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# THE DEFENDER

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# President's Message

By Steven Sherick

## Why I'm a Member of AACJ

*I was conversing with some of the AACJ Board Members about how to attract new members, which caused me to think, "Why am I a member of AACJ?"*

I'm not naturally a joiner. I'm not on a bowling team or in a bridge club. I don't tweet or twitter. My approach to joining organizations is consistent with Groucho Marx – "I don't care to belong to any club that will accept people like me as a member."

*So why have I been a member of AACJ these past almost 25 years?*

Maybe I joined because everyone is just like me. We all share the same political philosophy. After all, isn't every member a liberal? Yes, except those who are conservatives. And everyone is a Democrat, right? Except those who are Republicans, Independents, Greens, Libertarians, or something else, or who have no affiliation.

We all have the same theology. Aren't all the members Catholics (lapsed or practicing)? Except those who are Atheist or Agnostic, or Baptist, Buddhist or Baha'i, Christian (mainstream or conservative), Jewish, Muslim, Mormon, Wiccan, Zoroastrian, or none of the above.

We're homogeneous. Everyone is Caucasian, right? Except those of us who are Latino, Asian, African-American, Native American, or mixed race.

*And it's a men's club, right?*

Because everyone in the organization agrees with all my views and realizes how brilliant I am? So why do I keep running into members who disagree with me and know how full of bullshit I am?



*So what is it?*

I find that AACJ is a contentious, opinionated, independent, sometimes profane, always irreverent gang of lawyers who I love to be around. Being in AACJ is a constant challenge to each of us to be bold, to stand up for fundamental principles, and to be relentless in defending the Constitution. Membership is a reminder

to courageously speak truth to power, especially when judges, legislators or prosecutors don't want to hear it. And it means to always have each other's backs when authority does as authority will at times - seek to intimidate or silence one of ours.

I'm proud to have you all as my brothers and sisters in AACJ. Keep on being pushy, aggressive and unreasonable on behalf of your clients and on behalf of all of our rights. I might just hang around for another 25 years.



# Judges Say The Darndest Things

By Fredric F. Kay

**US. V. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010),  
Dissent @ 2010 WL 3169573**

In a recent Ninth Circuit case out of Oregon, the dissent is more interesting than the majority opinion. Here, the police came on to the curtilage of defendant Pineda-Moreno's property - his trailer's driveway - "in the dead of night" and attached a GPS device to the undercarriage of his automobile. The trial court denied Pineda-Moreno's motion to suppress, and the Ninth Circuit affirmed. Chief Judge Alex Kozinski, who immigrated to the U.S. at age 12 and is the Romanian son of Holocaust survivors, dissented from the denial of rehearing *en banc*. He was polite, but not complimentary, about his fellow judges' decision and the ivory tower in which they work. He wrote:

*There's been much talk about diversity on the bench, but there's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live. Yet poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. Whatever else one may say about Pineda-Moreno, it's perfectly clear that he did not expect - and certainly did not consent - to have strangers prowl his property in the middle of the night and attach electronic tracking devices to the underside of his car. No one does.*

*When you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep. But the Constitution doesn't prefer the rich over the poor; the man who parks his car next to his trailer is entitled to the same privacy and peace of mind as the man whose urban fortress is guarded*

*by the Bel Air Patrol. The panel's breezy opinion is troubling on a number of grounds, not least among them its unselfconscious cultural elitism.*

\*\*\*

*I don't think that most people in the United States would agree with the panel that someone who leaves his car parked in his driveway outside the door of his home invites people to crawl under it and attach a device that will track the vehicle's every movement and transmit that information to total strangers. There is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu.*

***"The needs of law enforcement, to which my colleagues seem inclined to refuse nothing, are quickly making personal privacy a distant memory."***

Chief Judge Kozinski summed it up in simple words: "The needs of law enforcement, to which my colleagues seem inclined to refuse nothing, are quickly making personal privacy a distant memory. 1984 may have come a bit later than predicted, but it's here at last."

The September 13 edition of *Time* magazine described Chief Judge Kozinski as "a Reagan appointee and leading conservative" and the majority opinion as "bizarre - and scary." An August 14 *New York Times* article noted that the *Pineda-Moreno* case contradicts

precedent from three other appeal courts on the same issue: whether police need to obtain a warrant before secretly attaching a GPS device under a car. The article notes four state supreme courts have held their state constitutions require a warrant to install a GPS device.

Arizona, however, is not one of THE states listed.

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*Fred Kay is a longtime member of AACJ, a former Federal Public Defender for the District of Arizona, and a member of the Pima County Public Defender Office.*

## AACJ Amicus in SB 1070 Lawsuits

Congratulations and thanks go out to **David Euchner, Matthew Green, Louis Fidel, and Adam Bleier** - the team writing and filing AACJ's amicus brief in the SB 1070 litigations filed in United States District Court - Arizona (Phoenix), *Friendly House, et al., v. Michael B. Whiting, et al.*, U.S. Dist.Ct. Case N° CV 10-01061-PHX-JWS.

In addition to being a well-written, cogent brief, it was quoted by District Court Judge Susan R. Bolton as support for her order granting in part the preliminary injunction requested by plaintiffs. Related case: *United States of*

*America v. State of Arizona and Janice K. Brewer*, U.S. Dist. Ct. Case N° CV 10-01413-PHX-SRB. At page 16, Judge Bolton cited arguments presented at page 15 of AACJ's amicus brief, citing to the City of Tucson's Answer and Cross-Complaint in *Escobar, et al. v. City of Tucson, et al.*, U.S. Dist.Ct. Case N° 10-249-TUC-SRB.

On October 8, 2010, Judge Bolton, in granting in part and denying in part the defendant's Motions to Dismiss in *Friendly House*, cited AACJ's Amicus brief extensively at pages 35-37 in her orders denying their motions.

**D** is for **DISMISSAL**:  
*A vignette in the life of a public defender discussing dismissal.*  
 By Ella Johnson



- C. My case was dismissed. Why am I here (in court)?  
 A. Your case was dismissed without prejudice.
- C. What does that mean?  
 A. It means that even though the original charges were dismissed, the County Attorney may bring back those charges at a later date.
- C. Those charges were two years ago!  
 A. The County Attorney has seven years to re-file the charges.
- C. That's unfair! That's double jeopardy!  
 A. Did you plead guilty to the former charges?
- C. No.  
 A. Were you convicted at trial on the former charges?
- C. No.  
 A. No double jeopardy.
- C. I need a lawyer.  
 A. No comment.

- C. I was on parole at the time I got those charges. My parole was revoked as a result of those charges. I went back to prison; I have served my time for these charges. These charges should be dismissed.  
 A. You were on parole in Arizona?
- C. No.  
 A. Where?
- C. California, Federal charges, Aggravated Assault.  
 A. One of the allegations for the violation of your parole may have been these charges; however, the prison time was for violation of your parole, not for these Arizona charges. You still have to answer for these Arizona charges.
- C. These charges should be dismissed. This is double jeopardy. I need a lawyer. I'm not going back to prison! I'm starting to get my life in order!

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*Ella Johnson is a member of the AACJ Board of Governors, a member of the La Paz Public Defender Office and the President of APDA.*

# Tucson City Public Defender Office Granted Caseload Relief

By Russell Hughes

The litigation involved in William Acosta and 335 other Tucson City Court Defendants, et. al. v. Riojas, was the result of the lengthy and extensive, but eventually failed, administrative efforts of the then Tucson City Chief Public Defender, Stephanie Meade, to limit the number of misdemeanor cases the court assigned to that office. The Public Defender's office had previously experienced a significant reduction in resources but not a commensurate reduction in caseloads and the court failed to reduce the cases assigned to the level mandated by Arizona law.

After the initial reduction in public defender resources, Tucson City Court granted individual public defender motions to withdraw due to caseload concerns. As the problem persisted, the court became more reluctant to grant these motions. The court began requiring increasing levels of justification from the attorneys filing such motions to withdraw and the hearings on these motions were frequently set quite some time after the motion to withdraw was filed. Sometimes, these cases would be resolved by the assigned attorney who was ethically bound to continue representing each client until substitute counsel was appointed, even though a motion to withdraw had already been filed. Eventually, the court required the entire office to file an office-wide motion to withdraw, effectively shutting off all out-of-custody cases coming into the Tucson City Public Defender's office. At the hearing on the office-wide motion to withdraw, the chief public defender presented an extensive record of her efforts to obtain an administrative solution. Nevertheless, the city court judge decided to allow the withdrawal in only 100 of the several hundred defendants who had accumulated during the lengthy time it took for the court to set the matter for a hearing. The city public defender sought review on special action.



The case (C20101428) was assigned to Pima County Superior Court Judge Acuna. At that hearing various arguments were propounded by the attorney hired to represent the lower court. The public defender relied heavily on *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984) and *State v. Zarabia* 185 Ariz. 1, 912 P.2d 5 (1996). This authority clearly adopts the ABA guidelines for annual caseloads

for public defenders. The current ABA guidelines limit a misdemeanor attorney, in most circumstances, to representing not more than 400 clients on as many dockets in a year. The court noted that some deference should be given to attorneys moving to withdraw, especially in those circumstances where the evidence showed that the attorneys were exceeding the ABA standards. In its May 14,

2010 ruling, the court dismissed the arguments propounded by the respondent and granted the petitioner defendants the relief requested, allowing the public defender to be withdrawn and substitute counsel was appointed. The respondent did not seek further review of this decision.

This may not be the last time this issue arises in these difficult economic times; Arizona law supports preserving workable caseload volumes for those who take on the task of representing indigent criminal defendants.

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*Russell Hughes is an Assistant Public Defender for the City of Tucson and an AACJ member.*

# Protecting Factfinders From Being Overly Misled, While Still Admitting Weakly Supported Forensic Science Into Evidence<sup>1</sup>

By Michael J. Saks<sup>2</sup>

*“Washington state legislators, faced with 10th graders’ declining achievement test scores in math and science, are poised to just eliminate the tests altogether,” according to a Seattle Times Report.<sup>3</sup>*

their “general approach of relaxing the traditional barriers to ‘opinion’ testimony,” while rejecting *Frye*’s<sup>8</sup> “rigid” requirements. How could a supposedly easier test (*Daubert*) exclude fields that had presumably been admitted under a more demanding test (*Frye*)?

## I. INTRODUCTION

If the students cannot pass the test, what is one to do? Answer: Get rid of the test. The legislators of Washington State were not the first to think of this idea. Federal (as well as state) judges, encountering a similar problem when applying the *Daubert* trilogy<sup>4</sup> to the non-science forensic sciences,<sup>5</sup> devised a similar solution.

The judges, however, have been more veiled about their solution, and they have reason to be. A state legislature is constitutionally empowered to impose or to withdraw a test as it seems reasonable to advance the health, safety, or welfare of the people. Not so for a judge of an inferior federal court who wishes to ignore three unanimous<sup>6</sup>

Supreme Court decisions -- which, with increasing commitment, direct lower courts to conscientiously subject expert evidence to meaningful tests appropriate to the nature of the subject matter, and to exclude any proffered testimony that is not able to meet the test. But conscientious and straightforward application of those Supreme Court opinions would have led to the exclusion of large segments of the non-science forensic sciences, and that prospect apparently did not sit well with quite a few judges.<sup>7</sup>

Many judges were surprised and puzzled to discover that the *Daubert* trilogy led them to the brink of flunking large portions of a number of fields that had long ago become familiar fixtures in the criminal courts. After all, the Supreme Court spoke of the “liberal thrust” of the Federal Rules and



There are several answers. Most of the non-science forensic sciences had never been subjected to any formal test of admission,<sup>9</sup> so who knows how they would have fared under *Frye*.<sup>10</sup> Moreover, if one looks not at what *Daubert* says, but instead at what *Daubert* does, the mystery begins to solve itself. In place of *Frye*’s test of “general acceptance,” *Daubert* substitutes a test of “evidentiary reliability” (validity) of the expertise’s underlying claims.<sup>11</sup> For many questions, *Frye* and *Daubert* will properly lead to the same result. But, on the one hand, where sound science has not yet come to be widely known or accepted, *Daubert* will admit more readily than *Frye*, and *Daubert* will appear to be the more liberal test. On the other hand, where a field came to be generally accepted among its practitioners even though

they had never gotten around to testing their assumptions, *Frye* will admit more readily than *Daubert*, and *Daubert* will appear to be the more rigorous test.

Few fields enjoy so much "acceptance" -- within their own domain, among the general public, and among lawyers and judges -- while having done so little validity testing, as do the non-science forensic sciences. Few contemporary fields of empirical, material, observable endeavor have done so little testing, taken so much on faith, and asked that so much of their offerings be taken on their *ipse dixit*, and yet have come to be so widely well-accepted. It was inevitable that such fields would run into standards they could not meet when the "general acceptance" test was replaced with the "evidentiary reliability" test. The surprise and the problem result not from something odd about the legal test being applied,<sup>12</sup> but from our belated realization that some of the disciplines being tested have not done their homework.

## II. BACKGROUND

### A. Weakness of the Non-Science Forensic Sciences

The non-science forensic sciences have not yet been able to establish the validity and the limits of their most fundamental claims.<sup>13</sup> As Giannelli and Imwinkelried have commented, "all the areas of forensic science discussed in this article share two common denominators: In each area little rigorous, systematic research has been done to validate the discipline's basic premises and techniques, and in each area there is no evident reason why such research would be infeasible."<sup>14</sup> Thus, their courtroom testimony routinely exaggerates what they can know and what they can infer about the evidence at issue. Thoughtful members of those fields, as well as observers from related fields, have long been aware of this, even though popular culture and courts believe otherwise. In this section, I will mostly allow those thoughtful observers to speak for themselves.

Fingerprint identification, the reigning champion of the non-science forensic sciences, notwithstanding puffery in its sales pitches<sup>15</sup> and by its many fans in the popular media, had long been recognized as unable to establish its most fundamental claims with any existing evidence, data, studies, or theory which it possessed. Biological researchers, after working diligently to try to prove that no two fingerprints could be alike, concluded: "[I]t is impossible to offer decisive proof that no two fingers bear identical patterns."<sup>16</sup> Put simply, "the suggestion that recorded fingerprints are unique has never been rigorously checked."<sup>17</sup> "It is impossible to prove any human characteristic to be distinct in each individual without checking every individual, which has not

been done."<sup>18</sup>

In response to the coming of *Daubert*, some government agencies began to look into the problem of preparing some of the non-science forensic sciences for their anticipated test of admission. Participants in the National Institute of Justice Fingerprint Advisory Committee, which "included practicing latent print examiners, researchers, and senior administrators from Federal, State, and private forensic science laboratories . . . reached a consensus that the field needs . . . [b]asic research to determine the scientific validity of individuality in friction ridge examination based on measurement of features, quantification, and statistical analysis."<sup>19</sup> More recently, an FBI Laboratory committee assembled, *inter alia*, "to evaluate the fundamental basis for the science of friction ridge skin impression pattern analysis" and concluded, once again, that "[e]mpirical studies can never prove absolutely the hypothesis of uniqueness."<sup>20</sup> Moreover, the committee was "not able to find a single peer-reviewed publication that definitely addressed all of the basic assumptions of friction ridge impression analysis."<sup>21</sup>

David Stoney has explained how fingerprint examiners actually reach their judgments of identity: "The criteria for absolute identification in fingerprint work are subjective and ill-defined. They are the product of probabilistic intuitions widely shared among fingerprint examiners, not of scientific research. This generally is unappreciated."<sup>22</sup>

How much correspondence between two fingerprints is sufficient to conclude that they [are the same pattern]? . . . An adequate answer . . . is not currently available. The best answer at present . . . is that this is up to the individual expert fingerprint examiner to determine, based on that examiner's training, skill, and experience. Thus, we have an ill-defined, flexible, and explicitly subjective criterion for establishing fingerprint identification.

. . .

Any unbiased, intelligent assessment of fingerprint identification practices today reveals that there are, in reality, no standards.<sup>23</sup>

Because of the subjectivity and variability in standards from one examiner to another, the FBI committee recommended that the quality of latents and their effects on examiner judgments need to be studied: "[Q]uality/clarity, i.e., distortion and degradation of prints, is the fundamental issue that needs to be addressed."<sup>24</sup> "There is no defined quality metric"<sup>25</sup> for assessing the quality of

a latent. Areas where the committee believed research is most needed to develop objective criteria include: Assessing quality of latents, image capture and quality (where no data were found to exist), simultaneous impressions (where they found, among FBI latent print examiners, “[c]onsiderable variation in the definition of simultaneous prints as well as the practices for interpreting such evidence”), and criteria for making an exclusion.<sup>26</sup> Relatedly, the Inspector General of the Department of Justice has called for procedural reforms which “will require dramatic changes in the way latent fingerprint identifications are performed in the FBI Laboratory and likely in other forensic laboratories as well.”<sup>27</sup>

Similar realizations hold for non-science forensic sciences other than fingerprint identification. Commenting on the broad domain of criminalistics, an FBI Laboratory examiner writing in the *Journal of Forensic Sciences* noted: “[I]t must be observed that there is no rational or scientific ground for making claims of absolute certainty in any of the traditional identification sciences, which include fingerprint, document, firearms, toolmark, and shoe and tire-tread analysis.”<sup>28</sup>

Two leading practitioners and researchers in forensic odontology reviewed the literature of their field. They wrote: “This article presents a discussion of the scientific basis for human bitemark analyses” and “[t]he review revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bitemark comparisons.”<sup>29</sup>

In the area of handwriting identification, strong advocates for the field conceded the long-standing lack of evidence supporting its claims: There is an “admittedly sparse history of carefully controlled empirical studies,” and “there certainly has been a shortage of studies . . .”<sup>30</sup> There is “an acute lack of empirical evidence on the proficiency of document examiners” and therefore “it is widely agreed that testing of professional document examiners and acquiring data on their abilities . . . are necessary.”<sup>31</sup> “Document examiners have not done the kind of empirical research that could have and should have been done.”<sup>32</sup> “On that the critics are absolutely correct.”<sup>33</sup> There is “indeed a dearth of published empirical information relating to the proficiency of document examiners . . .”<sup>34</sup>

In addition to the absence of foundational studies informing the principles on which examiners rely, absence of standards to which examiners must hew, and a free-for-all of subjective discretion -- examinations often are contaminated by examiners knowing of other raw investigatory information, theories, speculations, expectations, hopes, and desires, about a case they are working on. When one examiner checks the work of another examiner,<sup>35</sup> the second

examiner knows what the first examiner thinks he or she has found. Such context information is known to systematically skew the judgments of examiners, and is regarded as bad practice in most fields, but is standard operating procedure in the forensic sciences.<sup>36</sup>

Champod and Evett -- respectively, forensic scientists in Switzerland and Britain -- argue that “there is, at present, a major contradiction between the scientific status that is claimed and the operational paradigm to which its practitioners subscribe”<sup>37</sup> -- to the field’s rejection of conventional scientific criteria for thinking about, measuring, and evaluating probabilistically the evidence with which they work. Though writing specifically about fingerprint identification, they could be talking about all of the disciplines that claim to be individualizing the source of markings and materials left at crime scenes. Instead of asking courts to take the examiner’s word for the validity of what they offer the court, based on nothing more than their “experience,” Champod and Evett argue that “the scientist should, as far as possible, support his/her opinion by reference to logical reasoning and an established corpus of scientific knowledge. This is what we mean by ‘transparency;’ the former ‘in my experience’ justification we refer to as ‘obscurity.’”<sup>38</sup>

Forensic scientists and thoughtful prosecutors attribute the failure of forensic science to develop its scientific foundations to the credulousness of the courts.

The uniqueness of friction ridge patterns, be they fingerprints, palmprints, or bare footprints, has long been accepted by the scientific community and by the courts. The reason for this widespread acceptance perhaps lies in the fact that fingerprints were first introduced at a time in our history when society was less demanding of proof and more trusting of authority. As a result of widespread recent challenges that friction ridge identification, as well as other forms of personal identification evidence, lack a proven scientific foundation, efforts have been ongoing to supply today’s demands of validation and verification that is . . . required by . . . Daubert v. Merrell Dow Pharmaceuticals.<sup>39</sup>

Similarly, an assistant U.S. attorney, speaking at an FBI sponsored conference, commented: “[T]he QDE [questioned document examiner] community [has failed] to develop a rigorous empirical defense of its theories and methods.”<sup>40</sup>

He further stated, "*Daubert* challenges prosecutors and the QDE community to work with scholars to develop ways to demonstrate to courts . . . that the basic principles of QDE analysis are scientifically valid . . ."41 The reason for this shortcoming is that "forensic document examiners traditionally had not had any particular reason to conduct validity studies because their testimony was being admitted without them."<sup>42</sup>

Although these weaknesses might be news to courts, they are better known among forensic scientists themselves, where concerns about *Daubert* had either been how to prepare for the great test of validity<sup>43</sup> that had been put off for so many decades, or how to keep flying under its radar. An amicus brief, drafted by a consortium of law enforcement groups, including forensic scientists, as the Supreme Court was preparing to hear *Kumho Tire*, urged the Court to exempt from validity testing under *Daubert* prosecution expert evidence,

the great bulk of [which] does not involve scientific theories, methodologies, techniques, or data in any respect [but instead offers opinions] about such things as . . . fingerprint, footprint and handprint [identification], handwriting analysis, firearms markings and toolmarks and the unique characteristics of guns, bullets, and shell casings, and bloodstain pattern identification.<sup>44</sup>

Ironically, then, the same fields that had spent much of the previous century claiming a place on the witness stand on the basis of their claim to being "sciences," now sought to remain in court by arguing that what they do "does not involve scientific theories, methodologies, techniques, or data in any respect."<sup>45</sup>

Exaggerated belief in the forensic individualization sciences appears to play an important part in erroneous convictions. Forensic science errors account for more erroneous convictions than any source of evidence other than eyewitnesses.<sup>46</sup>

#### **B. Judicial Treatment of the Non-Science Forensic Sciences Post-*Daubert***

What do judges do when they come nose to nose with the shortcomings of the non-science forensic sciences in the course of deciding a challenge to admissibility under *Daubert/Kumho Tire* or similar state rules?

Recall the admissibility rules. In *Daubert* a unanimous Supreme Court held that "[p]roposed testimony must be supported by appropriate validation."<sup>47</sup> The opinion did

not regard this test as limited to "novel" forms of expert evidence,<sup>48</sup> and the implications of that non-limitation were readily seen by courts which read the *Daubert* opinion with any care.<sup>49</sup> Moreover, courts were not to trust in the expert's claims of "experience" -- the most frequent refuge of the non-science forensic sciences. The commentary to the 2000 revision of the Federal Rules cautions:

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."<sup>50</sup>

Accepting the idea that there must be a demonstrably valid basis to an expert's testimony, and that the opinions must rest soundly on that foundation,<sup>51</sup> does not appear to have created any existential gatekeeping crises for courts in civil cases, as they vigorously applied it to exclude experts proffered by the parties.<sup>52</sup>

On the criminal side of the hallway, the picture has been quite different. Thoughtful members of the forensic science community, and agencies that employed and supported the non-science forensic sciences, recognized their shortcomings, worried about their fate at the hands of judges armed with *Daubert*, and, in an effort to head off their likely exclusion, began to undertake research in an effort to meet the *Daubert/Kumho* standards. The courts themselves took a strikingly different view of forensic individualization science's wares.

Some courts simply did not and do not see any problem. They have absorbed the popular culture and have no idea how to evaluate empirical claims. These judges were raised believing the unsupported claims of the non-science forensic sciences, and cannot see beyond those blinders. They perceive no absence of supporting evidence; the mere assertions of proponents are more than sufficient. Those judges hold a hearing or not, and then think that the non-science forensic sciences look fine whether or not they are. One of the clearest examples of this is provided by *United States v. Havvard*, in which a *Daubert* challenge to fingerprint expert testimony was denied.<sup>53</sup> The court begins its opinion on the *Daubert* motion by inadvertently revealing its own strong assumptions: "The court's decision may strike some as comparable to a breathless announcement that the sky is blue and the sun rose in the east yesterday."<sup>54</sup> Finding no research, data, or other scientific basis for the claims of

fingerprint expert evidence, the court looked for other bases to try to justify admission, and it found them: For each of the *Daubert* factors that the proponents of fingerprint expert evidence failed to provide, the court invents a legal process substitute. For example, courtroom testing substitutes for scientific testing. The fact of a history of admission in courts (general acceptance by judges, as it were) fills in for the absence of research publications, of scientific testing, of results from such testing. Where the experts made assertions that the court found non-credible, the court replaced those assertions with its own more credible version. Following this curious exercise, in which the court replaced the *Daubert* factors with its own shadow factors, the judge declared this expert evidence to be “the very archetype of reliable expert testimony under [*Daubert*].”<sup>55</sup>

Some courts fear what they might learn, and that they will not be able to find a path around what they learned, and so they simply refuse to hold a hearing.<sup>56</sup> The most forthright example of this might be one given by Judge McKenna who, as explained below, found handwriting expert evidence to be sorely deficient, but nevertheless found a way to let it in.<sup>57</sup> With *Kumho Tire*, the Supreme Court closed off that evasion route. When later asked what he would do if the same case came before him now, he answered that he would not hold a hearing on the question; just let it in.<sup>58</sup>

Other courts do see the problem, but cannot bring themselves to apply *Daubert* in any manner that would lead to exclusion of the evidence. As one commentator wryly observed: “It seems that the only standard the courts are requiring of forensic science is that it be incriminating to the defendant.”<sup>59</sup> As we review a number of examples, the reader is invited to contrast these to the treatment courts have given to civil cases, illustrated in [footnote 52].

*United States v. Starzecpyzel*<sup>60</sup> entertained a challenge to the admissibility of asserted handwriting identification expertise. After a full *Daubert* hearing, the court concluded: “Were the Court to apply *Daubert* to the proffered FDE testimony, it would have to be excluded. This conclusion derives from a straightforward analysis of the suggested *Daubert* factors . . .”<sup>61</sup> “[F]orensic document examination constitutes precisely the sort of junk science that *Daubert* addressed.”<sup>62</sup> Despite these findings, the *Starzecpyzel* court admitted the document examiner’s testimony, reasoning that *Daubert* was intended to apply to scientific evidence, forensic handwriting expertise clearly was not science, therefore *Daubert* was inapplicable, and hence the testimony was admissible.<sup>63</sup> So “effective” was this reasoning that numerous other courts copied it in dealing with challenges to asserted

handwriting expert evidence in their own cases. *Kumho Tire* put an end to artificial distinctions between science and non-science, holding that all proffered expert evidence, whatever it might wish to call itself, had to demonstrate its validity or be excluded, implicitly overruling *Starzecpyzel* and its numerous imitators.

The claims of fingerprint identification experts have been challenged in dozens of *in limine* hearings in recent years. With one exception, all of those ultimately resulted in admission. At the same time, none of those courts was able to point to facts that met the requirements of *Daubert*. In *Havvard*,<sup>64</sup> as noted above, finding no scientific basis for fingerprint expert evidence, the court replaced each *Daubert* factor with some trial process factor. In another fingerprint case, *United States v. Llera-Plaza (Llera-Plaza II)*,<sup>65</sup> the court acknowledged the gaping absence of empirical research testing the claims of fingerprint examiners, saying: “I conclude that the one *Daubert* factor which is both pertinent and unsatisfied is the first factor -- ‘testing.’”<sup>66</sup> But the court admitted the testimony anyway. Query, however, if there is no empirical research testing the technique and its assumptions, what can be the basis for admission under *Daubert*: No published peer reviewed research, no known error rates, and no basis for general acceptance. The judge in *United States v. Crisp*<sup>67</sup> took the view that the Supreme Court could not have wanted the non-science forensic sciences to be excluded and therefore, notwithstanding *Daubert*’s apparent commands, soundness (validity, reliability) of the evidence could not be the touchstone of admission. Consequently, given the serious shortcomings in the scientific foundations of fingerprint expert evidence, the court created alternative, less rigorous, criteria that would facilitate admission.<sup>68</sup> Although the majority of a three-judge panel reviewing a decision to admit fingerprint expert testimony voted to admit on the ground that such testimony had been admitted for most of the century, a dissenting judge, attempting to test the facts against the *Daubert* criteria, concluded: “At . . . trial the government’s fingerprint identification evidence failed to satisfy any of the *Daubert* requirements for establishing scientific reliability.”<sup>69</sup> A review of the many cases in which courts wrestled with challenges to fingerprint expert testimony characterized those courts’ opinions (in which they could not find bases for admission that comported with the requirements of *Daubert* and *Kumho Tire*, but nevertheless found various ways to rule the testimony admissible) as “a catalog of evasions.”<sup>70</sup> These included: reversing the burden of proof, ignoring *Kumho Tire*’s task-at-hand requirement, conclusory judgments with

no analysis, substitute trial process criteria for scientific criteria, relying on general acceptance, emphasizing flexibility of criteria, and bringing the standards down to meet the expertise.

Some courts considering challenges to firearms identification testimony could not find adequate basis for admission under *Daubert*, but still did not exclude the testimony. One court commented that the examiner “conceded, over and over again, that he relied mainly on his subjective judgment. There were no reference materials of any specificity, no national or even local database on which he relied. And although he relied on his past experience with these weapons, he had no notes or pictures memorializing his past observations.”<sup>71</sup> Another court noted: “[D]uring the testimony at the hearing, the examiners testified to the effect that they could be 100 percent sure of a match. [Yet] an examiner’s bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology . . . .”<sup>72</sup>

In a challenge to the admissibility of microscopic hair identification evidence, the Kentucky Supreme Court purported to be conducting an analysis under that state’s version of *Daubert*.<sup>73</sup> The record was devoid of research studies on the validity of asserted microscopic hair identification expertise, so the Court relied entirely on the “general acceptance” criterion of *Daubert*.<sup>74</sup> But there was no evidence of that in the record either. So the Court turned to its own earlier (pre-*Daubert*) Kentucky decisions in search of general acceptance of microscopic hair comparison. But not one of the earlier cases admitting testimony on hair identification said a word about general acceptance of the technique. So the Court stated that it would assume that those earlier decisions must have: addressed the question, conducted an appropriate inquiry, and found general acceptance. How else could they have admitted the testimony?<sup>75</sup> This case, more than most, shows the lengths to which courts will go to admit asserted forensic science. This Court had to create out of thin air the basis for admission under the weakest of the *Daubert* prongs.<sup>76</sup>

*State v. Coon*,<sup>77</sup> a case involving a challenge to the admissibility of voiceprint identification, was the Alaska Supreme Court’s vehicle for adopting *Daubert* for their state. One might have thought that on such an occasion the Court would be especially cautious about what was required to be in the record and painstaking in its evaluation of the record. The first time the case reached the Supreme Court, it remanded with instructions to develop a more complete record so that the high Court would be in a position to

apply either a *Daubert* or a *Frye* analysis to the arguments for and opposing admission (depending on whether it held that Alaska would remain a *Frye* state or become a *Daubert* state). When the case returned to the Alaska Supreme Court, the Court first adopted *Daubert* as the new expert evidence admissibility test.<sup>78</sup> But the court below had failed to supplement the record with evidence that might have informed a *Daubert* analysis because it had been offered no scientific evidence by the parties, had demanded none, and did no research of its own.<sup>79</sup> An ironic state of affairs considering that for voice spectrography, unlike most other forensic identification techniques, there is a substantial scientific literature upon which to draw.<sup>80</sup> The Alaska Supreme Court did not appear to mind at all. It conducted a limited and superficial review of the record and the research on which one would expect a *Daubert* decision to depend, doing little more than quoting the trial court’s conclusory assertions, and then declared voiceprint expert evidence to meet its new standard.

In short, courts have found a multitude of ways to avoid the outcomes *Daubert* would have led to, had it been applied conscientiously to the reality of the non-science forensic sciences.

### C. An Alternative History

What might history have looked like if these various courts had conscientiously applied the *Daubert* trilogy to the facts about the expert evidence before the court, and followed the law where it led? That portions of some or many of the non-science forensic sciences would have been excluded (or sharply limited) is a conclusion that seems hard to avoid. If it were possible to apply the *Daubert* trilogy and find the areas of expert evidence we have been discussing admissible on *Daubert/Kumho* grounds, surely the numerous courts reviewing numerous areas of forensic science would have written those opinions that would have persuasively explained why these fields pass *Daubert* muster, rather than the evasive ones they did write.

Such outcomes are not impossible. There have been moments when judges have appreciated the shortcomings of the non-science forensic sciences and followed *Daubert* where it led.<sup>81</sup> Had those decisions been the dominant judicial response, what might that have led to?

Suppose judges had simply excluded certain tasks-at-hand of certain forensic sciences when the proffered expert testimony did not meet the requisite admissibility standards?<sup>82</sup> In such an event, forensic science organizations and their government sponsors and supporters would have

leaped into action, seeing to it that studies were conducted testing the claims of the expert fields so that they could establish their admissibility and return to court. At some level this is exactly what started to happen when *Daubert*, and then *Kumho Tire*, were decided. Task forces formed, agencies prepared requests for proposals, and some research projects were begun.<sup>83</sup> When these agencies realized that the courts were not serious about subjecting the non-science forensic sciences to *Daubert* scrutiny, the efforts faded almost as quickly as they had blossomed.

Thus, what the courts exclude or accept has the effect of prompting or subduing research. Were such research projects carried on in sufficient depth and breadth, and with the sincerity of scientific inquiry,<sup>84</sup> the result would be a body of data that revealed what claims are more and what claims are less valid -- ideally a map, of sorts, which showed courts which areas of the formerly non-science forensic sciences could be relied upon to provide what level of dependability. With such information, courts could make informed and sensible decisions about what to admit, what to admit with cautions to the factfinder, and what to exclude.

### III. SUGGESTED JUDICIAL STRATEGIES FOR SURRENDERING TO THE IMPULSE TO ADMIT NON-SCIENCE FORENSIC SCIENCE WITHOUT FORSAKING THE LEGAL POLICY UNDERLYING RULE 702.

We can assume that harmony will some day come to the law of admissibility of expert evidence. Either the courts will get around to following the rule<sup>85</sup> or the rule will be changed to reflect what judges are comfortable deciding.<sup>86</sup>

In the meantime, judges feel a strong -- for most, an irresistible -- impulse to admit the non-science forensic sciences regardless of what the evidence on the evidence teaches them about it. Whatever the reason, in criminal cases, most judges respond to government proffers of non-science forensic science, no matter how weak it is, regardless of the circumstances, by admitting the testimony.

Can something constructive be accomplished? Can ways be found to balance the need judges feel to allow the testimony and the law's interest in preventing exaggerated, assertedly "scientific," claims to be presented entered as evidence? Can we resolve the conflict without doing violence to either their intuitions of the judges or the rights of defendants to have evidence offered against them that is not misleading, exaggerated, false?

This final section presents a set of possible actions judges can take, short of exclusion, to manage expert testimony from the non-science forensic sciences in ways that might help achieve the needed balance.

#### A. Partial Admission

Courts that have employed partial admission allow the expert witness to testify concerning observable things, which the expert is presumed to be a better observer of than the jury, but the expert witness is barred from offering inferences about the meaning of what has been observed, leaving that to the jury. The rationale is that the expert's field has not established its expertise in drawing those inferences, or a sound basis for drawing them.<sup>87</sup> For example, a handwriting examiner would be permitted to describe features of the questioned and known writing but would not be permitted to assert an opinion on whether the defendant was the source of the questioned writing. In essence, this is a bar on ultimate issue testimony by fields which have not established their ability under *Daubert* to draw accurate inferences.

Relatedly, courts could (and should) prohibit assertions of unique individualization, because such claims go beyond the actual knowledge and capabilities of any field,<sup>88</sup> and courts could (and should) bar ultimate conclusions of identity.<sup>89</sup>

#### B. Require That Examinations Be Conducted Using Blind Testing and Evidence Lineups

Although the forensic science field does not protect examiners from extraneous and potentially misleading and biasing information, courts could require that examinations have been conducted blind or their results be barred.<sup>90</sup> Blind testing is common not only in many other fields of science (where blind and double-blind procedures are the norm in scientific research) but in such everyday activities as blind taste tests, blind grading, blind review by peer-reviewed journals, and so on. The failure to use blind testing is responsible for errors in which examiners inadvertently or deliberately take account of information not needed to make their judgments. Moreover, the use of blind testing would prevent fraudulent reports and testimony by examiners, because if they do not know what results are "needed" by investigators, they cannot manufacture them. A legally imposed requirement of blind testing would protect examiners from information that contaminates their work, and protect courts from examiners who have been tainted.

Blind examination is an important step, but more is needed. Where only a single suspect has been developed in a case, it is obvious who the suspect is, implying that inclusion of that person or object is the desired or expected results. These are the parallel of show-ups in the eyewitness context. Evidence lineups would be superior procedures to evidence show-ups for the same reasons that eyewitness lineups are considered superior to eyewitness show-ups.

### C. Require That the Examiner and Lab Be Certified

Certification by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) provides partial assurance that competent work is being done. Like all certification programs, the review itself has the limitations of whatever it chooses to look at and how well it looks. For example, ASCLD/LAB certification overlooks any requirement of blind (or masked) examination because the field of forensic science has never adopted such procedures, even though their value is well recognized in many conventional scientific fields. Moreover, the certification does not assure that any given examiner in any given case does everything properly and reaches accurate conclusions. But laboratories and examiners with certification are generally likely to be doing better work than laboratories without certification.

### D. Require Experts to Stay Firmly Within the Bounds of What Their Field Actually Knows

In important ways, testimony by examiners in various forensic individualization sciences regularly steps outside of the zone of what the field actually knows and can support. Courts have come to accept, without ever having asked for or received proof, that examiners can do what they claim to be able to do.<sup>91</sup> If courts closely scrutinized the claims being made or implicit in their testimony, and permitted experts to testify only to that which they could satisfactorily support with sound bases, less would be testified to, but what the factfinder was told would be more dependable.<sup>92</sup>

### E. Prohibit Overpowering and Exaggerated Terminology

The way a forensic science expert witness presents testimony can affect the factfinder's understanding of what conclusions the evidence can and cannot support.

Some subfields of forensic science, and some individual witnesses, use terminology that sounds as though it admits of no conclusion except the certain positive identification advocated by the witness, when such conclusions are unsupported (on scientific grounds) in any field of forensic science. One field insists that its practitioners use terminology that is absolute, categorically concluding that an "identification" either exists or does not (or that no opinion can be reached), when, ironically, only a probabilistic statement -- and a subjective probability estimate at that -- could accurately reflect the real basis of the judgment the examiner has made.

Some subfields use terms that do not readily convey to laypersons what the examiner intends. For example, if a



forensic dentist states that in his opinion a "match" has been found between the bite mark in a victim and the defendant's dentition, the jury is likely understand that to mean that the defendant is the biter. But, for forensic dentists, the actual meaning of a match is: "[S]ome degree of concordance . . . similarity" but no "expression of . . . specificity" intended; generally similar but true for "a large percentage of the population."<sup>93</sup> Other fields' experts might use the word "match" to mean a very strong probability of common source, but the judge or jury may well think it means an even more certain linkage than intended or supportable. A "match" merely indicates that two marks or objects appear indistinguishably alike. A second step must be performed to interpret the likelihood that two things that "match" originated from the same source.

Overreaching and exaggeration should be banned from the witness box. Any expression of absolute certainty by forensic identification experts, or any term likely to be understood by the fact finder as conveying such a strong and unjustifiable meaning, should be prohibited. Among such suspect terms would be "identification," "match," "unique," "no other in the world," "identification to the exclusion of all others in the world," and "consistent with."

### F. Jury Instructions about the Limits of a Field's Expertise

Some courts have decided that if shaky but admissible expert forensic evidence comes before the jury, the jury should be instructed in a manner that allows it to put the evidence in proper perspective. One example is the court in *Starzecpyzel*,<sup>94</sup> which concluded that handwriting identification was junk science, but decided to admit it anyway. In an effort to offset the impact of a "scientist's expert" testimony, the court also fashioned an instruction to the jury in an effort to temper the effects the testimony might have. The court explained to the jury that forensic

document examiners are not scientists per se but are more akin to craftsmen, and that their testimony may be less precise than, perhaps, a chemist's.

The concern that jurors might overvalue forensic science expert opinion is at the heart of the rules of evidence, which set higher thresholds for the admission of expert testimony. If the testimony is admitted despite the fact that jurors (as well as judges) have exaggerated beliefs in its soundness at the same time that it cannot persuasively demonstrate its validity, the problem can be ameliorated somewhat by an appropriate instruction. Of course, the court has to properly understand the nature of the field and the evidence before it, and their limitations, in order to draft such an instruction.

### G. Use of Court-Appointed Experts and Panels of Experts

The law does not limit judges to hearing from only the experts offered by the parties. In appropriate circumstances, such as deciding whether or how much evidence to admit, judges have the power to obtain help from additional experts. By rule or by their common-law powers, all courts have the authority to appoint their own expert witnesses or panels of experts;<sup>95</sup> some have the authority to appoint advisory juries.<sup>96</sup> Many also have the authority to appoint consulting experts (that is, experts who will assist the judge in deciding, more akin to a confidential aide than as a witness). Given the myriad forms of forensic science and the number of challenges raised to such evidence, these panels could be quite helpful to courts deciding the admissibility of controversial forensic science.

Selecting and communicating with such experts must, of course, be handled with care, such as to avoid improper *ex parte* exchanges. But the greatest challenge will be to appoint individuals who do not merely echo the unsupported claims<sup>97</sup> under scrutiny, but who can give real assistance to the court.<sup>98</sup>

### H. Enabling the Adversary Process to Work by Facilitating Counter-Testimony

Criminal defendants typically come to court without experts, whether to challenge admissibility *in limine* or to testify at trial concerning the weight to be accorded the expert's testimony. The most obvious reason for this is a lack of funds to pay for them.

Greater availability of competing expert witnesses in cases involving forensic identification testimony would fit well with *Daubert's* recognition that "presentation of contrary evidence" is one appropriate "means of attacking shaky but admissible evidence."<sup>99</sup> For the adversary process

to work, both advocates need the resources to present their strongest case. Courts can help make the adversary process work (and work for the court) by making such appointments more often.<sup>100</sup>

1 © 2007 University of Tulsa; Michael J. Saks. Reprinted with permission of Michael J. Saks. Article was originally published at *Symposium: Daubert, Innocence, and the Future of Forensic Science*, 43 *Tulsa Law Review* 609 (Winter 2007). Footnote numbering is off by 2 from the original.

2 Professor of Law & Psychology, and Faculty Fellow, Center for the Study of Law, Science, & Technology, Sandra Day O'Connor College of Law, Arizona State University.

3 Chuck Shepherd, *News of the Weird*, [www.news-of-the-weird.com/archive/nw070506.html](http://www.news-of-the-weird.com/archive/nw070506.html) (accessed 9/20/10) (internal parenthetical omitted).

4 See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

5 Forensic individualization sciences -- fingerprints, handwriting, toolmarks, bitemarks, etc. -- as well as fire and arson.

6 As regards the core issues in the opinions.

7 Justice Scalia anticipated a certain amount of recalcitrance, and so in a concurrence to *Kumho Tire* wrote "in a particular case the failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." 526 U.S. at 159 (Scalia, O'Connor & Thomas, JJ., concurring).

8 *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

9 See generally David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West 2008); Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 *Hastings L.J.* 1069 (1998). Interestingly, on the same day that Judge Van Orsdel handed down his decision in *Frye*, he also handed down a landmark admission decision on firearms identification, in which he did not bother to use the precepts he announced in *Frye*.

10 We have some hints. Two non-science forensic sciences that were formally subjected to *Frye* analyses were bitemarks and voiceprints. *People v. Marx*, 54 Cal. App. 3d 100 (2d Dist. 1975). Bitemark identification was found to satisfy California's version of the *Frye* test because the "tools" being used (casts, photographs, etc.) were not at all novel, ignoring the fact that the use to which those tools were being put was altogether novel, and notwithstanding then-widespread doubts among forensic dentists. *Id.* at 107-13. See also Faigman et al., *supra* n. 9, at ch. 36; Saks, *supra* n. 9. Voice spectrography cases were an ideal poster child for one of the common criticisms of the *Frye* test. The asserted expertise was admitted every time a gatekeeping court employed the *Frye* test narrowly (that is, regarded practitioners of the craft as the appropriate reference population whose acceptance or rejection was to be adopted by the court) and excluded the testimony every time a broad *Frye* test was employed (that is, regarding the proper reference population to include, along with practitioners of the craft, acoustical engineers, statisticians, linguists, and other fields which studied and used voice spectrography). Faigman et al., *supra* n. 9, at ch. 37.

11 *Daubert*, 509 U.S. 579. The "overarching subject [of Rule 702] is the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission." *Id.* at 594-95.

12 If we accept the notion, as scientists (and, we had thought, society) have for quite some time, that -- when it comes to matters of general, observable, repeatable facts -- proof of validity is better than the say-so of a group of self-appointed, self-interested gurus.

13 See e.g. Faigman et al., *supra* n. 9, at chs. 32-37; William C. Thompson & Simon A. Cole, *Psychological Aspects of Forensic Identification Evidence, in Expert Psychological Testimony for the Courts* 31-68 (Mark Costanzo et al. eds. 2006); Paul Giannelli, *Forensic Science*, 34 *J.L., Med. & Ethics* 310 (2006) (discussing the numerous concerns that have arisen regarding the use of forensic evidence); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 *Cal. L. Rev.* 721 (2007); D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 *U. Pa. L. Rev.* 731 (1989); Michael J. Saks & Jonathan J. Koehler, *The Individualization Fallacy in Forensic*

- Science Evidence*, 61 Vand. L. Rev. 199 (2008); Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 Sci. 892 (2005) [hereinafter Saks & Koehler, *The Coming Paradigm*].
- 14 Paul Giannelli & Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in Kumho Tires*, 14 Crim. J. 12, 40 (2000).
- 15 See Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard U. Press 2001).
- 16 Harold Cummins & Charles Midlo, *Finger Prints, Palms and Soles: An Introduction to Dermatoglyphics* 154 (Blakiston Co. 1943).
- 17 David J. Balding, *Weight-of-Evidence for Forensic DNA Profiles* 54 (Wiley 2005).
- 18 *Id.*
- 19 Natl. Inst. Just., *Forensic Friction Ridge (Fingerprint) Examination Validation Studies 3-4* (U.S.D.O.J. 2000) (available at <http://www.ncjrs.gov/pdffiles1/nij/s1000386.pdf>).
- 20 Bruce Budowle et al., *Review of the Scientific Basis for Friction Ridge Comparisons as a Means of Identification: Committee Findings and Recommendations*, 8 Forensic Sci. Commun. § II.B (Jan. 2006), [http://www.fbi.gov/hq/lab/fsc/backissu/jan2006/research/2006\\_01\\_research02.htm](http://www.fbi.gov/hq/lab/fsc/backissu/jan2006/research/2006_01_research02.htm).
- 21 *Id.*
- 22 David A. Stoney, *Fingerprint Identification*, in *Modern Scientific Evidence: The Law and Science of Expert Testimony* 360 (David L. Faigman et al. eds., West 2008).
- 23 David A. Stoney, *Measurement of Fingerprint Individuality*, in *Advances in Fingerprint Technology* 327, 329 (Henry C. Lee & Robert E. Gaensslen eds., 2d ed., CRC 2001).
- 24 Budowle et al., *supra* n. 20, at § III.
- 25 *Id.*
- 26 *Id.* at § VI.
- 27 U.S. Dept. Just. Off. Inspector Gen., *A Review of the FBI's Handling of the Brandon Mayfield Case* 271 (Mar. 2006).
- 28 Stephen G. Bunch, *Consecutive Matching Striation Criteria: A General Critique*, 45 J. Forensic Sci. 955, 956 (2000).
- 29 Iain Pretty & David Sweet, *The Scientific Basis for Human Bitemark Analyses -- A Critical Review*, 41 Sci. & Just. 85, 85 (2001).
- 30 Oliver Galbraith et al., *The "Principle of the Drunkard's Search" as a Proxy for Scientific Analysis: The Misuse of Handwriting Test Data in a Law Journal Article*, 1 Intl. J. Forensic Doc. Examrs. 7, 7 (1995).
- 31 Moshe Kam et al., *Proficiency of Professional Document Examiners in Writer Identification*, 39 J. Forensic Sci. 5 (1994).
- 32 Michael Risinger et al., *Brave New "Post-Daubert World" -- A Reply to Professor Moenssens*, 29 Seton Hall L. Rev. 405, 411 n. 29 (1998) (quoting Moenssens) (internal quotation marks omitted).
- 33 *Id.*
- 34 *Id.*
- 35 Something that has come to be called "peer review" in an effort to make it sound as though the non-science forensic sciences are meeting the Daubert requirements.
- 36 See generally Budowle et al., *supra* n. 20, at § II.B.1.
- To reduce examiner bias a blind technical review comprising the ACE portion of the ACE-V process should be carried out by another qualified examiner . . . . To be truly blind, the second examiner should have no knowledge of the interpretation by the first examiner (to include not seeing notes or reports). Such a technical review is absolutely necessary . . . .
- Id.*; Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 Forensic Sci. Intl. 74 (2005); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002); Michael Saks, *Context Effects in Forensic Science: A Review and Application of the Science of Science to Crime Laboratory Practice in the United States*, 43 Sci. & Just. 77 (2003).
- 37 Christophe Champod & Ian W. Evett, *A Probabilistic Approach to Fingerprint Evidence*, 51 J. Forensic Identification 101, 101 (2001).
- 38 *Id.* at 106-07.
- 39 Andre A. Moenssens, *Validating Friction Ridge Examination Techniques Proposals Solicited*, [http://forensic-evidence.com/site/ID/ID\\_fpValidation.html](http://forensic-evidence.com/site/ID/ID_fpValidation.html) (accessed 9/20/10).
- 40 J. Orenstein, *Panel Remarks, Effect of the Daubert Decision on Document Examination from the Prosecutor's Perspective* (2d Intl. Symposium Forensic Exam. Questioned Docs., Albany, N.Y., June 14-19, 1999), in 1 Forensic Sci. Commun. (Oct. 1999), <http://www.fbi.gov/hq/lab/fsc/backissu/oct1999/abstrctc.htm>.
- 41 *Id.*
- 42 *Id.*
- 43 See John I. Thornton & Joseph L. Peterson, *The General Assumptions and Rationale of Forensic Identification*, in *Modern Scientific Evidence: The Law and Science of Expert Testimony* ch. 29:35-29:47 (David L. Faigman et al. eds., West 2008) (outlining which fields within forensic science are vulnerable to challenge under *Daubert*).
- 44 Br. for Ams. for Effective L. Enforcement et al. as Amicus Curiae at 15, *Kumho Tire*, 526 U.S. 137.
- 45 *Id.*
- 46 Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 81 (2008); Saks & Koehler, *The Coming Paradigm*, *supra* n. 13, at 892.
- 47 *Daubert*, 509 U.S. at 590.
- 48 *Id.* at 592.
- 49 See e.g. *U.S. v. Hines*, 55 F. Supp. 2d 62, 67 (D. Mass. 1999) (noting that the Supreme Court in *Daubert* and *Kumho Tire* "is plainly inviting a re-examination even of 'generally accepted' venerable, technical fields"); *U.S. v. Horn*, 185 F. Supp. 2d 530, 554 (D. Md. 2002) ("[E]verything old is new again.").
- 50 Fed. R. Evid. 702 advisory comm. nn. (citing *Daubert v. Merrell Dow Pharms, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)).
- 51 "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *Gen. Elec.*, 522 U.S. at 137.
- 52 See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 Alb. L. Rev. 99 (2000) (outlining a statistical overview, finding that *Daubert* challenges are both more common and more successful in civil cases than in criminal cases); see also e.g. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 157 (3d Cir. 2000) (observing that, "[a]lthough *Daubert* does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than the haphazard, intuitive inquiry that [the engineering expert here] engaged in"); *Cook v. American S.S. Co.*, 53 F.3d 733, 739 (6th Cir. 1995) (reversing a trial court decision to admit expert testimony an expert qualified in testing and failure analysis offered an opinion that a marine rope had failed from exposure to a torch, where the only "test" performed by the expert "was to visually examine the frayed end of the [alleged defective] line with the naked eye and under a low power microscope"); *McMahon v. Bunn-O-Matic*, 150 F.3d 651, 658 (7th Cir. 1998) ("We have said before, and reiterate, that '[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.'" (brackets in original)); *Rudd v. Gen. Motors Corp.*, 127 F. Supp. 2d 1330, 1337 (M.D. Ala. 2001) ("[Amended Rule 702] makes it clear that this court is now obliged to screen expert testimony to ensure it stems from, not just a reliable methodology, but also a sufficient factual basis and reliable application of the methodology to the facts."); *U.S. v. Orians*, 9 F. Supp. 2d 1168, 1173 (D. Ariz. 1998) (stating that *Daubert* "does not require the court to limit its inquiry to those individuals that base their livelihood on the acceptance of the relevant scientific theory. These individuals are often too close to the science and have a stake in its acceptance; i.e., their livelihood depends in part on the acceptance of the method."); *Traharne v. Wayne Scott Fetzer Co.*, 156 F. Supp. 2d 690, 694 (N.D. Ill. 2001) (following *Daubert* that expert evidence must be "more than subjective belief or unsupported speculation" (quoting *Daubert*, 509 U.S. at 590)); *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993) (excluding plaintiff's expert where the proffered witness "offered no testable design to support his concept"); *In re TT Boat Corp.*, 1999 WL 694095 (E.D. La. Sept. 7, 1999) (commenting on an expert who "did not use any scientific or other technical methodology to arrive at his opinion. He, like Descartes, basically says, 'I think; therefore, it is.' This is insufficient under Federal Rule of Evidence 702."); *Reali v. Mazda Motor of Am., Inc.*, 106 F. Supp. 2d 75, 80 (D. Me. 2000) ("All I have is [the expert's] assertion-- unsupported by citation to studies, tests or statistics.... That is not enough."); *Saia v. Sears Roebuck & Co.*, 47 F. Supp. 2d 141, 148, 144 (D. Mass. 1999) (noting that, as "the Supreme Court recognized in both *Daubert* and again in *Kumho*, the ability to verify a hypothesis is at the core of a court's inquiry;" in addition, rejecting the argument that an expert or an expert's field are entitled to admission in the case at bar because they had been admitted in prior cases, commenting that "numbers do not an argument make"); *Kemp v.*

Tyson Seafood Group, Inc., 2000 WL 1062105 (D. Minn. July 19, 2000).

Both *Daubert*, and *Kumho*, make clear that the day of the expert, who merely opines, and does so on the basis of vague notions of experience, is over. Experts are now held to a level of accountability, that requires factual predicates, in historical fact, or in competent evidence, which allows a factfinder to independently verify the accuracy of the expert's results.

*Id.* at \*7; *In re TMI Litig. Cases Consolidated II*, 922 F. Supp. 1038, 1046-48 (M.D. Pa. 1996), *aff'd.*, 193 F.3d 613, 708 (3d Cir. 1999) (excluding the testimony of the plaintiffs' epidemiological expert based on research design considerations; because the sampling selection criteria were unknown, the error rate was potentially large); *Mays v. St. Farm Lloyds*, 98 F. Supp. 2d 785, 787 (N.D. Tex. 2000) (The expert "entirely fail[ed] to provide a basis for his conclusion."); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 721-26 (Tex. 1998) ("Mechanical engineering is science" and the requirement of scientific validity applies to non-novel, experience-based engineering testimony.); *Werner v. Pittway Corp.*, 90 F. Supp. 2d 1018, 1032 (W.D. Wisc. 2000) (The expert offered nothing but a "bare conclusion" and utterly failed to explain the reasoning process he used.).

53 117 F. Supp. 2d 848 (S.D. Ind. 2000).

54 *Id.* at 849.

55 *Id.* at 855.

56 *U.S. v. Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995).

57 *Id.* at 1044.

58 Lawrence M. McKenna, *Panel Remarks, Science, Technical Knowledge, and Skill: Who Is an "Expert?"* (Natl. Conf. Sci. & L., San Diego, Cal., Apr. 15-16 1999) (copy of transcr. available at [www.ncjrs.gov/pdffiles1/nij/179630.pdf](http://www.ncjrs.gov/pdffiles1/nij/179630.pdf)). Of course! Now that the test that would have to be administered cannot be passed, don't give the test.

59 Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Policy Rev. 381, 381 (2004).

60 880 F. Supp. 1027 (S.D.N.Y. 1995).

61 *Id.* at 1036.

62 *Id.* at 1028.

63 One could characterize this reasoning as: "Heads it's in; tails it's not out."

64 117 F. Supp. 2d 848 (S.D. Ind. 2000).

65 188 F. Supp. 2d 549 (E.D. Pa. 2002).

66 *Id.* at 571.

67 324 F.3d 261 (4th Cir. 2003).

68 Sound familiar? If the student cannot pass the test, the test can be made as easy as it needs to be to ensure that the student passes it.

69 *Crisp*, 324 F.3d at 273.

70 Faigman et al., *supra* n. 9, at ch. 32.

71 *U.S. v. Green*, 405 F. Supp. 2d 104, 107 (D. Mass. 2005).

72 *U.S. v. Montiero*, 407 F. Supp. 2d 351, 372 (D. Mass. 2006).

73 *Johnson v. Commonwealth*, 12 S.W.3d 258, 260-64 (Ky. 1999).

74 To this extent, the *Daubert* analysis became the equal of a *Frye* analysis.

75 The court must have assumed that *Frye* was in effect and that its predecessor courts were following *Frye*. What the court did not realize was that *Frye* had not been adopted, or even mentioned, in Kentucky, until after those cases were decided. See Michael J. Saks, *Johnson v. Commonwealth: How Dependable is Identification by Microscopic Hair Comparison*, 26 *Advoc. J. Crim. Just. Educ. & Res.* 14 (2004).

76 The U.S. Supreme Court has stated that general acceptance, with nothing else, would not suffice for admission in federal courts. *Kumho Tire*, 526 U.S. at 151.

77 974 P.2d 386, 388 (Alaska 1999).

78 *Id.* Interestingly, in favor of retaining the *Frye* test, the government made two arguments: One, that the *Daubert* standard is so low that it will lead to the admission of junk science and, two, that the *Daubert* standard is so high that it will exclude forensic science. The only way both arguments can exist coherently is if the government believes junk science is superior to forensic science. *Id.* at 388-89.

79 Permissible when a court is searching for legislative facts. See Fed. R. Evid. 201 advisory comm. nn.

80 Faigman et al., *supra* n. 9, at ch. 37.

81 *U.S. v. Saelee*, 162 F. Supp. 2d 1097 (D. Alaska 2001); *U.S. v. Fujii*, 152 F. Supp. 2d 939 (N.D. Ill. 2000); *U.S. v. Llera Plaza (Llera Plaza I)*, 2002 WL 27305 at \*11 (E.D. Pa. 2002), *vacated and superseded, Llera Plaza II*, 188 F. Supp. 2d 549; *State v. Rose*, K06-0545 (Md. Cir. Balt. Co. 2007); and perhaps the numerous courts that followed the example of *Hines*, 55 F. Supp. 2d at 73, and only partially admitted

the proffered expert evidence.

82 A variation on this is that courts might have declared a date certain (five or ten years, say) beyond which exclusion would occur if the fields had not by then undertaken research which succeeded in establishing their admissibility under the rules of evidence. This approach offers certain obvious benefits (e.g., leaves the status quo intact, but sends a powerful message that the courts are going to start expecting something of greater substance from these fields) and certain obvious complications (convictions occurring during this *interregnum* might have to be revisited if it later turned out that the evidence which had been admitted was inadmissible and that without it no reasonable jury could have convicted). Moreover, the only way the courts of a jurisdiction could manage such an approach in a coordinated fashion would be if the highest appellate court in the jurisdiction imposed the *interregnum*, probably on appeal of such a decision by a trial court.

83 For example, consider the RFPs promulgated by the NIJ. See *Natl. Inst. Just., supra* n. 19.

84 And not merely to manufacture pseudo-scientific evidence designed to support predetermined conclusions (like a pharmaceutical company that funds research with the understanding that the research must be designed or the data massaged or the results interpreted so as to keep the company's product on the market). See e.g. D. Michael Risinger & Michael J. Saks, *A House with No Foundation*, 20 *Issues Sci. & Tech.* 35 (2003).

85 Leading to something like the alternative history described in the preceding section.

86 Much as the Washington legislature did with student testing, but this time by a body authorized to change Rule 702, rather than by individual judges evading Rule 702.

87 This method has been used in *Green*, 405 F. Supp. 2d at 106-07 (firearms identification); *Hines*, 55 F. Supp. 2d at 63 (handwriting); and *Llera Plaza I*, 2002 WL 27305 at \*11 (fingerprints). In the instance of handwriting expert testimony, this technique has been followed by numerous other courts.

88 Saks & Koehler, *supra* n. 13.

89 Fed. R. Evid. 704(b) does this categorically for ultimate issue expert testimony on mental states constituting an element of a crime or defense to a crime.

90 Extensive discussion of blind testing can be found in Risinger et al., *supra* note 36, at 45-47. See also Paul C. Giannelli, *Confirmation Bias*, 22 *Crim. Just.* 60 (Fall 2007).

91 See e.g. Risinger et al., *supra* n. 13; Saks, *supra* n. 9.

92 This is the more general principle of what is expressed *supra* note 85 and accompanying text.

93 Am. Bd. Forensic Odontology, ABFO Bitemark Guidelines, [http://www.forensicdentistryonline.org/Forensic\\_pages\\_1/bitemark\\_guidelines.htm#ABFO%20Bitemark%CC20Methodology%Guidelines](http://www.forensicdentistryonline.org/Forensic_pages_1/bitemark_guidelines.htm#ABFO%20Bitemark%CC20Methodology%Guidelines) (accessed 9/20/10).

94 880 F. Supp. 1027.

95 The power of courts to appoint their own expert witnesses has been codified in Fed. R. Evid. 706 and affirmed by the Supreme Court in *Daubert*, where the Court recognized a trial court's ability to "procure the assistance of an expert of its own choosing." 509 U.S. at 595. Science panels have been appointed to assist the court in complex tort cases, notably in the silicone breast implant litigation. *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881-82 (10th Cir. 2005).

96 Fed. R. Civ. P. 39.

97 Imagine appointing a committee of astrologers to evaluate astrology.

98 Courts might follow the strategy of the National Academy of Science, which, for example, in evaluating the validity of voiceprint identification, appointed a panel consisting not only of practicing voiceprint examiners but of people from other relevant fields, such as acoustical engineering, linguistics, and statistics.

99 *Daubert*, 509 U.S. at 596.

100 In the long run, this would lead to improvement in forensic science because weaknesses in forensic science are in part the result of a lack of adversarial testing of forensic science throughout most of the twentieth century.

# Arizona Justice Project Defense Lawyer Tunnel Vision: The Oft-Ignored Role Defense Counsel Plays in Wrongful Convictions

By Carrie Sperling

Our criminal justice system has witnessed the dawning of a new age: the age of wrongful convictions. With over 260 DNA exonerations and many more non-DNA exonerations, every player in the system has had to confront the fact that we convict the wrong person more often than we'd like to admit. And when we convict the wrong person, the true perpetrator frequently goes on to commit more crimes. Commissions have been formed to investigate and academics have studied the causes of these wrongful convictions. The main offenders have been exposed – unreliable witness identifications, false confessions, snitches, unreliable testimony from forensic science experts, prosecutorial misconduct, and ineffective assistance of counsel.

We have made great strides in identifying why innocent people are convicted, but we have yet to address a problem that continues to nag those of us working for innocence projects across the country. Why is it so hard to free the innocent even with substantial evidence that the conviction is unreliable?

One of the hurdles blocking relief to innocent inmates is the post-conviction procedural quagmire they face. Post-conviction procedural rules were developed when we had no solid proof that wrongful convictions were more than complete happenstance, occurring with statistically insignificant frequency. These formalistic rules of post-conviction contribute to a system possessing less tolerance for process errors than for wrong results. In fact, many would argue it's not a function of our system to get it right. Instead, our system, at best, insures a fair process and only hopes for accuracy.

In this process-based system, any failure to preserve error can be fatal to an innocent inmate's claims. Every step in the

post-conviction process paves the way to freedom or closes the doors to relief. Given that the rules of the game elevate process over result, the post-conviction relief or Rule 32 petition plays a critical role in freeing the innocent.

Unfortunately, we see too many cases where the PCR fails to lay a foundation for relief, and the defendant's road to freedom faces almost insurmountable barricades. Many of the inmates' cases we review have never filed a PCR. Instead, their lawyers simply filed notices of completion claiming they found no issues worthy of mention in post-conviction. In complicated cases where defendants claim innocence, it's hard to believe that their lawyers could find no arguable issues. Before filing a notice of completion, lawyers should, at a minimum, conduct a thorough investigation.

A thorough investigation first involves reading the

transcripts and the complete files from all the defendant's lawyers. Remember, you can't assess a lawyer's effectiveness if you don't investigate the lawyer's representation at both the trial and appellate levels.

No post-conviction case is complete without interviewing the client, preferably in person. Only defendants can tell you what their trial representation was like from their perspective. And their perspective is relevant. What kind of information did the lawyer give the client about the case? What did the client want the lawyer to investigate? Was the client consulted about plea offers or State's witnesses or the evidence in the case? Were there witnesses the client told the lawyer to find? Has

important evidence surfaced since trial that was not disclosed to the lawyer pre-trial? Was the client mentally fit to assist in his own defense? These questions cannot be adequately answered without at least one, if not more, client interviews.



Another area ripe for post-conviction attention is forensic science. Did forensic science experts testify at trial? If so, did the defense properly investigate and appropriately challenge the claims offered by the State's experts? Did the defense seek its own experts? Has the forensic field come under fire recently by the National Academy of Sciences report on forensic science or other scientific experts, like those in the shaken baby, ballistics, or arson arenas? If so, the new science raises a newly discovered evidence claim or a claim of ineffective assistance because the trial attorney failed to properly challenge the admissibility of the evidence.

Remember that making ineffective assistance of counsel claims is a necessary part of the job. Although our colleagues may not like our PCR allegations, if the lawyers in the case failed to talk to key witnesses, failed to request or hire appropriate experts, failed to properly prepare a defense, your duty is to preserve the argument for your client rather than to preserve your relationship with your colleague. Of course, lawyers who have represented defendants for any length of time will admit that they make mistakes and that those mistakes should not continue to jeopardize a client's case in postconviction.

We've all read about tunnel vision and how it affects police investigations and prosecutors' decisions. Defense lawyers also fall prey to cognitive biases. They often see their clients as the jurors and judges saw them – guilty. And they often see their clients' cases as unwinnable. Because of these cognitive biases we often fail to raise the claims that could eventually lead to exoneration. Lawyers are wise to investigate all the facts and test all the theories, withholding judgment until the investigation is complete. Only when every theory has been debunked and every favorable relevant fact turns out to be false, can a post-conviction lawyer throw in the towel.

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*For more on the Arizona Justice Project, see [www.azjusticeproject.com](http://www.azjusticeproject.com).*

# Congratulations!

Congratulations to AACJ member **Gregory J. Kuykendall** who recently was elected to the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) at the Association's 52nd Annual Meeting in Toronto, Ontario. He has been a life member of NACDL for 15 years as well as a volunteer editor for NACDL's *The Champion* magazine.

A frequent presenter and collaborator with indigent capital defense groups nationwide and international abolitionist groups, Kuykendall, in addition to maintaining his private practice, has been the Director of the Mexican Capital Legal Assistance Program (MCLAP) for the last five years. In that capacity, he has supervised nearly four hundred death penalty cases in addition to personally representing capital clients. He has also appeared as Mexico's counsel in both domestic and international courts.

Fluent in Spanish, Italian and English, Kuykendall is licensed to practice law in Arizona, Colorado and Texas. He is also admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Courts for Arizona, the Central District of Illinois and the Eastern District of Michigan. Kuykendall is a graduate of the University of Colorado, Tulane University Graduate School and the Northwestern University School of Law.

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## The Bar Charge Process Before the Filing of a Formal Complaint

By James J. Belanger

It's always better to use the process of resolving a bar charge **before** any formal State Bar complaint is filed. The Arizona Supreme Court stated this pre-complaint process is one of its primary goals in the recently revamped attorney disciplinary process.

Effective January 1, 2011, many rules regarding the Arizona Attorney Disciplinary Process are going to change.<sup>1</sup> Amendments to the rules were adopted in response to a July 1, 2009 administrative order issued by the Arizona Supreme Court stating the Court wanted "to maintain a fair and impartial discipline system while decreasing the time and cost to process cases."<sup>2</sup>

The Task Force created to amend the rules was charged with reviewing and implementing the best practices from Colorado's Attorney Discipline System, specifically to modify the intake process at the State Bar "to allow intake attorneys to **divert** more cases" **before** screening and **before** initiating formal proceedings.<sup>3</sup> Accordingly, intake attorneys will have greater authority to dismiss matters and to offer diversion if the alleged misconduct is minor. The upshot is more cases **should** be dismissed or diverted earlier in the process, allowing more serious cases to receive greater attention, including with the initiation of formal proceedings.

Although there are a number of amendments to the Rules, this article focuses on the amendments dealing with the initiation of the investigation process and resolution of charges by Bar Counsel **before** formal proceedings commence. The reason for this is at least twofold.

1. Bar counsel is a respondent's first and, perhaps, most significant audience. With care, and a thoughtful and comprehensive response, many matters can be successfully resolved at this investigative stage, particularly those that

can be legitimately characterized as practice management or personal issues. This is of particular concern to criminal defense lawyers because, as has been the case for the last several years, criminal defense lawyers as a group receive the greatest percentage of bar charges. The 2009 Annual Report of the Office of Lawyer Regulation noted that almost one in five referrals to the Bar alleging misconduct involve criminal defense lawyers. The most common complaints involved lack of diligence and failure to communicate with the client.

2. Many lawyers don't understand there is a preliminary screening process at the Bar nor how that process works or that it is a critical stage in Bar disciplinary proceedings. We are all used to a formal complaint initiating a legal proceeding, but with the Bar process, as with many white collar criminal cases, there is much opportunity to reach a reasonable and palatable resolution before any kind of formal complaint is filed.

The disciplinary process is initiated pursuant to Rule 55. Under Rule 55, the State Bar is **obligated** to "evaluate all information coming to its attention, in any form, by charge or otherwise, alleging unprofessional conduct, misconduct,<sup>4</sup> or incapacity." A "bar charge," by the way, is not a complaint. Rather it is "any allegation or other information of misconduct or incapacity that comes to the attention of the State Bar."<sup>5</sup> A complaint, on the other hand, is when a "formal complaint" is actually filed with the disciplinary clerk. Much like typical litigation, a formal complaint involves an answer, disclosure statements, discovery, a settlement conference, and a formal hearing. There is a similar structure to the process before a formal complaint is filed, which will be explained below. In any event, once the Bar receives

information alleging some kind of sanctionable conduct -- be it by a telephone call, a written charge, a media account, or a referral from the bench -- it is required to act on it.<sup>6</sup>

Initially, the Bar is given the discretion to summarily resolve a bar charge in the following ways: (1) dismiss the matter with or without a comment; (2) where warranted, enter into a diversion agreement or take other appropriate action without conducting a full screening investigation; or (3) if the alleged conduct could warrant the imposition of a sanction,<sup>7</sup> refer the matter for a screening investigation.<sup>8</sup> As an aside, the grounds for discipline are set forth at Rule 54 and include

- violation of a rule of professional conduct;
- violation of a canon of judicial conduct;
- knowing violation of any rule or any order of the court; and
- violation of any obligation pursuant to the ethical rules in a disciplinary or disability investigation or proceeding.

Also, lawyers shall be disciplined "upon conviction of a misdemeanor involving a serious crime or any felony."<sup>9</sup>

If a charge is received by or comes to the attention of the Bar, and it is not summarily dismissed in the intake process (which happened 71% of the time in 2009), or is not otherwise diverted, the charge is further evaluated by Bar Counsel in a screening investigation. This stage of the evaluation process is where the lawyer, now the Respondent, receives a letter from the Bar providing notice of the investigation and the nature of the allegation(s). Generally the Bar's letter contains an attachment from the complaining party. The lawyer is directed to (**must**) respond to the charge and the complaining party's letter within twenty days. The charge letter from the Bar usually asks the lawyer to focus on one or more ethical rules. This response is furnished to the complainant, who is then given an opportunity to reply. The Respondent is afforded an opportunity to file a surreply, which is generally the final word at this stage of the process.<sup>10</sup>

This is a critical phase of the investigation. The Respondent's letter can and usually does set the tone for the entire ensuing proceeding and can make the difference between dismissal or diversion and the initiation of formal proceedings. The Respondent letter's tone and content are critical. We are a self-regulating profession - the Bar is ultimately responsible for the oversight of over 16,000 active attorneys. A frank, honest assessment of the conduct alleged is critical. If there have been mistakes, acceptance

of responsibility, remorse and remediation are extremely valuable. If the charges are not well-founded, a reasoned and well-developed explanation within the context of the allegedly violated ethical rules is equally vital. Self righteous indignation and ad hominem attack are virtually never helpful.<sup>11</sup>

After conducting the screening investigation, "if there is no probable cause to believe that misconduct or incapacity under these rules exists," Bar Counsel shall dismiss the charge, again, with or without comment.<sup>12</sup> Now, however, notice of the dismissal and an explanation must be provided to the complainant, who then has ten days to object. If an objection is filed, it is reviewed and ultimately decided by the Attorney Discipline Probable Cause Committee (the "Committee").<sup>13</sup> Any **recommendation** other than dismissal, moreover, say, for diversion, stay, probation, restitution, or admonition, is also passed on to and resolved by the Committee, also with notice and an opportunity for the complainant to respond, but, this time, also with an opportunity for the Respondent's input. The Committee may direct further investigation, dismiss, refer the matter for diversion, order an admonition, probation, restitution and assessment of costs, order a stay or authorize the filing of a formal complaint.

Even through this stage of the process, and before a formal complaint is filed, Bar Counsel is engaged. Depending on the context of the alleged conduct, as well as the response's tone and content, Bar Counsel can be an ally to bringing about a palatable resolution of the process.

Obviously, charge dismissal, with or without comment, is the desired result at this stage. However, dismissal is just not possible in certain cases. Because "diversion" appears more frequently under the amended rules, understanding that process is helpful. Any good criminal defense lawyer who has done a sentencing memorandum and counseled a client through a plea and its aftermath will be familiar with these concepts.

The Diversion process is set out at Rule 56. Diversion is an alternative to discipline and may be imposed for up to two years, subject to a discretionary extension of two years. Under the Bar's proposed Diversion guidelines, the Diversion Program's stated purpose is to protect the public by improving the professional competency of attorneys through education, remediation and rehabilitation.<sup>14</sup> The conduct appropriate for Diversion generally involves minor misconduct and is routinely related to poor office management procedures or personal issues that bear on the lawyer's ability to adequately meet her duties to the client, the court or her profession.

The following factors will be used to determine if Diversion is appropriate in any given case:

- The lawyer engaged in professional misconduct and the basis for the misconduct is susceptible to remediation or resolution through alternative programs (i.e., it can be fixed with counseling, mentoring, LOMAP,<sup>15</sup> etc.);
- There is little likelihood the attorney will harm the public during the period of participation (i.e., the lawyer is aware of the conduct, is dealing with it, and is not likely to do it again);
- Bar Counsel can adequately supervise the conditions of Diversion; and
- The attorney is likely to benefit by participation in the program (i.e., the lawyer has a self-awareness that suggests successful remediation).

Generally, Diversion will not be offered unless the presumptive range of discipline in the particular matter appears likely to result in a reprimand or less. The factors set out in the *ABA Standards for Imposing Lawyer Sanctions* are particularly helpful here.<sup>16</sup> Moreover, the Bar is much less inclined to offer Diversion unless the attorney has maintained a cooperative attitude toward the discipline investigation and proceedings, hence the importance of the lawyer's initial response to a bar charge.

Receiving a bar charge is no fun. It is stressful, it can be frustrating and there is a natural tendency to be defensive about the process. That is not the way to go about responding. If you receive that letter from the Bar, take a deep breath. The Arizona Supreme Court has publicly stated it wants to dismiss and divert more cases. And there are people out there who can help you, including your peers, your partners, and your supervisors. Under the letter and spirit of the amended rules, there should be ample opportunity to seek a favorable and palatable resolution of a bar charge prior to the initiation of formal proceedings. Much of this will depend on how you respond to that bar charge and how you frame your response. It will never hurt to respond with intelligence, objectivity and professionalism.

1 Rule references in this article are to the amendments to Rules 46-74, 75, 77, and 78, Rules of the Arizona Supreme Court (17A A.R.S. Supreme Court Rules).

2 *In the Matter of Establishment of Attorney Discipline Task Force, Members and Schedule*, Administrative Order No. 2009-73 (July 1, 2009). [http://www.myazbar.org/SecComm/TF/LR/Files/ASC\\_Order\\_2009-73.pdf](http://www.myazbar.org/SecComm/TF/LR/Files/ASC_Order_2009-73.pdf).

3 *Id.* (emphasis added).

4 Misconduct means "any conduct sanctionable under [these rules], including unprofessional conduct as defined in Rule 31(a)(2)(B) or conduct that is eligible for diversion."

5 17A A.R.S. Supreme Court Rules, Rule 46(f)(3).

6 *Id.* at Rule 55(a).

7 Disciplinary sanctions include disbarment, suspension, reprimand (censure under the old rules), admonition (informal reprimand under the old rules), probation and restitution.

8 17A A.R.S. Supreme Court Rules, Rule 55(a)(2).

9 "Serious crime" generally means any crime involving interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, theft or moral turpitude. Rule 54(g).

10 There is often discussion and negotiation with bar counsel throughout this stage of the proceeding.

11 The Bar must prove misconduct by clear and convincing evidence, and generally assesses lawyer misconduct pursuant to the directives of the *Standards for Imposing Lawyer Sanctions* (ABA 2005). [http://www.abanet.org/cpr/regulation/standards\\_sanctions.pdf](http://www.abanet.org/cpr/regulation/standards_sanctions.pdf). As with criminal law, a lawyer's state of mind -- intentional, knowing or negligent -- is key, as is the harm flowing from the alleged misconduct. Is the person harmed the client, the justice system, the public? These factors all play out in reaching a dismissal or other appropriate resolution.

12 In my experience, when there was a screening investigation under the old rules, dismissals with comment were not unusual even though the rules did not expressly provide for a dismissal with comments. Now that dismissals with comment are expressly part of the amended rules, my guess is that they will be far more common.

13 17A A.R.S. Supreme Court Rules, Rule 55(b).

14 See generally the *State Bar of Arizona Diversion Guidelines* [http://www.myazbar.org/LawyerRegulation/files/Diversion\\_Guidelines.pdf](http://www.myazbar.org/LawyerRegulation/files/Diversion_Guidelines.pdf).

15 Law Office Management Assistance Program.

16 [http://www.abanet.org/cpr/regulation/standards\\_sanctions.pdf](http://www.abanet.org/cpr/regulation/standards_sanctions.pdf).

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# WHAT NOW?

## Practicing Criminal Defense in a Post-*Padilla* World

By Kara Hartzler

By now, most of us have recovered from the initial shock of the U.S. Supreme Court's landmark Sixth Amendment decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding criminal defense attorneys have an affirmative duty to advise their non-U.S. citizen clients of the immigration consequences of a particular conviction. We've dissected the case, read an endless stream of practice advisories, and attended one or more seminars on the topic. But numerous questions remain. What does the language of the decision actually mean? How broadly will *Padilla* apply? And perhaps most importantly: what will a post-*Padilla* criminal defense practice look like?

For those unfamiliar with the case, the petitioner in *Padilla* was a long-term lawful permanent resident who was incorrectly assured by his defense attorney that accepting a plea to a drug trafficking offense would not affect his immigration status. Once Immigration tried to deport him, Padilla sought to undo his conviction and plea. After lower courts denied his petitions for post-conviction relief, the Supreme Court reversed, finding immigration consequences are a direct, rather than collateral, consequence of a criminal conviction. The Court held that **affirmative misadvice** constitutes ineffective assistance of counsel. It even went on to state that **failure to advise** on the immigration consequences of a conviction similarly falls below the objectively reasonable standards every attorney must meet. Therefore, when the consequences of a conviction are "truly clear," an attorney has a duty to inform the client the conviction **will** lead to deportation; when the law is not clear, the attorney must at least warn of a "risk of adverse immigration consequences."

As we navigate this new landscape, here are a few informal thoughts on some of the most frequently-asked questions emerging post-*Padilla*:

### WHEN ARE THE IMMIGRATION CONSEQUENCES OF A CONVICTION "TRULY CLEAR"?

It depends who you ask. Many immigration attorneys believe the distinction between "truly clear" and a mere "risk" of deportation should be downplayed so defense

attorneys will be as specific as possible when advising on immigration consequences. Meanwhile, some defense attorneys stress that, because immigration consequences are never certain until the subsequent decision of an immigration judge or other official, merely advising every non-citizen there is a "risk" of deportation satisfies *Padilla*.

The answer probably lies somewhere in between. Due to a lack of case law, differing judicial opinions, and the vagueness of terms such as "crime involving moral turpitude," it will indeed be difficult to predict the exact immigration consequences in a large number of cases. However, in light of the heightened scrutiny on such advisals, defense counsel should presume that most cases fall into the first "truly clear" category until a body of case law emerges better defining this distinction.

Meanwhile, uncertainty does not necessarily excuse a lack of specificity. For instance, you may have a lawful permanent resident with a plea offer to endangerment. Although no clear case law exists on whether endangerment is a removable offense, this does not mean the lawyer can simply throw his hands up and declare "risk of deportation," expecting this will be effective assistance of counsel.

Instead, the lawyer could (should?) consult with an immigration attorney and advise the client,

*If you plead to this, there's a chance ICE could pick you up and say you're deportable for a 'crime involving moral turpitude.' However, I'm going to use language in the plea should give you strong arguments that it's **not** deportable, and, even if it is, you'll be eligible to apply for a pardon that would allow you to stay here in the U.S. with your green card.*

While both advisals acknowledge the ambiguity in the case law surrounding "endangerment," the latter allows the client to enter a more knowing and voluntary plea and should not be deemed ineffective assistance of counsel.

### DO PROSECUTORS HAVE A SIMILAR DUTY TO ADVISE UNDER *PADILLA*?

Probably not. While the *Padilla* court encouraged active plea negotiations to reach agreements better satisfying the interests of both parties, there appears to be no similar prosecutorial duty to advise since the prosecutor is not charged with providing effective counsel to the defendant. However, it may be in the prosecutor's best interests to ensure that a defendant has been advised of immigration consequences to avoid future applications for post-conviction relief.

On an ideological level, some prosecutors may see it as their duty to actively pursue convictions with more severe immigration consequences for non-U.S. citizens. Even when it is well-meaning, defense attorneys should never rely on information from a potentially adversarial source when advising a client of immigration consequences.

### DOES FAILURE TO ADVISE OF IMMIGRATION CONSEQUENCES AUTOMATICALLY INVALIDATE A REMOVAL ORDER?

No. In general, an immigration judge must defer to the existence of a criminal conviction until it is actually overturned or vacated; merely seeking post-conviction relief on legitimate grounds is not enough, by itself, to remove the immigration consequences. However, there are strong arguments that, in light of *Padilla*, immigration judges should grant continuances of currently pending removal proceedings when the immigrant is seeking post-conviction relief.

### DOES *PADILLA* APPLY RETROACTIVELY?

While there are strong arguments that *Padilla* did not create a new rule of criminal procedure and, thus, should be applied retroactively, courts so far are split on this question, with a slight majority tilting towards a retroactive application. Unfortunately, a full analysis of retroactivity is beyond the scope of this article.

### WHAT WILL CONSTITUTE PREJUDICE UNDER THE SECOND STEP OF *STRICKLAND*?

If an attorney has misadvised or failed to advise a non-citizen of a plea's immigration consequences, *Padilla* holds this satisfies the first prong of an ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984). However, here are some of the likely scenarios likely required to satisfy *Strickland's* second prong of demonstrated prejudice:

*If a safer plea could have been negotiated:* If it appears counsel could have negotiated a plea minimizing or removing immigration consequences altogether, this will probably be sufficient to demonstrate prejudice. Courts will likely take into account how realistic this possibility was. For instance, prejudice would not attach because a defender failed to negotiate a Class 2/Transfer of Marijuana for Sale down to a Class 6/Disorderly Conduct. However, prejudice would likely be found if a Class 6/Drug Paraphernalia could have been negotiated into a Class 6/Solicitation to Possess a Narcotic Drug.

*If the client would have gone to trial:* If the client can demonstrate that, had he known about the immigration consequences of a particular plea, he would have gone to trial, this might be sufficient to demonstrate prejudice.

*If a client was "over advised":* Most scenarios involve situations where an attorney failed to advise about the possibility of deportation. However, it may also be possible to show prejudice if the attorney advised there was a risk of deportation when, in fact, none existed. For instance, if an attorney advises a client that a plea offer "might" lead to deportation when it realistically did not, a client anxious to preserve her immigration status could go to trial, lose, and be convicted of an offense that actually *does* lead to deportation. This is another reason why merely advising all non-citizens there is a "risk" of deportation without conducting an individual analysis does not necessarily protect against an ineffective assistance claim under *Padilla*.

### WHAT IS A REALISTIC WAY TO GIVE IMMIGRATION ADVISALS POST-*PADILLA*?

While the legal duties enumerated in *Padilla* may seem daunting, there are practical steps most defense attorneys can take to responsibly advise on immigration consequences.

*First*, figure out the client's immigration status. Is client undocumented, legally present on a visa or green card, or have some other type of status? Ask client when she entered, if he's ever been deported, if she ever applied for papers, when he received his legal status. Try to figure out the chronology of client's immigration history, which is often critical in determining the effect of criminal convictions.

*Second*, determine client's priorities. Some clients are aware they are permanently ineligible for immigration

status and want the most favorable criminal deal possible, while others will take highly unfavorable pleas to have a slim chance at preserving their immigration status. In cases where immigration status is not a high priority for the client, nothing in *Padilla* **requires** the attorney to seek an immigration-friendly plea – only that the client is **advised** of the immigration consequences.

*Third*, consult the “Quick Reference Chart” on Arizona criminal offenses located at [http://www.ilrc.org/immigration\\_law/pdf/arizona.pdf](http://www.ilrc.org/immigration_law/pdf/arizona.pdf). Is the offense likely to trigger removability as a crime involving moral turpitude, a controlled substance offense, an aggravated felony, a domestic violence offense? Not all grounds of removability will affect all immigrants, but a brief review of the chart will alert you to the potential problems a conviction could cause. If immigration status is a low priority for the client, most cases could be handled by advising the client with reference to the chart and endnotes.

*Fourth*, if immigration status is a high priority for the client, consult an immigration attorney. While a chart or other legal materials may enable you to make the initial determination that a particular offense is a “crime involving moral turpitude” or other removable offense, the impact will nevertheless be highly dependent on the client’s current immigration status, how long she has had it, prior convictions, and numerous other factors. Particularly when a client already has lawful status, this analysis is not always an easy one and should be handled by an experienced immigration practitioner.

#### WHAT IS THE BEST WAY TO PROTECT MYSELF AGAINST FUTURE INEFFECTIVE ASSISTANCE CLAIMS UNDER *PADILLA*?

First, make it a standard part of your intake procedure to ask your client whether she is a U.S. citizen. Because many clients are confused about their immigration status, it may be advisable to follow up by asking whether the client was born in the U.S. If client unequivocally states she was born in the U.S., there should be no need to advise of immigration consequences. However, if a client says she was born abroad, or even if she is unsure about her country of birth, the attorney should assume a *Padilla* advisal will be necessary until presented with definitive evidence of the client’s U.S. citizenship.

*Second*, **keep a written confirmation of the immigration advisal**. On the most basic level, this could consist of a form stating, “On March 31, 2010, I advised client that his plea to ARS § 13-3407(a)(2) for Possession of a Dangerous Drug for Sale would likely be found an aggravated felony and would make him ineligible for future immigration status in the U.S.” Both attorney and client should sign it, giving one copy to the client, and keeping one copy in the client’s file. If the defense attorney consults an outside source, keep a copy of this in the client’s file.

In conclusion, many questions are yet to be answered on the long-term effects of *Padilla*. However, awareness of current case law and utilizing existing resources will assist criminal defense attorneys in avoiding claims of ineffective assistance of counsel.

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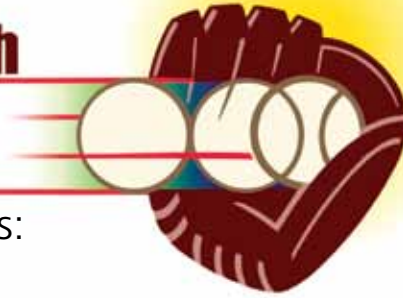
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## Jon Sands' Ninth Circuit Updates: June - August 2010

### SEARCH & SEIZURE

United States v. Villaseñor, No. 08-50541 (6-10-10)(Bybee with T. Nelson and M. Smith). Can one breathe easy after clearing a Port of Entry(POE)? No. Even though one is referred to secondary; even though a dog sniff fails (and the dog is subsequently "fired"), one still falls under the extended border, and if there are facts that cause a police officer to be suspicious -- say pulling into a gas station, using the restroom and then driving away -- such facts, combined with a tip from a Confidential Informant (CI), can trigger reasonable suspicion, and thus a search. Such was the instance here. The Immigration and Customs Enforcement (ICE) agent got information of a smuggling operation, with details. He was on the watch for the car, and other details. The car had come through secondary (see above) when happenstance had the agent pull alongside the car. The agent observed the car, some phone calls, and eventually pulled it over because of a traffic violation (the rosary (!) hanging from the rearview mirror obstructed sight lines). The district court had suppressed the search (37+ lbs of cocaine, based on having emerged from secondary inspection.

Not so fast, holds the 9th, in reversing the suppression. The search looks good to us under the extended border doctrine (close to the border) because the agent did not know of the secondary search, the tip was good, there was some actions that caused suspicion (various stops at known drug centers), and because legally the police can still watch and search after clearing a first hurdle at the border.

United States v. Burkett, No. 09-30260 (7-20-10)(Hall with Wardlaw and Gould). The 9th affirmed the denial of a suppression motion. It was a stop on a highway for speeding, and the police officer had reasonable suspicion to "stop and frisk" the passenger due to his furtive movements while the driver was refusing to comply with instructions, his deceptive responses, and the strange way he opened the car door, and kept his arm by his side. All these factors justified, to an experienced officer, the possibility the defendant was armed and dangerous and so led to a pat down, where a weapon was found.

United States v. Maddox, No. 09-30284 (8-12-10)(Hawkins with Lucero; dissent by N. Smith). The defendant was pulled over for traffic violations. He became belligerent (note: asking the officer, "Why the f \* \* k are you stopping me!" is not a good way to start the conversation), and was found to be driving on a suspended license and had other problems with the car (expired tags), and he ended up being arrested. Upon arrest, the officer took the defendant's key-chain with an attached closed container and placed them on the seat. After the defendant's arrest, and the defendant being placed and secured in the police car, the officer went back to defendant's car, retrieved the key-chain, unscrewed the container, and --lo and behold -- it contained what appeared to be meth. Subsequently the car was impounded and a search of a laptop container disclosed a handgun and more meth. The 9th held the unscrewing of the container screwed up the 4th Amendment, because it was not a search incident to arrest. The defendant was away from the car, secured, and not a threat. There was no threat visible in the car. Hence, the key-chain container should not have been searched. The laptop container should not have been subject to a so-called inventory search because the car need not have been impounded under state law. The defendant offered to have a friend drive it away, and the car was not impeding anything. It was not a valid search.

In dissent, N. Smith argues the key-chain was in defendant's hands when he was arrested, and so that made it subject to search incident to arrest. The timing should be left to the officer.

### EVIDENCE

United States v. Bonds, No. 09-10079 (6-11-10)(Schroeder joined by Reinhardt; dissent by Bea). The 9th calls the Government out in the appeal of the district court's decision from the Bonds steroids/perjury case. The district court had precluded statements under hearsay that supposedly linked Bonds with steroids use. The statements were from the trainer, who delivered samples to a lab employee, saying that the samples came from Bonds. The 9th agreed with the district

court, calling a strike on the Government, because the residual exception under Fed.R.Evid 807 was only for exceptional circumstances, and this was not exceptional. It was routine, like a fly out. Moreover, the testimony of the trainer about the source may not have been trustworthy. Strike two on the Government was the statements made by the trainer were not authorized by Bonds, and hence were authorized under Fed.R.Evid. 801(d)(2)(C). Finally, strike three against the Government was called because the statements were not made within the scope of employment. The trainer was not an agent, but was a free agent, so to speak, by being an independent contractor.

Bea, dissenting, balks. He argues the call, stating that the trainer was an agent of Bonds, and the statements were of a party opponent nature. He concludes that the district court made bad calls on legal curves and sliders that were still in the evidentiary strike zone.

#### DURESS DEFENSE & GRAND JURY

United States v. Navarro, No. 08-50365 (6-11-10)(Kleinfeld joined by Tallman and Trager, D.J.). This appeal from a conviction for importing and possession with intent of drugs involves a duress issue and a grand jury charge. Both are interesting. The defendant argued at trial that he acted under duress. He was being tested by the cartel, and was threatened. The defendant has the burden with duress. In closing, the Government argued there was no evidence of threat. The objection was that the Government was requiring an express threat, when the law allows an implied threat. The 9th agreed that duress, and indeed all threats, can be both express and implied (for the latter, "Do this. I have a bomb."). However, it was unclear whether the Government was actually arguing express; moreover, and importantly, the court instructed the jury to follow the instruction, which stated there needs to be an immediate threat.

As for the grand jury, the district court charged the grand jury with an instruction stating the Government had to provide exculpatory evidence and that the prosecutor was credible and trustworthy. The 9th stressed that the exculpatory charge was wrong. The Government may have a Department of Justice (DOJ) policy to present such evidence, but policies may change; there is no legal requirement (isn't that reassuring?). As for the credible instruction, the 9th was troubled, but it was in the benchbook. The 9th turned to the remedy for such an error. Surveying the few Grand Jury cases, the 9th holds that when there is a verdict of guilty, errors regarding probable cause disappear. Thus, no harm despite a charging foul. (Reasonable doubt vs probable cause). However, if presented before a

verdict, and ruled upon, the court has to consider under *Bank of Nova Scotia* whether such error had substantially led to an improper indictment. Here, though, the verdict was affirmed.

#### WRIT OF AUDITA QUERELA

United States v. Gamboa, No. 09-30217 (6-11-10)(Alarcon joined by W. Fletcher and Rawlinson). The **writ of audita querela**, which goes to procedural errors, cannot be used to attack a sentence under Booker. The challenge to a sentence must come under § 2255.

#### ILLEGAL REENTRY CASE - MOTION TO DISMISS FOR BAD DEPORTATION

United States v. Villavicencio-Burrue, No. 09-50204 (6-14-10)(Gould joined by Canby and Ikuta). The 9th affirms a 8 U.S.C. § 1326 conviction in an appeal that raised the issue of exhaustion of the removal proceedings. The defendant had not waived his right to an appeal at the removal hearing; indeed, he twice said he was not waiving his appeal. However, neither his lawyer nor he pursued the appeal. This failure, argued the defendant here, meant that ineffective assistance of counsel (IAC) occurred, and that exhaustion could be excused. The 9th disagreed, finding instead that he had known of his right, reserved it, and his failure to pursue meant that the administrative remedy was unexhausted, and thus not reviewable. The 9th **reversed** the district court's finding that the offense of making criminal threats under Calif. Penal Code § 422 was not a categorical crime of violence (COV) because it was too broad (taking in crimes against property). The 9th held such threats were violent, against person and property, and proportionate so the offense was considered a COV.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

Howard v. Clark, No. 08-55340 (6-15-10)(Gertner, D.J. joined by Kozinski and D. Nelson). The defendant was accused of shooting at two victims. He allegedly murdered one and injured the other. Problem was, the defendant said he was innocent and wasn't there. One witness on the stand said she couldn't identify him. (The police detective said she had identified him in a photo line up, which was contested. The prosecution argued gang intimidation). The jury convicted of first degree after lengthy deliberation and saying that they were hung. Oh yes, about the victim that lived? It seems he would have said the defendant was NOT the shooter. Unfortunately, the trial lawyer never interviewed him nor called him. IAC? One would think. The state court though said that it wasn't because the same information came out through the witness. The 9th, though, **reversed and remanded**

for an evidentiary hearing on prejudice. The 9th emphasized how important the victim-witness would have been, and how powerful that testimony would have been. The interview of him could have lead to other leads and an even more potent cross examination on others. The 9th did hold that it was not IAC for the lawyer not to have called an expert on eyewitness identification.

Cheney v. Washington, No. 08-35204 (8-2-10)(Ikuta with Kleinfeld and Bea). What is more deferential than AEDPA review of state decisions? Review of state court IAC claims under AEDPA, which has a “double deference” standard (*cf.* double secret probation). In this case, a petitioner argues that in a state child sexual assault case, his lawyer should have objected when the prosecutor, examining an officer, elicited that referrals are made only if they are felt to be true. The lawyer let that slip, but did object to prosecutor vouching in closing argument. The 9th sets out the “double deference” standard from the Supremes in Knowles v. Mirzayance, 129 S.Ct. 1411 (2009). The petitioner tries to argue unreasonable application of precedent, but the 9th looks at the deference of the decision under AEDPA and the general principles of *Strickland* (violate standards and prejudice), and concludes that the state courts decisions as to IAC were not objectively unreasonable under AEDPA and under the application of *Strickland* and so did not involve an unreasonable application of clearly established federal law.

Detrich v. Ryan, No. 08-99001 (8-20-10)(Paez with Pregerson and McKeown). The 9th **grants penalty habeas relief** in this capital case. There was IAC when it came to penalty investigation and presentation in a resentencing. Trial counsel did not use a expert mitigation investigator: and the investigator used was unqualified to do a life history. His investigation was minimal at best. No defense mental health expert was used nor defense evidence presented. Counsel failed to investigate and present the extensive mental health history. This ineffectiveness was prejudicial.

#### ATTORNEY-CLIENT PRIVILEGE AND CONFRONTATION

Murdoch v. Castro, No. 05-55665 (6-21-10)(*en banc*) (Tashima for plurality of Kleinfeld, Ikuta, Callahan, and N. Smith; Silverman concurrence; Kozinski dissents with W. Fletcher and Wardlaw; Thomas dissents with McKeown). The petitioner here was convicted of a murder 13 years before. The conviction was based on shaky eyewitness identifications and testimony by a co-defendant, who said he was pressured by the state. The co-defendant stated he had written a letter to the prosecutor saying he was coerced and that the petitioner was innocent. The letter was not disclosed to the defense

because of attorney-client privilege. In this *en banc* decision, the 9th holds that no Supreme Court decision has held that the attorney-client privilege must give way under certain circumstances to the Confrontation Clause. Thus, the state’s decision denying the challenge was not contrary to Supreme Court decisions. The state moreover and federal courts have held that any error was harmless. Silverman concurs, stating that the defense counsel erred by not moving to strike the testimony of the codefendant for failure to be able to cross.

Kozinski writes a blistering dissent, lambasting the state trial court for pressuring the co-defendant to testify at the petitioner’s trial and he (the court) would give him a break at sentencing. Kozinski derides the state courts for missing the issue, and failing to address it as required; he attacks the majority for misreading the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and for a crabbed view of precedents; and he laments the failure of the habeas system to address the wrong done. Thomas joins and dissents also for finding of error even if the state courts had addressed it.

#### RESTITUTION

United States v. Batson, No. 09-50238 (6-21-10)(Canby with Hall and O’Scannlain). The 9th considers whether the court can order restitution for Title 26-Internal Revenue Service (IRS) offenses. The answer is “yes” but only for the count of conviction if it is not for a conspiracy or scheme. The defendant plead guilty to aiding and abetting one fraudulent tax return. She was fined and ordered to pay almost a million dollars if restitution. The restitution for the single count was around 12,500 dollars. The defendant appealed, arguing the Victim and Witness Protection Act of 1982 (VWPA) and the Mandatory Victims Restitution Act of 1996 (MVRA) does not authorize such restitution. The VWPA is limited by *Hughey* to amounts arising from the count of conviction (except conspiracy) and the MVRA applies to COVs or crimes against property. This is true, but the court, holds the 9th, can order restitution under probation and supervised release terms. The restitution though again is limited to just the count of conviction, and so the sentence is vacated and remanded.

#### SENTENCING GUIDELINES & CRIMINAL HISTORY

United States v. Bozo-Zepeda, No. 09-50190 (6-25-10) (N. Smith with Schroeder and Fisher). This is a Sentencing Guidelines criminal history counting case. California has what is known as a *Johnson* waiver when it comes to state sentences. A *Johnson* waiver is when a state defendant waives incarceration credit for pretrial custody in order for the state court to sentence him longer to jail. Why? The state law allows

jail only for sentences of a year or less. This avoids going to the California prison system. Does a *Johnson* waiver, which pushes the ultimate sentence over 13 months (see where this is going) count as a sentence imposed of over 13 months? Yes, holds the 9th. The sentence is the time spent in custody in a sentence.

United States v. Crews, No. 09-30183 (7-23-10)(M. Smith with Paez and Tallman). The 9th holds that Oregon's second degree assault statute, Ore. Rev. Stat. §163.175(1)(b) is a COV under the Guidelines' "residual clause." The analysis is focused on *Begay's* two step approach: (1) does the offense involve conduct that presents a serious potential risk of injury; and (2) is the offense roughly similar to the enumerated offenses that appear at the start of the residual clause of U.S.S.G. § 4B1.2(a) (2)? The defendant argues his conduct does not necessarily involve purposeful conduct. The state statute only requires knowingly, which can be a lesser standard. While negligent or reckless conduct falls outside of purposeful, the statute here requires purposeful and violent acts. The focus is on deliberative acts.

United States v. Langer, No. 09-50399 (8-20-10)(Breyer, D.J. with Trott and W. Fletcher). The 9th decides a rap sheet, even in the absence of corroborating evidence, is still sufficiently reliable to establish by a preponderance of evidence the timing and length of the resulting sentence. The defendant agreed he had a prior conviction for assault. He argued the rap sheet indicating 180-day sentence (which got him an additional 2 points under criminal history), may be good enough to prove identity (that's me) when there is a fingerprint match, but is not good enough when it comes to the length and timing of the sentence. The 9th holds though that rap sheets, when matched with fingerprints, are good enough. In *Alvarado-Martinez*, 556 F.3d 732 (9th Cir.2009), the 9th found a finger-print matched rap sheet was sufficiently reliable for criminal history. If it was good enough for that, reasons the 9th, it is good enough for timing and length. The 9th notes the defendant did not challenge the rap sheet as incorrect, or contest the sentence, and indeed admitted he had such a conviction. This is a reliability decision, and it is reliable enough here.

#### GOVERNMENTAL MISCONDUCT

United States v. Struckman, No. 08-30312 (6-30-10)(Berzon joined by O'Scannlain and Kleinfeld; concurrence by Berzon). The Government charged the defendant with massive tax fraud in 2004. He left to Panama and refused to come out. The Government then made misrepresentations to the Panama Government and courts that got the defendant removed. In addition to unclean hands in its haste to grab the defendant

upon his removal from Panama, the Government committed egregious *Brady/Giglio* violations which resulted in suppression of evidence and witnesses. On appeal, the defendant argues that the conduct was so outrageous that the indictment should be dismissed. The 9th expressed its distaste for the Government's actions, but found dismissal was not appropriate for the misrepresentations to Panama that got him here (that is up to the State Dept).

As for the *Brady/Giglio* violations, including fabricating sources of information (so-called "Ted") and not disclosing all sorts of deals and impeachment on witnesses, the suppression of evidence was the appropriate remedy. Going back to "Ted," it seems that the Government fabricated this witness as a source of information, and refused to name the source when ordered by the court. This did not make the 9th very happy. Concurring to her opinion, Berzon would remand the case to see what other mischief the Government may have been up to, and to finally get the information requested by the court.

#### AEDPA & INNOCENCE

Lee v. Lambert, No. 09-35276 (7-6-10)(O'Scannlain joined by Wolle, D.J.; concurrence by N. Smith). AEDPA does not have an innocence exception to its statute of limitations. That was the decision by the 9th, where the panel reversed and remanded a granting of relief by a district court. The petitioner had been convicted of various counts of child molestation in Oregon, but his challenge, with a compelling innocence claim, was outside AEDPA's statute. The 9th chose this case to quash any assumption that there was an exception for innocence, stating it was basically a waste of time and judicial resources and that district courts are deciding cases differently (see pp. 9533 & 9534). The 9th's decision boils down to the plain language of the statute and that Congress was aware of such a possible judicial created exception, but did not fashion such an exception in the final legislation. The decision by the 9th creates a circuit conflict with the 1st, 5th, 7th, 8th, and now 9th aligned against the 6th. N. Smith concurred, focusing on the lack of AEDPA deference given to the state courts by the district court under AEDPA.

#### FARETTA/EDWARDS

United States v. Johnson, No. 08-10147 (7-6-10)(Silverman with Fisher and M. Smith). "The record clearly shows that the defendants are fools, but that is not the same as being incompetent." That pretty much sums up this *Faretta/Edwards* decision. The defendants ran an illegitimate debt-elimination scheme and once caught, decided to represent themselves. The district court held a *Faretta* hearing, begged them to have

counsel, had a competency hearing, and appointed stand-by counsel. The defendants cannot now say that Indiana v. Edwards, 554 U.S. 164 (2008), required the court to appoint counsel. *Edwards* allows a district court to override a *Faretta* request where there is a mental disorder that prevents a fair trial from occurring. Here, though, the defendants were found competent, appeared rational, if foolish, and after an extensive hearing, voluntarily and knowingly waived counsel. The defendants could not meet the threshold for an *Edwards* claim. The opinion does identify that the standard of review for such *Edwards* claims is still undecided. There is a suggestion that it is an abuse of discretion, but it may require a higher standard once a *Faretta* request has been granted. This issue is left for another day because the defendants were competent. The 9th also held that the district court did not abuse its discretion in refusing to recuse itself after having presided over a civil trial with the defendants on related issues.

#### SENTENCING

United States v. Chavez, No. 09-50434 (7-8-10)(Per curiam by O’Scannlain, Tallman, and Block, D.J.). Can one be parsimonious about Apprendi? “No,” flatly states the 9th, when it comes to the parsimony clause of 18 U.S.C. § 3553(a). Apprendi maximum sentence refers to the criminal statute of conviction, and not the overarching sentencing policy of the parsimony clause. Although the clause states the sentence should not be greater than necessary, that clause does not set a separate statutory maximum under the sixth amendment apart from the statutory maximum of conviction. Any other reading would make any sentence open to a parsimony challenge.

United States v. Armstrong, No. 09-30395 (8-31-10) (Berzon with Canby and Noonan). Can one adjust for hate? Yes, under the Guidelines. This appeal arose from a conviction for a racially motivated assault. Three men viciously beat an African American simply because he was African American. The defendant here wasn’t the first one to assault the victim, but participated in the planning (taking place in a Walmart grocery section in Idaho). After the other co-defendant had tackled and started to beat the victim, the defendant joined in. Was it proper to assess the defendant an adjustment under U.S.S.G. § 3A1.1(a) for a racially motivated attack when another defendant selected the victim, started the fight, and the defendant was a Johnny-come-lately? Sure, concluded the 9th, because the adjustment was designed to prevent such attacks. The court did not have to make separate findings that the defendant had selected the specific victim before the attack; the fact was race motivated the defendant. Moreover,

the court also properly assessed an adjustment for obstruction of justice because the defendant testified race was not a motivation, and that he did not use racially motivated slurs. The evidence at trial was to the contrary, and the court made findings that all the requirements of perjury had been met.

#### SOFT EXPERT

United States v. Brooks, No. 08-10301 (7-8-10)(Canby with B. Fletcher and Graber). In an interstate prostitution conviction case, the 9th draws the distinction between two interstate trafficking of minors statutes: 18 U.S.C. §§ 1591(a) and 2423(a). The former requires specific knowledge that the victim was under 18; the latter does not. The former also requires that the defendant knew the victim would engage in a sex act; the former only requires intent. There is overlap between the statutes, and the distinction is fine, but the two statutes are separate, and therefore not multiplicitous. The 9th also upheld the detective’s testimony as an expert on the relationship between pimps and prostitutes, and that such a relationship is not common knowledge to the jury. The 9th does vacate the sentence and remand for error in the enhancement under U.S.S.G. § 2G1.3(b)(1)(B), which is a +2 level adjustment for being a parent, relative or guardian or in the care or custody or control of the defendant. Although the 9th said this was a close question, the focus of the guideline characteristic is on parent-like care and custody, and on like figures, such as teachers or day-care providers. The relationship here, pimp to prostitute, falls outside of that, even with the minor’s attachment. To apply the adjustment here, where the crime and guideline deal with the act, is not appropriate.

#### STATE APPLICATION OF RING & RETROACTIVITY

Rhoades v. Henry, No. 07-99023 (7-15-10)(Rymer with Gould and Bybee). The Supremes said that *Ring* (requiring capital jury sentencing) wasn’t retroactive in *Summerlin*, 542 U.S. 348 (2004), but that states could apply *Ring* retroactively. See Danforth v. Minnesota, 552 U.S. 264 (2008). This was the case here, where petitioner asked the Idaho Supreme Court to apply *Ring* retroactively. The Idaho Supreme Court said “no” to retroactive application, applying a *Teague* analysis, and denied relief. The 9th now turns to the merits, and denies relief on IAC claims. The 9th holds counsel adequately investigated mitigation, and made a reasoned strategic choice to present an innocence claim rather than ask for mitigation based on petitioner’s childhood abuse, drug use, polio, IQ, and other personal matters. These matters moreover were alluded to in mitigation, when 20 witnesses were called. There appears to have been no IAC. Moreover, the court’s finding of aggravators

and the underlying facts would show no prejudice as the result would have been the same.

### JURY INSTRUCTIONS & EVIDENCE

United States v. Pineda-Duval, No. 08-10240 (8-10-10) (B. Fletcher with Canby and Graber). This is an appeal from a ten count alien smuggling conviction in which death resulted due to a roll-over. The district court refused a causation jury instruction, which would let the defendant argue that he had not proximately caused the deaths but rather the border patrol did in its negligence employment of the spike strips used to stop the car, resulting in its roll-over. The defendant also argued various other evidentiary rulings. The court also brushed aside defendant's argument at sentencing that he had not acted with malice aforethought (indifference to life) because he had done this before and he thought it would be safe.

The 9th found error in the court's preclusion of evidence, stressing that causation (proximate cause) has long been required. The only exception really is in drug trafficking offenses, as seen in *Houston*, 406 F.3d 1121 (9th Cir.2005) (Tallman decision), but that is cabined for that class of offenses. Alas, although there is error, the 9th found it harmless under the circumstances and with the weight of evidence. The 9th also found error, albeit harmless, in the court's preclusion of evidence as to the training manuals of the Border Patrol. The 9th did **vacate the sentence** (life) and remanded for a new sentencing on the issue of whether there was clear and convincing evidence of the defendant acting with malice aforethought. The court failed to make clear findings as to the degree of recklessness was involved and used the wrong evidentiary standard. The 9th implied that the degree of recklessness did not meet the malice aforethought/reckless indifference standard.

**Congrats to Assistant Federal Public Defenders (AFPDs) Dan Kaplan (Phoenix) and Richard Juarez (Yuma) for the win.**

### STATUTE UNCONSTITUTIONAL - 1ST AMENDMENT VIOLATED

United States v. Alvarez, No. 08-50345 (8-17-10)(M. Smith with T. Nelson; dissent by Bybee). This is a fascinating opinion. The 9th holds unconstitutional as violating the first amendment the statute, 18 U.S.C. § 704, that criminalizing falsely claiming one has won the Medal of Honor. The defendant here was a liar. He ran for a water board commissioner seat and said that he was a Marine, that he served in Vietnam, and that he had won the Medal of Honor. All false. He also claimed at various times that he had been a

police officer, played for the Detroit red Wings, and married a Mexican starlet. Again all false. He was a through and through liar. Lying is bad, acknowledged the 9th, but everyone does some lying. Moreover, lying, or satire, or exaggeration, is part and parcel of political debate. Falsehoods are wrong, but in the cut and parry of public issues, things get said. The 1st Amendment recognizes this. Although certain categories of speech have no first amendment protection -- and this includes libel or defamation -- there has to be a cognizable harm or injury. There is no harm or injury here tied to the lie. The medal winners are admired (indeed, the majority cites to the dissent in *Hinson* which concerns the lie of a Government witness that he had won medals). The statement went to the speaker, and opened him up for ridicule and attack, as indeed happened. There is also no specific finding of intent attached to the statute, which could lead to overbroad prosecutions. The marketplace of ideas have many vendors, hawking many strange notions, and falsehoods may be in the pitch. That is one price the first amendment allows to be protected. To criminalize this falsity would run the risk of silencing speech (Colbert report, for example) without a direct cognizable harm. This opinion is a nice overview of the interplay between speech and criminal statutes.

In dissent, Bybee argues that the parade of horrors is hypothetical. The intentional statement can be tied to the intent to deceive, and that the libel laws and precedents are well attuned to this and can be used here.

### ASSIMILATIVE CRIMES ACT (ACA)

United States v. Dotson, No. 09-30149 (8-17-10)(Tashima with Fisher and Berzon). This is an interesting ACA case. The ACA is designed to fill in gaps in the federal criminal code under 18 U.S.C. § 13. It uses state law to criminalize acts within federal enclaves. However, for ACA to apply, Congress cannot have enacted a statute or dealt with the acts that are the subject of the state code; and the state code must be criminal and not regulatory. Here, defendants served underage servicemen alcohol on an Air Force base in the state of Washington. The state code makes it a gross misdemeanor for such underage serving. On appeal, the defendant argued that Congress had stepped into this area, giving to the Secretary of Defense the power to regulate alcohol use on the base. The 9th found that this was a general authorization but not a specific statute or law dealing with underage serving of alcohol. The defendant also argued that the underage serving was a regulation, because the state code was in regulation of alcohol. Again the 9th didn't buy this, holding criminal statutes could be in regulatory schemes. The 9th also did not

find that the possible disparity between servicemen drinking (under Department of Defense regs) and state law was the harm meant to be addressed by the ACA, but rather the acts of the defendant on or outside the federal enclave. The opinion provides a thorough discussion of the ACA framework, tests, and purpose.

#### WHEN THE RETAINER RUNS OUT

United States v. Rivera-Corona, No. 08-30286 (8-18-10) (Berzon with Tashima; concurrence by Fisher). The defendant has retained counsel. The retainer is depleted, and now the defendant wishes to change counsel -- and asks the court to appoint counsel. What is the standard? This issue is a recurring one, and yet there is sparse precedent on it. That changes with this opinion. Here, the defendant retained counsel on a firearms charge. He pled guilty, but as sentencing approached, told the court that he wanted an appointed lawyer. He complained that the retained counsel demanded \$5000 more to go to trial, and that the defendant had pled guilty because of the counsel's pressure. The district court did not inquire into the defendant's financial state and denied the request. The court reasoned that it was at a late stage, and the defendant had said that he was satisfied with counsel at the change of plea. On appeal, the 9th identified two constitutional rights under the 6th Amendment: the right to have counsel and the right to effective counsel. The right to retain counsel is close to absolute (counsel must be a lawyer and timing). Did the request for appointed counsel constitute such an election? The 9th thought so, rejecting a "good cause" requirement. The court should only inquire into the financial status of the defendant, whether he qualifies for appointed counsel, and timeliness. There is no need to inquire into whether there was such conflict between counsel and defendant that effective representation required new appointed counsel. The 9th reasoned that forcing an unpaid lawyer, who didn't want to be on the case, could lead to conscious or subconscious resentment and undermine representation. This standard is reached by the 9th looking at the two decisions dealing with this issue, *Bland* and *Schell*, although in the context of habeas. The 9th parsed *Schell's en banc* overruling of *Bland* as going to the standard of review on habeas for substitution of counsel, leaving in force *Bland's* holding that the choice to go from retained to appointed was not under a "good cause" standard. The 9th vacated and remanded for inquiry into qualification for appointed counsel and for fact finding if the defendant moved to withdraw from the plea. Concurring, Fisher argued that the 9th was not writing on a clean slate, but rather was bound by *Schell*, and its holding for

a finding of "good cause." It was a *Schell* game to distinguish *Bland*. *Schell* went *en banc* to overturn *Bland*, and it could not be limited to "only in habeas." Fisher concurs because the district court failed to fully inquire into the need for new counsel and the conflict.

This is a significant case for retained counsel and CJA appointments. Retained counsel sometimes deplete the retainer, and the whole issue of whether CJA can and should be appointed is raised. This opinion seems to make clear the court only should inquire into the financial status of the defendant, whether the status qualifies for appointed counsel, and the timeliness. The court cannot require a conflict or issues with representation.

#### BATSON

Crittenden v. Ayers, No. 05-99006 (8-20-10)(Fisher with Farris and Berzon). The 9th grants habeas relief in this capital post-conviction challenge. The 9th ordered a remand for a hearing on a *Batson* issue. At trial, the state struck the only African American prospective juror, supposedly for a reluctance to impose death. The prosecutor however kept other jurors that expressed the same qualifications when it came to the death penalty. Under *Batson*, the petitioner has to have presented a *prima facie* case, which he did; and the State has to come forth with a race-neutral explanation. If time has passed, and memories faded, the state can produce reasons that are race neutral based on the record and circumstantial evidence. At the third step, a court has to assess whether the strike was "motivated in substantial part" by race. Cook v. LaMarque, 593 F.3d at 815. *Cook* came down after the district court had conducted a mixed motive analysis (where there race neutral reasons that would have led to a strike even if race was an issue). Under *Cook*, if race was a substantial part of the strike, then *Batson* relief must be given, even if other reasons exist or provided substantial reasons. The remand is to allow the court, which had found race did play a factor, to conduct a *Cook* analysis.

#### MAILING THREATS

United States v. Havelock, No. 08-10472 (8-23-10) (Canby with B. Fletcher; dissent by Graber). The 9th reverses convictions under 18 U.S.C. § 876(c), mailing threats, because the threats have to be addressed to an individual person, as reflected in the address on the mailed item. The jury cannot go within the envelope and read the salutation or contents to find a named person. Here, the defendant was angry with the world as a result of business setbacks. He mailed packets addressed to news organizations and websites that were a

hodgepodge of rants, threats, and warnings. He dropped the packets in the mail. The rants though, were mailed on the eve of the Super Bowl in Glendale, Arizona, and indicated that he would shoot innocent people, slay children, and create a bloodbath at the game. He would be responsible for a massacre at the Super Bowl. The blood of the dead would be on the hands of various government and city officials. The defendant anticipated being shot by the police. Armed to the teeth with firearms (legally possessed), the defendant went to the Super Bowl site. There, he had second thoughts, called his family, and turned himself in. No one was hurt. The mail rants were read on Monday, and the defendant subsequently was charged with mailing threats and convicted. The 9th reversed, holding that the threats had to be addressed to someone, and these were not. The statute specifically states mail must be addressed to a "person" and this means a natural person. The context of the statute makes clear an individual is intended. The Government so agreed. To prove an addressee, though, the Government cannot use as evidence the contents of the letter or packet, but must look solely at the address on the envelope. This is different from the approach of the 10th Circuit, in *Williams*, 376 F.3d 1048 (10th Cir.2004), which allows "at a minimum" the envelope and the salutation. This is too broad a fishing expedition for the 9th. The 9th sidesteps having to rule on the other issues of first amendment and mootness of threat.

Graber dissents, arguing for a wider definition of "addressed," and would include corporations of businesses. Graber uses an example (among several) hat a letter addressed to the 9th Circuit threatening to take vengeance on a judge for today's decision would escape prosecution because of this result.

**Congrats to AFPDs Dan Kaplan and Jeff Williams (Phoenix).**

#### MIRANDA

Hurd v. Terhune, No. 08-55162 (8-23-10)(Beezer with Pregerson and Thompson). All the world is a stage, but *Miranda* doesn't mean you have to act out a particular role. Here, the petitioner was charged with first degree murder of his wife. There was an ongoing divorce and the issue was whether the shot was accidental (showing her how to use the gun in case of an intruder) or premeditated murder. The first trial resulted in a hung jury. The second trial resulted in a life without parole (LWOP) sentence. At trial, the state court allowed the prosecutor to argue that petitioner's refusal to re-enact the shooting of his wife the police questioning was affirmative evidence of guilt. The 9th held this was and

unreasonable application of *Miranda* and Doyle v. Ohio, 426 U.S. 610 (1976). A petitioner can invoke *Miranda* on a question by question basis, and in response to a request to act something out. The petition was **granted**.

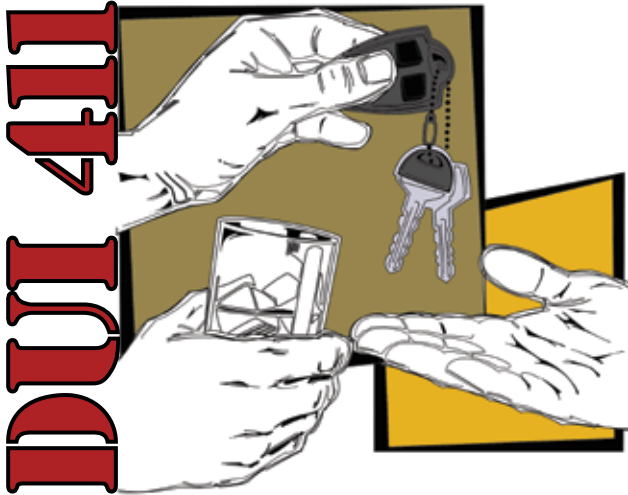
#### MOTION TO CONTINUE

United States v. Kloehn, No. 06-50456 (8-30-10)(Reinhardt with Wardlaw; dissent by Trott). In some instances, the trial must not go on. The defendant was on the stand for a fifth day in a complex and complicated tax evasion trial. The first trial had ended in a hung jury. In the midst of the testimony, the defendant's son, diagnosed with terminal cancer, suffered a massive seizure and "had little life expectancy left." Defense counsel asked for a two day continuance so the defendant could see his son, with whom he lived prior to trial, in Las Vegas. Despite the fact that no one questioned the gravity of the son's condition, and there was a message from the treating doctor saying "come quickly," the Government opposed because the jury would be inconvenienced and lose track of the testimony. The judge denied the request without any findings. The defendant completed his testimony, and the Government called an agent as a rebuttal witness. When the agent went long, defense counsel asked that the proceedings be ended for the day so the defendant could catch a plane to Las Vegas, and that he be excused for the rest of the trial. The court ended the proceedings for the day, and excused the defendant. The son died an hour after the father arrived. The next day, the court explained to the jury that the defendant could absent himself if he wanted. He was convicted. On appeal, the 9th held the district court abused its discretion in refusing a two day continuance. All the factors in weighing the discretion for a continuance, set out in United States v. Flynt, 756 F.2d 1352 (9th Cir.1985), weighed in favor of granting a continuance, and a denial was unreasonable. The defendant as diligent, the continuance requested was short and proper, the court failed to make findings of inconvenience, and the defendant was prejudiced, it affected his ability to testify. The Government did not request a harmlessness analysis, and the 9th found it waived. Even so, the 9th believed the case was close (it had hung previously).

Dissenting, Trott would find any error, if there was one, harmless.

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# From Crawford to Melendez-Diaz: The Confrontation Clause and Breath Testing

By James Nesci

## PART I: FACTS, DISSENT, & ANALYST-PRODUCED ERROR

No longer can drug analysts testify by paper, avoiding cross-examination. On June 25, 2009, the United States Supreme Court issued its ruling in Melendez-Diaz v. Massachusetts, 557 U.S. \_\_\_, 129 S.Ct. 2527 (2009). Although *Melendez-Diaz*' facts involved testimony about the analysis of an unknown substance suspected to be cocaine, the decision also applies to the breath analysis in a DUI case. Applied to the admission of a breath test estimation, *Melendez-Diaz* requires additional testimony, beyond the traditional testimony of the breath test operator - the Confrontation Clause requires additional government witnesses than had generally had been required before June 25, 2009.

As part of a typical DUI-breath investigation in Arizona, a suspect is required to submit to a breath alcohol content estimation, supplying two breath samples for scientific analysis by an Intoxilyzer 8000. The samples must be no less than five minute apart and no more than ten minutes apart. Samples must be consecutive, must be immediately preceded by at least a fifteen-minute deprivation period, and must agree with each other by no more than .020. The tests must be completed on a device approved for use in Arizona by the Department of

Public Safety. See Arizona Administrative Code R13-10-101 et. seq.

These results, which estimate the breath alcohol concentration in excess of .08, support the subsequent charges, several of which have draconian, mandatory consequences upon conviction, such as the Extreme DUI (A.R.S. §28-1382(A)(1)) and Super Extreme DUI (A.R.S. §28-1382(A)(2)). These breath test results are the sole evidence offered against an accused on the *per se* charges, and figure prominently in the government's accusation and evidence for the alleged violation of the impairment-to-the-slightest-degree charge (A.R.S. §28-1381(A)(1)).

### Justice Kennedy's Dissent

The rules of forensic evidence admissibility changed drastically June 25, 2009, with the U.S. Supreme Court's majority opinion authored by Justice Scalia. However, it is not Justice Scalia's opinion that lays out the argument most clearly. Rather, Justice Kennedy's dissent best details the decision's ramifications. His dissent can be viewed in two parts. The first part describes exactly what the majority opinion means -- and it is important to note the majority opinion does not disagree with Justice Kennedy's assessment of their decision.

However, the majority disagrees strongly with the second part of Justice Kennedy's dissent where he argues the opinion is so onerous, placing such a great burden on the prosecution that the wheels of justice will grind to a halt and it will be the rare case where forensic evidence is ever admitted again. Justice Kennedy wrote:

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the "analyst" who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

*Melendez-Diaz, supra.* (Kennedy J. dissent).

This quote from Justice Kennedy's dissent hits the nail right on the head. Until *Melendez-Diaz*, the results of scientific analyses could be introduced into evidence without testimony from the analyst who conducted the examination. No longer can that be done. Now, all scientific results can **only** be admitted through the testimony of the analyst who produced them.

### Melendez-Diaz's Facts

In 2001, Boston police received a tip that a Kmart employee, Thomas Wright, was engaging in suspicious activity. An informant told police Wright repeatedly received phone calls at work, after each of which a blue car would pick him up in front of the store, returning to the store a short time later. Instead of simply firing him for leaving work without authorization, Kmart allowed the police set up surveillance in their parking lot where police witnessed this precise sequence of events. When Wright got out of the car upon his return to Kmart, one of the officers seized Wright and searched him, finding four clear plastic bags containing white powder. Other officers then swooped in and arrested the two men in the blue car -- one of whom was Luis Melendez-Diaz. Officers placed all three men in the back of a police car.

During the short drive to the police station, the officers noticed the three men fidgeting and making "furtive movements" in the back of the car. After delivering the men to the station, they searched the police car and found hidden in the partition between the front and back seats a plastic bag containing 19 smaller plastic bags with white powder inside. The police submitted all the seized evidence to a state laboratory for chemical analysis. The result: the white powder was cocaine.

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At his trial, the court admitted into evidence the bags seized from Wright and from the police cruiser. It also submitted three "Certificate of Analysis" showing the results of the forensic analyses performed on the seized substances. The certificates reported the weights of the seized bags and stated the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." The certificates, sworn to before a notary public, were completed by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. The analyst never testified. Not surprisingly, Melendez-Diaz was convicted.

The U.S. Supreme Court reversed his conviction and held the Constitution's Confrontation Clause required the analyst who conducted the analysis be exposed to confrontation and subject to cross-examination by the defendant before such evidence may be admitted.

In fact, even where the accused has the ability to subpoena the analyst under state law or pursuant to the Compulsory Process Clause, it is error for the government not to present the analyst in its case-in-chief. Justice Scalia, for the majority wrote:

More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

*Melendez-Diaz, supra.*

### The Power to Produce Error

So, what does this mean regarding admitting a breath alcohol estimation at trial? It means four people **must be present and testify** before admitting an Intoxilyzer 8000 breath estimation because each of the four has the power to introduce error.

Again, Justice Kennedy's dissent discusses the roles of four hypothetical analysts in a routine analysis for illegal drugs who must be present to admit a test result:

- one who prepares the sample, places it in a machine and retrieves the printout;
- a second analyst who interprets the printout;
- a third analyst "perhaps an independent contractor" who calibrated the machine and certifies it is in good working order; and
- a fourth analyst, "perhaps the laboratory's director," who certifies that his subordinates followed established procedures.

Justice Kennedy gives compelling reasons for supposing all four people mentioned above could be considered analysts: "(E)ach of the four has power to introduce error." In fact, he specifically mentions that the person who calibrated the machine might "botch the machine's calibration" -- this is highly relevant to a DUI breath test machine. Justice Kennedy wrote:

Consider the independent contractor who has calibrated the testing machine. At least in a routine case, where the machine's result appears unmistakable, that result's accuracy depends entirely on the machine's calibration. The calibration, in turn, can be proved only by the contractor's certification that he or she did the job properly. That certification appears to be a testimonial statement under the Court's definition: It is a formal, out-of-court statement, offered for the truth of the matter asserted, and made for the purpose of later prosecution. See ante, at 3-5. It is not clear, under

the Court's ruling, why the independent contractor is not also an analyst.

*Melendez-Diaz, supra* (Kennedy J. dissent).

### Melendez-Diaz and the Breath Tester

The breath test operator acts as the first analyst mentioned by Justice Kennedy. Before June 25, 2009, when a breath tester printed concurrent calibration checks on a print card, the card could be admitted, pursuant to A.R.S. §28-1323, solely based on the testimony of the breath test operator. This operator would normally testify

- a. as to the type of machine used; and
- b. that the operator
  - i. prepared the Intoxilyzer by using an approved G6 checklist;
  - ii. prepared the subject's breath sample via a conducted minimum 15- minute deprivation period;
  - iii. instructed the subject about how to deliver the breath sample to the machine;
  - iv. ran the machine;
  - v. interpreted any error messages; and
  - vi. determined there were no defects on the face of the breath test card.

These results were admissible without further testimony.

*Melendez-Diaz* does nothing to change whether the breath-device operator must testify or not. In Arizona, the operator was required to give testimony both prior to the *Melendez-Diaz* decision and since the decision has been rendered. Previously, however, the operator was the only person who needed to testify if the government availed itself of the statutory admission of the test results pursuant to A.R.S. § 28-1323.

Since the June 25's decision, however, three additional people must testify.

### Three Additional Witnesses

The analyst who calibrated the Intoxilyzer now **must** testify. With an Intoxilyzer 8000 printout, we have a *calibration check*, but not an actual *calibration*. This calibration check is done at the time of the test and the result is printed on the breath test card.

The actual machine calibration, however, is done at the factory. Each Intoxilyzer 8000 comes with a "Certificate of Calibration" provided by the manufacturer, CMI, Inc. of Owensboro, Kentucky. It declares that this particular Intoxilyzer 8000 was certified on a specific date and by a specific person. It also states that the solutions used to calibrate the Intoxilyzer

8000 are traceable to the National Institute for Standards and Technology (NIST). Moreover, as evidence that this document was prepared in anticipation of litigation, many police departments certify the document under A.R.S. § 28-1327 intending it be admitted as evidence in a court of law. The CMI analyst is clearly one of the four people contemplated by the *Melendez-Diaz* case. This analyst has the power to interject error into the process by a "botched calibration," as Justice Kennedy described and the majority implied.

The Quality Assurance Specialist (QAS) must also testify; Justice Kennedy states the defense's position in this. He considers the lab director a necessary analyst.

And we must yet consider the laboratory director who certifies the ultimate results. The director is arguably the most effective person to confront for revealing any ambiguity in findings, variations in procedures, or problems in the office, as he or she is most familiar with the standard procedures, the office's variations, and problems in prior cases or with particular analysts. The prosecution may seek to introduce his or her certification into evidence. The Court implies that only those statements that are actually entered into evidence require confrontation. See *ante*, at 4-5. This could mean that the director is also an analyst, even if his or her certification relies upon or restates work performed by subordinates.

*Melendez-Diaz, supra*. (Kennedy J. dissent)

In the case of an Intoxilyzer 8000 test result, the analyst whose testimony is required will be the QAS responsible for the relevant care and maintenance of the machine near the time of the test. In this particular case, the QAS's name appears on the print card as the person who maintains that particular Intoxilyzer 8000. The fact that the Intoxilyzer appears to have passed its calibration checks is recorded on that print card. That appearance is a result of the QAS's machine maintenance and preparation. Before admitting the test results, the accused has the right to confront the QAS whose name appears on the breath print card.

Next, an Ethanol Breath Standard (EBS -- also known as a "dry-gas standard") is used to create the calibration check results printed on the breath test card and is identified by a lot number which is printed on the canister label. The EBS is allegedly prepared properly and certified as a .100 standard. In fact, each dry-gas canister is accompanied by a "Certificate of Analysis" for the EBS. Each certificate identifies an "analyst" who prepared and certified the EBS. The analyst signs the

"certificate" as

- a. evidence of his or her involvement in the process,
- b. a certification that the EBS
  - i. is a mixture of ethanol and nitrogen,
  - ii. has a known concentration of ethanol,
  - ii. is traceable to NIST,
  - iv. contains an analytical accuracy value, and
- c. to the EBS's manufacture date, expiration date, and dry-gas value.

However, we know nothing about the laboratory's conditions or certifications, the analyst's qualifications or analyst's certification to create the dry-gas standard or to analyze it. We know nothing about the method used to analyze the dry-gas -- that is, whether it is generally accepted or not. We know nothing about the analyst's bias or motivation. In fact, we do not even know whether the analyst who signed the certificate did the actual analysis, as opposed to simply certifying results by a subordinate. Before admitting the test results, the accused has the right to confront the EBS analyst.

Once again, Justice Kennedy's dissent (with the example of the four hypothetical analysts) recognizes **exactly** what the majority meant in their holding.

All contribute to the test result. And each is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.

Justice Kennedy's foresight and insight are 20/20 -- for this is exactly what the majority opinion represents.

## Coming in the Winter issue of *The Defender*: Part II: Countering the Government's Arguments

Note: The United States Supreme Court accepted certiorari on September 29, 2010, in *Bullcoming v. New Mexico*, 09-10876 - Constitutional right to confront witnesses.

Issue: Whether it violates the Constitution's right to confront witnesses against the accused for a trial judge to admit the testimony of a crime lab supervisor to discuss a forensic test that the supervisor did not personally conduct or observe. The issue arises in a case involving a blood test as evidence in a drunk driving case.

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# Erasing Arizona's Example of Absurdity - Arguing the Unconstitutionality of Arizona's Child Pornography Sentencing Scheme

By David Euchner



In *State v. Berger*, decided in 2006,<sup>1</sup> the Arizona Supreme Court held that Arizona's sentencing scheme for sexual exploitation of a minor (A.R.S. § 13-3553, which includes child pornography possession), requiring consecutive sentences of 10-24 years **per image** without possibility of early

release, was not repugnant to the United States Constitution's Eighth Amendment. Under this scheme, Berger, who was convicted of possessing 20 child pornography images and had no previous criminal record at all, received the mandatory minimum 200-year sentence.

Though it appears on the surface the question of whether this sentencing scheme is excessive is settled, unanswered is whether the Arizona Supreme Court would similarly affirm this sentencing scheme under the mirrored "cruel and unusual punishment" provision in Article II, § 15 of the Arizona Constitution.

U.S. CONST., AM. VIII	ARIZ. CONST., Art. II, § 15
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.	Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Even *Berger's* language suggests the Court might have reached a different conclusion had it been asked to consider Arizona's Constitution as a basis for striking down this sentencing scheme. Two justices on the bench (Berch and Bales) have openly shown a willingness to extend the state's

constitutional protections beyond its federal counterparts. And Justice Hurwitz, in his *Berger* concurrence, took great pains to relay his reluctant agreement with the majority.

For instance, in *State v. Davis*,<sup>2</sup> while the Arizona Supreme Court ordered supplemental briefing on whether consecutive mandatory minimum sentences totaling 52 years imprisonment for a young adult convicted of mutually consensual sexual conduct with a 14-year-old minor violated **Arizona's** constitutional protection against disproportionate sentences, it held the punishment violated the federal constitution's Eighth Amendment, never addressing, except by introduction, Arizona's Art.II, §15.

Arizona courts typically match interpretation of Arizona's constitutional language to the Supreme Court's interpretation of the federal constitution.<sup>3</sup> However, our state courts are not bound as such and should not march lockstep with the U.S. Supreme Court.<sup>4</sup>

After the U.S. Supreme Court decided in 1991's *Harmelin v. Michigan*<sup>5</sup> that a mandatory life sentence without possibility of parole for possessing more than 650 grams of cocaine was constitutional, the Michigan Supreme Court immediately pushed back. The following year, in *People v. Bullock*,<sup>6</sup> the Michigan Supreme Court decided the same mandatory natural life sentence required by precisely the same state statute as in *Harmelin* should be invalidated under Michigan's **state** constitutional prohibition on disproportionate sentences.

To successfully challenge a sentencing scheme as unconstitutional, one must show the legislature's punishment of a particular offense is devoid of reason. As to simple possession of child pornography, no rational basis exists behind the sentencing scheme. This short list of examples demonstrates the excessive nature of child pornography possession penalties:

1. *Varying Types of Conduct, One Punishment*: A.R.S. § 13-3553 punishes all violations of the statute the same, whether

the offender simply downloaded to his computer a single image of a 14-year-old girl posing nude, downloaded a video of an infant being raped, or personally filmed an infant being raped. By dividing § 13-3553(A) into two separate subsections with multiple means of violating each subsection, the legislature may have actually intended to punish (A)(1) - the creation of child pornography - differently than (A)(2) - the possession of the contraband.<sup>7</sup>

2. Concurrent vs. Consecutive Sentences: Under § 13-705(M), an offender who molests a single child a thousand times may receive concurrent sentences of 10-24 years. Simple possession of child pornography as downloaded onto a computer, however, is ineligible for concurrent sentencing.
3. Actual Harm to Child vs. No Direct Child Victimization: Causing a child under age 15 to engage in bestiality is punishable under §§ 13-705(F) and 13-1411(A)(2) and (D) by 2.5 – 7.5 years imprisonment with probation available. Compare this with possessing child pornography, the only crime enumerated in § 13-705 not direct victimizing a child and, yet, it is one of the most severely punished offenses.

Our Legislature knows of the absurdity of this sentencing statute, and there is a possibility of an amendment in the near future so that judges will have discretion to run sentences concurrently.<sup>8</sup> That such an amendment is necessary was admitted by the President of the Arizona Prosecuting Attorneys' Advisory Council (APAAC) at a recent legislative subcommittee hearing addressing sentencing reform.<sup>9</sup>

Meanwhile, attorneys defending child pornography possession cases should make constitutional challenges to the current sentencing scheme. While courts properly are loathe to legislate from the bench, successful challenges require courts to craft solutions, rendering unconstitutional sentencing statutes constitutional. In *Bullock*, the Michigan Supreme Court simply struck the "no parole" part of the sentencing scheme as unconstitutional. The result: a life sentence was still required but inmates would be eligible for parole after serving ten years.

The two sentence reform repairs here both require minimal changes to statutory language. Courts could:

1. remove language from § 13-3553 that the offense should be punished pursuant to § 13-705; or
2. add language to § 13-705(M) allowing the sentences to be run concurrently, as with multiple molestations of the same child.

Finally, Arizona's current sentencing scheme can be attacked as violating the Equal Protection Clause of both the

federal and Arizona constitutions. Offender classifications by offense must meet a "rational basis test."<sup>10</sup> As stated above, possession of child pornography is the only offense punishable under § 13-705 that does not require direct harm of a child by the defendant, yet these offenders are punished far more severely than those who do directly harm children.

Pima County Superior Court Judge John Leonardo has publicly, outside any specific court case, asserted that *Berger* was wrongly decided, the sentencing requirements are an "example of [cruel and unusual punishment] absurdity," and our legislature has failed in its "responsibility of rectifying this unconscionable penalty."<sup>11</sup> Defense attacks have, so far, been unsuccessful in convincing any judge to strike down this sentencing scheme, but we have come extremely close and no judge has dismissed these arguments out of hand. Defense attorneys filing such motions (this author's is included in the AACJ motion bank) may succeed where pioneers have to date failed.

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#### Endnotes

- 1 212 Ariz. 473, 134 P. 3d 378 (2006).
- 2 206 Ariz. 377, 79 P.3d 64 (2003).
- 3 State v. Noble, 171 Ariz. 171, 829 P.2d 1217 (1992) (ex post facto clause of state constitution interpreted the same as that of federal constitution).
- 4 Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984) (stronger double jeopardy protections than what federal constitution provides when mistrial caused by intentional prosecutorial misconduct).
- 5 501 U.S. 957, 111 S.Ct. 2680 (1991).
- 6 485 N.W.2d 866 (Mich. 1992).
- 7 State v. Paredes-Solano, 223 Ariz. 284, ¶ 10, 222 P.3d 900, 904 (App. 2009).
- 8 Arizona State Legislature Ad Hoc Committee on Sentencing. "To review and assess Arizona's sentencing laws. The Committee shall review and evaluate the purpose, history, and evidence of effectiveness of the laws regarding criminal sentencing. The Committee shall make recommendations for improving the sentencing process and guidelines. The Committee shall meet as often as necessary, take public testimony and report findings and recommendations to the Speaker of the House of Representatives on or before November 1, 2010." <http://www.azleg.gov/FormatDocument.asp?inDoc=/icommittee/Ad+Hoc+Committee+on+Sentencing%2Edoc.htm>
- 9 Arizona State Legislature, House Study Committee of Sentencing (May 15, 2010), Derek Rapier, Greenlee County Attorney and Chairman, Arizona Prosecuting Attorneys' Advisory Council. <http://www.azleg.gov/FormatDocument.asp?inDoc=/iagenda/house/051410+committee+on+sentencing%2E1%2E2r%2Edoc%2Ehtm> and [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=7737](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7737) at 1:45:09-1:45:50.
- 10 State v. Mulalley, 127 Ariz. 92, 618 P.2d 586 (1980).
- 11 46 Arizona Attorney 8 (February 2010) (Sound-Off letter from Hon. John S. Leonardo). <http://www.azattorneymag-digital.com/azattorneymag/201002/#pg11>. Judge Leonardo cites to Michael Berch, "Sentencing, Prosecutorial Discretion, and the Criminal Injustice System," *The Defender* (Spring 2008).