F·L·O·R·I·D·A DEFENDER

Volume 33 No. 3 A Publication of the Florida Association of Criminal Defense Lawyers Fall/Winter 2021





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The Florida Defender is published quarterly by the Florida Association of Criminal Defense Lawyers.

The material contained herein is solely for informational purposes. Opinions expressed herein may not necessarily reflect the views and/or policies of FACDL.

Editorial matter, change in address, and correspondence regarding advertising should be mailed to P.O. Box 1528, Tallahassee, Florida 32302, or emailed to facdl@facdl.org.

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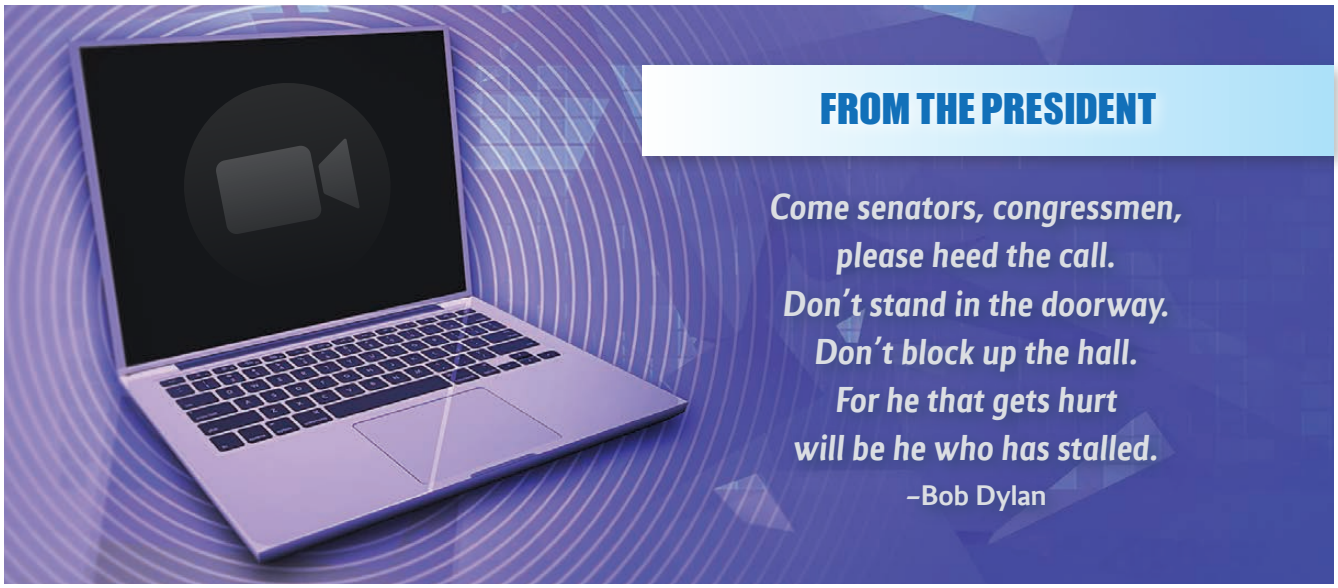


Judges, Please Heed the (Zoom) Call

by Jude Faccidomo

As most members know, *The Defender* is one of the many benefits of FACDL membership. This is a triannual publication distributed to the entire organization's membership. What you may or may not know, is that *The Defender* is also sent to every Florida judge. This publication is shipped to trial and appellate judges on both the State and Federal bench, as long as they maintain an address within the State of Florida. With apologies to all of my beloved members: this article is for the judges.

If you are a judge, especially a chief judge, please read this. As you are painfully aware, 2020 brought unexpected challenges to day-to-day court operations. Universally and throughout the Circuits, the system adapted. We realized that technology could be used to further the business of the court and keep the wheels of justice turning. As the vaccine started to have a positive effect in the early part of this year, courts throughout Florida began resuming in-person hearings. While this was most certainly welcome, it was not welcome in exchange for discarding all that we learned through the earlier stages of the pandemic. Sometimes you don't know there is a better way until you are forced to find a better way. We are currently seeing an unfortunate, and probably avoidable, surge in COVID-19 that has forced us to take a step back in reopening. This is a safety issue. It must be done. If you are a judge resistant to Zoom proceedings amidst this Delta variant surge you need to reconsider and follow the science to ensure that all who have business with the court-defense lawyers, prosecutors, defendants, victims, clerks, bailiffs — are safe. With that said, this article is to address the value, and frankly need for continued Zoom proceedings in a post-pandemic world.

The arguments in favor of continued use of remote proceedings are comprehensive and well-reasoned. They span all areas of the criminal justice system from simple time management to significant financial impacts. Conversely, the arguments I have heard from several of the more resistant judges are specious and frankly seemed based more in fear of the unknown. Below I have highlighted some (not all) of the arguments in favor of continue use of Zoom. I also, in the interest of fairness, address some of the arguments in opposition.

TIME MANAGEMENT AND EFFICIENCY

Perhaps the most compelling argument in favor a more expansive use of remote technology is that is allows for a more efficient and effective use of time. The practice of criminal law is a tedious, stressful, but important business. To practice effectively requires the most fleeting of all commodities — time. During the pandemic we were forced to build a better mouse trap. As we all know there are far too many ministerial

hearings in the life span of a criminal case. Whether you call them Pre-Trial Conferences, Status Hearings, Case Management Conferences or Soundings, they are a reality of criminal practice, but also a time vacuum. It is admittedly essential for courts to keep tabs on the progress of cases to ensure proper movement toward trial or resolution. That task, as has been shown, can be accomplished quickly and efficiently via remote technology. Additionally, simple motions such as motions to compel, sealing and expunction matters, and acceptance into diversion programs are easily accomplished remotely. These do not trigger any confrontation or constitutional requirements that would mandate any in-person hearing. On any given morning a criminal practitioner will be required to drive to the courthouse, most of which are located either remotely or inconveniently in the center of the convergence of heavy traffic. After searching for parking, one will need to go through the security line, wait in the courtroom for the case to be called only to offer the court a status update on the case that will take fewer than sixty seconds. The lead-up time to provide the court with a progress report or to advise of outstanding discovery or pending depositions is comically out of proportion to the actual time spent on the record addressing the case.

Additionally, the time spent in court is often wasted. While we all miss the social aspect of seeing one another, when we are in court, we are at the mercy of the calendar with no real ability to do anything other than wait. If a lawyer is situated in their office, they can work simultaneously while waiting to be called on Zoom. Through the pandemic criminal defense lawyers have been able to engage in more robust motion practice which has, in most cases, led to resolutions. This doesn't just apply to the defense bar. How often have judges heard from the State, "I haven't been able to get in touch with my victim" or "I haven't been able to speak with my supervisor" or "I haven't had a chance to review the defense counteroffer"? This inevitably results in a reset. The reason they can't accomplish those simple tasks is because they lose 4-5 hours a day handcuffed to the lectern running a morning calendar.

Moreover, the need for multiple, unnecessary in-person hearings has created a "coverage culture." This is detrimental to effective case management as well as effective client representation. This is also an apparent source of frustration for judges as the coverage attorneys are never as knowledgeable or prepared as the attorney of record. Appearing at multiple courthouses becomes even more complex for private practice attorneys who often have practices that span several jurisdictions. It is significantly more efficient for the attorney, the defendant, and the Court to have the attorney of record to be present for case management settings as the attorney of record should be more knowledgeable and should be able to answer any questions which may arise.

> "During the pandemic we were forced to build a better mouse trap."

MAINTAINING REMOTE PROCEEDINGS IS FISCALLY RESPONSIBLE

Directly related to the efficiency and time management argument is that it is very much in the financial interest of the State to continue with remote proceedings where appropriate. The Justice Administration Commission will never have sufficient funds to properly allow for private court appointed lawyers and due process costs. This causes them to consistently and understandably wrestle with billing and their own internal budget. Private court appointed counsel encompass a large percentage of the cases not handled by the Public Defender's Office or Regional Conflict Counsel. Those attorneys are frequently engaged in hourly billing. It also common for the cases to which these lawyers are appointed to be complex multi-defendant or capital cases. As such, many of these cases have several attorneys and are handled by special unit prosecutors. Prior to Zoom, it was commonplace for lawyers to have to sit in court waiting for the other counsel or the out-of-division prosecutor to arrive. This wasted not just time- but money.

Remote court appearances made us more efficient. Now when attorneys are logged in to Zoom they can work on other matters until such time their case is called, maximizing professional efficiency, and obviating the need to invoice the JAC for wasted time. On most occasions, the time the attorney spends addressing the case is less than 5 minutes. The billing decreases from .8 for a 45-minute wait to .1 for actual time on the record. Throughout the life span of a case, this amounts to significant savings.

TRANSIT BURDEN AND ACCESS TO THE COURTS

On any given day, a deluge of people from all over the State are required to, or wish to, attend court proceedings. Many of the defendants coming to court do not have their own transportation. Many defendants,

SEE PAGE 10

34TH ANNUAL MEETING HIGHLIGHTS

EXECUTIVE DIRECTOR'S REPORT

Becky's Bulletin

WHAT'S NEW?

by Becky Barlow

PRESIDENT, JUDE FACCIDOMO

Mitch Stone transitioned to immediate past president last July, as Jude Faccidomo was sworn in a president. Mitch completed an unprecedented full term as FACDL's president, dealing with a justice system impeded by a pandemic and an association forced to go virtual in an effort to provide support and education to criminal defense lawyers. Jude now steps up to guide FACDL through a new and constantly changing environment for criminal defense lawyers.

EXPERT WITNESS LIST

Members may now submit expert names to and search for an expert witness on FACDL.ORG's Expert Witness List page. This specialty page lists the name, telephone number, area of expertise and additional information at a "click". This list may be accessed by FACDL members from the blue navigation bar after logging in to the website. If you have an expert witness to submit, just email **facdl@facdl.org**.

COMMITTEE CHAIR LIST

FACDL committee work can be very important for FACDL and the Florida criminal defense lawyer. There is now a list of committee chairs and their contact information on the FACDL website. This list can be accessed from the blue navigation bar under "FACDL Leadership". If you have a question regarding action a committee should or may take, or if you just want to volunteer, consult this list to contact the chair.

GEAR

FACDL's new president also came with some new gear. Thanks to Jude, the FACDL polo is back. The polo is a light blue micro pique wicking material with the FACDL logo. We also have new t-shirts: black with a catchy statement about Miranda; blue with the Defender's Credo; and a heather blue long sleeve with quote from Bryan Stevenson. After many requests, we now have a few kid's shirts with an adorable statement on the front. Contact the FACDL office for more details.

RENEWAL TIME

Yes, it is that time of year. The first set of reminder emails will start going out October 2nd. A current member can simply use the link in the reminder emails (check junk mail) or login to FACDL.ORG and use the "Renew Membership" link which appears in blue type on the profile page along with a countdown of days until the membership expires. Membership dues are based on year of admission to The Florida Bar and run the fiscal year of January 1 to December 31st. Renewals are not prorated. Only new members joining subsequent to the fall board meeting will extend membership into the following fiscal year.

DEFENDER ISSUES

As you may have noticed this issue is a combined Fall/Winter issue. In closing, I need my curiosity sated. If you read my last article (Summer 2021 issue), please email me your takeaway at **becky@facdl.org**.

TIME TO RENEW

YOUR MEMBERSHIP ONLINE OR CALL FACDL TO REACTIVATE A LAPSED MEMBERSHIP

Find the membership application on page 70 of this magazine, or go to www.facdl.org and renew today.

FACDL CALENDAR

OCT

THURSDAY, OCTOBER 14 - FRIDAY, OCTOBER 15, 2021

BLOOD, BREATH & TEARS 2021

VIRTUAL • **www.facdl.org**

OCT

SATURDAY, OCTOBER 16, 2021

EXECUTIVE COMMITTEE & BOARD MEETING

VIRTUAL

OCT

THURSDAY, OCTOBER 28, 2021

LUNCH & LEARN WEBINAR:
"DUDE, WHERE'S MY PHONE?
CELL PHONE LOCATION AND TRACKING"

VIRTUAL • **www.facdl.org**

NOV

THURSDAY, NOVEMBER 4, 2021

LUNCH & LEARN WEBINAR:
LEGAL RESEARCH USING FACDL.ORG

VIRTUAL • **www.facdl.org**

NOV

TUESDAY, NOVEMBER 16, 2021

LUNCH & LEARN WEBINAR:
FLORIDA IGNITION INTERLOCK REVIEW AND UPDATES

VIRTUAL • **www.facdl.org**

DEC

WEDNESDAY, DECEMBER 15, 2021

LUNCH & LEARN WEBINAR:
FELONY DISENGRANCHISEMENT IN FLORIDA: HOW TO COMBAT LEGAL FINANCIAL OBLIGATION BARRIERS TO VOTING

VIRTUAL • **www.facdl.org**

DEC

FRIDAY, DECEMBER 31, 2021

DEADLINE TO RENEW FACDL MEMBERSHIP!!

www.facdl.org

JAN

SATURDAY, JANUARY 1, 2022

SPRING DEFENDER 2022 EDITORIAL DEADLINE

www.facdl.org

JAN

SATURDAY, JANUARY 15, 2022

EXECUTIVE COMMITTEE & BOARD MEETING

Hotel Indigo • Nashville, Tennessee

FEB

THURSDAY, FEBRUARY 24- FRIDAY, FEBRUARY 25, 2022

DEATH IS DIFFERENT 2022 IN PERSON

Rosen Plaza Hotel (not the other Rosen properties) • Orlando

WWW.FACDL.ORG

PRESIDENT • from page 5

even with private counsel, live barely above the poverty line and requiring their appearance for meaningless procedural matters reflects a level of tone-deaf privilege that borders on insulting. Many of these people need to travel to remotely placed courthouses, or, in the more populous areas, need to rely on the woefully deficient and sometimes unreliable public transit system. The constant cycle of in-person court hearings costs defendants and other criminal justice participants time and money and requires they take time off from work. This can result in termination or lost wages. Moreover, those who are employed are likely employed in a manner that does not allow the flexibility needed to attend multiple court hearings every thirty days. When dealing with run-of-the mill motions, status conferences and other non-complex, non-evidentiary court hearings: it is much more efficient both for the defendants and the community to be allowed to appear remotely. Similarly, often victims or the public may wish to observe proceedings but are precluded due to employment or transportation restraints. The court system is designed to be open and public. Defendants, victims, and public in general can easily access the remote hearing from any location and observe or be active in the proceeding. To ignore the proliferation of this technology, which clearly promotes access to the courts, in favor of a system that limits engagement toes the line of unconstitutionality.

MENTAL HEALTH AND WORK LIFE BALANCE

Prior to the pandemic, the criminal defense bar was reaching its wit's end. The word most often associated with the practice was "untenable." The hours invested in this personal appearance process for what was usually less than 60 seconds on the record and the frequent re-set to do this all over on another day took an incredible toll on the personal well-being of the attorneys. Further, many of the lawyers represented by FACDL have familial obligations, be it small children or family members in their care. Zoom has provided a flexibility to make it more feasible to maintain a home life. The practice of criminal law was often like a hamster wheel. It was not until we were forced to find a different way that we realized what an emotional toll the old way had taken. As recently as this month, I was able to take my three kids to their first day of school and still be home in time to sign on and conduct two Zoom hearings in two separate courthouses. Had those cases required in-person attendance I would have been in the car rather than helping my children get acclimated to a new school. To any judge who is reading this who is inclined to maintain in-person proceedings for non-essential hearings because they prefer the lawyers to be in court- I assure you my children need to see me more than you do. Also, had these hearing both required my attendance I would have had to pick which of these two was more important and sought coverage for the other one. Scheduling conflicts are inevitable but maintaining a system where a lawyer is literally required to decide between representation of two clients is a troubling especially when a viable alternative exists.

In 2016, a landmark ABA/Hazelden Betty Ford Foundation report indicated that 28 percent of licensed and employed attorneys suffer from depression, another 19 percent exhibit symptoms of anxiety, and 21 percent qualify as problem drinkers. In August of 2017 the Board of Governors created a special committee designed to address the "Mental Health and Wellness of Florida Lawyers." Then in May of 2018 the Board voted unanimously to elevate that committee to a standing and permanent committee acknowledging that the metal health and wellness of the lawyers within the Florida Bar was an on-going cause of concern. One of the main findings of this committee is the inability of lawyers, across all practice areas, to find a healthy work/life balance. The Florida Bar and our local volunteer bars have expressed a desire to make the lives of bar members less stressful, less hectic, more efficient, and more humane. Remote appearances have accomplished that. Ash, J. (2018, June 15) "Mental Health Panel Becomes Permanent," *The Florida Bar News*, Vol. 44, No. 14.

COUNTERPOINTS

As discussion about continuing the use of remote proceedings became more prevalent, I have heard several arguments against its use from several different judges throughout the State. All trial judges have encountered a situation in which a lawyer stands pleading a case and, as he/she sees his/her arguments failing, confronts desperation while those very arguments to go from flimsy to downright absurd. I now know how you feel.

REMOTE PROCEEDINGS CAUSE DELAY IN MOVING A CASE TOWARD TRIAL

The argument that lawyers are using Zoom to delay cases or are not putting the work in because they believe the can get another continuance due to Zoom seems wildly misguided. If a lawyer is being dilatory in preparation he or she can just as easily, if not more easily, be dressed down remotely as he or she could be standing at a lectern. And frankly, as the president of an organization that is comprised of some of the best lawyers in this State, we welcome the reprimand of those members of our profession who are lazy and ill-prepared. You as judges are not forfeiting your right to move your calendars simply because there is a screen. This argument may have carried weight at the height of the pandemic when we were fully shut down, but the ability to try cases creates a release valve and allows you to manage your docket. Lean into the microphone and repeat after me "no further continuances." Problem solved.

Certainly, whether on a computer screen or in person there will unfortunately always be those lawyers who don't want to do the work, who don't want to go to trial, and who don't serve their client's interest in the manner they

should. We should never govern ourselves by the lowest common denominator. Nor should we penalize those who are working at their highest capacity simply to police those who would seek to take advantage. Additionally, now that there is the ability to appear in court, if a case is not moving at the pace required, or if a seemingly routine motion reveals itself to be more complicated, the court can order the parties to appear in person. This gives the court greater control and discretion over its own docket rather than wasting judicial economy on lengthy in-person calendars.

ZOOM IS TOO INFORMAL

While we have all had a good laugh at lawyers with cat filters, and those who clearly were still in bed while handling a hearing, there is merit to the argument that ours is a serious business and requires a certain amount of formality. That said, you are still the judge. If a lawyer walked into court inappropriately dressed you would certainly correct them for the next scheduled appearance. The same can be accomplished remotely. If you see a lawyer in a t-shirt lying in bed handling a status hearing it is incumbent upon you, the judge, to make clear that you have encountered unacceptable behavior. Just as each judge has their own motion practice, each judge can set their own rules for remote courtroom decorum. Set your ground rules and post them on the court's webpage. If you wish to maintain formality, then do so.

MORE CASES GET SETTLED IN PERSON

Of all the specious arguments I have heard in favor of wasting lawyers' time, inconveniencing the defendants, and limiting access to the public, the one that I find most frustrating is this notion that when defense lawyers and prosecutors are together in a courtroom they settle more cases. This is pre-pandemic thinking and promotes a flawed, and frankly never true, notion. Many judges I have spoken to about this issue cling to this concept and have romanticized this idea that at a pre-trial conference date the defense lawyer and the prosecutor would head out into the hallway during a recess and come back smiling and shaking hands. Apparently, some judges believe in this magical hallway discussion each party shared the strengths and weakness of their case and they then mutually agreed on a reasonable plea that addressed all the interests of justice. Allow me to disavow you of that fantasy. Cases do not resolve in this manner. Any resolution brought before the court is the result of the case either being easy to close (diversion, CTS) or out-of-court effort. Perhaps decades ago when caseloads were lighter there was an avenue for resolution through an in-person discussion that took place in the courtroom. That has not been the case for many years. Take the opportunity to observe (from the hallway or gallery) if you doubt my representation here. If you are concerned that your physical presence in the hallway or gallery may alter attorney behavior, ask court administration or security to allow you to check the video tape. Prosecutors carry far too heavy caseloads and require far too many levels of oversight and approval to simply step into the hall and agree to a resolution. Legitimate pleas result from motion practice, depositions, mitigation and/or frequent negotiations with the assigned Assistant State Attorney. The time saved from remote proceedings will allow for more actual effort to be expended in those avenues. Defense lawyers will have more time to review discovery and file possibly dispositive motions. Prosecutors will be able to review defense counter offers and attend depositions to more properly evaluate the strength and weakness of the State's case. The cases that can be resolved will get resolved. Those cases that cannot resolve will have more ready access to the court for the original purpose of the courtroom: a trial.

LAWYERS WILL BECOME OBSOLETE

I don't know that this argument even warrants much attention, but I assure you I have heard it. First, let's be clear about one thing, when Armageddon comes (hopefully we are not seeing it now) there will be three things that survive, cockroaches, twinkies, and lawyers. To suggest that we can be done away with by something a trivial as global pandemic indicates you have not been paying attention. Further, I submit that the use of remote technology will actually elevate the legal profession. This organization is comprised of the some of the hardest working, most clever, and intuitive legal minds in the nation. Using that level of skill on ministerial status and motion calendars is a waste. Give us the time to do our work so that when we appear in front of you we are there to litigate and not to get babysat.

CONCLUSION

I imagine there are innumerable other arguments that could be cobbled together to reject the clear benefits of remote proceedings, but let's call those what they are: fear of change. Right now, EVERY court in every circuit should be allowing lawyers who wish to appear remotely for non-essential hearings to do so. It is just a matter of safety and not allowing them to do so reveals an unacceptable level of disrespect for the lawyers who appear in front of you. That said, when we emerge from this pandemic, which we one day will, it would be tragic to not have salvage something good from two years of hardship. Those who do not adapt and resist change are destined to be left behind. The old manner of handling non-essential hearings strained the system and detracted from its real function which is to dispense justice. Remote proceedings protect time, promote efficiency, and will undoubtedly lead to faster and more effective resolutions in criminal cases. To those who are hesitant, I can assure you remote hearings are not the downfall of the criminal justice system, but rather its future.

DIVERSITY

by Prya Murad

and J. Samantha Vacciana

The word diversity invokes a history of pain or fear in some, but for others diversity is the promise of an America where all people, regardless of race, color, gender, national origin, religion, age, sexual orientation, to mention a few, are not just tolerated, but accepted and included into the fabric of American society. Perhaps no other place is diversity more important than in the criminal justice system. The system has long been plagued with systemic discrimination and bias rooted so deep that even the most "woke" (to use street vernacular) sometimes miss the mark.

Truth be told, the legal profession has long since missed the mark when it comes to diversity. According to the Bureau of Labor Statistics, only about a third of lawyers in this country are women. Even more concerning, only 4.6% are Black, 2.9% are Asian, and 3.8% are Hispanic.

Any discussion of diversity in the criminal judicial system raises an important question: What is diversity? In her article entitled, *5 Reasons Why Diversity Is Important*, Toni O Boyle, (June 2020), defines diversity as "The presence of a wide range of human qualities, both visible and invisible, within a group, organization or society".

Diversity and Inclusion is essential in the criminal justice system; a system that purports to be based on fairness. As criminal defense attorneys, we are too often on the frontlines of injustice. We read countless police reports of legally permitted stops by police officers that have blatant racist pretext. We witness Black and Brown people walk into court shackled and treated like animals. We see how freedom can be bought by those who can afford monetary bonds and how sentencing is often dictated by institutionalized racism, sexism, and a myriad of other "isms."

As co-chairs of FACDL's 2021-22 Diversity Committee, we believe that awareness and inclusion are the stepping-stones to a strong diverse organization. It is within this framework that we are committed to developing programs that will encourage diversity within the organization itself as well as provide advocacy training and materials for new and seasoned practitioners. For example, we are in the process of creating a substantive diversity advocacy CLE program. The program will pair different phases of case preparation, with advocating for a specific historically disenfranchised group, such as preparing cross examination for a motion to suppress that focus on racial bias from a police officer or mitigation specific to LGBTQIA+ clients.

Like so many voluntary bar organizations within our professions, FACDL has a series of glass ceilings. We are grateful to see more women and people of color in positions of leadership, but we must do more. We are thrilled that our President, **Jude Facciadomo**, has placed an intentional emphasis on Diversity and Inclusion. As he stated in his address to our membership at the Annual Meeting,

A third of U.S. lawyers are WOMEN

4.6% of U.S. lawyers are BLACK

3.8% of U.S. lawyers are ASIAN

"it is not something that has been organic in the organization."

Every lawyer who fights the good fight as a member of FACDL should be equipped with an honest history of exclusion in our profession and strategies for remedying such institutionalized injustice. As such, we want to hear from you about how we can become an organization that values diversity from each member to our highest offices. Most importantly we ask that you get involved in leadership roles within the organization. FACDL is stronger when we have perspectives and ideas from members of different races, sexual orientation, genders, national origin, religion, age, and citizenship. 🏛

PRYA MURAD is a solo practitioner in Miami, FL. She has served as a public defender in West Palm Beach, FL and San Francisco, CA. Prya is currently an adjunct professor at Loyola University Chicago School of Law. She has also taught trial advocacy at Loyola University, Florida International University, and Golden Gate University law schools. She has published several articles including "Give Juveniles their Due" in *The Marshall Project* and "#MeToo, Perksy, and the erosion of mercy in criminal justice" in *The Mercury Times*. As a South Asian, woman, Prya is excited to co-chair the Diversity and Membership committee.

J. SAMANTHA VACCIANA is the managing attorney of the Trial Lawyers of Florida. She is a fierce advocate for her clients and over the past 18 years has litigated hundreds of criminal cases. She earned her JD, Cum Laude, from the University of Florida. Upon graduation from law school, she competed for and was awarded the prestigious Equal Justice Works Fellowship. She serves as FACDL's Diversity & Membership co-chair and on the Boards of Florida Legal Services, the Florida Bar Foundation, the Florida Bar Grievance Committee, and Gang Alternatives. Samantha also serves as an Adjunct Professor at Florida Atlantic University.

Source: U.S. Bureau of Labor Statistics

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

F·L·O·R·I·D·A DEFENDER

PUBLISHING POLICY

Articles submitted for publishing in *The Defender* are not guaranteed to be published but are subject to review by the editor(s) for content supporting FACDL's mission and any possible theme of a particular issue.

The editor(s) shall have full authority to determine the content and layout of *The Defender* in accord with FACDL's mission.

Any person with knowledge of and interests in, any of the ideals and goals stated in the FACDL mission statement may submit an article for the Defender. Any published article may be republished as long as the FACDL *Florida Defender* is properly cited at the time of republishing.

Articles must be submitted already proofed and edited.

Articles must be submitted in Word format or other format required by editor(s) for ease of publishing.

The author of a submitted article must provide their full name or enough of their name to be easily identified.

The author of a submitted article must provide a biography of no more than 100 words.

The author of a published article, who is not a FACDL member, may request a courtesy copy of *The Defender* issue containing their article be mailed to them.

The author of a submitted article mayalso provide a headshot to accompany their article.

Any entity with a clear connection to the FACDL mission may purchase advertisement space in *The Defender* magazine, but the content of such advertisement is subject to the editor(s) review and approval for appropriate content in accordance with the FACDL social media policy.

The editor(s) may reject or delay publishing any article or advertisement that does not conform with the FACDL Mission and/or does not conform with a theme set for a particular issue.

Textualism for Defenders

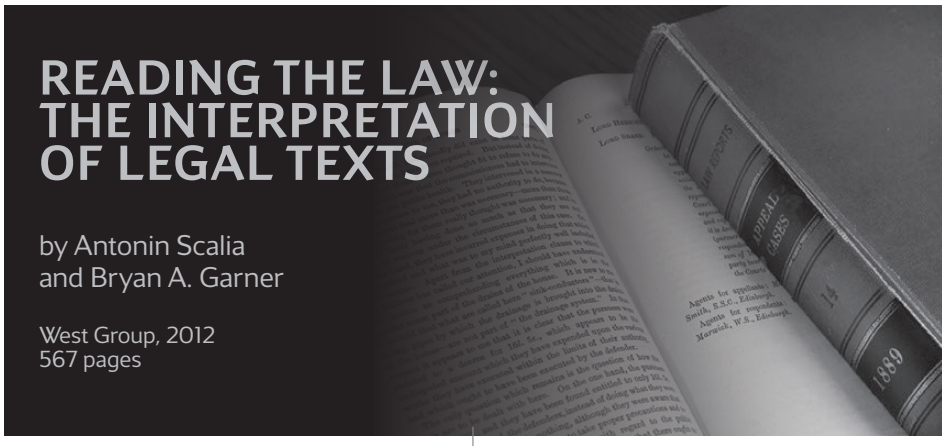
by Nancy Ryan

The 2012 book by Bryan A. Garner and Justice Antonin Scalia, *Reading Law: The Interpretation of Legal Texts*, has become something of a bible for self-styled conservative judges. Since *Reading Law* was published it has been cited thirteen times by the Florida Supreme Court; between January of 2020 and August of 2021, Florida's appellate courts cited the book forty times. Some of the pronouncements in the book have already become the law in Florida. Going forward, certain aspects of the authors' advice need to be resisted by the criminal defense bar. However, other aspects of their advice can be usefully appropriated.

According to the basic premises laid out in the book, "[t]he most accurate spokesmen for the people of each generation are the legislators that those people elect to represent them."[1] An enacted text "is itself the law," as opposed to mere evidence of the drafters' intent.[2] For that reason, it is antithetical to the constitutional doctrine of separation of powers for judges to discern a legislature's intent and to fill in what the legislature *meant*, but did not *say*.[3] The subjective intention of a text's drafters is "beside the point," since textualism begins and ends with what a text says and what the text fairly implies.[4]

As noted, some of the views expressed by the authors of *Reading Law* do not mesh readily with the interests typically argued by criminal defendants. The authors are originalists; they would limit interpretation of the terms used in constitutions and statutes to the meaning those terms had when they were used by that document's drafters.[5] While the authors make an exception for applying historical language so as to cover "later technological innovations," they draw the line at recognition by courts of "evolving standards of decency."[6] Where the Bill of Rights is concerned, the authors of *Reading Law* dismiss its core terms—*e.g.*, "due process" and "unreasonable searches"—as "vague."[7] This is so despite the fact they refer elsewhere to those terms as "capacious" and "general,"[8] and despite their acknowledgement that general terms "are to be accorded their full and fair scope [and] are not to be arbitrarily limited."[9] The authors dismiss the view that terms such as "due process" were deliberately chosen for their very open-endedness.[10] The concept of a "living Constitution" is particularly offensive to Scalia and Garner, who unleash a spirited diatribe against it.[11]

In spite of these views, there is much in *Reading Law* that can advance our clients' interests. The book is most often cited in Florida for two principles: the first is that, as noted, the primary source of meaning of statutory and constitutional terms is the text itself.[12] The second is that in interpreting those terms, their plain and ordinary sense is preferred.[13]



As to the latter principle, the Florida Supreme Court has held that as long as a proposed constitutional amendment has a comprehensible, ordinary meaning, indications of the drafters' intentions extrinsic to that text will not be considered.[14] That holding was announced in an opinion interpreting the 2018 Voting Rights Restoration constitutional amendment ("Amendment 4"), which returned voting rights to convicted felons "upon

completion of *all terms of sentence."* It was disputed whether the italicized language requires financial obligations to be fully paid. *Amendment 4* at 1072. Only Justice Labarga dissented from the holding that external evidence is irrelevant to the drafters' intent; he would have considered, as clues to the intentions of those who sponsored Amendment 4, comments made on the sponsors' website before the election, as well as concessions made by the sponsors' counsel at oral argument before the election. He would have held that the language in question was undeveloped in the amendment itself, and that excluding from consideration "extrinsic credible information that would assist in determining the meaning of the text" had in fact led to a less reliable result than could have been achieved.[15]

Similarly, per the authors of *Reading Law*, familiar sources of legislative history are not appropriately consulted when interpreting statutes. They reject committee reports and records of floor debate as likely efforts to manipulate the courts' eventual view of what the legislators thought they were voting on.[16] Justice Scalia once compared use of those sources to "ventriloquism."[17] The Florida Supreme Court has not addressed the ramifications of Amendment 4 on such conventional sources of legislative history.[18]

Nuanced analysis of constitutional and statutory meaning is not precluded by the trend toward plain meaning derived from limited sources. This is so because Scalia and Garner reject what they call "*strict* constructionism."[19] Their view is that appropriate adherence to the fair meaning of a text is not the same thing as hyper-literal interpretation of individual words.[20] The authors quote Judge Learned Hand approvingly on the point: "[a] sterile literalism…loses sight of the forest for the trees."[21] In accord is a concurring opinion by Judge Thomas Winokur of Florida's First DCA, where he lauded a judge from the federal Sixth Circuit for writing that statutes "should not be construed 'broadly,' 'narrowly,' 'strictly,' or 'liberally,' but rather fairly and reasonably."[22]

In aid of avoiding "sterile literalism," the authors of *Reading Law* teach, in the strongest of terms, that context matters to the meaning of text. "It is untrue that a textualist judge must put on blinders that shield the legislative purpose from view."[23] The authors emphasize that "context is as important as sentence-level text,"[24] and that "no interpretive fault is more common than the failure to [consider the whole text.]"[25] They agree that interpretation *always* depends on context, and that context *always* includes the document's evident purpose.[26]

The Florida Supreme Court agrees. When it rejected Governor DeSantis's bid to appoint an unqualified Justice to that Court, it explained that its correct role is to read the entire text in question, and to arrive at a fair and reasonable reading of that text which "furthers rather than obstructs the document's purpose."[27] In that case, the text in question was Article V of the Florida Constitution. It is clear from *Thompson v. DeSantis* and Amendment 4 that a document's purpose matters, but it appears likely that going forward, the purpose will have to be gleaned from sources within the document itself.[28]

The "context" Scalia and Garner speak of includes not only the enactment's purpose, but also the words' historical associations and the syntactic setting, *i.e.,* the words that surround the words at issue.[29] As to syntactic settings, the authors quote Justice Felix Frankfurter to the effect that "[s]tatutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes."[30] The maxim that related statutes should be read *in pari materia,* per Scalia and Garner, rests on two principles: that the *corpus juris* should make sense, and that it is the responsibility of the courts to make that sense clear.[31] Concern for perceiving an enactment's place in the *corpus juris* has been echoed by the Third DCA, which has criticized an argument that, in its view, treated a civil-procedure rule "as an isolated regulation with no past, no future, no purpose, and no relation to the body of law of which it is a part."[32]

As to an enactment's historical associations, the authors again quote Justice Frankfurter: "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[33] When a statute uses a common-law term without defining it, the body that enacted the statute is presumed to have adopted its common-law meaning.[34] Scalia and Garner cite approvingly a 1952 holding that *mens rea* was at that time presumed to underlie criminal statutes which were silent as to intent, in part because that presumption "took deep and early root in American soil."[35]

Historical context further includes *statutory* history, as distinct from disfavored external sources of *legislative* history. A statute's history consists of its previous versions which have been repealed or amended.[36] The authors of *Reading Law* realistically note that it is "fanciful" to assume *actual* "legislative omniscience" regarding all of this history.[37] Their position is that it is nevertheless reasonable to *impute* historical knowledge to legislatures, since lawyers cannot give effective advice without confidence that legal terms share a uniform meaning when used in the same body of law.[38] *See* p. 324.

Per the authors historical context also includes past interpretations of statutory terms by a jurisdiction's highest court, on the assumption that legislatures are aware of and accept such authoritative pronouncements.[39] The Florida Supreme Court has recently announced that it applies this interpretive rule.[40] Per *Reading Law*, the same is true where a term has been given uniform interpretation by a jurisdiction's lower courts.[41] The Florida courts have not weighed in on that pronouncement.[42] As to interpretations reached by executive-branch agencies, the Florida Constitution was amended in 2018 to preclude reliance by the Florida courts on any such source.[43] Prior Florida cases had applied the prevailing federal test for deferring to such interpretations.[44]

The rule of lenity, per the authors of *Reading Law*, is a common-law staple that

predates American constitutions and is "so deeply ingrained…that [it] can be considered inseparable from the meaning of the text."[45] In their view the rule is underused in modern practice, "perhaps [as] the consequence of zeal to smite the wicked."[46] Their support of the rule of lenity is based not on the due-process principle of fair notice, but in their perception that "a fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures will take the trouble to provide it."[47]

Judge Winokur of the First DCA, in a concurring opinion, has suggested that in Florida, the rule of lenity is a creature of statute only.[48] No written opinion has taken him up on that suggestion. The federal Eleventh Circuit Court of Appeals, citing *Reading Law*, exhibits no similar doubts about the rule's continuing vitality.[49] The book's authors note that some states have enacted a "repeal" of the rule of lenity, only to have the courts ignore the enactment; they doubt whether it is ever consistent with constitutional rules dictating the separation of powers for a legislature to prescribe, or proscribe, rules of statutory interpretation.[50]

Another doctrine favored by Scalia and Garner is *stare decisis*. They view fealty to precedent as an exception to textualism "born not of logic but necessity," in that it encourages stability in the law.[51] The authors note that the doctrine has special force in cases where statutes are construed.[52] They quote the Baron de Montesquieu for the view that unbounded judicial decision-making leads to judicial despotism, which undermines the predictability made possible by rulings which are uniformly issued based on the letter of the law.[53] That view is consistent with the authors' conviction that jurists' intellectual integrity, discipline, and self-abnegation are crucial to the rule of law.[54] Their conclusion is that "[c]ourts cannot consider anew every previously decided question that comes before them. *Stare decisis* has been a part of our law from time immemorial, and we must bow to it."[55]

As noted earlier, some of Scalia and Garner's expressed views may raise an eyebrow among criminal defense lawyers. Nevertheless, some pronouncements in *Reading Law* can be co-opted for our clients' purposes. The authors' enthusiasm for the rule of lenity and *stare decisis* have clear application. Also potentially useful, if less obviously so, are their distaste for cramped, literal construction, their expansive view of the importance of context, and their willingness to impute to legislatures ample knowledge of the *corpus juris* they add to so readily. In some case or cases, relying on the conservatives' bible may open the hearts and minds of our present-day judiciary to our clients' concerns. 🏛

[1] *Reading Law: The Interpretation of Legal Texts* (West 2012) at 407.
[2] *Id*. at 397.
[3] *Id*. Accord *Villanueva v. State*, 200 So. 3rd 47, 52 (Fla. 2016).
[4] *Reading Law* at 30, 16.
[5] *Id*. at 78-92 and 399-402.
[6] *Id*. at 16; see *id*. at 85-86, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[7] *Reading Law* at 84-85.
[8] *Id*. at 408-09.
[9] *Id*. at 101. See also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943) (referencing "the majestic generalities of the Bill of Rights.")
[10] *Reading Law* at 406. The authors call out by name adherents to that view; the individuals chided include Laurence Tribe, Cass Sunstein, and Alan Dershowitz. *Id*.
[11] *Id*. at 403-10.
[12] E.g, *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3rd 942, 946-47 (Fla. 2020); *Page v. Deutsche Bank*, 308 So. 3rd 953, 958 (Fla. 2020).
[13] See *Ham* and *Page*, supra n. 12; see also *City of Bartow v. Flores*, 301 So. 3rd 1091, 1096-97 (Fla. 1st DCA 2020), review granted 2021 WL 1593270 (Fla. April 23, 2021).
[14] Advisory Opinion to Governor re: Implementation of Amendment 4, 288 So. 3rd 1070 (Fla. 2020).
[15] Amendment 4, 288 So. 3rd at 1087 (Labarga, J., concurring in result and dissenting in part).
[16] *Reading Law*, Ch. 66.
[17] *Koons Buick Pontiac GMC, Inc.. v. Nigh*, 543 U.S. 50, 73-74 (2004) (Scalia, J., dissenting), quoted in *Reading Law* at 397.
[18] As of August, 2021.
[19] *Reading Law* at 39-40 (emphasis added).
[20] *Id*. at 356.
[21] *New York Trust Co. v. Commissioner*, 68 F. 2d 19, 20 (2d Cir. 1933), quoted in *Reading Law* at 356.
[22] *Intn'l Academy of Design, Inc. v. Dep't. of Revenue*, 265 So. 3rd 651, 655-56 (Fla. 1st DCA 2018) (Winokur, J., concurring specially), quoting *Appoloni v. United States*, 450 F. 3rd 185, 200 (6th Cir. 2006) (Griffin, J., concurring in part and dissenting in part.)
[23] *Reading Law* at 20 (punctuation and citation omitted).
[24] *Id*. at 323, and see pp. 167-68.
[25] *Id*. at 167.
[26] *Id*. at 63; see p. 33.
[27] *Thompson v. DeSantis*, 301 So. 3rd 180, 187 (Fla. 2020).
[28] Or within sources that are sufficiently closely affiliated with the document. See fn. 29-42, infra.
[29] Reading Law at 33.
[30] Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Columbia L. Rev*. 527, 539 (1947), quoted in *Reading Law* at 252.
[31] *Reading Law* at 252, and see p. 331. *Accord Medical Center of Palm Beaches v. USAA Cas. Ins. Co.*, 202 So. 3rd 88, 91 (Fla. 4th DCA 2016).
[32] *De La Osa v. Wells Fargo Bank, N.A.*, 208 So. 3rd 259, 263 (Fla. 3rd DCA 2016).
[33] Frankfurter, supra n. 29, 47 *Columbia L. Rev*. at 537, quoted in *Reading Law* at 73. *Accord Dungarini v. Benoit*, 312 So. 3rd 126, 130 (Fla. 5th DCA 2020).
[34] *Nunes v. Herschman*, 310 So. 3rd 79, 83 (Fla. 4th DCA 2021), citing Reading Law at 320.
[35] *Reading Law* at 304, quoting *Morrissette v. United States*, 342 U.S. 246 (1952).
[36] *Reading Law* at 256.
[37] *Id*. at 328; see also pp. 185 and 252.
[38] *Id*. at 324.
[39] *Id*.
[40] *Florida Highway Patrol v. Jackson*, 288 So. 3rd 1179, 1183 (Fla. 2020).
[41] See fn. 39, supra.
[42] As of August 2021.
[43] Article V, section 21, Fla. Const.
[44] E.g., *Dep't of Health and Rehabilitative Services v. Solis*, 580 So. 2d 146 (Fla. 1991), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[45] *Reading Law* at 30-31.
[46] *Id*. at 301.
[47] *Id*.
[48] *Schmidt v. State*, 310 So. 3rd 135, 138 (Fla. 1st DCA 2020) (Winokur, J., concurring in denial of rehearing), citing Section 775.021(1), Florida Statutes (2020).
[49] *United States v. Caniff*, 955 F. 3rd 1183, 1191 (11th Cir. 2020).
[50] *Reading Law* at 43-44.
[51] *Id*. at 413-14.
[52] *Id*. at 255.
[53] *Id*. at 345.
[54] *Id*. at xxix, 348.
[55] *Id*. at 414.

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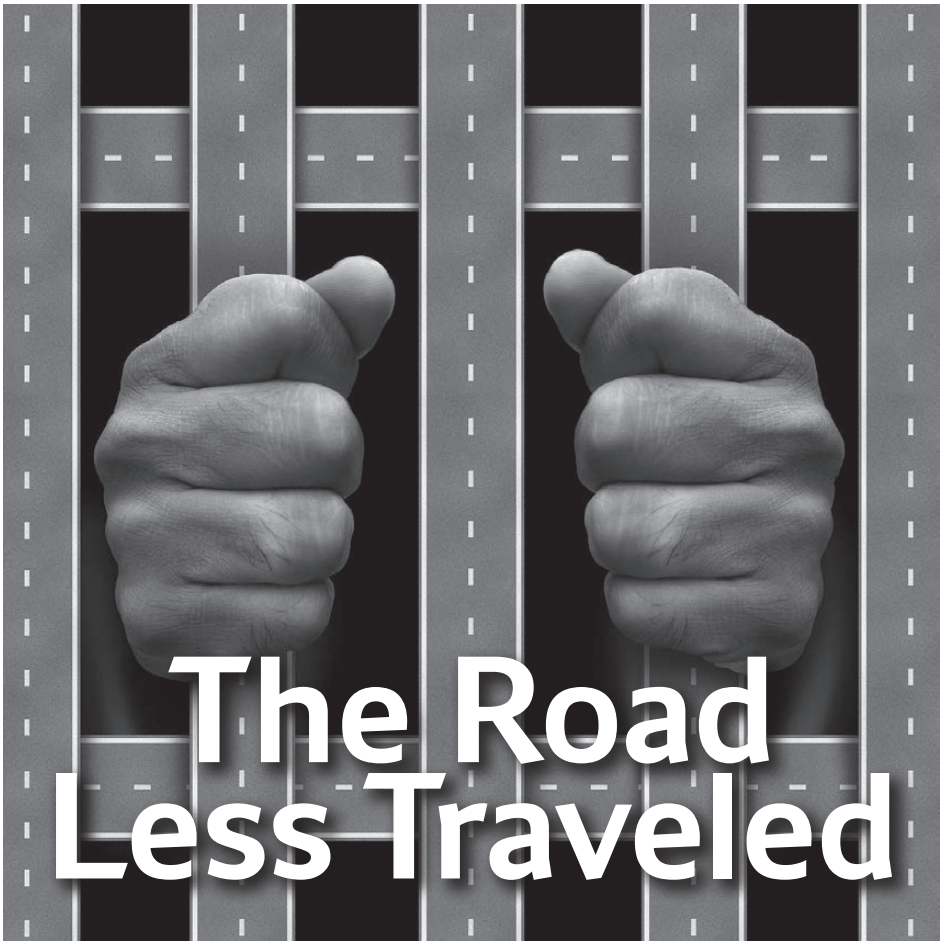

The Road Less Traveled

by
Brice
Aikens

In the film *Falling Down*, Michael Douglas portrays a character that in a single day experiences one set back after another. The unlucky chain of events pushes him to a breaking point that ends up proving fatal. During the opening credits of *Unhinged*, starring Russell Crowe the concept or phenomena of road rage was portrayed via various news and social media clips, leading up to the honking of a horn and traffic jam putting a tragic set of dominoes in motion. In these types of movies involving road rage, the main character suffers some major setback such as loss of job, divorce, or death of someone close that triggers a downward spiral of events or violent encounter. When you talk about road rage in the real world, a lot of the factors and circumstances Michael Douglas and Russell Crowe's characters encountered aren't always there.

At some point a case will come across your desk where your client with little or no criminal history find themselves sitting in traffic humming along to their favorite tune and next thing they know completely out of their character, they are acting in the most primitive fashion. Due to sudden rage they become involved in a physical altercation with another driver, and either intentionally striking another vehicle with their vehicle or brandishing and/or firing a weapon at another driver. Whether it be based upon a disagreement over the volume of music, moving too slow through the drive-thru, or simply being cut off in traffic, all stem from some sort of road rage. This journey will begin by discussing the hurdles in litigating a road rage case, potential defenses that can be raised, applicable case law, and mitigation strategies taking it all one mile at a time.

One factor road rage differs from any other crime is the short time period in which something occurs. There is rarely any planning and plotting like, say, with a robbery or trafficking of drugs. In many cases the snap decision of a driver to act out against another driver happens almost within the same time period as a fender bender. Merriam-Webster.com defines road rage as "a motorist's uncontrolled anger that is usually provoked by another motorist's irritating act and is expressed in aggressive or violent behavior."[1] When you slam down on your horn, extend your finger telling another driver that he or she is "number one," or yell at another motorist, you are exhibiting road rage. With road rage the critical issue comes down to the response of a driver doing something intentional to another driver, and the motivation behind it. Was your client having a bad day? Was he or she trying to prove a point or teach a lesson to another driver? Answering those questions will put the event into some context and framework as you navigate a defense.

Road rage is not always some long, drawn-out adventure on the freeway captured by the skycam of the local news. For most clients it is an isolated incident that, depending on the circumstances, can prove life-changing. The interesting thing about road rage is there isn't a statute specifically regulating it. Depending on the set of circumstances and injuries (if any): someone could be charged with aggressive driving, simple assault, aggravated assault, aggravated assault with a firearm, burglary with an assault, or attempted murder. In the scenario where two motorists have a spat over a parking space, and one driver exists his vehicle to confront the other driver and in the process reaches into the other car and grabs the driver by the shirt, that could potentially be charged as a burglary with an assault or battery and that defendant would face the potential of a life sentence.[2]

Another sequence of events can have two persons bickering back and forth in traffic and one driver shoots at the other, that defendant can be charged

with attempted second-degree murder. Attempted second-degree murder has two elements: 1) the defendant intentionally committed an act that could have resulted, but did not result in the death of someone, and 2) the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life."[3] So while the root of the issue could stem from some sort of traffic dispute the end result tends to control the charging decision.

Examining the triggering event (no pun intended) is where you would begin by ascertaining if this was an event that was not provoked by another party or actor to which your client simply reacted, or whether there was a mental lapse or defect. To investigate any sort of mental infirmity defense you would want to obtain as much background and mental health information about your client as early as possible, including a comprehensive evaluation. If your client suffered from post-traumatic stress disorder (PTSD) due to prior military service or experiencing a traumatic episode, that revelation might provide valuable mitigation. Diagnosing your client's mental health is germane to establishing a defense early on in the process, not fully investigating any traumatic disorders could be grounds for a 3.850.[4]

Insanity is established when: the defendant had a mental infirmity, disease, or defect; and because of the condition, the defendant: 1) did not know what he or she was doing or its consequences; or 2) although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.[5] However, evidence of abnormal mental conditions not constituting legal insanity are not admissible in Florida for proving whether a defendant could not or did not possess the specific intent or state of mind required for the charged offense.[6] If you do not have classic "insanity" there are instances where state of mind evidence can be offered. In *State v. Mizell*, the defendant was charged with attempted second degree murder, and sought to introduce expert testimony of PTSD to explain how PTSD affects an individual's perception.[7] The prosecution filed a pre-trial motion in limine to exclude the testimony arguing it was diminished capacity evidence. The appellate court held that PTSD offered in this case was not diminished capacity evidence, but state-of-mind evidence analogous to battered spouse syndrome testimony that has been approved many times.[8] The distinction is not offering PTSD to suggest that a defendant cannot form the intent necessary to commit second degree murder, rather offering the testimony to describe the characteristics of someone suffering from that particular syndrome and their state of mind.

State of mind is so important in these types of cases, because it may be the only way to put the offense in any sort of context. This is especially true where there are no grounds for asserting legal insanity. Although the discussion here has been in relation to "road-rage" scenario cases, the use of experts to offer state of mind evidence is not a one-way street. In *Filomeno v. State* the court found error to exclude expert testimony about the characteristics of "flight or flight" response where the defendant's state of mind was relevant to establish the reasonableness of force in raising self-defense.[9] In *Delice v. State* the court held it was error to exclude expert testimony of a defendant's depression, as that evidence was relevant to support the defense of entrapment.[10] By contrast the court held that evidence of a defendant's dissociative state would not have been admissible during trial.[11] Understanding how the metal health defense fits into your theory of defense will need to be undertaken on a case-by-case basis, and identifying mental health issues is not the ending point, you also need to explore if there are any additional affirmative defense that can be raised such as justifiable use of force.[12] Defenses such as mistaken identity can also be raised, especially where there is no arrest at the scene of the crime, and someone operating a vehicle that is registered to your client shot at or stuck a victim who was only was able to obtain a license tag number.

Like any other case, it may be in the best interest of the client to resolve the case with a negotiated resolution instead of trial. Having ample mitigation via mental health or other character evidence will be critical to a favorable resolution. There are also services available such as *Technologies For Justice*[13] that will allow you to see how similarly-situated defendants have been sentenced. This is helpful for not only negotiations, but also to educate your client as to what he or she can expect and understand what obstacles lie ahead. Defending a road rage case can seem daunting. But the terrain is not impassable. Exercising your due diligence in investigation, not only the government's evidence but consulting your own experts, will help you maintain your lane, and give you and your client some solid footing to avoid falling down. 🏛

[1] "Road rage." Merriam-Webster.com. 2021. www.merriam-webster.com (27 Aug. 2021).
[2] §810.02(1)(b), 810.02(2)(a), Fla. Stat. (2021).
[3] §782.04(2), Fla. Stat. (2021).
[4] *King v. State*, 289 So.3d 559 (Fla. 1st DCA 2020).
[5] §775.027, Fla. Stat. (2021).
[6] *Chestnut v. State*, 538 So.2d 820 (Fla. 1989).
[7] *State v. Mizell*, 773 So.2d 618 (Fla. 1st DCA 2000).
[8] *Id*. at 620; citing State v. Hickson, 630 So.2d 172 (Fla. 1993).
[9] *Filomeno v. State*, 930 So.2d 821 (Fla. 5th DCA 2006).
[10] *Delice v. State*, 878 So.2d 465, (Fla. 4th DCA 2004).
[11] *Spencer v. State*, 842 So.2d 63 (Fla. 2003).
[12] §776, Fla. Stat. (2021).
[13] technologiesforjustice.com/.

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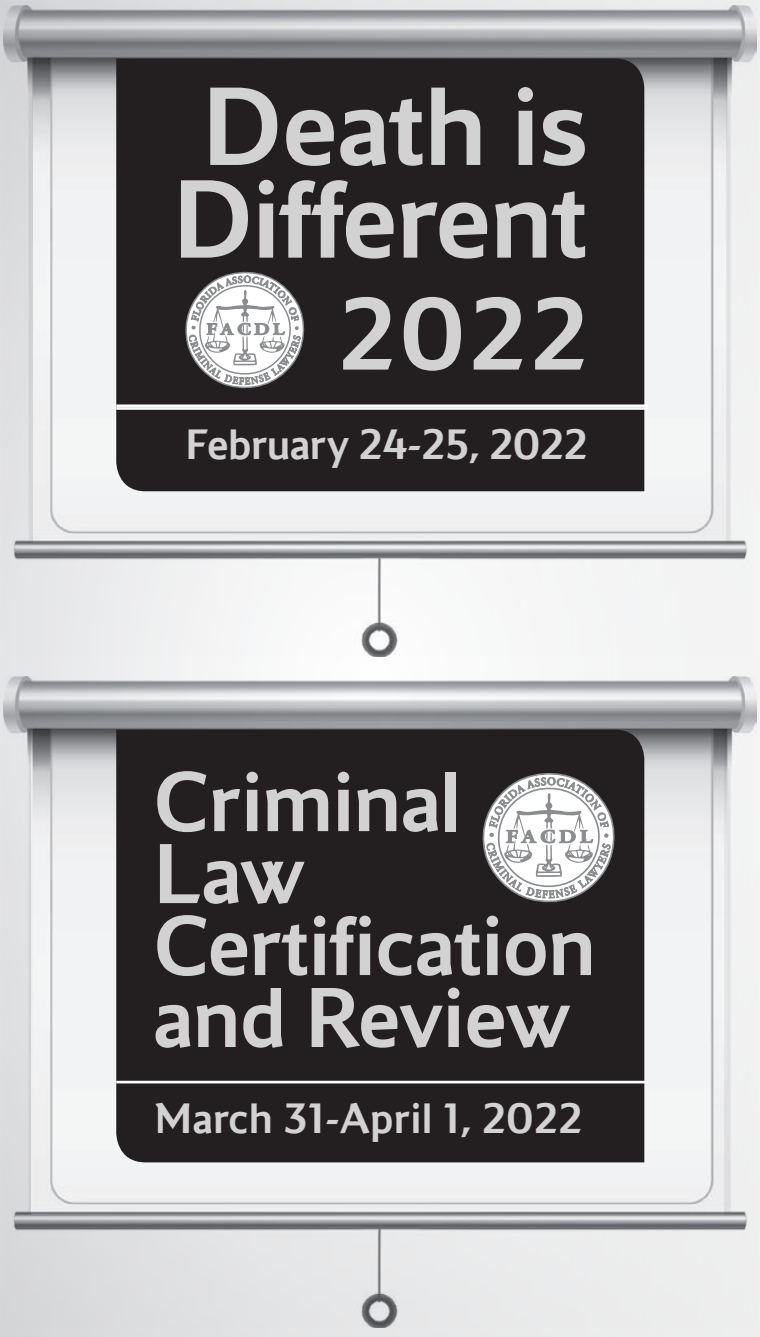

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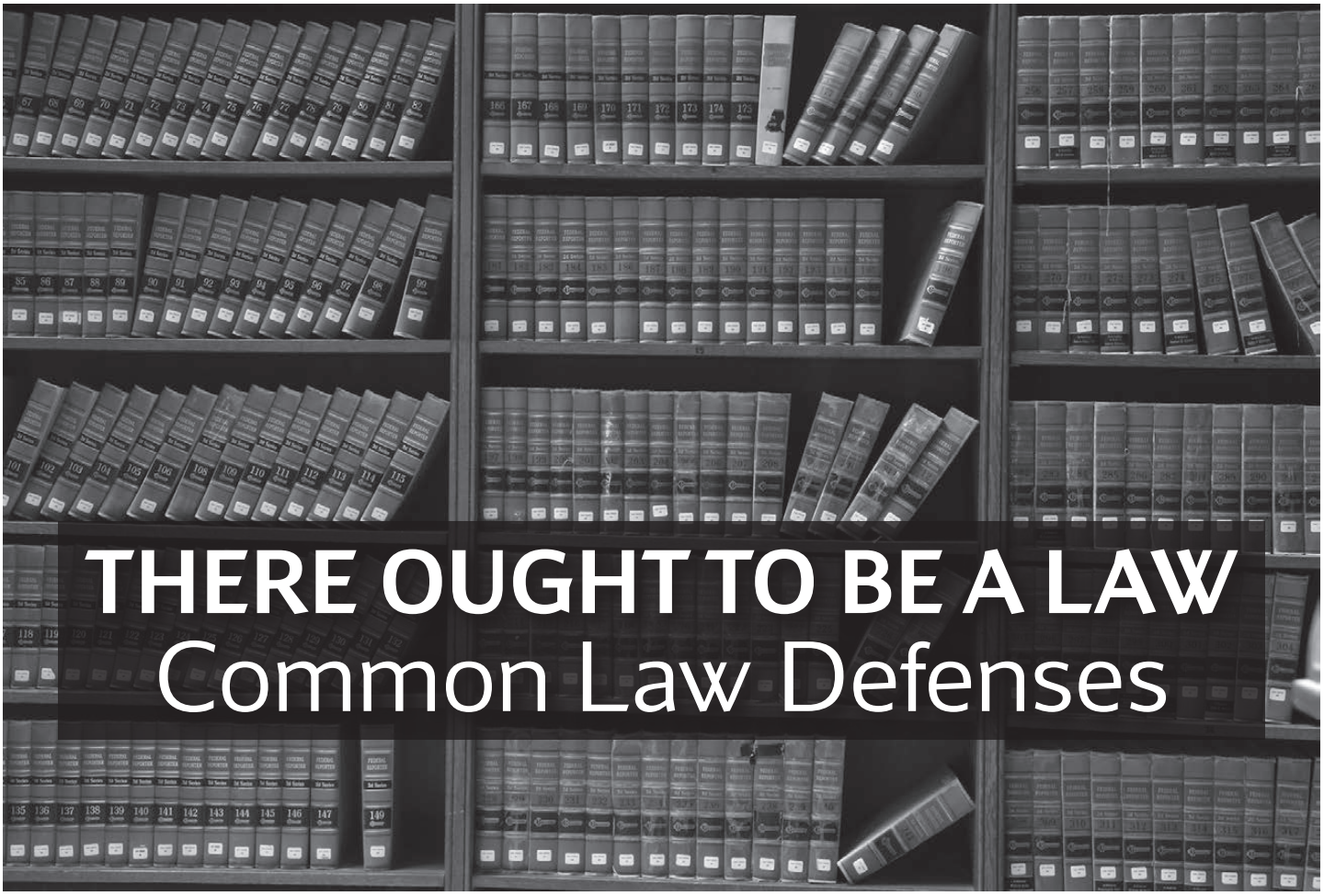

THERE OUGHT TO BE A LAW
Common Law Defenses

by
Jonah K.
Dickstein

While preparing your client's case, do you ever feel like there should be a recognized defense — one you have never heard of before? Then consider this. That defense may well be a "preexisting common law right." See *Loza v. Marin*, 198 So. 3d 1017, 1021 (Fla. 2d DCA 2016). Section 775.01, Florida Statutes (2021) makes the common law "of force in this state" specifically "in relation to crimes." "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev*. 193, 193 (1890). So, identify the reasonable question the jury must answer to defeat the allegation, and set forth that defense in a motion in limine. Yes, logic and common-sense can win cases. See *Rogers v. Tennessee*, 532 US 451, 461-62 (2001) (discussing courts applying common law, bringing "criminal defenses…into conformity with logic and common sense.").

The common law accounts for many of the criminal defenses you already know. Duress, for instance, is a defense recognized in the common law while it is absent from all state statutes. See *Franklin v. State*, 275 So. 3d 192, 195 (Fla. 4th DCA 2019). And "the common law rule still remains that a person may lawfully resist an illegal arrest without using any force or violence." *C.W. v. State*, 76 So. 3d 1093, 1096 (Fla. 3d DCA 2011). Old defenses are waiting to be revived and new defenses are waiting to be developed. Consider *State v. Adkins*, 96 So. 3d 412, 422 (Fla. 2012), which discusses the common law, and establishes the defense of lack of knowledge of the illicit nature of a controlled substance.

The legal system is designed for you to develop the law as you strive to preserve your clients' rights. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws…. [W]here there is a legal right, there is also a legal remedy…whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 *Cranch*) (1803) (quoting 3 William Blackstone, Commentaries *23). Justice Frankfurter commented in *Natl. Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (in dissent): "Great concepts like…'liberty'…were purposely left to gather meaning from experience" for "only a stagnant society remains unchanged." It is "the particular, to which common law method normally looks." As society changes, the law still "strives to provide predictability so that" we "may wisely order [our] affairs…." *Regan v. People of State of New York*, 349 U.S. 58, 64 (1955).

Always make crystal clear to the court its full obligation to exercise its discretion to allow the specific defense which applies to your client's case. "Discretion arises only as to the content of the instruction" so "giving or refusing jury instructions is reviewed under a mixed standard of de novo and abuse of discretion." *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 152-53 (Fla. 4th DCA 2006). On top of that, "[t]he law is well settled that a trial court must exercise its discretion where discretion has been provided; a refusal to so exercise is error." *Boykin v. Garrison*, 658 So. 2d 1090, 1090 (Fla. 4th DCA 1995). One "who decides any matter without hearing both sides, though [that] decision is just, is himself unjust" (this is termed the "rule of natural reason"). 4 *Blackstone Comm.* 283.

Juries are meant to apply the entire law. Jurors are: "entitled to have the benefit of the defense theory before them" to "make an informed judgment…." *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (citing *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). "'The purpose of a jury is to guard against the exercise of arbitrary power — to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.'" *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir. 1982) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1972). "Society wins not only when the guilty are convicted but when criminal trials are fair; our system… suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Let's take a specific example of an undeveloped common law defense. Statutory emancipation is a defense to sexual activity with certain minors under section 794.05(2), Florida Statutes (2021). But have you ever heard of a "common law emancipation" sexual battery defense? It certainly bears arguing that there is such a defense—thereby entitling a defendant to present evidence removing the alleged victim's disabilities of nonage under the common law. For, indeed, "common law emancipation may be effected between parties notwithstanding non-compliance with the statutory means of securing emancipation." *Ison v. Fla. Sanitarium & Benevolent Ass'n*, 302 So. 2d 200, 201 (Fla. 4th DCA 1974). See also *Owen v. Owen*, 234 So. 2d 165, 166 (Fla. 1st DCA 1970) (describing a case in which "evidence was sufficient to warrant the submission to the jury of the question of emancipation"). *Ison* remains controlling law, cited recently in *Dixon v. Dixon*, 233 So. 3d 1285, 1288 (Fla. 2nd DCA 2018).

> "Society wins not only when the guilty are convicted but when criminal trials are fair."

Why do courts protect the common law so carefully? The government's police power is specifically reserved "to safeguard the vital interests of its people," *Home Bldg. & Loan Assn. v. Blaisdell*, 290 US 398, 434 (1934), and only "in appropriate circumstances" does "regulatory interest in community safety… outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987). Our "courts are assuredly not agents of the legislature" but instead are "agents of the people…." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 138 (2012). After all, "the trial judge is the only elected constitutional officer with the organic right to determine a litigant's case." *DeClements v. DeClements*, 662 So. 2d 1276, 1283 (Fla. 3d DCA 1995).

Assert rights to keep them alive. For example, *Griswold v. Connecticut*, 381 US 479, 481 (1965) quotes the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Indeed, the Founders were keenly aware that "the jury right could be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). *Cf. State v. Wooten*, 260 So. 3d 1060, 1072 (Fla. 4th DCA 2018) ("Judge Conner's [dissenting in part] opinion states that the 'Florida Constitution and the implementing statutes override the common law.' In fact, the constitutional provision and the pertinent rules…do not override or supplant the common law…but rather assist its implementation…."). In sum, for courts, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F. 3d 1071, 1079 (6th Cir. 1994).

As a zealous defense attorney you must explore and exploit all possible alternative defenses. "[L]awyers are expected to be zealous advocates…." *de Vaux v. Westwood Baptist Church*, 953 So. 3d 677, 684 (Fla. 1st DCA 2007). Remember that a "criminal defendant is entitled, upon request and by law, to a jury instruction on the law pertaining to the theory of defense if any evidence supports the theory, irrespective of how weak this evidence is." *Barnes v. State*, 108 So. 3d 700, 702 (Fla. 1st DCA 2013). A defense does not have to be strong, rather, it just has to *be there*. Then, leverage that defense to get a better plea offer — or better yet, go to trial and *just win, baby*.

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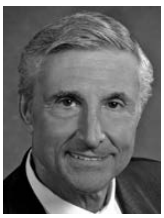
MIRANDA

When Failure to Ask for a Lawyer May Not Be Fatal



by
Denis M.
deVlaming

When I started practicing law in 1972, the "*Miranda* rights" were a hot topic. After all, the United States Supreme Court handed down *Miranda v. Arizona*[1] in 1966. As a young prosecutor, I felt that police would never be able to get a confession which was often necessary to prove the case. Apparently, I overestimated the intelligence of those individuals arrested. You would think that being told that they have the right to remain silent and to have a lawyer present when they are questioned would be enough for them to shut up and invoke the right to counsel. Almost 50 years later, confessions came in at virtually the same rate.

The *Miranda* rights are some of the most misunderstood concepts in criminal law. A good percentage of the public does not understand when they have to be given and what effect, if any, the case has if no *Miranda* rights are read. I laugh when I remember the clients who came in for their initial interview and, before we start, said:

> "You can beat this charge!" "Oh really," I reply. "How can I beat this charge?" "They didn't read me my rights." "And did you confess, I ask." "Hell no, I didn't say nothing."

I then usually proceed to give them a Reader's Digest version of the *Miranda* rights and what they mean. We as criminal defense lawyers know that there are a myriad of aspects to *Miranda*. When the defendant is and is not in custody; whether he or she makes an equivocal or unequivocal request for counsel; the adequacy of the Miranda warnings themselves; whether the person being interviewed is competent to understand *Miranda* rights; whether there is a coercive atmosphere or promises being made by the police in return for a confession and the "Christian burial" technique, just to name a few. If I covered all of the above, it would undoubtedly fill this entire edition of *Florida Defender*.

Instead, this article is going to cover a difference in the holdings by both the United States Supreme Court and the Florida Supreme Court about whether or not an attorney can invoke a client's right to be present or whether that right is personal in nature which only a defendant can exercise. In *Moran v. Burbine*,[2] the United States Supreme Court ruled that it does not violate the Fifth Amendment to the United States Constitution when a suspect is not notified that legal counsel called the police station in an effort to reach him before any questioning. Any confession given thereafter was admissible at trial. The court noted that events occurring outside of a suspect's presence can have no impact on his or her ability to understand and knowingly waive a constitutional right. However, in its ruling, the court specifically noted that nothing in its decision precluded the states from implementing different requirements under state law. In other words, a state constitution can interpret the legal principle differently. And that is exactly what happened here in Florida.

In 1985, the Florida Supreme Court decided *Haliburton v. State*,[3] (referred to as *Haliburton I*). In that appeal, the court

reversed the defendant's first-degree murder and burglary convictions finding that the trial court reversibly erred in refusing to suppress Mr. Haliburton's statement made while an attorney, retained on his behalf, was at the police station requesting to speak with him. The holding found that the police's failure to notify him that an attorney was present and requesting to see him deprived him of information essential to a knowing and intelligent waiver of his right to counsel under Miranda. But in 1986, the US Supreme Court vacated that decision and remanded the case for reconsideration in light of Burbine.

The case was then back before the Florida Supreme Court and *Haliburton v. State*,[4] (*Haliburton II*) was decided again. It took notice of the US Supreme Court's specific notation that the states may take an individual and different view than that taken by the country's highest court. They were also impressed with Justice Stevens's dissent wherein he noted:

> "Due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections.... Police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the due process clause prohibits.... Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication... Any distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a misleading statement, is simply untenable."

The Florida Supreme Court went on to reaffirm its original holding in suppressing the statement noting the conduct by the police denied the defendant due process of law under Article I Section 9 of the Florida Constitution. Since that decision in 1987 (*Haliburton II*) there have been many appeals which have touched upon this important principle. In *Bruce v. State*,[5] the defendant was arrested for attempted first-degree murder. As he was being arrested, he instructed his mother to telephone his lawyer to inform him of the situation. After a phone conversation with Bruce's mother, the lawyer understood that Bruce was hiring him. He told the mother to tell her son not to say anything to the police other than to express a desire to speak with legal counsel. As Bruce was being taken away by the police, his mother relayed the message while also making the arresting officers aware that she was on the phone with her son's attorney. Immediately after receiving the mother's phone call, the lawyer left a voice message with the police department telling them that he was invoking his client's right to remain silent and right to counsel. He even faxed letters to the police department and the sheriff's office relaying the same information. When the lawyer arrived at the sheriff's office, he was denied access to his client who at the time was being interrogated. The detectives questioning Bruce were unaware that the lawyer was seeking to access the interrogation room to see his client. Bruce signed a *Miranda* waiver and confessed never invoking his right to counsel. About an hour later, the lawyer was taken to the interrogation room but by then, it was too late. A motion to suppress the confession was thereafter filed but the trial court denied the motion reasoning that Bruce did not personally invoke his right to counsel and that the interrogating officers did not have a duty to stop the interrogation of the defendant because they were not aware that the lawyer was present to see the defendant. However, citing the holding in *Haliburton II*, the Fourth District reversed the convictions and remanded for a new trial.

In 2016 *Greenwich v. State*[6] was decided. In that appeal detectives interrogating the defendant failed to advise him that his stepfather, who was also a criminal defense attorney, had telephoned the police department to speak with his stepson. The trial court denied a defense motion to suppress ruling that the defendant made an ambiguous request to remain silent or request counsel and therefore the police were not obligated to discontinue their questioning. Even though Greenwich indicated to the police that he understood his Miranda rights and voluntarily agreed to waive them and speak with the detectives, the Fifth District reversed. In its opinion, the court ruled that the unrebutted testimony at the suppression hearing was that the lawyer advised the receptionist at the police department that he was the defendant's attorney and stepfather. The receptionist referred the lawyer to the lead detective and the lawyer left a voicemail message on the detective's phone advising that he was speaking as the defendant's attorney. The detective did not check his voicemail until after the interview. The Fifth District ruled that it made no difference. In fact, they noted that there is no evidence that the police either intentionally or fraudulently tried to conceal from the defendant the phone call made by his attorney offering assistance. This is neither critical nor dispositive as to the issue at hand. It is the individual given the knowledge and power to take advantage of the attorney's services that the due process clause of the Florida Constitution protects.

Two years later *Baskin v. State*[7] was decided. In that appeal, the defendant was being confined in a psychiatric wing of a hospital. The police wanted to speak with him about a murder that had taken place. Baskin's mother, being concerned about her son being questioned in light of his mental state at the time, set about looking for an attorney to represent him. She found one who immediately went to the hospital. He spoke to a security guard and a nurse and told them that he was Mr. Baskin's lawyer but he was not permitted to see him. The lawyer gave

the nurse a business card reiterating that he was there as Baskin's lawyer and told them that he did not want his client talking to the police. The lawyer left the hospital and the police arrived sometime later. Even though the police became aware that a lawyer had been hired to represent Mr. Baskin, they did not tell him that he had a lawyer and did not inform him of any rights under *Miranda* because he was not in custody. Once again, the trial court denied the motion to suppress the subsequent confession. In reversing the trial court, the Second District ruled that our state Supreme Court explicitly rejected the custodial/noncustodial distinction upon which the trial court relied in favor of a bright line rule which applies when a defendant is being questioned in a nonpublic place and an attorney comes to represent him. The decision noted that the only real difference here was that the attorney left the hospital before the police arrived. That distinction made no difference.

A month after the Baskin decision was rendered, Florida's Fourth District Court of Appeal decided *Santos v. State*.[8] The ruling was essentially the same. Factually, the defendant made two noncustodial confessions to the police. During a third interview, which was custodial, the appellant's father called a detective who was assigned to the murder case being investigated and informed him that he hired an attorney to represent his son and that the attorney advised him not to let the appellant speak to law enforcement. Minutes later, the attorney left the same detective a voicemail, attempting to invoke the appellant's right to remain silent. Although ruling that the third interview was subject to suppression, the appellate court found that, under the circumstances, the introduction of the third confession was harmless beyond a reasonable doubt.

Since *Haliburton II*, the Florida Supreme Court took the issue up once again in 2016 in *State v. McAdams* and *McAdams v. State*.[9] That appeal involved a murder investigation where the police asked the appellant if he would be willing to come to the sheriff's office to speak with detectives about the matter. The detective specifically informed him that he was not under arrest nor was he handcuffed. Upon arrival at the sheriff's office, the appellant was escorted to an interview room where he met with detectives. Thereafter, he made a non-custodial confession after which *Miranda* warnings were given. The appellant continued to speak with the detectives and subsequently directed the police to the bodies of the murdered victims. While McAdams was being questioned by the detectives and before the confession commenced, an attorney retained by McAdams's parents arrived at the station. After determining that McAdams was being interrogated in the building, the deputy at the counter advised the attorney that it would not be possible to convey any information to the location where McAdams was being questioned by any means, including email, telephone, a knock on the door, or even a note slipped under the door. Even though the lawyer made it clear that he wanted all questioning to stop, he was not allowed to see or otherwise communicate with McAdams in any manner. Ultimately, McAdams was informed about the presence of the attorney after he directed the detectives to the burial site. The court in McAdams discussed *Haliburton II* and noted that it had agreed to accept a certified question from the Second District Court of Appeal which was rephrased as follows "under the Due Process Clause of the Florida Constitution, when must a person who is being questioned by law enforcement in a nonpublic location be notified that an attorney retained on his or her behalf is at the location and available to speak with him or her?" Both the state and McAdams petitioned for review of the certified question. In answering the question, the Florida Supreme Court arrived at a bright line rule not subject to interpretation. That is "a suspect who is being questioned in a location that is not open to the public has the right to be notified regarding the presence and purpose of the attorney retained on his or her behalf, regardless of whether the suspect is in custody." So, there you have it.

So, should you receive a phone call requesting legal advice and assistance for someone who was just arrested by the police, you should immediately telephone the arresting police department stating that you are the lawyer representing the defendant, whose name you will leave with the person you are speaking with, and get the name of the person to whom you are speaking. Hopefully, it will be on a recorded line. You will then advise that person that you are invoking your client's Fifth Amendment right against self-incrimination as well as the right to counsel. Then if you learn the name of the arresting officer, put a call in to him or her and do the same even if it means leaving a voicemail. And if you want to show off, tell the person at the police department and the arresting officer that it is a violation of due process under the Florida Constitution to not advise the defendant that he has a lawyer and that he should make no statements until you can appear and give further advice. After that, meet with the person who called you in the first place and get a retainer. 🏛

[1] 384 U.S. 436 (1966).
[2] 475 U.S. 412 (1986).
[3] 476 So.2d 192 (Fla. 1985).
[4] 514 So.2d 1088 (Fla. 1987).
[5] 255 So.3d 902 (Fla. 4th DCA 2012).
[6] 207 So.3d 258 (Fla. 5th DCA 2016).
[7] 255 So.3d 895 (Fla. 2nd DCA 2018).
[8] 254 So.3d 437 (Fla. 4th DCA 2018).
[9] 193 So.3d 824 (Fla. 2016).

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Young Lawyers: Tips for Success

HAVE A PLAN

by Alli Heller

and Caleb Kenyon

Benjamin Franklin said it best: "If you fail to plan, you are planning to fail." As a young lawyer, planning is crucial for your future success. While some find success through sheer dumb luck, for most of us, it takes hard work, perseverance, and a good plan.

PLAN YOUR REPUTATION

You cannot fake a reputation. Everyone knows your reputation is earned from years of exposure to your work product. Yet, you can strategically guide its development. Many young lawyers fall into the habit of pushing whatever legal argument they come up with. Unchecked, this pattern leads to a reputation as a lawyer who throws everything against the wall to see what sticks. Plan out whether you want a reputation as a shotgun lawyer or one as a precision "sniper" lawyer. Neither is right or wrong, so long as you've planned it. Think about your reputation in the types of cases you want to work or be known for. Do you handle sex, drugs, technology, or financial crimes? Consider doing some pro-bono or low bono cases as part of your long-term reputation plan.

PLAN YOUR FIRM

Is your entire career at the Public Defender's Office? Are you in for your 10-years, loan forgiveness, then out? Are you going to open your own firm? Are you going to buy in to an existing firm? Unless you are in the first category, you need to be making a financial plan now. Starting a firm requires enough capital to keep things floating while you work towards profitability. Similarly, no established firm will give away part of their hard-built business without your cash to buy in. Plan out your finances before you need the cash and find yourself scrambling. If you don't have the ability to personally finance a buy in, plan now to position yourself as an attractive business loan recipient. Plan out where your referrals will come from. Are you going to spend money on advertising or are you going to invest time in something like BNI? Either way, your new firm's doors won't stay open long if you don't have a plan to generate new clients.

PLAN FOR FAILURE

Everyone loves to plan for how they will celebrate after acquitting their clients. No one wants to see their painstakingly crafted plan crash and burn in a fiery inferno. Yet, we've all had these moments; professionally and personally. Make your best argument on that motion to suppress, but also plan a mitigation package so that when the judge denies the motion, you aren't pleading your client to a bad deal. We tell every client we are ethically prevented from guaranteeing a specific result; we should plan accordingly. Whether it's a backup trial strategy for getting the jurors you hoped you wouldn't, cash reserves for slow months of business, or healthy personal coping mechanisms for disappointing defeats; every true plan for success can withstand a speedbump along the way—but only if you plan for them.

BUILD YOUR LEGAL COMMUNITY

Osmosis isn't just for scientists.

It's also true in the legal profession. You become who you surround yourself with. As a young lawyer, immersing yourself into all aspects of your profession is essential. Some ways to do so include:

Actively seek out a mentor.

A mentor is pivotal, whether a listening ear, someone to brainstorm legal arguments and ideas with, or a guide through the infant stages of your legal career, every young attorney should actively seek out least one mentor. When it comes to practicing law, there are known knowns; things we know we don't know; but most dangerously, there are things we don't know that we don't know. Having a quality mentor helps avoid the

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NEW RULES OF EXECUTIVE CLEMENCY More Felons are Now Eligible for Automatic Restoration of Civil Rights

by
Reginald R.
Garcia

Governor Ron DeSantis and the three members of the Florida Cabinet, acting as the Board of Executive Clemency, unanimously approved new clemency rules effective March 10, 2021, that are designed to approve civil rights applications faster, expedite pardon and firearm authority cases and reduce the backlog for convicted felons seeking a grant of mercy from Florida's top elected officials.[1] The changes are the first major rules update in 10 years and will make the advisory recommendations from the Florida Commission on Offender Review (FCOR) even more important.

RESTORATION OF CIVIL RIGHTS (RCR) LINKED TO AMENDMENT #4 (VOTING RESTORATION FOR FELONS)

The new rules resulted in two major changes: 1) The prior eligibility waiting periods of five years or seven years for RCR are gone. Previously convicted felons had to wait these years after completion of their sentences before they could even apply and start the process; and 2) The new Rule 9 will provide for automatic RCR without a hearing if the applicant meets the criteria of constitutional Amendment 4 which was approved by 65% of Florida voters in November 2018.[2] The applicant must have completed all terms of sentence including payment of legal financial obligations and restitution and must not have any outstanding detainers or pending criminal charges.

In addition to voting restoration, RCR includes the right to serve on jury duty for civil and criminal cases and hold elected office.

The five eligibility criteria in Rule 9 are the same as in the 2019 legislative implementing law codified as Section 98.0751(2)(a), Fla.Stat.[3] which was upheld by the U.S. Court of Appeals for the Eleventh Circuit.[4]

If felons do not meet the Amendment #4 criteria, RCR is still an option but a hearing is required.

FULL PARDONS AND FIREARM AUTHORITY = SECOND CHANCES

Most of my clemency clients are business owners or professionals who committed drug or property crimes as young adults and needed help with obtaining state or federal licenses, security clearances, government contracts, better jobs, and volunteer opportunities at schools or with non-profit groups. Other felons wanted firearm authority for personal, family and business protection; law enforcement, security, or military jobs; recreational hunting; or to inherit a family gun collection.

The existing 10-year (for pardons) and 8-year (for gun rights) eligibility waiting periods still apply. Once filed, these cases will hopefully be considered sooner because most of the RCR cases will be expedited, and the backlog of pending applications will be reduced. Pardons for misdemeanors and for when adjudication of guilt is withheld for

a felony are still options. Any pardon releases a grantee from punishment and forgives guilt.[5]

However, new Rule 11 provides these applications may now be "summarily denied" without a hearing and by letter if the FCOR makes a negative advisory recommendation and no member of the board requests a hearing. This is a major change. Previously, if the FCOR made a negative advisory recommendation the applicant was still given a hearing and speaking opportunity at a quarterly clemency meeting in Tallahassee.

The three members of the FCOR are appointed by the governor and Florida Cabinet and confirmed by the Florida Senate and can serve a maximum of two six-year terms.[6] Previously known as the Florida Parole Commission, FCOR investigates all clemency cases, prepares a report called a "confidential case analysis" and provides an advisory recommendation on all clemency cases.

Given the FCOR recommendation is now more important than ever and likely dispositive of many applications, optional supporting documents — like character references, letters of support, a personal statement, and resumes — should be added to the original application or provided during the investigation.[7]

COMMUTATIONS OF SENTENCE

Per Rule 8, state inmates with less than a 5-year sentence are no longer eligible to apply. All inmates must still serve at least one-third of their sentence, or one-half if they are serving a minimum mandatory sentence, before applying. Inmates serving a life sentence must complete 20 years to apply. Previously, a life sentence was treated as a 25-year minimum mandatory sentence for clemency eligibility, so the inmate had to serve only 12.5 years before applying.

Inmates must obtain a "Request for Review" (RFR) as a condition precedent to getting a commutation hearing. This can now be achieved with a positive advisory recommendation from the FCOR. Previously the RFR required specific approval from the governor and one board member so this change should also streamline and expedite the process. If the FCOR makes a negative advisory recommendation, the application is subject to be "summarily denied" like the pardon and firearm cases.

NEW AND BETTER APPLICATION / INFORMATION SHEET

To implement the new rules and improve the process, a new two-page application has five option boxes for the type of clemency being sought and additional room to list multiple convictions. The application includes helpful information on how to obtain the required certified court records of the charging instrument and the judgment and sentence orders. Per statute, these documents should be provided to the applicant promptly and free of charge.[8] The application has been designated Form ADM 1501 and was updated April 14, 2021. A lawyer is not required and there is no application fee.

The new six-page Clemency Information Sheet (also called Form 1) explains the new rules, provides additional directions on how to apply, and includes excellent information on the eligibility criteria for each type of clemency. This form was also updated in April 2021.

Clemency Rules have been compiled into one document.

These documents and additional information can be obtained by calling the Office of Executive Clemency at 850-488-2952 or visiting the FCOR website at www.fcor.state.fl.us/index.shtml.

[1] All rule citations are to the Florida Rules of Executive Clemency (Fla. R. Ex. C.) effective March 10, 2021.

[2] Voting Restoration Amendment 14-01 sponsored by Floridians for a Fair Democracy, Inc., amending Fla. Const. art. IV, section 8 (a), obtained 5,148,926 votes or approximately 65% for passage.

[3] Committee Substitute for Senate Bill 7066, Section 25, entitled Election Administration, 2019-162, Laws of Florida, effective July 1, 2019.

[4] Kelvin Leon Jones, Rosemary McCoy et al. vs. Governor of Florida, Florida Secretary of State, No. 20-12003, 975 F. 3d 1016 (11 Cir. 2020), opinion dated September 11, 2020.

[5] Rule 4. I. A. and Rule 4. I. C., Fla. R. Ex. C.

[6] Sections 947.02 and 947.03, Fla. Stat.

[7] Clemency Information Sheet, Form 1, updated April 2021.

[8] Section 940.04, Fla. Stat.

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Your Discovery DEMAND is Not a REQUEST (and It Includes Video Evidence)

by T.S. Lupella

Technology and necessity have expanded the channels of data collection throughout the criminal investigative process. For example, in a single DUI case, there may be multiple officers on scene and each of them may have written offense reports and/or supplements to those reports. Additional paperwork may be available if a piece of collected evidence was sent to a lab for testing. We also have dispatch logs and reports, and audio recordings of 911 calls. And now since video is recorded throughout the investigative process, we have an exorbitant amount of potential video evidence: 1) in car, 2) intoxilyzer room, 3) body worn camera (BWC) (from *every* officer on scene), and 4) recorded witness interviews. So yes, there is a lot of evidence out there, and it is all subject to discovery.

With excessive data there are simply too many gigabytes to store on a local server. The third-party host was born. The silent partner of the discovery process, third-party hosts are the intermediary between law enforcement and the prosecution. In an ideal world, the officers upload everything to the server and therefore, the prosecution has all discovery available to them in digital form. In theory, it should be very efficient. In practice, the process is a complete disaster. These companies have set themselves up as a "black box" operation with no representatives, no contacts, no customer service and therefore, no accountability. What happens when video evidence is recorded and uploaded? What is the process and who is the custodian of these records? This is information that is not readily available if it is available at all.

Then add to the mix the false idea that law enforcement would want to upload everything. Not everything on video is good for the State and they know it. Something as innocuous as asking another officer on scene, "Do you think we have enough to arrest?" or "What should we charge him with?" could be enough to generate sufficient reasonable doubt at trial. As an officer reviews their video while preparing their written report, there would be a temptation to think that their case would be better served without video. Heck, this defendant might not hire an attorney, and they might plead out at arraignment anyhow…

Make no mistake, the prosecution gets what the cops *want* to give them, and that is what goes to the defense, and many prosecutors do not even look at the videos — unless they have to. Defense attorneys are then saddled with the onerous task of reviewing hours of video per case, which we have to do in order to be effective counsel. For example, we may review a case and realize that there is missing video and perhaps a witness present that was probably exculpatory, but was not discussed in the arresting officer's report because they gave their statement to an assisting officer (also not listed in discovery) that was on scene, but he did not care to submit a supplemental report or BWC video. We see this sort of thing relatively frequently. Is it a discovery violation? Yes, but not because the prosecutor is withholding it, but because law enforcement failed to provide it or properly preserve it, a failure imputed to the prosecution.

All video footage is supposed to be uploaded to the server at the close of the investigation and/or arrest and not edited in any way, but it is practically impossible enforce adherence to department policy when there is a non-party intermediary that serves as a virtual wall of separation between law enforcement and the prosecuting attorney. Unfortunately, this wall also serves to insulate the prosecuting attorney from the imputation of knowledge regarding the missing discovery or unpreserved evidence. And it does not help that a generalized malaise has set in when it comes to following and enforcing discovery obligations.

Nevertheless, we respond with a Motion to Compel Disclosure in almost every case. At the hearing, it is the mantra of the prosecutor, "Judge, we have given everything we have to the Defense." Should that response satisfy the Court? No, because that does not mean that they have exercised due diligence and inquired to the law enforcement agency or the specified officers as to the status of the requested discovery. But frustratingly, the Courts are reluctant to hold their feet to the fire, unless it starts to become an ongoing problem. And they will not realize it is a problem until all criminal defense practitioners take this issue seriously.

So what should we do? There are several things. First, we need to file a proper demand for discovery. This is not a notice or a request for discovery, but a formal demand that puts the prosecution on notice for *everything* that we are legally entitled to under the rules of procedure and the fact that the knowledge of the officer is also imputed to them. Second, we need to make the courts aware of the problem; every time we do not get what we are entitled to receive, we file a Motion to Compel. In that motion, we need be afraid to chastise the prosecution when appropriate, like when they file a cursory response checking the box indicating that video/electronic/digital evidence did not exist, when in fact it did.

Do not be tempted to simply send an email to the prosecutor pointing out what you think might be missing. Trust me, it is a waste of time that only perpetuates the problem. We need to make a record in order to let the courts know that this is an institutional problem and we need them to intervene. We also need the court's indignation to matriculate to the prosecutors so that law enforcement might better adhere to their own policies and procedures.

Next, this must be done corporately. What I mean is that all the defense attorneys must adopt the same approach. The courts will not acknowledge that there is a problem until we all show them. This is the purpose of an organization like FACDL. We must engage everyone, the private attorneys as well as appointed counsel. We share our pleadings and we fight together. There is no place for casual indifference on these types of due process issues.

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landmines in the latter category.

Know your local attorneys.

Knowing quality criminal defense attorneys in your area and building those relationships will also give you an advantage in navigating your circuit. Through these relationships, you will be apprised on relevant local information and legal issues. This includes watching these attorneys in Court when possible, actively arguing motions or arguing at trial. Additionally, don't miss out on opportunities with well-respected civil attorneys.

Know the local court system.

Take the time to get to know the individuals that work within your local Court system including the judicial assistants, clerks, bailiffs, probation officers, assistant state attorneys and their assistants. By knowing who these individuals are and vice versa, you will have an easier time getting that motion set or getting an inmate brought over to Court. The system works more smoothly when you know who to contact to make something happen. Also, take the time to review and become familiar with the clerk's website, the local administrative orders and the court procedures for the judges in front of whom you appear.

Become an active member with FACDL.

The FACDL community fosters relationships with attorneys locally and beyond your circuit throughout the State of Florida. If you have a legal issue, need assistance or seek a mentor, there are a sea of attorneys out there willing to help. If you are interested in getting connected with any of the FACDL members, please reach out to the Young Lawyers Committee Chairs (**Alexandra Heller** or **Caleb Kenyon**) and we will facilitate any connection.

I CAN'T RESIST?
The Lawful Execution Paradox

by
Geoffrey P.
Golub

One of the mantras that every lawyer in the criminal system hears at some point in their career is, "You cannot resist an unlawful arrest with violence."[1] Another well-known saying is, "You are allowed to resist an unlawful arrest without violence."[2] The reason for the latter is an officer who is making an unlawful arrest is not engaging in the lawful execution of a legal duty.[3] Which is also why a person is allowed to resist without violence an unlawful stop, seizure, detention or search.[4] The element of having to be engaged in the "lawful execution of a legal duty" is found in the resisting without violence statute(Fla. Stat. §843.02) and also in the resisting with violence statute (Fla. Stat. §843.01)("RWV"). The battery on a law enforcement officer("Battery on a LEO") statute (Fla. Stat. §784.07(2)(b) states that an officer must be engaged in the "lawful performance of his duties," which when compared to the element in the RWV statute of being "engaged in the lawful execution of a legal duty," is merely considered a distinction without a difference, as both elements have been used interchangeably and have been held to have the same meaning.[5]

To convict a person of committing the crime of RWV and battery on a LEO, the state must prove that at the time of the resisting with violence and at the time of the battery on a LEO, that the officer was engaged in the lawful execution of a legal duty. If the resisting and battery occur during a police officer's unlawful stop, seizure, detention, search or arrest, then the officer is not engaging in the lawful execution of a legal duty and the State has failed to prove a key element of the offense, and the person should be found not guilty of the charges.[6]

But then there's Florida Statute, 776.051(1)(2008) which states:

> (1)A person is not justified in the use or threatened use of force to resist an arrest by a law enforcement officer, or to resist a law enforcement officer who is engaged in the execution of a legal duty, if the law enforcement officer was acting in good faith and he or she is known, or reasonably appears, to be a law enforcement officer.

This statute seems to suggest that a person cannot unlawfully resist with force an officer who is conducting an unlawful stop, seizure, detention, search, or arrest if during the unlawful activity the officer is acting in good faith. The RWV statute does not have good faith as an element of its offense. Nor does the battery on a LEO statute. Engaged in the "execution of a legal duty" is not defined in Florida Statute, 776.051(1) or in Florida Statutes, 843.01 or 843.02. Nor is engaged in the "lawful performance of duties" defined in Florida Statute, 776.051.

The Florida Supreme Court in *Tillman v. State*, 934 So. 2nd 1263 (Fla. 2006) clarified somewhat what execution of a legal duty means.

> …[I]n construing the lawful execution element of sections 784.07(2) and 843.01, courts must apply the legal standards governing the duty undertaken by the law enforcement officer at the point that an assault, battery, or act of violent resistance occurs. These standards effectuate the Legislature's intent in making lawful execution of a legal duty an element of these crimes. *Id. at 1269*

All courts have acknowledged that when an officer unlawfully stops, seizes, detains, searches or arrests a person, the officer is not engaged in the execution of a legal duty.[7]

The question now is does the good faith in section 776.051(1), Florida Statutes, apply to sections 843.01 and 776.051, Florida Statutes? Or in other words: should section 776.051(1) be read in pari materia with sections 843.01 and 776.051? A discussion of the prior version of section 776.05(1), Florida Statutes may help in determining the answer, and the Supreme Court of Florida's decision in *Tillman v. State*, 934 So. 2nd 1263 (Fla. 2006) is a good place to start. The issue in *Tillman*, supra, as framed by the Supreme Court was:

> "Whether section 776.051(1), which prohibits the use of force to resist an arrest notwithstanding the illegality of the officer's actions, extends to other types of police-citizen encounters." *Id. at 1266*

At the time of *Tillman*, Florida Statute, 776.051(1) stated the following:

> A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer. *Id. at 1268*

The Supreme Court opined that section 776.051(1) Florida Statutes, foreclosed the defense of justifiable use of force by a defendant who resisted with force an arrest by a law enforcement officer, regardless of the legality of the arrest. The Court also held that the plain meaning of the language used in section 776.051(1) limited its application to arrest scenarios. Our state supreme court was very clear to limit the applicability of the statute to an actual arrest. Meaning that even if the officer lacked probable cause to arrest the Defendant, but had not yet actually arrested the Defendant, the Defendant could still be justified in using force to resist the officer.

> Section 776.051(1) does not address the use of force to resist an officer when there are grounds for an arrest, but no actual arrest is taking place. The notice provided by this provision does not inform persons that it applies once they could be arrested. *Id. at 1270*

Basically, the *Tillman*, Court held that section 776.051 did not apply to a Defendant's use of force during an unlawful stop, seizure, detention or search. The Florida Supreme Court disapproved "of the interpretive maxim in pari materia to engraft the prohibition into sections 784.07(2) and 843.01 when an actual arrest [was] not involved…." *Id. at 1269* But also refused to approve or disapprove of Florida courts reading section 776.05(1) in pari materia with Florida statutes 784.07(2) and 843.01 when an actual arrest was involved.

> In arrest situations, Florida courts have consistently read section 776.051(1) in pari materia with the offenses described in sections 784.07(2) and 843.01 and, in so doing, have not required the State to prove that the arrest was lawful. Because the issue is not before us, we decline to address the effect of section 776.051 on the "lawful execution" element in arrest situations. *Id. at 1274 n.4*

The Florida Legislature responded to the *Tillman*, decision by amending Florida statute, 776.051(1) to read:

> (1) A person is not justified in the use or threatened use of force to resist an arrest by a law enforcement officer, or to resist a law enforcement officer who is engaged in the execution of a legal duty, if the law enforcement officer was acting in good faith and he or she is known, or reasonably appears, to be a law enforcement officer.

The problem with section 776.05(1) has always been: How does one reconcile the language in it with the element of "lawful execution" found in sections 843.01 and 787.07(2)? How can one ignore one of the key elements in section 843.01 and 787.07(2)? Doesn't the state have to prove all of the elements of the charge for a person to be found guilty? Isn't that a fundamental aspect of the law?[8] If the stop, seizure, detention, search and or arrest are unlawful and therefore, the officer is not in the lawful execution of a legal duty, how can a person still be found guilty of violating sections 843.01 and 787.07(2)? And it now seems that the amended statute forecloses the defense of justifiable use of force by a defendant who resists an unlawful stop, seizure, detention, search or arrest as long as at the time of the unlawfulness, the officer was acting in good faith. But it is only foreclosed if section 776.051(1) is supposed to be read in pari materia with Florida Statutes, 843.01 and 787.07(2). If in fact section 776.051 is supposed to be read in pari materia with the RWV statute and the Battery on a LEO statute, then in every case where the officer is acting unlawfully, the next step should be to determine if the officer acted in good faith and if so, then the unlawful activity would not preclude a conviction for RWV or Battery on a LEO.

The Fourth District Court of Appeal in *A.W. v. State*, 82 So.3d 1136 (Fla. 4th DCA 2012) held that a person who committed the charge of Battery on a LEO during an unlawful detention, was still properly found guilty since the police officer acted in good faith. The Court acknowledged that "the tip from the 911 callers did not provide the officers with reasonable suspicion to detain the defendant and the officers were not acting in the lawful execution of a legal duty," but still held that good faith justified the conviction.

> …We reject appellant's unpreserved challenge to the adjudication of guilt for battery on a law enforcement officer. Though the police were not engaged in the lawful execution of a legal duty, there was no indication that the officers were not acting in good faith. *Id. at 1139*

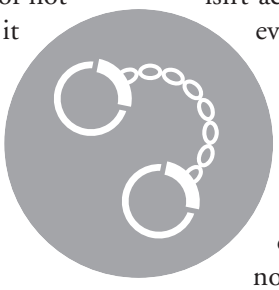
The Fourth District Court of appeal in *King v. State*, 120 So.3d 108(Fla. 4th DCA 2013) citing Florida Statute, 776.05(1) and *A.W.*, supra, again held that as long as the officer was acting in good faith the lawfulness of the stop, seizure, detention, search or arrest was irrelevant.

> Section 776.051(1), Florida Statutes (2008), prohibits the use of force to resist either arrest or the execution of a legal duty by a law enforcement officer unless the defendant can show that the officer was not acting in good faith. *A.W. v. State*, 82 So.3d 1136, 1139 (Fla. 4th DCA 2012). There was no such showing here. *King, supra at 109*

Jarrail Chauncey Brown of *Brown v. State*, 298 So.3d 716(Fla. 2nd DCA 2020), was walking alone in the parking lot of a motel. He fit the description of someone who had caused a disturbance at the hotel. A police officer arrived and asked Mr. Brown for identification which he begrudgingly gave to the officer. Another officer arrived. Brown got upset and began to walk away. He was told to stop. He did not listen. One of the officer's attempted to handcuff Brown and Brown battered both officers and resisted one of the officers with violence. At trial, Brown was found guilty of RWV and two counts of Battery on a LEO.

Brown claimed on appeal that the officers did not have reasonable suspicion to detain him and therefore, the officers were not in the lawful execution of a legal duty when he resisted and battered the officers, and the trial court should have entered a Judgment of acquittal on all charges. The Second District agreed with Brown and held that the officers did not have reasonable suspicion to detain Brown and remanded the case back to the trial Court to dismiss the RWV charge and to find Brown guilty of two misdemeanor batteries, the lesser included offenses of Battery on a LEO. The Second DCA did not undergo a good faith analysis.

In *Durham v. State*, 174 So.3d 1074(Fla. 5th DCA 2015), Mr. Durham resisted with violence a police dog that unlawfully entered his home without a warrant. Since Crime Dog McGruff holds the same status as a human police officer, Mr. Durham was charged with RWV. But since the dog acted unlawfully and was therefore not in the lawful execution of a legal duty, the Fifth District held that the trial court should have entered a judgment of acquittal for the charge of RWV. One cannot really blame the dog for not knowing the law, and since it was his trainer who ordered him to unlawfully enter the residence, there is a legitimate argument that Snoopy acted in good faith. But the issue of good faith was never discussed.



The juvenile in *State v. A.R.R.*, 113 So. 3d 942(Fla. 5th DCA 2013) was found guilty of one count of RWV and three counts of Battery on a LEO. The District Court opined that "to convict a defendant for battery on a LEO and resisting an officer with violence, the State must prove that the officer was engaged in the lawful performance or the execution of a legal duty." The Fifth District held that the officers were engaged in the lawful performance of a legal duty and therefore upheld the convictions. The Court also noted that three of the charges were based on actions that took place after the Defendant had been arrested. Citing to section 776.05(1) Florida Statutes, the Fifth District held that even if the Defendant's arrest had been illegal, the Defendant would still not have been justified in using force against the officers.

> A person is not entitled to use physical force to contest even an illegal arrest. *See* §776.051(1), Fla. Stat. (2011); *Jones v. State*, 570 So. 2d 433, 435 (Fla. 5th DCA 1990). Appellee committed the subsequent violence on the deputies in response to their attempt to arrest her. Hence, even if her arrest was illegal, Appellee was not justified in using force against the deputies. *Id. at 945*

The *A.R.R.* decision held that the officers' actions before and after the actual arrest were legal, so arguably there was no need for the court to decide if the officers had acted in good faith. But by stating that a person cannot use force to resist even an unlawful arrest, the Fifth DCA left one to wonder if a person is prohibited from using force to resist an unlawful arrest, even when the officer isn't acting in good faith, or if that even matters.

The Fourth DCA, by undergoing a good faith analysis, is reading the statutes in pari materia. The Second DCA, by not doing such an analysis, may not be reading the statutes in pari materia or the issue of good faith may have never been argued by either side. And the Fifth DCA, at least in *Durham*, did not undergo a good faith analysis, but then in *A.R.R.*, the Fifth did read section 776.051(1) in pari materia with section 843.01 and 787.07(2), it seems to be reading the older version of 776.051(1) that simply states, "A person is not justified in the use or threatened use of force to resist an arrest by a law enforcement officer." Either that or the Fifth DCA believes that the amended version does not add good faith into the analysis of resisting with actual force an unlawful arrest. That may be the case since that court seems to have indicated the same sentiment in *Brown v. State*, 36 So. 3d 826(Fla. 5th DCA 2010).

> These cases are made complicated by the fact that "lawfulness" of the police behavior is an element of the crimes under some circumstances. *Id. at 828*
>
> We say under some circumstances because of the effect of section 776.051(1), Florida Statutes (2008). Prior to its recent amendment, this statute prohibited the use of force in defending against an unlawful arrest. *Tillman v. State,* 934 So. 2d

1263 (Fla. 2006). In its present form, the statute applies to both arrests and other lawful actions by police. Essentially, what this statute does is eliminate the element of lawfulness when force is used. *Dyer v. Lee,* 488 F.3d 876, 879 (11th Cir. 2007). It does not establish a defense, as some courts suggest. "Lawfulness" is an element of the crime that the State must prove. This statute must be read *in pari materia* with the resisting with violence and battery statutes. The net effect is to negate the element of lawfulness. Interestingly, the initial bill proposed that "lawful" be deleted as an element in the resisting with violence statute, but it was not adopted in that form. We can only assume that, because the resisting with violence statute proscribes both resisting with actual force and resisting with threatened force, the legislature intended "lawfulness" to remain an element unless actual force is used. *Id at 832 n.2*

The jury instruction for RWV suggests that the statutes should be read in pari materia with Florida Statute, 843.01.

Note to Judge:

A special instruction incorporating §776.051(1) Fla. Stat. should be given when the defendant is charged with resisting an arrest by a law enforcement officer or with resisting a law enforcement officer and the defense claims the officer was acting unlawfully.[9]

The jury instruction for Battery on a LEO does not have the same notation, suggesting that section 776.051 should not be read in Pari materia with the statute for Battery on a LEO, even in a situation where a person batters a police officer during an unlawful arrest. One reason for not reading the statute for Battery on a LEO in pari materia with section 776.051 may be because Battery on a LEO is not a violent offense.[10] Whereas Resisting with Force has the same meaning as Resisting with Violence. The word "force" is defined in the Merriam-Webster dictionary among other meanings, as "violence, compulsion, or constraint exerted upon or against a person or thing." And the word "resisting" is used two times in section 776.051. A word not found in the Battery on a LEO statute. There is certainly an argument to be made that section 776.051 is not to be read in pari materia with the Battery on a LEO statute.

Perhaps section 776.051 is only supposed to be applied to situations where a Defendant is claiming self-defense against a police officer. Even though the title of section 776.051 states: "Force in resisting a law enforcement officer," the statute is found in the chapter 776 which deals with self-defense. The Justifiable use of deadly force and non-deadly force jury instructions state:

> A person is not justified in [using force] [or] [threatening to use force] to resist an arrest by a law enforcement officer, or to resist a law enforcement officer who is engaged in the execution of a legal duty, if the law enforcement officer was acting in good faith and he or she is known, or reasonably appears, to be a law enforcement officer.[11]

Maybe the meaning of section 776.051 is to just limit when self-defense against a police officer is allowed.

Perhaps the rules of statutory construction can help. The first rule about statutory construction is if the plain language of the statute is clear and unambiguous you don't talk about statutory construction. The second rule about statutory construction is if the language of the statute is clear and unambiguous you don't talk about statutory construction.[12]

The actual second rule of statutory construction is to follow the first rule unless an interpretation of the meaning of the plain language of the statute leads to an absurd result. If the result is absurd, then it's time to discuss legislative intent.[13] (Which is somewhat ironic since the members of the legislature are the same people responsible for writing and voting on the absurd result.) If the plain meaning of the statute is clear and unambiguous and the interpretation of its meaning does not result in an absurd result then all inquiries must end unless related statutes create an ambiguity not otherwise apparent on the face of each statute. If together these related statutes create an ambiguity, then it is necessary to construe the related statutory provisions in harmony with one another.[14]

The plain language in section 776.051, and the plain language in the statutes for RWV and Battery on a LEO, are clear and unambiguous so there is no need to talk about statutory construction. No need to determine legislative intent. No need to read the related statutes in pari materia. However, certainly, when read together an ambiguity exists between section 776.051 and the RWV statute and perhaps to some extent the Battery on a LEO statute.

The only way to harmonize the statutes is to read good faith into the RWV and Battery on a LEO statutes. And the good faith has to apply to all unlawful activity, including an unlawful arrest. But if the Florida Legislature wanted good faith to be an element of RWV and Battery on a LEO they could have amended the statutes to say that. Perhaps the reason the legislature has not done so is, the RWV statute and the Battery on a LEO statute are not supposed to be read in pari materia with section 776.051 or maybe just RWV is supposed to be read in pari materia with section 776.051.

There is one other statutory rule of construction that supports the argument that all three statutes should not be read in pari materia. The rule of lenity found in section 775.021. Judge Northcutt's reasoning in his concurring opinion in *Little v. State*, 111 So. 3d 214(Fla. 2nd DCA 2013) explaining why certain Stand your Ground statutes should not

be read in pari materia, also explains why section 776.051 should not be read in pari materia with section 784.07(2) and 843.01.

> Further, accepting the State's position would violate our legal duty to construe the statutory language strictly. That obligation is expressly set forth in section 775.021(1), which commands that the provisions of the Criminal Code "shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." The statute requires a strict construction in favor of the accused even when a reasonable contrary meaning can be found by application of traditional statutory construction principles. *See, e.g.*, *Kasischke v. State*, 991 So. 2d 803 (Fla. 2008); *Polite v. State*, 973 So. 2d 1107 (Fla. 2007); *State v. Huggins*, 802 So. 2d 276 (Fla. 2001); *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991). *Id. at 223* 🏛

[1] *Ruggles v. State*, 757 So.2d 632(Fla. 5th DCA 2000)(Even if the appellants' arrests were invalid because the deputy was off-duty and of a neighboring county, the appellants are still guilty of the offenses charged because neither of them had any right to use violence against the officer during their attempted arrest.) *Id.* at 633.

[2] *Livingston v. State*, 610 So.2d 696(Fla. 3rd DCA 1992)(…the defendant was entitled to resist the arrest without violence as a matter of law.) *Id.* at 697.

[3] *Livingston*, supra.; *State v. Anderson*, 639 So.2d 609(Fla. 1994) *Lu Jing v. State*, 46 FLW D946(Fla. 2021); *M.W. v. State*, 51 So.3d 1220(Fla. 2nd DCA 2011).

[4] Unlaw arrest: *Lu Jing v. State*, 46 FLW D946(Fla. 2021); *M.W. v. State*, 51 So.3d 1220(Fla. 2nd DCA 2011); Unlawful Detention/Seizure/Stop: *G.T. v. State*, 120 So.3d 1241(Fla. 4th DCA 2013); *B.G. v. State*, 213 So.3d 1016(Fla. 2nd DCA 2017); *M.M. v. State*, 72 So.3d 328(Fla. 4th DCA 2011); *T.P. v. State*, 224 So.3d 792(Fla. 2nd DCA 2017); *I.K. v. State*, 257 So.3d 1163(Fla. 2nd DCA 2018).

[5] *Brown v. State*, 298 So.3d 716(Fla. 2nd DCA 2020)(To support Brown's convictions for battery on a law enforcement officer and resisting an officer with violence, the evidence had to establish that the deputies had been engaged in the lawful execution of a legal duty when the offenses occurred.) *Id.* 718; *Tillman v. State*, 934 So. 2nd 1263 (Fla. 2006)(Overturned by statute.) (Section 784.07(2) requires that the officer be "engaged in the lawful performance of his or her duties." Section 843.01 requires that the officer be "in the lawful execution of any legal duty." These elements are functionally identical. For convenience, we refer to them in the singular as "lawful execution.") *Id.* 1266 n.2.

[6] *Brown*, supra; *Burney v. State*, 93 So.3d 510(Fla. 2nd DCA 2012)(Thus, "[a] conviction for battery on a law enforcement officer requires proof that the officer was 'engaged in the performance of a lawful duty'…." *Nicolosi v. State*, 783 So.2d 1095, 1096 (Fla.5th DCA 2001) (citing *Taylor v. State*, 740 So.2d 89 (Fla. 1st DCA 1999)). *Id.* 512.

[7] See endnote 4 above.

[8] *J.W. v. State*, 313 So.3d 909(Fla. 2nd DCA 2021)("the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged" has been recognized by Florida courts to be fundamental error. *Id.* (reversing conviction for possession of drug paraphernalia after entry of nolo contendere plea where factual basis did not establish all of the essential elements of the offense despite defense counsel's stipulation to the factual basis); see also *Miller v. State*, 988 So. 2d 138, 139 (Fla. 1st DCA 2008) ("We determine that, in those cases where the record affirmatively demonstrates the crime to which defendant pled guilty could not have occurred, fundamental error occurs."); cf. *Allen v. State*, 876 So. 2d 737, 740-41 (Fla. 1st DCA 2004) (granting petition for second-tier certiorari and determining circuit court "failed to comply with the established principle of law which holds that it is fundamental error to convict a defendant in the absence of a prima facie showing of the elements of the offense charged"). But see: *Twigg v. State*, 254 So.3d 464(Fla. 4th DCA 2018)(Despite the State's failure to prove that the nurse victim qualified as an "emergency medical care provider," Appellant failed to move for a JOA based on the insufficiency of the evidence and, therefore, failed to preserve the issue for anything other than a fundamental error review. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003).[I]n order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Id.* (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). Based on this narrow application, the Florida Supreme Court has clearly delineated that unpreserved challenges to the sufficiency of the evidence may only be reviewed for fundamental error in two circumstances: "(1) the mandatory review by [the supreme court] of the evidence by which a capital defendant was convicted and sentenced to death; and (2) when there is insufficient evidence that a defendant committed any crime." *Monroe v. State*, 191 So. 3d 395, 401 (Fla. 2016). Accordingly, the insufficiency of the evidence to prove an element of a crime does not warrant fundamental error review. *Bagnara v. State*, 189 So. 3d 167, 171 (Fla. 4th DCA 2016) (state's failure to prove value element of grand theft was not fundamental error). Therefore, Appellant's insufficiency of the evidence argument is not cognizable on appeal. The issue is, however, cognizable as an ineffective assistance of counsel claim.(*Id.* 468-69).

[9] Jury instruction 21.2 Resisting Officer With Violence.

[10] *State v. Hearns*, 961 So.2d 211(Fla. 2007); *Rawlings v. State*, 976 So.2d 1179(Fla. 5th DCA 2008); *Brookens v. State*, 963 So.2d 901(Fla. 5th DCA 2007).

[11] 3.6(f) – Justifiable [use] [or] [threatened use] of deadly force; 3.6(g) – Justifiable [use] [or] [threatened use] of nondeadly force.

[12] "The first rule about fight club is you don't talk about fight club. The second rule about fight club is you don't talk about fight club."

[13] *Polite v. State*, 973 So.2d 1107(Fla. 2007)(If the plain meaning of the language is clear and unambiguous, then the Court need not delve into principles of statutory construction unless that meaning leads to a result that is either unreasonable or clearly contrary to legislative intent. See *State v. Burris*, 875 So.2d 408, 410 (Fla. 2004). However, if the language is unclear or ambiguous, then the Court applies rules of statutory construction to discern legislative intent. See *Bautista*, 863 So.2d at 1185.) *Id.* at 1111; *Mesen v. State*, 271 So.3d 164(Fla. 2nd DCA 2019)(But unless it can be said "with absolute confidence that no reasonable legislature would have intended for the statute to carry its plain meaning," courts should "presume that [our] legislature says in a statute what it means and means in a statute what it says there." *Maddox v. State*, 923 So.2d 442, 452 (Fla. 2006) (alteration in original) (Cantero, J., dissenting) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004).The absurdity doctrine "exception to the plain meaning rule should not be used to avoid an unintended result, only an absurd or patently unreasonable one." *Id.* at 452-53.) *Id.* at 169.

[14] *Kirk v. State*, 30 So.3d. 604(Fla. 5th DCA 2020) (Two rules of statutory construction justify that position. The first is the doctrine of in pari materia, which provides that we should view statutes in a manner that would harmonize the applicable law. See *Deen v. Wilson*, 1 So. 3d 1179, 1182 (Fla. 5th DCA 2009). The second, referred to as the absurdity doctrine, is that "a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion."…) *Id.* at 606; *State v. Peraza*, 259 So.3d 728(Fla. 2018)(This is true because "[w]here possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another." *M.W. v. Davis*, 756 So. 2d 90, 101 (Fla. 2000) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)) *Id.* at 732.

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Pinellas Association of Criminal Defense Lawyers

SUMMER OF MENTAL HEALTH

by David Constantine Moran

After a long year of zoom meetings and CLEs on substantive law, it was time to focus on the one thing that lawyers tend to overlook: mental health. I decided to reach out to some of the best lawyers that know a lot about not only mental health for our clients, but our own mental health and mindfulness. Starting on June 17, 2021, we held a Zoom meeting and CLE with attorney **Maria Deliberato**. Currently an Assistant Public Defender in the Sixth Judicial Circuit handling capital trials, post-conviction cases, and *Miller/Graham* re-sentencings, Maria is also a certified yoga instructor. She presented on Wellness and Mindfulness for Attorneys. Because of Zoom, Maria was able to appear from her own mindfulness trip in Monterrey, California. She taught how breathwork, meditation, and physical practice helps calm the nervous system and manage stress. She led the members through demonstrations and even provided some follow-up reading, which I purchased as soon as she mentioned. The titles were *Nonviolent Communication: A Language of Life: Life-Changing Tools for Healthy Relationships"* by Marshall B. Rosenberg, Ph.D., and *"The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* by Bessel van der Kolk, M.D.

When the pandemic started and courts began to close, Maria was leading free Zoom yoga sessions for lawyers throughout the country. She recently kicked off each morning of the Life Over Death Virtual Conference with yoga sessions. As someone that has been practicing yoga on and off since 2001, I can attest to its benefits. Maria's classes are especially wonderful. We are very grateful to have Maria as a member of the Public Defender's Office, a PACDL, and FACDL. When not in court, you might find her on the mat instructing at Kodawari Studios in South Tampa or online with Yoga4Change at www.y4c.org.

The Pinellas Association of Criminal Defense Lawyers (PACDL) July 22nd meeting and CLE was slightly more traditional with a presentation by Mental Health Attorney guru, **Ashley Najar Roura**. Formerly an attorney with the Thirteenth Judicial Circuit's Public Defender's Office, in January Ashley joined the Sixth Circuit's Public Defender's Office. Ashley is currently a Senior Assistant Public Defender and the Director of Mental Health. While in the Thirteenth Circuit, Ashley worked with stakeholders to create both the Adult and Juvenile Mental Health Courts. Ashley is currently striving to create the same in the Sixth Circuit. Ashley's interactive presentation covered some of the basics of client competency, insanity, and the updated caselaw in the areas. Should you ever find yourself in need of advice on mental health or client competency, I suggest reaching out to Ashley.

To learn more, visit www.police.stpete.org/call

For more about our chapter, visit www.pacdlfl.org

Finally, on August 19, 2021, we were honored to welcome St. Petersburg Police Department's Assistant Chief **Antonio Gilliam** and the Department's Special Projects Manager, **Megan McGee**. As you may recall, months after the killing of George Floyd and the world-wide outcry, the department announced it was going to create a program to have mental health counselors and social workers respond to non-violent, non-criminal calls. That program finally got underway in February of this year, entitled CALL-Community Assistance and Life Liaison. It is a division within the police department but operated by Gulf Coast Jewish Family and Community Services. And while naysayers told them it would never work and the case workers would just get attacked, they have had zero such incidents in the 3,000 calls answered. As of August 1, CALL was responding to 93% of contacts independently. Officers even reach out to CALL when they sense their presence will be more suited for a given call. Later that afternoon on the 19th, our guests presented to the St. Petersburg City Council to get funded for two more years. After their presentation and shared success, they were unanimously approved for the program to continue, a slight increase in the budget for a new position, a cost-of-living raise, and some new equipment.

While St. Petersburg is just one of eleven agencies covering Pinellas County, it is good to know that a program like this in the second largest agency and largest city is off to a great start. The members were certainly pleased with the questions answered and impressed by the program's success.

DAVID CONSTANTINE MORAN is a Board Certified Specialist in Criminal Trial Law and an attorney in Clearwater at the Sixth Circuit's Public Defenders Office. He is currently the Vice-President of PACDL and one of the Chapter Representatives/Board Members for FACDL.

Cognitive Bias in the Jury Selection Process

by
Tamara
Meister, JD, BCS

Ask any experienced trial attorney, and they will tell you: jury selection is the most critical part of any jury trial. Jury selection is the attorneys only opportunity to question potential jurors and glean any overt or covert biases that will affect the jurors' ability to be fair and impartial. If a biased juror makes it into the deliberation room, the evidence will not matter. The defendant will have never had a chance, and there will not be a fair trial. Without a meaningful jury selection, the system fails. Innocent people will be sent to prison, and a sacred constitutional right will be violated. Jury selection is that important. Understanding the human psychology of potential jurors' cognitive bias is critical to a successful jury selection.

"Voir dire," as judges and lawyers colloquially refer to jury selection, means to speak the truth. The whole aim of the process of jury selection is to reveal potential juror bias. However, asking a juror about their cognitive bias presents an oxymoronic conundrum. Cognitive bias is an inherently unconscious and already well-established preconception or belief. How can we expect jurors to "speak the truth" about an ingrained bias of which they are not consciously aware? Moreover, before we can conquer individual juror cognitive bias, we must first examine the cognitive bias obstacles that overlay the process of jury selection. This article will discuss three cognitive bias obstacles in the jury selection process: the overconfidence effect, the social conformity effect, and the authority bias effect.

THE OVERCONFIDENCE EFFECT

The overconfidence effect occurs when people over-assess their actual ability to perform difficult tasks. Here is a typical courtroom example: jurors are ushered into the courtroom to find their seats, the judge makes introductions and reads the charges against the accused, and then begins to instruct the potential jurors as to the general rules of law. The defendant is innocent until proven guilty, the defendant does not have to prove anything or testify, not testifying cannot be held against the defendant, law enforcement testimony is not to be given any greater weight than any other witness, the burden of proof rests entirely upon the State, and guilt must be proven beyond a reasonable doubt. The judge then inquires. "Do you all understand?" The judge gets a unanimous "yes." The judge is satisfied. "Do you all agree to follow the law and be fair and impartial in this case?" Another unanimous "yes" resounds across the room as all the jurors adamantly proclaim to understand the entire criminal jury trial process, pledge to follow the law, and

to be fair and impartial.

At this point, the judge is satisfied and eager to proceed to trial, but should we be? Every juror said they understood and would be fair. So, they will be fair, right? Here is the problem. One's subjective assessment of their abilities generally exceeds their actual achieved success rates. This phenomenon has been well-documented and is referred to as the overconfidence effect in the study of human psychology (for a comprehensive review, see Lichtenstein et al., 1982; as cited by Dunning et al., 1990). Further, research shows that the overconfidence effect becomes exacerbated by people's inability to evaluate their own reasoning skills (Kruger et al., 1999). Studies have shown that the least insightful and least reasonable people may be the most over-confident regarding their abilities (Kruger et al., 1999).

Therefore, the least competent juror may be the most confident in his or her abilities, while the juror who is more cautious about their abilities might be the more qualified or "fair" juror. However, in a jury trial, any equivocation as to fairness will most often get a juror struck from the panel. In this circumstance, the attorney will need to take a deeper, more nuanced look into cognitive bias and how the overconfidence effect plays into the jurors' responses. The attorney will also need to consider the effect of the group dynamic of the questioning, which presents the next obstacle in the jury selection process.

THE SOCIAL CONFORMITY EFFECT

When the jurors are questioned and answer in a group together, their answers will inherently be limited and possible altered by the social conformity effect. The social conformity effect has been well-researched and documented by science (Asch et al., 1956, 1961), but it is something we have all observed or experienced. People are generally terrified of expressing an opinion against a group of people in an open forum. Humans will generally go along with the group over disagreeing with that group, and, accordingly, they will modify their behavior or answers to conform to that group (Asch et al., 1961). This inclination towards conformity hinders an individuals' ability to form and express his or her own opinions (Asch et al., 1956; see also Honeyman, 2021). Social conformity bias clearly plays out in the example above and in every jury selection performed with a group questioning dynamic.

However, the social conformity effect must be understood and overcome for a successful jury selection in all trials. The easiest way to avoid social conformity bias in jury selection is not to limit the individual questioning of the jurors. Research has shown that restricting the questioning of individual jurors could have chilling results (Hans et al., 2003). An intriguing study done by a federal judge showed how when silent or hesitant jurors were questioned away from the group, their answers became much more revealing. Often, these jurors exposed overt bias or other issues resulting in them being removed for cause (Mize, 1999; cited by Hans et al., 2003). Reasonably, if these jurors hadn't been questioned outside of the group, they may have ended up on the jury, with devastating results.

Therefore, it is clear that taking the time to thoroughly question the potential jurors and allowing them to answer questions outside of the group removes potential implicit and explicit bias from the jury panel. However, good luck convincing a judge, with their own cognitive bias who already thinks they have qualified a "fair" jury panel and wants to get a jury selected before lunch, to question forty or more jurors individually. After all, the judge is ultimately the one in charge at trial, which takes us to the next obstacle in jury selection.

AUTHORITY BIAS

Consider this typical courtroom scenario. The prosecutor asks the jurors about their friends and family in law enforcement. Juror one explains that their father, uncle, and brother are in law enforcement. When questioned whether this will affect their ability to be fair and impartial, juror one answers, "well, you know, I was raised to respect police officers and believe they tell the truth, but I know they are just regular people. I back the blue, you know, with my family, we don't talk about their work or anything, so I am pretty sure I can be fair." Later, the defense attorney moves to remove juror one due to bias favoring law enforcement. The judge decides to call the juror back into the room to ask more questions. The judge asks, "juror one, you remember how I instructed you about police testimony, it must be considered the same way as any other testimony. Now that is the law in this case. Can you set aside your feelings about your family in law enforcement and follow the law in this case and be fair and impartial?" Juror one responds emphatically, "Absolutely, yes, your honor. I can be fair. I will follow the law." The judge denies the attorney's request for removal, and the juror remains on the panel.

Clearly, this juror is displaying an implicit bias for authority on two levels, both for law enforcement and judicial power. However, the juror explicitly agrees that they will follow the law and be fair. Now, the defense attorney will have to exercise a peremptory strike, exhaust all peremptory strikes, and object to the jury in order to be able to strike this juror and preserve the issue on the record for appeal. Studies have shown the pervasiveness of implicit bias amongst jurors and judges alike; these studies have proven that judge-dominated questioning reduces the honesty and meaningfulness of the jurors' responses (Bennet, 2010). However, judges continue to infuse authority bias into potential jurors by instructing and questioning the jury panel ahead of the attorneys. By that time, the jurors know all the "correct" answers and are ready to parrot the judge and other jurors. Perhaps, by allowing the attorneys to question the

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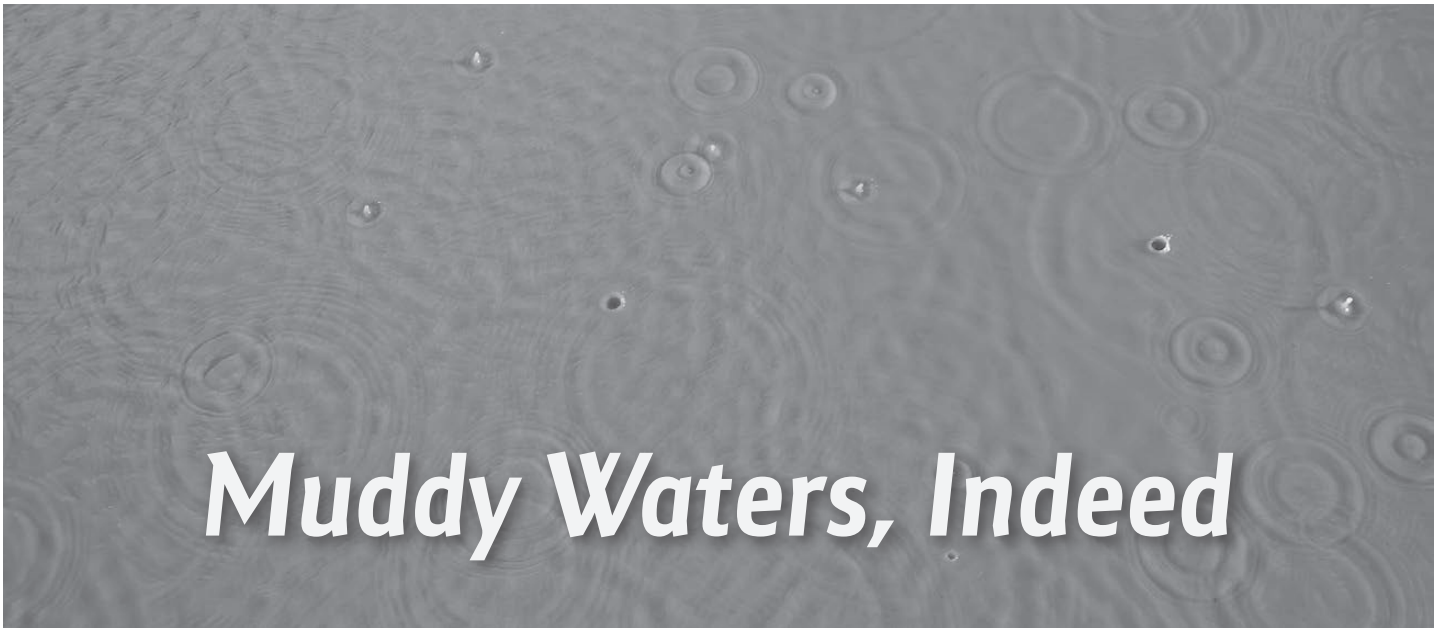

Muddy Waters, Indeed

by
Michael
Kessler

Every now and then, even a seasoned (and well-scotched) Freedom Fighter and FACDL member gets to play a new game. This happened recently to your humble correspondent. The facts of what follows are mostly true. Only the names have been changed, to protect the innocent and amuse the writer.

One day in January, McKinley Morganfield wandered off. He was 60 years old, and had been sampling various substances, some of which were legal, from time to time for much of his adult life. But he wandered off, and his mom became worried.

After a few days of silence, McKinley's Mom called the police and reported him missing. In a heroic demonstration of priorities, the newly-elected Sheriff assigned the case to a deputy five days later.

The deputy looked in the places one might have expected to find McKinley, and he found what some might call clues. Several people remembered seeing McKinley with a woman named Jamesetta. Both of them were overserved at a neighborhood gathering and were asked to leave. They left in Jamesetta's silver BMW, according to the partygoers.

The intrepid deputy located video confirmation at a gas station nearby. McKinley and Jamesetta were seen gassing up a BMW the same day.

One thing led to another, as it so often does, and a week or so later, the deputy located Jamesetta doing yard work not far from her gold BMW.

The deputy and his partner insisted that Jamesetta give them permission to look in the trunk, and lo and behold, there was McKinley, or what used to be McKinley.

While he was most certainly deceased, the deputies found no obvious injuries or evidence of violence, so they did not charge Jamesetta with homicide. Instead, since McKinley was rather well decomposed, they instead charged her with abuse of a dead body and requested the medical examiner to perform an autopsy.

Anticipating proof of a violent death that would support a murder charge, the State Attorney assigned the case to the Major Crimes Unit. After the autopsy revealed no such evidence, the case was reassigned to the Not-So-Major Crimes Unit, where the prosecutor filed an Information charging a violation of Florida Statute 872.06, specifically alleging that Jamesetta "did mutilate, commit a sexual assault upon, or otherwise grossly abuse a dead body."

Eventually, the medical examiner graced us with her presence for a deposition. The questions became very precise.

Based upon what you observed before, during and after the autopsy, and taking into account your education, training and experience, can you tell us to a reasonable degree of scientific certainty whether the body entered the trunk of the BMW before or after death? She said "No."

Based upon what you observed before, during and after the autopsy, and taking into account your education, training and experience, can you tell us to a reasonable degree of scientific certainty whether this corpse was mutilated after death? She said "No."

Based upon what you observed before, during and after the autopsy, and taking into account your education, training and experience, can you tell us to a reasonable degree of scientific certainty whether this corpse was sexually assaulted after death? She said "No."

Based upon what you observed before, during and after the autopsy, and taking into account your education, training and experience, can you tell us to a reasonable degree of scientific certainty whether this corpse was abused after death? She said "It depends what you mean by abuse."

Based upon what you observed before, during and after the autopsy, and taking into account your education, training and experience, can you tell us to a reasonable degree of scientific certainty whether this

corpse suffered any injury after death caused by the affirmative act or acts of another person? She said "No."

For reasons best known only unto themselves, when they enacted this law, Florida's band of crack legislators exercised their discretion by choosing not to define certain terms. Among those left undefined was "otherwise grossly abused."

"Abuse" is defined in the child abuse statutes, as are "aggravated abuse" and "neglect" in Chapter 827 and in the abuse of the elderly statutes in Chapter 825.

As far as your faithful correspondent can determine, it is distinctly possible that Jamesetta may have driven her gold or silver BMW around with McKinley Morganfield decomposing in the trunk. There appears to be no evidence that she put him in the trunk, before or after he expired. There appears to be no evidence that she even knows when or how he entered the trunk, before or after he expired. There appears to be no evidence that she touched his remains, either inside or outside the trunk.

At press time, this case remains set for trial. The Defense is ready. This, then, is a line of country, or perhaps a body of water, that your friendly neighborhood Freedom Fighter has not traversed before.

Muddy Waters, indeed.

Stay tuned for the exciting conclusion in the next edition of this fine magazine! Same bat time. Same bat channel.

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COGNITIVE BIAS • from page 37

jurors first and limiting the judge from asking leading follow-up questions, the authority bias effect could be limited.

CONCLUSION

Cognitive bias overlays the current jury selection process, hindering a successful or meaningful jury selection. However, we can implement simple solutions by recognizing and understanding the human psychology behind these cognitive biases. Attorneys can overcome the overconfidence effect by being astute to any varying confidence levels displayed by jurors and understanding what confidence really means about their actual abilities. Attorneys can look into the deeper meaning of the jurors' responses when they express too much or too little confidence. Attorneys can push for more open and honest responses from jurors by requesting individual voir dire. If the attorneys focus on just the more reticent jurors for individual voir dire, perhaps, the courts will be more reasonable with time. Finally, as uncomfortable as it may be, attorneys have to object to the judge's leading questioning to avoid authority bias from saturating the jury panel. If the courts and attorneys can make these simple adjustments, cognitive bias will be reduced, and a better environment for jurors to "speak the truth" will be created. Thereby, a more meaningful and successful voir dire will be accomplished.

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Necessity Defenses in Weapon-Possession Cases

by
Richard
Sanders

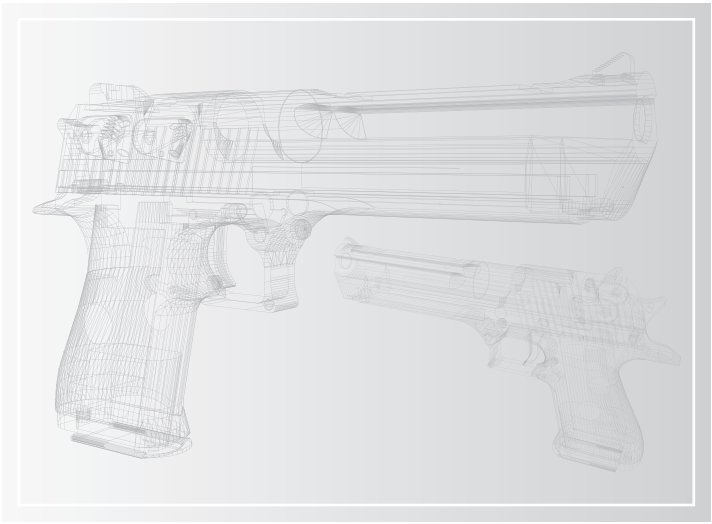
I. INTRODUCTION AND SUMMARY

Several criminal offenses are defined primarily in terms of the defendant's ("D") possession of a weapon of some type. Some weapons cannot be possessed by any member of the general public. Other weapons can be possessed by many but not by some groups (felons, minors). Some offenses are limited to certain locations (schools, jails). The common thread here is that weapon-possession is banned to prevent D from using the weapon to harm another.

But the weapon-possession offense itself will not necessarily require proof that D intended to, or did, use the weapon to cause harm; the crime is proven simply by the possession itself. In this regard, possession-based offenses are analogous to attempt offenses because the possession itself isn't what causes the harm that justifies the prohibition. Rather, possession is seen as an innocent-in-itself preliminary step — akin to the "overt act" in attempt offenses[1] — that might be part of a larger action that does cause a harm that society has an interest in banning.[2]

In light of this, courts have long recognized that a presumptively illegal weapon-possession may be legal in some circumstances, even though the statute doesn't expressly include a relevant exception. There are two possible defenses, which I will call justification-necessity and innocent-necessity. The difference between the two is easily illustrated: Felon-D takes a gun away from X because either 1) X is threatening to illegally shoot D or another; or 2) X is a child who cannot properly handle a gun and might accidentally fire it.

As will be seen, the basic issue in both defenses concerns D's motive for possessing the weapon. Although motive is usually not an element of a weapon-possession offense, if D's motive for taking possession is, in some sense, innocent, then the possession may be lawful. Innocent-possession means D took possession, not for the purpose of illegally using the weapon for harm, but for a non-harmful purpose, perhaps even in aid of a larger social good (e.g., disarming an aggressor; preventing a suicide; keeping weapons from kids).[3] In such cases, D's possession is said not to be the type of possession the legislature wished to ban even though it didn't expressly say so.



While courts often cite these two defenses in deciding issues of evidence-sufficiency and jury-instructions, some courts also cite a common rule of statutory construction: Even if the express language of a law is plain, "a sterile literal interpretation should not be adhered to when it would lead to absurd results."[4] As will be seen, this absurd-result rule meshes nicely with the logic undergirding our two necessity defenses: It would be absurd to convict D of an innocently motivated weapon-possession because that would not promote the underlying purpose of the law (and may also outlaw socially beneficial acts that we wish to encourage).

Neither the United States Supreme Court nor the Florida Supreme Court have addressed these precise issues. As discussed in Section II, lower courts "overwhelmingly" recognize the justification-necessity defense;[5] this includes all Florida district courts.[6] As discussed in Section III, no Florida court has expressly addressed the innocent-necessity defense in a weapon-possession case (although it has been recognized in a drug-possession case) and courts in other jurisdictions are split on the issue. In Section IV, I conclude that both necessity defenses should be recognized in Florida and, if they are not expressly included in a weapon-possession statute, courts must read them in in appropriate cases.

II. THE JUSTIFICATION-NECESSITY DEFENSE

There is inherent tension between a law that outlaws weapon-possession and the possibility that D might legitimately need that weapon to defend self or others.[7] Although courts often frame this issue in terms of the common law defenses of self-defense or necessity, "the distinctions between the[se] defenses

[are] immaterial [in this context] and the modern trend is to lump the[m] together under the generic rubric of 'justification.'"[8]

A leading federal case laid out the principles generally accepted with this defense. The court first noted that, although the federal felon-in-possession statute had "no express exemption for self-defense [or] other emergency," Congress "enact[ed the statute] against a background of Anglo-Saxon common law," which includes "the doctrine of self-defense."[9] And "Congress's failure to provide specifically for a common-law defense [does not] preclude [that] defense" because "statutes rarely enumerate [their applicable] defenses."[10] "The right to defend oneself from a deadly attack is fundamental," the court concluded, and Congress did not "intend[ ] to make ex-felons helpless targets for assassins."[11]

This logic is unassailable. Indeed, if the right to defend oneself is fundamental, then this defense is required "because of constitutional principles,"[12] i.e., one's due process right to life would be violated if the defense is not allowed. As another federal court said, a weapon-possession law "might not pass constitutional muster were it not subject to a justification defense" because "[t]he Second Amendment embodies the right to defend [self and] home against physical attack."[13]

There are differences between this justification-necessity defense and the defense that applies when D can lawfully possess the weapon, which regard the timing and manner of D's obtaining the weapon before use, and what D did with it after use. Courts tend to agree this defense has the following elements:

- [D] must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger;
- [D] must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct;
- [D] must not have any reasonable, legal alternative to possessing the [weapon];
- the [weapon] must be made available to [D] without preconceived design[;] and
- [D] must give up possession of the [weapon] as soon as necessity or apparent necessity ends.[14]

In sum, this defense is essentially universally recognized, and perhaps even constitutionally required, even without statutory language. The defense is based on D's motive for possessing the weapon. If felon-D grabs a gun and points it at X, the possession is lawful (assuming the other elements of the defense are met) if D grabbed the gun, not to illegally harm X, but to prevent X from illegally harming D or another. And D can possess the gun only as long as that necessity exists.

But what if the requirement that D "give up [the weapon] as soon as the necessity ends"[15] creates a new danger or necessity, e.g., after X flees, D immediately drops the gun in a schoolyard where a child might find it? This problem is addressed with the innocent-necessity defense.

III. THE INNOCENT-NECESSITY DEFENSE

In weapon-near-school-type cases, some courts recognize what they often call a necessity defense, which has four elements:

- [D] was "faced with a choice of evils and chose the lesser evil";
- [D] "acted to prevent imminent harm";
- [D] "reasonably anticipated a causal relation between his conduct and the harm to be avoided"; and
- there were "no other legal alternatives to violating the law."[16]

The justification defense discussed in Section II is a lesser-included of this necessity defense. Any facts that prove justification also prove necessity; but necessity includes more than justification. Justification applies in cases with threats of imminent intentional violence by another.[17] Necessity includes, but is not limited to, such cases; its concept of relative evils includes more than just threats of intentional violence (e.g., a potential suicide; a child playing with a gun).

As will be seen, some courts call this a necessity defense and others call it an innocent-possession defense.[18] I call it innocent-necessity to distinguish this defense from justification-necessity. With both, there must be an extant necessity that authorized the weapon-possession; the difference between the two concerns the nature of that necessity.

The cases are split on the issue of the validity of this innocent-necessity defense.

Over a century ago, New York's supreme court said weapon-possession laws "should not be construed to [include] a possession [that] result[s] temporarily and incidentally from the performance of some lawful act, as disarming a wrongful possessor."[19] This statement is dictum and the court did not explain it any further. Later New York cases said the defense includes such facts as: 1) D "found the weapon in a public toilet" and, "after keeping an appointment with his wife," took it to police 20 minutes later;[20] 2) D "was intoxicated when he came into possession and did not remember how it found its way into his waistband";[21] 3) a friend asked D "to hold [the friend's gun] while he went to the men's room [and, i]nstinctively, and without realizing the possible consequences, [D] took the gun as a favor to [him and] held [it] for the five minutes until his arrest";[22] 4) D found a weapon on a subway while working as a conductor and put is in his pocket, intending to turn it in to his boss at shift's end;[23] and 5) D took the weapon "from another person who had used it against him in a fight [and] he intended to turn it over to his father [and] seek his father's advice on how it could be disposed of legally."[24]

This New York defense has two elements: 1) D had "a legal excuse for having the weapon," and 2) it was not "used in a dangerous manner."[25] The

defense is allowed because, "as a matter of policy the conduct is not deemed criminal" because the "innocent nature of the possession negates both the criminal act of possession and the intent with which the act is undertaken when intent is an element of the crime."[26] Even if "intent is not [an element] of the crime[,] where there is evidence [D's] possession [may be] innocent, the jury should be instructed [on that]."[27]

Other courts allow a similar defense. District of Columbia courts recognize a "defense of innocent or momentary possession" that has two elements: 1) "[D had no] criminal purpose"; and 2) the possession "stemm[ed] from an affirmative effort to aid law enforcement."[28] Although "ordinarily the purpose of the [weapon-possession] is irrelevant,"[29] these courts say this defense is "consistent with the well-established principle that…a legally valid excuse or justification will negate liability for…an act normally held criminal."[30] California also allows a "momentary possession" defense that has three elements: 1) the possession is "momentary" and not "based on [a] right to exercise control over" the weapon; 2) the weapon is "possessed in furtherance of its abandonment or destruction" or to "[prevent or] terminat[e] the unlawful possession of it by another"; and 3) "control is not exercised [to] prevent[] its imminent seizure by [police]."[31]

While these cases refer to possessions that are temporary or momentary, it is not the brevity of the possession that matters; it is its innocent nature, as determined by D's motive when taking possession (i.e., D didn't take possession to cause illegal harm). Even if there is "no statutory requirement that [D] intend to use the weapon for an unlawful purpose" — which means D's "unlawful purpose is irrelevant to the [State's] *prima facie* case" — the "absence of a criminal purpose, *coupled* with an effort to assist law enforcement, may serve as a defense."[32]

There is a split in the federal cases on point. The defense is expressly recognized only in *United States v. Mason*, 233 F.3d 619 (D.C.Cir. 2000). While working his delivery job, Mason found a gun hidden in a bag near a school and kept it, intending to give it to police at his next stop. The court held he was erroneously denied an instruction on an "innocent possession" defense, which has two elements: "(1) the firearm was attained innocently and held *with no illicit purpose* and (2) possession [was] transitory — i.e., [D] took adequate measures to [abandon it] as promptly as reasonably possible."[33] This court said such "possession[s are] excused and justified as stemming from an affirmative effort to aid [police]," which is consistent with the law's "goal of keeping guns [from] felons" because "it is the retention of [a gun], rather than the brief possession for disposal[, that the law] criminalize[s]."[34] The court also said it "cannot imagine" that there isn't such a defense to this charge because, although

> no criminal intent is required to [prove the offense,] to completely reject the possibility of [this] defense is to say that [D] always will be guilty once he knowingly possesses a weapon, *without regard to how or why he came into possession* or for how long possession was retained. [I]f Mason did indeed innocently pick up a bag containing a gun (not knowing what was in the bag), he would be guilty the moment he was seen holding the bag knowing of its contents, even if he had every intention of relinquishing possession immediately. There is nothing to indicate that Congress intended such a *harsh and absurd result*.…[35]

Note the court's focus on the goal of the law, the *how or why D came into possession* (with its sub-issue of illicit purpose), and the possibility of absurd results. The implication is that D's motive for the possession is relevant, at least on these facts; and a failure to recognize this defense may lead to the absurd result of a law that outlaws innocent acts (i.e., possessions not motivated by an illicit purpose).

Note also the recognition of a concept I will call disposal-possession. In this context, possession is often defined as having two elements: D 1) knew of the item's existence and 2) intended to exercise control over it.[36] With this definition, it is well-recognized that "the briefest moment of possession may be enough for a conviction."[37] The problem raised by disposal-possession is that one can unexpectedly find oneself holding an item that one cannot lawfully possess and, in order to get rid of it, one must exercise control over it to dispose of it. In other words, one must fully take possession in order to abandon possession.

This problem can arise in several ways. The weapon can be unexpectedly and unwantedly tossed to D or dropped in D's lap;[38] or it suddenly and unexpectedly appears as D is engaged in acts like moving furniture or driving (e.g., gun slides from under car seat when D hits brakes).[39] The problem also arises when, as in *Mason*, the item is hidden in an opaque container that must be opened to reveal its contents. Thus, Mason finds a bag, looks inside and, after perhaps a moment or two of identification-inspection, he realizes he's now holding a gun. He must then *do something* with it in order not to possess it. But, in doing something (even if it's just dropping the bag with the gun inside), he is exercising control over — possessing — the gun. As the court noted, Mason "would be guilty the moment he was seen holding the bag knowing of its contents, even if he [intended to, and did,] relinquish[] possession immediately."[40] The Model Penal Code expressly recognizes this issue, defining possession in part as "[D] was aware of his control [of the item] for a sufficient period to have been able to terminate his possession," a definition based on the premise that "a law making possession a crime implies a duty to relinquish possession as soon as one is aware of it."[41]

In sum, even if one never intended to possess or control the item, and one first came to do that without knowing what the item was, once one realizes that one does control it, one (in the law's eyes) now possesses it, even if one immediately disposes of it.

We will return to this issue of disposal-possession in Section IV. For now, returning to the federal cases, in *United States v. Vereen*, 920 F.3d 1300, 1309 (11th Cir. 2019) the court said the "overwhelming majority of [other federal] circuits [reject *Mason*'s] theory of 'temporary innocent possession.'" Summarizing those cases, *Vereen* gave two reasons for rejecting the logic of *Maso*n. First, the "plain language" of the statute does not contain an "'innocent' or 'transitory' exception."[42] And second, the statute only requires proof of knowing (as opposed to willful or intentional) possession; and a knowing mental state "merely requires proof of knowledge of the facts that constitute the offense," rather than proof that D knew "his conduct was unlawful [or] acted with a bad purpose.'"[43] In "prohibiting only knowing possession," this court concluded, the law "does not invite inquiry into the reason" D possessed the gun; whether D "possessed [it] for a good or innocent purpose [is] irrelevant."[44]

There are problems with this logic. The two reasons are intertwined and are based on the fact that the defense is, not only not found in the plain language of the statute, it seems to conflict with that language, which imposes only a knowing mental state for the possession element. But this logic both 1) also applies to the justification-necessity defense[45] and 2) doesn't address the absurd-result problem. The statute contains neither a justification-necessity defense nor an innocent-necessity defense; why recognize one but not the other? And, regardless of the exact statutory language, if failing to recognize the innocent-necessity defense leads to an absurd result, then it must be recognized.

Thus, the reasons given in *Vereen* for rejecting this defense are unconvincing. Perhaps sensing this, some federal courts that reject this defense also hedge a bit on the rigidity of that conclusion. The Second Circuit "imagine[d]" cases in which not allowing the defense "would be at least highly problematic," citing as an example D's picking up a gun unknowingly dropped by an officer (who is eating at a lunch counter) and returning it to the officer.[46] The Third Circuit conceded "there *might* be an innocent possession defense in certain unusual situations," such as a felon who "find[s] a weapon and immediately deliver[s] it to [police]."[47] And the First Circuit noted the "underlying problem of allegedly innocent possession [arises] in a variety of forms" and, if D's conduct is "clearly not a crime, we would be very uncomfortable letting matters stand" (as it did in that case by affirming the conviction).[48] "No legislature can draft a generally framed statute that anticipates every untoward application and plausible exception," this court said, and there are "circumstances that arguably come within the letter of the law but in which conviction would be unjust" (e.g., "a schoolboy came home with a loaded gun and his ex-felon father took it from him…and called the police").[49]

This latter court said it would be "uncomfortable" affirming a conviction if D's conduct is "clearly not a crime."[50] One would hope so. But the issue of whether D's conduct is indeed a crime turns on whether the court, interpreting the relevant statute, finds it to be so. Seems to be a bit of circular reasoning to say "we reject this defense but we're uncomfortable with affirming the conviction because D's conduct is clearly not a crime but there is no defense we can apply to avoid that troubling result."

The Utah Supreme Court expressed similar concerns in a similar case. Holding D was not entitled to an "innocent possession" instruction because the statute created no such defense, the court nonetheless "conceive[d] of factual scenarios where the lack of [that] defense might lead to an absurd result[, e.g.,] if a felon dispossessed a toddler of a loaded gun and immediately placed the gun out of harm's way."[51] The court also noted the "interesting interaction between the absurd results doctrine and the common law defense of necessity": "[M]any of the instances in which a court concluding that a conviction…would be absurd would be those in which a jury applying the common law defense might have found [D's] actions were necessary."[52]

Although this court "offer[ed] no opinion" on this latter issue (because it wasn't preserved), it did recognize that "common law necessity could, in an appropriate case, inform an absurd results analysis."53 The court said there are "circumstances involving [weapon-possession] that the Legislature would not have intended to criminalize" and, "when those cases arise, they may be addressed through the absurd results doctrine."[54]

As with the three federal cases just noted, this court seems to say "we will not recognize this defense except in unusual cases that require us to do so." It is not clear how this differs from saying "we recognize the defense, although it will arise only in unusual cases." In any event, these courts indicate it would be absurd to reject the defense if the facts required it because that would outlaw innocent, even socially beneficial, acts. Similarly, the Model Penal Code, which (as noted above) defines possession to include disposal-possession, creates a defense if D "possessed [the weapon] briefly in consequence of having found it…or under circumstances similarly negativing any purpose or likelihood that the weapon would be used unlawfully."[55]

Although there are no reported Florida cases directly on point, a similar issue arose in a drug-possession case. In *Stanton v. State*, 746 So. 2d 1229 (Fla. 3d DCA 1999), a drug dealer gave Stanton a free-sample cocaine rock and he immediately took it to an officer some distance away and offered to help arrest the dealer. The court held this evidence was insufficient to support the conviction because "no crime is committed where [D] takes temporary control of contraband in order to make a legal disposition of it by throwing it away, destroying it, or giving it to police."[56] Florida later adopted a standard instruction for a defense of "temporary possession of [drugs] for legal disposal," with the following elements:

- D "acquired [drugs] without unlawful intent";
- the possession "was brief and [D]

sought to dispose of the[m] without delay"; and

- the possession "was solely for the purpose of destroy[ing] or throw[ing] away the [drugs] or to turn[ing them in] to [police]."[57]

No reported Florida cases consider whether a similar defense applies in Florida weapon-possession cases.

IV. DISPOSAL-POSSESSION REDUX AND CONCLUSION

The justification-necessity defense seems to be universally recognized, perhaps even constitutionally required, and it is based on essentially airtight logic. Although the cases are split on the innocence-necessity defense, I believe the better reasoning is found in the cases recognizing this defense.

To a great degree, this innocent-necessity defense addresses the issue of disposal-possession, which can arise in several contexts. To analyze this issue, we can start by noting the factual differences and similarities in *Mason* and *Stanton*.

The crucial difference between the two cases concerns the manner of the initial taking of possession. Mason picked up a bag not knowing its contents and then discovered it contained something he couldn't lawfully possess. But when Stanton first took possession, he knew exactly what he was about to possess and that's what he intended to possess. In terms of the elements of possession, 1) Mason took control over the item before knowing what it was (and thus didn't intentionally and knowingly take initial control of the item itself), but 2) Stanton knew what the item was before he took control of it (and thus knowingly and intentionally took initial control of it).

There are logical reasons to distinguish these two scenarios for purposes of an innocent-necessity defense. Mason didn't knowingly and intentionally obtain initial possession and Stanton did. The apparent unfairness in convicting Mason is less obvious with Stanton. But, as the actual facts in both cases illustrate, the distinction between the cases is actually of little relevance.

To see why, start with the most obvious unfair scenario here, which we can call "pure" disposal possession. This would arise if, on seeing what was in the bag, Mason immediately dropped both bag and gun on the spot. Again, "the briefest moment of possession may be enough for a conviction"[58] and, as the Model Penal Code defines it, possession can be found if "[D] was aware of his control [of the item] for a sufficient period to have been able to terminate his possession."[59] Thus, as the Mason court recognized, Mason "would be guilty the moment he was seen holding the bag knowing of its contents, even if he inten[ded to, and did,] relinquish[ ] possession immediately."[60] In other words, having unknowingly obtained the initial control over the item, Mason must exercise even further control in order to abandon that possession (which in turn further proves the possession itself).[61]

To alleviate this problem, we must either redefine possession not to include such pure-disposal-possession facts or recognize a defense on such facts. Redefining possession is a cumbersome task and it could only be done by referring to D's motive for taking possession. It is easier, and more intellectually honest, to recognize a motive-based defense: D took possession, not for the purpose of using the item to cause the harm the law means to prevent, but to dispose of it entirely without causing that harm (and, perhaps, in a manner that promotes some larger social good).

As to the scope of that defense, it is clearly both unfair and absurd to convict in pure-disposal-possession cases. Indeed, to abandon possession in such cases, D must not only immediately drop the weapon but also move far enough away to relinquish any constructive control over it. If Mason dropped the gun but stood guard nearby as he called police and waited for them to come, he still constructively possesses it, given that he intends to control it (until police arrive) at least to the extent of preventing others from getting it.

But immediately dropping the weapon where it was found and leaving the scene creates a new danger (or, more precisely, revives the prior danger that was temporarily alleviated by D's picking up the weapon): That someone, perhaps a child, may find it and use it to hurt someone (including that child). Thus, while limiting the innocent-necessity defense solely to pure-disposal-possession cases will alleviate the unfairness to D, it doesn't deal with the more fundamental underlying problem: What about the unattended weapon laying there? Do we want the innocent-necessity defense to deal with this problem as well?

The answer must be yes. Almost all the courts cited in Section III agreed that there are at least some scenarios in which D can, lawfully, do more with the weapon than drop it on the spot and leave. But, regardless of how D first obtains possession, D certainly possesses the weapon if she carries it to the nearest trash can, school office or police station. Thus, in extending this defense beyond pure-disposal-possession cases, we go well beyond a mere amendment to the definition of possession; we go into the realm of the affirmative defense.

And when we get to this point, the factual distinction between *Mason* and *Stanton* becomes irrelevant. Even though Mason initially obtained possession unknowingly, if he retains control and takes what he now knows is a weapon some distance (and some length of time) away, he is now knowingly and intentionally possessing it. His actions are now the same as Stanton's, who took initial (and knowing) possession and intentionally continued it for some time as he relocated the item he knowingly possessed. There is no reason to distinguish the continued possessions of *Mason* and *Stanton*.

The question now becomes, do we wish to punish or encourage (or at least excuse) the types of behavior exhibited by Mason and Stanton? The *Stanton* facts raise the possibility of encouraging a certain vigilantism, e.g., felon-D goes out and obtains guns from fellow felons with the intent of turning guns and felons over to police (perhaps to alleviate D's own criminal problems by currying favor with authorities). It's not clear

that we wish to encourage such acts. But disapproving of *all* possessions in which D knowingly and intentionally takes initial possession would also be problematic. If felon-D sees a child with a gun; or finds a gun on school grounds; or sees a stranger about to shoot herself; do we wish to apply a rule that says D's taking possession of these guns is flatly illegal because D knew what the item was before taking possession? Or do we wish to encourage (or at least excuse) D's taking possession in such cases?

This is an issue for the legislature but, if it fails to address it, courts must ensure that weapon-possession laws are not applied in ways that would cause the absurd result of punishing innocent, even socially desirable, acts. The cases discussed above offer several different (albeit quite similar) approaches that can be used here. The standard Florida instruction designed for drug cases seems to be a good place to start.

[1] "[A]n attempt consists of a specific criminal intent to commit the crime and an overt act beyond preparation toward that end." *Adams v. Murphy*, 394 So. 2d 411, 413 (Fla. 1981).

[2] See *Shaw v. State*, 677 P.2d 259, 260 (Alaska Ct.App. 1984) (noting felon-in-possession statute "is analogous to an attempt statute except that it permits punishment before [D] has an opportunity to use the handgun for a criminal purpose"); Charles H. Whitehead and Ronald Stevens, "Constructive Possession in Narcotics Cases: To Have and Have Not," 59 *Va.L.R.* 751, 753 (1972) (noting possession-based offenses are "anomalous" because "[p]ossession…itself is not the law's real concern"; rather, possession is banned "because the government wants to preclude [the item's] use" and criminalizing possession "allows police to arrest [D] before [the item is used to cause harm]").

[3] With non-weapon-based possession offenses, it is well-recognized that a substantive due process violation occurs if, on its face, the law outlaws too many innocent possessions, i.e., possessions in which D didn't intend to use the item to cause the harm the law was designed to prevent. E.g., *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986); *Delmonico v. State*, 155 So. 2d 368 (Fla. 1963); *State v. Walker*, 444 So. 2d 1137 (Fla. 2d DCA 1984), opinion adopted, 461 So. 2d 108 (Fla. 1984).

[4] *Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006).

[5] *State v. Coleman*, 556 N.W.2d 701, 705 (Mich. 1996); see also *Marrero v. State*, 516 So. 2d 1052, 1055, n.2 (Fla. 3d DCA 1987) ("most courts"); *Commonwealth v. Lindsey*, 489 N.E.2d 666, 668 (Mass. 1986) ("numerous courts"); *People v. Dupree*, 788 N.W.2d 399, 406 (Mich. 2010) ("most other jurisdictions"); *State v. Mercer*, 838 S.E.2d 359, 362 (N.C. 2020) ("widely recognized"); see generally Sara Johnson, "Fact that Weapon was Acquired for Self-defense or to Prevent its Use Against Defendant as Defense in Prosecution for Violation of [Felon-in Possession] Statute," 39 *A.L.R.*4th 967 (1985).

[6] *State v. Chambers*, 890 So. 2d 456 (Fla. 2d DCA 2004); *Smith v. State*, 729 So. 2d 496 (Fla. 5th DCA 1999); *Valicenti v. State*, 559 So. 2d 431 (Fla. 4th DCA 1990); *Marrero*, 516 So. 2d at 1054-56; *Mungin v. State*, 458 So. 2d 293 (Fla. 1st DCA 1984).

[7] For a good general discussion of this issue and the approaches courts take to it, see William Meyerhofer, "Statutory Restrictions on Weapons Possession: Must the Right to Self-Defense Fall Victim?" 1996 *Ann. Surv. Am. L.* 219 (1996).

[8] *State v. Padilla*, 164 P.3d 765, 772 (Haw. Ct.App. 2007); see also *Marrero*, 516 So. 2d at 1054, n.3; *United States v. Barne*s, 895 F.3d 1194, 1204, n.4 (9th Cir. 2018).

[9] *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).

[10] *Id.*

[11] *Id*. Accord, e.g., *People v. King*, 582 P.2d 1000, 1006 (Cal. 1978).

[12] *Commonwealth v. Lindsey*, 489 N.E.2d 666, 669 (1986).

[13] *United States v. Gomez*, 92 F.3d 770, 774, n.7 (9th Cir. 1996); see also *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (noting the Second Amendment "codified a pre-existing right [that] 'shall not be infringed,'" and it "guarantee[s] the individual right to possess and carry weapons in case of confrontation").

[14] *Chambers*, 890 So. 2d at 457–58 (some brackets added), quoting *State v. Crawford*, 521 A.2d 1193, 1199 (Md. 1987) (collecting cases).

[15] *Chambers*, 890 So. 2d at 458.

[16] *Barnes*, 895 F.3d at 1204 (citation and footnote omitted).

[17] See *United States v. Kilgore*, 591 F.3d 890, 893 (7th Cir. 2010).

[18] Compare *United States v. Al-Rekabi*, 454 F.3d 1113, 1126 (10th Cir. 2006) (noting the "fleeting[, i.e., innocent] possession defense is redundant to the necessity defense" because both "require [D] to prove no reasonable legal alternative was available to him") with *United States v. Meade*, 110 F.3d 190, 202 and n. 26 (1st Cir. 1997) (seeming to distinguish necessity defense from "good purpose" defense, e.g., taking gun from suicidal friend).

[19] *People v. Persce*, 97 N.E. 877, 878 (N.Y. 1912).

[20] *People v. La Pella*, 4 N.E.2d 943, 943 (N.Y. 1936).

[21] *People v. Trucchio*, 47 A.D.2d 934, 934, 367 N.Y.S.2d 76, 77–78 (App.Div. 1975).

[22] *People v. Valentine*, 54 A.D.2d 568, 568, 387 N.Y.S.2d 25, 26 (App.Div. 1976).

[23] *People v. Quintana*, 260 A.D. 13, 14, 20 N.Y.S.2d 806, 807 (App.Div. 1940).

[24] *People v. Harmon*, 7 A.D.2d 159, 160–62, 180 N.Y.S.2d 939, 940 (App.Div. 1959)

[25] *People v. Williams*, 409 N.E.2d 1372, 1373 (N.Y. 1980).

[26] *People v. Almodovar*, 464 N.E.2d 463, 465 (N.Y. 1984).

[27] *Valentine*, 54 A.D.2d at 568, 387 N.Y.S.2d at 26; accord, Harmon, 7 A.D.2d at 160, 180 N.Y.S.2d at 941.

[28] *Hines v. United States*, 326 A.2d 247, 248 (D.C.Ct.App. 1974).

[29] *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C.Ct.App. 1980).

[30] *Hines*, 326 A.2d at 248.

[31] *People v. Hurtado*, 47 Cal. App. 4th 806, 811, 54 Cal. Rptr. 2d 853, 858 (Cal.Ct.App. 1996) (citations omitted); *People v. Zarate*, 2019 WL 4127299 (Cal.Ct.App. Aug. 30, 2019); see also *State v. Flaherty*, 400 A.2d 363, 367 (Me. 1979) (recognizing defense of "temporary control incidental to the lawful purpose of terminating possession" in weapon-possession cases).

[32] *Bieder v. United States*, 707 A.2d 781, 783 (D.C.Ct.App. 1998).

[33] 233 F.3d at 623 (emphasis added) (citations omitted).

[34] *Id*. at 623, 625 (citations omitted).

[35] *Id*. at 623 (citations omitted) (emphasis added).

[36] In re Standard Jury Instructions in Criminal Cases, Report 2017-03, 238 So. 3d 182, 188 (Fla. 2018).

[37] *United States v. Teemer*, 394 F.3d 59, 63 (1st Cir. 2005); see also *State v. Eckrot*h, 238 So. 2d 75 (Fla. 1970) (affirming drug-possession conviction based on D's taking puff from pipe being passed among several users).

[38] This factual scenario has occurred in cases involving both drugs and weapons. E.g., ***Turner v. State***, 749 S.W.2d 339 (Ark.Ct.App. 1988); *Ford v. State*, 69 So. 3d 391 (Fla. 2d DCA 2011); *Carrasco v. State*, 19 P.3d 202 (Kan.Ct.App. 2001); *State v. Houston*, 654 N.W.2d 727 (Minn. Ct.App. 2015).

[39] See *United States v. Barnes*, 895 F.3d 1194 (9th Cir. 2018); *Shaw v. State*, 1988 WL 1511376 (Alaska Ct.App. 1988); *State v. Runnels*, 456 P.2d 16 (Kan. 1969).

[40] *Mason*, 233 F.3d at 623.

[41] Model Penal Code, §2.01(4) and Editor's Notes; but cf. United States v. Garcia-Zarate, 419 F. Supp. 3d 1176, 1180 (N.D. Cal. 2020) (asserting "the knowing-possession element of [federal felon-in-possession] charges is not satisfied when a person discovers that he's holding a gun and responds by immediately discarding it"; court cited no authority for this proposition).

[42] *Id*. at 1307.

[43] *Id*. at 1307-08.

[44] *Id*. at 1308. The *Vereen* court also noted a third concern: The defense is "extremely difficult to administer" because only D "truly knows" what was in D's mind and courts should not make the prosecution "contest motive in every [case with] an uncorroborated assertion by [D] that he innocently came upon a firearm and was preparing to turn it over to the authorities when, alas, he was arrested." *Id*. But this concern is not compelling. Juries regularly determine issues of witness credibility, and of intent and motive; and courts regularly address such evidence-sufficiency issues; and neither is required to accept at face value the uncorroborated assertions of anyone. As another court noted in addressing this defense, D's "actions alone"

> rarely would suffice to demonstrate innocent intent, just as a declaration of such an intent alone generally would not suffice. Rather, the totality of the circumstances must indicate [D] had the requisite intent and was acting consistent therewith.

Logan v. United States, 402 A.2d 822, 827, n.8 (D.C.Ct.App. 1979).

SEE PAGE 62

DUTY TO COUNSEL

The Professional and Moral Duty to Respond to Police Abuse

by
Michael A.
Tewell

As lawyers, we have a duty to counsel, not only our clients, but our communities as well. This duty arises from our profession's assertion that community progress depends upon non-violent conflict resolution and that we lawyers are the one group, among all others, best suited to lead the community in that most difficult endeavor. I trust none among you disagree, for non-violent conflict resolution is the raison d'etre of the historical evolution of our honorable profession.

This "duty to counsel" extends beyond the ethical responsibilities we choose to follow as a profession in defending our clients outward into the communities from which our clients come to us for help in their legal struggles.

If a minority community suffered from a catastrophic natural disaster, I am confident that the FACDL would try to help them with free legal services and other aid. Police abuse of minorities in Florida is a far greater disaster than any natural catastrophe and we at FACDL have a duty to protect minorities as best we can.

Why?

Because minorities are the weakest among us. They are the most unable to protect themselves from police abuse. Minorities can least afford to pay for legal counsel to advise them on whether they even are a victim of police abuse, or whether they have any legal remedy to redress the wrong done to them. They truly are helpless.

Police abuse of minority communities is not limited to the shocking displays of police racism and neglect evidenced by the wanton murder of George Floyd. Many of us, myself included, have represented clients over the years who have reported less violent, but nonetheless wrongful police conduct, including unreasonable stops, illicit searches, wrongful detentions, beatings, and even the planting of contraband or weapons.

We cannot rely on police to police themselves. They, too, have a union, the Fraternal Order of Police. However, as any experienced defense lawyer knows, the FOP is obligated to defend even the "bad cops" — regardless of what they are accused of. After all, the sole purpose of the FOP is to represent and advocate on behalf of its membership — not the public.

As criminal defense lawyers, we know "bad cops" and we know that they are capable of great harm. We also know better than anyone that one does not have to die to be a victim of a "bad cop." These "bad cops" do exist and their disregard for the rule of law undermines minority faith in the justice system — civilization's only barrier between social order and chaos. It is easier to keep "bad cops" from entering law enforcement than it is to weed them out.

Cries to "defund the police" are counterproductive to social order but we cannot ignore them. These cries arise from decades of quiet suffering and should not be marginalized. We may disagree with the proposed solution as unrealistic, but we must never patronize the frustration that spawns it. Minority communities deserve an opportunity to see law enforcement — not as "the enemy" — but as a valued barrier against gangs, drugs and gun violence. In order to accomplish this end, we must act.

If we do not take action, quick action, the frustration that spawned these calls to defund police will become increasingly disenfranchised, chaotic and, ultimately, violent. We cannot save George Floyd, or the many others who have needlessly suffered due to police brutality, but we owe it to ourselves and our profession to do what we can to save others from a similar fate. Let us consider some of the more obvious ways we can help.

We can begin by creating an FACDL committee tasked to timely advise the membership on those federal, state and local laws which are needed; identify those laws which are inadequate, and to represent our concerns and proposals in the media and government. Let us review Florida's law enforcement qualification statute as an example.

Section 943.13 Fla. Stat., sets forth the minimum qualifications for an individual to be certified as a Florida law enforcement officer. The statute instructs FDLE to take fingerprints of all prospective applicants and to store them in a "statewide automated biometric identification system." These fingerprints are to be compared with all fingerprints taken from "arrest fingerprints" to determine whether a law enforcement officer has been subsequently arrested.

This law does not provide for distributing these fingerprints to a national database. Why? To my knowledge, no such national database of law enforcement officer fingerprints exists. Each state is left to police their own…police… as each state sees fit.

Further, while Florida law requires background checks of all police applicants, this requirement only deals with criminal offenses — not administra-

tive termination for cause. Therefore, there is no mechanism within current Florida law to require the FDLE to determine whether any applicant has previously been administratively terminated for cause due wrongful conduct or wrongful association with militia or white supremacy groups.

Subsection (7) requires that all applicants must "Have a good moral character as determined by a background investigation under procedures established by the commission." That is not good enough. That is not good enough by a long stretch; especially as both the FBI and the Dept. of Homeland Security have warned since 2008 that militia and white supremacy groups have been targeting law enforcement agencies as hiding places for their members.

The "minimum requirements" set forth in the statute fail to provide for regular recertifications — a standard requirement of most modern professions; psychological testing as a requirement for certification; and a standardized duty of care officers must follow in dealing with the public. These are only the most obvious flaws in the current law. If an old, retired lawyer like myself can discover these flaws in mere moments, imagine what a committee of much more qualified lawyers will discover.

I was shocked to discover that Florida law does not mandate psychological testing — ever. Police work is among the most stressful occupations outside of combat. Officers put their lives on the line daily. Good officers are an invaluable resource of community compassion, dedication, good character and courage.

However, undermining this good intent is a mindset within law enforcement compelling officers to push toward a certain set number of years before they retire. Everyone wants a pension and law officers are no different.

This push toward retirement regardless of the psychological risks involved, runs counter to the reality that no one is immune to the stresses of their profession — especially law enforcement. This is a toxic atmosphere and must be eliminated for the benefit of the officers, their families as well as their communities. Law officers should not be forced to ignore symptoms of PTSD and other mental illnesses within themselves or their peers out of a desperate need to earn a pension.

The present disregard for the psychological well-being of law enforcement officers approaches the medieval. There was a time, not so long ago, when pro-football players who "got their bell rung" were left in the game regardless of the risk of brain damage and the consequent harm such impairment would cause both the players and those who lived with them. This mindset was a direct result from the toxic-laden military-macho culture from which the NFL grew. It took a billion-dollar lawsuit against the NFL by the players' union to change that mindset.

Unfortunately, this toxic mindset still exists in law enforcement. There is no rational reason for police officers, showing increasing symptoms of stress-related emotional trauma to feel compelled to continue to work — and place themselves, their community and loved ones at risk.

We must advocate for a just and honorable alternative. One suggestion is to require officers to submit to annual psychological and physiological testing. Those who do not pass should be allowed to honorably retire with benefits commensurate with their years of service. Let them retire early, when necessary, and retire with dignity. Give them a real alternative to working the streets when they are no longer fit to do so.

Concussion research and the NFLPA's CTE lawsuit changed the mindset of an entire sport. America's poor and minorities have no such union backing them in court. But they do have US — the FACDL. We must be their advocates in the media to change perceptions and within government to change laws. As individual lawyers, we cannot ethically appear on behalf of one we do not represent professionally. But, as representatives of the FACDL, we can — and we should.

> "We cannot save George Floyd but we owe it to ourselves and our profession to do what we can to save others from a similar fate."

This article presents just a few examples of the problems existing within law enforcement and how we can help. As a professional organization, we lawyers have a duty — not only to educate the public about how the rule of law is relevant and helpful in their daily lives — but to step up when social needs demand the advice and counsel of reasoned minds. Let history record that the FACDL led the fight to defend the Constitutional rights and privileges to which minorities are entitled — not just in the courtroom — but on the streets where they live. Are you with me?

MICHAEL A. TEWELL has been a licensed lawyer in Florida since 1983. In addition to serving 25 years as an Assistant Public Defender, he served one year as an Assistant State Attorney. Before that, he practiced in civil litigation for private firms. He earned his law degree from The George Washington University Law School in Washington, D.C. in 1982 and a master's degree in International Relations with an emphasis on counter-terrorism from Kent State University in 1979. Before college, he worked as a disc jockey and newspaper reporter.

Re: Email Evidence

by
Harold
McFarland

Whether you consider email to be the boon or bane of the Internet, its ubiquitous presence has provided opportunities and pitfalls for many court cases. But did you know that an email's content can change even after it has been received? Did you know that in the email header it can be made to appear like it came from someone else and lead a forensic examiner to a wrong conclusion? This article examines these two situations and the importance of understanding them when email as evidence in court.

The hidden headers of an email provide a complete path of the route the email followed from source to destination. This is where a forensics expert often looks first. The most common procedure is to examine the email header, find the originating IP address, and then subpoena the Internet Service Provider to see what house or office or other location had that IP address at that date and time. Using that information, you can generally determine the location of the source of the email. You can't prove which computer in that office or home created it or who was at the keyboard but you can know the location.

There can be a few problems with this scenario though. One of the significant issues is that a malicious actor can use a program called telnet to connect directly to the email server. Once connected, they can create fake header lines for an email. This can cause the examiner to reach a wrong conclusion as to the source of the email because the complete header gives the appearance of coming from a different person. Surprisingly, many forensic examiners do not understand that an email header can include falsified information. They work under the assumption that the writer only has access to the normal parts of email composition and that is true, but by not using an email client everything can be falsified through the direct connection to the email server. So, when your client continues to state they did not send a particular email, despite the fact that it shows a clear path from their IP address, they still may be telling the truth.

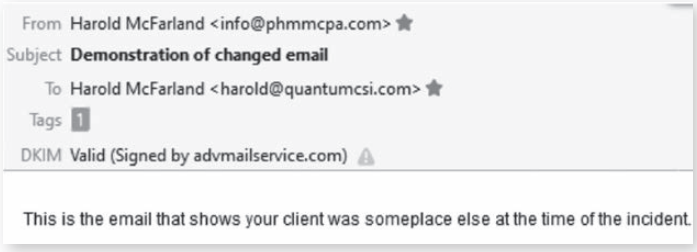
Perhaps the least reliable email is one that has been prepared with a technique that allows the sender to:

- Delete the body of the email after it is read. If you open it a second time it is completely blank.
- Delete the body content after a specified period of time.
- Create an email where the body of the email can be changed to something completely different.

This can lead to some really troubling situations. What if your client printed an email they received that exonerated them but the opposing attorney wants proof that it is more than just a typed document and takes the position that there never was an email. Then when you have your expert extract the email, it is totally blank? Or worse, what if it now incriminates your client? The next step is to check for a backup copy of the email, but that is not likely to exist in most criminal defense situations unless a business email system is involved. But, even if they do have a backup, the backup is now blank or now reads totally differently. The bottom line is no matter how you access this email it will show the changed email content. It does not matter whether it is in your email client, on the email cloud server, on a backup, or even copied into the file system; when it is opened it will show the changed content instead of the original.

Once the email is changed or deleted there is no way to determine what the original content was or what it said. It is forever lost. Even a copy of the email in a business email archiving system will show the new content. The only way to prevent the problem is to extract it from the email system and also print it, including all header information, to a pdf. There are other, more advanced, ways of extracting the email forensically and saving it in a manner where the examiner can testify about the content if it is done before any changes. Those techniques are beyond the scope of this article.

As an example, below is an email that I sent from one of my other email addresses to myself.



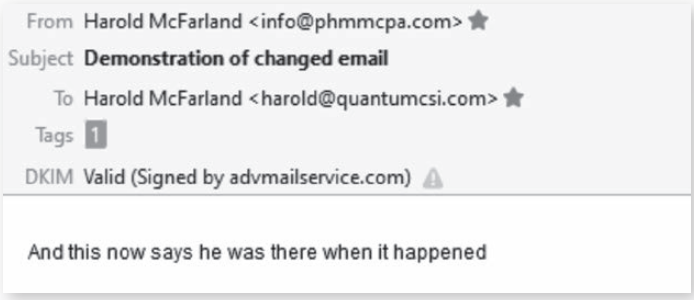
This is the initial email where I am going to change the email body. But before I do, I will make a copy of the DKIM Signature from the email header. The DKIM signature is used to detect if an email has changed between when it was sent and when it was received. The "bh" section is the hash value for the header and the "b" value is the hash value for the body of the email. If there is even a minute change then this DKIM signature will change significantly.

```
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/
relaxed; d=advmailservice.com;
h=from:subject:mime-version:content-type:reply-
to:to;
s=smtpapi; bh=hnulnmX6i2d4UXm4LHuOkgq3Pv8Swi1i2StM
ekdIiHY=;
b=u3YAq4cNoiIl4Ep8uTksmQAqfVteXpLF5hI8HF7KZnF6RaBF
1ZnOuhI/BQ7f+b5CRACH
F44ROd1BzC2KDn+FYy1RKtCjVSkKFxY3VO9A37tesaIfr9Vp2H
PxDg46lV6DGY4FI4hQfF
K3HExmsT6xyEA/weekTXK6qoE1XnWSoTQ=
```

And just to be sure we can detect even the most minute change, I used a second method of change detection by pulling the email out of the email program and calculating the MD5 and SHA1 hash values for it. These values should also change significantly if there is even a minute change in the email.

Filename	MD5	SHA1
Demonstration of cha...	6bccfb0718f3bf720f2027612b67f7b2	f68eade1ea981f28b1093365171fee4265c5355e

With these change detection methods in place, I change the body of the email remotely. It is changed from the same computer and account that sent the original email. Now on opening the same email in my email client it reads like this.



The email body has completely changed. So, lets go to the DKIM signature to see how the change in the email body has changed value of the DKIM signature.

```
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/
relaxed; d=advmailservice.com;
h=from:subject:mime-version:content-type:reply-
to:to;
s=smtpapi; bh=hnulnmX6i2d4UXm4LHuOkgq3Pv8Swi1i2StM
ekdIiHY=;
b=u3YAq4cNoiIl4Ep8uTksmQAqfVteXpLF5hI8HF7KZnF6RaBF
1ZnOuhI/BQ7f+b5CRACH
F44ROd1BzC2KDn+FYy1RKtCjVSkKFxY3VO9A37tesaIfr9Vp2H
PxDg46lV6DGY4FI4hQfF
K3HExmsT6xyEA/weekTXK6qoE1XnWSoTQ=
```

Well, it is exactly the same. That should mean that the message has not changed in any way. Yet, we can clearly see that the email body has in fact changed from "This is the email that shows your client was someplace else at the time of the incident" to "And this now says he was there when it happened". Part of the reason for this situation is because the DKIM hash calculates the hash for the email at the source and at the destination as it arrives. This is not a new arrival; the email was already in the inbox. This was not a new email that travelled through the internet from source to destination. I changed the body while in the recipient's inbox. Because of that the DKIM did not change and indicates that the email has not changed or been altered in any way from the original sender email.

Now for the final modification test, I extract the changed email from the email system and into the file system as a file. Then I run the MD5 and SHA1 hashes.

Filename	MD5	SHA1
Demonstration of cha...	6bccfb0718f3bf720f2027612b67f7b2	f68eade1ea981f28b1093365171fee4265c5355e

Both the MD5 and SHA1 hash values are the same as they were before. So, most forensic experts would testify that this changed email is the original and has not been changed or altered in any way.

If a client says that they cannot find that incriminating email but they are sure it was there and what it said, they may be right. Maybe it is gone, maybe a paragraph has been changed, maybe individual words have been changed or maybe it is a completely new email body. These are all possible.

The lesson here is if you have an email that is important to your case then it should be printed out, preferrable with the full headers. A correctly crafted email will allow the sender to change the body, but they cannot change what is printed on the paper. Or, have a forensic specialists export the emails so that they can testify as to the original content if it changes. Even then they need to not only export the emails but also print them to pdf or some other form that will not be changed when the email body changes.

All of the above items leave artifacts behind that can be used to testify about whether it could have been changed. But once it is changed, there is no going back to prove what the original email said. If it is not in print, or saved in a non-email format (such as printed to pdf) then there will be no proving the content of the original email.

HAROLD MCFARLAND is an expert in Computer, Internet and Electronic Communications Forensics. He has been admitted as an expert in State and Federal courts and has worked on numerous cases from local to international in nature. He was technical editor for several computer books and has been a guest speaker for many groups including the international conference for Certified Fraud Examiners, annual conference for the Florida Association of Private Investigators, and the annual conference for Florida Institute of Certified Public Accountants. His education includes coursework from Stanford University, MIT, and Johns Hopkins University.

It's All in the Numbers...

by
Robert S.
Reiff

When it comes to sentencing hearings, I am always concerned about the judge and the prosecutor only looking at the numbers, like those on the sentencing guidelines scoresheet. People are not numbers. While consistency and the removal of bias in sentencing is an important goal, we should never, ever reduce people to mere numbers. I was recently asked to become involved in a case after the individual had been convicted and sentenced. In that case, the numbers were what really told the story. A frightening story.

At the time of the tragic accident that led to the filing of the charges [of Leaving the Scene of an Accident with a death and DUI Manslaughter], the young man charged was a 28-year-old graduate school student who was enrolled at a local university.

The young man has always, adamantly, stated that he was not driving the car at the time of the accident. However, after a contentious trial which involved numerous actions of misconduct by the prosecutor [which, unfortunately, were not objected to by trial counsel and caused the appellate court to write that "the State made multiple inappropriate statements during closing argument…we affirm but write only to warn the State — and specifically the prosecuting attorney — that certain statements made during closing argument were improper"], the young man was convicted and immediately taken into custody.

Several months after trial a sentencing hearing took place before the trial judge. The now convicted young man had no prior criminal record or arrests and he had a clean driving record. The judge even commented at the hearing that he was "impressed" by what the young man had done with his life prior to this accident and the judge took time to state that "of all the people that appear in front of me to be sentenced, which is on a daily basis, thousands and thousands of people every year, there are not many that are college graduates; there are not many that are graduate school graduates or participating in graduate school. It's an unusual circumstance."

And yet, after noting how impressed he was with the young man (and his family), the Court followed the prosecutor's recommendation that it sentence him to 35 years in the Florida State Prison system. Currently, his scheduled release date is June 3, 2053.

This is where Al Barlow comes into the picture. In the English/Yiddish dictionary, there is the term that many people use: "Mensch." That term is used when the person being referred to is "a good person" or "a person of integrity and honor." Next to that word in the dictionary is the picture of **Al Barlow**.[1]

Al, a 35-year Florida Bar member and former criminal defense trial lawyer, is one of three business partners who created a web-based software service called The Equity in Sentencing Analysis System® (ESAS®), an approved member benefit of The Florida Bar and the Florida Association of Criminal Defense Lawyers.

With Al and his team's help, we were able to conduct a study based upon information provided by the Clerk of the Court to the Florida Department of Corrections. The information spanned from October 1, 1998 through June 30, 2020. The data was then compiled by ESAS® and formulated by Technologies For Justice, Inc.[2]

So what did the numbers say, you might ask? Well, from October 1, 1998 through June 30, 2020, judges in that county had sentenced 167 individuals for the offense of DUI Manslaughter.[3] See DUI Sentencing Chart, below. The minimum jail/prison sentence imposed was 0.5 years, with the maximum sentence being 40 years.[4] The average sentence imposed was 9.24 years and the median sentence: 8.0 years.[5]

For Leaving the Scene of a Crash with a Death for the same time period, judges in that county had sentenced 13 individuals for that offense. The minimum Sentence was one year in prison and the maximum sentence was 30 years [our client]. The average sentence was 9.08 years and the median sentence was four years. *See chart on next page.*

CHART OF ALL DUI MANSLAUGHTER CASES IN THE COUNTY

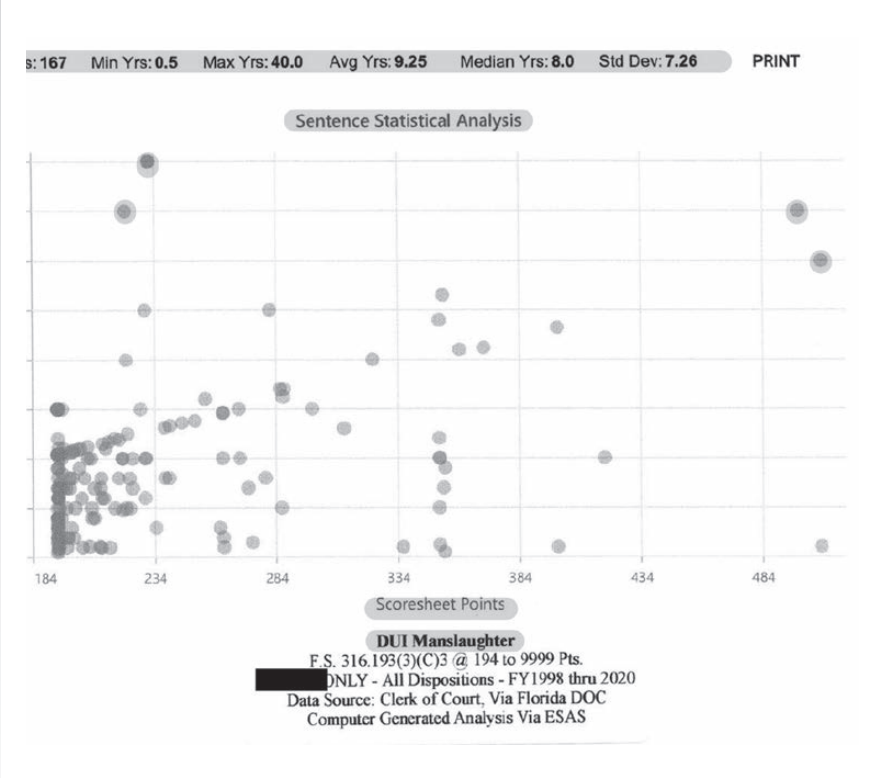
We also broke the data down to distinguish between sentences after pleas as opposed to trials for the judge and for the prosecutor (using data obtained from the State Attorney's Office pursuant to a public records request). The judge had only one one of his DUI Manslaughter cases proceed to trial during his short time on the bench; that was our case,

resulting in the aforementioned sentence.

However, in another case that came before the same judge, the defendant was charged with Fleeing or Eluding a Law Enforcement Officer resulting in a death, Vehicular Homicide and several additional criminal offenses. That case involved a situation where the police were investigating a call of a disturbance. Upon approaching that defendant, the officer "saw a large glass bottle of liquor in the front center cup holder [of the car]" and "[the officer] could smell a very strong odor of an alcoholic beverage and marijuana emitting from inside [the vehicle]." After the officer "announced [his] presence and identified [him]self by saying 'Police'…[the defendant put] the vehicle in drive and [fled from the officer] at a high rate of speed." The officer further noted that he "believed [that the defendant] demonstrated behaviors consistent with someone operating a vehicle while impaired by alcohol and/or a controlled substance." Although several other police vehicles also took up the chase of the vehicle, "[the defendant] willfully disregarded and failed to stop the vehicle; instead he quickly accelerated his speed and began maneuvering in and out of slower moving traffic in a manner that demonstrated a wanton disregard for the safety of others…" As the first officer approached, he heard another police officer advise over the radio of a crash that occurred. Upon arriving on the scene, the officer immediately identified the defendant, who was still seated in the driver's seat of the crashed vehicle and a passenger, who later died. After all of that, the offender, who had a prior criminal record that included two convictions for Resisting a Law Enforcement Officer, Aggravated Battery, Possession of Cannabis, and Possession of Drug Paraphernalia, was sentenced by this same judge to just over 16 years in the Florida State Prison on an open plea to the court.

So the sentence imposed by the same judge to that dangerous criminal who fled from the police, resulting in the death to another, was less than half that imposed against our client, a college graduate who was attending graduate school at the time this unfortunate accident occurred.

DUI Manslaughter Sentence Statistical Analysis



The objective evidence clearly showed that the subjective sentence, imposed by the judge at the request of the obviously peeved Assistant State Attorney prosecuting the case, was grossly disproportionate to those imposed upon individuals charged with such offenses in the county and far longer than even more serious offenses committed by individuals with long criminal records.

Even in a case where the defendant charged with Leaving the Scene of an Accident causing a death was classified under Florida law as a "habitual felony offender," see §775.084(1)(a), Fla. Stat. (2020), with multiple prior convictions for Armed Robbery (five prior convictions), Aggravated Battery Causing Great Bodily Harm, Aggravated Assault with a Firearm, Possession of a Firearm in the Commission of a Felony, Resisting Arrest and Burglary, the sentence imposed against that offender, at the request of the same prosecutor, was still ten years less than the sentence imposed upon our client.

While the results of our client's case were clearly tragic, there was nothing in the facts of the case that would distinguish it from the average and median sentences imposed on others so convicted other than the fact that our client had exercised his right to proceed to trial and had vigorously asserted his innocence through sentencing. There really was only one conclusion that could be drawn from the analysis of the sentences contained in our motion: that the young man was punished, and punished severely, at the recommendation of the prosecutor who was specifically cited for several instances of prosecutorial misconduct in this case, for his decision to proceed to trial in order

to assert his innocence.

Now, the prosecutor certainly had every right to recommend that the court punish our client consistent with the prior sentences that they had sought in similar cases for similar crimes. And our client had every right to be treated fairly and punished based on the jury's verdict and not because he refused to plead guilty to crimes he did not commit. Our system of justice is not perfect. To date, 156 individuals convicted and sentenced to death have been exonerated.[6] Death penalty cases are arguably the most closely investigated cases utilizing the most experienced investigators, prosecutors and defense attorneys. And yet, one out of every ten people sentenced to death to date have been exonerated. But there is a balance between an individual maintaining their innocence and being sentenced for the crimes for which they have been convicted.

In the words of John Adams, "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[7] President Adams' colorful language reflected the strength of his view — a view shared by his contemporaries — that the right to trial by jury protects our liberties as much as the right to cast votes for our representatives.[8]

But what happens when an individual, accused of committing serious crimes but who did not commit those offenses, proceeds to trial and is then found guilty? And what happens when a prosecutor then vigorously recommends to that court that it pronounce a sentence that is clearly disproportionate to the crimes charged and is objectively borne out of their desire to punish that individual for going to trial and protesting his innocence, and the court bows to that recommendation? That is the Kafkaesque situation that this young man now finds himself in, sentenced to 35 years in the Florida State Prison system for an offense that he did not commit and given a disproportionately high sentence because he sought to defend himself and maintain his innocence against such charges.

With the help of Al Barlow, we are seeking to mitigate this sentence pursuant to Rule 3.800(c) of the Florida Rules of Criminal Procedure. We have asked the judge to consider the other sentences meted out by judges in the same jurisdiction to similarly situated defendants, as well as those individuals previously sentenced by that judge for the same or similar offenses.

So will the judge do the right thing? We can only hope so. To be continued.

Postscript: In the last *Defender* article, I wrote about the origins of the Field Sobriety Exercises, using the words of the creator of the exercises currently used by police departments across the country. Sadly, that individual, Dr. Marcelline Burns, Ph.D., passed away in California shortly around the time the article was printed.

[1] Well, actually, his picture is not there, but it should be. Unfortunately, Wikipedia refused my attempts to add his picture to their Mensch page.

[2] The results of ESAS's data led to the awarding, in 2021, of the inaugural "Fairest of Them All Equal Justice Awards" based upon the analyzed data concerning the sentences imposed by judges across the state. See www.sun-sentinel.com/local/palm-beach/fl-ne-judicial-awards-ss-prem-20210524-c6kxwz2vzbdxdfnyeqjca5fqai-story.html.

[3] The data obtained did not disclose if a single person perished as a result of the accident, as was the situation in this case, or if multiple people died or were injured. Obviously, with additional points for each victim involved [Death-120; Severe Injury-40; Moderate Injury-18; Slight Injury-4], the guidelines score would be much higher and the sentence could be expected to be much higher as well.

[4] The data did show that there was another seemingly outlier case in which the defendant received a 40 year sentence for his traffic homicide offenses. However, that sentence could be explained by the fact that defendant had also been arrested for two other alcohol-related offenses: 1) a case in Virginia, seven months prior to the date of his homicide offenses, for driving under the influence, reckless driving and refusal to submit to testing, and, 2) a case in Florida, the day after the fatal accident, for driving under the influence of alcohol.

[5] An "average" is obtained by dividing the sum of the values in the set by their number. The "median" is the exact halfway point between all numbers in a set.

[6] Source: National Coalition to Abolish the Death Penalty. (ncadp.org).

[7] See *The Revolutionary Writings of John Adams* 55 (C. Bradley Thompson ed., 2000).

[8] See National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, www.nacdl.org/trialpenaltyreport (2019) at p. 5.

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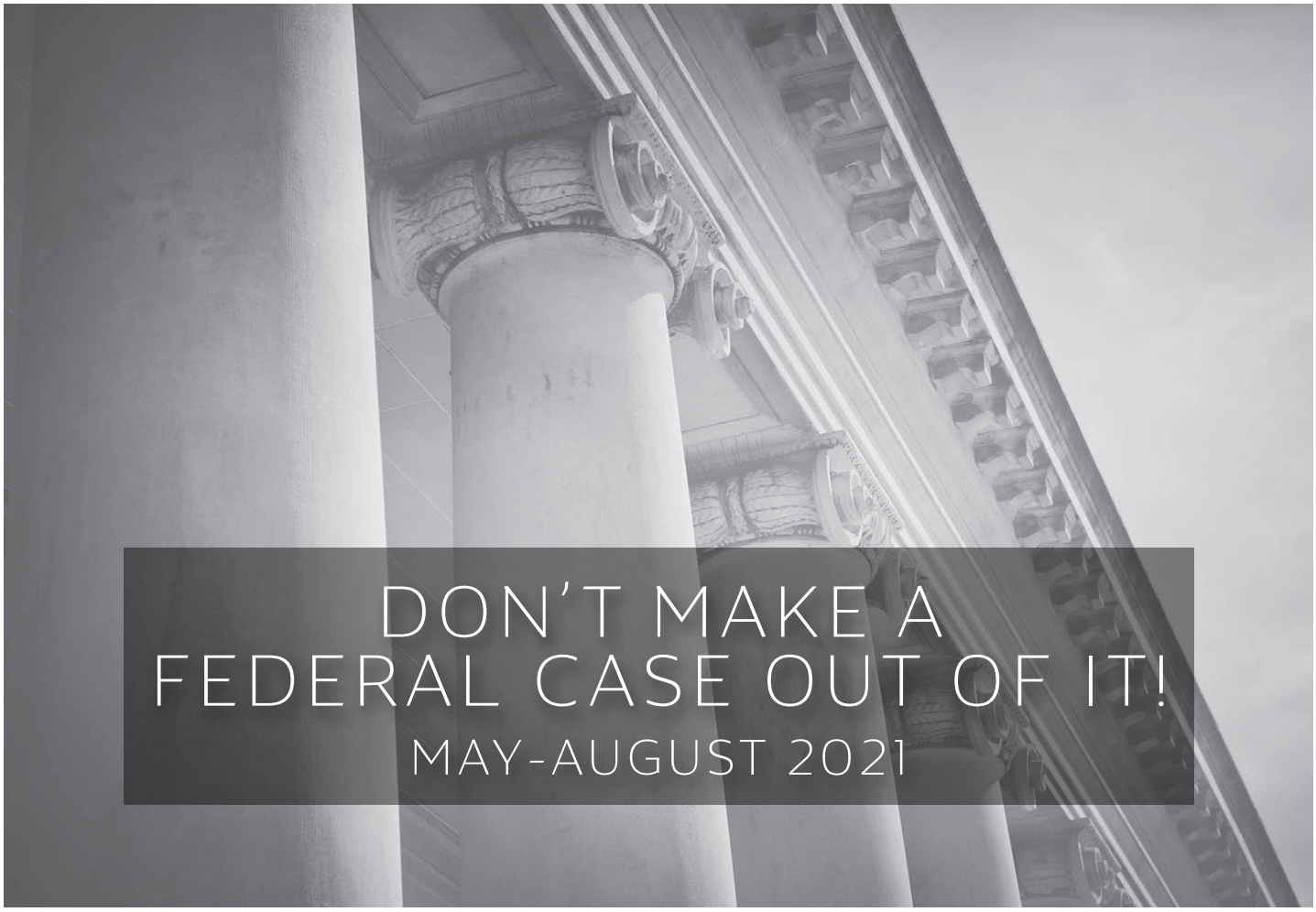
Charge	State Offer	Defense	Result	Reduction
Possession of Child Porn	15 Years SP		8 years SP	7 Years
Introducing contraband at detention facility	4 Years SP	18 months	9 months CJ	3.25 Years
Aggravated Battery with Deadly Weapon	15 Years SP	2 years suspended sentence	12 days CJ, 2 yrs CC, 12 yrs probation	14.9 Years
Shooting into Occupied Dwelling	10 Years SP	Community Based Drug/Alcohol Treatmen	Supervised Drug/Alcohol Treatment and credit fc 1.5 years time served	8.5 Years
Aggravated Assault with Deadly Weapon	2 Years SP	1 Year SP	9 Months time served, 1 Year CC, 1 Year Probation	1.25 Years
First Degree Felony Child Abuse	10 Years SP		6 Years SP, 7 Years Probation	4 Years
Possession of Firearm by Felon	10 Years SP	1 - 1.5 Years SP	1.5 Years SP	8.5 Years
Racketeering and Organized Fraud	35 Years SP	3 Years SP	7 Years SP	28 Years
Grand Theft	5 Years SP		2 Years CC, 1 Year Probation	5 Years
10 2nd Degree Felony Counts	6 Years SP	No SP, Youth Offender Program	2 Years SP, 2 Years CC, 2 Years Probation	4 Years
2 Counts Grand Theft	7 Years SP	Probation	22 Months SP	5.2 Years
				89.6 Yea



DON'T MAKE A FEDERAL CASE OUT OF IT!

MAY-AUGUST 2021

by Lisa Call

COLLATERAL REVIEW / TEAGUE DOCTRINE

Edwards v. Vannoy, --- S. Ct. ---, 2021 WL 1951781 (2021)

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court held that a state jury must be unanimous to convict a defendant of a serious offense. In *Edwards*, the Supreme Court held that the right announced in *Ramos* does not apply retroactively on collateral review. The Supreme Court altered the test to determine retroactivity. Historically, under *Teague*, new substantive rules and new watershed rules of criminal procedure apply retroactively on collateral review. But in *Edwards*, the Supreme Court revised the *Teague* framework. Now, criminal procedure rules are *never* retroactive on collateral review.

JUVENILE SENTENCING

Jones v. Mississippi,
141 S. Ct. 1307 (2021)

In the case of a defendant who committed a homicide when he or she was under 18, the sentencing judge need not make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole.

REHAIF / PLAIN ERROR REVIEW

Greer v. United States,
141 S. Ct. 2090 (2021)

In felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument on appeal he would have presented evidence at trial that he did not know he was a felon. Here, Mr. Greer could not show there was a reasonable probability that a jury would have acquitted him had it been informed of the *Rehaif mens rea* element.

Similarly, in the companion case, the Court held that a defendant who pled guilty, could not show there was a reasonable probability he would have went to trial had he known about the *Rehaif* element. Both defendants had several prior felonies, and neither defendant argued or represented on appeal that he would have presented evidence he lacked knowledge about his felon status when he possessed a gun. Therefore, neither defendant could show the Rehaif error affected his substantial rights.

United States v. Leonard,
4 F.4th 1134 (11th Cir.2021)

Section 922(g) is a criminal offense on its own, even after *Rehaif,* which held that §922(g) itself implies a knowledge-of-status requirement. Thus, the indictment was sufficient to charge an offense

against the United States even though it did not mention Section 924(a)(2).

United States v. Coats,
2021 WL 3560789
(11th Cir. August 12, 2021)

When a defendant is charged with being a felon in possession of a firearm under §922(g)(1), the knowledge-of-status element requires proof that when he possessed the firearm he was aware he had a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." Under the plain error standard, the defendant failed to show that error affected his substantial rights.

COMPUTER FRAUD AND ABUSE ACT
Van Buren v. United States,
141 S. Ct. 1648 (2021)

The Computer Fraud and Abuse Act of 1986 (CFAA) subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U.S.C. §1030(a)(2). The term "exceeds authorized access" is defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." §1030(e)(6).

In *Van Buren*, the Supreme Court held that an individual "exceeds authorized access" when he accesses a computer with authorization but then obtains information in particular areas of the computer — such as files, folders, or databases — that are off-limits to him. Therefore, Former Georgia police sergeant Nathan Van Buren did not violate the CFAA when he used his patrol-car computer to access a law enforcement database to retrieve information about a particular license plate number in exchange for money. Although Van Buren's conduct violated a department policy against obtaining database information for non-law-enforcement purposes, he used his own, valid credential to perform the search.

HEALTH CARE FRAUD
United States v. Akwuba,
2021 WL 3520460
(11th Cir. August 11, 2021)

A person is guilty of committing health care fraud if, "in connection with the delivery of or payment for health care benefits, items, or services," she "knowingly and willfully executes" a scheme "(1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program." 18 U.S.C. §1347(a). Billing a health care benefit program for office visits where controlled substances were illegally prescribed is one way to commit health care fraud in violation of §1347.

ACCA / VIOLENT FELONY & MENS REA
Borden v. United States,
141 S.Ct. 1817 (2021)

A criminal offense with a *mens rea* of recklessness does not require the use, attempted use, or threatened use of physical force against the person of another and thus does not qualify as a violent felony under the ACCA's elements clause.

ACCA / SERIOUS DRUG OFFENSES
United States v. Stancil,
4 F.4th 1193 (11th Cir. 2021)

The defendant was sentenced under ACCA based on prior drug convictions under Virginia Code §18.2-248, which states that it is unlawful to "manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance." The Court affirmed his sentence, holding his prior offenses qualified as "serious drug offenses." First, the Court reasoned that even if Virginia's definition of "selling" or "giving" differs from Virginia's definition of "distribution," that does not mean that Virginia's definition of "selling" or "giving" differs from the ACCA definition of "distribution." Second, the Court reasoned that the offense qualifies as a "serious drug offense" even if criminalizes social sharing among users.

EN BANC REVERSAL OF PANEL OPINION RE: JURY AND THE HOLY SPIRIT
United States v. Brown,
996 F. 3d 1171
(11th Cir. 2021) (en banc)

During deliberations, Juror 13 told the rest of the jury that the holy ghost had informed him that Corrine Brown was not guilty on all charges. Another juror notified the judge, and the judge asked Juror 13 for clarification. Juror 13 explained that he had asked for and received divine information from his "father in heaven" and "the holy ghost," but that it would not impede his ability to decide based on the evidence. The district court dismissed Juror 13.

In an *en banc* decision, the Eleventh Circuit held that the juror's statements did not unambiguously show juror misconduct, so the district judge's dismissal of the juror constituted an abuse of discretion and a violation of the Sixth Amendment.

BATSON CHALLENGE
United States v. Harris,
2021 WL 3485907
(11th Cir. August 9, 2021)

The prosecutor's use of one of seven peremptory challenges to strike an African American juror was inadequate, as a matter of law, to raise inference of racial discrimination.

SEARCH & SEIZURE
Caniglia v. Strom,
141 S. Ct.1596 (2021)

Although law enforcement has general "community caretaking" duties, those duties do not justify a warrantless search or seizure of a home. Here, officers called an ambulance to take the petitioner to the hospital for a psychiatric evaluation based on the belief he posed a risk to himself and others. After petitioner went to the hospital, the officers went in petitioner's home and seized his guns. The Court held the officers' actions could not be justified under a "community caretaking" exception.

Lange v. California,
141 S. Ct. 2011 (2021)

An officer cannot enter a home without a warrant to pursue a fleeing misdemeanor suspect if there are no exigent circumstances. Such exigencies exist, for example, when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape. Most misdemeanor pursuits involve exigencies that would allow warrantless entry. But the Court declined to create a rule that categorically allowed an officer to enter a home to pursue a fleeing misdemeanor suspect, even when the officer lacked a warrant and a law enforcement emergency.

United States v. Gonzalez-Zea,
995 F.3d 1297 (11th Cir. 2021)

ICE agents did not violate the defendant's Fourth Amendment rights when they stopped his car and searched his home. ICE agents were staking out a home, looking for a fugitive whose social security number had been linked to the home, and saw the defendant leave the house in his car. The defendant told the agents he had no US identification, he was unlawfully present in the country, and he lived in the house alone. He also consented to a search of his home, which revealed guns in plain view. The defendant was charged with possessing guns and ammunition as an illegal alien, in violation of 18 U.S.C. §§922(g)(5) and 924(a)(2). The defendant moved to suppress the evidence, and the district court denied his motion.

On appeal, the Eleventh Circuit affirmed the denial of the motion to suppress. First, the Court held that under the totality of the circumstances, the agents had reasonable suspicion to stop him—they were looking for a fugitive, it was dark out, and the defendant, at a minimum, could have had helpful information. Second, the stop was not unlawfully prolonged; the agents asked him questions only about his identity, which was the purpose of the stop. And third, the defendant voluntarily consented to the search of the home during a "friendly" and "cordial" interaction with the agents.

United States v. Watkins,
2021 WL 3700295
(11th Cir. August 20, 2021)

On rehearing *en banc*, the Court held that the government must show by a preponderance of the evidence that the evidence ultimately would have been discovered in order for the ultimate discovery exception to the exclusionary rule to apply; overruling *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980). Under *Brookins*, the Court had applied a "reasonable probability" standard to the inevitable discovery doctrine. Now, the court is applying a 'plain old preponderance of the evidence, more-likely-than-not standard.

United States v. Braddy,
2021 WL 3876938
(11th Cir. August 31, 2021)

The defendant appealed the denial of a motion to suppress and argued that law enforcement lacked reasonable suspicion to initiate the traffic stop, that they unlawfully prolonged the traffic stop even if there was reasonable suspicion for the initial stop and lacked probable cause to search the vehicle. The court rejected these arguments and upheld the denial of the motion to suppress.

FRAUD
United States v. Estepa,
998 F.3d 898 (11th Cir. 2021)

On appeal, the defendants (two brothers who owned a construction company) contended that the government's evidence could not sustain their wire fraud and conspiracy convictions for two reasons. First, they asserted that there was insufficient evidence of a scheme to defraud because the County did not suffer a financial loss. Second, they contended that the government presented insufficient evidence of the requisite mens rea for the crimes for which they were convicted. The court rejected both arguments.

DRUG OFFENSES
United States v. Colston,
4 F.4th 1179 (11th Cir. 2021)

In a prosecution for a drug offense, the government need not prove the defendant knew about the specific substance possessed. Instead, under §841(a)(1) or §846, the government only needs to show that the defendant knew he was possessing an illegal substance. And under §841(b), specific knowledge that the substance is an illegal drug is irrelevant. So "when the government charges violations of §841(a)(1) and §846, and mentions the specific drug involved to seek enhanced penalties under §841(b)(1), it needs to prove the defendant's *mens rea* only for the substantive violation, not for the specific drug charged."

TRAVELER CASE
United States v. Castaneda,
997 F.3d 1318 (11th Cir. 2021)

Defendant was charged and convicted of enticing a minor to engage in unlawful sexual activity. On appeal, he challenged, among other things: 1) whether the indictment should be dismissed because the government engaged in outrageous conduct when it exposed him to child pornography during its sting operation; 2) whether the district court should have suppressed evidence of child pornography contained on five of his computers; and 3) whether the district court should have allowed his expert in "computer mediate communication on sexual topics" to testify that people sometimes create fictitious details on the internet.

The Eleventh Circuit rejected each argument. First, the Court held that the government did not engage in outrageous conduct. Contrary to his argument, the government did not expose Castaneda to child pornography–he exposed himself to it. Second, the district court correctly denied his motion to suppress. Castaneda's friends found the child pornography on his computers and turned it over to law enforcement. A search by a private person does not implicate the Fourth Amendment unless he acts as an instrument or agent of the government. Third, as to the expert-testimony issue, the Court held that the district court acted within its discretion in excluding the expert because the testimony was not specifically pegged

to Mr. Castaneda's communications and contained only generalized background information that some people sometimes mix fact with fiction over the internet. As the Court explained, "everyone knows people sometimes lie."

CHILD PORNOGRAPHY

United States v. Phillips,
4 F.4th 1171 (11th Cir. 2021)

Jury instruction that it need not find defendant knew victim's age to find him guilty of production of child pornography did not constructively amend indictment as would violate Fifth Amendment's grand jury guarantee, but the defendant's convictions for knowingly receiving child pornography and possessing child pornography violated the Double Jeopardy Clause, requiring vacatur of conviction for knowingly possessing child pornography.

BRIBERY

United States v. Roberson,
998 F.3d 1237 (11th Cir. 2021)

As a matter of first impression, an official act requirement does not apply to federal program bribery, i.e., bribery concerning programs receiving Federal funding.

RESTITUTION

United States v. Williams,
5 F.4th 1295 (11th Cir. 2021)

Mr. Williams was convicted of sex trafficking three women, including two women who were minors when he recruited them. He was sentenced to life imprisonment and order to pay his victims restitution. On appeal, Mr. Williams argued that the district court improperly calculated his restitution obligation for three reasons: 1) the government estimated the amount rather than produce precise records; 2) the court should have used the victims' living expenses to offset the amount; and 3) one victim renounced the payment. The Court first held that the government could estimate the victims' loses because it provided a reasonable basis for the estimate through the testimony of the victims. Next, the Court held a defendant has no right to an offset under the Trafficking Victims Protection Act. Finally, the Court held the district court correctly imposed restitution for all three victims even though one victim renounced her right to the payment — under the TVPA, restitution is mandatory, and the district court must impose it.

ACCA / VIOLENT FELONY

United States v. Carter,
7 F.4th 1039 (11th Cir. 2021)

Post-*Borden*, the court held that the defendant's Georgia aggravated assault conviction did not qualify as predicate "violent felony."

ACCA / ON OCCASIONS DIFFERENT

United States v. Dudley,
5 F4th 1249 (11th Cir. 2021)

Under the ACCA, a district court may rely only on documents to determine whether a defendant committed two offenses on two different occasions (including a transcript of plea colloquy in which the defendant confirms the factual basis for the plea). In *Dudley*, the defendant did not expressly assent to the state prosecutor's recitation of the facts, including that he committed his prior offenses on different occasions. Nor did he object. Therefore, the Eleventh Circuit held that the defendant implicitly agreed with the state prosecutor's factual basis when he pled guilty, and the district court did not err when it imposed his ACCA sentence. Where there is evidence of confirmation of factual basis for plea by defendant, be it express or implicit confirmation, federal sentencing court may rely on those facts to conduct different-occasions inquiry under Armed Career Criminal Act (ACCA). However, Judge Newsom dissented from this finding (expressing concern that the fact finding by the district court exceeds the Supreme Court precedent exempting the "fact" of a prior conviction from the constitutional requirement of pleading and proof. And, there is a case set to be argued before the Supreme Court on October 4, 2021, (*United States v. Wooden*), where the

Supreme Court is reviewing the 'on occasions different" language.

SENTENCING GUIDELINES: FIREARMS

United States v. Jackson,
997 F3d. 1138 (11th Cir. 2021)

In this sentencing appeal, a defendant convicted of selling heroin and possessing a firearm as a felon contested the applicability of a provision of the Sentencing Guidelines that increases the offense level when a criminal uses or possesses a gun "in connection with" another felony. After agreeing to sell heroin and a firearm to a confidential informant, Jackson sold the heroin as promised but failed to deliver the firearm on that date. He made up for it later when he provided the firearm at the same time his associate provided more heroin for sale to the informant. The district court found that a sufficient connection existed between the first heroin sale and the later firearm sale, and the appellate court affirmed.

United States v. Montenegro,
1 F4th 940 (11th Cir. 2021)

A drug-trafficking offender is subject to a two-level sentencing enhancement "if a dangerous weapon (including a firearm) was possessed." To justify a firearms enhancement, the government must establish by a preponderance of the evidence either 1) that a firearm was present at the site of the charged conduct or 2) that the defendant possessed a firearm during conduct associated with the offense of conviction. If the government meets its initial burden, the burden shifts to the defendant to show that a connection between the weapon and the offense was clearly improbable.

United States v. Carrasquillo,
4 F.4th 1265 (11th Cir. 2021)

A defendant can avoid the application of a firearm enhancement under USSG §2D1.1(b)(1) if he can show it is "clearly improbable" that the gun is connected with the drug offense. Similarly, a defendant can qualify for safety valve relief under USSG §5C1.2(a)(2) if he proves by a preponderance of the evidence, among other things, that he did not possess a gun in connection with the offense. Although these two standards are similar, they are not exactly the same. Thus, an individual may qualify for safety valve relief even if he can't avoid the application of a §2D1.1(b)(1) gun enhancement. Such a situation, however, will be rare.

United States v. Matthews,
3 F.4th 1286 (11th Cir. 2021)

The defendant was convicted of making a false statement to a firearms dealer, and at sentencing, the district court applied a guidelines enhancement under USSG §2K2.1(a)(3) because the offense involved a semiautomatic firearm that is capable of accepting a large capacity magazine. The Eleventh Circuit affirmed the district court's application of the enhancement. The defendant tried to purchase a semiautomatic rifle that comes standard with a 30-round magazine from a store that sells both firearms and magazines. Based on these facts, it was reasonable for the district court to infer that a magazine capable of accepting more than 15 rounds of ammunition was near the rifle the defendant tried to buy.

SENTENCING GUIDELINES: IMMIGRATION GUIDELINES / ILLEGAL REENTRY

United States v. Osorto,
995 F.3d 801 (11th Cir. 2021)

Under §2L2.1, the guidelines provide for a specific offense characteristic if the defendant had been convicted of an offense either prior to his deportation or after his reentry. The defendant argued these enhancements discriminated against noncitizens, in violation of the Equal Protection Clause, by counting their prior convictions twice — once for the offense level and a second time for the criminal history calculation. The Eleventh Circuit rejected that challenge, reasoning that §§2L1.2(b)(2) and (b)(3) do not apply to noncitizens. Instead, it applies to noncitizens who both have illegally reentered the United States and have been convicted of other crimes. The court held this distinction was important because it reflects Congress's determination in 18 U.S.C. §1326(b) that illegally entering the country after being deported following conviction on another crime is a more serious offense than simply illegally reentering the country, and that conduct should be deterred. Judge Martin dissented in part because she believes that §2L1.2(b)(3) does not pass constitutional muster.

SENTENCING GUIDELINES: PATTERN OF CONDUCT (SEXUAL ABUSE)

United States v. Dominguez,
997 F. 3d 1121 (11th Cir. 2021)

In 18 U.S.C. §2422(b), "sexual activity" does not require interpersonal physical contact. The "sexual abuse or exploitation" requirement for the five-level enhancement in U.S.S.G. §2G2.2(b)(5) can be satisfied even if there is no attempted or actual interpersonal physical contact. Applying the five-level enhancement in U.S.S.G. §2G2.2(b)(5) requires the district court to determine whether the relevant sexual activity is conduct "for which any person can be charged with a criminal offense." Sending nude photos to, and soliciting nude photos from, a minor constitutes "sexual activity" under §2422(b) where it is done for the purpose of sexual gratification.

SENTENCING: VARIANCES

United States v. Riley,
995 F.3d 1272 (11th Cir. 2021)

The district court imposed a substantively reasonable sentence in a §922(g)(1) case when it varied upwards 52 months from a guidelines range of 12-to-18 months based mainly on the defendant's violent criminal history. The Eleventh Circuit reaffirmed the broad discretion afforded district courts at sentencing, and, stated that it would only vacate a sentence as substantively unreasonable if, but only if, it is left with the definite and firm conviction that district court committed a clear error of judgment in weighing the statutorily enumerated sentencing factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

SENTENCING / USSG 5G1.3

United States v. Henry,
1 F.4th 1315 (11th Cir. 2021)

Adjustment under Sentencing Guideline (USSG §5G1.3) relating to credit for state sentence against federal sentence was not mandatory. Prior panel opinion (968 F.3d 1276 (11th Cir 2020) withdrawn).

FIRST STEP ACT / PROCEDURE

United States v. Edwards,
997 F.3d 1115 (11th Cir. 2021)

In a case of first impression, the court held that the First Step Act is self-contained, self-executing, independent grant of authority empowering district courts to modify criminal sentences in circumstances to which the act applies; it is its own procedural vehicle for bringing sentence-reduction motion.

United States v. Gonzalez,
2021 WL 36771430
(11th Cir. August 19, 2021)

As a matter of first impression, a sentence imposed upon revocation of supervised release is eligible for a sentence reduction under the First Step Act when the underlying crime is a covered offense within the meaning of the Act.

FIRST STEP / RESENTENCING

Terry v. United States,
141 S. Ct.1858 (2021)

A crack cocaine offender is eligible for a sentence reduction under section 404 of the First Step Act only if convicted of a crack offense that triggered a mandatory minimum sentence. 21 U.S.C §841 provides three tiers of federal crack offenses. The lowest level crack offense is §841(b)(1)(C), which has no mandatory minimum and does not differentiate between crack and powder offenses. Because §841(b)(1)(C) triggers no mandatory minimum penalties, a crack offender convicted of violating §841(b)(1)(C) is not eligible for relief under the First Step Act.

United States v. Stevens,
997 F.3d 1307 (11th Cir. 2021)

The First Step Act does not mandate that a district court to consider the §3553(a) sentencing factors when exercising its discretion to reduce a sentence under section 404(b) of the First Step Act. The district court, however, must adequately explain its sentencing decision to allow for meaningful appellate review.

FIRST STEP / SAFETY VALVE

United States v. Garcon,
997 F.3d 1301 (11th Cir. 2021)

Defendant entered a guilty plea to a drug offense involving a minimum mandatory sentence. The district court applied the safety valve provisions of the First Step Act and sentenced him without application of the minimum mandatory. The appellate court reversed, holding that "and" means "or" in the First Step Act. "The contextual indication that the "and" in §3553(f)(1) is disjunctive is that if the "and" is read conjunctively so a defendant must have all three requirements before he is disqualified from the safety valve, then subsection (A) would be superfluous. If we read the "and" conjunctively, there would be no need for the requirement in (A) that a defendant must have more than four criminal history points total because, if he had (B)'s required three-point offense and (C)'s required two-point violent offense, he would automatically have more than four criminal history points." The court found this would violation a canon of statutory interpretation, the canon against surplusage. In contrast, the Ninth Circuit has held that "and" means "and" in *United States v. Lopez*, No. 19-50305 (9th Cir. May 21, 2021). Thus, there is a direct circuit split on this issue, increasing the chances of a Supreme Court certiorari.

CONDITIONS OF SUPERVISED RELEASE

United States v. Taylor,
997 F.3d 1348 (11th Cir. 2021)

Although electronic search conditions are typically reserved for sex offenders, a district court can also impose them on non-sex offenders who frequently recidivate, or habitually violate their conditions of supervised release, in a way than poses a danger to others.

COMPASSIONATE RELEASE

United States v. Bryant,
996 F.3d 1243 (11th Cir. 2021)

In a case of first impression, the court held that the Sentencing Commission's policy statement, defining "extraordinary and compelling reasons" for reducing a prisoner's sentence upon a sentence-reduction motion filed by Director of Bureau of Prisons (BOP), is still an "applicable policy statement" when a sentence-reduction motion is filed by a prisoner under the First Step Act. The district court may not grant compassionate release under §3582(c)(1)(A) unless a reduction would follow USSG §1B1.13. Although §1B1.13 states it applies to motions filed by the director of the BOP, district courts reviewing defendant-filed motions must still follow the policy statement. And although Application Note 1(D) allows a court to grant compassionate release when the BOP Director determines there are extraordinary and compelling circumstances, a district court cannot grant a defendant-filed motion based on extraordinary and compelling circumstances.

United States v. Potts,
987 F.3d 1142 (11th Cir. 2021)

Further, in a separate appeal, the court held that the district court did not reduce the defendant's term of supervised release after granting compassionate release.

United States v. Cook,
998 F.3d 1180 (11th Cir. 2021)

A district court must consider the 18 U.S.C. §3553(a) factors when deciding whether to grant compassionate release.

The contents of this message are personal and do not reflect any position of the judiciary or the FLMD Federal Public Defender Office.

LISA CALL attended the University of Florida, receiving a Bachelor of Science in Business Administration with High Honors and a Juris Doctor with Honors. After being in private practice in Jacksonville from 1992 through 2000, she joined the Federal Public Defender's Office in July 2000. She served as president of FACDL 2016-2017.

DEATH IS DIFFERENT...

UPDATES ON CASES, LAW, RULES & SO FORTH

by Peter N. Mills

This case and law update is intended to serve as a research aid in highlighting issues primarily related to the death penalty that occurred during direct appeal and some other matters. Due to space limitations extensive summation has been used and full citation limited. Many of the more recent opinions have not been released for publication in the permanent law reports, and until released, are subject to revision or withdrawal. I encourage you to fully read the cases, statutes, and rules to gain a better understanding of them. If you have an opinion or suggestion about the column, let me know. Reach me at PMILLS@PD10.ORG.

JURY INSTRUCTIONS

As of today, September 3, 2021, there are no committee approved capital jury instructions and no plans to address them on the September 17th agenda. This is completely contrary to what I wrote about in my last column. Things have changed. The attempt to write the instructions has been drawn out but for good reasons, which I will not get into here.

If you don't recall, the Florida Supreme Court (FSC) has decided to delegate the writing of civil jury instructions to the Bar. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases writes the criminal jury instructions, which you might have picked up on given the committee's name. The FSC no longer plans to anoint criminal jury instructions. Back on March 5, 2020, the FSC amended Florida Rule of Criminal Procedure 3.390 (Jury Instructions), and deleted Florida Rule of Criminal Procedure 3.985 (Standard Jury Instructions) as unnecessary. "[I]n order to put in place a more efficient process for providing standard jury instructions to be used in …criminal cases and to avoid any misconception that this Court has "adopted," "approved," or otherwise ruled on the legal correctness of the standard jury instructions prepared by the committees, the Court …determined that it should no longer be involved in the development and authorization for use of Florida's standard jury instructions." See No. SC20-145. Check it out. Gracious, two footnotes went on for three pages in single line space.

Anyway, the committee on standard criminal jury instructions was created by the FSC "to develop new and amended standard jury instructions for use and that committee is now also authorized to approve for publication and use the instructions they develop. Furthermore, "…the standard jury instructions approved for publication and use by the committees are not approved or otherwise specifically authorized for use by this Court and that the approval of standard instructions by the committee[] shall not be construed as an adjudicative determination on the legal correctness of the instructions, which must await an actual case and controversy." Again, see No. SC20-145.

Where does that leave you and your client? I suggest using the previously approved jury instructions. The State will likely and the trial judge might claim that those instructions were upended by Poole and should be drastically modified. However, remember that Poole dealt with a different statute. The legislature changed the statute and that new statute wasn't addressed precedentially (is that a real word? I'm adding it to my dictionary in Word) by the FSC in Poole.

If you get a case and someone (State, judge) tries to ram a simple two-step procedure down your throat, do not accept it. Contact me (email above) or **Karen Gottlieb** (KGottlieb@pdmiami.com). No. I didn't ask her permission to offer her help. But we share that fate as Mother Gooses/Geese (?).

ID & IQ ISSUES + RETROACTIVITY. F STARE DECISIS. F LAW OF THE CASE. FU.

Nixon,
2021 WL 3778705
(Fla. August 26, 2021)

The FSC ruled that Hall (2014) (ID issues regarding IQ rigidity) was retroactive in *Wall* (2016). Then the FSC decided in *Phillips* (2020) that it wasn't. So was *Phillips* also retroactive? Now we know that it was due to *Nixon* (2021). Nixon got a *Hall* hearing ordered in 2017. Law of the case doesn't matter either, because the law changed and he's no longer eligible for a *Hall* hearing.

ANOTHER ID LOSS. ANOTHER CHANCE TO ADDRESS THE CLEAR AND CONVINCING STANDARD DODGED.

Haliburton,
2021 WL 2460806
(Fla. June 17, 2021)

The title above explains most of this case. However, do not let this case get foisted upon you for the continuing proposition regarding "age of onset" only occurring before 18. The science has been updated.

The American Association on Intellectual and Developmental Disabilities (AAIDD) issued the updated 12th edition of Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports. This book leads the field in understanding, diagnosing, and classifying the construct of intellectual disability (ID). It includes updates in the field from the last 10 years. This new edition presents an important change to the operational definition used in the age of onset criteria for the diagnosis of ID. It boosts the age of onset from 18-22 years of age. Florida gets this wrong. Just like IQ and the SEM issue, age of onset should be challenged. As the US Supreme Court said repeatedly in Atkins and Moore, we have to follow the science not statutes built around folklore and myth. I suggest you get it off the AAIDD website — not Amazon. Amazon doesn't have the 12th edition yet. They are still selling the 11th edition.

NOT A CAPITAL CASE BUT YOU'RE ON NOTICE NOW: IF POLICE EXAMINE A GUN BUT DON'T MENTION ALL OF THE TESTING DONE ON IT, YOU SHOULD ASSUME THEY DID ALL OF THE TESTING

Teets,
2021 WL 2559651
(Fla. 4th DCA June 23, 2021)

Mr. Teets was charged with shooting and killing his ex-girlfriend. During the trial, a state expert made a claim about the trigger pull on the gun involved in the shooting. That claim was not included in the expert's report. The DCA held that "[n]o Richardson hearing was required here because no discovery violation occurred. Before trial, the State disclosed the "Crime Laboratory Analysis Report" in discovery. The defendant was therefore on notice the State tested and examined the weapon. He should have reasonably expected the State to test the gun's operability and examine its features, including the trigger pull weight. However, the defendant chose not to depose the expert. His claim is therefore barred because reasonable diligence would have led to the discovery of the evidence."

FYI: I don't know who the State's alleged expert was or where that person is from. However, if FDLE is involved in examining a gun, I'm informed that trigger pull testing is only performed in the Tallahassee office at this time.

VOIR DIRE: SAY THE MAGIC WORDS OR IT'S NOT PRESERVED

Hilton,
2021 WL 3779154
(Fla. August 26, 2021)

Among other issues, this one caught my eye (Yes. The one that still works.) It was raised as an appellate IAC claim. At some point in time during the jury selection process, one of the potential jurors read a newspaper article aloud to the rest of the potential jurors. That article included details about a prior murder conviction. That's bad. The trial lawyer moved to strike the entire panel. Seems like a good idea — contemporaneous objection to preserve the issue. Then before the jury was sworn, trial counsel made a general objection by stating: "I will have the prior objections put on the record, Judge." Nope. Not good enough. Even if everyone knew what trial counsel was talking about. Such a general objection is insufficient to preserve a cause challenge or to preserve a strike of the entire venire panel. Boilerplate objections are inadequate. Issue wasn't preserved; therefore, appellate counsel didn't provide IAC for failing to raise it.

STEVE BOLOTIN WINS FPDA'S SLATER AWARD

Beginning at Life Over Death in 2005, the Florida Public Defender Association inaugurated The James Evans "Jim" Slater Award for Assistant Public Defenders who have made a significant contribution to the defense of indigents in capital cases. The award is named for **Jim Slater**, who for many years served as an Assistant Public Defender and tireless trial litigator in the Twelfth Judicial Circuit. Jim also served as the Chair of the Death Penalty Steering Committee for the FPDA and was a frequent speaker at Life Over Death presentations. Jim's sudden and untimely death in May 2005 sparked the creation of this award, to honor those who, like him, selflessly dedicated their time, energies, and spirit to vigorously defending those facing the death penalty.

Past recipients include but are not limited to **Karen Gottlieb**, **Johnny Kearns**, **Susan Cary**, **Brian Donerly**, **Edith Georgi**, **Deb Goins**, **Bill McLain**, **Austin Maslanik**, T**rish Jenkins**, **Al Chipperfield**, and **Dave Davis**. Impressive company for sure.

But for a brief retirement, Steve has worked as an Assistant Public Defender since 1981. As noted in the nomination for the award, Steve epitomizes the true spirit of public defenders. When it comes to protecting the rights of the indigent accused, Steve is "all in," even though he often finds himself representing those who have been called the lowest of the

low. For the majority of his career, Steve has represented death-sentenced clients. He has briefed in excess of 60 capital appeals and writs in the Florida Supreme Court and district courts of appeal.

Steve would never expect to receive accolades for the results of his labor in individual cases. To Steve, as important as each case has been, he also recognizes them as a piece in a much larger picture. His hard work on each case constitutes an example of his life-long commitment to upholding the rule of law and bringing real meaning to the term "equal justice under law."

Further, Steve's value to clients extends beyond the appellate realm. He has been able to prevent innumerable miscarriages of justice at the trial level by being able to provide trial counsel with case authority to defeat positions taken by the State or trial judges. In addition, he is able to do so almost instantaneously. It borders on malpractice for an attorney to go to trial without having Steve's counsel. Steve's knowledge of the law and his calm style have earned him the respect, though not always the affection, of the judges and justices in front of whom he has appeared. This permits him to raise issues that might cause other attorneys to pause out of concern that they might alienate the judges or justices against other clients.

JUDGES AREN'T ALLOWED TO CONSIDER EVIDENCE NOT ADDUCED DURING TRIAL

Cruz,
320 So.3d 695 (Fla. 2021)

The trial judge in this case sentenced Mr. Cruz to death and relied on evidence from a co-defendant's trial. Specifically that Mr. Cruz shot and killed the victim. However, there was no competent, substantial evidence presented in Mr. Cruz's trial to support the jury's finding that he was the shooter. Due to the poor drafting of the sentencing order the FSC could not determine what weight the trial judge gave to the finding that Mr. Cruz was the shooter or what part the non-record evidence from codefendant's trial played in Mr. Cruz's sentence. That's error. That's not harmless. The trial judge was directed to reevaluate and resentence Mr. Cruz based solely on the record evidence presented in his trial, not the codefendant's trial. A new penalty phase was not deemed necessary.

PETE MILLS is an Assistant Public Defender in the 10th Judicial Circuit, Bartow, in the trial unit. He is qualified to handle capital trials. In addition to his work as an APD, Pete has worked at the Office of the Capital Collateral Representative (CCR) and has handled personal injury cases. He is a 1993 graduate from the Valparaiso University School of Law. He may be reached at 863/534-4327.

POSSESSION • from page 45

[45] This issue is discussed in depth in *United States v. Baker*, 523 F.3d 1141, 1141-43 (10th Cir. 2008) (McConnell, J., dissenting from denial of rehearing en banc); see also *Dixon v. United States*, 548 U.S. 1, 17–18 (2006) (Kennedy, J., concurring) (noting "[w]hen issues of congressional intent…arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo–American legal tradition[, and we also] assume that Congress would not want to foreclose the courts from consulting… newer sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the [statute]").

[46] *United States v. Paul*, 110 F.3d 869, 872 (2d Cir. 1997).

[47] *United States v. Holloway*, 402 Fed. Appx. 692, 698 (3d Cir. 2010).

[48] *United States v. Teemer*, 394 F.3d 59, 64 (1st Cir. 2005).

[49] *Id.*

[50] *Id.*

[51] *State v. Sanders*, 445 P.3d 453, 455, 457, 463 (Utah 2019).

[52] *Id.* at 463, n. 12.

[53] *Id.* at n. 12.

[54] *Id.* at nn. 12 and 13.

[55] Model Penal Code § 5.07.

[56] *Id.* at 1230.

[57] Fla. Std. Jury Instr. (Crim.) 3.6(m).

[58] *Teemer*, 394 F.3d at 63.

[59] Model Penal Code, §2.01(4).

[60] 233 F.3d at 623.

[61] Those who feel such facts are unlikely to occur should know this is what D alleged in the most infamous recent case on point, in which a women named Kate Steinle was killed on a public pier by a shot fired by someone who was illegally in the country. There, D claimed "he sat in a chair, bent over to pick up an object wrapped in rags, did not know that the object was a gun, the gun fired, and as soon as it fired, he immediately threw the gun in the water…." *People v. Zarate*, 2019 WL 4127299, at *7 (Cal. Ct.App. Aug. 30, 2019). This court reversed because the trial court erroneously denied D an instruction on the momentary-possession defense, which was a viable defense because "there was sufficient evidence [for] a jury [to] conclude [D] was not aware of the nature of the gun until it fired, possessed it for only a brief moment knowing it was a gun, reflexively abandoned it as soon as he realized it was a gun, and did not dispose of it to prevent law enforcement from seizing it." *Id.*

In the federal case based on the same facts, the trial court, ruling on pretrial issues, asserted "the knowing-possession element of [federal felon-in-possession] charges is not satisfied when a person discovers that he's holding a gun and responds by immediately discarding it." *United States v. Garcia-Zarate*, 419 F. Supp. 3d 1176, 1180 (N.D. Cal. 2020). The court cited no authority for this proposition.

RICHARD SANDERS graduated from the University of Pennsylvania Law School in 1982. He has worked in the appellate division of the public defender's office, 10th circuit, since 1996.

From the Pits

Covid and Beyond a Reasonable Doubt

by Denis deVlaming

I have often wondered how much evidence it takes to convince someone "beyond a reasonable doubt." That is a standard we are all used to hearing. It is a standard throughout the United States. But just how much evidence is needed? It got me thinking.

In all probability, it is a different standard to many people. Some would say "that doubt is not reasonable" and others would say "it is to me." Recently, Johnson & Johnson came upon a setback with its Covid vaccine. There were reports that several people died and many more were hospitalized because they took the vaccine. There was a recall and then the risk/benefit was analyzed and it was put back on the market. It seemed to negatively affect more women than men. So here's the dilemma: the parents of a 13-year-old daughter are being offered the Johnson & Johnson vaccine for her. Many would argue that statistically it is safe and there is little "doubt" that she will receive a negative, severe reaction. To others, however, there is a "reasonable doubt" and they would elect not to vaccinate their daughter with the Johnson & Johnson vaccine. Who is right? It all depends. Some people will look at statistics and then employ the word reasonable. To others, a risk, even a small one, is not something they are willing to take.

You might want to add this hypothetical to your Voir Dire the next time you pick a jury. Find out who would allow the vaccine and who would not. After all, we want jurors who doubt. Jurors who question. A juror who will not take the chance is one who is more prone to acquit.

So when jurors are asked if there is sufficient evidence to convince them beyond a reasonable doubt of the guilt of a fellow citizen, you can expect this type of debate. Sometimes jurors can agree on reasonable doubt and come to a verdict. Other times, people feel strongly about their commitment and a verdict is just not in the cards.

DENIS M. DE VLAMING, a Board Certified criminal defense attorney in Clearwater, has practiced criminal law exclusively since 1972. He has been on FACDL's Board of Directors since its inception in 1988 and is a Charter Member of the organization. He is a past president of FACDL.

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GET ENGAGED!

by Jason B. Blank

Do yourself a favor: get engaged! No, not to your significant other if you're not ready or are already married. That would just be silly. I'm talking about getting engaged with our profession. One of the greatest things I did was accepting that first offer to become a board member of my local chapter (BACDL) when I was at the Broward County Public Defenders office. That position opened my eyes to a world of new resources and contacts that I've been utilizing for years now. Between the relationships I built and knowledge I gained, it made me a better lawyer in and out of the courtroom. That springboard allowed me to become a FACDL Chapter Rep, then Director-at-Large, and now Treasurer of our beloved organization.

But we must do more than getting involved in FACDL alone if we want to better our profession for both us lawyers and our clients. We face problems, bitch and moan about issues in the courts, and complain about shifts in the law. But what do we do about it? What CAN we really do about it? The answer is relatively simple: Get engaged!

As I realized my enjoyment on the FACDL Board, I started looking to other ways I could make a difference in our practice. One day my search led me to *The Florida Bar News*. As a young APD, I saw an ad for an opening on the Florida Supreme Court's Criminal Jury Instructions Committee. I applied but was, very kindly, rejected as an applicant. I didn't yet have the experience. But I pressed on. I learned about The Florida Bar's Criminal Law Section and chose to run for a seat on the Executive Council. I waltzed into their annual meeting, added my name as a write-in candidate, gave a great speech where I told them that they needed to be younger and more diverse, and promptly lost my election that year. Even though I lost, I did start a trend and conversation in that Section that led to my election the next year and a general culture shift. Now, I sit as Chair of the Criminal Law Section which consists of nearly 2,500 federal and state defense lawyers, prosecutors, judges and professors.

Yet each year we continue to see the same problem when looking for Executive Council nominees: a lack of qualified and engaged *younger* lawyers. The Florida Supreme Court looks to the Section for comment and guidance on issues pertaining to criminal law in Florida. How can we better guide and mold that message and make sure it reflects today's criminal court system? Join the Section and get active. Lend your voice. Get engaged!

I was privileged to be appointed to the Criminal Procedure Rules Committee when Florida Bar Past-President (and long-time FACDL member) **Michelle Suskauer** took the reins. Sitting on that board for years now, I can tell you that the defense lawyers are often the loudest voice in the room, but less often the strongest. We must have more well-respected voices on that committee to make sure our positions hold strong. That means FACDL members applying timely and utilizing those of us who have relationships with the persons in power to get more of our members appointed to these important positions.

Likewise, we need representation on the Evidence Committee, the Appellate Rules Committee, the Juvenile Rules Committee, the Rules of Judicial Administration Committee, and more. Without having our members on these boards, we are destined to deal with the consequences of other (sometimes less informed) people's decisions.

We, as criminal defense lawyers, owe it to our profession and to our constant pursuit of justice to take the steps necessary to effect the change we want. But the first step is yours. Get engaged! If you're not sure how, reach out to me or any of the other FACDL leadership. We all would be happy to help you get engaged…but we're not buying you a ring.

JASON B. BLANK is the Treasurer of FACDL, the Chair of the Florida Bar's Criminal Law Section, a member of the Florida Criminal Procedure Rules Committee and a partner at Haber|Blank, LLP in Fort Lauderdale.

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If you have an idea for a topic, contact Becky at becky@facdl.org.

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OCTOBER 28, 2021 • NOON TO 1 P.M.
LUNCH AND LEARN WEBINAR
"Dude, Where's My Phone?" Cell Phone Location and Tracking
by John Sawicki

NOVEMBER 4, 2021 • NOON TO 1 P.M.
LUNCH AND LEARN WEBINAR
"Legal Research Using FACDL.org" by Robert Harrison

NOVEMBER 16, 2021 • NOON TO 1 P.M.
LUNCH AND LEARN WEBINAR
"Florida Ignition Interlock Review and Updates" by Scott Evans

DECEMBER 15, 2021 • NOON TO 1 P.M.
LUNCH AND LEARN WEBINAR
"Felony Disenfranchisement in Florida: How to Combat Legal Financial Obligation Barriers to Voting" by Angel Sanchez

Monitor FACDL.ORG home page calendar for more updates.

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☐ LIFE MEMBER . . . . . $4,000, payable in minimum installments of $500 per year

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Regular Membership in FACDL is available to private practitioners and public defenders who are members of The Florida Bar, actively engaged in the defense of criminal cases. Regular membership is also available to Federal Public Defenders or Assistant Federal Public Defenders who are members in good standing of another State Bar, and who are actively engaged in the defense of criminal cases in Florida.

Membership dues are based on year of admission to The Florida Bar and run on the fiscal year of January 1 to December 31st. Renewals are NOT prorated. Only new members joining subsequent to the fall board meeting will extend membership into the following fiscal year.

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SCHEDULE OF EVENTS
(subject to change)

Thursday, October 14, 2021
(FULL DAY)

PRESENTATIONS COVERING:

Winning DUI Trials During COVID

COVID's Effect on DUIs

A Conversation about Ethics

DMV Updates

Ways to Fight FSEs

DREs

SPECIAL FEATURE LIVE STREAM demonstration of Gas Chromatography Sample Testing from Axion Labs by Dr. Lee Polite

Adding to Your DUI Skills Toolkit

Friday, October 15, 2021
(HALF DAY)

Case Law Updates

Navigating the Complexities of DUI Manslaughters and Serious Injury Cases

The Importance of Accident Reconstruction in DUI Cases

Sentencing Considerations in Felony DUI Cases

Online Registration Closes October 13, 2021 at Noon

More details at WWW.FACDL.ORG

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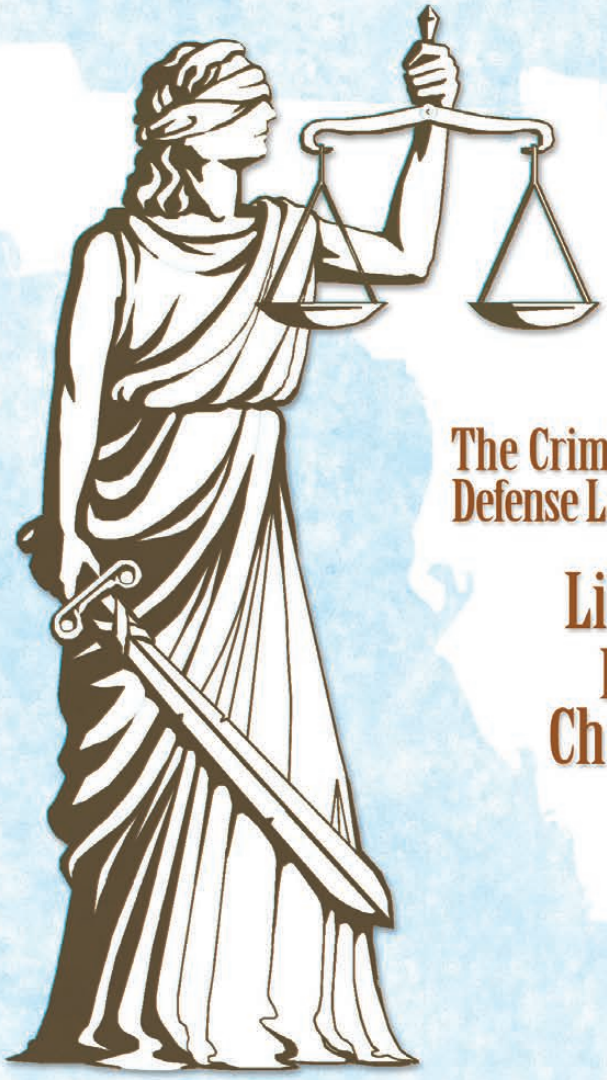

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