AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

CRIMINAL LAW PRACTITIONER

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DEMONSTRATIVE EVIDENCE *and* TRIAL GRAPHICS

EXAMINING *the* RIGHTS *of* NON-ENGLISH SPEAKING CRIMINAL DEFENDANTS

EXPLORING *the* PREJUDICIAL EFFECT *of* GANG VIOLENCE

DEFENDANTS' REHABILITATIVE NEEDS *in* FEDERAL SENTENCING

PROSECUTORIAL USE *of* RAP LYRICS

CHALLENGING DISCRIMINATION *of* LGBT YOUTH *in* JUVENILE JUSTICE

U.S. ATTORNEY *Ethical Guidelines* FOR DECLINING TO *Prosecute*

CIVILITY *and* DISCOVERY

An EXCEPTION WITHIN AN EXCEPTION, FOR POLICE *Officer Safety*

FIGHTING IMPAIRED DRIVING *in* D.C.

FAMILY TREATMENT *Drug Courts*

CRIMINAL LAW PRACTITIONER

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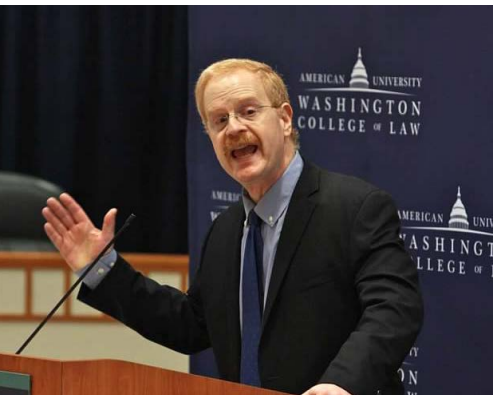
Dedication to Prof. Andrew Taslitz



The *Criminal Law Practitioner* dedicates this issue to Professor Andrew Taslitz (1956 - 2014).

Professor Taslitz was a driving force behind the formation of this publication. We are grateful to have had him as a teacher and mentor throughout our journey at the Washington College of Law. Prof. Taslitz's legal career began as a prosecutor in Philadelphia, Pennsylvania after graduating *cum laude* from the University of Pennsylvania (J.D. 1981). He spent over twenty years in academia and touched the lives of numerous law students, many of whom are practicing lawyers today. Prof. Taslitz taught at Duke University, Villanova University, Pittsburgh University, Howard University, and his career prematurely concluded at American University. While teaching at Pittsburgh University, Professor Taslitz was named the Welsh S. White Distinguished Visiting Professor of Law. It was therefore no surprise to those who knew him when Michael Hunger Schwartz's book, *What the Best Law Teachers Do* named Professor Taslitz as one of the top twenty-six law professors in America.

Professor Taslitz's expertise centered on constitutional and criminal justice. He wrote extensively on search and seizure issues; wrongful convictions; sexual assault; hate crimes legislation; freedom of speech; the expressive function of law; statutory interpretation methods; and evidence. He was the author of seven books[1] and hundreds of law review articles.

Below are a number of reflections from WCL students on the legacy that Professor Taslitz has left behind:

"When I started working with Taz, I was amazed at how well we connected over love for people, social justice, criminal law, and pop culture. As I got to know him better, I realized it was not that we had everything in common; it was just Taz. He cared first, then found ways to connect."

- Christiane Cannon, 3L

"Taz set a very high bar for what it means to be a truly good, ethical, courageous, and stead-fast advocate for victims of violence and crime. I will spend my career, always with him in mind, diligently working to never let him down. "

- Rachael Curtis, 3L

"Professor Taz was one of the first professors I had the privilege of meeting at WCL. He taught a brief snippet of criminal law as part of the LAP program, and I can truly say that he set the bar high for professors at WCL."

- Robert Nothdurft, Jr., 2L

"Every class that I had with him was exciting. He would tell funny stories about his childhood, encourage me to participate, and leave me with a sense of confidence that I could handle this law school "thing." Professor Taz was an amazing professor and an excellent mentor. He will truly be missed by the WCL community. "

- Alexis Patterson, 3L

"Words cannot express the loss of the WCL community. Professor Taslitz was one of the most genuine and knowledgeable professors I've had who sincerely cared about each one of his students."

- Megan Petry, 3L

"Taz was truly an incredible man. The enthusiasm he brought to teaching was a major role in convincing many students, myself included, to pursue a career in criminal law."

- Calen Weiss, 3L

1 R*econstructing the Fourth Amendment: A History of Search and Seizure*, 1789-1868 (NYU Press, hardcover edition, 2006; paperback edition 2009; Kindle edition 2010), and *Rape and the Culture of the Courtroom* (NYU Press, 1999, Kindle edition 2010).

FROM THE EDITORS

Dear Readers:

We are pleased to present the first issue of the second volume of the *Criminal Law Practitioner (CLP)*. We would like to thank our authors for their timely and thoughtful contributions as well as our Executive Board and the CLP staff who put in countless hours to publish this issue. This issue was started in the Spring of 2014 and we combined it with the Fall 2014 issue to bring you a robust collection of practice-oriented articles in criminal law. We would like to give a special thank you to Megan Petry (J.D., WCL '14), last year's Editor-in-Chief, as well as last Spring's CLP Executive Board and dedicated staff for their substantial contribution to this issue.

This issue includes twelve unique pieces on varying topics in criminal law. We are pleased to foster a dialogue regarding the controversial issue of the drunk driving policies in the District of Columbia. In our Fall 2013 issue, Senior Editor Monika Mastellone (J.D., WCL '14) wrote about D.C.'s drunk driving policies. As one of our goals is to facilitate debate on contentious issues, we were grateful to receive a response to her article from the Office of the Attorney General in the District of Columbia. Other articles in this issue cover a wide array of topics to help inform practitioners about issues such as discrimination of LGBT youth and non-English speaking defendants, as well as articles that cover topics such as prejudicial effects of gang violence, U.S. Attorney guidelines for declining to prosecute cases and guidance for the courtroom. We have also added a new section (conceived and written by last Spring's Articles Editor, Calen Weiss, J.D., WCL '14), Around the Nation, which highlights recent court decisions and policy changes in criminal law throughout the country. Just as criminal law and the criminal justice system change, the CLP hopes to constantly evolve to bring you new features and articles to help criminal law practitioners as well as foster important debate.

Each week, you can follow our blog at http://www.crimlawpractitioner.com for new articles and stay up to date with exciting CLP events.

We hope you enjoy the Fall 2014 issue and wish you happy reading!

Sincerely,

Raleigh Mark
Editor-in-Chief

Robert Nothdurft, Jr.
Executive Editor

CONTENTS

Students

Response

Editorials

Supreme Court

- *Kaley v. United States*, 134 S. Ct. 1090 (2014). The Supreme Court held in a 6-3 opinion that the defendants did not have a fifth or sixth amendment right to challenge a grand jury ruling that froze assets that the defendants required to pay their counsel. Kerri and Brian Kaley had planned to use a $500,000 certificate of deposit to pay their defense attorney, but were subject to a grand jury § 853(e)(1) pre-trial asset seizure that effectively froze all assets that were traceable to the offense. The Supreme Court, following *Monsanto v. United States*, held that a defendant is not entitled to judicial re-determination of a grand jury's probable cause ruling that property will ultimately be proved forfeitable, regardless of whether the property was going to be used to pay counsel.

- *Kansas v. Cheever*, 134 S. Ct. 596 (2013). The Supreme Court distinguished *Buchanan v. Kentucky*, finding that the prosecution was permitted to use a state examiner to rebut the defendant's voluntary intoxication defense. Cheever argued that the results of the court-ordered psychiatric examination were a Fifth Amendment violation because he had "neither initiated the mental examination nor put his mental capacity in dispute." The prosecution's introduction of the state examiner's evidence was consistent with the rules of rebuttal testimony because Cheever had offered expert testimony that he was unable to form the requisite *mens rea*.

- *United States v. Davila*, 133 S.Ct. 2139 (2013). A magistrate judge's suggestion to a defendant that the defendant plead guilty does not result in an automatic vacatur of the guilty plea if the record shows no prejudice to the defendant's decision to plead guilty. Davila requested new counsel after his attorney did not discuss trial strategy and instead told him to plead guilty. The magistrate judge told Davila that he would not get new counsel, and given the strength of the government's case, it may be best that he plead guilty. The Supreme Court held that though the judge violated rule 11(c)(1), it was not a "highly exceptional error" requiring automatic vacutor. Rather, the court should examine the plea with all the facts of trial taken into account and determine whether Davila would have gone to trial but for the judge's comments.

- *Fernandez v. California*, 134 S. Ct. 1126 (2014). The Supreme Court held in a 6-3 ruling that a warrantless consent search is permissible, even if a potentially objecting occupant is only absent because he is in police custody. Police observed Fernandez run into an apartment while observing a violent robbery. Officers removed him from the apartment and put him in police custody upon suspicion that he had battered another occupant. Police later gained access to the residence on the consent of the other occupant while Fernandez was in custody. The court held that because police had reasonable grounds to remove Fernandez from the property, he was in the position of any other occupant absent and unable to object to the search.

- *Hinton v. Alabama*, 134 S. Ct. 1081 (2014). The Court found that an attorney's refusal to request additional funds to replace an expert to rebut the State's case qualified as inadequate assistance of counsel. Hinton's attorney mistakenly believed that an Alabama judge could only grant him $1,000 to hire an expert witness. As a result, he hired a deficient expert and Hinton was found guilty. The Court held that an attorney's ignorance of a point of law fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland v. Washington*.

Circuit Courts

1st Circuit

- *Ponte v. Steelcase*, 741 F.3d 310 (1st Cir. 2014). The First Circuit Court of Appeals found that a male employer had not created a hostile work environment when he drove his female employee home and rested his hand on her shoulder. The court found that this sort of contact was not severe or pervasive to create the necessary requirements to eventually warrant a retaliation or discrimination claim.

- *Kosilek v. Spencer*, 740 F.3d 733 (1st Cir. 2014). A rehearing en banc has been granted and an original opinion was withdrawn in this case involving a state prisoner who sought treatment for her gender identity disorder. Michelle Kosilek filed suit when the DOC refused to provide her with gender reassignment surgery. The First Circuit held that the district court was correct in finding that the DOC violated Kosilek's eighth amendment rights because Kosilek has a serious need for the surgery that was not provided to her.

2nd Circuit

- *United States v. Crandall*, No. 12-3313-CR, 2014 WL 1386650 (2nd Cir. 2014). The Second Circuit Court of Appeals held that the Sixth Amendment requires reasonable accommodations for hearing-impaired defendants during judicial proceedings, but a judge is only required to provide accommodations for impairments that he is informed of, or should be reasonably aware of. Several times during his trial, Crandall asked for the microphone to be moved closer or the volume to be turned up, to which the judge complied. Because Crandall testified without any issue and was provided with assistance when counsel asked, the court found that the trial judge had made reasonable accommodations to comport with the Sixth Amendment.

3rd Circuit

- *United States v. Gumbs*, No 12-3630, 2014 WL 1275467 (3rd Cir. 2014). The Third Circuit Court of Appeals held that a judge was not required to question or remove a juror who cried while viewing a video of a defendant engaged in sexual activity with his underage victim. The court found that the judge acted appropriately by taking into consideration the juror's conduct throughout the entire trial and finding that further questioning was unnecessary.

- *United States v. Woronowicz*, 744 F.3d 848 (3rd Cir. 2014). A sentence of forty-one months for counterfeiting currency in excess of $200,000 was found to be substantively and procedurally reasonable by the Third Circuit Court of Appeals. The sentence was a result of a twelve-level enhancement because of the face value amount of counterfeit currency. Upon determination that the sentence was procedurally sound, the court followed the standard in *United States v. Tomko* and affirmed the sentence because it was within the range of sentencing guidelines and "more likely to be reasonable than those that fall outside this range."

4th Circuit

- *United States v. Washington*, 743 F.3d 938 (4th Cir. 2014). The Fourth Circuit Court of Appeals held that the government is not required to prove that the defendant had knowledge that a victim is a minor to prove interstate transportation of a minor with intent that the minor engage in prostitution or sexual activity. Looking to past cases and statutes, the court held that previous decisions did not intend to "establish a bright-line rule that specified that *mens rea* applied to every element of the offense." Thus, the knowledge requirement of moving the minor across state lines to commit sexual activity did not necessarily mean the government must show that the defendant had knowledge of the victim's age.

5th Circuit

- *United States v. Lagrone*, 743 F.3d 122 (5th Cir. 2014). A defendant cannot be convicted of multiple felony counts if the defendant is only charged with two thefts and the aggregate value of the theft is less

than $1,000. The Fifth Circuit Court of Appeals vacated the lower court's decision to charge Sheryl Lagrone with two felony counts for stealing $880 worth of postal stamps. Lagrone was sentenced to forty-five months imprisonment and over $20,000 in restitution. The court adopted the rule of lenity for ambiguous statutory law to avoid subjecting Lagrone to punishment that is not clearly prescribed.

- *Stauffer v. Gearhart*, 741 F.3d 574 (5th Cir. 2014). The Fifth Circuit Court of Appeals found a prisoner's claims to be moot after he sued his prison for confiscating automotive magazines that may have contained sexually provocative pictures of women (the prisoner was in a sex offender treatment program). The prisoner moved for injunctive and monetary relief. The court found the claims to be moot because the program changed their policies to require an individualized review of magazines for sexually provocative content. The court also rejected Stauffer's monetary claims because he received no physical injury in connection with the claims.

6th Circuit

- *United States v. Duval*, 742 F.3d 246 (6th Cir. 2014). The Sixth Circuit Court of Appeals found that a deputy's omission of the defendants' status as patients and caregivers under the state's medical marijuana act in his warrant affidavit did not destroy probable cause to search the defendants' farm. The defendants were permitted to grow limited amounts of marijuana under the Act as caregivers and patients. The court upheld the warrant because the deputy had "clear and uncontroverted evidence" that the defendants were not in compliance with the strict rigors of the Michigan Medical Marijuana Act.

7th Circuit

- *United States v. Balthazar*, 735 F.3d 634 (7th Cir. 2013). The Seventh Circuit Court of Appeals affirmed the lower court's ruling and found that police officers did not conduct a search of an apartment when they accidentally knocked down the apartment's door Police were unable to control the momentum of the battering ram and erroneously broke open the door of an apartment. They immediately moved to the correct door without entering the wrong apartment. The court made it clear that while police do not have to enter an apartment for a search to occur, there has to be some showing that the police were actually searching, not just an ability to see into the apartment.

8th Circuit

- *United States v. Rodriguez*, 741 F.3d 905 (8th Cir. 2014). The Eighth Circuit Court of Appeals found that an eight minute delay between removing a suspect from his vehicle and conducting a dog sniff was reasonable. The officer articulated to the court that the delay was a result of him waiting for a second officer, as there were two suspects in the vehicle. The court found that this was a delay that had been found to be reasonable in other circumstances.

- *United States v. Goodale*, 738 F.3d 917 (8th Cir. 2013). An officer's seventeen-second viewing of a defendant's laptop fell within the scope of the private search exception when the laptop was brought to police by a third-party victim. The Eighth Circuit Court of Appeals affirmed the decision of the lower court when reviewing a case in which a thirteen year-old victim brought the defendant's laptop to police to show evidence of sexual abuse. Because the search was neither instigated nor performed by the police (the victim showed lewd, illegal websites to the officers, and the officers never touched the computer), the court held that the search was private and conducted by a private party.

9th Circuit

- *Haskell v. Harris*, No. 10 15152, 2014 WL 1063399 (9th Cir. 2014). The Ninth Circuit Court of Appeals held that California's DNA and Forensic Database Act did not violate the Fourth Amendment. The act requires law enforcement to

collect DNA samples from all adults arrested for felonies. The court followed the Supreme Court's decision in *Maryland v. King*, finding that searches using buccal swabs to obtain DNA after a serious offense were reasonable.

10th Circuit

- *United States v. Gordon*, 741 F.3d 64 (10th Cir. 2014). The Tenth Circuit Court of Appeals found that an officer was not justified in seizing a shotgun from a home, incident to arrest, when that shotgun was not related to the crime, and the seizure of the shotgun did not warrant suppression. Officers seized the defendant's shotgun after the arrest and after the scene and defendants were secure. The defendant moved to suppress, but the court held that it was a *de minimus* intrusion on the defendant's rights that was "seemingly benign and did not warrant suppression."

11th Circuit

- *United States v. Rivera*, No. 13 10459, 2014 WL 46113 (11th Cir. 2014). Following *United States v. Broadwell*, the Elev-enth Circuit upheld an aiding and abetting charge in a case involving sex trafficking of a minor because "the aiding and abetting statute allows the jury to find a person guilty of a substantive crime even though that person did not commit all acts constituting elements of the crime." Ramirez was subsequently found guilty because the state was able to show that she mentored the trafficker and demonstrated what kind of sexual favors the minor should complete. Through her affirmative actions, she associated herself with the crime and aided its success.

D.C. Circuit

- *United States v. Glover*, 736 F.3d 509 (D.C. Cir. 2013). The D.C. Circuit Court found that a warrant for electronic surveillance on a defendant's truck was insufficient on its face because the court authorized a bug outside of its jurisdiction. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes electronic bugs "within the territorial jurisdiction of the court in which the judge is sitting." A D.C. District Court judges i g n e d the warrant, and the bug was placed in Maryland, thus invalidating the warrant.

Federal District Courts

- *United States v. Ramirez*, No. 13 20866 CR, 2014 WL 105320 (S.D.F.L. 2014). The District Court for the Southern District of Florida found that a defendant's statements after a police officer warned the defendant that "it would be worse for him if he did not speak to police" were involuntary. Ramirez was arrested and removed from his residence and subsequently warned by police that having a lawyer would be disadvantageous because the lawyer would advise Ramirez not to answer questions. The court found that these facts, along with the fact that the defendant had poor English skills, rendered his comments involuntary.

Nationwide Policies

- Eric Holder seeks to lower drug offenses by two levels. On March 13, 2014, Attorney General Eric Holder testified in front of Congress in support of lowering by two levels the base offense associated with various drug quantities in certain trafficking schemes. The United States Sentencing Commission projects that this change will lower the prison population by 6,550 inmates at the end of five years.

- Bitcoin theft sparks lawsuits.[1] Over $470 million in bitcoins were stolen from the world's largest bitcoin exchange and hundreds of investors are taking action to reclaim their lost assets. United States residents have filed suits against Mt. Gox, the Tokyo based bitcoin exchange. Because there is no regulation or judicial precedence on bitcoin

1 Martha Neil, *Thefts of $470M in bitcoins spur lawsuits, calls for regulation; a 'bitcoin paradox,' law prof says*, ABA Journal (Mar. 5, 2014), available at http://www.abajournal.com/mobile/article/multiple_reports_of_hackers_stealing_bitcoins_spur_class_action_litigants/.

exchanges, the results of these lawsuits are difficult to predict.

State Policies

- Washington, D.C. decriminalizes marijuana. Incumbent D.C. Mayor signed into law the "Marijuana Possession Decriminalization Amendment Act of 2013."[2] The bill will decriminalize possession of up to one ounce (twenty-eight grams) of marijuana.[3] The measure is next up for a sixty-day congressional review because Congress is granted constitutional power to review local D.C. laws.

- Decriminalizing marijuana is the new trend! Washington, D.C. is not the trailblazer in the marijuana decriminalization movement. Currently, Alaska, California, Colorado, Connecticut, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont all have laws that decriminalize small amounts of cannabis.[4] Colorado and Washington passed voter initiatives legalizing recreational marijuana use in the past year.[5]

- Eyewitness testimony procedures overhauled in several states. Prince Georges County in Maryland now requires its police stations to conduct lineups using the double-blind, sequential method.[6] This trend is occurring across the country, such as in Texas where departments are required to adopt the Law Enforcement Management Institute of Texas' guidelines for lineups, or submit a different plan that conforms to the current Texas law.[7] Meanwhile, the New Jersey Attorney General has been suggesting double-blind, sequential lineups for almost thirteen years.[8]

- A fifth person has been exonerated in Washington, D.C. after reanalyzing hair samples found at the crime scene.[9] Kevin Martin was officially released from prison after spending thirty years in jail for a rape and murder he didn't commit. Hair analysis from the crime scene led to his arrest and eventual conviction. Martin took an Alford plea, but maintained his innocence. A resampling of the hair determined that Martin was not at the crime scene, making him the fifth person since 2009 to be released after a hair resampling.

2 Eyder Peralta, *D.C. Mayor Signs Bill Decriminalizing Some Marijuana Use*, National Public Radio, Mar. 31, 2014, available at http://www.npr.org/blogs/thetwo-way/2014/03/31/297339798/d-c-mayor-signs-bill-decriminalizing-some-marijuana-use.

3 Marijuana Possession Decriminalization Amendment Act of 2013.

4 *States That Have Decriminalized*, NORML.org (last visitied Apr. 18, 2014), http://norml.org/aboutmarijuana/item/states-that-have-decriminalized.

5 Niraj Chokshi, *After legalizing marijuana, Washington and Colorado are starting to regulate it*, The Washington Post, Oct. 9, 2013, http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/09/after-legalizing-marijuana-washington-and-colorado-are-starting-to-regulate-it/.

6 Lynh Bui, *Prince George's police to transform photo lineups*, The Washington Post, Feb. 9, 2014, available at http://www.washingtonpost.com/local/crime/prince-georges-police-transform-photo-lineups/2014/02/09/e1513fe4-8e8a-11e3-b227-12a45d109e03_story.html.

7 Tex. Code Crim. Proc. Ann. art. 38.20 (2011).

8 Letter from John J. Farmer Jr., Att'y Gen. for the State of New Jersey (April 18, 2001), available at http://www.njdcj.org/agguide/photoid.pdf.

9 Paul Wagner, *5th DC man sent to prison on false hair analysis exonerated by DNA*, www.myfoxdc.com, Mar. 13, 2014, available at http://www.myfoxdc.com/story/24971004/5th-dc-man-sent-to-prison-on-false-hair-analysis-exonerated-by-dna#axzz2vzzCm6kV.

About the AUTHOR

Calen Weiss received his Juris Doctor from American University Washington College of Law in May of 2014 and was the Articles Editor for the *Criminal Law Practitioner* in his third year. He is originally from Los Angeles, California, but attended the University of Connecticut for his undergraduate studies. While at WCL, Calen has held internships with the D.C. Superior Court and Department of Homeland Security. Additionally, Calen has worked as a law clerk for the Dolan Law Firm in San Francisco and the National Association of College and University Attorneys in Washington, D.C.

“HUMAN RESPONSES TO COLOR ARE NOT JUST BIOLOGICAL,

BUT ARE ALSO INFLUENCED BY OUR CULTURE”

On Demonstrative Evidence and Trial Graphics: What Works and What Doesn't[1]

I. Litigation Graphics, Psychology and Color Meaning[2]

As a litigation consultant, one of my primary responsibilities is to help litigation teams develop and effectively use demonstrative evidence[3] to support their trial presentation. The primary means of doing this is to create litigation graphics,[4] which are most commonly used as PowerPoint slides that accompany oral argument and witness testimony, but could also include developing large-scale, permanent boards, 3D animations, scale models, or other visual aids for finders of fact.

A lot of what goes into creating effective litigation graphics relies on the evidence to be presented. If the evidence relies on a document and, specifically, on a particular part of that document, a document callout[5] is standard fare. If damages are the issue, it is not uncommon to use a chart or table to illustrate to the jury how they should add up the money to arrive at the desired result. However, a lot more goes into designing and developing really effective litigation graphics than the clever manipulation of evidence. Did you know that color plays a major role?

Litigation graphics are almost never black and white they almost always involve the use of color. Most colors carry psychological (and even physiological), cultural, personal, emotional, and expressive implications that can impact how persuasive you are when using them. Here's an example:

Looking at the two photos of President Bush above, minus any personal political views you may have, which president is more trustworthy looking? I bet you said the one on the right.[6] Do you know why?

In modern, holistic medicine, chromotherapy is used to heal with color. This form of treatment dates back millennia to ancient Egypt, China, and India. A more prominent use of color therapy occurs in environmental design, which considers the effect of color on health and behavior and develops interior design, architecture, and landscape design accordingly. An interesting example is use of the color Baker-Miller Pink (R:255, G:145, B:175),[7] affectionately known as "drunk tank

1 The following article is a compilation of blog posts written by Ryan Flax, Managing Director and Litigation Consultant for A2L Consultants.

2 Ryan Flax, *Litigation Graphics, Psychology, and Color Meaning*, A2L Consulting (Apr. 30, 2013, 5:00 AM), http://www.a2lc.com/blog/bid/64599/Litigation-Graphics-Psychology-and-Color-Meaning.

3 *See* A2L Consulting, *What is Demonstrative Evidence?*, A2L Consulting, http://www.a2lc.com/demonstrative-evidence/#.UwxJ2l6Lg5D (last visited Feb. 25, 2014).

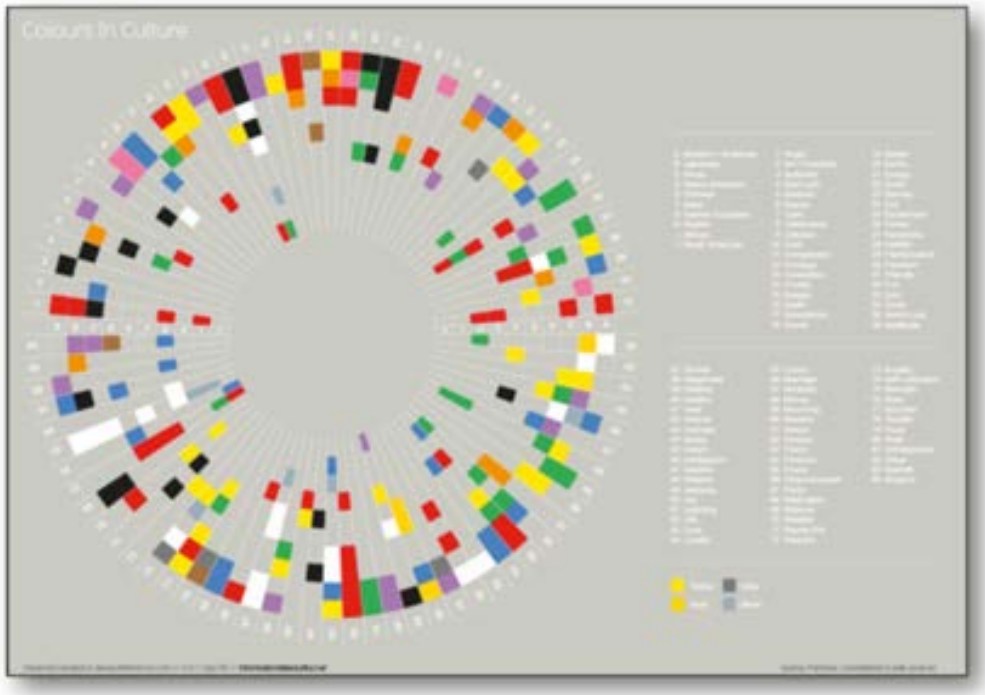
4 *See* A2L Consulting, *Litigation Graphics, Trial Exhibits, Physical Models, PowerPoint Presentations and 2D and 3D Animation*, A2L Consulting, http://www.a2lc.com/services/litigation-graphics-consulting/#.UwxK_l6Lg5A (last visited Feb. 25, 2014).

5 *See* Ken Lopez, *3 Styles of Document Call-outs Used at Trial*, A2L Consulting, (Apr. 13, 2012, 10:35 AM), http://www.a2lc.com/blog/bid/55124/3-Styles-of-Document-Call-outs-Used-at-Trial.

6 *See* Walter Graff, *Color or Color: The Psychology of Color*, bluesky-web.com, http://www.bluesky-web.com/color.htm (last visited Feb. 24, 2014).

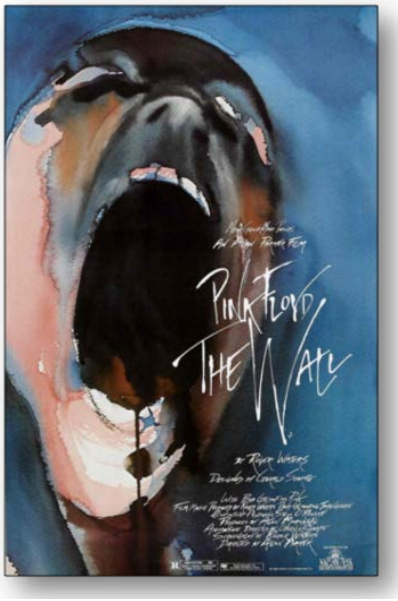
7 *See* James Gilliam & David Unruh, The Effects of Baker-Miller Pink on Biological, Physical and Cognitive Be-

pink" because it is commonly used in jails to keep violent prisoners calm.[8]



Human responses to color are not just biological, but are also influenced by our culture (in China the color yellow symbolizes royalty, but in Europe it's purple that plays this role). David McCandless[9] created this amazing color wheel[10] (right) to illustrate how different cultures interpret colors (or "colours," as Mr. McCandless is an author and designer from the U.K.). People (and by people, I mean jurors and judges) also respond to colors in individual ways. Although research reveals variables that help explain human responses to color, it is also true that our own color preferences are important to us and partially dictate the effect color has on us.

Color also causes emotional effects, which depend partly on the color's surroundings and partly on the ideas expressed by the work as a whole. There are two opposing ways to use color in graphics (as in art): local and expressive color. At one extreme is local color, which is the color that something appears when viewed under average lighting conditions, e.g., a banana is yellow. At the other extreme is expressionistic color, where artists use color to express an emotional rather than a visual truth. Just look at the famous art from Pink Floyd's *The Wall*[11] here the use of dark blue, gray and black in the background convey an intense feeling of sadness and depression, while the blacks and reds of the figure convey danger and anguish. Both of these color concepts affect a viewer's emotions. The expressionistic use of color is very important in the field of litigation graphics.



haviour, 3 J. of Orthomolecular Medicine 202, 202-206 (1988) (discussing the calming effects of the color Baker-Miller Pink).

8 *See Drunk Tank Pink*, Color Matters http://www.colormatters.com/color-and-the-body/drunk-tank-pink (last visited March 3, 2014).

9 *See* David McCandless & AlwaysWithHonor.com, *Colours in Cultures*, Information is Beautiful (Apr. 2009), http://www.informationisbeautiful.net/visualizations/colours-in-cultures/.

10 *See Colours In Culture*, information is beautiful, http://www.informationisbeautiful.net/visualizations/colours-in-cultures/ (last visited Feb. 25, 2014).

11 *See* Cover Art for Pink Floyd's *The Wall*, Pink Floyd | The Official Site, http://www.pinkfloyd.com/design/singles.php#nn (click on thumbnail of the second album cover in the third row moving from left to right) (last visited Feb. 25, 2014).

Why?

Jurors (and judges to an extent, as human beings) make decisions at trial based on their emotions above all else (download and read this paper[12] on the subject by Todd E. Pettys, Associate Dean at the University of Iowa College of Law). Concepts such as confirmation bias and research on decision making support this.[13] Two thousand years ago, Aristotle observed,[14] that the most persuasive arguments are those that appeal, at least in part, to the audience's emotions.

Traditional artists have used color to evoke emotion in specific ways:[15]

Red heat, passion, danger, optimism

Yellow warmth, caution, fear, cowardice

Blue responsibility, trustworthiness, compassion, honesty, integrity, morality, coolness, quality

Orange confidence, creativity, fun, socialness

Green natural, healthy, harmony, cheer, friendliness, immaturity

Purple regality, intelligence, wealth, sophistication, rank, shock

Gray neutrality, ambiguity, dullness, somberness

Black evil, unknown, treachery, depression, undesirability, danger, falsity

White innocence, purity, fairness, conservatism, harmlessness, transparency

Pink femininity, sweetness, liberalism

Brown natural, solid, sadness

These same principles are applied today[16] in information graphics and the graphic arts. For example, according to Mr. McCandless's color wheel (above),[17] the color **black** represents and connotes authority, the color **blue** intelligence and rationality, and **purple** virtue interestingly, he indicates no culturally based color in Western culture for wisdom or trust.

Did you ever notice how many law firm logos are **blue**? Why do you think that's the case?

Here's an exemplary litigation graphic that might be used by an expert witness using the above-discussed color principles to evoke a sense that the expert is honest, unbiased, and intelligent:

12 *See* Todd E. Pettys, *The Emotional Juror*, 76 Fordham L. Rev. 1609 (2007).

13 *See, e.g.,* George Lowenstein and Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 J. Legal Stud. 37 (2004) (observing and documenting this bias in experimental settings involving litigants).

14 *See* Aristotle, On Rhetoric: A Theory of Civic Discourse 112-13 (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2007) (noting "for it makes much difference in regard to persuasion (especially in deliberations but also in trials) that the speaker seem to be a certain kind of person and that his hearers suppose him to be disposed toward them in a certain way…").

15 *See* Douglas Kipperman & Melisa McKinstry, *Color Rules of Thumb*, Write Design Online, http://www.writedesignonline.com/resources/design/rules/color.html#psych (last visited Feb. 23, 2014) (showing that artists have relied on the inherent emotions invoked by certain colors to influence viewers).

16 *See* Katherine Nolan, *Color it effective: How color influences the user*, Office.com (Jan. 2003), http://office.microsoft.com/en-us/frontpage-help/color-it-effective-how-color-influences-the-user-HA001042937.aspx (noting the focus of advertisers on the effect that certain colors have on consumers).

17 *See* David McCandless & AlwaysWithHonor.com, *Colours in Cultures*, Information is Beautiful (Apr. 2009), http://www.informationisbeautiful.net/visualizations/colours-in-cultures/.

It may look simple, but a lot of thought went into its design. The overall color palate of **blue**, **purple**, and **gray** is intended to evoke trust and neutrality. Furthermore, the light **blue** color used in the text boxes is intended to again express that they are relaying true information. The accompanying icons (the check and x-marks) are similarly colored so as to relay that the top statement of opinion is trustworthy (**blue**) and that the second two are warnings (**red**) for jurors that they should not believe what they heard from the opposition's expert witness.

II. Don't Get Too Cute With Your Trial Graphics[18]

You must use trial graphics[19] and other demonstrative evidence[20] to be as persuasive as possible and win at trial. But, if you use trial graphics incorrectly, you risk losing everything. Take a recent trial scenario that played out in Orange County, California as an example and a warning.

The People v. Otero was a criminal prosecution over a sexual assault on a child. In the closing argument, the prosecutor discussed the burden of proof in criminal cases, which, as we all know, is beyond a reasonable doubt. The question is: what does that really mean? The prosecutor wanted to make the point that the burden does not require absolute knowledge not every fact must be supplied and not every fact supplied need be perfectly accurate to satisfy this burden.[21]

> "IF YOU USE TRIAL GRAPHICS INCORRECTLY, YOU RISK LOSING EVERYTHING

However, the prosecutor took it one step too far.

She used a trial graphic to demonstrate her point.[22] It was similar to a combination of the graphics I have supplied above and below. Instead of showing an incomplete puzzle, it showed the state of California, without an identifying label and with some incorrect city locations and names.[23] She began explaining that she wanted to identify the name of a state that looked like the one in the image (the trial was in California, by the way) and even though there was some incorrect or incomplete information, she knew the state was California.[24] Well, the defense jumped right up and objected to that trial graphic.[25]

The court sustained the objection and instructed the trial graphic be taken down and not referred to again.[26] Then the judge further instructed the jury to disregard the trial graphic and the discussion thereof. The trial and closing arguments continued and ultimately, the jury found the defendant guilty.[27]

18 Ryan Flax, *Don't Get Too Cute With Your Trial Graphics*, A2L Consulting (Nov. 5, 2012, 8:30 AM), http://www.a2lc.com/blog/bid/60923/Don-t-Get-Too-Cute-With-Your-Trial-Graphics.

19 *See* A2L Consulting, *Trial Graphics – A Critical Need for Any Courtroom*, A2L Consulting, http://www.a2lc.com/trial-graphics/ (last visited Feb. 23, 2014) (noting that trial graphics are information display mediums designed to support presentation of the case).

20 *See* A2L Consulting, *Demonstrative Evidence Services Provider Since 1995-A2L Consulting Works Worldwide*, A2L Consulting, http://www.a2lc.com/demonstrative-evidence/#.uwqiblXTpjL (last visited Feb. 23, 2014) (describing various demonstrative evidence resources and types).

21 *See id.* at 869.

22 *See id.* at 870.

23 *See id.*

24 *See id.*

25 *See id.*

26 *See Otero*, 210 Cal. App. 4th at 870.

27 *See id.*

On appeal, the defense argued that the prosecutor's little stunt with the map of California amounted to misconduct warranting reversal of the conviction.[28] The Court of Appeals agreed that the trial graphic and argument was misconduct, but that it was harmless because it was taken down so quickly and because of the strong evidence for conviction in the case.[29]

The court explained the problem: the prosecutor was misstating the law relating to its burden of proof.[30] The beyond a reasonable doubt burden is not quantitative it is not based on a certain number of puzzle pieces of evidence fitting together.[31] So, it is misconduct for the attorney to present it that way. It is misconduct to tell the jury that if they have "X" number of puzzle pieces they should convict. So, although it is always very tempting to make a graphic like this because the subject matter simply lends itself to visuals, you need to take a step back and decide just how to make this point visually and appropriately.

I do not know for sure, but I imagine that the prosecutor's path to this misconduct went something like this: "Hey, I've got a great idea!" And, if the law did not matter, she certainly did have a good idea. Make your case using trial graphics. Explain to the jurors that it is okay to convict this guy even though you do not feel 100% positive of his guilt (he *admitted* to the crime by the way). What this attorney was missing was someone by her side to say, "hold on a minute, you cannot do that" or "let's rethink this before committing to this strategy."

This is where a litigation consultant[32] is invaluable. No matter how many trials you have been through as an attorney, we have seen more as consultants (we are attorneys, too, by the way). Our specialty is how to get your "persuasion on" and how to do it the right way. A good litigation consultant is someone to bounce these ideas off of and work through the way to graphically make your case and how to stay inside the lines.

III. Watch Out for Subliminal Messages in Trial Graphics[33]

A recent study[34] by University of Arizona doctoral student, Jay Sanguinetti, found that people's brains perceive objects and images in everyday life of which we are not consciously aware. Even if you never actually know you see something, your brain can "see" it and process the related visual information. Below is an example from the University's study:

28 *See id*.

29 *See id*. at 873.

30 *See id*. at 872 (alluding that the Prosecutor was giving the impression of a lesser burden of proof).

31 *See id*.

32 *See* A2L Consulting, *The Litigation Consultant – Key to Your Trial Team's Success*, A2L Consulting, http://www.a2lc.com/litigation-consultant---your-trial-teams-best-support/ (last visited Feb. 23, 2014) (explaining the advantages provided by retaining a litigation consultant).

33 Ryan Flax, *Watch Out for Subliminal Messages in Trial Graphics*, A2L Consulting (Dec. 12, 2013, 1:30 PM), http://www.a2lc.com/blog/bid/69053/Watch-Out-for-Subliminal-Messages-in-Trial-Graphics.

34 Shelley Littin, *UA Study: Your Brain Sees Things You Don't*, UANews (Nov. 13, 2013) (citing Joseph Sanguinetti et al., *The Ground Side of an Object Perceived as Shapeless Yet Processed for Semantics*, 1 Psychol. Sci. 256 (2014)), http://uanews.org/story/ua-study-your-brain-sees-things-you-don-t.

When test subjects (that means human beings) were asked to look at abstract black silhouettes, their brains also perceived the real-world objects hidden in the negative space at the image border. Here, your brain perceives two seahorses, just as the test subjects' brains did during the experiment, even though there are no seahorses in the graphic.

RESEARCH SHOWS THAT VISUALS ARE A KEY TO PRESENTING INFORMATION CLEARLY AND PERSUASIVELY

Now, how can this be applied or abused in the courtroom? Well, I cannot give you a definitive answer, but I believe that if your brain is seeing seahorses in the image to the right, and if your subconscious has associated a certain **emotion** with seahorses, then **that emotion will likely be evoked** when you see the image above, even without you realizing it. So, at trial, such a phenomenon might be applied or abused when designing trial graphics to evoke a specific emotion from jurors (or judges).

What emotions might help one win at trial? Well, for example, if the argument is that your client should not be punished for a simple mistake, it would make sense to evoke sympathy in jurors when making this argument. If reason alone is not enough to do this, one could appeal to jurors' subconscious. What do you see in the image below?

In my extension of the University's experiment, what you might consciously perceive here (below to the left) as a simple and abstract design choice and message: "Don't Punish My Client," your brain likely perceives as two babies bookending the message. The question then becomes, did you recognize any emotional response in yourself when looking at the graphic? If you felt inclined toward sympathy for my hypothetical client, why? There is nothing really persuasive in the graphic other than my simple request in text.

If the baby bookends did not persuade you, how about the graphic to the right? Do the unseen, yet subconsciously perceived puppies make your heart melt for my imaginary client? It is hard to say.

What other emotions might help a litigator persuade jurors? What about evoking anger against the opposing party? How about evoking incredulity in relation to the opposition's damages demands? If the emotion fits, it can help you win because most jurors make their decisions based on emotions rather than reason or even evidence.

I imagine it would take more than these simple subliminal inputs to get the result I am going for here, but I think we should all pay attention to this type of science. When the facts are tough, a client is starting with a sympathy deficit with a jury, or counsel is looking for some edge for their case, anything is possible. So, pay attention to your opponent's trial graphics because even abstract shapes might be an attempt to sway emotions. On the other hand, when designing your own trial graphics, realize there's more to it than making sure the right dates are on your timeline.

IV. Trial Timelines and the Psychology of Demonstrative Evidence[35]

Research shows that visuals are a key to presenting information clearly and persuasively, be that presentation in a courtroom, an ITC hearing, the USPTO Trial and Appeal Board, a DOJ office, or in a pitch to a potential client. Because of what you can do with them and how your audience will psychologically react, if designed properly, trial timelines are one of the most important demonstrative aids you can use to be more persuasive.

Studies show that the vast majority of the public (what I'll call "normal" people not us lawyers) learns visually about 61% - which means that they prefer to learn by seeing. The majority of attorneys, on the other hand, do not prefer to learn this way, but are auditory and kinesthetic learners about 53% - which means we typically prefer to learn by hearing and/or experiencing something we are different than most people. This makes sense, when you think about it we all learned this way in law school by sitting through class lectures and we continue to learn this way as practicing attorneys by having to learn litigation by experiencing it. However, most people do most of their "learning" watching television or surfing the Internet.

No matter how smart you are, you typically teach the same way you prefer to learn, unless you carefully plan to do otherwise. Visual learners teach by illustrating. Auditory learners teach by explaining. Kinesthetic learners teach by performing. So, left to our own devices, we attorneys will usually teach by giving a lecture (consider your last opening statement, for example).

But, when you do this in an effort to persuade most "normal" people, you're not playing the game to win. It is not sufficient to just relay information because that's not how your typical audience wants to learn. You must bridge the gap between how you prefer to teach and how your audience prefers to learn, and demonstrative evidence, including graphics, models, boards, animations, and **trial timelines** are the way to bridge this gap, make your audience feel **better prepared** on the subject matter, feel it's **more important**, pay **more attention**, **comprehend** better, and **retain** more information.

Besides simplifying the complex, providing an opportunity to strategically use familiar, well-understood pop culture templates, and satisfying your audience's expectations of a multimedia presentation, trial timelines are a key component of your persuasion because they enable you to emulate generic fictions to produce a truth to be accepted by your audience. These are the four rules of thumb to effective visual information design.

> SOCIAL PSYCHOLOGY STUDIES SHOW THAT DIFFERENT SOURCES OF INFORMATION ARE NOT NEATLY SEPARATED IN JURORS' MINDS.

Social psychology studies show that different sources of information are not neatly separated in juror's minds. Trial timelines are one of the most effective ways to exploit this reality to be more persuasive at trial.

Visual meaning is malleable, so design your timelines to show a generic fiction you want the facts to fit: e.g., *there was a reasonable cause for your client's behavior* or *the opposing party's actions directly led to the injuries we're here about*. The essential generic fiction for

35 Ryan Flax, *Trial Timelines and the Psychology of Demonstrative Evidence*, A2L Consulting (Dec. 4, 2013, 9:45 AM), http://www.a2lc.com/blog/bid/68893/Trial-Timelines-and-the-Psychology-of-Demonstrative-Evidence.

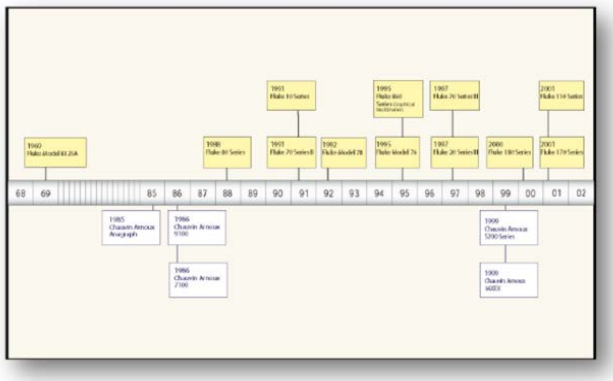
litigation (and all other circumstances, really) is that of **cause and effect** people are intensely hungry for a cause and effect relationship to provide a basis, or perceived basis, in logic and reason for their emotional beliefs.

A trial timeline is the key visual aid for establishing a **perception of causation** relating to any set of facts. Once you **induce such a perception of causation** in jurors, they can **adopt** this perception **as the truth**. This is the result you want in litigation. If you can set the factual stage for why your view of things makes more sense than your opposition's version, you've won (unless the facts are devastating, in which case you should have settled).

So, what **perception of causation** is being established by the first timeline (below) in this article? This timeline relates to a trade dress case where the design at issue was a yellow casing for an electrical device. What you're seeing is how long our client used this yellow casing design (since 1969 and through the trial) at top, when the defendant changed its product to have a yellow casing (1999), and how similar their accused design is to our client's product line.

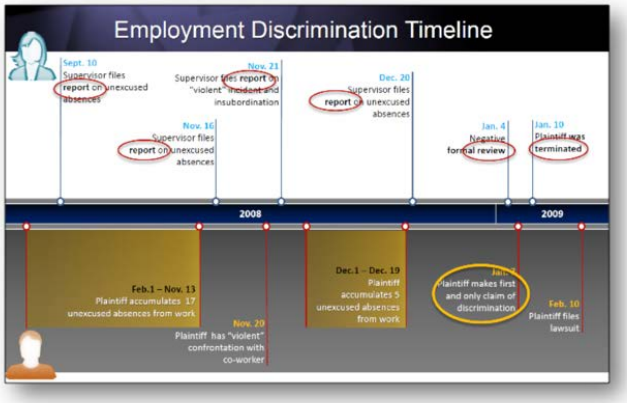
You get all this information visually from a single trial timeline it doesn't just relay information, it tells a story. Imagine having the timeline at the top of this article on a large board and available to show the jury over and over again.

Here's an alternative way of showing the very same information that is far less effective:



The same information is there, but there's no self-evident story. There's no cause and effect established. This is just no good as a persuasion tool, but this is what most attorneys think of when they consider developing a timeline (unless they envision the flags-on-a-stick conveying a series of events).

Here is a pretty standard, if attractive, trial timeline. It shows two series of related events. The series on top, as you might guess, relates to stuff our client did and the stuff in the shadows there on the bottom is what the opposing party did over the same period.



This rather simply, but clearly shows important interrelated events and *very* clearly establishes the key facts **to induce the perception of cause and effect** in the jurors. What do you learn from the timeline above? You learn that while the plaintiff claims that he was fired as retaliation for his claim of discrimination against his employer (and if you only knew that he made the claim and was then fired just days later you might believe him), the timeline shows that he had a terrible and well-documented history of unexcused absences from work and even a violent confrontation with a co-worker. This history is the real cause of the effect (his termination) and it's all conveyed in this graphic.

You must feed a jury what it needs to find for you. The more a jury feels they understand where you're coming from, the more you emulate generic fictions to establish a truth, and the better you induce the perception of

cause and effect in your audience using the facts you know matter, the better your chances of winning.

About the AUTHOR

Ryan Flax is the Managing Director for Litigation Consulting and the General Counsel for A2L Consulting, a national litigation consulting firm headquarted in Alexandria, VA. Mr. Flax joined A2L Consulting on the heels of practicing Intellectual Property (IP) law as part of the IP group at Dickstein Shapiro LLP, a national law firm based in Washington, DC. Over the course of his career, Ryan has obtained jury verdicts totaling well over $1 billion in damages on behalf of his clients and has helped clients navigate the turbulent waters of their competitors' patents. He has leveraged his significant experience in cases related to a wide array of technologies, including medical devices and systems, semiconductors, biotechnology, chemical engineering, mechanical engineering, software, and more.

Mr. Flax is also an adjunct professor, teaching advanced litigation practice at American University's Washington College of Law in Washington, DC.

Mr. Flax earned his Bachelor of Science degree in Biology from Wake Forest University and his Juris Doctor degree from Southern Methodist University Dedman School of Law. Between his undergraduate studies and law school, Mr. Flax was a Laboratory Scientist conducting DNA research at the R.J. Reynolds Tobacco Company.

APPROXIMATELY 24.5 MILLION PEOPLE IN THE UNITED STATES SPEAK ENGLISH LESS THAN "VERY WELL," AN INCREASE OF ROUGHLY 6.5 MILLION PEOPLE SINCE 2000.

Interpreting the Court Interpreters Act: A Practical Guide to Protecting the Rights of Non-English Speaking Criminal Defendants

by Jeffrey Archer Miller, JD 2010, AU WCL

I. Introduction

This article details the myriad of minefields that attorneys face when they represent non-English speakers, a segment of the United States population that has been growing at an exponential rate. Approximately 24.5 million people in the United States speak English less than "very well,"[1] which is an increase of roughly 6.5 million people over a seven year period.[2] The need for qualified court interpreters is following a similar upward trajectory. Since fiscal year 2000, the number of federal courtroom interpreting events has almost doubled from 190,127 to 357,171.[3] Throughout the 2010 fiscal year, the number of federal court events requiring court interpretation increased 13.8 percent.[4]

Courts, have struggled to come to terms with non-English speakers' inability to comprehend legal proceedings, which poses a challenge to the delivery of justice. Unlike allegations of ineffective assistance of counsel,[5] there is no well-established standard to determine the required effectiveness of courtroom interpretation.[6] The Supreme Court of the United States has never addressed when interpreters must be provided, nor has it opined on what quality of interpretation is required. This article argues that the broad discretion afforded to trial judges paired with the apparent willingness of appellate judges to place their imprimatur on misguided interpretations of law has seriously compromised the legal rights of non-English speakers. Because an appeal seeking reversal based on a failure to properly accommodate a non-English speaker's communnication needs faces a steep uphill battle, attorneys representing non-English speaking clients must not only be familiar with relevant case law, but also firmly insist that those rights be respected. It is important that attorneys advocate for proper language

1 *See* Hyron B Shin & Robert A. Kominski, *United States Census Bureau, Language Use in the United States: 2007* at 3 (2010).

2 *See* Hyron B Shin & Robert A. Kominski, *United States Census Bureau, Comparison of the Estimates on Language Use and English-Speaking Ability from the ACS, the C2SS, and Census 2000* at 13 (2008) (observing that according to the Census 2000 Supplemental Survey, approximately 19 million in the United States speak less than "very well").

3 Leonidas Ralph Mecham, *Annual Report of the Director of the Administrative Office of the United States Courts* 13 (2000) (reporting 190,127 district court events using interpreters in fiscal year 2000 and 357,171 events in fiscal year 2010); *see* James C. Duff, *Annual Report of the Director of the Administrative Office of the United States Courts* 37 (2010).

4 *See Annual Report of the Director of the Administrative Office of the United States Courts* (2010). *See generally, United States Bureau of Labor Statistics Occupational Outlook Handbook* (2010-2011) (expecting employment in interpretation and translation services to increase 22 percent between 2008 and 2018—a much faster rate than average employment growth).

5 *See* Strickland v. Washington, 466 U.S. 668 (1984).

6 *See* Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language and Due Process*, 2003 Wis. L. Rev. 843, 889 (2003). This article addresses the rights of non-hearing non-English speaking criminal defendants. The rights of deaf and hard of hearing individuals who use sign language would require an analysis of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, which are beyond the scope of the present article.

accommodations from initial proceedings, as attorneys are much more likely to succeed if they make these demands for their clients from the outset.

Part II of this article examines the circumstances under which judges are required to provide court-appointed interpreters. In a significant number of cases, appellate courts are extremely resistant to question a trial judge's decision not to provide a courtroom interpreter. As a practical matter, this means that attorneys who represent clients with limited English skills must be pro-active in advocating for their client's right to an interpreter. If a judge does not appoint an interpreter at trial, the attorney's chance of successfully arguing on appeal that an adverse decision should be reversed due to a linguistic impairment is close to nil. Part III explores issues that may arise when more than one participant in a court proceeding requires an interpreter. Here too, the case law (outside of California) strongly suggests that a trial judge's decision is unlikely to be overturned on appeal. Accordingly, an attorney must be prepared to explain to the trial judge why his client is entitled to his *own* interpreter *throughout* the trial. A post-trial appeal on these grounds is unlikely to succeed. Part IV explores issues relating to courtroom interpreting errors: how to identify them, how to challenge them in a timely fashion, and how to prevent them from happening.

II. The Non-English Speaker's Quasi-Right to a Court-Appointed Interpreter

The Supreme Court first discussed the right to a court-appointed interpreter in the 1907 decision, *Perovich v. United States*,[7] in which the defendant was found guilty of first-degree murder. In an opinion that focused mainly on unrelated matters, the Supreme Court briefly addressed the absence of an interpreter during trial. The Court's entire analysis of the issue is reproduced below:

> One [assignment of error] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter resting largely in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion.[8]

These two sentences have had an enormous impact on the non-English speaker's ability to receive court-appointed interpreting assistance. The *Perovich* approach, which provides the trial judge with broad discretion to determine whether a court-appointed interpreter is necessary, has been cited in state and federal courts for over a century and continues to be cited today.[9]

Following the *Perovich* decision, lower courts gradually acknowledged that the inability of a criminal defendant to comprehend court proceedings due to a linguistic impairment may violate the Sixth Amendment. Specifically, if a defendant is unable to understand a witness's testimony, his or her right to confrontation and cross-examination may be severely curtailed.[10] For example, in 1970, the Second Circuit held for the first time in *United States ex rel. Negron v. State*[11] that the Confrontation Clause of the Sixth Amendment, which applies to the States through the Fourteenth Amendment's Due Process Clause, requires that non-English speakers be notified that they have a right to simultaneous interpretation at the Government's expense.[12] The tension between the *Perovich* holding,

7 *See* Perovich v. United States, 205 U.S. 86, 92 (1907).

8 *See id.* at 91.

9 *See* Mollie M. Pawlowky, Note, *When Justice is Lost in "Translation:" Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 DePaul L. Rev. 435, 440 (1996).

10 United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); *see* Gonzalez v. Virgin Islands, 109 F.2d 215, 217 (3d Cir. 1940).

11 *See* United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970) (finding that a defendant who does not speak English and is denied a court interpreter is placed in a similar situation to a defendant who is not present at his own trial).

12 *See id.* at 391.

which provides wide discretion to the trial court judge to determine whether a court-appointed interpreter is required, and the *Negron* holding, which suggests that the failure to provide an interpreter in criminal proceedings may violate the Constitution, are mutually exclusive and require a more exacting level of judicial review. This inconsistency on the issue of an interpreter, however, has never been resolved.[13]

Following *Negron*, in 1978, Congress passed the Court Interpreters Act.[14] The legislative history of the Act expressed concerns that several federal convictions were reversed on due process grounds when an interpreter was not appointed.[15] Though the act has subsequently been clarified through judicial interpretation, the initial version did not require interpreter certification. This was problematic as the courts' only basis for evaluating the quality of the interpreters' skills were the interpreters' own averments.[16] The lack of quality control led to serious communication problems. For example, in the infamous case of *Virginia v. Edmonds*, in which a deaf woman had been raped, the court interpreter improperly conveyed the victim's characterization of the event as "made love" rather than "forced intercourse."[17]

The main stated purpose of the Court Interpreters Act is to provide interpreting services sufficient to permit a non-English speaking party to comprehend court proceedings and to communicate with counsel or the presiding judicial officer.[18] The Act requires that a certified court interpreter be used unless one is not "reasonably available," in which case, an "otherwise competent" interpreter may be used.[19] A review of the case law pertaining to the Act suggests that the legislation has not been as effective as its drafters had hoped.

1. Judicial Interpretation of the Court Interpreters Act

The first case to interpret the Court Interpreters Act, *United States v. Tapia*,[20] had a profound effect on the case law pertaining to non-English speakers. In *Tapia*, the Fifth Circuit determined, consistent with *Perovich*, (1) that the decision whether to provide a court-appointed interpreter rests within the broad discretion of the trial court, (2) that there is no constitutional right to a court-appointed interpreter, and (3) that the need for an interpreter is a question of fact.[21] The Fifth Circuit explained that the district court has a duty to inquire whether a defendant's ability to comprehend the proceedings and communication with his counsel would be inhibited without the assistance of an interpreter.[22] The question of whether or not a failure to provide an interpreter was an error is whether or not "such failure made the trial fundamentally unfair."[23] In *United States v. Johnson*,[24] the Seventh Circuit elaborated on the holding in *Tapia*, finding that a defendant is only entitled to a court-appointed interpreter if the district court judge determines that the defendant (1) speaks only or primarily a language other than English and (2) his inability to speak English inhibits his ability to comprehend the proceedings or communicate with counsel.[25] However, not all circuits have retained the factual inquiry requirement. In *United States v. Perez*,[26] the Fifth Circuit found that the trial judge need not engage in a factual inquiry as to whether the criminal defendant properly understands court proceedings if the defendant does not make an affirmative

13 *See* Pawlowky, *supra* note 9, at 442.
14 *See* 28 U.S.C. § 1827(d)(1)(1988).
15 *See* 1978 U.S.C.C.A.N. 4652, 4654.
16 *See id.* at 4655.
17 *See id.* at 4654.
18 *See* § 1827(d)(1).
19 *See id.*
20 United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).
21 *See id.* at 1209.
22 *See id.*
23 *See id.* at 1210.
24 United States v. Johnson, 248 F.3d 655 (7th Cir. 2001).
25 *See id.* at 661.
26 United States v. Perez, 918 F.2d 488 (5th Cir. 1990).

assertion that he does not understand.[27] A trial judge's decision to refuse to provide an interpreter over counsel's objection during trial is subject to abuse of discretion review.[28] If counsel waits until after the trial to raise the issue, the reviewing court examines the record under the plain error standard.[29] In order to overcome plain error review, the moving party must prove that the district court ruling is (1) an error, (2) which is plain, i.e. clear under the current law, and (3) which affects the defendant's substantial rights.[30]

At least four arguments in support of the current standard of review can be distilled from the case law. The first, as noted in *Nuguid*[31] and its progeny, is that the ordinary rules of evidence require counsel to make a timely objection. If no objection is made on the record, the objection is waived, and cannot be overturned on appeal unless it can survive plain error review.[32] The second argument is that the trial judge is in the best position to evaluate the language ability of the defendant. This view is expressed in one of the earliest cases to interpret the Act, *United States v. Coronel-Quintana*.[33] In *Coronel-Quintana*, the Eight Circuit held that "[b]ecause the decision to appoint an interpreter will likely hinge upon a variety of factors, including the defendant's understanding of the English language, and the complexity of the proceedings, issues, and testimony, the trial court, being in direct contact with the defendant, should be given wide discretion . . . ."[34] The third argument in favor of a heightened standard of review is that a less deferential standard would provide an unfair windfall for defendants. The most frequently cited expression of this concern is found in *Valladares v. United States*,[35] in which the court stated, "To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse."[36] The fourth argument, also raised in *Valladeres*, is the need to "balance the rights to confrontation and effective assistance against the public's interest in the economical administration of criminal law . . . ."[37]

Of the more than 90 cases that have interpreted the Act since 1978, reversal is exceedingly rare.[38] Cases in which federal appellate judges have upheld district court decisions despite serious misgivings about the trial courts' conduct are far more common.

27 *See id.* at 490-91.

28 *See* United States v. Salehi, 187 F. App'x 157, 168 (3rd Cir. June 28, 2006) (finding that district courts are afforded discretion in implementing the Court Interpreters Act and no abuse of discretion had taken place); *see also* United States v. Lim, 794 F.2d 469, 471 (9th Cir. 1986) (finding the district court did not abuse its discretion); *see also* United States v. Edouard, 485 F.3d 1324, 1337 (11th Cir. 2007) (reviewing failure of trial court to provide an interpreter under abuse of discretion standard).

29 *See* United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003) (finding objections made during trial are reviewed under abuse of discretion and under plain error when defendant fails to object during trial); *see also* United States v. Hasan, 526 F.3d 653, 660–61 (10th Cir. 2008) (explaining that a district court's denial of a motion will be evaluated for abuse of discretion but when a party fails to raise an issue before the district court, it is reviewed under plain error); *see also* United States v. Arthurs, 73 F.3d 444, 447 (1st Cir. 1996) (reviewing under plain error); *see also* United States v. Huang, 960 F.2d 1128, 1135–36 (2d Cir. 1992) (providing summaries rather than word-for-word interpretation is not plain error); *see also* United States v. Amador, No. 05-4934, 2007 WL 162783 at *2 (4th Cir. Jan. 19, 2007) (reviewing under plain error); *see also* United States v. Paz, 981 F.2d 199, 201 (5th Cir. 1992) (reviewing under plain error); *see also* United States v. Markarian, 967 F.2d 1098, 1104 (6th Cir. 1992) (determining that the trial court did not commit plain error in failing to provide an interpreter on its own motion); *see also* United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003) (reviewing under plain error).

30 *See, e.g.*, *Gonzales*, 339 F.3d at 728.

31 People of Territory of Guam v. Nuguid, No. CRIM. 89-00073A, 1991 WL 336901 (D. Guam App. Div. 1991) aff'd, 959 F.2d 241 (9th Cir. 1992).

32 *See* Debra L. Hovland, *Errors in Interpretation: Why Plain Error is not Plain*, 11 Law & Ineq. 473, 489 (1993).

33 United States v. Coronel-Quintana,752 F.2d 1284 (8th Cir. 1985).

34 *See id.* at 1291.

35 Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989).

36 *See id.* at 1566.

37 *See id.*

38 *See* Claudia G. Catalano, Annotation, *Construction and Application of Court Interpreters Act, 28 U.S.C.A. §§ 1827, 1828*, 40 A.L.R. Fed. 2d 115 (2009) (listing all cases citing to the Court Interpreters Act).

For instance, in *Yaohan U.S.A. Corp. v. NLRB*,[39] the Ninth Circuit observed that although the defendant's answers were "sometimes stumbling and ungrammatical" and that it did "not approve of the ALJ's handling of the witness's language difficulties," it would not disturb the lower court's decision to deny the defendant's request for an interpreter.[40]

United States v. Juarez-Duarte[41] provides another example in which a federal court of appeals reluctantly permitted a district court decision to refuse to provide an interpreter to stand. The defendant in *Juarez-Duarte* asked for an interpreter during his sentencing hearing, claiming that he did not understand fully what had happened during an earlier appearance.[42] The district court observed that the defendant had not asked for an interpreter at his detention hearing or at his prior arraignments, and that he appeared to understand English well enough when he entered his guilty plea. The district court agreed to set aside the plea, but warned, "an improper request could have an effect on his sentencing."[43] On the defendant's third arraignment, the district court made good on its threat, recommending a two-level enhancement for obstruction of justice for "providing materially false information to a judge regarding his need for an interpreter."[44] The decision increased the defendant's sentence range from 46-57 months to 78-97 months.[45] On appeal to the Fifth Circuit, the court admitted that it was "not unsympathetic to the legitimate concerns raised by Juarez-Duarte that imposing the obstruction enhancement on defendants who falsely assert the need for an interpreter might make other defendants hesitant to request an interpreter, a right protected by the Court Interpreters Act . . . ."[46] Nevertheless, the Fifth Circuit felt compelled to affirm the district court's ruling.[47]

THE DUE PROCESS CLAUSE PREVENTS TRYING CRIMINAL DEFENDANTS WHO LACK THE CAPACITY TO UNDERSTAND CRIMINAL PROCEEDINGS: THIS PROHIBITION HOLDS FOR INDIVIDUALS WHO ARE HINDERED BY LINGUISTIC BARRIERS AS WELL AS MENTAL IMPAIRMENTS.

2. Criticisms of the Case Law

The current standards of review governing the provision of court interpreting have been heavily criticized. One of the most sophisticated arguments is that they rest on an improper reading of the Court Interpreters Act itself. The Ninth Circuit in *Gonzalez v. United States*[48] upheld the district court's determination that the defendant did not need an interpreter. In *Gonzalez*, the district court noted that "there is some language difficulty but not a major one," and the majority of the Ninth circuit found that '[t]he defendant's answers were consistently responsive, if brief and somewhat inarticulate, and he only occasionally consulted his attorney."[49] In his dissent, Judge Reinhardt argued that the statutory language and legislative history did not support the district court's narrow application of the Act. Judge Reinhardt first analyzed the plain language of the statute, noting that absent evidence to the contrary, the court must

39 Yaohan U.S.A. Corp. v. NLRB, Nos. 95-70818, 95-70913, 1997 WL 453688 (9th Cir. June 30, 1997).
40 *Id.* at *2.
41 United States v. Juarez-Duarte, 513 F.3d 204 (5th Cir. 2008).
42 *See id.* at 207.
43 *See id.*
44 *See id.* at 208.
45 *See id.*
46 *See id.* at 211.
47 *See id.*
48 Gonzalez v. United States, 33 F.3d 1047, 1052–54 (9th Cir. 1994) (Reinhardt, J., dissenting).
49 *See id.* at 1050-51.

follow its common, everyday meaning.[50] The Act provides that the presiding judicial officer

> *shall* utilize the services of the most available certified interpreter . . . if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party . . . speaks only or primarily a language other than the English language . . . so as to *inhibit* such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer.[51]

Citing the Random House Dictionary of the English Language,[52] Judge Reinhardt concluded that the common meaning of "inhibit" is "hinder." Furthermore, the language "shall" clearly indicates that the Act is nondiscretionary.[53] A judicial officer "must" appoint an interpreter when a defendant's language skills are sufficiently deficient to trigger the Act. Judge Reinhardt found further support for his view in the Act's House Report, quoting Congressman Fred Richmond's statement before the subcommittee that "[i]f language-handicapped Americans are not given the constitutionally-established access to understand and participate in their own defense, then we have failed to carry out a fundamental premise of fairness and due process for all."[54] Judge Reinhardt concluded that the proper standard of review under these circumstances should not be clear error, but *de novo* review.[55]

Several scholars have subsequently picked up Judge Reinhardt's "*de novo*" flag and attempted to carry it further.[56] Most recently, Chao has advocated for a more nuanced approach, in which appellate courts examine district court factual findings under a clear error standard of review, but examine matters of statutory construction under *de novo* review. This approach is similar to the approach that the judiciary has taken to sentencing guidelines, federal statutes of limitations, the Speedy Trial Act, and the Juvenile Delinquency Act.[57] In Chao's view, the question of whether a defendant is entitled to an interpreter under the Court Interpreters Act is a mixed question of law and fact. The district court judge's interpretation of "inhibit" and how the judge applies that legal standard to the facts of the case should be reviewed *de novo*.[58]

IT IS NOT ONLY CONSTITUTIONALLY ESSENTIAL BUT ALSO EMINENTLY REASONABLE TO REQUIRE THE APPOINTMENT OF A SEPARATE INTERPRETER TO FACILITATE COMMUNICATION BETWEEN A DEFENDANT AND HIS COUNSEL "THROUGHOUT THE PROCEEDINGS" AND NOT TO PERMIT THE DEFENSE INTERPRETER TO PERFORM AN ADDITIONAL ROLE OF INTERPRETING WITNESSES' TESTIMONY FOR THE COURT.

50 *See id.* at 1053.
51 *See id.* (emphasis added).
52 Random House Dictionary of the English Language, 732 (1979).
53 *See Gonzales*, 33 F.3d at 1053.
54 1978 U.S.C.C.A.N. 4652, 4654.
55 *See Gonzalez*, 33 F.3d at 1053 (Reinhardt, J., dissenting).
56 *See e.g.*, Mollie M. Pawlowky, Note, *When Justice is Lost in "Translation:" Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 De Paul L. Rev. 435, 488 (1996); Leslie V. Dery, *Amadou Diallo and the "Foreigner" Meme: Interpreting the Application of Federal Court Interpreter Laws*, 53 Fla. L. Rev. 239, 288 (2001); Cassandra L. McKeown & Michael G. Miller, *Say What? South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. Rev. 33, 69 (2009).
57 *See* David H. Chao, *Bifurcated Review of Interpreter Determinations Under the Court Interpreters Act*, 10 Conn. Public Interest L. J. 139, 171-72 (2010).
58 *See id.*

3. Recommendations for the Practicing Attorney

Effective representation of a non-English speaking client begins with recognizing that the trial judge's power to appoint or refuse to appoint a courtroom interpreter is very unlikely to be overturned. To improve the likelihood of receiving a court-appointed interpreter, an attorney who represents a client in federal court who does not speak English fluently should inform the court of any linguistic deficiencies that her client may have as soon as possible. Under no circumstances should an attorney rely on the trial judge to make a *sua sponte* inquiry into her client's language skills. Nor should the attorney assume that if a client does not ask for an interpreter then he does not need one. The frequency with which defendants are denied meaningful access to the courts merely because they are unaware of their rights and their attorneys fail to assert their rights is grist for grim speculation. The seminal case of *Negron* provides a particularly apt description of how fallacious reliance on the client may be:

> For all that appears, Negron, who was clearly unaccustomed to asserting 'personal rights' against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any 'rights' or any 'privilege' to assert them. At the hearing before Judge Bartels, Negron testified: 'I knew that I would have liked to know what was happening but I did not know that they were supposed to tell me.'[59]

Defense counsel should be prepared to argue that the failure to provide an interpreter violates her client's Sixth Amendment rights. The Sixth Amendment ensures the right to be meaningfully present at one's own trial, to assist in one's own defense, to have effective assistance of counsel, and to confront opposing witness on cross examination.[60] To be "present" means more than physical presence; it means that a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[61] The Due Process Clause prevents trying criminal defendants who lack the capacity to understand criminal proceedings;[62] this prohibition holds for individuals who are hindered by linguistic barriers as well as mental impairments.[63]

The unfortunate reality is that if counsel fails to convince the trial court that an interpreter is required early on in the process, the odds of reversal on appeal are exceedingly low. Appellate courts have uniformly demonstrated a very strong dedication to upholding trial courts' decisions regarding the provision of interpreting services. Even if defense counsel loses the argument at the trial level and has no choice but to seek reversal on appeal, it is still worthwhile to raise the need for an interpreter as early as possible. At the very least, counsel will be able to point to a detailed record regarding her efforts to secure the appropriate services for her client.

III. The Controversial Question of Whether a Non-English Speaker Has a Right to His Own Court-Appointed Interpreter.

Lawyers often incorrectly assume that obtaining an interpreter for their client for courtroom proceedings is sufficient to ensure that their client receives a fair trial. The courts employ interpreters to perform several different functions, and when an interpreter is asked to perform too many functions at the same time, the attorney's ability to represent his client is invariably compromised.[64] The

59 *See* United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

60 *See* U.S. Const. amend. VI; *see also* United States v. Mosquera, 816 F.Supp. 168, 172 (E.D.N.Y. 1993).

61 *See Negron*, 434 F.2d 389 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

62 *See* Drope v. Missouri, 420 U.S. 162 (1975); *see also* Pate v. Robinson, 383 U.S. 375 (1966).

63 *See Negron*, 434 F.2d at 390-91.

64 The various functions include: interpreting all remarks in open court (proceedings interpreting), interpreting privileged communications in and out of court between coun-

problems that can arise are illustrated in the following hypotheticals. For the sake of simplicity, assume that all of the non-English speakers described below communicate fluently in Spanish, but do not understand English:

Example A—The Basic Case: The court appoints an interpreter because you have a non-English speaking client. Your client is the only Spanish speaker participating in the trial. Your client chooses not to testify. The interpreter sits between you and your client and performs two functions: he interprets the trial testimony for your client and facilitates communication between you and your client in and out of the courtroom.

Example B—The Case of Interpreter Borrowing: The court appoints an interpreter because you have a non-English speaking client. This time, however, your client is not the only non-English speaker to participate in the proceedings. The prosecution's star witness is also a Spanish speaker. For most of the trial, your interpreter performs the same functions as in *Example A*. He sits between you and your client; he interprets the trial testimony for your client and enables you to communicate effectively with your client during the course of the trial. But when the time comes for the prosecution's witness to testify, the judge orders the interpreter to leave the trial table, stand next to the prosecution's witness, and interpreter the witness' testimony into English for the benefit of the jury. You and your client have no means of communicating with each other while the witness is testifying. When the witness is excused, the interpreter returns to his seat between you and your client at the trial table.

Example C—The Case of Multiple Defendants: The court appoints an interpreter because there are three non-English speaking defendants in the case. Each non-English speaking defendant is represented by a different attorney. The court provides the defendants with headphones and instructs the interpreter to speak into a microphone. By listening to the interpreter's simultaneous interpretation, the defendants are able to follow the proceedings in Spanish. However, the defendants have no means of communicating with their attorneys while the proceedings are taking place.

The scenarios described above, and variations on them, have been the subject of litigation for decades. There is a line of cases that strongly condemns the practices of "borrowing" the defense's interpreter for witness testimony (as in *Example B*) or "sharing" a defense interpreter in a multi-defendant case (as in *Example C*). However, these cases may only be useful for attorneys who practice in California state court.

In *California v. Carreon*,[65] a Spanish-speaking defendant was convicted of robbery and kidnapping. On appeal, the defendant alleged that the trial and hearing courts erred in appointing only one interpreter to assist the defendant in conferring with defense counsel and to interpret a Spanish-speaking witness'

sel and the client (defense interpreting or table interpreting), and interpreting all non-English witness testimony (witness interpreting). *Mathers*, 1324 n. 33; *see also* Graham J. Steele, *Court Interpreters in Canadian Criminal Law*, 34 Crim. Law. Quarterly 218 (1991); Williamson B. C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 Cal. L. Rev. 801–23 (1975).

65 California v. Carreon, 151 Cal. App.3d 559, 565 (1994).

testimony[66] (in other words, *Example B*, *supra*.). The court found and agreed "that a separate interpreter should have been present throughout the proceedings to simultaneously translate all spoken English words and to facilitate communication between the defendant and

ATTORNEYS SHOULD BE FAMILIAR WITH THE PITFALLS THAT "SHARING" OR "BORROWING" INTERPRETERS FOR COURT PROCEEDINGS POSE AND SHOULD BE PREPARED TO EXPLAIN TO THE TRIAL COURT WHY AND HOW THIS PRACTICE PREJUDICE'S THEIR CLIENTS' RIGHTS.

his non-Spanish speaking attorney."[67] In support of its holding, the Court of Appeals of California observed that Article I, section 14 of the California Constitution provides that "[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."[68] The court cited with approval the Second Circuit's analysis in *Negron*, which concluded that the failure to provide "interpreter services impairs not only the defendant's due process rights, but also his right to confront adverse witnesses, to the effective assistance of counsel, and to be present at his own trial."[69] The court also quoted at length a District Court of Pennsylvania's opinion, which stated, expressly in dicta, that two interpreters may be constitutionally necessary if a Spanish-speaking witness testifies during the trial of a Spanish-speaking defendant.[70] The court then provided what may still be the most cogent argument in favor of providing a defendant with his own interpreter throughout a criminal trial:

> It is not only constitutionally essential but also eminently reasonable to require the appointment of a separate interpreter to facilitate communication between a defendant and his counsel "throughout the proceedings" and not to permit the defense interpreter to perform an additional role of interpreting witnesses' testimony for the court. The present case illustrates the point. When the Spanish-speaking victim was testifying, the interpreter was chiefly concerned with translating his testimony for the court and was not readily available to facilitate consultation between defendant and his counsel. It is true that if defense counsel and defendant wanted to consult one another, they could indicate their desire to do so and the interpreter would be made available to them, thereby interrupting the proceeding. Such an arrangement would significantly inhibit attorney-client communication. Simply put, it would require the defendant, in order to accomplish the otherwise simple task of consulting his counsel, to somehow make his intention known to the court and call the interpreter back to the counsel table. During the attorney-client conversation, attention undoubtedly would focus upon the scene at the counsel table, as occurs when counsel approach the bench for a private consultation with the court.
>
> For defense counsel's part, the risk of alienating or antagonizing the jury or bench would infuse the mere act of speaking to his client with considerations of strategy and tactics, in contrast to the English-speaking defendant whose consultation would be unobtrusive and likely to go unnoticed. Communication between counsel and defendant should not be hampered by such concerns, nor should the exercise of a constitutional right depend upon whether the defendant is assertive enough to

66 *Id.* at 555-56.
67 *Id.* at 566.
68 *Id.*
69 *Id.* at 566.
70 *Id.*, citing United States ex rel. Navarro v. Johnson, 365 F. Supp. 676, (E.D. Pa. 1973).

bring attention to himself.

Carreon raised serious doubts if it would ever be possible to "borrow" a defendant's interpreter while a non-English speaking witness testified without violating the defendant's constitutional rights.[71] In *California v. Rioz*,[72] the Court of Appeals of California effectively foreclosed the "sharing" of interpreters in a multi-defendant case as well (in other words, *Example C, supra*.). In *Rioz*, the defendant was required to share one interpreter with three other co-defendants.[73] While taking care to stress that the court was not creating a *per se* rule that an individual interpreter must be provided for each co-defendant in a multi-defendant case, the court reversed judgment against the defendant. The court held that "in any proceedings at which witnesses are called and testimony taken, the fundamental rights of a defendant to understand the proceedings being taken against him and to immediately communicate with counsel when the need arises require that each non-English-speaking defendant be afforded an individual interpreter throughout the proceedings."[74]

Finally, in *California v. Resendes*,[75] the California's Supreme Court weighed in on a procedure that has become a common and perfectly acceptable practice in federal court. In *Resendes*, two Spanish-speaking defendants shared a single interpreter. The judge devised a procedure whereby the defendant could raise his hand when he wanted to stop the proceedings, at which point the defendant would be permitted to have a private conversation with his attorney with the assistance of the court interpreter.[76] The State attempted to persuade the court that *Resendes* was distinguishable from *Carreon* because the trial court judge had created a specific procedure to address the problem of the defendant communicating with counsel.[77] The court did not agree:

> Even though the judge sanctions an interruption procedure and so informs the jury -- which apparently he did not do here -- a defendant must affirmatively interrupt proceedings each and every time he wants to invoke his *constitutional* right to communicate with counsel. Invocation of such a right should not be held hostage to a lingering fear that a jury wholly or mainly composed of monolingual English-speaking persons may view the non-English-speaking defendant as an obstructionist or at least a minor irritant.[78]

The *Carreon-Rioz-Resendes* trilogy and their companion cases[79] created robust protections for criminal defendants in state courts in California. During the early 1980s, the Court of Appeals of California repeatedly sided with non-English speaking defendants who objected to the practice of interpreter borrowing and interpreter sharing. Although the Court of Appeals cited frequently to the California's state constitution as the basis for its decision, it also drew upon federal court cases penned in the 1970s and quoted liberally from a 1975 law review article that argued that a criminal defendant should be provided with his own "defense interpreter" throughout the duration of his trial.[80]

Now, almost thirty years later, it appears safe to conclude that these cases have had prac-

71 *Id* at. 570-71. *See also* California v. Aguilar, 667 P. 2d 1198 (Cal. 1984) (reversing the conviction of a non-English speaking defendant because a second court-appointed interpreter was required); California v. Menchaca, 146 Cal. App. 3d 1019 (1983) ("In our view, nothing short of a sworn interpreter at defendant's elbow will suffice.").

72 California v. Rioz, 146 Cal. App. 3d 905 (1984).

73 *Id.* at 910.

74 *Id.* at 913.

75 California v. Resendes, 164 Cal.App.3d 812 (1985).

76 *Id.*

77 *Id.*

78 *Id.* at 612.

79 *See* California v. Aguilar, 667 P. 2d 1198 (Cal. 1984) (reversing the conviction of a non-English speaking defendant because a second court-appointed interpreter was required); *see also* California v. Menchaca, 184 Cal. Rptr. 691 (1983) ("In our view, nothing short of a sworn interpreter at defendant's elbow will suffice.").

80 Williamson B. C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 Cal. L. Rev. 801-23 (1975).

tically no influence on the trajectory of federal court interpreting case law. Rightly or wrongly, federal courts have construed the rights of non-English speakers to courtroom interpreters in a much narrower fashion. In *United States v. Lim*,[81] a judge sitting on the United States District for the Southern District of California "borrowed" an interpreter from the defense table to assist a witness and at times provided only one interpreter for two non-English speaking co-defendants.[82] The Ninth Circuit ruled that without a showing that the defendant's ability to understand the proceedings or communicate with counsel was impaired, the "use of interpreters in the courtroom is a matter within the discretion of the district court."[83] And that the trial judge's actions did not constitute an abuse of discretion.[84] Shortly thereafter, the Eleventh Circuit published *United States v. Bennett*.[85] The *Bennett* court encountered a fact pattern that the federal courts have faced repeatedly in the ensuing years. In *Bennett*, the trial court appointed one interpreter to interpret for three non-English speaking co-defendants.[86] Two of the defendants argued on appeal that the trial court's failure to appoint one interpreter for each defendant violated their rights under the Court Interpreters Act and the Sixth Amendment.[87] The *Bennett* Court found that the Court Interpreters Act "clearly authorizes the use of a single interpreter in multi-defendant cases".[88] The *Bennett* Court holdings have been reaffirmed repeatedly. With each successive court decision that cited with approval to *Bennett*, its holdings became more difficult to successfully challenge. Hence, when the Sixth Circuit took up the same issues in *United States v. Sanchez*,[89] the path had already been thoroughly blazed. The court noted, "Every circuit which has addressed this issue has concluded that the Act does not require every defendant in multi-defendant cases be provided with his own personal interpreter."[90]

81 United States v. Lim, 794 F.2d 469 (9th Cir. 1986).
82 *Id.*
83 *Id.* at 471 (quoting United States v. Coronel-Quintana, 752 F. 2d 1284, 1291 (9th Cir. 1985)).
84 *Id.*
85 United States v. Bennett, 848 F.2d 1134 (11th Cir. 1988).
86 *Id.* at 1140.
87 *Id.*
88 *Id.*
89 United States v. Sanchez, 928 F.2d 1450 (6th Cir. 1991).

Part IV: Courtroom Interpreting Errors

In many instances securing a court-appointed interpreter is not the final, but rather the first step in ensuring that the non-English speaker receive treatment equal to his English-speaking peers. Although there are good reasons to supply each defendant with his own interpreter, these arguments have encountered a skeptical audience outside of the California state court system. In Part IV, we touch on another substantial barrier to effective legal representation, even when court-appointed interpreters are provided: courtroom interpreter error.

The attorney who wants to provide evidence on appeal that the court interpreter's performance fell below an acceptable standard is in an exceptionally difficult position. First, unless the court has agreed to provide the defendant with his own interpreter, the defendant and his attorney have no way of knowing if the interpreter is correctly interpreting the testimony. Second, appellate courts are clearly disinclined to find that courtroom interpreter errors equate to more than harmless error. The current state of affairs is particularly disconcerting because there is reason to believe that courtroom interpreting errors are quite common.

1. Contemporaneous Objections

The evidentiary rule that objections must be contemporaneous to overcome plain error review is particularly difficult to adhere to with respect to correcting interpreting errors. Presumably, the defendant requires an interpreter because he does not speak English or speaks it poorly. Therefore, it will usually

90 *Id.* at 1455. The court relied upon *Bennett,* 848 F.2d 1134; United States v. Moya-Gomez*,* 860 F.2d 706, 740 (7th Cir. 1988); United States v. Lim*,* 794 F.2d 469 (9th Cir. 1986).

not be immediately apparent to the defendant that the interpretation is inaccurate.[91] Unless the defendant's counsel happens to be bilingual, he too will not be immediately aware that an interpreter is committing errors.[92] Even if defense counsel is bilingual, he cannot and should not be expected to provide his client with effective legal representation while simultaneously checking the interpreter's work for mistakes.[93] As a practical matter, given the unique disadvantages that the defendant and his lawyer face with respect to identifying interpreter errors, it may be impossible for counsel to object in a timely manner. Further complicating defense counsel's task, proceedings that are conducted with the assistance of a court interpreter are usually transcribed by court reporters into English, as if the entire proceeding were conducted in English. This makes it very difficult to verify or discount alleged errors of interpretation on appeal.[94]

2. The "Fundamentally Unfair" Hurdle

In *United States v. Joshi*,[95] the Eleventh Circuit held that "[a]lthough a continuous word for word translation of the proceedings will always pass constitutional muster, minor deviations from this standard will not necessarily contravene a defendant's constitutional rights."[96] In *United States v. Gomez*,[97] the Eleventh Circuit added that "defendants have no constitutional 'right' to flawless, word for word translations."[98] In *Valladares*, the Eleventh Circuit determined that the ultimate question is whether any inadequacy in the interpretation "made the trial fundamentally unfair."[99]

A number of subsequent court decisions suggest that it is extremely difficult for a defendant to show that an interpreter was so deficient that his trial was "fundamentally unfair." In *United States v. Huang*,[100] the Second Circuit held that an uncertified court interpreter who summarized certain portions of testimony was not fundamentally unfair, and therefore in compliance with the Act. Similarly, in *United States v. Hernandez*,[101] the Third Circuit determined that the inaccurate use of a word or phrase nine times did not rise to the level of unfairness. In *United States v. Gomez*,[102] the Eleventh Circuit concluded that the interpreter took "an unwarranted liberty with the trial testimony" by translating the word "disco" as "the Elks Lodge," which was the alleged scene of a drug deal. Although the court had no difficulty finding that the "interpreter's conduct . . . resulted in some prejudice against the appellant," it was not sufficient to render the trial fundamentally unfair.[103] Similarly, in *United States v. Mata*,[104] the Fourth Circuit upheld a district court's ruling that even if the interpreter had been ineffective, his trial was not fundamentally unfair, because the defendant did not object to the interpretation during trial, had at least a "passing" familiarity with the English language, and, in any case, there was overwhelming evidence of his guilt.[105]

V. Conclusion

Attorneys who hope to reverse the decisions of trial judges because their client was unable to fully understand and participate in the court proceedings below are treading in harsh realm. The standards of review that appellate courts employ to determine whether

91 *See Hovland*, *supra* note 33, at 490.
92 *See id.*
93 *See* Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. Rev. 1 (1990).
94 Susan Berk-Selignson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, 200 (1990).
95 United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990).
96 *See id.* at 1309.
97 United States v. Gomez, 908 F.2d 809 (11th Cir. 1990), *cert denied*, 498 U.S. 1035 (1991).
98 *See id.* at 811.
99 *See* United States v. Valladares, 871 F.2d 1564, 1566 (11th Cir. 1989), (citing United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980)).
100 United States v. Huang, 960 F.2d 1128 (2d Cir. 1992).
101 United States v. Hernandez, 994 F. Supp. 627 (E.D. Pa. 1998), *aff'd without opinion*, 248 F.3d 1131 (3d Cir. 2000).
102 United States v. Gomez, 908 F.2d 809, 811 (11th Cir. 1990).
103 *See id.* at 811.
104 United States v. Mata, No. 98-4843, 1999 WL 427570 (4th Cir. June 25, 1999).
105 *See id.* at *2–3.

a defendant should have been provided with a courtroom interpreter or a more qualified courtroom interpreter are so heavily balanced in favor of upholding the trial court's decision that only the most egregious sets of facts are likely to prevail. In light of the difficulty of reversing adverse decisions due to linguistic impairment on appeal, it is of paramount importance that attorneys who represent non-English speaking clients make timely requests to increase the probability that their clients will receive court-appointed interpreters. Attorneys should be familiar with the pitfalls that "sharing" or "borrowing" interpreters for court proceedings pose and should be prepared to explain to the trial court why and how this practice prejudices their clients' rights. Attorneys should also be aware that not all court interpreters are created equally. Interpreter error is a real problem, and appeals requesting reversal because the non-English speaking client received subpar access to the court proceedings are unlikely to encounter a sympathetic audience.

Finally, this article has examined a number of cases from the California state courts, which diverge substantially from federal case law. While the California cases can be readily distinguished as decisions based on interpretations of the California State Constitution, rather than the United States Constitution, the analyses that the California state courts engaged in to justify their holdings certainly could have been adopted by the federal courts if they had chosen to do so. While perhaps of little practical value to attorneys who do not practice in California's state courts, the California cases present an intriguing window into what the Court Interpreters Act, had it been interpreted differently by the federal courts, might have become; and from the optimist's vantage point, what the Court Interpreters Act, with the nudge of some creative advocacy, might still one day accomplish.

About the AUTHOR

Jeffrey Archer Miller is an associate attorney with Callegary & Steedman, P.A.. Before joining Callegary & Steedman, Jeff worked as a sole practitioner handling criminal and civil litigation cases. Jeff has a deaf sister and grew up in a bilingual household using American Sign Language and English. He regularly represents deaf individuals whose rights have been violated under the Americans with Disabilities Act.

Jeff holds a J.D. from the American University Washington College of Law, a B.A. from Haverford College and an M. Phil. in European Politics and Society from Oxford University. Before he attended law school, Jeff was a Fulbright Scholar in Berlin, Germany and a research assistant to the president of the Carnegie Endowment for International Peace.

NOTES

STUDIES HAVE FOUND THAT A *DEFENDANT'S RACE, ATTRACTIVENESS, AND EVEN EMPLOYMENT STATUS* CAN AFFECT JUROR JUDGMENTS

Exploring the Prejudicial Effect of Gang Evidence: Under What Conditions Will Jurors Ignore Reasonable Doubt

by Mitchell L. Eisen Ph.D. Brenna Dotson M.S.
Alma Olaguez B.A.
California State University, Los Angeles

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Summary

This article focuses on a series of experiments that demonstrate how gang evidence can have a clear prejudicial effect on juror decision-making. Moreover, the data from these studies shows that when gang evidence is introduced, jurors will often ignore reasonable doubt and convict a defendant who has been depicted as a bad actor by virtue of his association with a gang. Eisen et al. refer to this effect as "reverse [jury] nullification."[1] Perhaps most concerning is that deliberations analyses shows that when gang evidence was introduced, verdicts were often based on the defendant's apparent criminal history, despite the fact that no evidence of criminal history had been revealed at trial. Thus, the assumption of prior bad acts must have been inferred through the defendant's association with a street gang, and the gang's criminal activities as described by the gang expert. When a crime is indisputably gang-related and there is no doubt about the defendant's gang affiliation, the presentation of gang evidence is often necessary to prove the government's case. However, these issues are not always so clear. Based on this data, we argue that the inclusion of gang evidence at trial should face greater scrutiny by courts, and in cases where the charged offense is not indisputably gang related, the burden of proving the importance of presenting this class of prejudicial evidence to the triers of fact should be shifted to the prosecution.

Introduction

Gang enhancements are being used with increasing frequency around the United States. In one state, these enhancements can add up to ten years on sentencing for serious crimes.[2] Many people agree that increased penalties for crimes committed in the service of a gang are necessary for punishment, protection of the public, and the potential for deterrence. However, the data from the experiments described in this paper demon-

1 M.L. Eisen, D.M. Gomes, L. Wandry, D. Drachman, A. Clemente, & C. Groskopf, *Examining the Prejudicial Effects of Gang Evidence on Jurors*, J. Forensic Psychol. Prac. (2013),[hereinafter Eisen, et. al., Study 3].

2 *See, e.g.*, Cal. Penal Code § 186.21.

strates that when gang charges are presented to a jury, it not only increases the penalty for the crime, but also provides an unintended secondary effect of informing the jury that by virtue of the gang membership, the defendant is also involved in criminal conduct independent of the specific offense(s) being charged.[3]

In this article, we examine new data showing how the presentation of evidence related to the defendants' gang affiliation can affect juror verdicts. We also explore some specific arguments about how gang evidence can affect juror decision making in general. Finally, we introduce the concept of reverse jury nullification, where jurors focus on the character of the defendant over the details of the prosecution's case, and may disregard reasonable doubt when faced with the choice of locking up a dangerous gang member or sending him back into the community.

GUILTY VERDICTS IN THE GANG CONDITION WERE FAR GREATER THAN NOT-GUILTY VERDICTS BY NEARLY A THREE-TO-ONE MARGIN

I. The Probative Value of Gang Evidence: When is Such Evidence Actually Needed?

There is a substantial body of research in social science literature demonstrating the biasing effects of defendant characteristics on juror decision-making. For example, studies have found that a defendant's race,[4] attractiveness,[5] and even employment status[6] can affect juror judgments. More recently, data has further indicated that gang affiliation can be a potent extralegal factor that can have a significant prejudicial effect on jurors' perceptions of a defendant's culpability.[7] Because there is a great deal of prosecutorial discretion in charging gang enhancements, as well as judicial discretion in allowing that evidence to be presented before a jury, it is important that all actors in the criminal justice system, including legal practitioners and judges, understand the potential prejudicial effect that gang evidence might have on the triers of fact.

In many cases, the defendant's involvement with gang activity is not in dispute and the gang evidence is central to the charges being prosecuted. This is unquestionably true in crimes where the perpetrators announce their affiliation as part of the criminal act, or in instances when the crime is being committed to fill the gang's coffers. In many cases, the examination surrounding the alleged crime will start with the question, "Where are you from?" indicating that the acts that follow were clearly done either in service of, or for the benefit of the gang. In these types of cases, the jury must hear the gang evidence because it is necessary to establish motive and it is clearly material to the charges at hand. However, in other cases, the gang related nature of the charged offense may be in some dispute, and/or the defendant's active gang status may be in question. In these cases, the prosecutor and the judge must carefully balance the potential probative value of the gang evidence against the prejudicial effect it may have on the triers of fact.

A. Study One: What happens when jurors hear the defendant is associated with a gang

The Evidence: Three hundred and

3 Eisen et. al., *supra* note 1.

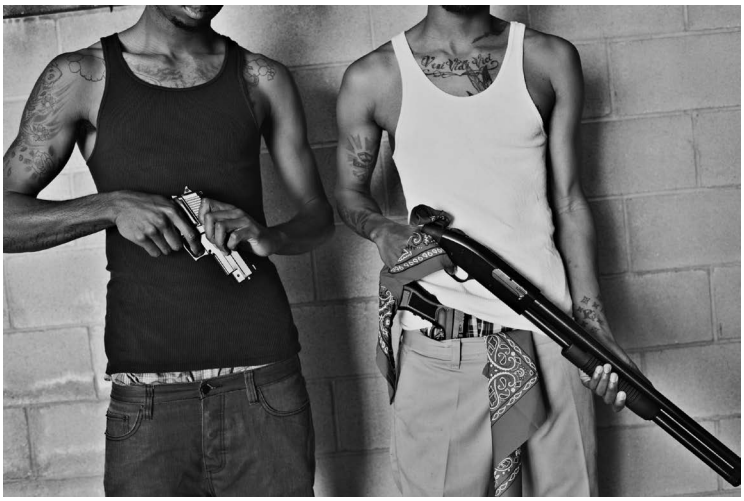
4 T. Mitchell, R. Haw, J. Pfeifer, & C. Meissner, *Racial Bias in Mock Juror Decision Making: A Meta Analytic Review of Defendant Treatment*, 6 Law & Hum. Behav. 621-637 (2005).

5 D.A. Abwender & K. Hough, *Interactive Effects of Characteristics of Defendant and Mock Juror on U.S. Participants' Judgment and Sentencing Recommendations*, 141 J. Social Psychol. 603, 615 (2001).

6 B.F. Reskin & C.A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 Law & Soc'y Rev. 423-438 (1986).

7 Eisen et. al., Study 3, *supra* n. 1, at 1-13.

fifteen mock jurors watched one of three versions of a simulated trial that included opening and closing arguments by the prosecution and defense, along with direct and cross examinations of the investigating officer and the victim/eyewitness.[8] The fact pattern centered around an eyewitness case, where the evidence was designed to be weak and equivocal:[9] there was an argument over a woman at a bar that resulted in the victim being stabbed.[10] The three versions of the trial differed only in regard to the mention of the defendant's gang association.[11] Gang association was manipulated by having the defendant described as either having been seen hanging out with gang members on the night of the incident (gang affiliate), or being a documented gang member with a gang tattoo (gang member).[12] In the Control Trial, there was no mention of any gang or gang affiliation.[13]



Results: As predicted, when testimony on gang affiliation was introduced, guilty verdicts increased significantly.[14] Specifically, when the prosecutor argued in the gang affiliation trial that the defendant had been seen hanging out with gang members on the night of the crime, convictions increased significantly from forty-four percent in the non-gang trial to fifty-nine percent when affiliation was discussed.[15] It is important to note that there was no assertion of actual gang membership in the gang affiliation trial. Rather, the defendant's mere association with gang members on the night of the incident was enough to drive up guilty verdicts by fifteen percent. When the defendant was described as a self-admitted member with a gang tattoo, guilty verdicts increased to sixty-three percent.[16]

This first study showed that gang evidence had a prejudicial effect on juror decision-making; however, it was not clear how powerful this effect was or what actually caused the increase in guilty verdicts. It is possible that mentioning the gang evidence merely tainted the character of the defendant just enough to push the mock jurors over the edge in a close call. Alternatively, introducing the defendant's gang association could have prejudiced the jurors to the point where they were ready to ignore reasonable doubt in order to convict a defendant who was perceived to be a bad actor by virtue of his gang affiliation. Unfortunately, the data from the initial study could not be used to test this latter hypothesis, because reasonable doubt was not clearly established. Rather, the evidence was designed to be equivocal to start with, resulting in over forty percent of the mock jurors voting guilty even when there was no mention of gangs.

Further, the simulation in this case lacked a few key elements that may have limited the study's applied value. For instance, jurors did not deliberate in panels; thus, it is possible that deliberations may have washed out biases that some participants came to the table with. Also, jurors were not read standard jury instructions that would have directed them in how to weigh the evidence and arguments presented. Therefore, it is possible that

8 M.L. Eisen, *The Biasing Effect of Gang Evidence on Juror Decisions*, (July 19, 2009), *available at* http://ssrn.com/abstract=1436222 [hereinafter, Eisen, Study 1].
9 Eisen, Study 1, *supra* n. 12.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 Eisen, Study 1, *supra* n. 12.
16 *Id.*

properly instructing the jurors could have affected the way they voted. Moreover, in a typical gang trial, jurors hear extensive testimony from a gang expert who describes in great detail how the gang is a criminal organization whose main goal is to terrorize the community at large. Thus, given the results of the aforementioned study, simply hearing such testimony from a gang expert could have a potent effect on jurors' perceptions of the defendant.

B. Study Two: Will jurors still convict a gang member when reasonable doubt is clear?

In the second study, Eisen, Dotson and Dohi[17] designed an experiment to address the issues raised above. A new simulated trial was filmed for this study that involved an armed robbery of an intoxicated victim who had just left a bar at 1:00 a.m.[18] In this trial, the defense attorney and prosecutor were played by superior court judges who had worked for many years as prosecutors in the hardcore gang unit before taking the bench. The victim/eyewitness was played by an actor, and the investigating officer who also testified as the government's gang expert was played by a Sheriff's deputy who frequently provided gang testimony for the District Attorney's Office in Los Angeles County.[19]

ONCE A NEGATIVE STEREOTYPE IS ACTIVATED, PEOPLE OFTEN SEEK INFORMATION THAT IS CONSISTENT WITH THAT STEREOTYPE

The Evidence: This new trial was designed to establish clear reasonable doubt.[20] The investigating officer testified that several days after the event occurred, he and his partner had located the car associated with the robbery and that the owner of the vehicle was caught having possession of the stolen property and the gun used during the commission of the crime.[21] The jurors heard testimony that this man confessed to his involvement in the robbery and that his case was settled through a plea agreement prior to the current trial.[22] The investigating officers testified that the defendant was one of several men seen hanging around the car listening to music when the police pulled up to make the arrest.[23] The defendant became a suspect solely by virtue of his association with the actual culprit: hanging out and listening to music with the main suspect when the police arrived.[24] Further, the defendant was a young Hispanic male wearing a sleeveless white undershirt similar to the one described by the victim.[25]

Based on these facts alone, the police decided to put his picture in a six-pack photo array to show the witness (despite the fact that the defendant did not match the victim's description of the suspect).[26] Most notably, the defendant was covered in tattoos on his arms, chest, and neck; and although the victim described the robber as wearing a sleeveless under shirt, he did not report seeing any tattoos.[27] Jurors heard testimony that the witness studied the six-pack for some time and ultimately told the investigating officer that he believed the defendant's face 'looked similar' to the second robber.[28] There was no evidence of any sort linking the defendant to the crime itself aside from the very hesitant identification from a photo lineup and uncertain in-court identification by an eyewitness who admitted to

17 M.L. Eisen, B.M. Dotson, & G. Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* 62 UCLA L. Rev. 2 (2014) [hereinafter, Eisen, Study 2].
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 Eisen, Study 2, *supra* n. 18.
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*

drinking heavily on the night of the incident.[29]

Two-hundred-twelve undergraduate psychology students participated in this study and were randomly assigned to watch one of two trials, where they either saw a version of the trial with no mention of gang evidence, or they heard evidence of the defendant's gang status.[30] The gang evidence was introduced through the investigating officer who also provided testimony as a gang expert.[31] The officer testified that he knew the defendant to be a long time member of a well-known local criminal street gang that was known for terrorizing the community through intimidation, extortion, and murder.[32]

Prior to viewing the trial, participants were told that they would see a video of a condensed trial and that they were being asked to act as a juror in this matter.[33] The following pretrial instructions from the California Criminal Jury Instructions (CALCRIM) were used: no. 110 (trial process); no. 102 (note taking); no. 103 (reasonable doubt); and no. 104 (evidence).

Following the trial, jurors were read a set of CALCRIM post-trial instructions.[34] As with the pretrial procedure, the instructions were played from an audio recording, while participants read along on printed copies. The following CALCRIM instructions were used: no. 300 (all available evidence); no. 301 (single witness's testimony); no. 315 (eyewitness identification); no. 1600 (robbery defined); no. 1603 (intent of aider and abettor in a robbery case); no. 3500 (unanimity); and no. 3550 (pre-deliberation instructions). In addition, in the gang trial, CALCRIM instruction no. 1401 titled "Felony or Misdemeanor committed for the benefit of criminal street gang" was used.[35]

After watching the trial, participants were asked to indicate how they would vote if they were asked to render a verdict "right now," and to make sure they voted as if they were participating as an actual juror in a real case, assuming the defendant was from their own general urban community. After that, participants were assigned to groups ranging

THE INTRODUCTION OF GANG EVIDENCE MAY CONVEY TO JURORS THAT THE DEFENDANT IS LIKELY INVOLVED IN OTHER CRIMINAL ACTIVITY BY VIRTUE OF HIS GANG MEMBERSHIP

in size from four to seven, and listened to an audio recording of standard CALCRIM jury instructions for deliberation that asked them to deliberate and come to a unanimous verdict.[36]

The Results: When participants were polled prior to deliberations, guilty verdicts in the gang condition were far greater than not-guilty verdicts by nearly a three-to-one margin, with thirty-three percent of the participants voting guilty when gang evidence was introduced compared with only twelve percent voting guilty when no gang evidence was presented.[37] The twenty-one percent increase in guilty verdicts in the gang trial prior to deliberations is comparable to the nineteen percent boost found in Study One.[38] After deliberations, none of the mock jurors voted guilty in the no gang trial.[39] However, ten percent of the mock jurors voted guilty after deliberations in the gang trial.[40] The fact that no one

29 Eisen, Study 2, *supra* n. 18.
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 Judicial Counsel of California Criminal Jury Instructions (2014), *available at* http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf.
35 Eisen, Study 2, *supra* note 18.
36 *Id.*
37 *Id.*
38 Eisen, Study 1, *supra* n. 12.
39 Eisen, Study 2, *supra* n. 18.
40 *Id.*

in the no gang trial voted guilty after deliberations provides strong support for the notion that this case was so weak that reasonable doubt had been clearly established. It appeared that the mock jurors who continued to vote guilty in the gang trial after deliberations ignored reasonable doubt and voted to convict the defendant based solely on the fact that he was a member of a criminal street gang. One hundred percent of the participants who voted guilty after deliberations reported that the gang issue played a role in their decision, and the defendant's gang affiliation was discussed during the deliberations of each panel where any mock juror voted guilty.[41]

This study clearly demonstrates that panels of mock jurors who considered gang evidence often continued to vote guilty despite the presence of clear reasonable doubt.[42] Most of the college students at this urban institution in East Los Angeles who participated in this study grew up in neighborhoods where their classmates and neighbors either hung out with gang members or joined gangs themselves at a young age. In this respect, the sample used was likely not representative of typical jury panels, thus, we would expect the prejudicial effect of the gang evidence to be much stronger among individuals who come from areas where their exposure to gang culture is more limited. Moreover, many of the participants reported that they did not see the crime as being that serious, because no one was physically injured. To address this latter issue of violence, a new study was conducted that involved a far more serious offense.

C. Study Three: Are jurors more likely to ignore reasonable doubt and convict the defendant when a child is killed?

This third study was designed to determine if mock jurors would be more likely to convict a defendant in a case where a self-admitted gang member allegedly committed a violent act, but reasonable doubt was clearly established.[43] To accomplish this task we filmed a new simulated trial using the same judges as attorneys and identical gang testimony.[44] However, we changed the crime to where one of the combatants was shot to death and a stray bullet killed a twelve-year old child sleeping in her home.[45]

Two-hundred-thirty-five undergraduate psychology students from a large state university located in Los Angeles, California participated in this study. The participants ranged in age from eighteen to thirty-five and varied in ethnicity, with the majority describing themselves as Latino.[46] This distribution generally reflects the ethnic representation in the university as well as the surrounding geographic area.

The Evidence: The crime involved a fight over a girl at a party on the front lawn of a house party.[47] An eyewitness testified that his friend was fighting over a girl with another attendee of the party.[48] He stated that his friend was beating the other guy badly, and that at one point an unknown Hispanic male wearing a hoody fired several shots from the street nearby.[49] His friend and girlfriend were both shot, and a stray bullet hit a twelve-year old girl who was sleeping in the house.[50] Both his friend and the child died; his girlfriend was injured badly but survived the shooting.[51] According to all accounts, the shooter fled in a white four-door Honda or Toyota.[52] The investigating officer, who was played by a retired police chief, testified that while investigating the case, he discovered that the defendant

41 *Id.*

42 It is always possible, however, that the modest number of guilty verdicts in the gang trial may have been due in part to the characteristics of the mock jurors used in this sample.

43 Dotson, B. Unpublished Thesis. *Effects of Belief in a Just World and Gang Evidence on Verdict Choice.*

44 *Id.*

45 *Id.*

46 *Id.*

47 Dotson unpublished thesis, *supra* n. 43.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

was associated with a white car; however, it was a Mazda, not a Toyota or Honda.[53] Also, the car was not a four-door, but rather a two-door. Additionally, although the defendant had access to the car, the car belonged to his girlfriend's grandmother.[54] There was no other direct or circumstantial evidence linking the defendant to the crime. Based on this weak investigative lead, the officer put the defendant's picture in a six-pack photo array, but the victim was unable to identify him.[55] According to testimony at a simulated trial, the defendant was then put into a live lineup, where the witness provided a tentative identification by noting that the defendant "looked familiar," which changed when the witness testified at trial that he was 100% confident in the identification.[56]

THE DATA FROM THESE STUDIES SHOW THAT THE ADMISSION OF GANG EVIDENCE CAN SERVE AS A BACK DOOR FOR ADMITTING EVIDENCE OF PRIOR CRIMINAL CONDUCT WITHOUT HAVING TO MEET THE STANDARDS DESIGNED TO LIMIT THIS EVIDENCE

Post-trial Procedures: The procedures here were identical to those used in Study Two.[57] Following the presentation of the trial video and the post-trial jury instructions, participants were asked to indicate how they would vote if they had to render a verdict at that moment, before deliberating, and to make sure they voted as if they were an actual juror in a real case and the defendant was from their own general urban community.[58] As in the first two studies, participants were also told to assume that the defendant would return to their community if found not guilty, as he would in an actual case.[59] In addition, participants indicated how confident they were in their verdict on a scale of zero to 100, and were asked to provide the reasons for their verdict.[60] They were then asked to place their responses in a cardboard box in the front of the room, and were reassured that all responses were anonymous.[61] Participants were also given a second sheet of paper titled "Trial Questionnaire."[62] On this form, they provided their age, gender, race, and also answered four questions about the case as a manipulation check, to make sure that the participants were paying attention.[63] One of the questions asked what the defendant was charged with. Seven participants could not answer this question correctly and were dropped from the sample.

The remaining participants were then assigned to jury panels ranging in size from four to seven members, and listened to an audio recording of standard CALCRIM jury instructions for deliberation that asked them to deliberate and come to a unanimous verdict. The following CALCRIM post-trial instructions were used: 3500 unanimity and 3550 pre-deliberation instructions.

After deliberations, each participant was given a form titled "Post-deliberation verdict form."[64] The instructions on the form read as follows: "Now that you have had the time to deliberate with your fellow jurors we

53 Dotson unpublished thesis, *supra* n. 43.
54 *Id.*
55 *Id.*
56 *Id.*
57 Eisen, Study 2, *supra* n. 18.
58 Dotson unpublished thesis, *supra* n. 43.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 Dotson unpublished thesis, *supra* n. 43.

would like you to vote one more time. It is assumed that you kept an open mind during the deliberations and considered your fellow jurors' perspectives." Participants were then asked to indicate how they voted and to rate their confidence in the verdict.[65] The participants were also asked if they had reached a unanimous verdict, and if so, to indicate how long it took them to reach the verdict, and the reasons for that verdict. Finally, participants were asked if they had any prior knowledge of this study from discussions with other students.[66] If they reported having prior knowledge of the study, their data were dropped from the sample. Thirteen students were dropped for this reason. After completing the questionnaire, the participants were debriefed as a group.

The Results: As hypothesized, increasing the severity of the offense from robbery to murder led to a corresponding increase in guilty verdicts in the gang condition from ten percent in Study Two, to nineteen percent in Study Three.[67] Taken together, these studies show the prejudicial power of gang evidence in persuading jurors to vote guilty even in cases where reasonable doubt was clearly established. The findings from Study Three are particularly interesting, since the charges involved were not gang related; rather, the shooting was motivated by a fight over a woman at a house party.

II. Why is gang evidence so prejudicial?

There are several potential explanations for the potent prejudicial effect of gang evidence on juror verdicts found across these three studies. Eisen et al., (2013) proposed that this effect is likely driven at least in part by a confirmation bias. According to this theory, once a negative stereotype is activated, people often seek information that is consistent with that stereotype.[68] Simply notifying the jury that the defendant is a member of a criminal street gang involved in violent crime suggests to the jurors that the defendant is a danger to society, independent of the evidence offered. According to this model, once this bias is instilled, the jurors may then filter the evidence presented through the negative stereotype that has been activated, attending most closely to information that confirms the established bias activated by the label "gang member."

GANG EVIDENCE CAN HAVE A SIGNIFICANT PREJUDICIAL EFFECT ON JURORS' PERCEPTIONS OF THE DEFENDANT, AND ULTIMATELY ON THEIR DECISIONS OF GUILT VERSUS INNOCENCE

III. Can charging the crime as gang related provide a back door method for admitting evidence of prior bad acts?

Confirmation bias is likely compounded by the fact that the introduction of gang evidence may convey to jurors that the defendant is likely involved in other criminal activity by virtue of his gang membership. Since gang experts often describe a gang's primary activities as involving extortion, drug dealing, intimidation, and murder, the inference is made that the defendant is also likely engaged in at least some if not all of these activities given his gang involvement. In fact, in Study Two, all of the jurors who voted guilty in the gang condition indicated that their verdicts were based at least in part on the defendant's prior criminal history or gang involvement.[69] How-

65 *Id.*
66 *Id.*
67 *Id.*

68 D. Frey, *Recent Research on Selective Exposure to Information*, in Advances in Experimental Social Psychology 41-80 (19th ed. 1986).
69 Eisen, Study 2, *supra* n. 18.

ever, no prior criminal history was revealed at trial. Thus, the assumption of prior criminal acts must have been inferred through the defendant's association with the gang and the gang's criminal activities, as described by the gang expert.

This finding may have important legal implications for the admission of such evidence. In many states, prior criminal history of the defendant can be admitted into evidence, if, and only if, the court determines that the prior conduct is consistent with the actions charged in that case.[70] However, since the prejudicial value of this type of evidence is intuitively clear, the admission of such evidence must be vetted by the court through an evidentiary hearing to determine if the prior conduct shows a pattern of behavior consistent with the charged crime that can be considered by the jury. When the admission of this evidence is allowed, the court is essentially ruling that the prejudicial nature of the evidence is outweighed by its probative value of demonstrating the defendant's propensity to take part in conduct similar to what is being charged in this particular case.[71] Thus, the data from these studies show that the admission of gang evidence can serve as a back door for admitting evidence of prior criminal conduct without having to meet the standards designed to limit this evidence that would normally be vetted by the court hearing the case.

However, alerting jurors to the defendant's previous criminal conduct even in concert with confirmation bias does not fully explain why jurors would vote to convict the defendant in a case where reasonable doubt has clearly been established. To explain this, the authors introduced the concept of reverse nullification.

IV. Reverse Nullification

Jury nullification occurs when jurors disregard the law and acquit legally guilty, but morally acceptable defendants.[72] In nullification cases, jurors spend a significant portion of their time discussing the defendant's moral characteristics.[73] Although most research on jury nullification has dealt with acquitting legally guilty but perhaps morally innocent defendants,[74] when jurors follow their conscience and personal sense of justice, it is also possible for jury nullification to occur in the reverse direction. In such instances, jurors would understand that reasonable doubt exists, but knowingly ignore this and nevertheless convict a defendant that they believe to be potentially innocent of the charged offense, but morally corrupt, dangerous to society, or otherwise deserving of punishment.

As noted earlier, an examination of the content of deliberations made by the groups who voted guilty in Studies Two and Three revealed that discussions of the defendants' gang membership and inferred criminal history were prominent across panels and played a central role in their ultimate verdict. The idea is that if the defendant is portrayed as a dangerous member of a violent street gang, and is viewed as an obvious threat to the community, then many ordinary people would agree that locking him up is an action that has genuine merit and may be the morally correct choice, whereby the ends ultimately justify the means. This situation meets the conceptualization of nullification as an instance of common sense justice as described by Finkel; that is, ". . .what ordinary people think the law ought to be."[75]

70 Cal. Evid. Code, § 1101(b) (permitting evidence of prior bad acts in order to prove certain specified things, such as identity, motive, or lack of accident).

71 *Id.* § 1100 et seq.

72 I.A. Horowitz & T.E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787-1988,* 15 Law & Hum. Behav. 165 (1991).

73 I.A. Horowitz, *The effects of nullification instruction on verdicts and jury functioning in criminal trials,* 9 Law & Hum. Behav. 25 (1985).

74 I.A. Horowitz, N.L Kerr, E.S. Park, & C. Gockel, *Chaos in the courtroom reconsidered: Emotional bias and jury nullification,* 30 Law & Hum. Behav. 163 (2006).

75 Norman J. Finkel, Commonsense Justice: Jurors' Notions of the Law (1995).

Eisen et al. (2014) points out that applying the reverse nullification argument to explain these data meets the criteria for jury nullification laid out by Finkel.[76] Most notably, reasonable doubt was clearly established and the correct verdict acquittal was an actual option for the jury. In Studies Two and Three, described above, an understanding of reasonable doubt was established the same way it is done in any actual trial, through reading legal instructions to jurors. Moreover, the fact that only one person out of almost three hundred participants voted guilty in the no-gang conditions across the two studies, indicates that reasonable doubt was clearly established, and the standard was understood by most all of the participants.[77]

V. Conclusion

In conclusion, the data from this series of experiments clearly shows that gang evidence can have a significant prejudicial effect on jurors' perceptions of the defendant, and ultimately on their decisions of guilt versus innocence. Most notably, the data from Studies Two and Three demonstrate that introducing gang evidence can lead jurors to vote guilty even when reasonable doubt has been clearly established. Moreover, Study Three showed that this effect is most potent when the crime is more serious (murder versus robbery).

In light of this new research, it may be worth reevaluating how gang evidence should be handled moving forward. As it stands, the decision to admit gang evidence is generally a matter of prosecutorial discretion. If the prosecutor decides to proffer a theory that the crime was committed in service of the gang, then they can unilaterally decide to include gang evidence as part of their case. This puts the burden of arguing to exclude this class of prejudicial evidence squarely on the shoulders of the defense. The defendant may seek to bifurcate the trial on the gang enhancement from the trial on the underlying charges or even move to exclude the gang evidence all together. In either case, in order to successfully block the prosecution from presenting gang evidence to the jurors, the defense must prove the prejudicial nature of the evidence. However, the data from the studies reported here demonstrates that the prejudicial nature of gang evidence is clear in and of itself. If one were to accept the apriori prejudicial value of this evidence, then perhaps the burden of arguing for the inclusion or exclusion of gang class of evidence is misplaced, and should be shifted. Following this logic, if the prosecution wanted to introduce gang evidence at trial, they would need to argue that the probative value of the evidence outweighs it's inherent prejudicial effect. Thus, gang evidence would be treated much like evidence of prior criminal conduct; with the understanding that it is likely to be prejudicial, but may also be probative for the jurors to understand the defendant's predisposition towards the type of behavior charged in the crime.

As noted earlier, there is no doubt that gang evidence is often central to the crime, and necessary for the jurors to understand the motive involved. However, in other cases, the gang related elements of the case are more questionable, and may not be essential for the triers' of fact to evaluate the defendant's guilt. In these instances, it is important for the courts to understand that the prejudicial effect of gang related testimony might be much greater than previously believed.

76 Norman J. Finkel, *Commonsense Justice and Jury Instructions: Instructive and Reciprocation Connections*, 6 Psychol., Pub. Pol'y, & L. 59 (2000).

77 See Eisen, et. al., Study 3, n. 1.

About the AUTHORS

Dr. Eisen is a professor of Psychology at California State University, Los Angeles where he serves as the Director of their graduate program in Forensic Psychology. In addition to his work on juror decision making, Dr. Eisen's research also examines memory and suggestibility in children and eyewitness memory in adults. Dr. Eisen is called to serve as an expert in these areas quite often for both the defense and prosecution.

Brenna M. Dotson is a graduate of California State University, Los Angeles. She graduated with her M.S. in Psychology (emphasis in Forensics) in June 2014. She obtained her B.A. in Psychology with a minor in Criminal Justice from California State University, Sacramento. She intends to follow a career path that unites two of her passions, psychology and the law.


THEY INVOLVE DIFFERENT FEDERAL LAW ENFORCEMENT AGENCIES, UNITED STATES ATTORNEYS' OFFICES, AND INVESTIGATIONS,
BUT THE RESULT IS THE SAME: FEDERAL PROSECUTIONS THAT WOULD LEAD TO CONVICTIONS ARE TURNED DOWN NEEDLESSLY.
DEPARTMENT OF JUSTICE

Improving the Ethical Guidelines for Assistant United States Attorneys who are Considering the Declination of a Law Enforcement Agent's Recommendation to Prosecute

by Elhrick Joseph Cerdan

I. Introduction

Imagine an eastbound interstate highway somewhere in the American Midwest on a warm summer evening. As a seasoned federal agent with several years of investigative experience, the local sheriff has contacted you for assistance with the interview of a male subject. The local sheriff's deputy pulled over the young man during a routine traffic stop, which led to the discovery of multiple pounds of high quality methamphetamine and several thousand dollars hidden within the vehicle. You introduce yourself to the young man, show him your credentials, and ask him if he is willing to waive his rights as per *Miranda*. He agrees, and you conduct a consensual interview.

After the interview is completed, you determine that the young man was acting as a trusted deliveryman for a foreign drug trafficking organization. He admitted to you that he knew what he was transporting across the United States and that the money was his payment for services rendered. Based on your training and experience, you conclude that you have probable cause that at least one federal crime has been committed. Prior to conducting a warrantless arrest and preparing a criminal complaint, you call the duty (or on-call) Assistant United States Attorney to confirm that federal prosecution will be accepted by the local United States Attorney's Office.

The Assistant United States Attorney listens to your facts, but despite your recommendation, declines the case on the spot. He states that the weight of methamphetamine and the amount of money does not reach his office's required minimum threshold for prosecution. You then decide to call the local county district attorney's office and refer the case to them. They accept prosecution on similar state charges, and the case is successfully prosecuted. However, the defendant receives a lesser sentence than he would have received in the federal system.

Unfortunately, instances like this occur across the United States far too often. They involve different federal law enforcement agencies, United States Attorneys' Offices, and investigations, but the result is the same: federal prosecutions that would lead to convictions are needlessly turned down. These declinations result from an unaddressed need for ethical guidance for Assistant United States Attorneys who make the important decision to decline or accept a case for federal prosecution. The current ethical guidelines are inadequate. The guidelines either address only the ethical standards for accepting a case for prosecution, or they are silent as to any ethical standards for appropriate declinations. There is no black letter rule that federal prosecutors can look to for guidance in these situations.

II. Overview

As in the above-mentioned vignette, when a federal law enforcement agent is pre-

paring to make a warrantless arrest, the agent must contact the local United States Attorney's Office (USAO) to confirm that federal prosecution will be accepted. However, agents can contact the local USAO to present cases at earlier and more convenient times during an investigation. Perhaps the need for a search warrant, a subpoena, or simply some legal advice may prompt the agent to present a case earlier than at the critical time of a warrantless arrest.

How an agent presents a case depends on which district he is contacting. Each USAO has its own unique procedure on how to accept or decline a case. For example, some USAOs have a "duty" Assistant United States Attorney (AUSA), who has been provided with a "duty" or "on-call" cellular phone. The duty AUSA is required to answer phone calls 24 hours a day for a certain period of time, ranging from one day to one week. The agents in the area are then given that phone number and have specific instructions to contact that number to present a case. Other USAOs allow agents to contact any AUSA at that USAO and present any case to them directly. Agents will contact AUSAs that they have worked with in the past successfully, or they may "shop" around for one that is held in high regard by law enforcement. In addition, other USAOs only allow agents to contact a supervisory AUSA and present the case to them. Which supervisor is contacted would depend on the facts and type of the case (narcotics, white collar crimes, immigration enforcement, etc.).

If the case is accepted, then the agent is assigned an AUSA to work within the investigation. In the vignette above, the agent would proceed with the warrantless arrest with the guidance of the assigned AUSA. However, should the case be declined, the agent has several options available. The agent can make the decision to close the investigation due to the declination of federal prosecution. This could result in agency-specific reports, explaining why the investigation was closed without an arrest, indictment, conviction, etc. If time and resources permit, the agent can continue to work the investigation, gathering more facts and/or evidence of a federal crime, and attempt to re-present the case to the local USAO later. Finally, the agent can contact the state or local prosecutor's office and present the case to them. However, this is contingent on there being an applicable state charge which the local office would be able to prosecute based on their office's limited resources.

THESE DECLINATIONS ARE A RESULT OF AN UNADDRESSED NEED FOR ETHICAL GUIDANCE FOR ASSISTANT UNITED STATES ATTORNEYS MAKING THE IMPORTANT DECISION TO DECLINE A CASE FOR FEDERAL PROSECUTION.

Regardless of which option the agent chooses, the declination of the case by the local USAO has consequences affecting parties throughout the criminal justice system. The burden on the state or local prosecutor's offices increases as more cases are added to their already large caseload. State prosecutors in large cities throughout the United States often have hundreds of cases assigned to them, while federal prosecutors enjoy much lower caseloads. Those cases are then prosecuted with lesser state charges when compared to the potential federal charges. The state charges usually carry lesser sentences than their federal equivalents. In addition, due to overcrowding in state penal institutions, oftentimes the defendant will not serve the entire sentence, or the sentence may be deferred altogether (comparatively, there is no deferred sentencing or opportunities for parole for the defendant in the federal criminal justice system). As the defendants get their sentences deferred, word

spreads throughout the criminal underworld. Just like legitimate businesses, these criminal organizations make strategic decisions on where to set up their networks. The organizations decide which states, or jurisdictions, to travel through when conducting their business, depending on the aggressiveness of the federal and/or state prosecutors within that jurisdiction. Instead of deterring crime through effective prosecutions, less aggressive USAOs may be encouraging criminal activity through their case declinations.

Likewise, the case declinations also affect the federal law enforcement agencies and their personnel in the district. Agents may feel resentment towards their USAOs or that their investigative work is inadequate or unappreciated. Agencies may survive on successful state prosecutions alone, depending on whether their statistics differentiate between a state and federal prosecution. However, federal law enforcement agencies have specific federal statutory authority, which allows them to achieve complex and far reaching federal prosecutions. If the agencies continue to rely on state prosecutions, each agency and its personnel may not be achieving the most effective results based on their original federal statutory authority.

Each USAO and its individual personnel are also affected by the case declinations. When management turns down potential prosecutions, they are denying career-oriented attorneys experience on quality cases. Federal criminal investigations can be complex, involving multiple defendants and charges, ranging from conspiracy to more sophisticated charges such as racketeering. Attorneys lose the opportunity to prosecute these complex cases, hone their litigation skills, and increase their overall experience. A lower caseload would also reflect on the USAOs annual performance statistics.

III. Background

A. The United States Attorney's Offices

The U.S. Attorney is considered the chief federal law enforcement officer within his or her jurisdiction.[1] There is one appointed U.S. Attorney for each of the nation's ninety-four judicial districts (Guam and the Northern Mariana Islands are served by a single U.S. Attorney). They are appointed by the President of the United States for a term of four years and may continue to serve until a successor is appointed.[2] Each appointment is subject to the confirmation of the United States Senate.[3] Once confirmed, each U.S. Attorney is subject to removal by the President at any time before the expiration of their term.[4] Interim, or acting, U.S. Attorneys are appointed by the Attorney General of the United States.[5] The Attorney General is the highest-ranking official and head of the U.S. Department of Justice, which is the nation's federal executive department responsible for the enforcement of federal law and administration of justice.

The U.S. Attorney position is the equivalent of an Assistant Attorney General in the U.S. Department of Justice's organizational hierarchy. This is significant because each U.S. Attorney reports directly to the Deputy Attorney General's Office, who is the second highest ranking official within the Department. As such, the position carries great prestige, authority, and autonomy. Each U.S. Attorney effectively has *carte blanche* on how to structure and manage his or her USAO.

Every U.S. Attorney has the ability to organize his or her USAO in a unique configuration, depending on factors such as the size of the district, the types of cases common in the district, or the district's history. However, there are certain common features within

1 U.S. Attorneys' Manual 9-2.010 (U.S.A.M.), 2000 WL 1708082 (2009).
2 28 U.S.C. § 541(a) (2001).
3 *Id.* at 541(b).
4 *Id.* at 541(c).
5 *Id.* at 546(a).

each USAO. Each U.S. Attorney will likely have a First Assistant, or Deputy U.S. Attorney, who acts as the second highest ranking official in that USAO. USAOs will generally have a separate criminal division and civil division, each managed by a division chief (who in turn may have his or her own deputies).[6] Some USAOs may further divide their divisions into units that specialize in particular cases, and supervised by unit chiefs. The larger districts will have divisions divided geographically. For example, the Southern District of Texas has its principal office in Houston, Texas, with six smaller, divisional offices spread throughout the District. The day-to-day responsibilities for handling prosecutions and working with law enforcement personnel within the USAO are handled by the AUSAs. AUSAs are appointed, and subject to removal, by the Attorney General.[7]

As the "workhorses" of each USAO, the AUSAs are at times faced with the decision whether to proceed with prosecution. The ability of any law enforcement agent (including prosecutors) to decide whether to investigate and proceed with the prosecution of a case is known as prosecutorial discretion. As stated by the U.S. Bureau of Justice Statistics, "the decision to prosecute a suspect in a criminal matter depends on many factors, including the Attorney General's priorities, U.S. Attorney priorities and resources, laws governing each type of offense, and the strength of evidence in each case."[8] Among the factors that AUSAs consider when applying prosecutorial discretion are the ethical guidelines that all American lawyers follow. The guidelines have evolved throughout history to the current codes that modern lawyers are tested on prior to their admission to the bar, and practice by afterwards.

B. Sources of Ethical Guidance

The earliest codified American ethical guidelines for lawyers were developed in Alabama in the late 1800s. The Alabama State Bar Association adopted a code of ethics in 1887 (Alabama Code), written by the 28th Governor of Alabama and U.S. District Court Judge, Thomas Goode Jones[9]. Judge Jones based the Alabama Code on two earlier sources: the lectures of Pennsylvania Supreme Court Chief Justice George Sharswood, which were published in 1854 under the title of *Professional Ethics*, and the fifty resolutions found in David Hoffman's *A Course of Legal Study* (2d ed. 1836), one of the first written American law school texts.[10] The Alabama Code was later adopted by eleven states and led to the development of the American Bar Association's (ABA) Canons of Professional Ethics, the first set of ethical guidelines for lawyers nationwide by the ABA[11].

The Alabama Code consisted of fifty-six generalized rules that were adopted for the guidance of the Alabama State Bar Association's members. Rule 12 of the Alabama Code addressed "the Defense and Prosecution of Criminal Cases" stating,

> "an attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for swears himself. The State's attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a nolle pros., a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts."

6 Daniel J. Fetterman & Mark P. Goodman, *Defending Corporations and Individuals in Government Investigations,* Defending Corp. & Indiv. in Gov. Invest. § 6:3 (2012).

7 28 U.S.C. § 542(a)-(b) (2001).

8 Bureau of Justice Statistics, *Home Page*, http://www.bjs.gov.

9 Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 Ala. L. Rev. 471, 481-82 (1998).

10 Model Code of Prof'l Responsibility Preface (1969).

11 American Bar Association, *Canons of Professional Ethics Centennial*, available at http://www.americanbar.org/groups/professional_responsibility/resources/canons_professional_ethics_centennial.html.

The rule does not specifically address the acceptance of a case for prosecution. However, it does set the first minimum standard for prosecution: if the prosecutor pursues a conviction when the evidence shows the defendant is innocent, then the prosecutor could be criminally liable.

Following the Alabama Code, the next milestone in American legal ethics took place in August of 1908 in Seattle, Washington. At the annual ABA meeting, the Canons of Professional Ethics were adopted for nationwide use by the legal community. They consisted of thirty-two individual canons, as well as a sample lawyer "oath of admission" for states to consider when crafting their own oaths. Of all the canons, only the fifth canon, titled "The Defense or Prosecution of Those Accused of Crime," specifically addressed prosecutorial conduct. Yet, it did not significantly improve upon the Alabama Code's minimum prosecutorial standard. It specified that the primary duty of a prosecutor was not to achieve a criminal conviction, but to ensure that justice was executed. This served a noteworthy purpose: to give prosecutors across the nation a broad, uniform mission statement, regardless of their employer. This mission statement was vague, however, and did not address case acceptance.

By the middle of the twentieth century, the legal community determined that the ABA's Canons were in need of an update. The Canons did not provide sufficient guidance on many situations and were not designed for disciplinary action. In August 1969, after months of committee meetings, the ABA House of Delegates approved a Model Code of Professional Conduct (Model Code). The Model Code consisted of nine Canons, each containing Ethical Considerations, and Disciplinary Rules. The Canons and Ethical Considerations were designed to be aspirational, guiding lawyers in their daily professional lives. The Disciplinary Rules were designed to be mandatory, setting a minimum standard by which all lawyers could be judged by the bar and the public. However, just as the earlier Canons, the Model Code did not carry the force of law.[12]

Prosecutors in particular were guided and bound by the Model Code's Canon 7: "A Lawyer Should Represent A Client Zealously Within the Bounds of the Law." Ethical Consideration (EC) 7-13 specifically addressed the special duties of a prosecutor[13]. It restated the 1908 Canon's goal of achieving justice rather than conviction. The special duties exist, as EC 7-13 states, because "the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."[14] The EC also stated principles of discovery, such as revealing damaging evidence, despite its detrimental effect on the prosecutor's case. Although vague, EC-7-13 addresses case selection by prosecutors and the "restraint" that they should use in their exercise of prosecutorial discretion. The EC builds upon the Alabama Code's minimum prosecutorial standard by adding the term "restraint," rather than suggesting that the prosecutor is "criminal" if the standard is not met.

Within Canon 7, Disciplinary Rule (DR) 7-103 sets a mandatory standard when seeking prosecution and providing discovery. DR 7-103 was based on Canon 5 from the 1908 Canons. Section (a) states that a prosecutor should not proceed with a prosecution if he knows that there is not sufficient probable cause. Section (b) restates the disclosure of harmful evidence during discovery as found in EC 7-13. Just as in the 1908 Canons, this only addressed the threshold for case acceptance, but was silent as to when declinations are appropriate.

Shortly after adoption, the Model Code began to draw criticism from the legal community.[15] In fact, even the Model Code's Pref-

12 Phillip K. Lyon & Bruce H. Phillips, *Professional Responsibility in the Federal Courts: Consistency is Cloaked in Confusion*, 50 Ark. L. Rev. 59, 63 (1997).

13 Model Code of Prof'l Responsibility EC 7-13 (1969).

14 *Id.*

15 Phillip K. Lyon & Bruce H. Phillips, *Professional*

ace admitted that there were at least four areas that would need revision in the future.[16] When compared to the ABA Canons, the structure of the Model Code was complicated. [17] "Some critics described the three part structure as irrational and unworkable."[18] There were criticisms that some of the Ethical Considerations were in conflict with their matching Disciplinary Rules.[19] Also, the nine Canons and their Ethical Considerations did not carry any disciplinary ramifications. Rather than enumerate black letter rules, the consistent vagueness throughout the Model Code merely created an "ethical mood," subject to interpretation by the local bars. [20]

In response to the criticism of the Model Code, as well as the negative perception of lawyers following the "Watergate" scandal, the ABA created a commission to revise the Model Code.[21] Known as the Kutak Commission, after the commission chair Robert Kutak, this committee published the first draft of the Model Rules of Professional Conduct (Model Rules) in 1980.[22] These Model Rules were styled after the American Law Institute's (ALI) Restatements of the Law, which are black letter rules covering various legal subjects.[23] The Model Rules provide a body of ethical principles that a lawyer could look to for guidance in different situations.[24] The Kutak Commission eliminated the confusing distinctions between Ethical Considerations and Disciplinary Rules; each Model Rule, as well as its Comments, would be the sole starting point for any given situation. As with the prior ethical guidelines, the Model Rules were not binding and did not have the force of law.

Addressing both state and federal prosecutors, MRPC 3.8 "Special Responsibilities of a Prosecutor" provided an expanded set of rules to follow when compared to previous ethical guidelines. MRPC 3.8 included detailed rules for pre-trial activity, discovery, and public release of information. As with prior ethical sources, section (a) set the minimum standard for proceeding with prosecution: if not supported by probable cause, prosecution should not proceed. However, MRPC 3.8 did not include a minimum standard for declination.

In the years following the adoption of the Model Rules, several amendments were proposed. As recently as 2009, when the ABA created the Commission on Ethics 20/20, lawyers proposed changes to many of the Model Rules. However, since its adoption, there has been no adopted amendment to MRPC 3.8. This could be attributed to the fact the MRPC 3.8 only affects prosecutors, a small portion of the nation's legal community.

C. Other Sources of Guidance

Outside of the ethical sources discussed, the USAOs have other sources that they look to for guidance. The *U.S. Attorney's Manual* is a point of reference for U.S. Attorneys and AUSAs, providing general policies and procedures for the daily operation of USAOs.[25] As such, it is not a legally binding document and only serves as internal guidance for USAO personnel.[26] Section 9-2.020

Responsibility in the Federal Courts: Consistency is Cloaked in Confusion, 50 Ark. L. Rev. 59, 62 (1997).

16 John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 Tex. L. Rev. 255, 257 (1970).

17 Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 339 (1994).

18 John M. A. DiPippa, *Lon Fuller, The Model Code, and The Model Rules*, 37 S. Tex. L. Rev. 303, 344 (1996).

19 *Id.*

20 John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 Tex. L. Rev. 255, 257 (1970).

21 Sylvia E. Stevens, *Bar Counsel: New (and Evolving) Developments in the Disciplinary Rules*, 62-APR Or. St. B. Bull. 27 (2002).

22 Cynthia M. Jacob, *A Polemic Against R.P.C. 1.7(c)(2): The "Appearance of Impropriety" Rule*, 177-June N.J. Law. 23 (1996).

23 Gregory C. Sisk, *A brief history of professional rules of ethics for lawyers*, 16 Ia. Prac., Lawyer and Judicial Ethics § 3:1 (2012).

24 John M. A. DiPippa, *Lon Fuller, The Model Code, and The Model Rules*, 37 S. Tex. L. Rev. 303, 345 (1996).

25 U.S. Attorneys' Manual 1-1.100 (U.S.A.M.), 1997 WL 1943989.

26 *Id.*

provides AUSAs guidance on declining prosecution. It states that a U.S. Attorney has the final decision on declining prosecution, unless there is a statutory limitation that requires the acceptance of prosecution. In practice, case declination authority is delegated to AUSAs, as it is not practical for the U.S. Attorney to be involved in the daily case intake process.

Several other Sections provide additional guidance on case declination. Section 9-2.111 expands on the statutory limitation mentioned in Section 9-2.020, stating that prosecutions can be declined in certain situations if it is determined that "the ends of public justice do not require investigation or prosecution." Section 9-27.220 provides three factors, in addition to the probable cause requirement, for AUSAs to weigh when deciding to decline prosecution. First, prosecution should be declined if no substantial federal interest would be served by the prosecution. Second, prosecution should be declined if the suspect would be subject to prosecution in another jurisdiction. Finally, if there are non-criminal alternatives to prosecution, prosecution should be declined. The Comment to Section 9-27.220 also adds an additional consideration: that there be admissible evidence sufficient to obtain and sustain a conviction. These sections effectively raise the minimum standard of probable cause found in the aforementioned ethical sources. It seems that in practice, AUSAs require probable cause plus the three Section 9-27.220 factors to accept prosecution, unless the "ends of public justice" (from Section 9-2.020) justify declination.

Another source of guidance for USAOs is the ABA Standards for Criminal Justice Prosecution Function and Defense Function (ABA Standards). The ABA Standards, first adopted in 1971, provide reliable guidance through the discussion of "prevailing norms of practice" and assist in determining what is reasonable criminal justice attorney performance.[27] The primary source for the ABA Standards was the Model Rules, but it also aims to discuss subjects not directly covered by the Model Rules.[28] As with the previous ethical sources, the ABA Standards have no force of law, but their process of development has successfully yielded standards that fairly reflect widely shared professional views.[29]

RATHER THAN SET BLACK LETTER RULES, THE CONSISTENT VAGUENESS THROUGHOUT THE MODEL CODE CREATED AN "ETHICAL MOOD," SUBJECT TO INTERPRETATION BY THE LOCAL BARS.

The ABA Standards have three Standards that address case acceptance. Standard 3-1.2 restates the historical duty of the prosecutor to seek justice with discretion and not to merely seek convictions. Standard 3-2.9 addresses the prompt disposition of charges once they are accepted and states that a prosecutor should avoid any delay throughout the process. Standard 3-3.4 resembles the *U.S. Attorney's Manual* by placing the decision to charge "initially and primarily" with the prosecutor. The Comments for Standard 3-3.4, state that a prosecutor's office should have a screening process for cases, to prevent a high acquittal rate. This is comparable to the *U.S. Attorney's Manual's* Comment to Section 9-27.220, where the avoidance of acquittal is an implied principle. In Section 9-2.101, the *U.S. Attorney's Manual* recommends that all AUSAs become familiar with the ABA Standards since the federal courts consider them

27 Rory K. Little, *The ABA'S Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 Hastings L.J. 1111, 1113 (2011).

28 Standards for Criminal Justice Prosecution Function and Defense Function Introduction, at xii (3 ed. 1993).

29 Little, *Supra* note 27.

during appropriate cases. As with the Model Rules, the ABA Standards are silent as to when case declination is appropriate or not.

D. Published Concerns

In 1978, a highly publicized report by the U.S. General Accountability Office (GAO), the audit, evaluation, and investigative arm of the U.S. Congress, described the high levels of case declination by the USAOs.[30] The report stated that the USAOs declined to prosecute 62% of the criminal complaints available for prosecution during fiscal years 1970-76.[31] Of the 62%, the report explained that only 37% were not prosecutable because of legitimate reasons, such as legal deficiencies.[32] There were no explanations for the other declinations. In response to the report, the U.S. Department of Justice issued the Principles of Federal Prosecution.[33] The Principles were intended to promote effective prosecutorial discretion by AUSAs, and led to revisions within the *U.S. Attorney's Manual*, such as the inclusion of the three factors in Section 9-27.220.[34]

In 2010, the GAO again published a similar report. However, this report addressed the high level of case declinations occurring in Indian Country (a term for the self-governing Native American communities within the U.S.).[35] The report stated that through fiscal years 2005-09, 50% of cases presented for prosecution were declined.[36] Of the cases declined, 72% were declined for appropriate reasons, such as weak evidence or issues with witnesses.[37]

30 Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 99 (2002).
31 U. S. Attorneys Do Not Prosecute Many Suspected Violators Of Federal Laws – GGD-77-86, 7 (1986).
32 *Id.* at 8.
33 Wright, *Supra* note 27.
34 *Id.*
35 GAO-11-167R Declinations of Indian Country Matters, 3 (2010).
36 *Id.* at 3.
37 *Id.*

IV. Sociological and Political Forces

Inappropriate case declinations at USAOs across the country are partially a result of the lack of ethical guidance. However, there are other outside forces that can affect the decision to accept federal prosecution. For each prosecutorial decision, an AUSA weighs factors such as office resources, case strengths, and subject's culpability. However, the personalities, motivations, and objectives of the individual AUSA frame the final decision. As an organizational entity, each USAO sets its unique policies on prosecutorial discretion. The policies are based on internal reporting requirements, minimum thresholds, and other organizational strategies. These forces, outside of the legal ethics framework, affect the USAOs ability to effectively accept cases.

The individual AUSA ideally has a mutual goal with law enforcement agents of crime control though effective prosecutions. The manner in which they reach their acceptable level of crime control varies, depending on their personal interests, such as an interest in a specific area of federal criminal law. At one end of the spectrum, some AUSAs will achieve this level by maximizing the amount of charges applied to the largest number of defendants.[38] These AUSAs will aggressively accept many cases, some of which could warrant declination, with the result of attaining as many convictions as possible. They will assist their agents with "stacking" additional charges against the defendants, encouraging them to reach a plea agreement, avoid trial, and reach a quick resolution, thus freeing the AUSA to work on the next case. These AUSAs are likely younger, risk-seeking, and interested in forming a strong reputation with the law enforcement community and the local bar. Through the large number of cases prosecuted, they get the opportunity to showcase or improve their litigation skills.[39] An "agent's AUSA" runs

38 Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 Marq. L. Rev. 9, 29 (2007).
39 *Id.* at 31.

the risk of creating a caseload that becomes unmanageable, leading to increased stress among other problems resulting from being overworked. However, they may continue to aggressively accept cases until they are promoted, leave to work at a different firm with solid work experience, or begin to decline cases more often to bring down their caseloads to manageable levels.

Most AUSAs will focus on specific crimes, as they have likely been assigned to a division by their management. In addition to their assigned case type, they create a personal set of priorities on which crimes to pursue prosecution.[40] These priorities could be based on factors such as the seriousness of the crime or the defendant's criminal history. For example, an AUSA will likely decline federal prosecution on an illegal alien with no criminal history under 8 U.S.C. 1325 (improper entry by alien). The AUSA will explain that an administrative action, such as a deportation from the United States, would be a better alternative and more effective use of federal resources. However, that same AUSA would be more likely to accept prosecution when an agent presents an illegal alien, who is a gang member with a substantial criminal history, for prosecution. In addition to charging 8 U.S.C. 1325, the AUSA would be able to seek a ten year sentencing enhancement for being a documented gang member under 18 U.S.C. 521 (criminal street gangs). This illustrates how some AUSAs will only accept cases that could result in their prioritized charges, maximizing those convictions while declining cases that involve non-priority, or lesser charges. Perhaps they will be frank with the agent, providing advice on what investigative steps should be followed to achieve sufficient probable cause for the prioritized charges. On the other hand, the AUSA may simply decline the case, legitimately citing USAO priorities, or that a state charge may be the appropriate action instead. The vast majority of AUSAs could be classified in the middle of the spectrum.

At the other end of the spectrum are the AUSAs who only accept cases that are likely to be resolved through a plea agreement due to the amount of evidence against the defendant. These AUSAs only accept cases that seem to be guaranteed convictions. They are extremely risk-averse, and as such, decline most cases because of the fear of participating and losing in a trial. They accept cases because they are winnable or there is no legitimate excuse to decline. Rather than using the constitutionally required probable cause standard, they use the higher criminal trial standard of "beyond a reasonable doubt." These are AUSAs who are considered "retired on duty" by their peers. They are likely near the end of their careers, trying to do the required minimum to stay employed until they retire. These AUSAs continue to make satisfactory performance evaluations because they may be judged on their conviction rates, regardless of the total number of cases prosecuted. For example, one of these risk-averse AUSAs may have a 90% conviction rate for one year. This would seem highly successful at first glance, but prosecution was only sought in ten cases while another forty cases were declined. Those cases that could result in trial may also be avoided because a high trial rate could be interpreted as a sign of overzealousness or ineffective negotiating skills.[41] Finally, these AUSAs may simply increase their leisure time by resolving more cases though guilty pleas and having high declination rates.[42]

Aside from the individual AUSA, each USAO affects its level of case declination through its organizational strategies and policies. The *U.S. Attorney's Manual* requires a report when a case is closed without prosecution.[43] This reporting requirement encourages case declination, as cases are declined before an AUSA risks opening a USAO case and having to report case closure. When a case is declined before opening a USAO case, there is

40 *Id.* at 29-30.

41 *Id.* at 31.

42 *Id.*

43 U.S. Attorneys' Manual 9-2.020 (U.S.A.M.), 2000 WL 1708083.

no reporting requirement. Without any report, there is no statistic or measure to provide to the U.S. Bureau of Justice Statistics (BJS), which is responsible for measuring activity at all stages of the criminal justice system. Among all the statistical reports provided, the BJS also provides measures of successful prosecutions for each USAO. However, the BJS cannot accurately measure the actual number of case declinations if no report is filed.

prevent improper or insignificant investigations from going forward.

As part of the case intake process, each USAO has its own informal or unwritten policies that guide case acceptance. These policies prioritize which case types are aggressively enforced and conversely, which case types are occasionally enforced.[47] For example, USAOs have informal minimum thresholds for drug-related offenses. Drug-related offenses may have higher thresholds in the USAO for the Southern District of Florida, because of the higher number of cases referred for prosecution, than in the USAO for District of Idaho.[48] Those cases that do not meet the minimum threshold could be best handled by a state or local prosecutor's office instead, freeing the AUSAs to focus on more important investigations. With these unique policies, the same federal crimes will be prosecuted differently, depending on which USAO is proceeding with prosecution, thus showing disparities in case declination rates.[49]

THE INTEGRATION OF A LAW ENFORCEMENT AGENT IN AN ADVISORY CAPACITY AT THE CASE INTAKE POINT COULD ADDRESS THE ISSUE OF IMPROPER DECLINATIONS BY ADDING A FRESH VIEWPOINT TO THE DECISION.

V. Possible Explanations

As stated by the BJS, the primary reasons USAOs cite for case declinations are case-related reasons, such as weak evidence and other legal deficiencies.[44] The BJS also recognizes many other legitimate reasons, including lack of resources, minimal federal interest, alternative resolutions available, etc.[45] These reasons demonstrate how the USAO case intake process acts as a screening and regulatory device, preventing improper prosecutions from going forward while preserving a manageable caseload.[46] This screening process is the same as the screening process performed by law enforcement agents when deciding to initiate or continue with an investigation. Agents decide whether to initiate or proceed with an investigation depending on the same factors the AUSAs weigh, such as agency resources and manpower, the strengths of the case, or agency priorities. Agents, as well as their management teams, screen cases to

VI. Comparative Perspective

To better understand case declinations in the U.S. federal criminal justice system, one may look to other countries' criminal justice systems. In the U.S., the criminal justice system is classified as an adversarial one, where the court acts as an impartial mediator between the prosecution and the defense. The court rules on issues of law, and leaves questions of fact for the jury to decide. In comparison, France's criminal justice system is classified as an inquisitorial one. In an inquisi-

44 *See generally* Bureau of Justice Statistics Basis for Declination 2008, http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st203.pdf (last visited Jan. 3, 2015).

45 *See id.*

46 Donald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 50-51(2002).

47 William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative*, 54 Ohio St. L.J. 1325, 1344 (1993).

48 *Id.* at 1343.

49 *Id.* at 1344.

torial system, the courts are actively involved in some portion of an investigation.[50] An inquisitorial judge may question witnesses, defendants, or perform other fact-finding tasks, while the lawyers on each side of a prosecution argue on behalf of the state or defendant.

The French criminal justice system is organized in the Ministry of Justice (comparable to the U.S. Department of Justice), which is headed by the Minister of Justice (the American equivalent would be the Attorney General).[51] All French prosecutors serve in the Ministry's bureaucratic hierarchy, and all are subject to an entrance exam before being hired by the Ministry.[52] Instead of the American system that includes state and local prosecutor's offices, the French system is centralized in a single, unified national system. As such, the French prosecutor's offices follow the same uniform policies nationwide, whereas a U.S. Attorney exercises some freedom in setting individual policies in his USAO. With a national system, all decisions by French prosecutors are subject to review or possible correction by their non-politically appointed management.[53] Therefore, the French model of prosecutorial discretion is customarily carried out at the supervisory ranks. Additionally, French prosecutors are not as conviction-driven as their American counterparts.[54] They are instructed to determine a just solution to problems, which does not always necessarily mean seeking prosecutions.

French law enforcement agents have a unique relationship with their prosecutors. French law enforcement agents are instructed to notify prosecutors "without delay" upon the discovery of an offense, and "immediately" if it is a "flagrant" offense.[55] This early involvement of prosecutors allows them to act as a check on the police, sometimes directing how the investigation should proceed, or preventing the use of questionable investigative methods.[56] In fact, French prosecutors are known to arrive at the scene of an offense with the police, or shortly thereafter.[57] Despite the early prosecutorial involvement in criminal cases, French declination rates are comparable to those by the USAOs.[58]

Not all of the features of the French inquisitorial system would be applicable in the American adversarial system. However, the USAOs throughout the country could limit improper case declination by following some of the French features. Law enforcement agents should attempt to increase AUSA participation in the early stages of investigations, similar to their French counterparts. Likewise, USAOs should allow and encourage the increased participation, and not require that a USAO case be officially opened to avoid the reporting requirement. Perhaps creating a general USAO case, where each AUSA could document the early exploratory activities in potential cases, would be suitable for USAO accountability. Early participation by AUSAs, without the necessary commitment to accept the case, could decrease improper case declination.

VII. Recommendations for Change

As discussed, there is a necessity for a level of ethical guidance for prosecutors when declining law enforcement agent's potential

50 Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 Buff. Crim. L. Rev. 165, 194 (2004).

51 Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do The French Do It, How Can We Find Out, And Why Should We Care?*, 78 Cal. L. Rev. 539, 560 (1990).

52 *Id.*

53 Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons From Current White Collar Cases and the Inquisitorial Model*, 8 Buff. Crim. L. Rev. 165, 194 (2004).

54 Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 No. 1 Crim. Law Bulletin Art. III (2008).

55 Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do The French Do It, How Can We Find Out, And Why Should We Care?*, 78 Cal. L. Rev. 539, 557 (1990).

56 *Id.*

57 *Id.*

58 *Id.* at 615.

cases. However, this absence of ethical standards is correctable. There are several recommendations that would address this need directly and indirectly. Each potential solution carries with it distinctive strengths and weaknesses to consider when implementing them.

The most direct approach to rectify the lack of ethical guidance is by adding a new ethical guideline to the current set. A modification to MRPC 3.8 could include a section on declining cases. For example, an additional section could be worded as: "the prosecutor in a criminal case shall refrain from declining a charge that the prosecutor knows is supported by probable cause" (this is a purposely, closely-worded companion to MRPC 3.8 (a)). It is conceivable that this word choice could undermine the practice of prosecutorial discretion, making prosecutors accept all cases supported by probable cause. Perhaps adding a supplementary phrase after the aforementioned section would create a more flexible rule, such as "… unless there is a valid or legitimate reason for the declination." This would provide some room for appropriate declinations based on factors such as office and judicial resources, while emphasizing that declinations should be made carefully. The proposed section could also be modified by replacing the words "refrain from" with "make reasonable efforts to avoid," thus making the rule more permissive while still addressing declinations in the MRPC. If an additional section is not feasible, then at least an additional comment to MRPC 3.8 could explain the same ethical theory.

The ABA has an existing amendment process for the addition or modification of a Model Rule. Recently, the 2009 ABA Commission on Ethics 20/20 was created to perform a thorough three-year review of the Model Rules and the American system of lawyer regulation. A modified MRPC 3.8 could fit in the Commission's transparent review and amendment process, leading to a rule that has been discussed, changed, and adopted by the ABA. Once adopted, the newly modified MRPC 3.8 would next have to be adopted by each state's judiciary. This additional review step would ideally provide an improved rule, better suited to the needs of each individual state. When the new MRPC 3.8 is finally adopted by the states, it would not only provide guidance to the USAOs, but also to the state and local prosecutor's offices as well.

A modified MRPC 3.8 would also be a cost-effective alternative. The ABA, and each state, would spend the initial time and effort in the adoption process. However, if an adoption process were already under way, such as the present Ethics 20/20 process, then one additional Model Rule modification would actually lower the cost expended per Model Rule modified or adopted. The time expended in publishing and promoting the new Model Rule would be relatively small because of the Internet. The ABA's website, as well as other free legal academic/research websites, could publish the new Model Rule quickly. As the new Model Rule spreads, it would have an immediate impact. It would likely be taught in ABA accredited law schools throughout the nation within the semester, as law students take their legal ethics class and prepare for their nationwide ethics examination. As the new Model Rule is taught and accepted, it can become a new reference point for updating other instructional sources, such as the *U.S. Attorney's Manual* and the ABA Standards.

The adoption of a new MRPC 3.8 would not come without some dilemmas. MRPC 3.8 only affects prosecutors, a relatively small portion of the legal profession, so it would not be a priority for review by the ABA. Even if the modification was proposed in an ABA meeting, there would be expected backlash from prosecutors. Federal and state prosecutors have a legitimate argument that the modified MRPC 3.8 would reduce their ability to apply prosecutorial discretion effectively. They would explain that they already have high caseloads despite limited office resources, particularly in the state prosecutors' offices. A larger caseload would limit their time spent per case and could lead to lower conviction

rates. Another foreseeable cost would be the development and deployment of Continuing Legal Education (CLE). Federal and state prosecutors would have to spend at least a few hours away from work to learn about the new MRPC 3.8. This cost may be picked up by the local bar association or the prosecutor's office. If these costs make the adoption of a new MRPC 3.8 impossible to achieve, then perhaps providing guidance, from a different viewpoint, directly within the USAO could provide change quickly.

As explained previously, each USAO has its own distinctive case intake process. The integration of a law enforcement agent in an advisory capacity at the case intake point could address the issue of improper declinations by adding a fresh viewpoint to the decision. An experienced law enforcement agent, who is not directly related to the case being referred or to the agency presenting the case, would be able to provide valuable insight to the AUSA making the decision. The wealth of knowledge and education in the federal agent ranks should be used in the intake process. Although not a universal requirement, the vast majority of federal agents possess an undergraduate degree, coupled with years of investigative experience. There are also many agents who have Juris Doctors, or were practicing attorneys before joining the law enforcement profession (some federal agencies, such as the Federal Bureau of Investigation (FBI) have entry programs that recruit directly from American law schools). The agent should be detached, perhaps being from an agency outside of the U.S. Department of Justice, to avoid any foreseeable bias. If necessary, the U.S. Department of Justice has two agencies that investigate allegations of misconduct within the Department (Office of Inspector General) and the USAOs (Office of Professional Responsibility). These agencies have law enforcement agents that could participate in, or assist in the oversight, of the USAO intake process.

ANOTHER SOLUTION WOULD BE THE CREATION OF A MULTIPERSON REVIEW BOARD AT THE USAO'S CASE INTAKE POINT. THE BOARD WOULD CONSIST OF A COMBINATION OF THE ORIGINAL INTAKE AUSA PERSONNEL, LAW ENFORCEMENT AGENTS, AND STATE OR LOCAL PROSECUTORS.

The embedded agent could be from a state or local law enforcement agency. This would increase communication between their agency and the USAO, providing the "locals" with a better understanding of how a USAO operates and how they can work together. Case referrals from the state and local agencies would increase, providing them another alternative for prosecution.

With an embedded agent in the case intake process, the decision would ideally become a collaborative discussion. The agent would explain his opinion on whether the probable cause threshold was reached, whether there are further investigative steps that should be pursued, or whether the case should be declined. With the agent's experience, the actual feasibility or futility of potential investigative steps would be debated, compared to the AUSA's theoretical suggestions.

Placing an agent at the USAO does pose some understandable difficulties. The agent would require office space and equipment. This could be lessened by having the agent be at the USAO's office on a part-time basis, or perhaps have him be subject to a callout as needed. A conference call including the referring agent, the AUSA, and the intake agent, could achieve the same benefits while limiting the office costs.

Another issue with agent placement in

the USAO would be the increased time spent during case intake. A decision that may have taken a few minutes before the placement could become more time-consuming. The discussion, although beneficial, would prolong the decision, particularly if the case referred is a difficult one. This would take time away from the AUSA's other daily duties, whether it be case work or case intake. A possible resolution could be a predetermined time limit for case intake to be used in those situations where the discussion is prolonged. Regardless, the final decision to accept a case for prosecution rests with the AUSA. If a discussion takes too much time, the AUSA can end it by making the decision.

The human factor could also become a problem with the agent placement. The federal government has over eighty federal agencies that have law enforcement personnel. Since many of the agencies share investigative authorities, cases will occasionally overlap. For example, the Drug Enforcement Administration (DEA) investigates drug crimes as found in Title 21 of the Unites States Code. However, the FBI and Homeland Security Investigations (HSI) also have concurrent Title 21 jurisdiction with DEA. Natural investigative overlaps such as these have led to tense rivalries between agencies. If the embedded agent participates in a case referral from an agency that he does not care for, there is a risk that he may sabotage the case and improperly advocate for case declination. The opposite is also true: an agent could zealously push for prosecution in one of his agency's cases, despite there being reasons for declination. Similarly, if an agent knows that the embedded agent is from a rival agency, the case may never reach the USAO and instead be presented to the state or local prosecutor's office.

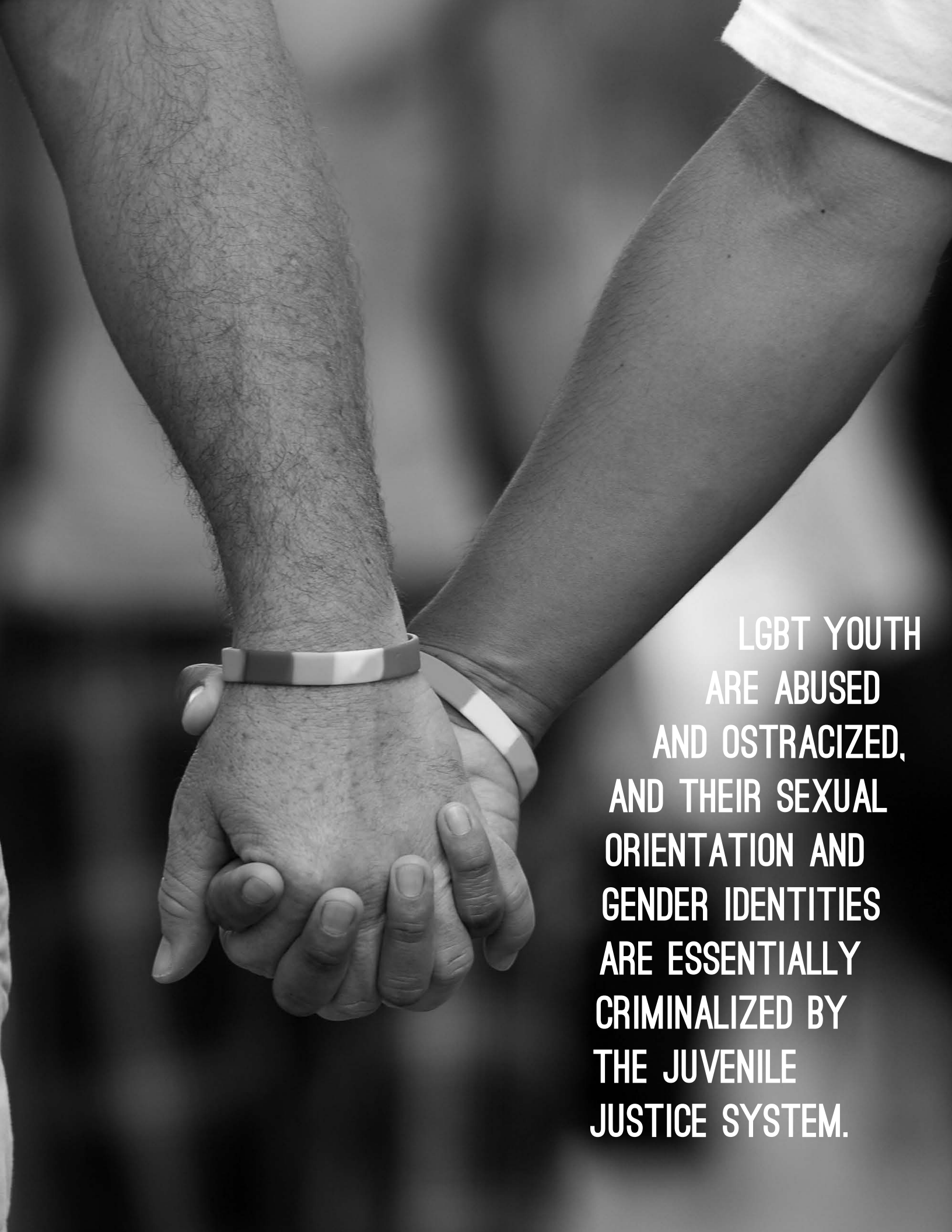
Another solution would be the creation of a multi-person review board at the USAO's case intake point. The board would consist of a combination of the original intake AUSA personnel, law enforcement agents, and state or local prosecutors. Much like the single agent placement, the board would encourage discussion and increase transparency. However, because of time constraints, this board may not be practical for situations where a warrantless arrest is imminent. This board could act as a review committee for longer-term investigations that are presented for prosecution. If declination is appropriate, a state or local prosecutor would be present to assist the agent with presenting the case to their office.

VIII. Conclusion

After review of various ethical sources, both past and present, as well as other factors affecting case declination, it is apparent that there is a need for ethical guidance for AUSAs when making the important decision to decline a law enforcement agent's case for prosecution. There is presently a lack of guidance in the ethical sources, specifically the Model Rules, which can guide AUSAs when deciding to decline cases. A proposed amendment to the Model Rules, providing factors such as those found in the *U.S. Attorney's Manual* to consider when declining a case, would be a direct and cost effective improvement to the status quo.

About the AUTHOR

Elhrick J. Cerdan is a Special Agent with U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI). He also serves as an intelligence officer with the United States Navy Reserve. He received his J.D. from the Oklahoma City University School of Law and his M.B.A. in Finance and Management Science and B.B.A. in Marketing from the University of Miami School of Business. The views expressed in this article are solely those of the author.



LGBT YOUTH ARE ABUSED AND OSTRACIZED, AND THEIR SEXUAL ORIENTATION AND GENDER IDENTITIES ARE ESSENTIALLY CRIMINALIZED BY THE JUVENILE JUSTICE SYSTEM.

Challenging Discrimination of LGBT Youth in Juvenile Justice: Encouraging the Legal Strategy of Selective Prosecution Motions

by Alanna Holt

Introduction

The gay, lesbian, bisexual, and transgender (LGBT) rights movement is in a period of profound transformation. This transformation has involved rapidly expanding support, both publically and politically, for gay marriage, for the acceptance and understanding of "non-traditional" gender identities, and for the integration of the LGBT community into social, familial, cultural, and political life.[1]

This progress is contrasted starkly by the realities facing LGBT youth, who continue to be abused and ostracized, and whose sexual orientation and gender identities are essentially criminalized by being targeted by the juvenile justice system. LGBT youth particularly youth of color in poor communities are significantly over-represented in the homeless population and the juvenile justice system.[2] Although gay and transgender youth make up approximately five to seven percent of the country's overall youth population,[3] they make up approximately thirteen percent of youth in detention facilities.[4] LBGT youth face a wide range of intensely abusive and discriminatory treatment in their home lives, at school, in their broader communities, and by police, prosecutors, and correctional officials.[5] Criminal justice officials charged with protecting youth in the juvenile system, such as juvenile defenders, probation officers, and social workers, frequently fail to competently represent the youth's interests and protect them from discrimination and abuse.[6] This maltreatment persists because of a critical lack of recognition of the particular challenges facing LGBT youth both in and outside of the juvenile justice system.[7] Youths with non-traditional sexual preferences and gender identities face a higher frequency of family rejection and unstable home conditions, which results in a higher risk of contact with the juvenile justice system.[8] LGBT youth also

1 *See generally Our Victories*, Human Rights Campaign, http://www.hrc.org/the-hrc-story/our-victories (last visited Feb. 18, 2014) (detailing the expansion of LGBT rights).

2 Jerome Hunt & Aisha C. Moodie-Mills, Center for American Progress, The Unfair Criminalization of Gay and Transgender Youth 1 (2012), available at http://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/.

3 *Id*.

4 Katayoon Majd et al., The Equity Project, Hidden Injustice: Lesbian, Gay, Bisexual, and Trans-Gender Youth in Juvenile Courts 10 (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf.

5 *See, e.g., id.* at 3–5 (describing how police target LGBT for certain crimes and how schools fail to adequately address harassment that LGBT youth face).

6 *See* Jody Marksamer, *In Defense of LGBT Youth: Strategies to Help Juvenile Defenders Zealously Advocate for their LGBT Clients*, *in Practitioner's Section*, 15 U.C. Davis J. Juv. L. & Pol'y 401, 403–05 (2011) (commenting that advocates sometimes have biases or a lack of understanding on how to work with LGBT youth, which hinders their ability to properly advocate).

7 *See* Majd et al., *supra* n. 4, at 4 (noting that some advocates have misconceptions about the LGBT community, such as not knowing the difference between gender and sexual orientation or the difference between transgender and gay, lesbian, or bisexual).

8 *See* Hunt & Moodie-Mills, *supra* n. 2, at 1 (stating that because our system is not equipped to handle the unique struggles LGBT youth face, they become unfairly criminalized

face higher risks of prosecution for crimes arising from family rejection or domestic disputes, sex-related crimes, such as statutory rape and prostitution, and ultimately "survival crimes" associated with homelessness.[9]

Unfortunately, efforts to address the disproportionate impact of the juvenile justice system on LGBT youth have been inadequate.[10] In 2009, The Equity Project[11] produced a comprehensive report entitled "Hidden Injustice: Lesbian, Gay, Bisexual, & Transgender Youth in Juvenile Courts," which detailed the ways that juvenile justice professionals are unprepared to effectively address the unique challenges that confront LGBT youth both in and out of the system. The report also provides tools for actors in the system to ensure LGBT youth are treated fairly by the courts, correctional facilities, and their communities.[12]

JUVENILE JUSTICE PROFESSIONALS ARE UNPREPARED TO EFFECTIVELY ADDRESS THE UNIQUE CHALLENGES THAT CONFRONT LGBT YOUTH... LGBT YOUTH IN THE SYSTEM FACE MISTREATMENT, ABUSE, AND ISOLATION AS A RESULT OF THEIR STATUS.

This paper will focus on the representation of LGBT youth. Juvenile defenders are uniquely situated to fight for the equal and fair treatment of LGBT youth in the juvenile justice system and to combat the selective targeting of these youth by law enforcement and the courts. Unfortunately, juvenile defenders frequently do not realize a client is LGBT or may not understand how a client's LGBT status influenced the client's contact with the system.[13] This article will argue that, in addition to the current recommendations available to juvenile defenders in their representation of LGBT youth, juvenile defenders should be encouraged to explore filing selective prosecution motions.

Comprehensive recommendations and resources for juvenile defenders with LGBT clients are available, including the extensive recommendations in the Equity Project's report.[14] Still missing from these resources are specific strategies for juvenile defenders to seek relief based on constitutional violations. For instance, due process and equal protection challenges have been raised in response to the discriminatory treatment of LGBT youth in schools and correctional facilities.[15] Juvenile defenders can take advantage of the constitutional implications of discriminatory treatment through the use of selective prosecution mo-

and deprived of their civil rights).

9 *See, e.g.*, Majd et al., *supra* n. 4, at 71–74, 143 (describing the charges often brought against LGBT youth often face, including ungovernability, various survival crimes—prostitution, shoplifting, and selling drugs—and domestic dispute charges).

10 *See generally* Marksamer, *supra* n. 6, at 403–05.

11 The Equity Project's mission is

To promote leadership and provide guidance regarding lesbian, gay, bisexual, and transgender (LGBT) youth in the juvenile justice system, Legal Services for Children, the National Center for Lesbian Rights, and the National Juvenile Defender Center joined in 2005 to launch the **Equity Project.** The Equity Project represents a unique collaboration of individuals and organizations with diverse expertise relevant to LGBT youth in the juvenile justice system.

Majd et al., *supra* n. 4, at v (emphasis in original).

12 Marksamer, *supra* n. 6, at 404.

13 *Id.* at 407, 411 (explaining the need for defenders to ask a client if he or she is LGBT and to not proceed with their representation based on assumptions).

14 Majd et al., *supra* n. 4, at 137–38.

15 *See, e.g.* R.G. v. Koller, 415 F.Supp.2d 1129; Flores v. Morgan High School District, 324 F.3d 1130, 1138 (9th Cir. 2003). ("Plaintiffs' claim that the defendants' response or lack of response to complaints of student-to-student anti-homosexual harassment denied them equal protection."); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

tions. This strategy has been recommended in one area, the disproportionate targeting of LGBT youth for violations of statutory rape laws.[16] In the case of statutory rape, LGBT youth are disproportionately prosecuted for engaging in consensual sexual conduct where similarly situated heterosexual youth would not be prosecuted.[17]

Juvenile defenders should be prepared to file such motions in cases where an LGBT youth's status specifically influenced the decision to prosecute, as opposed to those instances where their gender or sexual orientation influenced the circumstances leading to their contact with the system, such as homelessness, harassment, or abuse. Prosecutions arising directly from a LGBT youth's status include "incorrigibility" or "ungovernability,"[18] statutory rape, and prostitution.[19]

Pursuing selective prosecution motions for those crimes could have several benefits in challenging the disparate treatment of LGBT youth in the juvenile justice system. First, such motions, while difficult to win, present a form of legal relief for LGBT clients.[20] Second, selective prosecution motions and the accompanying discovery provide the chance to present numerical and anecdotal data of the discriminatory experiences of LGBT youth in the system; this data illuminates the maltreatment experienced by LGBT youth and educates judges, prosecutors, and the community at large. Third, selective prosecution motions can help educate all persons associated with the juvenile justice system, as well as communities at large, on the particular challenges and persisting discrimination facing LGBT youth.

Courts are public institutions, so selective prosecution motions based on a youth's sexual orientation provide an important opportunity for the public to hear more stories of the unique experiences of LGBT youth in the justice system. Because the juvenile justice system persistently discriminates against LGBT youth while individuals inside and outside the system remain largely blind to the reality, it is critical to both create public awareness and a legal record documenting the mistreatment.

The increased use of selective prosecution motions, however, should only be done within the framework of client-centered legal representation. Such motions should not be considered without the full and informed consent of LGBT clients, or if a motion would not strengthen or aid in a client's defense. Filing such a motion amounts to "outing" a client, and many LGBT youth would prefer to keep their sexual orientation or gender identity out of their juvenile adjudications. These fears are powerfully justified by the mistreatment, abuse, isolation, and punitive responses that LGBT youth face in the system as a result of their status. Defenders should make clear to clients that such motions will be accompanied by extra measures to prevent such mistreatment and explore with their clients the benefits of a defense centered around the client's identity and the discrimination the client faces.[21]

Section I of this article will provide a general overview of the factors contributing to a higher contact of LGBT youth with the juvenile justice system. Section II discusses prosecutions for offenses that are driven almost exclusively by an LGBT youth's gender or sexual orientation. Section III will detail the current

16 *See generally* Michael H. Meidinger, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision Making Involving Queer Youth & Statutory Rape*, 32 B.C. J. L. & Soc. Just. 421 (2012) (describing how prosecutorial discretion and societal norms lead to the selective prosecution of LGBT youth).

17 *Id*. at 421–22 (providing that certain provisions in the law intended to protect youth from prosecution for statutory rape do not equally apply to LGBT youth).

18 Ungovernability is defined as being beyond the control of one's parent/guardian. Many ungovernability cases involve a LGBT youth's refusal to "change" their sexual status results in a criminal prosecution.

19 *See* Majd et al., *supra* n. 4, at 70–74 (reporting the list of crimes that LGBT youth are disproportionately charged with committing).

20 These motions also provide opportunities for appeals based on a trial court's potential abuse of discretion.

21 For instance, a lawyer who stands up in a courtroom to defend a client's identity and expose vicious discrimination could empower LGBT youth as much as he or she could enlighten judges, prosecutors, and the police.

recommendations for best practices of juvenile defenders in representing LGBT youth, and the recommendation that defenders file selective prosecution motions in cases of LGBT prosecutions for statutory rape. Section IV explores how such motions could be filed in cases involving other crimes for which LGBT youth are disproportionately prosecuted. Section V argues that the expanded use of selective prosecution motions could be an important tool in exposing the experience of LGBT youth in the juvenile justice system, and in the fight for their equal treatment.

PURSUING SELECTIVE PROSECUTION MOTIONS FOR STATUS CRIMES COULD HAVE SEVERAL BENEFITS IN CHALLENGING THE DISPARATE TREATMENT OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM.

I. LGBT Youth in the Justice System

LGBT youth experience a substantially higher risk of contact with the criminal justice system. The higher risk of contact that LGBT youth experience begins with pre-trial incarceration, where general rules requiring pre-trial detention that it be imposed only when the youth is a flight or safety risk are often ignored for LGBT youth, who are twice as likely to be detained pre-trial.[22] This has a substantial impact on the likelihood of conviction--as juvenile justice specialist Dr. Marty Beyer described, "[a] kid coming into court wearing handcuffs and shackles versus a kid coming in with his parents it makes a very different impression."[23] Additionally, while LGBT youth represent approximately 3 10% of the overall population, LGBT youth represent 15% of the prison population.[24] External social factors contribute to this higher level of contact within the system, but internal biases against LGBT youth, and the criminalization of their sexual orientation, also give rise to harsher treatment and punishment within the system.[25] This section will explain some of the persisting biases against LGBT youth, and the main external factors contributing to their disproportionate contact with and disproportionate treatment within the juvenile justice system.

A. Biases Within the Juvenile Justice System Towards LGBT Youth

Despite the disproportionate representation of LGBT youth, the criminal justice system is largely blind to the existence and experiences of LGBT youth.[26] Many judges actively refuse to address the sexual orientation or gender identities of juveniles; many defenders are unaware that their clients are in fact LGBT; and a large portion of LGBT youth want to keep their identities secret out of fear of the discrimination and backlash that persisting prejudices evoke.[27]

Moreover, once justice professionals[28] know a youth's transgender status or sexual orientation, many refuse to recognize or respect that youth's identity.[29] Justice professionals frequently refuse to use a transgender

22 Daniel Redman, *'I Was Scared to Sleep': LGBT Youth Face Violence Behind Bars*, The Nation Magazine, (June 21, 2010), http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars.

23 *See id*.

24 *Id*.

25 *See* Majd et al., *supra* n. 4, at 2–4 (describing barriers to LGBT youth which contribute to, and exacerbate, their overrepresentation in the juvenile justice system).

26 *See id.* at 43–45 (discussing the invisibility of LGBT youth within the system).

27 *Id*. at 44.

28 "Justice professionals" refers to a range of actors within the juvenile justice system, including juvenile defenders, probation officers, detention officers, judges, prosecutors, court personnel, and counselors.

29 *Id.* at 49–50.

youth's chosen name and preferred pronoun.[30] They often view a youth's clothing, appearance, and mannerisms expressing their sexual orientation or gender identity as unruly "acting out," instead of recognizing that such expressions are an important part of LGBT youth's acceptance and understanding of their own identity.[31]

The Equity Project also notes an alarming number of juvenile justice professionals who view an LGBT youth's sexual orientation or gender identity as a mental illness or indication of being sexually predatory.[32] Some jurisdictions require all youth "suspected" of being LGBT to undergo a mental health evaluation.[33] Many youth report being treated as "crazy, dangerous, or unstable."[34] One judge, describing a case where a young lesbian assaulted a family member after her family objected to her sexual orientation, stated, "the whole case was about sensationalizing lesbians. [The prosecution] played it like she was a deranged lesbian lunatic."[35] In an interview with *The Nation* magazine, Krystal, a transgender youth from Louisiana, explained that her counselor told the judge of her transgender status.[36] The judge cited this fact specifically as the reason why he refused to grant Krystal's early release.[37] Her lawyer explained to *The Nation*, "many judges in rural Louisiana still conflate sex offenses with sexual orientation and gender identity. "[38]

AN ALARMING NUMBER OF JUVENILE JUSTICE PROFESSIONALS VIEW AN LGBT YOUTH'S SEXUAL ORIENTATION OR GENDER IDENTITY AS A MENTAL ILLNESS OR INDICATION OF BEING SEXUALLY PREDATORY.

Despite broad consensus in the mental health community that LGBT identities fall within a range of normative sexual development and the increasing acceptance of this fact in the eyes of the public, dangerous prejudices remain in the juvenile justice system.[39]

B. Family

One main finding of the Equity Project's report was that "[f]amily rejection of LGBT youth increases the risk of their involvement in the juvenile justice system and negatively impacts their cases."[40] Studies show that LGBT youth continue to experience rejection by their families at alarming rates as a result of their gender or sexual orientation.[41] One study indicated that nearly fifty percent of parents, upon finding out their child was LGBT, experienced feelings of repulsion, anger, and disappointment.[42] In The Equity Project's survey of juvenile justice professionals, nine out of ten respondents believed that a lack of family support was a "very serious" or a "somewhat serious" problem for LGBT youth in the juvenile justice system.[43]

Family rejection and a lack of family support have far reaching consequences. Family conflicts that arise out of a youth's gender

30 *Id*. at 50.
31 *See* Majd et al., *supra* n. 4, at 49 (commenting that medical professions believe it is important to allow LGBT individuals to express their identity).
32 *See id.* at 51–52 (proving the story of one LGBT youth who was asked by a staff member, in a juvenile hall, if he was gay because he had been molested).
33 *Id.* at 52.
34 *Id.*
35 *Id.*
36 Redman, *supra* n. 19, at 17.
37 *See also id*. (describing how the judge laughed and found the recommendation for an early release a joke).
38 *Id.*
39 *See* Majd et al., *supra* n. 4, at 51–52 (stating that thirty-five years of research have shown that LGBT identities are not associated with mental disorders, social or emotional problems, or sexual abuse).
40 *See id.* at 3 (reporting the frightening statistics associated with family rejection and entry of LGBT youth into the juvenile justice system).
41 *Id*. at 70.
42 *See also id.* (noting that almost 30% of LGBT youth experienced physical abuse by a family member because of their sexual orientation or gender identity).
43 *Id.*

identity or sexual orientation increase the risk that the youth will run away from home and become homeless.[44] Indeed, LGBT youth are disproportionately represented in the youth homeless population – they make up between twenty and forty percent of homeless youth.[45] In one study of LGBT homeless youth, thirty-nine percent reported they had been forced out of their homes because of their sexual orientation or gender identity.[46] Additionally, forty-five percent reported involvement with the juvenile justice system.[47] Parental disapproval also creates a heightened risk of domestic disputes, physical altercations, and parental attempts to use the courts as a means of "changing" their child's gender identity or sexual orientation through ungovernability charges, domestic violence or assault charges, or statutory rape charges.[48]

C. School Harassment

Another related social factor contributing to increased LGBT involvement in the juvenile justice system is the pervasive harassment and bullying LGBT youth face in school.[49] LGBT youth experience persistent verbal abuse, physical harassment, and physical assaults as a result of their sexual orientation or gender identities.[50] Frequently, LGBT youth who defend themselves against physical harassment or assault face delinquency or criminal charges for their conduct.[51] Unsurprisingly, LGBT youth are substantially more likely to skip school as a result of bullying, harassment, and violence – making them vulnerable to arrests on truancy charges or related probation violations.[52]

LGBT YOUTH ARE SPECIFICALLY TARGETED FOR CERTAIN CRIMES DUE TO THEIR GENDER IDENTITY OR SEXUAL ORIENTATION. THIS DISPROPORTIONATE TARGETING FREQUENTLY BEGINS WITH AGGRESSIVE, DISCRIMINATORY POLICING OF LGBT YOUTH BECAUSE OF THEIR GENDER IDENTITY OR SEXUAL ORIENTATION.

II. Selective Targeting of LGBT Youth for Specific Offenses

In addition to external factors increasing their risk of contact with the juvenile justice system and the biased treatment they face within the system, LGBT youth are specifically targeted for certain crimes due to their gender identity or sexual orientation. This disproportionate targeting frequently begins with aggressive, discriminatory policing of LGBT youth because of their gender identity or sexual orientation.

44 *See id.* at 71 (declaring many LGBT run away because they experience physical and verbal abuse at home).

45 Nicholas Ray, National Gay and Lesbian Task Force Policy Institute, Lesbian, Gay, Bisexual And Transgender Youth: An Epidemic of Homelessness 1 (2006), *available at* http://www.thetaskforce.org/downloads/HomelessYouth.pdf; *see also* Majd et al., *supra* n. 4, at 70.

46 Majd et al., *supra* n. 4, at 72.

47 *Id*.

48 *Id*. at 71; *see also infra* Section II (listing the specific offenses LGBT youth are specifically targeted for).

49 *See, e.g.*, Lambda Legal, Facts: LGBT Youth in School 1, *available at* http://data.lambdalegal.org/pdf/158.pdf (revealing that 77.9% of LGBT students heard epithets such as "faggot" or "dyke" frequently at school); *see also* Gay, Lesbian, and Straight Education Network (GLSEN), *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools* (2009), *available at* http://glsen.org/sites/default/files/Harsh%20Realities.pdf.

50 *See id.* (noting that 84% of LGBT youth had been verbally harassed due to their sexual orientation); *see also* Majd et al., *supra* n. 4, at 75–76 (noting that LGBT students are more likely to be involved in a physical fight, threatened, or harmed with a weapon than non-LGBT students).

51 *E.g.,* Majd et al., *supra* n. 4, at 76–77 (describing one example where though the LGBT youth had been bullied for a long time, the school police asked the youth accusatory questions such as 'Why were they calling you a faggot?').

52 *See id.* at 76 (finding that 32.7% of LGBT youth skipped school because they felt unsafe).

A. Selective Police Targeting

LGBT youth are more likely to be arrested and charged for violations of laws relating to sexual expression, "quality of life," and status offenses such as loitering, public drunkenness, public urination, running away, and littering than their heterosexual counterparts.[53] Police frequently equate homosexuality with deviancy and criminality a prejudice that pervades the attitudes of judges and prosecutors as well.[54] Research revealed that LGBT youth are profiled by law enforcement based on their gender identity or sexual orientation. Rather than basing investigatory stops or searches on reasonable, articulable suspicion of criminal activity, police will view perceived LGBT status as suspicious or criminal in and of itself. One Amnesty International Report exploring this issue concluded:

> [Amnesty International's] research has revealed that law enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to 'morals regulations,' bars and social gatherings, demonstrations and 'quality of life.' Transgender individuals in particular report being profiled as suspicious or as criminals while going about everyday business such as shopping for groceries, waiting for the bus, or walking their dogs.[55]

There is an obvious logical connection between discriminatory policing and a disproportionate amount of criminal prosecutions aimed at LGBT youth. A disproportionately higher volume of arrests of LGBT youths means that a disproportionate volume of this category of youth will also be prosecuted. Therefore, police targeting of LGBT youth contributes to their disproportionate representation in the juvenile system.

B. Ungovernability

LGBT youth are also at risk of having their sexual orientation or gender identity criminalized directly. One offense for which LGBT youth are selectively targeted almost exclusively based on their gender identity or sexual orientation is "ungovernability." A report prepared for the Department of Justice defined "ungovernability" as follows:

> When a youth's disobedience reaches a crisis level, the family may reach a breaking point and seek the assistance of probation officers, family court judges, and child welfare workers to take control of their troubled children. The youth may subsequently be classified as 'ungovernable' or 'incorrigible,' which can result in a petition to have the youth adjudicated as a status offender and face sanctions ranging from probation to out-of-home placement to secure detention.[56]

According to the report, eight percent of ungovernability cases in 2004 resulted in detention; eighteen percent resulted in an out-of-home placement for the youth; and sixty-two percent resulted in probation.[57]

Interviews conducted by The Equity Project revealed that many inter-family conflicts between LGBT youth and their parents led prosecutors to file charges of ungovernability.[58] One intake officer reported that nine out of ten LGBT youth entering the system in her jurisdiction had been charged with "ungovernability, curfew violations, or truancy, all based primarily on the parents' objections to their

53 *Id.* at 61.

54 *Id.*

55 Amnesty International, Stonewalled: Police Abuse And Misconduct Against Lesbian, Gay, Bisexual And Transgender People In The U.S. 4 (2003), *available at*, http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf.

56 Development Services Group, Inc., Ungovernable/Incorrigible Youth Literature Review 2 (2009), *available at*, http://www2.dsgonline.com/dso2/Ungovernable%20Youth%20Literature%20Review.pdf.

57 *Id.*

58 Majd et al., *supra* n. 4, at 71.

children's sexual orientation."[59]

As identified by that intake officer, ungovernability charges are often accompanied by other status offenses such as curfew violations or truancy, which, as identified in Section I, may also be linked to an LGBT youth's parental rejection. Sometimes, however, the charge is brought against an LGBT youth in absence of any other chargeable behavior a report on the treatment of LGBT youth in Louisiana identified one example:

In 2009, an eleven-year-old youth in Louisiana was taken into Judge's chambers without his attorney to discuss his sexual orientation. His mother was then called in and questioned about his sexual orientation. The eleven-year-old, who had no delinquency charges, was placed in detention as his disposition, partly at his mother's request, who perceived her child to be gay, and thus, 'ungovernable.'[60]

That same report identifies LGBT youth in Louisiana as being at risk for ungovernability charges, even in the absence of any previous court involvement or criminal record.[61] *The Nation* magazine's investigation into LGBT youth identified cases of incarceration disguised as "treatment" of LGBT youth based exclusively on their sexual orientation or gender identity. For example, at the parents' request, a judge in Mississippi ordered a lesbian youth to a private

59 *Id.*

60 Wesley Ware, Lesbian, Gay, Bisexual, & Transgender Youth in Louisiana's Juvenile Justice System: Locked Up and Out 16 (2007), available at http://jjpl.org/site/wp-content/uploads/2011/07/locked-up-and-out.pdf.

61 *See id.* at 14 (explaining how this charge drives the youth deeper into the system because they will typically face more discrimination once they are outside of their home environment).

hospital in order to "cure" her homosexuality.[62] In Georgia, a child who came out as transgender was sent to a facility for youth likely to commit sex crimes against children even though the child had never committed a sexual offense.[63]

C. Prostitution

LGBT youth also face a higher risk of being arrested and charged with prostitution or soliciting sex than their heterosexual counterparts.[64] Police frequently profile and harass LGBT youth on suspicion of prostitution based entirely on their gender identity or sexual orientation. One youth interviewed by the Equity Project described this harassment:

> [The LGBT youth said] that a police officer stopped him as he was walking on the street, dressed in drag (i.e. wearing a wig, dress, make-up, etc.), and insisted on seeing identification. "[The police officer] said that the reason he stopped me was suspicion of soliciting sex . . . I had to show him evidence that I was going to a drag show before they let me go . . . Whenever I would dress up in drag, [the police harassment] was horrible."[65]

Another LGBT youth explained that streets frequented by trans-youth are aggressively patrolled by police who stop youth on the street and ask, "[y]ou're working, right?"[66] While not focused exclusively on LGBT youth, Amnesty International also "found a strong pattern of police unfairly profiling transgender women as sex workers" in Los Angeles, Chicago, New York, San Antonio, Washington, D.C., Philadelphia, San Francisco, and Houston.[67] In addition to being selectively targeted, increased rates of homelessness raise the risk LGBT youth will engage in prostitution as a "survival crime."[68]

D. Age of Consent Laws

The discriminatory application of statutory rape laws, and in some instances, overtly exclusionary exceptions to statutory rape reveal that LGBT youth face selective targeting and disproportionate punishment for statutory rape.[69] Every state has age of consent or "statutory rape" laws that prohibit sexual activity with young persons under a certain age.[70] The mechanics of age of consent laws vary by state.[71] Some laws set an explicit limit on the age of consent, while some laws set limits on the permissible age difference between two individuals engaged in sexual activity. Age of consent laws can apply to youths engaged in sexual activity even when they both fall under the age of consent. Many states, however, also have "Romeo and Juliet" exceptions to statutory rape laws, which provide an affirmative defense to under-age youth engaged in sexual conduct so long as they are sufficiently close in age.[72]

In some states, Romeo and Juliet provisions are specifically written to only include heterosexual sex acts, which preclude same sex couples from using the defense and exposes LGBT youth to an even higher risk of prosecution for statutory rape. For instance, in Texas, sexual activity with a child under the age of seventeen is a felony, but an affirmative defense applies if the victim and defendant are no more than three years apart in age and of the opposite sex.[73] Similarly, Alabama's statutory rape laws distinguish between "statutory rape," which occurs between two members of the op-

62 Redman, *supra* note 17.
63 *Id.*
64 *See* Amnesty International, *supra* n. 52, at 16–50 (examining ways in which police profile LGBT individuals, including selective enforcement of prostitution and solicitation laws); *supra* n. 48.
65 Majd et al., *supra* n. 4, at 62.
66 *Id.*
67 Amnesty International, *supra* n. 52, at 21.
68 *See* Heather Squatriglia, Note, *Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process*, 14 Cardozo J.L. & Gender 793, 806 (2008) (reiterating that a youth's sexual orientation cannot be separated from the delinquent behavior because it is often their LGBT status that leads them to juvenile justice system).
69 *See* Meidinger, *supra* n. 15, at 421–22.
70 Majd et al., *supra* n. 4, at 62.
71 *See* Meidinger, *supra* n. 15, at 426.
72 *Id.* at 422.
73 *Id.* at 432.

posite sex, and "deviate sexual intercourse," which includes sodomy (acts more frequently associated with homosexual individuals), with an individual below the age of consent.[74] Alabama offers reduced penalties for individuals two years apart who violate statutory rape prohibitions, but such reduced penalties are not offered for "deviate sexual acts" between actors two years apart."[75] California and Kansas also have discriminatory exceptions in place for youth who engage in sexual activity.[76]

The consequences of these discriminatory laws are significant. In twenty-nine states, a statutory rape conviction constitutes a sex offense that requires the individual to register as a sex-offender.[77] Such status has far reaching consequences for any youth, particularly an LGBT youth who already faces demonization based on his or her perceived sexual orientation. The 2002 case of *Kansas v. Limon*,[78] illustrates a similarly grave consequence. Matthew Limon was convicted of criminal sodomy for engaging in consensual oral sex with the complainant, a boy whom he was approximately three years older than.[79] Mr. Limon was not eligible for a reduced sentence based on a statutory Romeo and Juliet exception because of the homosexual nature of his conduct.[80] He was sentenced to seventeen years in prison, followed by five years of supervision and registration as a sex offender.[81] Had Mr. Limon qualified for the Romeo and Juliet exception, his sentence would have been significantly reduced.[82] The United States Supreme Court vacated Mr. Limon's conviction in the wake of its decision in *Lawrence v. Texas*,[83] and remanded to the Kansas Court of Appeals for reconsideration.[84] The appeals court, however, upheld the discriminatory Romeo and Juliet provision using profoundly prejudicial reasoning and antiquated notions of the "dangers" associated with homosexuality: that protecting children from homosexual sex is a rational state interest, given that such acts are contrary to traditional sex norms; that the state has a preference for procreative sex; that lenity towards heterosexuals fosters parental responsibility by freeing such individuals from incarceration; and that prevention of STDs, the risk of which is "generally associated" with homosexual conduct, is a rational state interest.[85]

The Supreme Court of Kansas overturned the appellate court's decision, finding that the discriminatory Romeo and Juliet provision unconstitutional on equal protection grounds, stating, "moral disapproval of a group cannot be a legitimate governmental interest."[86] The Kansas Supreme Court also dismissed all of the appellate court's grounds for upholding the discriminatory provision and discredited its reliance on the false assertion that homosexual activity creates a higher risk for the spread of HIV or other STDs.[87] Though Mr. Limon's case ultimately resulted in a victory, the State's persistence in upholding his harsher punishment on the grounds of his homosexuality, as well as the appellate court's acceptance of Mr. Limon's sexual orientation as a grounds for disproportionate punishment, exemplifies the pervasive discrimination against LGBT youth that persists in the criminal justice system.

Another example of selective targeting is evident in the recent Ohio case, *In Re D.B.*[88]

74 *Id.*
75 *Id.*
76 *See id.* at 433.
77 Majd et al., *supra* n. 4, at 62.
78 41 P.3d 303 (Kan. Ct. App. 2002), *vacated*, 539 U.S. 955 (2003), *remanded to*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).
79 Kansas v. Limon, 122 P.3d 22, 24–25 (2005).
80 *Id.* at 25.
81 *Id.*
82 *Id.*
83 *See generally* Lawrence v. Texas, 539 U.S. 588 (2003) (holding a Texas statute criminalizing sexual conduct between members of the same sex was unconstitutional as applied to two consenting adults).
84 *Limon*, 122 P.3d at 26.
85 *See generally* Kansas v. Limon, 83 P.3d 229 (Kan. Ct. App. 2004).
86 *Limon*, 122 P.3d at 35.
87 *See id.* at 36–37 (explaining how the studies the appellate court relied on in determining the Romeo-and-Juliet law was constitutional actually would show the Romeo-and-Juliet law to be both over inclusive and under inclusive).
88 950 N.E.2d 528 (Ohio 2011), *cert. denied*, Ohio v. D.B., 132 S. Ct. 846 (2011).

In that case, a twelve-year-old male, D.B., was charged with statutory rape for engaging in sexual conduct with a minor on two separate occasions: once with another twelve-year-old male, and the other with an eleven-year-old male.[89] The trial court found no evidence that force was used, but still found D.B. delinquent based on his violation of Ohio's age-of-consent law, which did not have a Romeo and Juliet provision. D.B. was ultimately placed on probation for an indefinite period of time.[90] The judge further ordered D.B. to attend counseling and group therapy. D.B. appealed, alleging that his due process and equal protection rights had been violated.[91] The Supreme Court of Ohio agreed, finding the Ohio statute used to adjudicate D.B. was unconstitutional as applied in that case.[92]

D.B.'s case serves as an important example for future selective prosecution motions in similar adjudications, even though his defense was not explicitly one of selective prosecution. First, D.B.'s appeal was rooted in discriminatory application of the law and a subsequent violation of his constitutional rights. Second, as made clear in an amicus submitted by a number of defense organizations (including the Bluhm Legal Clinic), the defense argued that the same-sex nature of the offense likely drove D.B.'s discriminatory treatment:

> Although most statutes criminalizing sexual conduct between teens under the age of consent make no reference to gender or sexual orientation, there is a danger of discriminatory enforcement of these laws in accordance with stereotypes surrounding gender and sexuality. Such stereotypes are often implicit and in many cases, largely unconscious. For example, when there is male-female underage consensual sex, the male is typically viewed as the perpetrator and is thus more likely to be charged with statutory rape. Even in cases where both youth engaging in the sexual conduct are of the same sex, prosecutors' decisions regarding which youth is victim and which is perpetrator tend to be based on who assumed which gender role in the sexual activity.[93]

This amicus brief highlights the manner in which juvenile defenders can expose and clarify discriminatory treatment that is rooted in unexamined and unconscious biases.

III: Recommendations for Juvenile Defenders for Addressing the Unique Challenges of LGBT Youth

The Equity Project and other commentators have developed recommended best practices for juvenile defenders in their representation of LGBT youth in the juvenile justice system, both to address the external social factors impacting LGBT youth, and their discriminatory treatment within the system. These recommendations include treating LGBT youth with dignity and respect, encouraging promotion of their gender identity, engaging in training on the specific challenges facing LGBT youth, developing individualized and developmentally appropriate responses to LGBT behavior, working to avoid unnecessary detention and incarceration, advocating for programs or alternatives for out of home placements, and respecting the confidentiality and privacy of LGBT youth, among others.[94] Another important recommendation for juvenile defenders is to "approach all clients in a manner that recognizes that any youth may be LGBT."[95] This approach addresses the widespread unawareness of many juvenile defenders of their clients' LGBT status.

A. Selective Prosecution Motions

Cases involving statutory rape are the only area in which specific legal mechanisms

89 In re D.B., 950 N.E.2d at 529–30.

90 *Id.* at 530–31.

91 *See id.* at 532 (arguing that the statute violated his due process rights as it was too vague when applied to children under thirteen and that the statute was applied in an arbitrary manner thus violating his right to equal protection).

92 *Id.* at 534.

93 Brief for Juvenile Law Center, et. al. as Amici Curiae Supporting Appellant, In re D.B., 950 N.E.2d 528 (Ohio 2011) (No. 10-0240) at *31–32.

94 Majd et al., *SUPRA* n. 4, at 6–7.

95 *Id.* at 10.

have been recommended for use in the fight for equal treatment of LGBT youth. One article, *Peeking Under the Covers: Taking a Look at Prosecutorial Decision Making Involving Queer Youth and Statutory Rape*, recommends the use of selective prosecution motions.[96] A selective prosecution motion argues for dismissal based on equal protection grounds that the defendant was selected for prosecution based on an arbitrary classification, such as their race or religion. Prosecutors occupy a very unique role in the juvenile justice system: ethically, they are barred from discriminating against, or in favor of, an individual based on their race, religion, sexual orientation, or sex.[97]

In *United States v. Armstrong*,[98] the Supreme Court held that for a court to grant discovery on the claim of selective prosecution, the defendant must make a threshold showing of selective prosecution.[99] In the case of LGBT status, the defendant must show that the prosecutor targeted him or her while ignoring other similarly situated individuals who were not LGBT.[100] The Court imposed this barrier to ensure prosecutors still retain their broad discretion in choosing their defendants. State courts differ in their standards for what meets this threshold showing of selective prosecution, but this generally requires a defendant to show prosecution based on "an unjustifiable standard such as race, religion, or other arbitrary classification."[101]

Claims of selective prosecution based on gender, for instance, have seen success in courts granting access to discovery. For example, in *Massachusetts v. Bernardo B.*,[102] the Massachusetts Supreme Judicial Court granted a motion for discovery concerning selective prosecution based on gender.[103] In that case, a fourteen-year-old male was charged with engaging in underage sexual conduct with three other girls, two twelve and one eleven, and no force was involved.[104] The prosecutor chose not to bring any charges against the three girls. Based on these facts, the court ruled that selective prosecution based on gender was possible and ordered the District Attorney to provide statistics on how many statutory rape cases it has prosecuted against only the male juvenile where the conduct was consensual.[105]

In the context of sexual orientation, a number of significant barriers exist to the potential success of selective prosecution motions for statutory rape cases. First, sexual orientation is not (yet) a "suspect class" requiring heightened scrutiny, meaning courts will apply the rational basis test for evaluating LGBT youth's claims.[106] This standard is an extremely low level of review that most often results in the court's acceptance of patently irrational or false claims of governmental interest, such as those accepted by the Kansas appellate court in the *Limon* case.[107] Second, courts maintain an extremely high level of deference towards prosecutorial decision-making.[108] Third, when proving a selective prosecution motion even af-

96 *See generally* Meidinger, *supra* n. 15 at 421–425.
97 ABA Criminal Justice Section Standards, *supra* note 101, at 3-3.1(b).
98 517 U.S. 454 (1996).
99 *Id.* at 465-66.
100 *Cf. id.* at 465 (declaring that in this case, to show discriminatory effect, the claimant needed to show similarly situated people of a different race were not prosecuted).
101 *Id.* at 464.
102 900 N.E.2d 908 (Mass. 2009).
103 *Id.* at 848.
104 *Id.* at 837.
105 *Id.* at 843–48.
106 *See* Massachusetts v. Washington W., 928 N.E.2d 908, 912 (Mass. 2010) (holding that though this case involved a selective prosecution on the basis of LGBT status, the court did not have to decide whether sexual orientation qualified as a protected class).
107 *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *see also* Kansas v. Limon, 122 P.3d 22, 28 (determining that the proper standard of review for the equal protection claim was rational basis); Meidinger, *supra* n. 15, at 443–44 (noting that courts will typically use the rational basis test when examining LGBT youths' selective prosecution claims).
108 *See Bernardo B.*, 900 N.E.2d at 842 (commenting that prosecutors should be given a lot of discretion in their charging decisions and those decisions should be presumed to have been made in good faith); *see also* Meidinger, *supra* 15, at 443 (commenting that prosecutors have "near-absolute discretion").

ter discovery is granted, defendants face a high burden under *Armstrong*. They must show that the government's prosecutorial policy (1) had a discriminatory effect, and (2) was motivated by a discriminatory purpose, meaning that the prosecutor had specific discriminatory intent.[109] This means that defendants would have to find instances where the government targeted LGBT youth for statutory rape offenses, and chose not to prosecute similar statutory offenses committed by heterosexual youth, on top of the intent to pursue charges against LGBT youth because of their sexual orientation.

LGBT YOUTH ARE MORE LIKELY TO BE ARRESTED AND CHARGED FOR VIOLATIONS OF LAWS RELATING TO SEXUAL EXPRESSION, "QUALITY OF LIFE," AND STATUS OFFENSES–SUCH AS LOITERING, PUBLIC DRUNKENNESS, PUBLIC URINATION, RUNNING AWAY, AND LITTERING–THAN THEIR HETEROSEXUAL COUNTERPARTS.

B. Discovery Requests

Despite the significant legal barriers to successful dismissals for selective prosecution, grants of discovery motions to defendants seeking to prove selective prosecution are still beneficial to a youth's fight for equal rights in court. For example, in the case of *Massachusetts v. Washington W*, a sixteen-year-old boy named Washington was accused of having sexual encounters with a thirteen-year-old boy that began when Washington was fifteen.[110] When the younger boy's father learned of the alleged sexual activity, he reported Washington to the police, who charged him with two delinquency counts of statutory rape and two delinquency counts of indecent assault and battery on a child under the age of fourteen.[111]

Washington filed a motion to dismiss based on selective prosecution, but the Massachusetts Supreme Judicial Court affirmed the prosecutor's "wide discretion" in deciding whether to press charges against Washington, presuming the prosecutor's decision was made in good faith.[112] However, the Supreme Judicial Court also affirmed a limited version of a discovery order granted to Washington by the juvenile court to pursue his selective prosecution claim.[113] The court reasoned: "the subtleties behind a decision to prosecute just one youth in the context of same-gender sexual relations suggests that a comparison of similarly situated juvenile defendants . . . may provide more telling and relevant statistical information to support the juvenile's claim."[114] In upholding this discovery order, the court also noted, "the historic continuing animosity against homosexual[s,]"[115] and the importance of evaluating potential equal protection violations because "the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose."[116]

Therefore, regardless of Washington's success, his motion for selective prosecution and the juvenile court's grant of his limited discovery motion forced the courts to evaluate the serious claim of selective, unconstitutional targeting of LGBT youth, the persisting animosity towards homosexuals, and the possibility that such animosity infects prosecutorial decision-making. This kind of judicial evaluation is criti-

109 United States v. Armstrong, 517 U.S. 456, 476 (1996).
110 *Washington W.*, 928 N.E.2d at 910.
111 *Id.*
112 *Id.* at 911.
113 *Id.* at 915.
114 *Id.* at 914.
115 *Id.* at 912-13, n. 5.
116 *Id.* at 912 n.4 (citing Stemier v. Florence, 126 F.3d 856, 873–74 (6th Cir. 1997)).

cal in bringing the claims of LGBT youth to light.

Section IV: Expanding Selective Prosecution Motions to other Crimes

The legal standard for granting discovery, and proving selective prosecution, could be applied to a broader range of crimes for which LGBT youth are selectively targeted particularly for ungovernability and for prostitution crimes. As identified earlier in this paper, LGBT youth are often reported, arrested, and charged for ungovernability and for prostitution based entirely on their sexual orientation or their gender identity. In the case of ungovernability, defense attorneys should be encouraged to file motions for discovery to support selective prosecution motions. As identified by The Equity Project, sometimes parents specifically seek out judicial intervention in attempting to "change" their child's gender identity or sexual orientation. Particularly in cases where the youth is not charged with any other crime other than ungovernability, a case for selective prosecution can be made by an LGBT youth facing these charges.

Defense attorneys should seek out records of the parent's contacts with prosecutors, and carefully examine the wording of the charges levied against their client. They should also work together with other juvenile defenders on keeping records of instances where LGBT youth are targeted for ungovernability offenses because of their parent's rejection of their sexual orientation or gender identity. Similarly, when defending LGBT youth against prostitution charges or other offenses related to sexual conduct, juvenile defenders should explore selective prosecution motions. Defenders can develop a record of police treatment and police questioning of LGBT youth in support of their motions for discovery. As noted by The Equity Project and by Amnesty International, LGBT individuals are profiled by police departments for sex related offenses, and are often wrongly assumed by police to be engaging in prostitution, just for walking down the street. Such egregious and overtly discriminatory treatment should be documented by juvenile defenders and highlighted for the court in all cases where such arrests result in prosecution.

Section V: The Role of Selective Prosecution Motions & Discovery Requests in the Struggle for LGBT Youth Equality

By incorporating the use of selective prosecution motions and requests for discovery into the defense of LGBT youth for crimes such as statutory rape, prostitution, or ungovernability, juvenile defenders do not just increase the avenues of legal relief for their clients. Such motions can begin to encourage "soft-enforcement" within the justice system to change its treatment of LGBT youth. Professor Anne Poulin described the potential for soft-enforcement in the context of selective prosecution motions:

> Soft enforcement is the impact of the judicial process on the voluntary behavior of prosecutors, law enforcement officers, and the public. Even if the court ultimately denied relief, the exposure of disparate treatment through legal process may effect some reduction in improper selective prosecution as the government and the public respond to reduce or eliminate improper disparity.[117]

If selective prosecution motions at the very least result in successful discovery orders, defense attorneys can begin uncovering potentially troubling patterns of selective prosecutorial decision-making in cases involving LGBT youth. Even if the evidence uncovered does not result in successful dismissals, the detailing of such evidence in court forces prosecutors to face the charges of selective prosecution directly, and potentially encourages them to engage in more equitable decision-making.

The violations of human dignity that arise from such unequal treatment of LGBT youth go to the heart of what the Fourteenth Amendment is designed to protect. Even if

117 Poulin *supra* note 121, at 1090.

such motions are a "long-shot," or challenging to win, zealous and competent representation of LGBT youth demands that violations of a youth's fundamental rights be documented, presented, and argued before the courts. The use of selective prosecution motions as a weapon in the fight for equal rights of LGBT youth should therefore be vigorously encouraged and utilized.

Juvenile defenders of course can only utilize this weapon in the context of zealous, committed, client-centered representation demanded by the ethics rules and respect for the privacy and dignity of LGBT clients. Some LGBT youth will no doubt not want to build a legal defense surrounding their gender identity or sexual orientation, and juvenile defenders should always respect the decisions of their clients in this regard. Therefore, defense attorneys must be vigilant in protecting their client's comfort with exposing or discussing gender identity or sexual orientation in open court. They must refrain from encouraging the exposure of these identities to the point that an LGBT youth feels coerced. In the cases where LGBT clients agree to the use of their gender or sexual identities in their legal defense, defenders must make clients feel empowered, not fearful, of the central role their identity will play in their legal defense.

Conclusion

The substantial abuse, discrimination, and disparate treatment of LGBT youth in the juvenile justice system is a vitally missing part of the public discourse surrounding LGBT rights. Juvenile defenders must capitalize on this significant culture moment and develop an effective strategy toward targeting and fighting the invidious discrimination of LGBT youth in juvenile courts. While resources for juvenile defenders have been developed to inform defense attorneys how to develop meaningful and respectful relationships with LGBT clients and fight for their fair treatment within the system, there are still no resources encouraging juvenile defenders to challenge the disparate treatment of LGBT youth using legal mechanisms and strategies and certainly not on the same level that other invidious discrimination against the LGBT population has been challenged in the courts.

Given the few resources, juvenile defenders should utilize selective prosecution motions and requests for discovery in an effort to demonstrate the disparate treatment among LGBT youths in the juvenile justice system. The benefits of these tools extend far beyond their potential for legal success, which is likely low. Forcing prosecutors to confront claims of selective prosecutorial decision-making, forcing judges to evaluate serious claims of equal protection violations, and exposing the public to evidence of systemic, invidious discrimination in the targeting of LGBT youth can have a broader impact in the fight for equal rights and fair treatment.

About the AUTHOR

Alanna Holt currently practices law as an Assistant Public Defender for Miami-Dade County's Office of the Public Defender. She graduated cum laude from Northwestern University School of Law in 2013, and earned her Bachelor's Degree with Distinction in History and Philosophy from the University of Michigan in 2008. Prior to law school, Ms. Holt served as Policy Coordinator for Washington, D.C. based non-profit organization, The Justice Project, where she worked on a number of criminal justice reform campaigns dedicated to preventing wrongful convictions. During law school, Ms. Holt worked as a summer law clerk for the Habeas Corpus Resource Center in San Francisco as well as the District of Columbia Public Defender Service. She also served as Production Editor for Northwestern's Journal of International Human Rights, President of Northwestern's Public Interest Law Group, and President/Co-founder of Northwestern's Chapter of the National Lawyer's Guild. The views expressed in this article do not reflect the views of the Miami-Dade Office of the Public Defender. Ms. Holt wishes to thank Professor Bernadine Dohrn for her assistance, feedback, and support during the drafting of this article.

NOTES

...THE SUPREME COURT HAS ADDRESSED THE PARAMOUNT IMPORTANCE OF PROTECTING THE MEN AND WOMEN OF LAW ENFORCEMENT WHO DAILY PUT THEMSELVES AT RISK WHEN ENCOUNTERING THE PUBLIC.

POLICE OFFICER'S SAFETY; AN EXCEPTION WITHIN AN EXCEPTION OF THE FOURTH AMENDMENT

by Jeffrey T. Wennar, J.D.

Much has been written regarding the Fourth Amendment to the United States Constitution and its requirement that a search warrant be issued by a neutral and detached magistrate before a search and seizure can be valid. Over the years, exceptions to this requirement have evolved and been recognized by the Supreme Court of the United States.[1] Within those exceptions lies a body of law examining and recognizing a concern to all law enforcement officers' safety.[2] It does not re-examine the Fourth Amendment, but instead addresses those United States Supreme Court cases establishing the law effecting law enforcement safety.

The Supreme Court established the obligation of inferior courts regarding Fourth Amendment issues when the Court stated, "[It] is the duty of courts to be watchful for the constitutional rights of the citizen . . . ."[3] "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."[4] For the last half century, courts have followed the mandate that, ". . . the Fourth Amendment protects people . . . ."[5] Without specifically recognizing an exception for officer's safety, within specific recognized

1 California v. Hodari, 499 U.S. 621, 630 (1991) (the recovery of the crack cocaine was not the fruit of an illegal search because the defendant discarded it before being arrested); (Maryland. v. Buie, 494 U.S. 325, 334 (1990) (law enforcement officials may conduct a limited search of closets or closed areas where a suspect was arrested to ensure their safety from any possible threats); Mincey v. Arizona, 437 U.S. 385, 393 (1978) (warrantless searches and seizures are not permissible if there were no exigent circumstances); United States v. Chadwick, 433 U.S. 1, 11 (1977) (holding that individuals demonstrate a degree of privacy when they place a lock on a container and law enforcement must obtain a warrant to search its contents); South Dakota v. Opperman, 428 U.S. 364, 369 (1976) (holding that law enforcement may inventory the items found in automobiles after being impounded); Cady v. Dombrowski, 413 U.S. 433, 446-47 (1973) (police officers will take certain precautions for the safety of the community); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (courts must look at the totality of the circumstances to determine whether consent was given for law enforcement to search a specific area); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (stating that objects can be seized if they are in 'plain view' and as long as nothing in the surrounding area is touched); Chambers v. Maroney, 399 U.S. 42, 48 (1970) (determining that a search of a car without a warrant is constitutional so long as the officer has probable cause to believe that there is contraband inside the car); Chimel v. California, 395 U.S. 752, 762-63 (1969) (holding that during a search incident to arrest a law enforcement officer can search the area immediately within arm's reach of the detained individual); Terry v. Ohio, 392 U.S. 1, 27 (1968) (police officers may conduct a limited frisk of an individual if he or she has reasonable suspicion that criminal activity is afoot, happened, or is about to happen); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (law enforcement officials can act without a warrant in the circumstance that their safety or the safety of innocent bystanders may be endangered).

2 Firearms related fatalities were the second leading cause of death among America's law enforcement officers in 2013. Handguns were the leading type of firearm used in fatal shootings of law enforcement officers in 2013. Law Enforcement Officers Memorial Fund, Law Enforcement Fatalities Dip to Lowest Level in Six Decades, nleomf.org, available at http://www.nleomf.org/assets/pdfs/reports/2013-EOY-Fatality-Report.pdf.

3 Boyd v. United States, 116 U.S. 616, 635 (1886).

4 McDonald v. United States, 335 U.S. 451, 455-456 (1948).

5 Katz v. United States, 389 U.S. 347, 351 (1967).

exceptions, the Supreme Court has addressed the paramount importance of protecting the men and women of law enforcement who daily put themselves at risk when encountering the public. Case law addresses officer safety in the context of on street encounters,[6] vehicle stops,[7] and protective sweeps.[8]

The Fourth Amendment becomes applicable when an individual has been seized and a reasonable person does not feel free to leave.[9]

arrest.[14] The purpose of the stop is detecting evidence of the crime, past crime, stopping crime then in progress, or preventing the possibility of imminent crime.[15] Each is a distinct intrusion, each is designed to serve a distinct purpose, each requires a distinct justification, and each is subject to distinct scope limitations.[16] A purpose of the frisk is not focused upon the crime at all, but rather upon the protection of the stopping officer.[17]

A PURPOSE OF THE FRISK IS NOT FOCUSED UPON THE CRIME AT ALL, BUT RATHER UPON THE PROTECTION OF THE STOPPING OFFICER.

The assertion of officer's safety does not establish an unfettered opportunity for law enforcement officers to frisk, pat down or search[10] an individual they have encountered. Reasonable articulable suspicion[11] is required for law enforcement officers to stop individuals. "Reasonable suspicion means something more than inchoate and unparticularized suspicion or hunch [but] less . . . than probable cause."[12] However, while this standard is sufficient to stop an individual, it does not automatically give the officer a right to frisk that individual.[13]

As the officer encounters the individual, the officer's interaction with that individual may become progressively more intrusive based on the officer's successive observations to a set of escalating responses: (1) articulable suspicion that a crime has occurred, is occurring, or is about to occur this will justify the stop; (2) articulable suspicion that the stopped person may be armed this will justify the frisk; (3) an arrest; then, (4) search incident to

"In the case of the self-protective search for weapons [the officer] must be able to point to particular facts from which [the officer] reasonably inferred that the individual was armed and dangerous."[18] Once the officer has been satisfied that there is suspicious behavior that warrants investigation, ". . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[19]

The Court has been adamant, noting in *Terry*, "[w]e need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases."[20] On the same day the Court issued its opinion in *Terry*, the Court issued an opinion consolidating two cases also addressing searches of individuals who were stopped and searched by

6 *Terry*, 392 U.S. at 27-28.
7 Michigan v. Long, 463 U.S. 1032 (1983).
8 *Buie*, 494 U.S. at 334.
9 Michigan v. Chestnut, 486 U.S. 567, 573 (1988).
10 Sibron v. New York, 392 U.S. 40, 64 (1968).
11 Brown v. Texas, 443 U.S. 47, 53 (1979).
12 Illinois v. Wardlow, 528 U.S. 119, 123-124 (2000).
13 *Sibron*, 392 U.S. at 74.
14 *Terry*, 392 U.S. at 10.
15 *Id.* at 26.
16 *Id.* at 25-26.
17 *Id.* at 29, 31.
18 *Sibron*, 392 U.S. at 64 (citing *Terry*, 392 U.S. at 24).
19 *Terry*, 392 U.S. at 24.
20 *Id.* at 29.

police officers.[21] In *dicta*, the Court explained that a search may be permitted, even when probable cause for an arrest is lacking, if the officer ". . . had reasonable grounds to believe [the suspect] was armed and dangerous."[22] "The search for weapons approved in *Terry* consists solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault."[23] The case law is clear, ". . . a search incident to a lawful arrest may not precede the arrest and serve as part of its justification."[24]

A decade before *Michigan v. Long,* the Court had the opportunity to review an officer's actions when the officer approached the occupant of a vehicle, reached into the window, and removed a gun from the occupant's waistband.[29] All of the actions taken by the officer were based upon information supplied by a citizen. The Court refused to adopt a holding that a stop and frisk can only occur based upon an officer's observation.[30] In rational-

LAW ENFORCEMENT OFFICER MAY ORDER OCCUPANTS TO STEP OUT OF A VEHICLE DURING A TRAFFIC STOP, AND MAY FRISK THOSE PERSONS FOR A WEAPON WHEN THERE IS A REASONABLE BELIEF THAT THEY ARE ARMED AND DANGEROUS

With the authority to arrest comes the authority to search, incident to arrest,[25] in order to seize any weapon that can be used against the arresting officer.[26]

Terry was applicable to individuals only. In *Terry,* the encounter between the individual and law enforcement occurred when both were pedestrians on a public street and involved only the protective search of the individual for weapons. The question then became, could protective searches extend beyond the individual in the absence of probable cause? The Supreme Court addressed this question in *Michigan v. Long*.[27] The Court phrased its inquiry as, "…the authority of a police officer to protect himself by conducting a Terry-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle."[28]

izing its affirmation of the seizure, the Court examined the holding in *Terry*. The Court enunciated a principle from *Terry* that permits the limited pat down for weapons where the officer has justification in the belief the person being investigated is armed and dangerous. The Court stated, "[the] purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue [the] investigation without fear of violence . . . ."[31] The fact that this search occurred in an automobile rather than through a street encounter was not addressed by the Court. The Court recognized, based on the information provided to the officer, the officer ". . . had ample reason to fear for his safety."[32]

A law enforcement officer may order occupants to step out of a vehicle during a traffic stop, and may frisk those persons for a weapon when there is a reasonable belief that they are armed and dangerous.[33] The

21 *Sibron*, 392 U.S. at 47.
22 *Id.* at 63.
23 *Id.* at 65.
24 *Id.* at 67.
25 *Chimel,* 395 U.S. at 763-63.
26 Preston v. United States 376 U.S. 364, 367 (1964).
27 Michigan v. Long, 463 U.S. 1032 (1983).
28 *Id.* at 1037.
29 Adams v. Williams, 407 U.S. 143, 145 (1972).
30 *Id.* at 147.
31 *Id.* at 146.
32 *Id.* at 148.
33 *See* Pennsylvania v. Mimms, 434 U.S. 106 (1977);

Court stated, ". . . we recognize that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers."[34]

> . . . protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and the danger may arise from the possible presence of weapons in the area surrounding a suspect. … the 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, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is armed and dangerous and the suspect may gain immediate control of weapons.[35]

COURTS ARE DIRECTED TO ANALYZE BOTH DEADLY AND NON-DEADLY FORCE PURSUANT TO THE REASONABLENESS STANDARD OF THE FOURTH AMENDMENT.

The Court, in a footnote to this holding, stressed that their decision ". . . does not mean that police may conduct automobile searches *whenever* they conduct an investigative stop."[36] That footnote became the holding in *Arizona v. Gant,*[37] where the Supreme Court held an investigative stop does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been removed from the vehicle and secured, thus overruling *New York v. Belton.*[38] However, *Gant* added an independent exception for a warrantless search of a vehicle's compartment "when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle."[39] A unanimous Supreme Court ruled that a traffic stop is a seizure of both the driver and the passenger, thus either individual "may challenge the constitutionality of the stop."[40]

The street and roadside encounters were the basis for the Court's eventual decision permitting police to conduct a protective sweep of an in-home arrest, only when the officer has a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[41] The Supreme Court previously ruled that officers had ". . . the limited authority to detain the occupants of the premises while a proper search is conducted."[42] Justice Holmes wrote, ". . . the character of every act depends upon the circumstances in which it is done."[43]An officer encountering an individual has a finite amount of time within which to assess the situation. Unlike most individuals, a police officer has certain experiences and specialized training to draw upon[44] when making inferences and deductions regarding said situations. The question in every situation is whether "the circumstances are of such a nature as to create a clear and present danger."[45] "The reasonableness of the officer's

Maryland v. Wilson, 519 U.S. 408 (1997).

34 *Long*, 463 U.S. at 1047.

35 *Id.* at 1049.

36 *Id.* at n.14.

37 Arizona v. Gant, 556 U.S. 332, 351 (2009).

38 New York v. Belton, 453 U.S. 454 (1981).

39 *Gant*, 556 U.S. at 335.

40 Brendlin v. California, 551 U.S. 249, 259 (2007) (citing 6 W. LaFave, Search and Seizure, §11.3(e) (4th ed. 2004 and Supp. 2007)).

41 Maryland v. Buie, 494 U.S. 325, 325 (1990).

42 Michigan v. Summers, 452 U.S. 692, 705 (1981).

43 Schenck v. United States, 249 U.S. 47, 52 (1919) (citing Aikens v. Wisconsin, 195 U.S. 194, 205, 206 (1904)).

44 United States v. Aryizu, 534 U.S. 266, 273 (2002).

45 *Schenck*, 249 U.S. at 52.

decision to stop a suspect does not turn on the availability of less intrusive investigating techniques."[46]

In order to avoid suppression of any evidence recovered during one of these encounters, the officer has to be able to articulate what was being observed and how those observations were processed at the time the observations were made. That articulation must address "the totality of the circumstances"[47] encountered by the officer and related to experience and training. Each situation encountered by an officer is somewhat different. The officer must have a "particularized and objective basis' for suspecting legal wrongdoing."[48] "Reasonable suspicion depends on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[49] This "commonsense approach"[50] is met through the articulation of reasonable suspicion.

In two civil use of force[51] cases, the Supreme Court[52] recognized that, "police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation."[53] The court clearly limited the use of deadly force to those situations ". . . necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[54]

"[An] officer [has] the right to use deadly force if that officer harbored an objective and reasonable belief that a suspect presented an immediate threat to his safety."[55] Courts are directed to analyze both deadly and non-deadly force pursuant to the reasonableness standard of the Fourth Amendment.[56] "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[57]

The practitioner, either defense or prosecution, faced with the issue of officer's safety may find two recognized exceptions to the Fourth Amendment requirement persuasive. The first recognized exception, exigent circumstances[58] applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable. . . ."[59] Those exigent circumstances are not unqualified. The ". . . exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense."[60] Courts will permit the warrantless search pursuant to this exception where ". . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment . . . ."[61] The second recognized

46 United States v. Sokolow, 490 U.S. 1, 11 (1989).
47 United States v. Cortez, 449 U.S. 411, 417 (1981).
48 *Aryizu*, 534 U.S. at 273.
49 Navarette v. California, 134 S. Ct. 1683, 1690 (2014).
50 *Id.*
51 42 U.S.C. §1983 (2014).
52 Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985).
53 *Graham*, 490 U.S. at 397.
54 *Garner*, 471 U.S. at 3.
55 Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2014) (*internal quotes omitted*).
56 *Graham*, 490 U.S. at 395.
57 *Id.* at 396.
58 Mincey v. Arizona, 437 U.S. 385, 394 (1978).
59 *Id.*
60 Kentucky v. King, 131 S. Ct. 1849, 1858 (2011).
61 *Id.*

exception is consent.[62] When challenged, the court must make a determination based upon a "totality of the circumstances" whether the consent was knowingly and voluntarily given.[63]

The prosecutor applying these two analogous exceptions, must, by a preponderance of the evidence persuade the court that the officer acted appropriately given the situation the officer was confronted with at the time of the incident. The prosecutor is well advised to make certain that the officer can objectively articulate all facts that the officer was presented with which led to the use of force for the officer's safety. Likewise, applying these two exceptions the defense must be prepared to refute the officer's testimony. This preparation should include, but is not limited to: reviewing discovery, speaking to witnesses, going to the scene, attempting to locate witnesses not previously interviewed by police, and otherwise conducting a thorough independent investigation.

Courts have bestowed upon law enforcement officers the authority to use deadly and non-deadly force when confronted with an imminent threat. The officer will have to justify this force when called upon to do so. It stands to reason then that the same officer has the implied authority to conduct a search without the benefit of a search warrant when the officer perceives and can articulate with as much detail as possible why that action was taken.

62 Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

63 United States v. Mendenhall, 446 U.S. 544, 557 (1980).

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.

Mr. Wennar 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 an advanced trial advocacy class focusing on prosecuting gang homicide, and, developed and teaches a course regarding the challenges and obligations of the prosecutor.

HOW A DEFENDANT'S REHABILITATIVE NEEDS AND EFFORTS AFFECT FEDERAL SENTENCING

BY JANET FOSTER

Introduction

A criminal defense attorney can have a significant impact on the sentence, if any, a defendant receives through plea negotiations, pre-trial investigations, or the trial itself. But the federal sentencing process itself leaves ample room for an attorney to affect the sentence his or her client receives. Most attorneys are aware that one of the first steps to take when advising a client on the potential federal sentence he or she may receive is to walk the client through basic Sentencing Guidelines calculations, accounting for additions to the client's overall score if, for example, the defendant abused a position of trust during the commission of the crime[1], or subtractions to the client's Guidelines score if the client clearly demonstrates an acceptance of responsibility.[2] While these factors are important, an attorney should also make sure to ask whether the client has a drug or alcohol problem. This issue, though seemingly disconnected from the overall facts of the case, is nevertheless an important one that should be addressed because a client's rehabilitative needs could affect the sentence he or she receives and actually serves.

For example, the Supreme Court's ruling in *Pepper v. United States*[3] allows federal judges to take a defendant's rehabilitative efforts into account as a mitigating factor during resentencing[4] and the Guidelines similarly allow for sentencing judges to take a defendant's rehabilitative needs into account at sentencing. Moreover, it is fairly common for defense attorneys to use the Residential Drug Abuse Program ("RDAP"), enacted in 1989, to not only ensure that their clients receive treatment during incarceration, but also to secure a reduction in the overall federal sentence their clients receive.[5]

Although a defendant's rehabilitative efforts or needs may be a mitigating factor at resentencing as a result of *Pepper* and during sentencing because of the Guidelines and the availability of RDAP, what remains unclear is whether a defendant will *actually* receive a downward departure or rehabilitative treatment. First, *Pepper* merely broadens a judge's discretion at resentencing, stating that a judge "may" take a defendant's rehabilitative efforts into account at sentencing;[6] it does not mandate a judge to reduce a defendant's sentence for his or her rehabilitative efforts before sentencing.[7] Second, the Guidelines, which are non-binding on sentencing judges[8], do not provide those judges with a detailed roadmap or calculation for how much a defendant's sentence should be affected by the need for treatment.[9] Third, even though a judge may recommend that a defendant enroll in RDAP at sentencing, enrollment is not guaranteed because actual entry into the program is voluntary, within the sole control of the Bureau of Prisons, and subject to strict eligibility requirements and overcrowding.[10]

This article explores how *Pepper v. United States*, the Federal Sentencing Guidelines, and the Bureau of Prison's Residential Drug Abuse Program ("RDAP") differently affect a federal defendant's sentence. Part I addresses the history and purposes of the current federal sentencing regime in the United States and provides a brief background of sentencing defendants with substance abuse issues. Part II addresses how the Supreme Court's decision in *Pepper* may potentially lead to even more dis-

1 § 3B1.3.

2 *Id.* § 3E1.1.

3 *See* 131 S. Ct. 1229 (2011).

4 Pepper, 131 S. Ct. at 1249. *See generally*, Gall v. United States, 552 U.S. 38 (2007)(explaining factors, such as the Guidelines, the seriousness of the offense federal sentencing judges must look to when imposing sentence).

5 Indeed, there are manuals which give criminal defense attorneys "Practice Tips" on how to get a client into the Bureau of Prison's RDAP. *See infra* n. 101 for an example.

6 *Pepper*, 132 S. Ct. at 1249.

7 *Id.* at n. 17.

8 *See* United States v. Booker, 543 U.S. 220 (2005).

9 *See, e.g.*, U.S. Sentencing Guidelines Manual § 5C1.1(a) (stating that sentences within the minimum and maximum terms conform with the guidelines for imprisonment).

10 *See generally* Todd Bussert & Joel Sickler, *Grid & Bear It: Bureau of Prisons Update: More Beds, Less Rehabilitation*, 29 Mar Champion 42, 44–45 (2005) (explain the components of various RDAPs across the country).

parate sentencing after *United States v. Booker*,[11] and offers solutions to achieving more equitable results by clarifying the holding and updating the Guidelines. Finally, Part III explores how RDAP serves as a "back-end" sentencing mechanism to lower a defendant's length of imprisonment and analyzes how the program can be reformed to better serve the purposes of sentencing and achieve more uniformity in application.

A DEFENDANT'S REHABILITATIVE NEEDS COULD AFFECT THE SENTENCE HE OR SHE RECEIVES AND ACTUALLY SERVES.

Part I: Background and Purposes of Federal Sentencing in the United States

A. The Shift to a Determinate Sentencing System

For nearly a century, the Federal Government employed a system of indeterminate sentencing for federal criminal defendants in which judges were the "primary arbiters"[12] over a convicted defendant's sentence. In this regime, federal judges exercised "unfettered discretion."[13] The judges determined whether an offender should be incarcerated and for how long, or if the defendant should receive a lesser punishment, such as probation.[14] This indeterminate scheme was premised on the fact that "[d]iscretion allowed 'the judge and the parole officer to [base] their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation.'"[15] This sentencing scheme, however, attracted many critics who were concerned by how "astonishingly haphazard"[16] the system was as a result of placing discretion solely in the hands of individual judges, while lacking any real systemic oversight.[17]

A 1984 Senate Report[18] confirmed these fears, highlighting two serious consequences that emerged out of the indeterminate sentencing system. First, the Report found that the indeterminate system led to a wide variation in the sentences imposed on similarly situated defendants.[19] Second, the Report noted that the indeterminate system led to uncertainty as to the length of time a defendant would spend in prison.[20] In response to these findings, Congress enacted the Sentencing Reform Act of 1984 ("SRA"),[21] explicitly rejecting the indeterminate system which had endured nearly a century in favor of a determinate sentencing scheme.[22] The Act authorized the creation of the United States Sentencing Commission, which was tasked with creating the Sentencing Guidelines.[23] The purpose of the Guidelines was to provide courts with "a range of determinate sentences for categories of offenses

11 543 U.S. 220 (2005) (striking down provision of federal sentencing statute that made the Sentencing Guidelines mandatory and requiring district courts to focus on broader range of factors when imposing sentence).

12 Kevin Reitz, *Modeling Discretion in American Sentencing Systems*, 20 Law & Pol'y 389, 390 (1998).

13 Mistretta v. United States, 488 U.S. 370, 364 (1989).

14 *Id.* at 363.

15 Tapia v. United States, 131 S. Ct. 2382, 2386 (2011) (quoting *Mistretta*, 488 U.S. at 363) (alteration in original).

16 Reitz, *supra* note 12, at 390.

17 *Id.*; *see also Mistretta*, 488 U.S. at 365 (noting that the only real constraint on judges were the statutory maximums imposed by Congress, which a judge could still replace with probation).

18 S. Rep. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

19 *See* S. Rep. No. 98-225 at 38 (stating that every day judges "mete out an unjustifiably wide range of sentences" to similarly situated defendants).

20 *Id.* at 39.

21 Sentencing Reform Act of 1984, Pub. L. No. 98-47, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3742 (Supp. IV 1986) and 28 U.S.C. §§ 991-998 (Supp. IV 1986)).

22 *See* U.S. Sentencing Commission, *An Overview of the United States Sentencing Commission* 2, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (providing that the sentencing guidelines provide federal judges with a consistent, fair way to sentence defendants).

23 *Id.* at 3.

and defendants."[24] To that end, the Guidelines employed a point system that correlated with the length of incarceration a defendant would receive.[25] The Guidelines began with a base offense point level, which was determined by the crime itself, and then points would be added or subtracted depending on mitigating or aggravating factors, such as acceptance of responsibility or abuse of a position of trust.[26] The higher a defendant's point level, the longer the sentence.[27]

Under the SRA a judge was also required to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing."[28] The SRA defined the purposes of sentencing as to:

> (**A**) Reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (**B**) Afford adequate deterrence to criminal conduct;
>
> (**C**) Protect the public from further crimes of the defendant; and
>
> (**D**) Provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[29]

Accordingly, the SRA required judges to fashion sentences to achieve these purposes, commonly referred to as: retribution, deterrence, incapacitation, and rehabilitation.[30]

B. A Return to Indeterminacy

Despite Congress's shift to a determinate sentencing system with its enactment of the SRA, recent Supreme Court rulings have pushed federal sentencing back toward the indeterminate system of the past. For example, in 2005 in *United States v. Booker*, the Supreme Court held that the SRA's provision requiring a judge to sentence a defendant within the appropriate Federal Sentencing Guidelines[31] range violated a defendant's Sixth Amendment right to have the jury "find the existence of any particular fact that the law makes essential to his punishment."[32] As a result of *Booker*, judges have essentially been "set free"[33] to make their own sentencing decisions, because *Booker* made the Federal Sentencing Guidelines advisory, rather than mandatory.[34]

Indeed, since *Booker*, the disparity and uncertainty that the 1984 Senate Report first uncovered has reappeared. As the Department of Justice noted in its 2010 report to the United States Sentencing Commission, sentencing in this country, on the one hand, "remains closely tied to the Sentencing Guidelines" with respect to crimes involving sentences "largely determined by mandatory minimum sentencing statutes."[35] On the other hand, particularly in white collar and child pornography cases, judges "regularly impose sentences outside the applicable guideline range."[36] The uncertainty created by these dual regimes, the Department

24 *Mistretta*, 488 U.S. at 368.

25 *See, e.g.*, U.S. Sentencing Guidelines Manual § 4A1.1 (listing the point values allocated to defendants based on their criminal history).

26 *Id.* § 3E1.1.

27 *Id.* § 1B1.1.

28 18 U.S.C. § 3553(a) (2012).

29 § 3553(a)(2).

30 Tapia v. United States, 131 S. Ct. 2382, 2386 (2011). *See generally* Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1 (2006) (discussing the history of sentencing practices and the purpose of sentencing).

31 United States v. Booker, 543 U.S. 220, 234 (2005) (arguing the Sentencing Guidelines are mandatory and binding on judges as "the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases") (emphasis in original) (quoting 18 U.S.C. § 3553(b)).

32 *Booker*, 543 U.S. at 232 (citing Blakely v. Washington, 542 U.S. 296, 300–01 (2004)).

33 Editorial, *Rethinking Criminal Sentences*, N.Y. Times (July 27, 2010), http://www.nytimes.com/2010/07/28/opinion/28wed1.html.

34 *Booker*, 543 U.S. at 233 (noting that "advisory" Guidelines would not implicate the Sixth Amendment).

35 Letter from Jonathan J. Wroblewski, Dir., Office of Policy and Legislation, U.S. Dep't of Justice Criminal Div. to William K. Sessions III, Chief Judge, U.S. Sentencing Comm'n (June 28, 2010) at 1.

36 *Id.* at 2.

of Justice noted, will "breed disrespect for the federal courts," diminish "trust and confidence in the criminal justice system," and jeopardize sentencing's role of deterring future criminal conduct.[37] The Sentencing Commission has similarly observed "troubling trends in sentencing" in the wake of *Booker* and its progeny, noting that there have been "growing [sentencing] disparities among circuits and districts."[38] Although the Sentencing Guidelines continue to provide a "gravitational pull in federal sentencing," *Booker* and its progeny still leave criminal defendants largely in doubt about what type of sentence they may receive, because those cases restored wide discretion to individual judges who may sentence according to their own biases and beliefs.[39]

C. Sentencing Defendants with Substance Abuse Problems

Before the Supreme Court ultimately ruled that the Sentencing Guidelines were merely advisory, courts were divided over whether a defendant's substance abuse and need for rehabilitation could be a mitigating factor at sentencing.

1. Courts Opposed to Granting Downward Variances in Light of a Defendant's Rehabilitative Efforts

Courts that were reluctant to issue downward departures in recognition of a defendant's post-sentencing rehabilitative efforts typically cited four arguments:

> 1) the Commission adequately considered drug rehabilitation in the Guidelines' provision allowing a reduction in sentence based on the defendant's acceptance of responsibility;
>
> 2) the Commission adequately considered drug rehabilitation in the Guidelines' proscription against departing downward based on the defendant's drug dependency at the time of the crime;
>
> 3) allowing a sentence reduction for drug rehabilitation is contrary to the Act's stated objective that imprisonment not be used as a means of promoting rehabilitation; and
>
> 4) allowing drug addicts a potential reduction is unfair to defendants who are not addicted to drugs.[40]

Underlying these considerations was a strong commitment to following the Guidelines, and fear that consideration of such factors would create an uncertain and disparate sentencing regime.

2. Courts Supporting the View that Rehabilitative Efforts be Taken into Account at Sentencing

Courts that supported taking a defendant's rehabilitative needs and efforts into account at sentencing did so because they found

37 *Id.*

38 *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. On the Judiciary*, 112 Cong. 12 (2011) (statement of Patti V. Saris, Chair, United States Sentencing Commission).

39 *Id.*

40 J. Gordon Seymour, Comment, *Downward Departures from the Federal Sentencing Guidelines Based on the Defendant's Drug Rehabilitative Efforts*, 59 U. Chi. L. Rev. 837, 841 (1992); *see also* United States v. Harrington, 947 F.2d 956, 962 (D.C. Cir. 1991) (finding that the Sentencing Commission recognized the need for departure from the Guidelines only in cases to account for atypical defendants); United States v. Pharr, 916 F.2d 129, 130 (3d Cir. 1990) (holding that overcoming a drug addiction did not warrant a downward departure from the Guidelines for the defendant); United States v. Van Dyke, 895 F2d 984, 987 (4th Cir. 1990) (determining the defendant's post offense conduct could be considered, but the conduct could fit into one of the established categories and could not be an independent factor for departure); United States v. Martin, 938 F.2d 162, 164 (9th Cir. 1991) (noting that allowing departures for post-arrest rehabilitation would favor defendants with drug addictions over defendants without such addictions); United States v. Williams, 948 F.2d 706, 710–11 (11th Cir. 1991) (reiterating that post-arrest rehabilitation was contemplated by the Commission and can be calculated as part of the acceptance of responsibility mitigating factor); United States v. Sklar, 920 F.2d 107, 116 (1st Cir. 1990) (excluding downward departures based on rehabilitation as departures from the Guidelines should be reserved for the atypical defendant).

that the Guidelines failed to adequately consider a defendant's personal characteristics, and emphasized the rehabilitative purposes of sentencing. For example, a district court judge in the Southern District of New York vigorously attacked the "widespread but serious misconception that Congress . . . intended to do away with consideration of the personal characteristics of the offender."[41] The court focused on the defendant's significant rehabilitative efforts; he had remained drug-free for nearly two years, obtained employment, and resumed his familial responsibilities.[42] Given the defendant's history and characteristics, the court held that it would be "senseless, destructive and contrary to the objectives of the criminal law to now impose a year's jail term," (the defendant's Guidelines range was eight to fourteen months), and determined that the defendant's rehabilitation was a sufficient mitigating factor justifying a downward departure.[43]

Similarly, the Sixth Circuit determined that §5K2.0 of the Guidelines permitted a consideration of evidence of a defendant's efforts to avoid drugs as a mitigating circumstance whereby a judge would have discretion to consider and use such evidence as a basis for departure.[44] In remanding the case, however, the circuit court hinted at applicability problems to come: "we remand this case to the District Court, instructing the judge that he may, but need not, consider the defendant's efforts to stay away from drugs as a basis for departing from the [G]uidelines."[45]

ALTHOUGH THE SENTENCING GUIDELINES CONTINUE TO PROVIDE A "GRAVITATIONAL PULL IN FEDERAL SENTENCING," *BOOKER* AND ITS PROGENY STILL LEAVE CRIMINAL DEFENDANTS LARGELY IN DOUBT ABOUT WHAT TYPE OF SENTENCE THEY MAY RECEIVE

Part II: Pepper v. United States: Extending Booker's Legacy

In *Pepper*, the Supreme Court reaffirmed its holding in *Booker* and its progeny that sentencing courts need only give the Guidelines "respectful consideration"[46] when it expressly authorized sentencing courts to consider a defendant's post-sentencing rehabilitative efforts at resentencing. Despite its strong endorsement of the underlying principles of *Booker* and push for more individualized sentencing, the opinion initially received little attention, as it was released just minutes before the high-profile free speech case, *Snyder v. Phelps*.[47] Nevertheless, commentators have since noted, "the real spice in *Pepper* is the Court's reminder to the courts of appeals and the Sentencing Commission that the history and characteristics of the *offender* are just as important as the nature of the *offense* in just sentencing."[48]

41 Seymour, *supra* note 39, at 856 (quoting United States v. Rodriguez, 724 F. Supp 1118, 1119 (S.D.N.Y. 1989)).

42 Rodriguez, 724 F. Supp at 1119.

43 *Id.*

44 United States v. Maddalena, 893 F.2d 815, 817 (6th Cir. 1989).

45 *Id.* at 818.

46 Pepper v. United States, 131 S. Ct. 1229, 1241 (2011) (citing Kimbrough v. United States, 552 U.S. 85, 101 (2007)).

47 131 S. Ct. 1207 (2011); *see* Andrew Cohen, *The Important Supreme Court Decision You Didn't Hear About Last Week,* Politics Daily (Mar. 6, 2011), http://www.politicsdaily.com/2011/03/06/the-important-supreme-court-decision-you-didnt-hear-about-last/ (contending that the *Pepper* decision was eclipsed in the press by the *Synder v. Phelps* decision).

48 Steven Kalar, *Red Hot Chili Pepper: An Individualized Sentencing Encore*, 35 Mar Champion 38, 38

1. The Facts

In the fall of 2003, Jason Pepper was arrested and charged with conspiracy to distribute 500 grams or more of methamphetamine.[49] Pepper faced a Guidelines sentencing range of 97 to 121 months, but the government moved for a 15 % downward departure based on Pepper's substantial assistance.[50] Despite the government's recommendations, the District Court for the Northern District of Iowa sentenced Pepper to a twenty-four month prison term, resulting in a nearly 75% departure from the original Guidelines range.[51] The government appealed this sentence, and, in June 2005, just three days before Pepper would complete his 24 month term, the Eight Circuit reversed and remanded Pepper's case for resentencing.[52] At the next resentencing hearing, Pepper put on substantial evidence of his post-sentencing rehabilitative efforts.[53] In affirming the original sentence of 24 months, the court held that "it would [not] advance any purpose of federal sentencing policy or any other policy behind the federal sentencing Guidelines to send [Pepper] back to prison."[54]

The government again appealed Pepper's sentence, and once again, the Eight Circuit reversed and remanded the case for resentencing this time finding that: "post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance" and noting that consideration of this type of evidence "would create unwarranted sentencing disparities and inject blatant inequities in the sentencing process."[55] After several more appeals and resentencing hearings and nearly five years after the imposition of his original sentence, the sentencing court imposed a sixty-five month imprisonment term, to be followed by one year of supervised release.[56] The Eighth Circuit affirmed this sentence, and stood by its determination that Pepper's post-sentencing rehabilitation efforts, though admirable, were not appropriate factors to consider at resentencing.[57] Pepper appealed the case to the Supreme Court, and the Court granted *certiorari* to decide whether a district court may consider evidence of a defendant's post-sentencing rehabilitation to support a downward departure at resentencing.

2. The Opinion: A Return to Individualized Sentencing

Writing for the majority, Justice Sotomayor began the Court's opinion by underscoring the foundational, albeit pre-Guidelines,[58]

(2011) (emphasis in original).

49 *Pepper*, 131 S. Ct. at 1236.

50 *Id.*; *see also* U.S. Sentencing Guidelines Manual § 5K1.1 (2009) (authorizing the Government to move for a downward departure based on a defendant's substantial assistance).

51 Pepper, 131 S. Ct. 1229, 1236 (2011).

52 *Id.*

53 Pepper testified about his new found sobriety due to his participation in a 500 hour drug treatment program in prison, and his renewed optimism for life given his re-enrollment in college and part-time employment. Pepper's father testified that his son had "truly sobered up" and had a more mature outlook on life. Finally, his probation officer noted that a twenty-four month sentence would be reasonable given Pepper's substantial assistance, post-sentencing rehabilitation, and low risk of recidivism. *Id.* at 1237.

54 *Id.*

55 *Pepper*, 131 S. Ct at 1237-38.

56 *Id.*

57 *Id.* at 1239.

58 Although concurring in the judgment, Justice Breyer took issue with the majority's reliance on cases such as Williams v. N.Y., 337 U.S. 241 (1949) and the emphasis

principle that "the punishment should fit the offender and not merely the crime."[59] Indeed, the majority's opinion in *Pepper* placed a heavy emphasis on the role that offender characteristics should play during sentencing because:

TO GIVE SENTENCING COURTS MORE GUIDANCE AND REDUCE THE POTENTIAL FOR DISPARITY AND UNCERTAINTY, THE UNITED STATES SENTENCING COMMISSION SHOULD CONSIDER GIVING SENTENCING COURTS SPECIFIC STANDARDS TO APPLY WHEN ANALYZING A DEFENDANT'S REHABILITATIVE EFFORTS

"[p]ermitting sentencing courts to consider the widest possible breadth of information about a defendant 'ensures that the punishment will suit not merely the offense but the individual defendant.'"[60] By strongly endorsing the need for individualized sentencing and judicial tailoring, the Court glossed over Congress' concern about disparate and uncertain sentences, made obvious by the enactment of the SRA and the directive to the Sentencing Commission to promulgate the Guidelines.

To support its proposition, the Court focused on Congress' directive that, "*No limitation* shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[61] The Court then noted that evidence of a defendant's rehabilitation would also be "highly relevant" to the § 3553(a) factors that Congress directed sentencing courts to consider, because its relation to the defendant's "history and characteristics" was pertinent to the "need for the sentence imposed," and "critically informed" the sentencing judge's penultimate duty to "impose a sentence sufficient, but not greater than necessary" to comply with the § 3553(a)(2)'s sentencing purposes.[62]

The Court, though, was unconcerned by how the need for individualized considerations would affect the Guidelines. After noting that the Guidelines were just a "starting point and the initial benchmark,"[63] the Court concluded that:

> [T]he Court of Appeals erred in categorically precluding the District Court from considering evidence of Pepper's post-sentencing rehabilitation after his initial sentence was set aside on appeal. District courts post-*Booker* may consider evidence of a defendant's post-sentencing rehabilitation at resentencing and such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range.[64]

Ultimately, the Court was satisfied with the precedent set by *Booker* and *Kimbrough* that a sentencing court must give "respectful consideration" to the Guidelines but may take other statutory concerns into account as well.[65]

B. Application of Pepper: To Depart or Not to Depart

Although *Pepper* stood for the explicit proposition that a court could not categorically

on treating every convicted offender separately, noting that "Congress in the Sentencing Reform Act . . . disavowed the individualized approach to sentencing that [Williams] followed." *Pepper*, 131 S.Ct. at 1253 (Breyer, J., concurring).

59 *Williams*, 337 U.S. at 247.

60 *Pepper*, 131 S. Ct. at 1240 (quoting Wasman v. United States, 468 U.S. 559, 564 (1984).

61 *Pepper*, 131 S. Ct. at 1240 (quoting 18 U.S.C. § 3661) (emphasis added by the Court).

62 *Pepper*, 131 S. Ct. at 1242 (2011).

63 Id. at 1241 (citing Gall v. United States, 552 U.S. 38, 49–51 (2007)).

64 *Pepper*, 131 S. Ct. at 1249.

65 *Id.* at 1241 (citing Kimbrough v. United States, 552 U.S. 85, 101 (2007)).

ban evidence of a defendant's post-sentencing rehabilitative efforts at resentencing, it left open the question of what a court should do once presented with such evidence, how much evidence was needed to support a downward variance, and how much of a downward variance, if any, should be given. Since the Supreme Court issued its opinion in *Pepper*, only a few Circuit Courts have squarely addressed the issue of post-sentencing rehabilitative efforts.

For example, in remanding a case for resentencing because the district court failed to consider the defendant's rehabilitative efforts, the Third Circuit noted:

> [A] defendant's post-sentencing rehabilitation illuminate[s] a defendant's character and assist[s] the sentencing court in assessing who the defendant is as well as who s/he may become. Such information may, in some cases, be as significant in ascertaining the defendant's character and likelihood of recidivism as the defendant's conduct before s/he was forced to account for his/her antisocial behavior.[66]

The Seventh Circuit, while not directly addressing the effect that rehabilitative efforts should have on resentencing, has nevertheless stated that a district court *may* entertain new arguments and evidence (presumably including rehabilitative efforts) when refashioning a new sentence.[67] Moreover, in *United States v. Gapinski*, the Sixth Circuit held that *Pepper* essentially created a "new constitutional rule," *requiring* the district court to rule on the effect that the defendant's post-sentencing rehabilitative efforts should have on his sentence.[68]

But most federal circuits have seized on the Court's equivocal language in *Pepper* and noted that *Pepper* in no way requires them to impose downward departures. These courts point out that the Supreme Court merely stated that a sentencing court "*may*" consider post-rehabilitative evidence and such evidence "*may*" support a downward variance.[69] Indeed, in the same year that it issued its opinion in *Gapinski*, the Sixth Circuit held that *Pepper* in no way meant that district courts *must* reduce a defendant's sentence when there is evidence of post-sentencing rehabilitation.[70] In upholding the district court's sentence and refusing to credit the defendant's post-sentence behavior, that Circuit stated: "[*Pepper*] nowhere holds that courts must consider post-sentence conduct."[71]

The Eleventh Circuit has been most explicit in this regard, noting in an unpublished decision issued in 2012 that:

> . . . *Pepper* merely permits, and does not require, the district court to grant a downward variance if a defendant provides evidence of rehabilitation. Thus, the district court did not abuse its discretion in finding that any rehabilitation Santos experienced before his re-sentencing did not affect the court's calculation of an appropriate sentence.[72]

In *United States v. Leahy*, the defendant argued to the First Circuit Court of Appeals that the district court gave insufficient weight to his rehabilitation at resentencing.[73] In rejecting this argument and affirming the defendant's sentence, the court emphasized the limits of *Pepper*, noting a defendant's rehabilitation is "highly relevant . . . [b]ut this is only half of the story. Although a sentencing court must consider evidence of a defendant's rehabilita-

66 United States v. Salinas-Cortez, 660 F.3d 695, 698 (3d Cir. 2011). *See also* United States v. Bailey, 459 Fed.Appx. 118, 120 (3d Cir. 2012) (remand was required to determine the effect of the defendant's post-sentencing rehabilitation on his sentence).

67 United States v. Barnes, 660 F.3d 1000, 1006 (7th Cir. 2011).

68 United States v. Gapinski, 422 F. App'x. 513, 520 (6th Cir. 2011) (stating "[i]f a defendant's case is on direct appeal when the Supreme Court articulates a new constitutional rule, we apply that new rule to the defendant's case").

69 *See, e.g.*, United States v. Santos, 476 F. App'x. 694, 696 (11th Cir. 2012).

70 *See generally* United States v. Butler, 443 Fed. Appx.147 (6th Cir. 2011).

71 *Id*. at 153.

72 *Id.*

73 United States v. Leahy, 668 F.3d 18 (1st Cir. 2012).

tion as part of its analysis, it is not required to impose a lesser sentence as a result."[74]

B. Going forward: How Courts Should Evaluate A Defendant's Post-Sentencing Rehabilitative Efforts

As the Seventh Circuit has noted, few courts have applied *Pepper*, and the Supreme Court has not yet defined the scope of the case.[75] However, it is clear from the First, Third, Sixth, and Eleventh Circuits' application of *Pepper* that there still remains uncertainty as to what a court should do with evidence of a defendant's post-sentencing rehabilitative efforts. Although *Pepper* bars a sentencing court from excluding such evidence, it gives no further guidance on how a court should analyze the evidence, and to what extent, if any, it should be used to effect a downward variance from the Guidelines. Thus, there is a growing potential for wide ranges of disparity and uncertain sentences as *Pepper* gains more traction throughout the various district and circuit courts.

1. Clarifying The Scope of Pepper

In his concurring opinion in *Pepper*, Justice Breyer took care to point out that the Court's holding was in tension with the Guidelines' policy statement on Post-sentencing Rehabilitative Efforts (§5K2.19) which, at the time, noted that a defendant's "[p]ost-sentencing rehabilitative efforts, even if exceptional . . . are not an appropriate basis for downward departure when resentencing."[76] The following year, the Sentencing Commission, presumably because of the Court's holding in *Pepper*, amended the Guidelines by deleting §5K2.19 altogether.[77] However, the Guidelines have not addressed how, if at all, federal courts should take a defendant's post-sentencing rehabilitative efforts into account at resentencing.

To give sentencing courts more guidance and reduce the potential for disparity and uncertainty, the United States Sentencing Commission should consider giving sentencing courts specific standards to apply when analyzing a defendant's rehabilitative efforts. The Court in *Pepper* did not define rehabilitation, leaving individual judges free to impose their own standards and potential biases as to whether a defendant's actions constitute true "rehabilitation," or something less. Moreover, nowhere in *Pepper* did the Court state how much evidence is necessary to warrant a departure. For example, should there be significant rehabilitative evidence or is some evidence sufficient? Finally, the Court's continued use of ambivalent terminology, such as "may," while deferential to sentencing courts, also increases the likelihood of arbitrary application. The Sentencing Commission should consider answering these threshold questions to give sentencing courts additional guidance and, at the very least, create sample criteria for sentencing judges to refer to before applying *Pepper* at resentencing.

2. The Guidelines and General Sentencing

The Guidelines' overall provisions on how a sentencing judge should factor in a defendant's drug or alcohol abuse and need for treatment during sentencing in general are lacking. The Sentencing Guidelines provide that "in certain cases a downward departure *may* be appropriate to accomplish a specific treatment purpose."[78] However, when a defendant suffers from substance abuse, the Guidelines do not recommend *how much* of a departure is warranted, as no point increase or decrease is provided. Moreover, the Commission seems to disfavor downward departures related to treatment needs altogether, and instead favors conditions of supervised release that are tailored to

74 *Id*. at 25.

75 United States v. Barnes, 660 F.3d 1000, 1007 (7th Cir. 2011).

76 Pepper v. United States, 131 S. Ct. 1229, 1252 (2011) (Breyer, J., concurring) (citing U.S. Sentencing Guidelines Manual § 5K2.19).

77 See U.S. Sentencing Guidelines Manual ch. 5 (2013), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/Chapter_5.pdf.

78 *Id*. at § 5H1.3 (2013) (emphasis added).

address a defendant's substance abuse:

> Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.[79]

Sentencing judges, therefore, are left with the option of departing downward, imposing modified conditions of supervised release, or a hybrid of both where counsel can show that the defendant has substance abuse issues.

The Guidelines, however, do give some limited instructions on how a downward departure *could* apply in cases where a specific need for treatment is shown.[80] Under note six in the commentary to § 5C1.1, courts are instructed to depart downward if "the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed."[81] That provision goes on to provide two discrete examples of how such a departure could apply, but it leaves open the possibility for courts to refrain from imposing the fullest potential downward departure. Defense counsel, therefore, should always take note of the Guidelines commentary on a defendant's need for specific treatment as discussed in §§ 5H1.4 and 5C1.1, and use those provisions to argue for reduced incarceration and increased supervised release to facilitate specific treatment needs. However, due to the fact that the Guidelines are voluntary and the language in the Guidelines dealing with specific treatment purposes is unclear, it is highly likely two similarly situated defendants, both with a need for rehabilitation, may receive different sentences.

To account for this potential disparity, the U.S. Sentencing Commission should consider clarifying the Guidelines to give more guidance to district courts on how a defendant's need for rehabilitation should affect the defendant's sentence.

Part III: The Residential Drug Abuse Program: how a defendant can receive substance abuse treatment while incarcerated and at the same time reduce his overall length of incarceration

Although *Pepper* and the Guidelines provide federal judges the chance to account for a defendant's rehabilitative needs and efforts to support downward variances at sentencing, the Bureau of Prison's Residential Drug Abuse Program (RDAP) also provides opportunities for offenders to receive rehabilitative treatment and the chance for an early release from prison. The way the program is structured, however, can also lead to disparities and uncertainties in sentencing.

THE SUPREME COURT'S RECENT DECISION IN *TAPIA V. UNITED STATES*, ILLUMINATES THIS PROBLEM BY ILLUSTRATING HOW HELPLESS JUDGES ARE AT ENSURING DEFENDANTS RECEIVE THE BENEFITS OF THE RDAP

A. Background

In 1989, the Bureau of Prisons (BOP) first implemented its RDAP based on the cor-

79 § 5H1.4.
80 § 5C1.1, cmt. n. 6.
81 *Id.*

rectional drug abuse treatment research and literature at the time.[82] Participation in the program was voluntary, and inmates who completed the year-long program received no reduction in sentence.[83] Despite the BOP's efforts to provide incentives for entry, such as "performance pay awards . . . special T-shirts, ball caps, and pens" this early RDAP received relatively low numbers of volunteers.[84] However in 1994, Congress passed the Violent Crime Control and Law Enforcement Act (VCCLEA),[85] which overhauled BOP's RDAP[86] and boosted the program's popularity.

In general, RDAP provides "intensive drug abuse treatment" to inmates diagnosed with a drug use disorder, as defined by the American Psychiatric Association.[87] A doctoral-level psychologist, known as the "Drug Program Coordinator," runs the program and oversees the treatment staff.[88] RDAP inmates are housed together in a treatment facility separate from the general prison population, and treatment is provided for a minimum of 500 hours over nine to twelve months.[89] However, inmates that meet the VCCLEA's qualification criteria for RDAP[90] cannot automatically enter the program. Instead, admission to RDAP is ultimately controlled by RDAP clinical staff who screen and assess potential inmates to ensure that they meet the diagnostic criteria for a substance use disorder.[91] Entry into the program is completely voluntary, although accepted inmates are required to sign an agreement to participate in RDAP and abide by its rules.[92]

B. The "Back-End Sentencing Realities"[93] of RDAP

After the BOP's preliminary efforts to encourage inmate enrollment into RDAP failed to garner sufficient interest, Congress overhauled RDAP, and created new incentives for inmates to join the program. Congress linked an inmate's successful completion of RDAP with a reduction in his or her prison sentence. The VCCLEA provides, as an incentive for prisoners' successful completion of a treatment program, "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by [BOP], but such reduction may not be more than one year from the term the prisoner must otherwise serve."[94]

Importantly, early release determinations are decided solely by the Drug Abuse Program Coordinator. BOP has established additional qualifications to determine whether inmates will be eligible for early release.[95] As a threshold matter, BOP requires the early release to be based on the length of the inmate's

82 Fed. Bureau of Prisons, Annual Rep. on Substance Abuse Treatment Programs to the U.S. Congress Judiciary Committee (2012), available at http://www.bop.gov/inmates/custody_and_care/docs/annual_report_fy_2012.pdf [hereinafter BOP Substance Abuse Report, 2012].

83 Alan Ellis, *Reducing Recidivism: The Bureau of Prison's Comprehensive Residential Drug Abuse Program*, The Champion 35-39 (2006), available at http://alanellis.com/wp-content/uploads/2013/11/Reducing-Recidivism-072006.pdf.

84 *Id.*

85 Violent Crime Control and Law Enforcement Control Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

86 18 U.S.C. § 3621 presents the changes VCCLEA made to RDAP.

87 BOP Substance Abuse Report, 2012, *supra*, n. 84.

88 *Id.*

89 *Id.*

90 § 3621(5)(B) (defining "the term 'eligible prisoner' [as] a prisoner who is-- (i) determined by the Bureau of Prisons to have a substance abuse problem; and (ii) willing to participate in a residential substance abuse treatment program").

91 BOP Substance Abuse Report, 2012, *supra*, n. 84.

92 *Id.*

93 Doug Berman, *New GAO Report Reviews Back-End Sentencing Realities in Federal System*, Sentencing Law and Policy (Feb. 13, 2012, 11:10 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/02/new-gao-report-reviews-back-end-sentencing-realities-in-federal-system.html.

94 18 U.S.C. § 3621(e)(2)(B).

95 *See generally* Bureau of Prisons, Program Statement No. P5331.02: Early Release Procedures Under 18 U.S.C. §3621(e) (2009), available at http://www.bop.gov/policy/progstat/5331_002.pdf [hereinafter BOP Program Statement, 2009]. The Supreme Court upheld this scheme in Lopez v. Davis, 531 U.S 230, 233 (2001), whereby it ruled that Congress intended for this discretion to be placed solely within the BOP's control, rather than under the sentencing judge's control.

sentence[96]:

Sentence Length	Early Release Time-Frame
30 Months of Less	No more than 6 months
31-36 Months	No more than 9 months
37 Months or More	No more than 12 months

Legal commentators have noted that, regardless of whether a defendant has a diagnosable substance abuse issue, she or he must be sentenced to a certain amount of time to be eligible for the early release program. For example:

Accounting for customary good time credits, the 24-month cutoff means that a defendant with a diagnosable disorder and no pretrial jail credit must receive a sentence of 27.6 months or greater to even be considered for the program. Notably, BOP officials have stated publicly that the 24-month cutoff has shifted to 27 months, which means a sentence of at least 31 months (if no pretrial jail credit).[97]

Moreover, the BOP has designated certain inmates, such as certain types of violent offenders, to be ineligible for early release.[98]

1. Getting Into RDAP

Although program entry is determined completely by BOP, there are a few things that attorneys can do to improve a client's eligibility for the early release program. For example, a 2006 American Bar Association publication advised:

> **Tip 7:** Judicial recommendations for RDAP and documentation of substance abuse in the PSI [presentence investigation report] help establish eligibility for treatment. The BOP requires that the inmate's substance abuse problem (including alcoholism and prescription drug abuse) be substantiated in the presentence report to make him or her eligible to participate in residential treatment. A clear indication in the presentence report of a substance abuse problem that existed within one year of the defendant's incarceration, and a sentencing court's recommendation that the defendant participate in residential treatment, will help avoid problems of eligibility for early release.[99]

Lawyers also must be aware that "charge bargaining can result in a better chance at RDAP eligibility."[100]

Accordingly, although a defendant may actually be in need of counseling and treatment within a RDAP, the program is also viewed as a way to facilitate a client's release at the earliest possible opportunity; successful completion of the program can eliminate up to one year of the defendant's prison sentence.[101] This early release incentive is significant: Congress essentially has created a system linking the length of a defendant's actual prison sentence to his

96 BOP Program Statement, 2009, *supra*, n. 97, at 7.

97 Alan Ellis & Todd Bussert, *Federal Sentencing, Looking at the BOP's Amended RDAP Rules*, 26 Crim. Just. 37, 39 (2011).

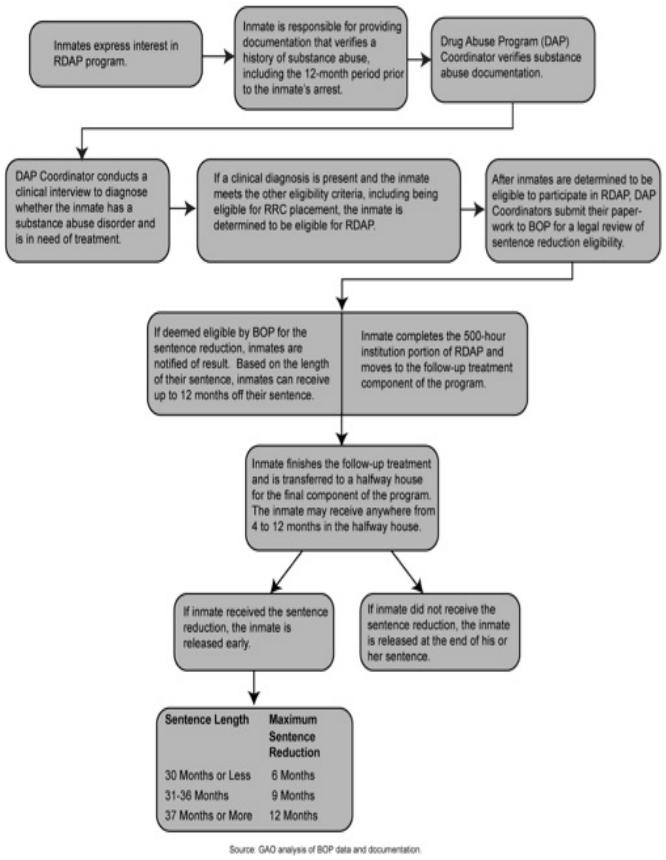
98 For a listing of all ineligible inmates, see BOP Program Statement, 2009, *supra*, n. 97, at 4; *see also* Lopez v. Davis, 531 U.S. 230, 233 (2001) (holding that BOP has discretion to determine which inmates are eligible for the program's early release).

99 Alan Ellis, *Departments, Federal Sentencing Practice* Tips*: Part 2*, 21 Crim. Just. 55, 56, (2006) [hereinafter Ellis, *Federal Sentencing Practice* Tips].

100 *Id.* (stating, for example, that defense counsel should ensure defendant is not convicted of a violent felony, as it would make him or her ineligible for sentence reduction).

101 Ellis, *Federal Sentencing Practice* Tips at 55, *supra*, n. 101.

post-sentencing rehabilitative efforts.[102]



2. Tightened Restrictions

Given the popularity of the program, the BOP's national drug abuse coordinator acknowledged in July 2008 that "2007 [was] the first year that the Bureau was unable to meet its mandate to provide treatment for all inmates who volunteer for and are qualified for treatment before they are released from the Bureau of Prisons."[103] Shortly thereafter, the BOP amended its RDAPs for Spanish-speaking prisoners; to participate in the program, applicants must now be able to speak and understand English. Some commentators believe that this change was enacted due to budgetary concerns, but note that the BOP's larger concern could have been an agency interest in complying with Congress's mandate.[104] The BOP in 2009 declared that eligible prisoners must "ordinarily" be within twenty-four months of release to qualify for admittance to RDAP.[105] This twenty-four month requirement had the effect of requiring a defendant with a diagnosable disorder and no pretrial jail credit to receive a sentence of 27.6 months or greater to ensure RDAP eligibility.[106]

C. Uncertainty Abounds

Although a defendant with substance abuse issues may be eligible for treatment in the RDAP and thus could earn a potential one year sentence reduction, a defendant facing sentencing, and, more importantly, the sentencing judge herself, has no way of being certain that the defendant will actually enter RDAP. This uncertainty exists because entry and successful completion of the program is: (1) determined solely by the BOP, as a judge's order that a defendant enter a specific prison for treatment has "no binding effect"[107]; (2) susceptible to administrative oversight, waitlists and eligibility restrictions[108]; and (3) completely vol-

102 The above chart, created by the U.S. Government Accountability Office, depicts how an early-release eligible defendant who successfully completes RDAP treatment receives a sentence reduction. *See* U.S. Gov't Accountability Office, GAO-12-320, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (2012), *available at* http://www.gao.gov/assets/590/588284.pdf.

103 Ellis & Bussert, *supra* note 99, at 38.

104 *Id.*

105 *Id.*

106 *Id.*

107 18 U.S.C. § 3621(b)(5).

108 Ellis & Bussert, *supra* note 99, at 38–39 (proposing that presently there are about 6,000 inmates enrolled in RDAP at forty-nine different prisons, and about 7,600 more inmates waiting for entry into the program); *see also* Bussert & Sickler, *supra* note 9, at 45 (asserting "[s]uccessful navigation of the eligibility gauntlet earns placement on a wait list, which is governed not by degree of treatment needs but rather by one's projected release date. Those approved at an institution not offering RDAP are compelled to endure the uncertainty of transfer, which can be time-consuming for staff to arrange, is unlikely to involve out-of-region moves due to the budget crunch, and heightens the risk of delayed program participation. Announcement of one's RDAP entrance is made by the posting of a class list. However, any list is subject to change at the last possible moment, with those at an RDAP institution frequently bumped due to the arrival of a bus carrying others with less time remaining to serve. Removal from the list, for whatever reason, can postpone admittance for up to several months.").

untary because the inmate cannot be forced to enter the RDAP. Indeed, although a sentencing judge may recommend that a defendant enter RDAP when she issues the sentence, she nevertheless has no way of knowing whether or not the defendant will actually enter the program and whether the defendant will receive a reduced sentence due to successful completion of the program:

> RDAP participation does not require a judicial recommendation, though a prisoner is in an obviously stronger position with a court's recognition and encouragement of treatment, especially if accompanied by a recommendation for a facility with the program. Also, a judicial recommendation and a satisfactory PSI do not assure designation to one of the dozens of facilities nationwide that offer the program. A prisoner's sentence length or a simple administrative oversight can result in placement at an institution lacking requisite services.[109]

Accordingly, there is no guarantee at sentencing that similarly situated offenders will get the rehabilitative treatment they need or earn up to a one-year sentence reduction due to successful program completion. Instead, there is a potential for disparity for whether a defendant receives rehabilitative treatment at all. For example, even if two RDAP-eligible, similarly situated defendants who want to enter the program receive the same judicially imposed sentence, the back-end sentencing realities of RDAP may, nevertheless, result in one inmate securing an early release and rehabilitative treatment, with the other receiving solely a sentence to prison, where he must complete the entirety of his sentence.[110]

The Supreme Court's recent decision in *Tapia v. United States*,[111] illuminates this problem by illustrating how helpless judges are at ensuring defendants receive the benefits of the RDAP. Petitioner Tapia was convicted of smuggling unauthorized, undocumented immigrants into the United States[112] and faced a mandatory minimum sentence of thirty-six months, but her Guidelines range was forty-one to fifty-one months.[113] The district court imposed a fifty-one month prison term, reasoning Tapia should serve that long in order to qualify for and complete the RDAP:

> The sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program…. Here I have to say that one of the factors that--I am going to impose a 51-month sentence … and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program….[114]

Even though the sentencing judge strongly recommend that Tapia enter treatment, "the court's recommendations were only recommendations--and in the end they had no effect"; Tapia was not placed in the recommended prison and was not admitted to RDAP.[115] Importantly, despite the judge's recommendations and encouragement during Tapia's psychology intake screening, Tapia herself refused to volunteer for the program.[116]

Tapia appealed her sentence, arguing that lengthening her prison term (albeit still within the applicable Guidelines range) to make her eligible for RDAP violated 18 U.S.C. § 3582(a), which instructs sentencing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and

109 Bussert & Sickler, *supra* note 9, at 44.

110 *See* Lopez v. Davis, 531 U.S. 230, 248 (2001) (Stevens, J., dissenting) ("I fully agree with the majority that federal prisoners do not become entitled to a sentence reduction upon their successful completion of a drug treatment program; the words 'may be reduced' do not mean 'shall be reduced.' Nonetheless, while the statute does not entitle any prisoner to a sentence reduction, it does guarantee nonviolent offenders who successfully complete a drug treatment program consideration for such a reduction.").

111 *131 S. Ct. 2382 (2011).*

112 *Tapia*, 131 S. Ct. at 385.

113 *Id*. at 2393 (Sotomayor, J., concurring).

114 *Id.* at 2385.

115 *Id.* at 2391.

116 *Id.*

rehabilitation."[117] In a unanimous decision, the Supreme Court held that a sentencing court may not impose or lengthen a prison term to foster a defendant's rehabilitation because of Congress's mandate in § 3582(a).[118] *Tapia* is significant, therefore, because even though a judge is required to consider retribution, deterrence, incapacitation, and rehabilitation at sentencing, the judge is powerless to use the last two purposes in conjunction, even though RDAP, which uses incapacitation to provide rehabilitation, does just that.

IN 2006, THE BUREAU OF JUSTICE STATISTICS (BJS) ESTIMATED THAT 56% OF STATE PRISONERS AND 49% OF FEDERAL PRISONERS MET THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DIAGNOSTIC CRITERIA FOR ALCOHOL OR DRUG USE

D. Where to Go From Here

Offender treatment is seriously lacking in the U.S. In 2006, the Bureau of Justice Statistics (BJS) estimated that 56% of state prisoners and 49% of federal prisoners met the Diagnostic and Statistical Manual of Mental Disorders diagnostic criteria for alcohol or drug use.[119] However, a comprehensive three-year study by the BOP Office of Research and Evaluation concluded that those offenders who participate in the RDAP benefit greatly. The study, known as TRIAD Drug Treatment Evaluation Project, found that:

> (1) RDAP participants are significantly less likely to recidivate and less likely to relapse upon release than non-participants; (2) RDAP participants are significantly less likely to relapse to drug use; and (3) women inmates who complete the program have improved employment figures after release. In addition, an evaluation of inmate behavior found that institutional misconduct among male inmates who completed RDAP was reduced by 25 percent when compared to misconduct among similar non-participating male inmates; and institutional misconduct among female inmates who completed residential treatment was reduced by 70 percent.[120]

These results demonstrate the important impact the RDAP has on its participating inmates, as well as its value in deterring future criminal conduct.

Accordingly, to ensure that all eligible inmates receive the benefits of RDAP, the BOP should consider increasing funding for its Residential Drug Abuse Program. BOP should expand and improve the program to ensure that inmates are not denied treatment solely due to over-crowding and administrative oversight. For example, the BOP should create a uniform set of criteria for consideration in evaluating applications for sentence reductions. As things currently stand, the determination procedure is conducted behind closed doors, with no real explanation of why one eligible defendant may receive a reduction, while another defendant may not.[121] Increased funding could also be used to hire Spanish-speaking program coordinators, thereby making the program available for Spanish-speaking inmates.

117 *Id.* at 2389.

118 *Id.* at 2392.

119 Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, Mental Health Problems of Prison and Jail Inmates 1 (2006), available at http://www.bjs.gov/content/pub/pdf/mhppji.pdf.

120 Ellis, *supra* note 83, at 39.

121 *See* Lopez v. Davis, 531 U.S. 230, 249 (2001).

The long-term deterrence benefits of the program would outweigh the costs of the program due to the fact that RDAP reduces recidivism. Additionally, the program would allow eligible offenders up to a one year early release, thereby saving the BOP the costs of housing that inmate for an additional year. Given the voluntary nature of RDAP participation, BOP's lone discretion over RDAP, and judges' inability to sentence guilty defendants to rehabilitative treatment in prison under 18 U.S.C. § 3553(a) and *Tapia*, judges, at best, can "strongly recommend" that the defendant enter RDAP. However, judges should be considering defendants' rehabilitative needs upfront, during the sentencing itself, rather than hoping that defendants receive rehabilitation on the back-end of the sentencing process. Judges can do this by applying the Guidelines provisions of U.S. Sentencing Guideline 5H1.4 and U.S. Sentencing Guidelines Manual 5C1.1 cmt. n. 6, which state that judges may impose conditions of release to ensure that defendants receive treatment. This is completely judicial discretion, given *Pepper*'s strong endorsement of individualized sentencing, as well as recent amendments to the Sentencing Guidelines. This approach would be more upfront and make defendants' fates more certain, ensure that defendants receive rehabilitation, and reduce the risk of judges ordering longer sentences just to ensure RDAP eligibility.

Conclusion

Due to *Pepper*, the voluntary Guidelines, and RDAP, federal defendants with substance abuse problems should expect disparate and uncertain sentencing. Congress and the U.S. Sentencing Commission, by clarifying the Sentencing Guidelines and improving RDAP, will give judges more guidance and confidence, and hopefully give defendants with substance use disorders more certainty at sentencing and a better chance for rehabilitation.

About the AUTHOR

Janet M. Foster is an attorney with Schertler & Onorato, LLP, a boutique litigation firm in Washington, D.C. Ms. Foster represents clients in both state-level and federal criminal cases, ranging from drug possession misdemeanors to white collar matters. She is a graduate of the George Washington University Law School (J.D.) and Amherst College (B.A.).

NOTES

The 'Rhyme or Reason' Behind Prosecutorial Use of Rap Lyrics as Evidence in Criminal Trials

by Robert Nothdurft, Jr.

I. Introduction

Does a rapper know that when they walk up to the mike and drop their latest verse or put pen to paper to scratch out their newest lyrics, they can essentially incriminate themselves? While the rap genre has continued to gain popularity across audiences nationwide, it has also attracted fairly new and certainly unfavorable attention from prosecutors. In light of trending case law that permits rap lyrics to be used as character evidence against criminal defendants, rappers must be cautious to separate their rap persona from real world events. Courts nationwide are expanding evidentiary bounds at an increasing rate to include an individual's artistic expression through rap music in criminal proceedings.[1]

THE RAP GENRE HAS CONTINUED TO GAIN POPULARITY ACROSS AUDIENCES NATIONWIDE, AND IT HAS ALSO ATTRACTED NEW AND UNFAVORABLE ATTENTION FROM PROSECUTORS.

The synthesis between pop culture and criminal justice is problematic. Many individuals aspire to create lyrical art, either from their own personal experiences or fictional ideas. Few, if any, anticipate their lyrical expression becoming evidence against them. A number of courts across the nation, however, are assessing the compatibility of rap lyrics in evidence law and finding that admissibility is proper. Approximately eighty percent of those courts held that rap lyrics are admissible.[2]

This article will focus on the method prosecutors employ to admit rap lyrics into evidence and how prosecutors use these lyrics once admitted. Additionally, this article will analyze the evidentiary foundations for the admissibility of rap lyrics and evaluate the soundness of their admission at trial. Because a number of states have adopted the same or a substantially similar formulation of the evidentiary rules contained in the Federal Rules of Evidence, this article will focus on the language of those federal rules. While there is an apparent 'rhyme or reason' for the prosecutorial use of rap lyrics at trial, defense attorneys can employ evidentiary strategies contained in this article to combat these prosecutorial tactics.

II. Rap Lyrics: Grounds for Admissibility

Prosecutorial use of rap lyrics at trial is generally challenged on three different grounds. First, as with other pieces of unfavorable evidence, the defense may attempt to exclude rap lyrics because they are irrelevant.[3] Second, the defense may attempt to attack the probative value of the rap lyrics and argue that such value is substantially outweighed by the prejudicial effect it may have on the jury.[4] Finally, the defense may argue that rap lyrics constitute inadmissible character evidence or improper evidence of prior bad acts, as governed by federal rule 404.[5] Despite the number of hurdles prosecutors face in admitting rap lyrics, courts have provided numerous accommodations under these three federal rules.

1 Lauren Williams, *Your Rap Lyrics Can Be Held Against You in a Court of Law*, Mother Jones (Mar. 10, 2014, 3:00 AM), http://www.motherjones.com/politics/2014/03/rap-lyrics-trial.

2 Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, New York Times (Jan. 13, 2014), http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?_r=0.

3 Fed R. Evid. 401.

4 Fed R. Evid. 403.

5 Fed R. Evid. 404.

A. Federal Rule 401: Are Rap Lyrics Relevant?

The test for relevance derives from the common law and is not codified in the federal rules.[6] Under federal rule 401, evidence must have a tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.[7] Courts, however, have crafted their own way to interpret the rule.[8]

COURTS HAVE CONSISTENTLY ACKNOWLEDGED THAT RAP LYRICS AUTHORED BY A DEFENDANT CAN HAVE PROBATIVE VALUE AS AN ADMISSION OF GUILT.

Because the threshold to meet the relevance requirement is so low, the question usually becomes what value might a juror attach to rap lyrics as evidence? Moreover, would admitting such lyrics make jurors more likely to resolve disputed issues of fact than without the lyrics? The Court in *United States v. Stuckey* tackled these questions.[9]

In *Stuckey*, the defendant, Thelmon Stuckey, was confronted with lyrics he purportedly wrote in connection to the crime for which he was ultimately convicted.[10] The defendant was charged with murdering Ricardo "Slick" Darbins, a former Detroit Police Officer, to prevent Darbins from cooperating with federal authorities. At trial, the Government successfully moved to admit the handwritten lyrics seized in the defendant's belongings.[11] The lyrics included, "I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode."[12] The lyrics also repeatedly referred to killing and retaliating against "snitches."[13] On appeal, the Sixth Circuit held that the trial court did not abuse its discretion in permitting the Government to use the defendant's rap lyrics at trial.[14] The court started its review at relevance, holding that the defendant's lyrics depicted events so similar to the crimes for which he was charged that they strengthened the probability of his guilt.[15]

"Stuckey's lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street--precisely what the Government accused Stuckey of doing to Darbins in this case."[16]

The relevance determination in *Stuckey*, however, assumes that an author bases his or her lyrics on personal experiences. If a court finds that a defendant's writings are fictional and intended purely for the artistic enjoyment of others, it is likely to exclude such writings as irrelevant.[17] Courts, though, are not always amenable to arguments purporting pure artistic intent. In *United States v. Foster*, a defendant argued that his rap lyrics were irrelevant

6 United States v. Hobson, 519 F.2d 765 (9th Cir. 1975) (holding federal rule 401 accurately states the common law test for relevance).

7 Fed R. Evid. 401.

8 United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) (developing its own rule of thumb which inquired whether a reasonable man might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence).

9 *See* 253 Fed. Appx. 468, 482-84 (6th Cir. 2007).

10 *Id*. at 481.

11 *Id*. at 474-77.

12 *Id*. at 475.

13 *Id*.

14 *Stuckey*, 253 Fed. Appx. at 482 (stating *in dicta* that the rap lyrics also would not have been excluded on hearsay grounds because they would have constituted an admission by a party-opponent pursuant to federal rule 801(d)(2)(A)).

15 *Stuckey*, 253 Fed. Appx. at 482.

16 *Id*.

17 Washington v. Hanson, 731 P.2d 1140 (Wash. Ct. App. 1987).

in demonstrating his guilt regarding charges of drug possession with the intent to distribute because the lyrics were created with the sole purpose of being incorporated into a rap song.[18] Nevertheless, the Seventh Circuit held that the defendant's rap lyrics were relevant because they described the reality of the defendant's urban lifestyle.[19] Accordingly, it held that the lyrics were relevant to prove his knowledge of the activities for which he was charged.[20] The court analogized the relevance of the defendant's rap lyrics to his charges to the relevance of "*The Godfather* to illustrate Puzo's knowledge of the inner workings of an organized crime family and *The Pit and the Pendulum* to illustrate Poe's knowledge of medieval torture devices."[21]

On the other hand, courts have found that defendants may not always benefit from blanket exclusion of fictional rap lyrics. In *Iowa v. Leslie*, the defendant attempted to introduce the victim's rap video to prove both that the victim had violent tendencies and used guns.[22] The Iowa Court of Appeals, however, rejected the defendant's contention and held that not everything the victim rapped about related to his personal life experiences.[23] In contrast, courts may still find value in drawing incriminating inferences from a defendant's artistic expression. In fact, courts have gone so far as to find relevance in the books the defendant read.[24] Additionally, courts have been inclined to admit anti-government literature to demonstrate a defendant's knowledge, conspiracy, and intent to prepare terrorist attacks and conspire against the government.[25]

Nevertheless, a court's determinations regarding relevance are bound by the facts of each case.

B. Federal Rule 403: Are Rap Lyrics Unfairly Prejudicial?

Before the implementation of federal rule 403, courts recognized it was sometimes necessary that evidence, though relevant, be excluded "where the minute peg of relevancy will be entirely obscured by dirty linen hung upon it."[26] The exclusion of relevant evidence under federal rule 403, however, is an extraordinary remedy that must be used sparingly,[27] as it need not "scrub the trial clean of all evidence that may have an emotional impact."[28] That said, defense attorneys almost invariably resort to this balancing test in a final attempt to exclude unfavorable evidence, such as rap lyrics. To satisfy federal rule 403, attorneys must show that the probative value of relevant evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.[29]

In *Stuckey*, the defendant challenged the admissibility of his rap lyrics on federal rule 403 grounds, arguing that unfair prejudice would outweigh the probative value of his lyrics. The defendant maintained that his use of explicit language and graphic imagery alone in his rap lyrics might offend jurors' sensibilities and make him appear morally reprehensible.[30] The court, however, found that the value of the

18 939 F.2d 445, 456 (7th Cir. 1991).
19 *Id*.
20 *Id*.
21 *Id*.
22 2014 Iowa App. LEXIS 71 at *15-16 (Jan. 9, 2014).
23 *Id*.
24 United States v. Giese, 597 F.2d 1170 (9th Cir. 1979) (Hufstedler, J., dissenting).
25 United States v. Stone, 2012 U.S. Dist. LEXIS 5920 at *7 (E.D. Mich. 2012) (admitting various forms of anti-government literature against defendant charged with seditious conspiracy and conspiracy to use weapons of mass destruction); United States v. Anderson, 353 F.3d 490, 504 (6th Cir. 2003) (admitting portions of anti-government books and pamphlets against defendant charged with conspiracy to defraud and commit offenses against the United States); United States v. Salameh, 152 F.3d 88, 111 (2d Cir. 1998) (admitting terrorist books and manuals against defendant charged with bombing the World Trade Center).
26 Washington v. Goebel, 240 P.2d 251, 254 (Wash. 1952).
27 United States v. Pham, 78 Fed. Appx. 86 (10th Cir. 2003) (citing K-B Trucking Co. v. Riss International Corp., 763 F.2d 1148 (10th Cir. 1985)).
28 United States v. Kennedy, 643 F.3d 1251, 1257 (9th Cir. 2011) (citing United States v. Ganoe, 538 F.3d 1117 (9th Cir. 2008)).
29 Fed R. Evid. 403.
30 United States v. Stuckey, 253 Fed. Appx. 468, 483 (6th Cir. 2007).

defendant's lyrics, which described the events of his alleged crime, outweighed any unfair prejudice the defendant may suffer.[31] The court recognized the added probative value in highly detailed lyrics because the court believed that the author likely drew upon personal experiences.

Similar to *Stuckey*, the defendant in *Holmes v. Nevada* was also forced to confront a verse of his rap lyrics offered as evidence against him at trial.[32] The State argued that the defendant's lyrics were relevant because they almost identically described the nature of the crimes for which he was charged: first-degree murder and robbery.[33] The defendant authored the following lyrics in jail while he awaited extradition from California to Nevada:

> But now I'm uh big dog, my static is real large. Uh neighborhood super star. Man I push uh hard line. My attitude shitty nigga you don't want to test this. I catching slipping at the club and jack you for your necklace. Fuck parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing.[34]

In affirming the defendant's conviction, the Supreme Court of Nevada held that the lyrics described details that "mirror" the crime charged and thus, were considered factual instead of fictional.[35]

In fact, courts have even gone so far as viewing a defendant's lyrics as autobiographical when the lyrics sufficiently resemble evidence of the crimes charged,[36] despite rappers' common use of exaggeration, metaphor, and other artistic devices in developing abstract representations of events or ubiquitous storylines.[37] Generally, law enforcement views confessions as the "holy grail" of solving crime and placing blame with the correct offender. As a result, courts have consistently acknowledged that rap lyrics authored by a defendant can have probative value as an admission of guilt.[38]

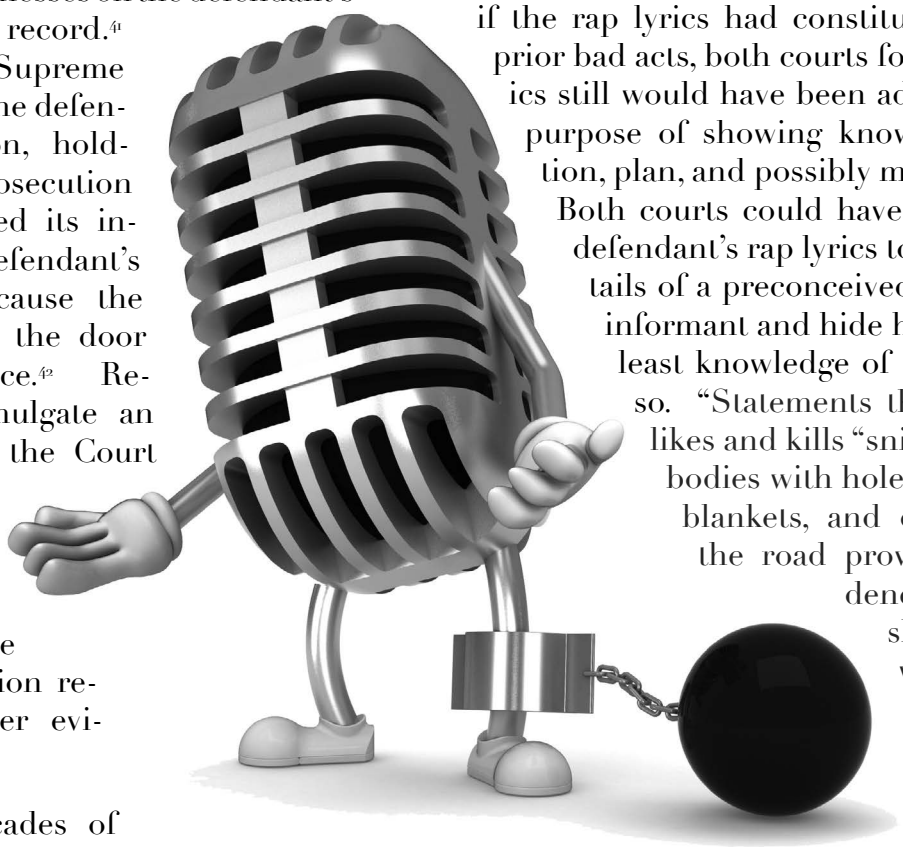
WITH AN ABUNDANCE OF CRITICISM REGARDING THE VIOLENT NATURE OF SOME IN THE RAP GENRE, COURTS ARE NAIVE IF THEY BELIEVE THAT JURORS WILL JUST PLACE ASIDE THE NEGATIVE STIGMA THAT CAN POTENTIALLY ACCOMPANY RAP LYRICS.

C. Federal Rule 404: Do Rap Lyrics Improperly Characterize the Defendant?

Character evidence has long been a field

31 *Id*. (citing United States v. Carver, 470 F.3d 220, 240-41 (2006) admitting defendant's letter with foul language despite little probative value).
32 306 P.3d 415 (Nev. 2013).
33 *Id*. at 419.
34 *Id*. at 418.
35 *Id*. at 419.
36 *Id*. at 419 (citing Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 18, 22, 25-26 (2007)).
37 *Holmes*, 306 P.3d at 419(citing Daniels v. Lewis, 2013 U.S. Dist. LEXIS 7422 (N.D. Cal. Jan. 17, 2013)).
38 *See* Hannah v. Maryland, 23 A.3d 192, 204-05 (Md. 2011) (Harrell, J., concurring)(stating that courts should be unafraid to apply firmly-rooted canons of evidence law, which have well-protected the balance between probative value and prejudice in other modes of communication. Undoubtedly, rap lyrics often convey a less than truthful accounting of the violent or criminal character of the performing artist or composer. But there are certain circumstances where the lyrics possess an inherent and overriding probative purpose. One circumstance would be where the lyrics constitute an admission of guilt, but others would include rebutting an offered defense and impeaching testimony. Although there is no definitive line that demarcates the amount or content of lyrics that may be used appropriately, reasonableness should govern.).

of evidence law that the criminal justice system continues to shape. In the middle of the twentieth century, the landmark case, *Michelson v. United States*, set forth a new federal rule governing character evidence.[39] In *Michelson*, the Supreme Court balanced the benefits and risks of the prosecution's use of character evidence against a criminal defendant.[40] The facts in *Michelson* are comparable to many cases that involve character evidence today. During the defendant's trial for bribing a federal agent, the court permitted the Government to challenge the defendant's credibility by cross-examining five character witnesses on the defendant's prior arrest record.[41] On appeal, the Supreme Court affirmed the defendant's conviction, holding that the prosecution properly explored its inquiry into the defendant's truthfulness because the defense opened the door to such evidence.[42] Reluctant to promulgate an overriding rule, the Court called for the establishment of uniform evidentiary rules to address the inherent confusion regarding character evidence.[43]



After decades of formulating and restyling, federal rule 404 was adopted to regulate the admission of character evidence and prior criminal acts.[44] Federal rule 404 embodies the compromise of ideas respectively held by the majority and dissent in *Michelson*, where the latter propounded the American tradition of holding a man responsible only for the specific acts of misconduct for which he is charged and not for his general character and previous bad acts.[45]

The defendants in *Stuckey* and *Holmes* both attempted to undermine the admissibility of their rap lyrics by arguing that their lyrics either constituted improper character evidence or improper evidence of prior bad acts.[46] In each case, however, the Sixth Circuit and Supreme Court of Nevada both viewed the defendant's rap lyrics not as evidence of prior bad acts, but merely as a prior statement.[47] Even if the rap lyrics had constituted evidence of prior bad acts, both courts found that the lyrics still would have been admissible for the purpose of showing knowledge, preparation, plan, and possibly modus operandi.[48] Both courts could have interpreted the defendant's rap lyrics to contain the details of a preconceived plan to kill the informant and hide his remains, or at least knowledge of the ability to do so. "Statements that Stuckey dislikes and kills "snitches," fills their bodies with holes, wraps them in blankets, and dumps them in the road provides direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road."[49]

Furthermore, the Government in *Stuckey* circumvented federal rule 404 obstacles because

39 335 U.S. 469, 482 (1948).
40 *Id*. at 475-78.
41 *Id*. at 470-72.
42 *Id*. at 485.
43 *Id*. at 486-87.
44 Fed R. Evid. 404.
45 *Michelson*, 335 U.S. at 489.
46 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420.
47 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420.
48 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420. *Contra* United States v. Wright, 901 F.2d 68 (7th Cir. 1990) (holding that the admission of rap lyrics to merely prove identity, which was not an issue in dispute, was unfairly prejudicial).
49 *Stuckey*, 253 Fed. Appx. at 482-83.

it offered the defendant's lyrics not to prove his violent propensity, but rather to prove that he directly killed the victim.[50] The court drew virtually no distinction between the defendant's lyrics and a stationhouse confession, providing all but a few specific details.[51] The specificity of the crime expressed through the rap lyrics was sufficient for the court to construe a quasi-confession.

The court in *Stuckey* also relied upon the decision of *United States v. Foster*, which recognized the Government's circumvention of federal rule 404(b) through admitting rap lyrics to prove the defendant's knowledge of drug possession and distribution.[52] Upon search of the defendant's duffel bag, the police seized a notebook containing the following handwritten lyrics: "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average business sic man."[53] The court held that the rap lyrics clearly demonstrated the defendant's knowledge of "drug code words" and "drug trafficking," which made it more likely that he knew he was carrying illegal drugs.[54] The basis for this admission, however, assumes that the defendant is articulating his true knowledge and not purporting the attributes of a persona to which he is attempting to conform. *Stuckey* further explained that, "rap is no longer an underground phenomenon but has become a mainstream music genre."[55]

Accordingly, the court was convinced that reasonable jurors would know not to infer a person's propensity for violence simply because he raps about violence.[56] However, with an abundance of criticism regarding the violent nature of some in the rap genre, the court is naïve if it believes that jurors will just place aside the negative stigma that can potentially accompany rap lyrics.[57] With this naivety, unfair prejudice will follow defendant rappers whose lyrics are used as character evidence against them in a criminal trial.

III. Conclusion

Courts are increasingly recognizing the various evidentiary grounds for the admission of rap lyrics at trial. While defense attorneys continue to search for support among the federal rules governing evidence and manipulate the impact of a strengthening line of case law regulating the use of rap lyrics at trial, defendants must be aware of the adverse impact their lyrical expression can have on their potential culpability. In the same way an individual preserves their presumption of innocence by invoking certain constitutional protections during an interrogation, rappers need to avoid the appearance of criminal impropriety in their music that can implicate them later.

50 *Id.*

51 *Id*. at 482-83.

52 United States v. Foster, 939 F.2d 445 (7th Cir. 1991).

53 *Id*. at 449.

54 *Id*. at 455.

55 *Stuckey*, 253 Fed. Appx. at 484 (quoting *Daniels*, 2013 U.S. Dist. LEXIS 7422).

56 *Id*. (holding that the trial court did not err in failing to give a limiting instruction informing the jury that the admission of rap lyrics did not necessarily mean that the author had a propensity for violence); *see also* New York v. Wallace, 873 N.Y.S.2d 403 (N.Y. App. Div. 2009) (affirming admission of defendant's rap lyrics because the trial court gave a limiting instruction to alleviate the potential for unfair prejudice).

57 COMMENT: Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence at Criminal Trials, 12 UCLA Ent. L. Rev. 345 (Spring 2005) (describing rap music as increasingly promoting vile, deviant, and sociopathic behavior).

About the AUTHOR

Robert Nothdurft, Jr. is a 3L at American University Washington College of Law where he serves as the Executive Editor of the *Criminal Law Practitioner*. Robert is a teaching fellow for the Marshall Brennan Constitutional Literacy Project and is Vice-President of the Criminal Law Society. He is also a member of the Mock Trial Honor Society, serving the society's executive board as Tournament Director. Prior to attending law school, Robert spent two years working on his Master's degree in Government and Politics at St. John's University. Robert solidified his interest in criminal law this past summer when he worked for the Maryland Office of the Public Defender. He also spent some time working for a professor, who practices under the Criminal Justice Act. Robert seeks every opportunity to help represent indigent criminal defendants in need of quality legal representation.

NOTES

IN 2012, OVER 10,000 PEOPLE

WERE KILLED NATIONWIDE
AS A RESULT OF AN
IMPAIRED DRIVER.

Fighting Impaired Driving in D.C.: A Response to D.C. Disturbia[1]

By Melissa Shear, Traffic Safety Resource Prosecutor, Office of the Attorney General for the District of Columbia

This article is a response to *D.C. DUI Disturbia: The Intended Policy and Its Explosive Effects*,[2] published by the *Criminal Law Practitioner* in its Fall 2013 issue. It discusses the District of Columbia's newly enacted impaired driving laws and accompanying enforcement policy and clarifies points made in *D.C. DUI Disturbia* (the "article"). At the Office of the Attorney General, we are proud that we have a "zero tolerance" policy concerning impaired driving and we will continue to work with our law enforcement partners towards our goal of zero deaths and injuries.[3]

I. Impaired Driving: Consequences & Reality

Imagine standing on the sidewalk, waiting with a friend for the traffic light to change before crossing the street. Out of nowhere, an SUV jumps the curb, strikes you and your friend and then flees the scene before crashing into two parked cars. Police respond to the scene to investigate the driver and EMS arrives to take you and your friend to the hospital. The police investigation determines that the driver was under the influence of alcohol and drugs. The driver's alcohol concentration level was almost three times the "per se" impairment level and he also had amphetamines in his system. At the hospital, doctors determine you and your friend are lucky to be alive but sustained substantial physical injuries, including fractured bones, a concussion, torn ligaments, and head lacerations. Additionally, you both also suffer extreme emotional and financial injuries. Needless to say, the events of that day forever change your life.

These are the facts from an actual, recent driving under the influence ("DUI") case in the District and are unfortunately similar to other impaired driving cases here and around the country. Driving while impaired by alcohol and/or drug(s) is serious business. In 2012, the National Highway Traffic Safety Administration ("NHTSA") reported that over 10,000 people were killed nationwide as a result of an impaired driver.[4] This statistic amounts to nearly one third of all traffic related fatalities and does not account for the non-fatal physical and emotional injuries and property damage caused by impaired drivers. In the District, between October 2012 and September 2013, 139 people were injured in crashes involving a driver with a blood/breath alcohol concentration ("BAC") level of .08g/100 ml of blood/210 L of breath, or higher.[5] Of the 15 traffic fatalities in the District during that timeframe, four were the result of a driver with a BAC of .08 or higher.[6] Even more telling, research indicates that first time offenders drive impaired at least 80 times before they are arrested for an impaired driving offense.[7]

1 This article is submitted on behalf of the Office of the Attorney General for the District of Columbia, Attorney General Irvin B. Nathan. Ms. Shear would like to acknowledge the drafting assistance of Assistant Attorneys General Connaught O'Connor; Whitney Stoebner, Dave Rosenthal, M. Kimberly Brown, and Deputy Attorney General Andrew Fois.

2 Monika Mastellone, *D.C. Disturbia: The Intended Policy and Its Explosive Effects*, Criminal Law Practitioner, Fall 2013.

3 The Office of the Attorney General for the District of Columbia ("OAG") prosecutes all impaired driving offenses in the District except those that result in death which are prosecuted by the United States Attorney's Office for the District of Columbia.

4 NHTSA's National Center for Statistics and Analysis, Traffic Safety Facts 2012 Data, (Dec. 2013), available at http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf.

5 District of Columbia Highway Safety Office, FY2013 Annual Report (Dec. 31, 2013), available at http://ddot-hso.com/ddot/hso/documents/Publications/Annual%20Report/2013/FY2013%20Annual%20Report.pdf.

6 *Id.*

7 MADD, Ignition Interlocks Save Lives (Apr. 2014), available at http://www.madd.org/laws/law-overview/Draft-Ignition_Interlocks_for_all_Offenders_Overview.pdf.

II. Addressing Impaired Driving in the District

Each year, approximately 2,000 impaired driving cases are presented to the Office of the Attorney General ("OAG") for prosecution. The volume and seriousness of impaired driving offenses demonstrates a public safety concern to which significant efforts are rightly directed. High visibility police enforcement,[8] increased impaired driving detection training for police officers, saturation patrols, sobriety check points, national initiatives like NHTSA's bi-annual "Drive Sober or Get Pulled Over" campaign, the Washington Regional Alcohol Program's ("WRAP") SoberRide[9] program, and a vast District-wide public transit system, all serve to ensure that citizens and visitors remain safe in the District, and to provide potential impaired drivers alternative methods of transportation home.

In 2012, Mayor Vincent Gray submitted the "Comprehensive Impaired Driving and Alcohol Testing Program Amendment Act of 2012" to the D.C. Council to further advance the fight against impaired driving in the District.[10] An Emergency version of the law was enacted in July 2012. The legislation provided for appropriate higher maximum penalties for first-time impaired drivers,[11] additional mandatory minimum sentences, and more severe mandatory minimum sentences for repeat offenders,[12] drivers with high alcohol-concentration levels,[13] drivers impaired by specific drugs,[14] cab drivers, and impaired drivers who operate their vehicles with children in the car.[15]

With the tools available to law enforcement to detect impaired drivers and remove them from the District's roads, community resources available to provide alternative modes of transportation, and tighter laws to deter potential offenders and punish offenders, would-be impaired drivers should be on notice that if they risk driving under the influence of alcohol or drugs, they will be detected, arrested and prosecuted. On the other hand, despite the article's claim, unimpaired and sober drivers have nothing to fear.

IMPAIRED DRIVERS SHOULD BE ON NOTICE THAT IF THEY DRIVE UNDER THE INFLUENCE, THEY WILL BE DETECTED, ARRESTED AND PROSECUTED: HOWEVER, UNIMPAIRED AND SOBER DRIVERS HAVE NOTHING TO FEAR.

8 *Driving Safety: Enforcement & Justice Service*, Nat'l Highway Traffic Safety Admin, http://www.nhtsa.gov/Driving+Safety/Enforcement+&+Justice+Services/HVE.

9 SoberRide provides free cab rides home for would-be impaired drivers on high risk holidays such as Halloween, New Year's Eve, and St. Patrick's Day. Since 1993, SoberRide has provided over 60,000 free cab rides home to potential impaired drivers. Most recently, over the 2014 St. Patrick's Day holiday, SoberRide provided 112 free cab rides.

10 *Mayor Vincent C. Gray Signs Bills Enhancing Enforcement of Impaired-Driving Laws*, Exec. Office of the Mayor (Jan. 9, 2013), http://mayor.dc.gov/release/mayor-vincent-c-gray-signs-bills-enhancing-enforcement-impaired-driving-laws.

11 *See* D.C. Code § 50-2206.13 (2013).

12 *Id.*

13 *Id.*

14 *See* D.C. Code § 50-2206.13 (4) (2013) (mandating a 15-day mandatory-minimum term of incarceration if the person's blood or urine contains a Schedule I chemical or controlled substance as listed in *§ 48-902.04*, Phencyclidine, Cocaine, Methadone, Morphine, or one of its active metabolites or analogs). The Office of the Chief Medical Examiner reported 51 traffic related deaths it investigated in calendar year 2011; toxicology analysis was conducted in 44 cases. Of those 44 cases, 26 cases (59%), were positive for drugs. *See* Government of the District of Columbia, Office of the Chief Medical Examiner Annual Report (2011). http://ocme.dc.gov/sites/default/files/dc/sites/ocme/publication/attachments/Annual%20Report%202011%20AR_0.pdf.

15 *See* D.C. Code § 50-2206.18 (2013). Motor vehicle crashes are the number one cause of death for children ages 3-14 in the United States. http://www-nrd.nhtsa.dot.gov/Pubs/811767.pdf. In 2011, 226 children were killed in impaired driving crashes. Of those 226 child deaths, 122 (54%) were riding with the impaired driver. *Statistics*, MADD, http://www.madd.org/statistics/.

In the District, a DUI charge can be proven in either of two related but alternative ways.[16] The District must prove that the individual operated a motor vehicle either while "intoxicated" or while "under the influence" of alcohol, any drug or any combination thereof.[17] A person is intoxicated under the law if his blood, breath, or urine alcohol concentration levels are at or above a "per se" amount - .08g/210L of breath or 100 ml of blood or .10g/100ml of urine.[18] Note that it is a "per se" level not a "legal limit." Persons who have blood, breath, or urine alcohol concentration levels below the per se level may still be guilty of "driving under the influence."

Alternatively, to be guilty of driving under the influence, the government must prove that the driver's ability to operate the vehicle was impaired to a degree that can be perceived or noticed.[19] A blood, breath, or urine alcohol concentration level may be available as an additional piece of evidence for the fact finder to consider, but is not required to prove that a person was impaired by alcohol and/or drug(s). Moreover, a significant number of drivers refuse to submit to chemical testing, or agree to submit to testing, but the alcohol concentration level is below the per se level. It is important to realize, therefore, that people who operate a vehicle below the per se level may still be driving while impaired by alcohol or by a combination of alcohol and one or more drugs. There is no "legal limit" below which it is always legal to drive; testing below the per se level for intoxication does not prove the driver had no impairment from the effects of alcohol or drugs. It is illegal to drive after consuming any amount of alcohol or drugs that is sufficient for another person to be able to perceive or notice the effects. MPD and other agencies enforce that law and OAG prosecutes it. This is as it should be.

When determining if there is enough evidence for probable cause for an arrest the police focus on the totality of the circumstances. Police officers or lay persons rely on observations to determine if a person is under the influence. Evidence of a driver's impairment can be established in a variety of ways, including, but not limited to Standardized Field Sobriety Tests ("SFSTs").[20] SFSTs, however, are not the only evidence upon which officers rely when determining whether a driver is under the influence of alcohol or drugs.

Officers often rely on any number of driving behaviors in forming reasonable, articulable suspicion to conduct a traffic stop. For example, weaving within the travel lane might indicate that an impaired driver is on the road. Failing to utilize headlights when driving at

16 *See* D.C. Code § 50-2206.11 (2013).

17 *Id.*

18 The per se level is .04g/210L of breath for drivers of commercial vehicles.

19 *See* D.C. Code § 50-2206.01(8) (2013); *see also* Criminal Jury Instructions for the District of Columbia, Instruction 6.400 DRIVING UNDER THE INFLUENCE (2013); Taylor v. District of Columbia, 49 A.3d 1259 (D.C. Cir. 2012) (citing Poulnot v. District of Columbia, 608 A.2d 134 (D.C. Cir. 1992)).

20 *See* NHTSA DWI Detection and Standardized Field Sobriety Testing (2006) available at http://www.tdcaa.com/sites/default/files/page/NHTSA%20SFST%20Student%20Manual%20200608.pdf. [hereinafter NHTSA Manual].

night or driving on the wrong side of the road might also be indicators. Once the officer alerts the driver to pull over, additional indicators of impairment might be displayed during the stop. For example, a suspected impaired driver might not pull over right away, might have a slow response to the officer's signal, might stop suddenly, or may even strike the curb. Of course, poor driving in and of itself will not lead to a DUI arrest or charge.

Once the traffic stop has occurred, however, the officer may make additional observations that provide indications of impairment. Officers may see a driver's bloodshot eyes, open containers of alcohol inside the vehicle, or fumbling to locate the vehicle and driver identification materials. Officers may also hear a driver's slurred speech or admissions to drinking alcoholic beverages or ingesting drugs. Furthermore, officers may smell odors of alcoholic beverage coming from the driver's breath or odors of drugs, such as marijuana or phencyclidine ("PCP"). The officer may also ask the driver to complete divided attention tasks, such as simultaneously asking a driver to provide his license and registration or asking questions about the date and time or where the driver is coming from or headed to. Moreover, drivers under the influence of certain types of drugs, like PCP, may exhibit distinctive behaviors. The observations of impairment, combined with lack of medical impairment indicators, may lead an officer to suspect a driver is under the influence of alcohol and/or drugs.

Officers may also ask drivers to perform SFSTs. The SFSTs administered nationwide by trained law enforcement officers are comprised of a series of tests, including an eye examination, the Horizontal Gaze Nystagmus ("HGN") test and two divided attention tests, the Walk and Turn ("WAT") and One Leg Stand ("OLS") tests that, when administered and evaluated in a standardized manner, allow trained law enforcement to observe validated indicators of a subject's impairment.

HGN refers to the involuntary jerking as the eyes gaze from side to side. Alcohol and certain types of drugs cause HGN. Each eye is tested in three different ways, each displaying nystagmus or not, for a total of six clues. When administered correctly, the test showed a 77% accuracy for detecting a subject's BAC level at a .10 or higher.[21] The two divided attention tests, the WAT and OLS, are also administered to test a driver's psychomotor skills[22] because the ability to divide one's attention is essential when operating a motor vehicle safely. Drivers must simultaneously control steering, acceleration and braking while reacting to the change in roadway conditions and manipulating the various controls inside the vehicle and possibly communicating with passengers and processing other distractions. Alcohol and certain drugs can impair a driver's ability to perform divided attention tasks. When administered correctly, the WAT and OLS tests showed a 68% and 65% accuracy respectively for detecting a subject's BAC level at a .10 or higher.[23]

It is possible to administer a roadside breath test as suggested in *D.C. DUI Disturbia*. In the District, however, such tests are not admissible at trial because of their limited reli-

21 *See* NHTSA Manual, Session VIII, (*citing* Colorado Department of Transportation, *A Colorado Validation Study of the Standardized Field Sobriety Test (SFST) Battery*, Nat'l Highway Traffic Safety Admin (Nov. 1995), available at http://www.drugdetection.net/NHTSA%20docs/Burns%20Colorado%20Study.pdf); *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery*, Nat'l Highway Traffic Safety Admin (1997), available at http://www.duianswer.com/library/1997_Florida_Validation_Study_of_SFST___Burns___Dioquino.pdf; Jack Stuster & Marcelline Burns, *Validation of the Standardized Field Sobriety Test Battery at BACs Below .10 Percent*, Nat'l Highway Traffic Safety Admin (Aug. 1998), http://www.drugdetection.net/NHTSA%20docs/Burns%20Validation%20of%20SFST%20at%20BAC%20below%200.10%20percent%20San%20Diego.pdf.

22 When administering the WAT test, the driver may exhibit one of more of the following: inability to maintain balance while listening to instructions, starting the test too soon, stopping walking, inability to touch heel to toe, stepping off the line, using arms for balance, executing improper turns or taking the incorrect number of steps. When administering the OLS test, officers may observe that the driver: sways while balancing, uses his arms to balance, hops, or puts a foot down.

23 *See* NHSTA Manual, Session VIII.

ability and are thus not routinely used.[24] The breath test regulations referenced in the article pertain to evidentiary breath tests administered at the police station after drivers are arrested and informed of their rights. The carefully certified instruments required for these tests should not be carried in squad cars and administered by patrol officers at the scene.

Based on all of the observations of impairment, an officer must make a determination if probable cause exists to arrest the driver for DUI. If the driver is placed under arrest for an impaired driving offense, he is typically transported to a police station for chemical testing to determine an alcohol concentration level. The driver is informed of his rights under the D.C. Implied Consent Act and, if he afterwards consents, submits to testing by providing a sample of his blood, breath, or urine.[25]

As discussed above, prosecutions for DUI can proceed on two different bases: a "per se" violation and/or demonstration of impairment.[26] For a "per se" case, an alcohol concentration level at or above the per se level alone is sufficient to prove DUI. For impairment cases, the government must show that the person was under the influence of alcohol and/or drug(s) to a degree able to be perceived or noticed. An alcohol concentration level, however, is not necessarily indicative of one's degree of impairment when proceeding on an impairment theory. Impairment is affected by the individualized physical characteristics of the driver. Accordingly, some individuals with alcohol concentration levels well above the per se level may have high alcohol tolerance and, therefore, still not display observable evidence of impairment. Others with alcohol levels well below that amount are nevertheless unable to safely operate a motor vehicle.

In low or zero alcohol concentration level cases, a rebuttable presumption exists to establish that the defendant was not under the influence of alcohol.[27] It then becomes the government's job to overcome that presumption with other evidence of impairment. According to the National Transportation Safety Board, most drivers experience a decline in both cognitive and visual functions by .05 BAC,[28] significantly increasing the risk of a serious crash.[29] Recent evidence found, for example, that even one alcoholic drink was enough to impair the driving skills of older drivers aged 55 to 70.[30]

Moreover, an alcohol concentration level may not always directly reflect a driver's impairment level if a driver may also have consumed drugs. The law in the District broadly defines drugs to include drugs like PCP and other commonly considered illicit substances, as well as prescription and non-prescription medica-

IT IS ILLEGAL TO DRIVE AFTER CONSUMING ANY AMOUNT OF ALCOHOL OR DRUGS THAT IS SUFFICIENT FOR ANOTHER PERSON TO NOTICE THE EFFECTS: THERE IS NO "LEGAL LIMIT" BELOW WHICH IT IS ALWAYS LEGAL TO DRIVE. THIS IS AS IT SHOULD BE.

24 *See* D.C. Code §50-2201(b-1) (1) et. seq. Although the United States Park Police ("USPP") utilizes RBTs, neither the Metropolitan Police Department ("MPD") nor the United States Capitol Police ("USCP") currently use them.

25 *See* D.C. Code §§ 50-2206.52 and 50-1904.02 (2013).

26 *See* D.C. Code § 50-2206.01 (2013).

27 *See* D.C. Code § 50-2206.51 (2013).

28 .05g/210L breath and/or .05g/100ml of blood.

29 Nat'l Transp. Safety Bd, *NTSB Unveils Interventions to Reach Zero Alcohol-Impaired Crashes* (May 2014), http://www.ntsb.gov/news/2013/130514.html.

30 Mary B. Marcus, *Older Drivers May be Impaired After Just One Drink*, CBS News (Mar. 21, 2014), http://www.cbsnews.com/news/older-drivers-may-be-impaired-after-just-one-drink/.

tions, and the impairing chemical substances found in inhalants.[31] The rebuttable presumption of lack of impairment does not apply if there is evidence of drug use.[32] It is not uncommon, for example, for a person to drive after either smoking marijuana or taking prescription or over-the-counter medication in addition to having a drink or two. While the person's alcohol concentration level may be low, they are clearly impaired and should not be driving in the District.

In response, the article shows little faith in the checks and balances present in all phases of a criminal case, from arrest to conviction, which prevent overzealous enforcement or prosecution. An arrest for an impaired driving offense in the District must be based on probable cause and a prosecution must not proceed unless the prosecutor knows that the charge is sufficiently supported by the evidence to establish a *prima facie* showing of guilt. A prosecutor's ethical duties require as much.[33] In addition, of course, a defendant must plead guilty, or a neutral judicial officer or jury must find the defendant guilty beyond a reasonable doubt, in order for a conviction to result. Therefore, the article's claim that 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"[34] could not be further from the truth.

The lives and safety of sober drivers, passengers and others are vulnerable to the menace of impaired drivers. District streets are safer because police officers actively seek out these drivers and remove them from behind the wheel as well as prosecutors who fight for justice every day in these cases. Due to the danger they pose, anyone driving while impaired risks arrest, prosecution, and a criminal conviction.

About the AUTHOR

Melissa Shear is an Assistant Attorney General with the Office of the Attorney General, for the District of Columbia. Since 2010, Ms. Shear has served as the District's Traffic Safety Resource Prosecutor (TSRP) and focuses her work on impaired driving prosecutions. Ms. Shear graduated from Indiana University with a dual Bachelor of Arts degree in Psychology and Criminal Justice, and received her law degree from New York Law School.

31 *See* D.C. Code § 50-2206.01 (6) (2013).
32 *See* D. C. Code § 50-2206.51 (2013).
33 *See* D.C. Rules of Prof'l Conduct R 3.8(b) Special Responsibilities of a Prosecutor.
34 Mastellone, *supra* n. 2, at 71.

NOTES

FAMILY TREATMENT DRUG COURTS: A PERSPECTIVE FROM LEWISTON, MAINE

BY JUDGE JOHN B. BELIVEAU AND AISLING RYAN

Eight million American children live with at least one parent who is dependent or abuses alcohol and 2.1 million children live with at least one parent who is dependent or abuses illicit drugs.[1] Given these statistics, many states began implementing Family Treatment Drug Courts (FTDC) to focus on parents whose children have been placed in the custody of Child Protective Services due to substance abuse. Most programs are voluntary, meaning that the parent must agree to participate. All dependency cases are civil, rather than criminal matters. This distinction is critical to understand. The generic phrase "drug courts" is sometimes misunderstood because the term applies to several types of drug courts (i.e. criminal adult; juvenile; co-occurring; and mental health courts). Though all courts focus on drug and alcohol abuse, they have distinct remedies and goals. To date, all states have implemented such programs in their respective state courts. As early as 2006, for example, there were 191 family drug courts in operation in all fifty states. Since then, approximately eighty more courts have been established in other states and counties throughout the United States.

This editorial provides a brief overview of the implementation and success of Family Treatment Drug Courts in Maine. Specifically, it will focus on the procedures of the Family Treatment Drug Court in Lewiston, Maine one of the first drug courts in the state.

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1 Office of Applied Studies, Substance Abuse and Mental Health Services Administration, *The NSDUH Report: Children Living with Substance-Dependent or Substance-Abusing Parents: 2002 to 2007* (2009), *available at* http://www.samhsa.gov/data/2k9/SAparents/SAparents.htm.

The Family Treatment Drug Court in Lewiston, Maine serves a population of approximately 110,000 local residents. Demographics of the participants are mostly young, single mothers who have been addicted for a long period of time. The objective of Lewiston's FTDC is to effectively attack parental substance abuse issues in order to reunify children with their parents in the shortest time period possible. This is achieved by establishing a treatment plan that can be monitored weekly with additional in-court group sessions twice per month. The treatment plan is created and administered by the drug court team, which is comprised of professional addiction counselors and a full time case manager. The Lewiston FTDC team consists of the following individuals: a drug counselor from the local mental health agency; a Department of Human Services case worker; the case manager; the presiding judge; a parent attorney; and a representative of the local hospital behavioral medicine department.[2]

EIGHT MILLION AMERICAN CHILDREN LIVE WITH AT LEAST ONE PARENT WHO IS DEPENDENT OR ABUSES ALCOHOL

I. Summary of Lewiston's FTDC Procedures

All court-filed cases involving child dependency are screened for substance abuse by the judge, child protective caseworker, and the court clerk. If there are allegations of substance abuse, the parent is referred by court order to a drug court information session with the FTDC case manager. The court cannot mandate participation in the program. Should the parent volunteer to participate, he or she signs an agreement, in court and on the record, to voluntarily participate in the FTDC. Additionally, the parent must sign all relevant releases of treatment information that can be obtained by the drug court team.

Upon entry into the program, the parent is immediately assessed and evaluated by a professional addiction licensed specialist. Subsequently, the team reviews the assessment and decides whether to accept the parent. A parent may be excluded due to clinical or legal criteria, such as serious chronic mental health diagnoses or serious criminal convictions. If accepted, the case manager develops a treatment plan for the parent. Plans vary according to the degree of addiction and the choice of substances. Currently, the program accepts those parents who are being treated with buprenorphine (Suboxone or Subutex). This, however, is a controversial policy. Some FTDC programs do not accept parents who have been prescribed these drugs and feel that the goal is complete sobriety. Furthermore, Maine has legalized use of marijuana for medical treatment purposes. Even though a parent has a medical certificate, that parent must abstain from use if he or she wishes to participate in the FTDC program.

There are three phases or steps to reach graduation, with graduation being the ultimate goal of all FTDC clients. The program lasts anywhere from twelve to eighteen months and each phase lasts around three to six months. Lewiston's FTDC provides a unique opportunity for clients to participate in "wrap around" services recommended by the team. In addition to treatment, the team attempts to attack collateral issues that arise in individual cases. Common collateral issues include: housing, education, parenting education, mental illness, employment, and dental health (cocaine addiction side effects), among others. Co-dependency raises its ugly head on a consistent basis. Certain parents are or have been subjected to the "circle of domestic violence" and have a difficult time to cutting off unhealthy relationships. This has been a difficult problem for many clients in the program.

2 The hospital administers a detox and intensive outpatient program for the members of the FTDC and others in the community.

The ultimate goal of parents in the program is to successfully complete all requirements of the program and officially "graduate." Some requirements include, but are not limited to, six consecutive months of negative testing, an obtained GED or high school diploma or another education program approved by the team, housing, employment, and appropriate child care. The fact of graduation is admissible in any future dependency proceeding pertaining to the parent. Conversely, any dismissal is also admissible as evidence in the parents' dependency case.

In 2007, Lewiston's FTDC was the most productive of Maine's FTDC programs, processing more than sixty percent of referrals, in addition to having the highest retention and completion rate in the state based on the results of those evaluations. [3] In terms of case-to-court closure, Lewiston's FTDC clients had their cases closed in less time than clients who did not participate in the FTDC. Most importantly, however, this meant that children spent significantly less time in foster care, and a permanency plan was established faster for families who participated in the FTDC. Clients who graduated from the program were more likely to regain custody of their children.

Despite the success of the Lewiston Family Treatment Drug Court, only 18.8% of clients have graduated the program, and most of the dismissals occurred in the first phase of the program (35.7%), while 26.2% of clients were dismissed in Phase 2, and 14.3% of clients were dismissed in Phase 3.

II. Key Components of Lewiston's FTDC

A. Providing Support to Pregnant Mothers

Since the inception of the Lewiston's FTDC in 2005, participants who are pregnant have benefited from the FTDC by giving birth to drug free babies while still in the program. Many studies exist that discuss prenatal exposure to drugs and its negative effect on future generations of babies and children.[4] As such, Lewiston FTDC's drug court team has been very engrossed in this problem and follows pregnant FTDC participants very closely. This includes providing pre-natal care, observations, and private sessions with our case manger.

Lewiston's FTDC has recorded at least 8 drug free births since the inception of the program in 2005. There is a qualification to the phrase "drug free." Though there are cases where the parent is prescribed medication to treat substance abuse, such as Subutex, Campral, and other antagonist medications that block the effects of a drug, the effects these drugs have on the fetus compared to heroin, cocaine, tobacco, and alcohol are negligible.

3 Hornby Zeller Associates, Inc. and students of Bates College have evaluated the Lewiston Family Treatment Drug Court. Past evaluations have primarily focused on what enables clients to succeed in the program and what has resulted in program dismissal. In 2007, Hornby Zeller Associates, Inc. evaluated the FTDC program and compared the program in Lewiston to similar Maine drug courts, while Ryan, Kern, Flatlow, and Naranja (2013) analyzed the Lewiston FTDC 2007-2012 raw data and came to conclusions about the program's effectiveness. Both evaluations concluded that the Lewiston FTDC was a successful program overall.

4 *See* Florence F. Roussotte et. al., *Abnormal Brain Activation During Working Memory in Children with Prenatal Exposure to Drugs of Abuse: The Effects of Methamphetamine, Alcohol, and Polydrug Exposure*, 54 NeuroImage 2557, 3067-75 (2011); *see also* John M. Rogers, *Tobacco and Pregnancy*, 28 Reproductive Tech. 117, 152-60 (2009).

B. Addressing Collateral Issues

Education: The FTDC provides educational information sessions to participants on topics that would be beneficial to recovering addicts. This occurs one hour before the group meetings held twice a month. These sessions include speakers who discuss nutrition, affects of drugs, alcohol and tobacco on the fetus, and adult education opportunities for those who have not obtained their high school diplomas. There are plans to hold sessions on post secondary educational opportunities in the community utilizing speakers from community colleges and the University of Maine community campuses.

Mental Health: Untreated mental illness inhibits progressive behaviors towards success. It impedes the readiness to change behaviors, as mental illness often fogs life-affecting choices. It is well recognized that keeping successful clients in the program "[d]epends on mental health status… if you don't identify [the mental health component], you're not going to treat it, if you're not going to treat it, then it [will] trigger relapse and affect quality of life." [5] Thus, adding a detailed mental health assessment or introducing a mental health provider to the team may reduce some of the unclear behaviors and provide treatment that will increase positive behaviors. Though personality characteristics and compulsive thinking are common side effects of substance dependency, they are also components of some undiagnosed mental illnesses. Without meticulous knowledge of an individual's mental health background, a client may never be treated in a way that will reduce triggers, increase stability, and increase self-management.

C. Holding Team Members Responsible

No FTDC program can be successful unless the individuals selected to be part of the team are highly motivated, conscientious and dedicated. The team is charged with monitoring the progress of each client. Lewiston's FTDC meets weekly in a team session to discuss each client's treatment plan and their progress. The team, when necessary, will decide on sanctions against a client if there are positive tests, non-appearances at the weekly mandated case manager meetings, or other violations of court's policies and procedures. In addition, team members attend continuous education programs held in and out of state. Most team members attend the annual conference of the National Council of Drug Court Professionals.

SINCE THE INCEPTION OF LEWISTON'S FTDC IN 2005, PARTICIPANTS WHO ARE PREGNANT HAVE BENEFITED BY GIVING BIRTH TO DRUG FREE BABIES WHILE STILL IN THE PROGRAM

D. Utilizing Help from Local Universities

Lewiston's FTDC program has associated itself with the local liberal arts college, Bates College located in Lewiston, Maine and the University of Maine School of Law located approximately forty miles away. These students provide invaluable support to the FTDC: they revise and review our procedures and policies; and act as case management aides to the presiding drug court judge; and volunteer as interns for school credit. It is highly recommended by these authors that all such drug court programs make a serious effort to collaborate with all local post secondary in-

5 Interview with Hartwell Dowling, State Coordinator for Maine's Family Treatment Drug Courts. Interview conducted by Aisling Ryan, October, 2013.

stitutions in the area. We found enthusiastic support by these institutions in our area.

E. Identifying what Motivates Parents to Succeed

The motivation to live sober and care for children is potentially powerful enough for some parents to change their substance dependent habits. Other obstacles, such as, neurological effects of substance abuse, mental illness, environmental factors, and personality characteristics, impede the overarching goal of sobriety. Due to FTDC program opportunities, social support, and direct communication with DHHS, Family Treatment Drug Courts have a tendency to instigate intrinsic motivation in clients. The question of, "*why do I want to become sober"* is a challenging one that only arises when someone has accepted his or her need to change. Lewiston's FTDC focuses on intrinsic personal success, specifically through heavy social support during drug court meetings, consistent interaction, highly-monitored case management, and personal counseling sessions.

F. Ensuring Support and Input from State Judicial Department

Without question, the cooperation and support of the Maine Judicial Department's Administrative Office of the Courts is a key stimulus for the success and continuation of the program. The Judicial Department approved and permitted judges at the drug court locations to preside over the court hearings and team meetings. Let us keep in mind that most family courts throughout the country are comparable to our Maine courts. These courts are constantly over burdened with high caseloads and understaffed Clerk Offices that are trying to sustain the demands.

It is the judges who are responsible for the success or failure of any "problem solving" court. Judges who agree to take on this responsibility are to be commended for their efforts. Such judicial work can be tedious, demanding, and sometimes overwhelming due to the nature of the judicial approach or mode of "judging" that goes with the program. The concept and skill of "motivational interviewing," face to face confrontation with clients, the impositions of sanctions for non-compliance, the knowledge of treatment modes, the knowledge of available services within the community, and, of course, the full comprehension of legal and illegal drugs are only a few of the challenges that judges face in substance abuse programming.

REACHING PERMANENCY IS THE GOAL OF ALL CHILD DEPENDENCY CASES

III. Challenges of Lewiston's FTDC

A. Sustainability

Upon the expiration of any drug court grant, the challenge facing the existing program is enormous. The drug court grant, contributed by the United States Justice Department, expired at the end of 2007. Prior to expiration, those funds were used to fund a court clerk's position, a full time case manager, judge time, a state drug court coordinator position, testing devices, funds for rewards and miscellaneous wrap around services, treatment expenses, and funds for payment of the costs of the local hospital's substance abuse services.

B. Team Communication

An in-touch network of case management, counseling, attorneys, DHHS caseworkers, and treatment providers avoids unnecessary client confusion and immediate program

feedback for the client. Excess frustration from the client derives from imbalanced outcomes from professionals. For example, case management may address a drug test failure, while a DHHS caseworker provides more child supervision time. Imbalanced outcomes without proper explanation lead to confusion and unclear feedback about what to change during treatment. Additionally, unclear team communication extends time between behavior and reward or sanction, raising challenges for the clients to understand the behaviors they need to change.

The development and implementation of strategies to gain continued judicial support is critical. A sophisticated judiciary knowledgeable in the area of substance abuse is a must. Both the National Council of Juvenile and Family Court Judges and the National Council of Drug Court Professionals offer family drug court education as part of its educational programs. These programs focus on strategies needed to implement a family treatment drug court.

WITHOUT METICULOUS KNOWLEDGE OF AN INDIVIDUAL'S MENTAL HEALTH BACKGROUND, A CLIENT MAY NEVER BE TREATED IN A WAY THAT WILL REDUCE TRIGGERS, INCREASE STABILITY, AND INCREASE SELF-MANAGEMENT

C. Client Readiness to Change

Expecting sustainable sobriety, in addition to a changed life, within a year is extremely ambitious for most clients. For those who are not psychologically at a stage to change, success is impossible. Drug courts face the challenge of recognizing whether a client's mindset matches his or her behavior, such as recognizing when a client intends to use again after the program is successfully completed. This challenge, however, can be improved through appropriate rewards and sanctions, motivational interviewing, evidence-based treatment, and intense case management.

IV. Future Direction

From the authors' perspectives and experiences, the placement of a parent and child in a structured and supervised residential setting is the ideal. Change of environment, sophisticated daily treatment, professional counseling, and parent education on the site is the way to go. The costs may be prohibitive in some cases but it is certainly a worthy goal of substance abuse treatment policies by both state and federal governments.

Funding is always a critical issue among states. Maine has established a 501(c)(3) nonprofit organization entitled the Maine Alliance for Drug Treatment Courts. Donors to such an organization can claim their donation as a charitable contribution under the Federal Internal Revenue Code. The organization's function, goals and, purpose is to seek grant funding aiming to support the State's existing drug courts, both family and adult criminal, and to promote public understanding of how addiction negatively impacts our communities. An excellent example of the success of such organizations is the Kalamazoo County Michigan Drug Treatment Court Foundation located in Kalamazoo, Michigan. The organization has provided much of the funding for the county's drug courts.

One problem encountered in applying for grants is the lack of understanding by certain state and national foundations regarding

the function and purpose of drug courts and similar non-profit organizations. Therefore, the need to educate the public and certain stakeholders is a very important goal for all drug court programs.

V. Conclusion

Is a family drug court worth the time, costs and effort? Measuring the worth or value of such a program is difficult to determine. Do we look at costs, time, efforts, and contributions by people involved in the drug-free program? Certainly the value of saving six babies and more is certainly persuasive. Keeping a pregnant mother free from drug use during her pregnancy is in itself a large cost saving when considering the costs of treatment for an infant born drug affected. Some of these medical costs are tremendous, particularly if there are long term adverse affects on the fetus and after birth. In addition, reducing the time for reunification saves the cost of foster care and further treatment for the parents. Overall, reaching permanency and doing what is in the best interest of the child is the goal of all child dependency cases. Family Treatment Drug Courts seek to provide assistance to parents throughout this process.

Acknowledgements

There are many individuals and organizations that have been most helpful in planning and implementing the FTDC and aiding the authors in writing this article. Most importantly is Lindsay Gannon, who was the first full time case manager for the Lewiston family drug court and eventually the State Drug Court Co-Coordinator from 2005-2012. Here constant attention, ideas for implementing changes, strong leadership, and being a substantial contributor to the Policy and Procedures manual was above and beyond the demands of the position. She is now President of the Maine Alliance For Drug Treatment Courts.

Also thank you to Bates College's Psychology department's co-operation in providing students to evaluate the FTDC in 2013. We thank Professor Amy Bradfield-Douglass, PhD. for spearheading this evaluation and providing us with the students who completed the evaluation. Educational institutions, such as Bates College, are of great value to our courts and should be "tapped" more often. In addition, we thank the law students from the University of Maine School of Law who have contributed their time and effort to the FTDC program. The university has an excellent externship program that allows students to gain credit by interning at our District Courts.

To my co-author, Aisling Ryan, Bates'14, thanks for volunteering to work on this article with me. Aisling was one of the Bates students who evaluated the FTDC and continue on with further study helping the drug court team and writing her senior college thesis on the Lewiston FTDC.

My colleagues, thanks for letting me persist in my passion for the FTDC, allowing me the time to preside over the FTDC, and work with the drug court team. To Danielle Danforth, LSAC, Nicole Garant, LSAC, and Aga Matusiak, LCSW three wonderful clinicians who continue to provide the drug court with the expertise needed. Of course, also to Hannah Corbin, our case manager who at times spends more than the required hours working with our many clients and administering all the drug tests. In addition, to Erika Bristol, Esq. who as a parent's attorney and my former law clerk, has provided great insight in discussions involving our clientele at all team meetings. To the caseworkers at this district's Department of Human Services Child Protective Division who have been in attendance at all meetings and provided the necessary input concerning a client's progress through the child dependency process. I cite Kelly Mason and Laurel Sampson, DHHS caseworkers who never know when to stop.

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About the AUTHORS

Judge John B. Beliveau is a graduate of the University of Notre Dame, Bachelor's degree 1955. He received his Masters in Business Administration from New York Univerity's Sterns School of Business 1962 and his J.D. degree from Georgetown University School of Law 1964.

Judge John B. Beliveau practiced law in a private firm in Lewiston, Maine until his appointment to the Maine District Court in September of 1984. Prior to his appointment to the Judiciary, he was elected and served as Mayor of Lewiston, Maine (1969-70). He also served as Androscoggin County Attorney from 1971-72. Judge Beliveau chaired the Maine CASA Advisory Committee from 1985-97, which implemented and organized the Judicial Department's Court Special Advocate's program. He was also a teacher/trainer of CASA volunteers. From 1995-1999, he chaired the Committee to Study the Role of the Courts in Protecting Children and was instrumental in drafting legislation amending the Maine Child Protection laws to comply with Federal mandates contained in the Adoption and Safe Families Act (1997).

In 2005, Judge Beliveau organized and implemented a Family Treatment Drug Court at the Lewiston District Court. A Federal grant was awarded to the court in 2004. FTDC's now exist in two other District Court locations in Maine. Judge Beliveau presided over the Lewiston FTDC and chaired the Family Treatment Drug Court Steering Committee. He is a member of the National Council of Juvenile and Family Court Judges and has served on some of the organization's committees since 1994, including the Permanency Planning Division's Advisory Committee. He is also a part of the National Association of Drug Court professionals (2005-present). Judge Beliveau is now Active Retired and works at the court part time.

Judge Beliveau is an avid lecturer on Family Treatment Drug Courts. He presented at the 2010 annual summer conference in Boston, Massachusetts; made several presentations to civic groups on child protection issues and the value of the Family Treatment Drug Courts; and provides presentations to professional mental health and substance abuse providers concerning the issue of parental addiction and its impact on the family.

Aisling Ryan graduated Bates College in Lewiston, Maine in 2014. She studied Psychology and minored in Music and Educational Studies. Aisling began researching the Family Treatment Drug Court with three other classmates in May 2013. In September, she continued with the FTDC for her thesis work, researching client motivation behind FTDC success. Aisling has continued her interests in community-based research as a Research Associate at Endpoint and Outcomes, LLC in Boston, Massachusetts.

NOTES

WE HAVE FUNDAMENTALLY DIVERGENT INTERESTS IN AN ADVERSARIAL SYSTEM. HOWEVER, CIVILITY AND HONESTY AMONG COLLEAGUES, EVEN OPPOSING COUNSEL, GO A LONG WAY TOWARD AMELIORATING THE PROBLEM OF DISCOVERY.

On Professionalism, Civility, & Discovery

by Kathryn Todryk

Criminal trials in Virginia are conducted by ambush; only a small portion of the evidence in a case must be disclosed to the defense by the police and prosecutor. And, although the Supreme Court of Virginia is currently considering amending the discovery rule, the Virginia Association of Commonwealth's Attorneys vehemently opposes the amendments proposed by the Virginia State Bar's Indigent Defense Task Force. All the while, attorneys are contentiously litigating the current statutory discovery scheme. Colloquially, defense attorneys and prosecutors refer to this ongoing dispute as "Discovery Wars."

One of the battles centers the requirement that written discovery responses, including copies of documents and videos subject to discovery, are not being uniformly complied with throughout the Commonwealth. I have heard from defense attorneys who, when requesting the minimum discovery provided by rule, receive a response stating that the attorney may view the applicable discovery at the prosecutor's convenience. Such a response can be onerous because while a prosecutor may cover a single or limited geographical jurisdiction, defense attorneys often cover multiple jurisdictions and may not reside in the city or county where the discovery material is located. As Onerous as it is, however, some prosecutors believe that this constitutes ample compliance with the rule. It should be noted that some jurisdictions and Commonwealth's Attorney's Offices follow better practices than others.

Another questionable discovery response from prosecutors tasks defense counsel with contacting the police department to see if there is any information, documents, videos, or other tangible evidence that may be the subject of discovery or *Brady v. Maryland*. While I empathize with those prosecutors who do not have a good working relationship with their respective police departments, such a lack of rapport does not excuse violating the rule and passing the responsibility to the defense counsel. It is the prosecutor who is tasked with reviewing information to determine whether material is exculpatory and discoverable, and the prosecutor must be held accountable.

One of the reasons cited by the Virginia Commonwealth's Attorneys Association for their opposition to increased discovery is witness safety. Having worked in a jurisdiction known primarily for its gang violence, I recognize this as a real concern. However, this particular concern applies in a minority of cases. Outside of my own experience, I was unable to find any studies on the number of cases in which witness safety is an integral issue in

the prosecution. Defense attorneys, however, are sensitive to this issue, and revised ethical guidelines permit discovery without disclosing witness addresses. Additionally, this information is easy to redact from written discovery, and there can be an agreed order to prohibit the dissemination of that information in open-file discovery. In such cases, there must also be an agreed index and order for the purposes of appeal. Prosecutors, however, decry this approach claiming that redacting discovery is time consuming. But, consider the defense position: defense attorneys, particularly public defenders, can, like prosecutors, carry a caseload from 100 to 250 open cases. Such a caseload, coupled with in-office client meetings, jail visits, and witness interviews, leaves little time to visit prosecutors' offices to review their files or canvass local police departments looking for discoverable material.

So, why is there so much controversy and discord? Unfortunately, it is not as simple as, "can't we all just get along?" We have fundamentally divergent interests in an adversarial system. However, civility and honesty among colleagues, even opposing counsel, go a long way toward ameliorating the problem of discovery. This means that the level of candor one should pay towards opposing counsel is the same as you would owe to the court. Courtesy and honesty by counsel make negotiations easier in an overburdened criminal justice system. I have found that a good working relationship, predicated on one's honesty and reputation as defense counsel, makes prosecutors more forthcoming with discovery. Similarly, police officers are more likely to advise defense counsel of information if they respect and know that the attorney deals with them and other witnesses fairly and honestly.

In addition, ethics should prompt prosecuting attorneys to be more forthcoming with discovery. For example, prosecutors should be encouraged to go beyond the scant statutory rule by providing additional inculpatory information, and early disclosure of *Brady* material (exculpatory, mitigating, and impeaching information). In providing such information prior to trial, the prosecutor will have less to fear from a wrongful conviction or reversal. Furthermore, increased information sharing will foster plea agreements and ease heavy dockets, when appropriate. It is no secret that it is much easier to advise a client about his or her options (trial or plea, jury, or bench trial), when defense counsel knows all of the evidence likely to be presented at trial.

Ultimately, it is in everyone's best interest to be honest with all parties involved in criminal litigation, to provide, at a minimum, the statutorily required discovery and Brady material well in advance of trial, and to maintain one's reputation for professionalism, honesty, and civility. In my opinion, open discovery can only further these ends and will benefit us all as we seek to uphold our oaths to provide competent, zealous representation to our respective clients.

About the AUTHOR

Kathryn Todryk is an Assistant Public Defender in Virginia for the City of Franklin and the counties of Southampton and Isle of Wight. Prior to coming to Franklin, she was an Assistant Public Defender in Richmond, Virginia, and an Assistant Commonwealth's Attorney in Newport News for one year. She is an active member of the Virginia Association of Criminal Defense Lawyers, the NACDL, and zealously advocates for the rights of all those charged with crimes, but has a particular interest in juvenile justice and mental health.

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