

2017

Criminal Justice

Institute Manual



Minnesota Continuing
Legal Education

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SEARCH

2017 Criminal Justice Institute



Minnesota State Bar Association
Continuing Legal Education

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Brendan Dassey: A True Story of False Confession

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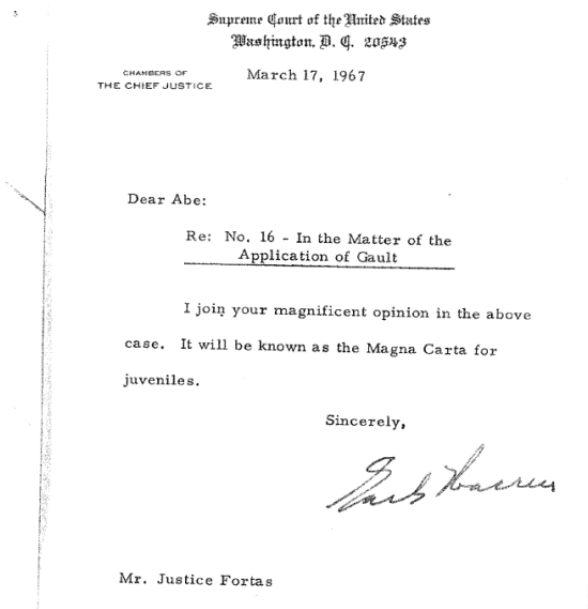
Gerald Gault, Meet Brendan Dassey: Preventing Juvenile False and Coerced Confessions in the Twenty-First Century

By Laura Nirider, Megan Crane, and Steven Drizin

In 1964, fifteen-year-old Gerald Gault was taken into custody by the Sheriff of Gila County, a rural jurisdiction about eighty miles east of Phoenix, after a neighbor accused him of making prank telephone calls of the “irritatingly offensive, adolescent, sex variety.” Over the course of the following week, Gerald appeared twice in the chambers of a juvenile court judge, accompanied by his mother, older brother, and two probation officers. Though the hearings were untranscribed, later testimony indicated that the judge questioned Gerald both times about whether he had in fact made the calls. Gerald’s mother recalled that he told the judge only that he dialed his neighbor’s phone number and handed the phone to his friend Ronald; one probation officer recalled that he admitted making the lewd calls and later recanted; and the judge himself recalled that Gerald had admitted making some of the lewd statements – but only the less “serious” ones. Based on these statements, Gerald was taken from his parents and held in detention. It is not known whether his uncorroborated, uncounseled confession – or, if there was more than one, which version – was true or false. In many respects, it didn’t matter; the authorities believed that Gerald had done something wrong and were free to act accordingly.

Two and a half years later, in 1967, the U.S. Supreme Court ordered Gerald’s release in an opinion that was nothing less than a reckoning for the nation’s juvenile court system. Blinded by “neither sentiment nor folklore,” Justice Abe Fortas, writing for the Court, laid bare the gulf between juvenile court’s rhetoric – characterized by speeches about “kindly” judges, informality, and the therapeutic treatment and rehabilitation of youthful offenders – and its reality. Juvenile courts, according to the Justice, too often operated as “kangaroo courts” prone to inaccurate fact-finding, unchecked abuses of discretion, and arbitrary punishments. His prescription was a healthy dose of due process, including most prominently the right to counsel. To Justice Fortas, only a child aided by a lawyer’s “guiding hand” could both “ascertain a defense” and “prepare and submit it.”

Gault revolutionized juvenile court process by not only requiring counsel for kids, but also granting them other basic ingredients of due process: the right to notice of the charges, the rights to confrontation and cross-examination, and the right against self-incrimination. Perhaps for these reasons, Chief Justice Earl Warren, upon receiving a draft of the *Gault* opinion, sent his colleague Justice Fortas a personal note: “I join your magnificent opinion in the above case. It will be known as the Magna Carta for juveniles.”



In 2017, which is the 50th anniversary of the *Gault* decision, the opinion’s discussion of the right to counsel is rightfully being feted across the country. But tucked among the decision’s later pages is an equally important discussion: one concerning a child’s right against compelled self-incrimination. This fifty-year-old discussion still resonates today precisely because the problem it describes still exists: the problem of unreliable confessions from juveniles. These are the pages we wish to celebrate in this essay.

“Authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children,” decreed Justice Fortas, wrapping the word *confession* in ever-so-slightly acerbic quotation marks to underscore just how formidable the Court’s doubts were. In an era when DNA testing was not known or thought of, and when the notion of a false confession was hard to imagine and even harder to prove, the Court pointed out that a child subject to police interrogation might admit “whatever he thought was expected so that he could get out of the immediate situation.” And Justice Fortas turned his searching gaze on pressure-filled interrogation techniques, finding that false confessions could occur “wherever the innocent person is placed in such a situation that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose.” These words inspired the undersigned authors to create and develop the Center on Wrongful Convictions of Youth nearly ten years ago – the first and only organization dedicated in large part to representing children who falsely confessed to crimes they never committed.

Gault’s bold words should have resounded as a clarion call for interrogation reform – but the need for such a Center persists to this day. Perhaps no more widely recognized proof exists than the uncounseled, uncorroborated confession of our client: sixteen-year-old, mentally limited Brendan Dassey, whose videotaped confession to murder was publicized in the 2015 Netflix Global docuseries *Making a Murderer*. Brendan was interrogated alone on video camera by Wisconsin police in 2005 until he gave a confession to the rape and murder of a young woman named Teresa Halbach. Watched by audiences worldwide, the series has generated a worldwide groundswell of support for Brendan because many believe him to be innocent and his confession to be false.

Viewers watched as police used a series of misguided techniques to elicit a confession: they told the impressionable Brendan that everything would be “okay” as long as he told them what they already believed he had done; they fed him crucial non-public details about the murder, like the fact that Halbach had been shot in the head; and they falsely led him to believe that he would be returned to school in time to finish a project – even after he confessed to rape and murder. The series serves as a vivid reminder that the concerns articulated in Gerald’s case haven’t gone away. Even in the new millennium, a child subject to uncounseled interrogation might agree to “whatever he thought was expected” in order to go back home – or, in Brendan’s case, back to school. And by putting a heartbreaking face on the problem of juvenile false confessions, the series has reminded us of the fierce urgency of the task at hand: working to reform juvenile interrogation techniques before we lock up more Brendan Dasseys.

To be sure, the legal terrain has not gone completely unchanged since the era of Gerald Gault. After decades of dormancy, the high Court revived *Gault*’s concern about the unreliability of juvenile confessions in 2011’s *J.D.B. v. North Carolina*. There, the Court noted that empirical studies undertaken in the era of DNA-proven exonerations have shown that the problem of false confessions is indeed “all the more acute” when the subject of custodial interrogation is a juvenile. Building on a decade of reinvigorated juvenile jurisprudence, the Court explained that juveniles are vulnerable during interrogation precisely because they “are more vulnerable or susceptible to...outside pressures” and “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”

Recognition of the problem has spread beyond the courts, too. While many police interrogation training firms have been loathe to reform their techniques, some law enforcement agencies have agreed on the need for reform, including the International Association of Chiefs of Police. In 2012, that Association issued a juvenile interrogation manual specifically geared at preventing false confessions that recommended, among other things, the use of different and more child-sensitive interrogation techniques. Harkening back to *Gault*’s warning that children might admit to anything if they think they will get to go home, the Association cautioned officers to avoid “even...indirect promises of leniency” that imply that confession will result in help or that silence will result in negative consequences. Similarly, it warned against using deception with children, including the use of false evidence during interrogation, and insisted that officers refrain from disclosing crime-scene facts during the interrogation. To be sure, this manual binds not a single officer, but it stands as a reform-minded template for departmental interrogation policies around the country.

Many state legislatures have also taken basic steps to improve the conditions surrounding juvenile interrogation. Indeed, Brendan’s case is emblematic of one of the most significant reforms that has swept the nation in the past ten years: the videotaping of interrogations. To date, about twenty states have adopted rules requiring the recording of interrogations from start to finish. This reform has been crucial, shining a spotlight into the hitherto secret confines of the interrogation room; but it does not directly alter interrogation techniques themselves. And reforms beyond videotaping have been scattershot. A few states have adopted simplified juvenile *Miranda* warnings, while a few others, including Illinois in 2016, have mandated counsel in the interrogation room for children under the age of fifteen in highly limited circumstances. These reforms are unquestionably important, giving heft to important Fifth and Sixth Amendment protections for juveniles – but again, they leave untouched interrogation techniques themselves.

The bottom line? After decades of recognition that juvenile interrogation techniques must be fixed, the time is finally right to reform them. In the wake of *Making a Murderer*, front-line defenders and others concerned with making interrogations less coercive and more reliable have an unprecedented opportunity to pursue change. Now more than ever, a global outcry about juvenile interrogation techniques is incentivizing judges, politicians, and law enforcement officers to change the way interrogation works in order to ensure confessions' reliability. And the best places to start are the very tactics used on Brendan Dassey, including false promises of leniency, lies about the evidence, and fact-feeding. That toxic bundle of techniques is used around the country – not just in Wisconsin – and each has long been identified as a risk factor for false confession, especially when used on juveniles. Those techniques should have been discarded in the days of *In re Gault*. It is time to rid ourselves of them now.

False Promises of Leniency

"If you did some things...it's OK. As long as you can be honest with us, it's OK. If you lie about it that's gonna be problems." – Interrogation of Brendan Dassey (Wisconsin, 2006)

"All everyone's waiting for today is for you to admit to what you did so that we can start the process of getting you some help." – Interrogation of Nga Truong (Massachusetts, 2008)

"You need to start thinking about what you are going to do for yourself because I know you got a couple of kids out there and I'd to see the kids miss their daddy for a long time because you didn't want to talk about what's going on." – Interrogation of Anthony Polk (Iowa, 2008)

Any defender who has had a case involving a recorded interrogation will recognize these refrains or variants thereon. Taught to officers during interrogation trainings that are held at police departments nationwide, such statements are dangled in front of suspects to provide them a reason to confess. This is standard practice. It should be obvious that confession is a profoundly self-damaging act, the likes of which few rational persons would do. In a legal system characterized by public stigma, lengthy sentences, and harsh prison conditions, most people would rationally conclude that the physical costs of confessing to a serious crime outweigh the benefits of a relieved mind. To convince someone to confess who is not already predisposed to do so, therefore, officers are regularly trained to obfuscate the harm, to trick a suspect into believing that his self-interest actually lies with confession, not with silence. In this sense, the task of interrogation is to make the irrational choice – confessing – seem rational.

That said, courts often look askance at direct promises of leniency, like "if you confess, you will go home." Such obvious lies are too much for many courts to stomach in light of a Fifth Amendment that insists that any self-incrimination must be done voluntarily after a suspect freely weighs the costs and benefits of confessing. The Seventh Circuit put a fine point on this in *U.S. v. Villalpando*: "The reason we treat a false promise differently than other somewhat deceptive police tactics (such as cajoling and duplicity) is that a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable."¹ In reaching this conclusion, the court recognized that "[p]olice conduct that influences a rational person who is innocent to view a false confession as more beneficial than being honest is necessarily coercive, because of the way it realigns a suspect's incentives during interrogation."

¹ *U.S. v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) (internal citation omitted).

Against this legal landscape, officers are trained to dance around the issue: to suggest leniency without ever saying it outright, using language that clearly telegraphs the message without crossing the line. Many interrogators, thus, tell suspects that if they confess, the prosecutor will “understand” and “work with” them; that everything will be “all right”; that the suspect will receive “help,” such as counseling; and that the suspect’s future will remain bright. Some interrogators even explicitly say “I can’t promise you anything,” only to follow, a sentence or two later, with an assurance that everything will be okay if the suspect confesses. While common sense tells us that that these types of statements communicate leniency as clearly as a direct promise – particularly to the ears and mind of a child – such common sense has yet to take hold in some courtrooms. Indeed, trial courts are often blinded by the content of a confession and thus bend over backward to find the confession voluntary, resulting in a jurisprudence that purports to prohibit “if you confess, you will go home” but may tolerate “if you cooperate, everything will be okay.”

But should this repackaging – in which the thinnest of veils are drawn over unmistakable promises of leniency – insulate such interrogation tactics from judicial scrutiny? The answer is a clear no. In a White Paper summarizing the position of its membership, the American Psychological Association identified even *implied* promises of leniency as risk factors for false confession and warned that interrogation tactics that imply leniency “may well lead innocent people who feel trapped to confess.”²

This is particularly true when the person being interrogated is a juvenile. When asked, children who falsely confessed to crimes that they did not commit frequently offer the same explanation: I confessed because I thought I would go home. The consistency of this refrain is remarkable, and it demonstrates that children hear these promises loud and clear. And the U.S. Supreme Court has acknowledged the reasons for this clear pattern: children and teenagers are indeed more susceptible to the pressures of interrogation precisely because their still-developing brains render them ill-equipped to weigh long-term costs and benefits – which, in turn, makes them easy marks for interrogation tactics that distort the consequences of confessing. In short, it simply takes a lot less to realign the interrogation room incentives for a juvenile than for an adult – even when the juvenile is factually innocent. It is up to defenders to point this reality out.

PRACTICE TIPS:

- Challenge courts’ tolerance of implied promises of leniency in motions to suppress
- Rely on the scientific foundation provided by the American Psychological Association’s White Paper on false confessions
- Cite cases including *Dassey*, *Truong*, *Polk*

Lies About Evidence

“They pointed you out. They gave me your name! They gave me your last name. I had your first name. ‘Who’s this? Do you recognize anybody in this picture?’ ‘Yeah, that’s Trevon Yates.’” -- Falsehood During Interrogation of Trevon Yates (Illinois, 2013)

“[We need to figure out] why you feel like you want to touch a three-year-old little girl. Okay? Cause it did happen. She explained it perfectly.” – Falsehood During Interrogation of Elias V. (California, 2013)

² [http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20\(2010\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf)

“There’s an item that you touched, all right, that left some [DNA] particles on it that did some damage to somebody... The evidence shows you were there. The evidence shows it. I can’t lie about the evidence.” – Falsehood During Interrogation of Robert Davis (Virginia, 2003)

Lies about the evidence – known in the false confession literature as “false evidence ploys” – are prohibited in the United Kingdom and most other European countries. But courts across the United States have blessed police lies about the evidence, even when the person being interrogated is a child – albeit in a series of outdated opinions that are ripe for refreshing. In 1969, in *Frazier v. Cupp*, the U.S. Supreme Court affirmed the legality of deceptive interrogation tactics.³ The *Cupp* court held that a police falsehood about the evidence will not render a confession involuntary on its own; instead, the use of such a tactic is just one factor to consider in the totality of the circumstances. Lower courts read *Cupp* as a virtual green light for police deception and now regularly sign off on a wide range of police lies, from generalized assertions like “we already know what you did” to highly specific claims like “we found your fingerprints on the gun” and even lies about whether police are permitted to lie.

But the reality is that lies about the evidence are another risk factor for false and unreliable confessions. In its White Paper, the American Psychological Association noted that “[a]t times, American police will overcome a suspect’s denials by presenting supposedly incontrovertible evidence of his or her guilt . . . even if that evidence does not exist.” Outrageously, it noted, such a tactic is even recommended in some police training manuals. But the APA warned that “outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of the evidence against them.” Indeed, an evidentiary lie often tips the scales by convincing a suspect that the odds are so stacked against him that nothing can be done but mitigate the damage by admitting guilt. In other words, lies about the evidence can help make the irrational choice to confess look rational.

Some courts have placed limits on police deception during interrogation; courts in both Florida and New Jersey, for instance, have drawn the line at actually manufacturing fake evidence.⁴ And the Seventh Circuit Court of Appeals has taken a different tactic by prohibiting lies about specialized forms of medical evidence that a suspect is not able to contradict.⁵ But such limits are incomplete guards against false confessions. For this reason, the APA recommends a complete ban on police lies about the evidence but, in the alternative, proposes criterion for case-by-case evaluation including “the extent that a suspect is vulnerable (e.g., by virtue of his or her youth, naiveté, intellectual deficiency, or acute emotional state) and to the extent that the alleged evidence is presented as incontrovertible, sufficient as a basis for prosecution, and impossible to overcome.” Indeed, as the APA recognizes, youthful suspects are particularly ill-equipped to push back against false assertions by authority figures. Many juveniles do not have the basic knowledge or life experience to question or suspect that the police are allowed to lie, nor do many have the maturity or confidence to challenge a lying officer. More likely, the juvenile will simply throw up his hands, admit defeat in the face of apparently inculpatory evidence that he cannot challenge or explain, and yield to the demand for a confession – whether guilty or not.

Pursuant to the APA’s recommendation, defense attorneys should advocate for significant limits on police deception, particularly when the subject of interrogation is a juvenile. This has already been successful in some courts. For example, in a 2015 California Court of Appeals case, an appellate court

³ 349 U.S. 731 (1969).

⁴ *State v. Patton*, 362 N.J. Super. 16 (N.J. 1993); *State v. Cayward*, 552 So. 2d 921 (Fla. 1989).

⁵ 662 F.3d 897, 906 (7th Cir. 2011).

found a thirteen-year-old boy's confession to be involuntary, noting among other reasons that "[t]he use of deceptive techniques is significantly more indicative of involuntariness where, as here the, the subject is a 13-year-old adolescent."⁶ It is high time for other courts to catch up – and it is up to front-line defense attorneys to make sure that they do.

PRACTICE TIPS:

- Argue for a ban – or at least a limit – on false evidence ploys with juvenile suspects
- Cite the many juvenile false confession cases that involved lies about the evidence; use resources like the National Registry of Exonerations to find such cases
- Cite the American Psychological Association White Paper
- Cite cases like *In re Elias V* and *Aleman v. Village of Hanover Park*
- Cite the developmental and social science proving both that children are especially vulnerable to deception and psychological manipulation, and that they are ill-equipped to confront such lies from authority figures
- Remember that the U.S. Supreme Court has recognized in cases like *Haley v. Ohio* that tactics which may leave an adult criminal suspect "cold and unimpressed" may "overwhelm and overawe" a youthful suspect. In other words, tactics which may not render an adult's confession involuntary may require suppression of a juvenile confession.

Contamination

"We are really going out on a limb here with you. Would it make you feel better if we told you exactly who was with you?" – Interrogation of Robert Davis (Virginia, 2003)

"I know Kenzell wasn't up at the door because there was only two people. Okay, so the only two people that did the robbery was you and Devan, right?" – Interrogation of Trevon Yates (Illinois, 2013)

"I'm just gonna come out and ask you. Who shot her in the head?" – Interrogation of Brendan Dassey (Wisconsin, 2006)

Perhaps no problem in the sordid realm of false confessions is more pernicious than the problem of contamination. As a California court noted, police too often disclose specific facts regarding the crime during the interrogation process, thus enabling the suspect to adopt those facts and weave them together into a detailed narrative of guilt – even if he or she is innocent – that virtually seals his or her fate because of its plausibility. Indeed, Brendan Dassey's case provides a disturbing example of the power of a contaminated confession. Brendan's videotaped interrogation shows the officers feeding him nonpublic information about the crime when he was unable to produce it, including the whereabouts of the victim's personal effects, the disabling of the victim's car, and – most crucially – the method by which the victim was murdered ("I'm just going to come out and ask you. Who shot her in the head?"). At closing argument, however, the State suggested that Brendan's confession should be believed precisely because he gave accurate information about these nonpublic details – while glossing over the reality that his "knowledge" of those facts was based on contamination. Like the overwhelming majority of other false confessors who take their cases to trial, Brendan was convicted and sentenced to

⁶ *In re Elias V.*, 237 Cal. App. 4th 568, 586, 587, 591, 593-95 (1st Dist. June 9, 2015).

life in prison based on a confession that ended up including accurate-sounding details but that still misled the jury about his guilt.

Even law enforcement interrogation trainers recognize the danger of contaminating a confession. In its training manual, John E. Reid & Associates emphatically warns officers against intentionally or inadvertently providing suspects with key facts of the crime. Interrogators are instructed that when reviewing a confession that appears to be corroborated, “the investigator should be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs.” The manual stresses that “[i]t is highly important . . . that the investigator let the confessor supply the details of the occurrence, and to this end, the investigator should avoid or at least minimize the use of leading questions.”

Despite these warnings, fact-feeding still occurs too often – but because some defenders are not trained to think of fact-feeding as cognizable during a traditional motion to suppress, many are left unsure how to combat it. But the trick to challenging contamination in a motion to suppress is to cast fact-feeding – appropriately, we believe – as part of an interrogator’s arsenal of coercion and manipulation. Indeed, many defenders who have argued that contamination or fact-feeding is itself a form of coercion have succeeded. The notion that contamination was constitutionally problematic was first introduced in the *Miranda* decision itself, where the Court spoke critically of police tactics that cause a suspect to “merely confirm[] the preconceived story the police seek to have him describe.”⁷ Since then, many lower courts have followed suit. Just this past year, a federal court suppressed an eighteen-year-old’s confession where the police “asked him the same questions over and over until he finally assented and adopted the details that the officers posited.”⁸ Similarly, courts have suppressed confessions in cases where “there is not a single inculpatory fact in defendant’s confession that was not suggested to him”⁹; where “the majority of [suspect’s] final confession was comprised of details that [suspect] had adopted from the officers’ suggestions”¹⁰; and where the confession “contains little information that was not first provided or suggested by the interrogating officers.”¹¹ Clearly, it is possible – and indeed wise – to argue that contamination itself is, in essence, coercive.

PRACTICE TIPS:

- Litigate contamination as a form of police coercion that violates constitutional guarantees of due process
- Persuade more judges to apply heightened scrutiny to juvenile confessions, like in *Elias V*
- Cite cases like *In re Elias V*, *U.S. v. Preston*, and *State v. Rettenberger*

In short: the time is ripe for wholesale reform of the ways in which our police interrogate our youth. While piecemeal progress is being made in law enforcement-driven reforms and a few state legislatures, the most effective vehicle for change can be made by front-line defense attorneys who can bring to life not only *Gault*’s call for zealous advocacy but also its concern for the unreliability of youthful confessions. Now more than ever, those concerned about the reliability of children’s confessions should act to break through the legal fictions that can insulate such confessions from rigorous scrutiny –

⁷ *Miranda*, 384 U.S. at 455.

⁸ *Preston*, 751 F.3d at 1023-24.

⁹ *Thomas*, 8 N.E.3d at 316.

¹⁰ *In re J.F.*, 987 A.2d 1168 (D.C. 2010).

¹¹ *State v. Rettenberger*, 984 P.2d 20 1009, 1020 ¶ 40 (Utah 1999).

drawing on the time-honored lessons of *In re Gault* to insist that after fifty years, our system can no longer tolerate interrogation tactics that imperil children. With dedication, creativity, and perseverance, the wise words of *Gault* can finally be turned from a rhetorical mandate into legal reality.

Criminal Justice and Mental Illness: What Are the Next Steps?

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Criminal Justice and Mental Illnesses: Next Steps

I. Building the Mental Health System

Great progress has been made in creating an array of mental health services and supports. (see chart). The problem is that while we know what works– we don't have enough and there is a workforce shortage. People do get assessed in the emergency rooms but if they don't meet hospital level of care there are few alternatives. No urgent cares treat mental illnesses. Some hospitals have psychiatric emergency rooms.

II. Alternatives to Criminal Justice

- CIT and other police training
- 911 operators doing warm handoffs to mental health crisis teams
- One crisis number in the state
- More mobile mental health teams
- Yellow Line Project
- Protected transport
- Stepping Up Projects
- Mental Health and Problem Solving Courts

III. Treatment in Jails

- OLA report identified several problems
- Screened for mental health but not assessed
- No requirement for individual treatment plans
- Restrictive medication formularies
- Can't administer involuntary medications even if a jarvis order
- Poor discharge planning
- Lack of sharing information with human services
- Staff training varies
- No ombudsman to follow up on complaints
- Months before decision to commit takes place
- Some community mental health centers and jails are collaborating to provide treatment

IV. Treatment in Prisons

- Need for more treatment and mental health staff
- Need to restrict the use of solitary confinement

Mental Health Promotion and Illness Prevention	Early Intervention	Basic Clinical Services	Community Services and Supports	Hospitalization and Residential Treatment	Crisis Response Services
Individual/Family Level Follow Along Program Child and Teen Check-Ups Birth Defects New Born Follow-Up Family Home visiting (eligible families) Early Childhood Family Education Parent supports Integrated Adult/Children's Mental Health School- and Classroom- Based Supports and Programs Positive Behavioral Interventions and Supports Bullying Prevention Diversion and Restorative Justice Youth Development and Prevention Mentoring Economic and Nutrition Supports (e.g. WIC) Skills Development Initiatives (e.g. Army Soldier and Family Fitness) Culture and Language Preservation programs Support and Resource Groups Senior Initiatives Community and Systems Level Community Capacity (Including Community Resiliency Planning and	Home visiting (M) Early childhood mental health (MG) First Episode programs (PMG) ACES work (Adverse Childhood Experiences) (G) Mental Health First Aid (G)	Physician/Primary Care (PM) Psychiatrist (PM) Mental Health Professional (PM) Community Mental Health Center (PMG) Community Health Center (PMG) School-linked Mental Health (PMG) Clinical Care Consultation (with mental health professionals) (M) Dialectic Behavior Therapy (DBT) (PM) Telemedicine (PM)	Case Management (M) Targeted Case Management (M) Community Support Programs/Club Houses (G) Children's Therapeutic Services and Supports (M) Adult Rehab Mental Health Services (M) Assertive Community Treatment (M) Youth Assertive Community Treatment (M) Respite Care (child) (G) Personal Care Assistance (PCA) Community First Services and Supports (M) Community Alternatives for People with Disabilities Waiver Independent Living Services (ILS) (M) Behavioral Health Homes (M) Health Care Homes (M) Therapeutic Foster Care (M) Family Foster Care (G IVE) Corporate Foster Care (G) Supportive Housing (G) Warm Lines Wellness Recovery Action Plan Training Special Ed/504 Plans and Intermediates and Coops (Ed funding and M) Community Paramedics (M)	Day Treatment (PM) Mother/Baby Partial (PMG) Partial Hospitalization (PM) In-reach Services (M) Inpatient (PM) Community Behavioral Health Hospital (PM) Children's Residential Treatment (PM & IVE) Psychiatric Residential Treatment Facilities (child) (PM) Intensive Residential Treatment (adults) (MG) State Operated Secure (Anoka Metro Regional Treatment Center, Minnesota Security Hospital, Child & Adolescent Behavioral Health Services (G) Subacute for Children (MA)	Crisis numbers (G) Crisis teams (PM) Crisis stabilization (MG) Crisis homes (adults) (G) Psych Emergency Departments (PM) Psych Urgent Care (MG)

Implementation) Social Connectedness Initiatives Education and Outreach (e.g. Adverse Childhood Experience) Suicide Prevention Community Planning Integrated Mental Health and Primary Care Systems improvements & policy changes Mental health consultation (e.g., child care) Trauma Informed Systems Development Workplace wellness initiatives			Bridges Housing (G) Crisis Housing Fund (G) Peer-led Support Groups Illness Management and Recovery (M)		

P- Private insurance

M – Medicaid or MNCare

G- Grants

Full Service Federal Sentencing: Treating Sentencing as Trial

Steven R. Morrison
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Grand Forks

2017 Minnesota Criminal Justice Institute CLE
August 22, 2017
1:15-2:15

“Full Service” Sentencing
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This CLE will provide a brief overview of the basics of federal sentencing, but will focus primarily on how a criminal defense attorney can provide his or her client with advanced sentencing representation. The brief overview of the basics will cover general procedure, the Federal Sentencing Guidelines, motions for downward departure based on cooperation, § 3553(a) factors, working with prosecutors and probation officers, and the sentencing memo. The advanced portion of this CLE will consider how to develop and shape the record to give one's client the best possible chance to obtain a great sentence. Topics covered will include: addressing pending charges in state courts, enabling a client's exemplary cooperation, working with psychological and other experts, obtaining medical and psychological records, convincing prosecutors to decertify priors under § 851 and recommend favorable sentences, and requesting recommendations for incarceration at particular facilities. In short, “full service” sentencing means generating facts and shaping reality just as an attorney does in anticipation of trial.

- I. The basics
 - a. Federal sentencing procedure:
 - i. pre-indictment→
 1. Goal: keep client from being indicted
 2. Method: full cooperation
 3. Benefits: no federal indictment, may be state indicted
 4. Drawback: have to inform on everyone, risk of client making false statements, don't get discovery
 5. Pitfalls: client may lie, information may not be good enough, client may be more guilty than agents know
 6. Solution: close communication with client re proffer interview, careful analysis of client's culpability, usually don't have to worry about quality of information
 7. PRO TIPS:

- a. Tell a story to the AUSA, starting now. This story should be coherent throughout the process (part of the story is “my client is [sick, an addict, etc.], I am only now learning just how” sick.
 - b. Start now with your client to develop a genuine treatment/rehabilitation plan
 - c. Start now to avoid 851 certifications, prevent your client’s “f**k you” attitude
 - d. Get your client’s autobiography: they know relevant things, but not necessarily that they are relevant (clients may have difficulty opening up to people, may not have been rewarded in their lives for opening up)
- ii. counsel appointed/hired(?)→
- iii. indictment→
 - 1. Goal: avoid 851 certifications, cooperate or prepare for trial
 - 2. Method: speak with AUSA as soon as possible, keep client from adopting a “f**k you” stance
 - 3. Benefits: Can fully apply 3553(a), no mandatory minimums, can set client up for success
 - 4. Drawback: If cooperation, don’t necessarily get full discovery, don’t get a trial, client may plead guilty but be innocent
 - 5. Pitfalls: plead too early and client can’t demonstrate progress or view much discovery, plead too late and prosecutor may not accept the deal. If trial, client gets a trial penalty
 - 6. Solution: Stay friendly with the AUSA, stay in contact with AUSA, share with AUSA your client’s progress — change the AUSA’s mind about your client through concrete evidence. Use status reports and other motions to signal to court and AUSA what you want to signal.
(status report)
 - 7. PRO TIPS:
 - a. Tell AUSA about your client — blunt the prosecutor’s zeal
 - b. Cooperation above and beyond (client’s proactive cooperation with state, efforts to resolve child support arrears, etc.)
- iv. counsel appointed/hired→
- v. plea then cooperation(?)→
 - 1. Goal: set client up for the best sentence possible from the judge, the best recommendation possible from the AUSA, and create reasons to recommend the best sentence possible
 - 2. Method: Get experts (and funds from the court for experts), move to continue sentencing, stay in friendly contact with AUSA, show the AUSA how good your client is, show your client how good he can be. Convince your client to help himself for himself, not for a good sentence.
 - 3. Benefit: can set up client for a great sentencing outcome
 - 4. Drawbacks: AUSA and the court may want to hurry up the sentencing

5. Solution: Give the AUSA and the court reasons to delay sentencing and work, if not in favor of your client, at least blunt their zeal against her.
6. PRO TIPS
 - a. Resolve pending state charges, seek to cooperate on state charges
 - b. Resolve civil matters, like child support
 - c. Get experts. Inmates have drug addiction, TBI, childhood abuse, low IQ, mental illness. **(statistics on inmates)**
 - d. Get experts on drug amounts, child porn amounts, and other quantifiable variables (these amounts don't reflect culpability, especially meth) **(Miller article)**
- vi. trial(?) →
- vii. sentencing →
 1. Goal: Draft a sentencing memorandum that is informed by the hard work you and your client have done to get to this point, present witnesses at the sentencing hearing to support your client, prepare for oral argument
 2. Method: Treat this as the trial, for which you have prepared extensively, generated discovery and other evidence, prepared witnesses and ensured they are in court.
 3. Benefit: The best sentence possible for your client.
 4. Drawbacks: Client's sentence depends upon many different people
 5. Solution: Be as prepared for the sentencing hearing as you would be for the trial of your life.
 6. PRO TIPS
 - a. Sneak 3553(a) factors into 5k1.1/3553(e)-limited sentencing
 - b. Client's health and prison placement **(Hofstad brief)** — when BOP cannot care for a D. Requesting incarceration at particular facilities (when the BOP *cannot* accommodate needs).
 - c. Using Sentencing Commission statistics and addressing sentencing disparities.
 - d. Sentencing as a trial, but everything is fair game and evidence rules do not apply, but you still have to support your argument with evidence.
 - e. Keep telling the story.
- viii. Appeal
 1. Goal: to avoid any appealable issues
 2. Method: in district court, fully brief issues and develop facts to limit the court's discretion in favor of your client
 3. Benefit: you've done everything you can, up front, for your client
 4. Drawbacks: none
 5. District court duty: Court must address all of the non-frivolous arguments. By fully briefing them, the court will be required to grapple with good arguments and developed facts.

6. Appellate standard: review for reasonableness under the abuse of discretion standard
7. PRO TIPS
 - a. Fully briefing an issue *requires* the court to consider it. The more convincing your argument, the narrower the discretion of the court.
- b. Federal Sentencing Guidelines: an overview
 - i. Four approaches:
 1. Guidelines analysis
 2. Statutory min/max
 3. 851 certifications/5K1.1 and 3553(e) cooperation
 4. 3553(a) factors (**18 U.S.C. § 3553(a)**)
 - ii. **Sentencing exercise**
 - iii. **Guidelines worksheet**
 - iv. **Sentencing table**
 - v. Relevant conduct is the “cornerstone” of the Guidelines, but the designated “relevant conduct” favors harsher sentences.
- c. Federal Sentencing Guidelines: when numbers are involved
 - i. **U.S.S.G. § 2G2.2**
 - ii. **U.S.S.G. § 2B1.1**
- d. Federal Sentencing Guidelines: drugs
 - i. **U.S.S.G. § 2D1.1**
- e. § 851 certifications
 - i. **§ 851 certification**
 - ii. Downward departure based on cooperation (5K1.1, 18 U.S.C. § 3553(e))
- f. Probation officer interview/PSIR
- g. Sentencing memo
 - i. **Sentencing memorandum**
 - ii. **Psych eval packet cover and TOC**
- II. Going beyond the basics
 - a. Addressing a defendant’s underlying issues
 - i. **Statistics on inmates**
 - b. Getting an expert evaluator/witness
 - i. **Motion for funds for expert psychologist**
 - c. Challenging the numbers in the Guidelines
 - i. **Miller article**
 - d. Using sentencing statistics
 - i. **8th Circuit statistical information packet**
 - ii. **Quick facts (meth)**
 - iii. Aging out of crime
 - e. Using pleadings to your strategic advantage
 - i. **Status report**
- III. Open questions with the Guidelines
 - a. What does “life” equate to?
 - i. Sentencing Commission says life = 470 months.
 - ii. Prosecutors (in ND) say life = 360 months.
 - iii. The time isn’t definite.
 - b. What provisions are [otherwise unconstitutionally] vague?

- i. Johnson→Beckles→Dimaya: --
 - 1. *Johnson* (2015): D pleads guilty to being a felon in possession, gets an enhancement under the ACCA's residual clause for three prior "violent felonies" (18 U.S.C. § 924(e)(1)), defined as "conduct that presents a serious potential risk of physical injury to another." D's prior crime was possession of a sawed-off shotgun. Held: residual clause was unconstitutionally vague because it requires courts to look to the "ordinary case" of, say, possession of a sawed-off shotgun. But there is no "ordinary case."
 - 2. In light of Johnson, the U.S. Sentencing Commission got rid of the identical residual clause in the career offender provision. In its place is a list of enumerated crimes that count as "crimes of violence" which can increase a D's offense level and/or criminal history category.
 - 3. *Beckles* (2017): D convicted of being a felon in possession, gets a sentencing enhancement under USSG § 4B1.1(a)'s residual clause, enhancing sentences for prior "crimes of violence", defined at § 4B1.2(a) as the use, attempted use, or threatened use of physical force against another. Held: Guidelines are not subject to vagueness challenges, because the Guidelines do not fix sentences; they merely guide judicial discretion.
 - 4. *Dimaya* (2017): Considers whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions re an alien's removal, is unconstitutionally vague. Sec. 16(b) defines "crime of violence" in virtually the same way that the ACCA did in Johnson (exchanging "serious potential risk" with "substantial risk" and "conduct" with "in the course of committing the offense"). This provision triggers deportation. SCOTUS is still considering *Dimaya*.
 - 5. *Dimaya* and sentencing: under § 2L1.2(b)(1)(C) (re unlawfully entering or remaining in the U.S.), a D can get additional offense level points for committing a prior "aggravated felony." This term is defined in 8 U.S.C. § 1101(a)(43), which in turn defines it as a crime of violence in 18 U.S.C. § 16.
 - 6. THE UPSHOT: can't challenge Guidelines as vague, but may be able to challenge statutes as vague if the Guidelines refer to them.
- c. Drugs minus 2
 - i. **Richter pet for cert**
- d. Self-representation on resentencing, and major Guidelines amendments
 - i. Some amendments are retroactive (30 of appx 800 have been deemed retroactive). If they are, the question of self-representation may arise
 - 1. **Tollefson pet for cert**
 - ii. Retroactive amendments may also give rise to whether 3553(a) factors can be applied. Commission says no, SCOTUS in *Dillon v. U.S.* strongly suggested no, but this conclusion isn't unassailable or universal.
- e. Defendant's extraordinary physical condition
 - i. **Hofstad brief**
- f. Effect of future amendments (these are proposed 2017 amendments)

- i. Acceptance of responsibility: would delete the sentence that states “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The proposed amendment would instead provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under §3E1.1(a).
- ii. Potential amendments on synthetic drugs (like bath salts, spice, or K2):
Current Commission thinking is that a court would first determine
 1. “Whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance referenced in this guideline,”
 2. “Whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline,” and
 3. “Whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.”
 4. Second, once the court determines the most closely related controlled substance, the court would then determine the equivalent quantity of drug and use this quantity for the base offense level.

IV. Shaping the case, creating the facts

- a. Create leads through communication with client, client’s family and associates
 - i. Get client’s autobiography
 - ii. Sit with client multiple times, explore his life with him
 - iii. Speak with family members, friends, etc.
- b. Create facts through investigation and experts
 - i. Get every expert possible, as indicated by the facts
 - ii. If the synthetic drug amendment passes, you’ll need a drug expert
- c. Manipulate prosecutor’s outlook through formal and informal conversations
 - i. Disclose key facts at appropriate times (client’s past coerced drug abuse, for example) — don’t try to change prosecutor’s mind, but inform the prosecutor and let him come to his own conclusion
 - ii. Enlist the court in putting pressure on the prosecutor (through status reports, motions, etc.)
- d. Form and manipulate court’s outlook through motions and hearings
 - i. The court knows little/nothing about the case. Assume that. Take every opportunity to help the court form its opinion, shape its assumptions and expectations.
- e. Cooperation: on the instant case, other cases, state cases, child support, etc.
 - i. Cooperate in state cases (get state PD for your client, or agree to attend the proffer interview yourself)
 - ii. Prepare client for excellent proffer interview
 - iii. Prepare agents for excellent proffer interview (for example, make agents aware of a client’s particular mannerisms, which could be misinterpreted)

- f. Encourage client to get into counseling, work program, etc. for herself, not for sentencing
 - g. Probation interview
 - i. Make sure it is in person
 - ii. Prepare client for the interview
 - iii. Provide key documents to probation officer before interview
 - iv. Guide the interview where appropriate
 - h. Use the collateral consequences
 - i. Is your client a hunter? Talk about the prohibition on owning a gun.
 - ii. Is your client politically active? Talk about the ban on felons voting.
- V. Problems that prevent justice
 - a. 851 certifications (prosecutors certify simply because the court regularly undercuts them)
 - i. Get to the prosecutor and client before prosecutor certifies
 - b. Judicial discretion combined with defense counsel's failure to fully brief issues
 - c. Proliferation of crimes and felonies (overcriminalization)
 - i. Address the legislature (ND law making personal use a misdemeanor)
 - d. Failure to address individuals' problems before they commit crime
 - e. Other mandatory minimums
 - i. Charge bargain, if you have leverage
 - f. Gamesmanship: prosecutors withdraw potential deal because defendant took too long to accept (prosecutors have deadlines)
 - i. Get to your client early
 - g. Failure to address the "addict's deathly triad" (federal charges, conspiracy, addiction)
 - i. Unavailability of vital services in rural areas
 - ii. Failure of defendant or family to recognize problems (a client's car accident with TBI, for example)
 - iii. Conspiracy charges levied for evidentiary purposes, to induce pleas, and jack up sentences
 - iv. Federal charges take defendants out of the community, result in much longer sentences, more severe incarcerative settings
- VI. Solutions
 - a. Eliminate 851 certifications, give courts a role in rejecting certifications, or at least prosecutors should limit them to their intended use: against large-scale and repeat drug traffickers, not people stuck in the addict's deathly triad.
 - b. Reform federal and state drug laws, legalize a lot, trade enforcement resources for treatment resources
 - c. Shift resources from prosecution and law enforcement to treatment for TBI, addiction, childhood abuse, etc.
 - d. Tighten up federal conspiracy law, eliminate *Pinkerton* liability
 - e. Create mechanisms to encourage state, not federal prosecution

SENTENCING EXERCISE

Conviction: Count 1

Offense: Armed Bank Robbery; violation of 18 U.S.C. § 2113(a) and (d)

Maximum Statutory Penalties: 25 years and/or \$250,000; Class B Felony: up to 5 years supervised release following imprisonment; up to 3 years imprisonment upon subsequent revocation.

Note: an additional count of conviction for 18 U.S.C. § 924 (c) (use, carry, possession of firearm in relation to a crime of violence) would have required a consecutive sentence of at least 5 years imprisonment.

- committed robbery
- a federally insured bank
- carried a .38 caliber revolver (operational and loaded)
- pushed a teller, resulting in bodily injury (cut on forehead, bruises, contusions)
- restrained a customer (used packaging tape to bind and put into storage area)
- \$18,000. in bank loot taken, \$8000 recovered upon arrest 6 weeks after robbery
- within few days of apprehension defendant provided full information to the government and announced intentions to plead guilty

- defendant is a 23 year old male
- raised in broken family
- was sickly during childhood and missed a lot of school
- dropped out of school in the 9th grade and is functionally illiterate
- no job skills
- work history is that of construction laborer
- spotty employment record; currently unemployed and seeking work
- drinks 2 to 6 beers daily; occasional marijuana use
- lives with older sister
- never married
- has one child for which he is under a support order
- at time of robbery the defendant was in arrears in child support, had outstanding bills and had not contributed for some time to sister for living arrangements
- financial records show that within two weeks following the robbery, the defendant became current in his child support with a payment of \$4000, paid off outstanding debts of \$2000, gave his sister \$1000 and made a \$1000 down payment on a used car
- defendant has no noteworthy assets
- the defendant reports he was feeling pressure due to financial and family obligations and robbed the bank to get "out of the hole." In addition to the \$8000 spent on financial obligations and the down payment for an automobile, the defendant states that he used the remaining \$2000 to buy clothes and "party."
- the defendant has prior criminal record resulting from conduct committed after the defendant was 18 years old and disposed of in state court, as follows:

5 years ago	auto theft	2 years probation
2 years ago	grand larceny	6 months jail

Worksheet A (Offense Level)

Defendant _____ District/Office _____

Docket Number (Year-Sequence-Defendant No.) _____ - _____ - _____

Count Number(s) _____ U.S. Code Title & Section _____ : _____
_____ : _____

Guidelines Manual Edition Used: 20____ (NOTE: worksheets keyed to the Manual effective November 1, 2010)

Instructions:

For each count of conviction (or stipulated offense), complete a separate Worksheet A. Exception: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (see §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (see §3D1.2(a) and (b)).

1. Offense Level (See Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

<u>Guideline</u>	<u>Description</u>	<u>Level</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Sum		

2. Victim-Related Adjustments (See Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable enter "0."

\$ _____

3. Role in the Offense Adjustments (See Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (-) sign in front of the adjustment. If no adjustment is applicable, enter "0."

\$ _____

4. Obstruction Adjustments (See Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0."

\$ _____

5. Adjusted Offense Level

Enter the sum of Items 1-4. If this worksheet does not cover all counts of conviction or stipulated offenses, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1.

☐

Check if the defendant is convicted of a single count. In such case, Worksheet B need not be completed.

☐

If the defendant has no criminal history, enter criminal history "I" here and on Item 4, Worksheet D. In such case, Worksheet C need not be completed.

Worksheet B

(Multiple Counts or Stipulation to Additional Offenses)

Defendant _____

Docket Number _____

Instructions

Step 1: Determine if any of the counts group. (Note: All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically, (1) counts grouped under §3D1.2(d), or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (see §3D1.2(a)). Explain the reasons for grouping:

Step 2: Using the box(es) provided below, for each group of closely related counts, enter the highest adjusted offense level from the various “A” Worksheets (Item 5) that comprise the group (see §3D1.3). (Note: A “group” may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.)

Step 3: Enter the number of units to be assigned to each group (see §3D1.4) as follows:

- One unit (1) for the group of closely related counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. **Adjusted Offense Level for the First Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

2. **Adjusted Offense Level for the Second Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

3. **Adjusted Offense Level for the Third Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

4. **Adjusted Offense Level for the Fourth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

5. **Adjusted Offense Level for the Fifth Group of Closely Related Counts**

Count number(s): _____

_____ (unit)

6. **Total Units**

(total units)

7. **Increase in Offense Level Based on Total Units (See §3D1.4)**

1 unit:	no increase	2 1/2 - 3 units:	add 3 levels
1 1/2 units:	add 1 level	3 1/2 - 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

8. **Highest of the Adjusted Offense Levels from Items 1-5 Above**

9. **Combined Adjusted Offense Level (See §3D1.4)**

Enter the sum of Items 7 and 8 here and on Worksheet D, Item 1.

Worksheet C (Criminal History)

Defendant _____ Docket Number _____

Enter the Date Defendant Commenced Participation in Instant Offense (Earliest Date of Relevant Conduct) _____

1. 3 Points for each prior ADULT sentence of imprisonment EXCEEDING ONE YEAR AND ONE MONTH imposed within 15 YEARS of the defendant's commencement of the instant offense OR resulting in incarceration during any part of that 15-YEAR period. (See §§4A1.1(a) and 4A1.2.)
2. 2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) imposed within 10 YEARS of the instant offense; and
2 Points for each prior sentence of imprisonment of AT LEAST 60 DAYS resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) from which the defendant was released from confinement within 5 YEARS of the instant offense. (See §§4A1.1(b) and 4A1.2.)
3. 1 Point for each prior sentence resulting from an offense committed ON OR AFTER the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 10 YEARS of the instant offense; and
1 Point for each prior sentence resulting from an offense committed BEFORE the defendant's 18th birthday not counted under §4A1.1(a) or §4A1.1(b) imposed within 5 YEARS of the instant offense. (See §§4A1.1(c) and 4A1.2.)

NOTE: A maximum sum of 4 Points may be given for the prior sentences in Item 3.

Date of Imposition	Offense	Sentence	Release Date**	Guideline Section	Criminal History Pts.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

* Indicate with an asterisk those offenses where defendant was sentenced as a juvenile.

** A release date is required in only two instances:

- a. When a sentence covered under §4A1.1(a) was imposed more than 15 years prior to the commencement of the instant offense but release from incarceration occurred within such 15-year period;
- b. When a sentence counted under §4A1.1(b) was imposed for an offense committed prior to age 18 and more than 5 years prior to the commencement of the instant offense, but release from incarceration occurred within such 5-year period; and

4. Sum of Criminal History Points for prior sentences under §§4A1.1(a), 4A1.1(b), and 4A1.1(c) (Items 1,2,3).

Worksheet C

Defendant	Docket Number

5. 2 Points if the defendant committed the instant offense while under any criminal justice sentence (e.g., probation, parole, supervised release, imprisonment, work release, escape status). (See §§4A1.1(d) and 4A1.2.) List the type of control and identify the sentence from which control resulted. Otherwise, enter 0 Points.

10

6. 1 Point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under §4A1.1(a), (b), or (c) because such sentence was counted as a single sentence which also included another sentence resulting from a conviction for a crime of violence. (See §§4A1.1(e) and 4A1.2.) Identify the crimes of violence and briefly explain why the cases are considered a single sentence. Otherwise, enter 0 Points.

10

[illegible]

- 7. Total Criminal History Points** (Sum of Items 4-6)

10

8. **Criminal History Category** (Enter here and on Worksheet D, Item 4)

<u>Total Points</u>	<u>Criminal History Category</u>
0-1	I
2-3	II
4-6	III
7-9	IV
10-12	V
13 or more	VI

Worksheet D (Guideline Worksheet)

Defendant _____

District _____

Docket Number _____

1. **Adjusted Offense Level** (From Worksheet A or B)
If Worksheet B is required, enter the result from Worksheet B, Item 9.
Otherwise, enter the result from Worksheet A, Item 5.

2. **Acceptance of Responsibility** (See Chapter Three, Part E)
Enter the applicable reduction of 2 or 3 levels. If no adjustment is applicable, enter "0".

3. **Offense Level Total** (Item 1 less Item 2)

4. **Criminal History Category** (From Worksheet C)
Enter the result from Worksheet C, Item 8.

5. **Terrorism/Career Offender/Criminal Livelihood/Armed Career Criminal/Repeat and Dangerous Sex Offender**
(see Chapter Three, Part A, and Chapter Four, Part B)

- a. Offense Level Total

If the provision for Career Offender (§4B1.1), Criminal Livelihood (§4B1.3), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in an offense level total higher than Item 3, enter the offense level total. Otherwise, enter "N/A."

- b. Criminal History Category

If the provision for Terrorism (§3A1.4), Career Offender (§4B1.1), Armed Career Criminal (§4B1.4), or Repeat and Dangerous Sex Offender (§4B1.5) results in a criminal history category higher than Item 4, enter the applicable criminal history category. Otherwise, enter "N/A."

6. **Guideline Range from Sentencing Table**
Enter the applicable guideline range from Chapter Five, Part A.

Months

7. **Restricted Guideline Range** (See Chapter Five, Part G)
If the statutorily authorized maximum sentence or the statutorily required minimum sentence restricts the guideline range (Item 6) (see §§5G1.1 and 5G1.2), enter either the restricted guideline range or any statutory maximum or minimum penalty that would modify the guideline range. Otherwise, enter "N/A."

Months

☐

Check this box if §5C1.2 (Limitation on Applicability of Statutory Minimum Penalties in Certain Cases) is applicable.

8. **Undischarged Term of Imprisonment** (See §5G1.3)

☐

If the defendant is subject to an undischarged term of imprisonment, check this box and list the undischarged term(s) below.

Worksheet D

Defendant _____

Docket Number _____

9. **Sentencing Options** (Check the applicable box that corresponds to the Guideline Range entered in Item 6 or Item 7, if applicable.)
(See Chapter Five, Sentencing Table)

☐

Zone A If checked, the following options are available (see §5B1.1):

- Fine (See §5E1.2(a))
- "Straight" Probation
- Imprisonment

☐

Zone B If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one month plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(c)(2))
- Probation with a condition that substitutes intermittent confinement, community confinement, or home detention for imprisonment (see §5B1.1(a)(2) and §5C1.1(c)(3))

☐

Zone C If checked, the minimum term may be satisfied by:

- Imprisonment
- Imprisonment of at least one-half of the minimum term plus supervised release with a condition that substitutes community confinement or home detention for imprisonment (see §5C1.1(d)(2))

☐

Zone D If checked, the minimum term shall be satisfied by a sentence of imprisonment (see §5C1.1(f))

10. **Length of Term of Probation** (See §5B1.2)

If probation is imposed, the guideline for the length of such term of probation is: (Check applicable box)

☐

At least one year, but not more than five years if the offense level total is 6 or more

☐

No more than three years if the offense level total is 5 or less

11. **Conditions of Probation** (See §5B1.3)

List any mandatory conditions ((a)(1)-(10)), standard conditions ((c)(1)-(14)), and any other special conditions that may be applicable:

Defendant _____

Docket Number _____

12. Supervised Release (See §§5D1.1 and 5D1.2)

a. A term of supervised release is: (Check applicable box)

- ☐ Required because a term of imprisonment of more than one year is to be imposed or if required by statute
- ☐ Authorized but not required because a term of imprisonment of one year or less is to be imposed

b. Length of Term (Guideline Range of Supervised Release): (Check applicable box)

- ☐ Class A or B Felony: Three to Five Year Term
- ☐ Class C or D Felony: Two to Three Year Term
- ☐ Class E Felony or Class A Misdemeanor: One Year Term

c. Restricted Guideline Range of Supervision Release

- ☐ If a statutorily required term of supervised release impacts the guideline range, check this box and enter the required term. _____

13. Conditions of Supervised Release (See §5D1.3)

List any mandatory conditions ((a)(1)-(8)), standard conditions ((c)(1)-(15)), and any other special conditions that may be applicable: _____

14. Restitution (See §5E1.1)

a. If restitution is applicable, enter the amount. Otherwise enter "N/A" and the reason: _____

b. Enter whether restitution is statutorily mandatory or discretionary: _____

c. Enter whether restitution is by an order of restitution or solely as a condition of supervision. Enter the authorizing statute: _____

15. Fines (Guideline Range of Fines for Individual Defendants) (See §5E1.2)

a. Special fine provisions

- ☐ Check box if any of the counts of conviction is for a statute with a special fine provision. (This does not include the general fine provisions of 18 USC § 3571(b)(2), (d))

Minimum

Maximum

Enter the sum of statutory maximum fines for all such counts \$ _____

b. Fine Table (§5E1.2(c)(3))

Enter the minimum and maximum fines \$ _____ \$ _____

c. Guideline Range of Fines

(determined by the minimum of the fine table (Item 15(b)) and the greater maximum above (Item 15(a) or 15(b)))

\$ _____ \$ _____

d. Ability to Pay

- ☐ Check this box if the defendant does not have an ability to pay.

Worksheet D

Defendant _____

Docket Number _____

16. Special Assessments (See §5E1.3)

Enter the total amount of special assessments required for all counts of conviction:

- \$25 for each misdemeanor count of conviction
- Not less than \$100 for each felony count of conviction

§ _____

17. Additional Factors

List any additional applicable guidelines, policy statements, and statutory provisions. Also list any applicable aggravating and mitigating factors that may warrant a sentence at a particular point either within or outside the applicable guideline range. Attach additional sheets as necessary.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.

Completed by _____ Date _____

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
Zone D	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

November 1, 2016

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$6,500 or less	no increase
(B) More than \$6,500	add 2
(C) More than \$15,000	add 4
(D) More than \$40,000	add 6
(E) More than \$95,000	add 8
(F) More than \$150,000	add 10
(G) More than \$250,000	add 12
(H) More than \$550,000	add 14
(I) More than \$1,500,000	add 16
(J) More than \$3,500,000	add 18
(K) More than \$9,500,000	add 20

(L)	More than \$25,000,000	add 22
(M)	More than \$65,000,000	add 24
(N)	More than \$150,000,000	add 26
(O)	More than \$250,000,000	add 28
(P)	More than \$550,000,000	add 30 .

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;

(B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

(13) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If—

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or meth-amphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(14) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.

(15) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled

substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(16) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

(17) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
• 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD;	
(1) • 36 KG or more of Fentanyl;	Level 38

- 9 KG or more of a Fentanyl Analogue;
- 90,000 KG or more of Marihuana;
- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam.

- (2)
- At least 30 KG but less than 90 KG of Heroin;
 - At least 150 KG but less than 450 KG of Cocaine;
 - At least 8.4 KG but less than 25.2 KG of Cocaine Base;
 - At least 30 KG but less than 90 KG of PCP, or
at least 3 KG but less than 9 KG of PCP (actual);
 - At least 15 KG but less than 45 KG of Methamphetamine, or
at least 1.5 KG but less than 4.5 KG of Methamphetamine
(actual), or
at least 1.5 KG but less than 4.5 KG of "Ice";
 - At least 15 KG but less than 45 KG of Amphetamine, or
at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
 - At least 300 G but less than 900 G of LSD;
 - At least 12 KG but less than 36 KG of Fentanyl;
 - At least 3 KG but less than 9 KG of a Fentanyl Analogue;
 - At least 30,000 KG but less than 90,000 KG of Marihuana;
 - At least 6,000 KG but less than 18,000 KG of Hashish;
 - At least 600 KG but less than 1,800 KG of Hashish Oil;
 - At least 30,000,000 units but less than 90,000,000 units of
Ketamine;
 - At least 30,000,000 units but less than 90,000,000 units of
Schedule I or II Depressants;
 - At least 1,875,000 units but less than 5,625,000 units of
Flunitrazepam.

Level 36

- (3)
- At least 10 KG but less than 30 KG of Heroin;
 - At least 50 KG but less than 150 KG of Cocaine;
 - At least 2.8 KG but less than 8.4 KG of Cocaine Base;
 - At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
 - At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Case No. 3:13-cr-39-06
Plaintiff,	)	
v.	)	<u>INFORMATION TO ESTABLISH</u>
	)	<u>PRIOR CONVICTIONS FOR</u>
CASSANDRA ANNE KASOWSKI,	)	<u>ENHANCED SENTENCE PURSUANT</u>
	)	<u>TO 21 U.S.C. § 851(a)(1)</u>
Defendant.	)	

The United States of America by Timothy Q. Purdon, United States Attorney for the District of North Dakota, and Christopher C. Myers, Assistant United States Attorney, pursuant to Title 21, United States Code, Section 851(a), hereby provides information to establish previous convictions that the United States will rely upon at sentencing to enhance the minimum mandatory sentence applicable under Title 21, United States Code, Section 841(b)(1), if the defendant is convicted or pleads guilty.

Attached and incorporated into this Notice are copies of the documents relating to the prior conviction of Cassandra Anne Kasowski, for felony drug offenses as defined in Title 21, United States Code, Section 802(44).

The prior convictions are:

Controlled Substance Crime Fifth Degree, Possession

Court File No. KX-07-676 in Clay County District Court, State of Minnesota, a felony under Minnesota law; Criminal Judgment entered on or about December 10, 2007.
(Exhibit 1)

Possession of a Controlled Substance / Possession of Drug Paraphernalia

Court File No. 09-04-K-01778 in Cass County District Court, State of North Dakota, a felony under North Dakota law; Criminal Judgment and Commitment entered on or about June 27, 2005. (Exhibit 2)

Possession of a Controlled Substance / Possession of Drug Paraphernalia

Court File No. 09-04-K-00535 in Cass County District Court, State of North Dakota, a felony under North Dakota law; Criminal Judgment and Commitment entered on or about May 10, 2004. (Exhibit 3)

Possession of a Controlled Substance / Possession of Drug Paraphernalia

Court File No. 09-03-K-03924 in Cass County District Court, State of North Dakota, a felony under North Dakota law; Criminal Judgment and Commitment entered on or about May 10, 2004. (Exhibit 4)

In the Indictment the defendant is alleged to have knowingly and intentionally combined, conspired, confederated, and agreed together with others, both known and unknown to the grand jury, to possess with intent to distribute and distribute in excess of 500 grams of mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Pursuant to Section 841(b)(1)(A), if convicted of the Indictment, the defendant faces a minimum mandatory 10-year sentence. The statute further reads:

If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. [. . . not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$20,000,000 if the defendant is an individual . . .]

Therefore, the United States respectfully submits that upon conviction of Indictment, defendant Cassandra Anne Kasowski, is subject to the mandatory penalty of life imprisonment, and a fine of \$20,000,000 pursuant to 21 U.S.C. § 841(b)(1)(A)(viii).

Dated: July 17, 2013.

TIMOTHY Q. PURDON
United States Attorney

By: /s/ Christopher C. Myers
CHRISTOPHER C. MYERS
Assistant United States Attorney
Quentin N. Burdick United States Courthouse
655 First Avenue North - Suite 250
Fargo, ND 58102-4932
(701) 297-7400
N.D. Bar Board ID No. 05317
Chris.C.Myers@usdoj.gov
Attorney for United States

ORIGINAL

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

State of North Dakota,

Plaintiff,

vs.

Cassandra Kasowski,

Defendant(s).

CRIMINAL JUDGMENT

AND COMMITMENT

09-03-K-03924

03-DG-00745

On this 5th day of May, 2004, came Tracy J. Peters, Assistant State's Attorney, and the above-named defendant appearing in person with Richard D. Varriano as counsel; this being the date fixed by the Court for pronouncement of judgment upon a plea of guilty to the offense(s) of:

COUNT ONE: POSSESSION OF A CONTROLLED SUBSTANCE in violation of N.D.C.C. § 19-03.1-23(6), a Class C Felony, occurring on or about November 14, 2003,

COUNT TWO: POSSESSION OF A DRUG PARAPHERNALIA in violation of N.D.C.C. § 19-03.4-03, a Class C Felony, occurring on or about November 14, 2003,

as charged in the Criminal Information heretofore filed against said Defendant in this Court; and the said Defendant having been asked by the Court whether the Defendant had any statement to make on the Defendant's own behalf or wished to present any information in mitigation of punishment or which would require the Court to withhold pronouncement of judgment and sentence, having considered the same, and no sufficient cause to the contrary having been shown why judgment should not be pronounced,

IT IS THE JUDGMENT AND SENTENCE OF THE COURT:

COUNT ONE:

1. The defendant be committed to the custody of the North Dakota Department of Corrections and Rehabilitation for imprisonment in a state correctional facility for a period of fifty three (53) days commencing on the day of sentencing.

FILED-CLERK OF DISTRICT COURT

1

MAY 10 2004

CASS COUNTY, ND
031

Exhibit 4

COUNT TWO:

2. The defendant be committed to the custody of the North Dakota Department of Corrections and Rehabilitation for imprisonment in a state correctional facility for a period of **fifty three (53) days** commencing on the day of sentencing.

3. Credit of 53 days shall be given for previous custody time.

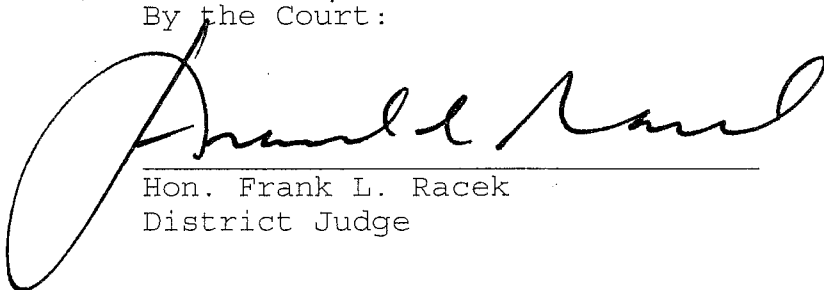
4. The defendant shall obtain a chemical dependency evaluation from a licensed addiction treatment facility as required by N.D.C.C. § 19-03.1-23(7) and follow all recommendations therefrom.

IT IS FURTHER ORDERED, unless otherwise stated in this Judgment, the Defendant is committed to the custody of the North Dakota Department of Corrections and Rehabilitation or the Sheriff of Cass County or the Sheriff's authorized representative for incarceration at hard labor in accordance with the Judgment until expiration of the sentence or until discharged by proper authority.

IT IS FURTHER ORDERED, the Clerk of this Court deliver a certified copy of this Judgment and Commitment to the Sheriff or other appropriate officer as a commitment of the Defendant.

Dated this 10 day of May, 2004.

By the Court:


Hon. Frank L. Racek
District Judge

State v. Cassandra Kasowski
09-03-K-03924
03-DG-00745

J:\SATINFO\GENERAL\tjm\Drug Files\Judgments 2003\KasowskiCassandra.wpd

I, Kathryn Ouren, Clerk of the District Court, Cass County, State of North Dakota, do hereby certify that this is a true and complete copy of the original instrument filed in this office. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at my office, in Fargo, North Dakota this 7 day of June, 2013

KATHRYN OUREN
Clerk of the District Court

By Megan Weisk Deputy

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

vs.

Cassandra Kasowski,

Defendant(s).

INFORMATION

09-03-K- 3924
SA #03-DG-00745

The Cass County State's Attorney charges that the above-named defendant(s) committed the following offense in Cass County, North Dakota:

Count 1: **POSSESSION OF A CONTROLLED SUBSTANCE** in violation of N.D.C.C. § 19-03.1-23(6) in that on or about November 14, 2003, the above-named defendant willfully, as defined in N.D.C.C. § 12.1-02-02, possessed a controlled substance which was not was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or as otherwise authorized by N.D.C.C. ch. 19-03.1, to-wit: that on or about said day, the defendant, **Cassandra Kasowski**, intentionally, knowingly or recklessly, exclusively or jointly, and actually or constructively possessed the schedule II controlled substance Methamphetamine at West Fargo, Cass County, North Dakota.

Count 2: **POSSESSION OF DRUG PARAPHERNALIA** in violation of N.D.C.C. § 19-03.4-03 in that on or about November 14, 2003, the above-named defendant used or possessed with the intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance other than marijuana in violation of N.D.C.C. ch. 19-03.1, to-wit: that on or about the above-stated date, the defendant, **Cassandra Kasowski**, exclusively or jointly and actually or constructively possessed a syringe, scale and smoking device at West Fargo, Cass County, North Dakota with the requisite intent.

Against the peace and dignity of the State of North Dakota.

FILED-CLERK OF DISTRICT COURT

NOV 14 2003

CASS COUNTY ND

State's witnesses:

SA Duane Sall
State Toxicologist or designee
Evidence custodian(s)

Dated: November 14, 2003

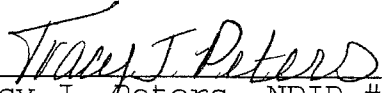
Penalty section:

Count 1: 19-03.1-23(6)

Class C felony
(min. mand. drug add. eval.)

Count 2: 19-03.4-03 & 19-
03.1-23(7)

Class C felony
(min. mand. drug add. eval.)



Tracy J. Peters, NDID #5432
Assistant State's Attorney

I, Kathryn Ouren, Clerk of the District Court, Cass County,
State of North Dakota, do hereby certify that this is a true
and complete copy of the original instrument filed in this
office. IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the Seal of said Court at my office, in
Fargo, North Dakota this 7 day of June, 2013

KATHRYN OUREN
Clerk of the District Court

By Megan West Deputy
034

(a)FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1)

the nature and circumstances of the offense and the history and characteristics of the defendant;

(2)the need for the sentence imposed—

(A)

to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B)

to afford adequate deterrence to criminal conduct;

(C)

to protect the public from further crimes of the defendant; and

(D)

to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3)

the kinds of sentences available;

(4)the kinds of sentence and the sentencing range established for—

(A)the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i)

issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28](#), United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(ii)

that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B)

in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28](#), United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));

(5)any pertinent policy statement—

(A)

issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28](#), United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(B)

that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.^[1]

(6)

the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7)

the need to provide restitution to any victims of the offense.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

United States of America

v.

Edward

No.

DEFENDANT'S SENTENCING MEMORANDUM

The defendant, submits this memorandum to assist the Court in determining an appropriate sentence.

Mr. respectfully requests that this Court impose a sentence of 121 months. A 121-month sentence would reflect Mr. complete, honest, and truthful cooperation. The quality of this cooperation must be evaluated relative to Mr. status as an individual who has suffered from drug abuse, his hope and efforts to address his addiction, and his childhood emotional, physical, and sexual abuse.

A 121-month sentence would also reflect the United States Sentencing Commission's dual goals of uniformity and proportionality by falling within Mr. Guidelines range but being higher than the average sentences imposed in this court, in the Eighth Circuit, and nationally for offenses like Mr.

Just as the United States Probation Office recommends, (PSIR at 16), Mr. also requests that this Court recommend his participation in both the Federal drug rehabilitation program and engagement in cognitive-behavioral therapy.

Finally, the Probation Office notes that Mr. has "some positive supports in the form of his father and sister, but he is geographically isolated from them." (PSIR at 14). In order for

him to be near his family and to access important job training programs, Mr. [REDACTED] asks that this Court recommend to the Federal Bureau of Prisons that his sentence be served at FCI Sandstone.¹

I. [REDACTED] extensively and proactively cooperated with law enforcement agents

In October of 2015, [REDACTED] was arrested at a hotel in Fargo. He had approximately one pound of methamphetamine and a handgun in his possession. Upon his arrest, [REDACTED] hired an attorney. However, he filed only one substantive pre-trial motion, a motion to suppress evidence, on January 6, 2016. Apparently in anticipation of changing his plea to guilty, [REDACTED] effectively abandoned this motion; a hearing on it was never held. On June 30, [REDACTED] announced his intent to plead guilty. On December 5, 2016, [REDACTED] in fact pleaded guilty.

Throughout this process [REDACTED] has consistently shown his proactive cooperation. Not only did he immediately accept the government's invitation to enter into a proffer agreement, but [REDACTED] went out of his way to cooperate with law enforcement, prosecutors, and the jail in a way that reflects the extent to which he wants to cooperate and make himself a better person, to prepare for life once he is released from what will inevitably be a long prison sentence.

Since his arrest, [REDACTED] has willingly and honestly provided two federal proffer interviews. There was never any doubt that [REDACTED] proffered completely, honestly, and truthfully. The amount and quality of information that [REDACTED] was able to provide should be considered in relation to his overall involvement with the drug trade. Although he was caught with one pound of meth, and additional amounts could likely have been attributed to him, [REDACTED] is ultimately a small fish, an

¹ FCI Sandstone is a low-security facility for male inmates, located in Sandstone, Minnesota. It offers inmates the chance to develop job skills in Unicor employment and various vocational programs. It also offers RDAP treatment. Finally, many inmates at FCI Sandstone take college courses. Although Sandstone is a low-security facility, it houses many inmates who were formally housed in United States Penitentiaries and who were convicted of violent crimes such as murder.

addict whose primary purposes in dealing meth were to feed his own habit, earn enough money to get by,² and support the drug habits of others with whom he was acquainted.

In addition to the proffer interviews, ██████ expressed his willingness to assist the government as a confidential informant at the federal government's disposal. The government, not unexpectedly, indicated that ██████ would be of no use in that role, presumably because he is not acquainted with any higher-level bigger fish. Regardless of ██████ usefulness as a confidential informant, his offer to assist in any possible way stands to this day. This offer, of course, extends to testifying at any trials or hearings of other defendants with whom ██████ was involved. It is ██████ understanding that some of these defendants' cases are not yet resolved, and may result in trials.

██████ cooperation did not end with his federal proffers. ██████ knew that he had state criminal charges pending in Minnesota. (PSIR at 11). On his own accord, ██████ asked his undersigned attorney to help resolve these charges before entering the federal prison system. At ██████ request, the undersigned attorney contacted the prosecuting attorney in Minnesota to offer ██████ cooperation. This offer was made independent of any contact that the undersigned attorney had with the Assistant United States Attorney in ██████ federal case (since then, the AUSA assigned to this case has become aware of this cooperation and has indicated that it might positively reflect on his sentencing recommendation in this Court).

Despite knowing that any cooperation ██████ would provide to Minnesota would not necessarily be reflected in his sentence in this Court, ██████ insisted on moving ahead with this cooperation.

He has done so. On February 13, 2017, ██████ had his proffer interview with Minnesota law enforcement agents, who were satisfied that ██████ proffered completely and honestly. On that

² The United States Probation Office reports that prior to his arrest, ██████ "was homeless and supporting himself through drug sales." (PSIR at 15).

date, these agents informed [REDACTED] and his undersigned attorney that they are investigating a much more substantial complex of criminal conduct (which [REDACTED] unconnected to this conduct, stumbled into by chance), and that [REDACTED] was helpful in clarifying this complex. [REDACTED] remains ready to further assist the Minnesota agents, including testifying against others.

[REDACTED] also knows that there is a bench warrant for his arrest in Wisconsin. (PSIR at 10). This warrant issued because [REDACTED] was arrested for the instant offense and was unable to appear in court in Wisconsin. [REDACTED] is eager to address this warrant, and has instructed undersigned counsel to work with Wisconsin. Undersigned counsel has communicated with the state prosecutor, who seemed amenable to quashing the warrant. That prosecutor indicated that he would contact the AUSA assigned to this case. Undersigned counsel has relayed to both the state prosecutor and the AUSA [REDACTED] desire to cooperate with Wisconsin authorities to the extent he is able.

[REDACTED] is also aware that he has outstanding child support obligations in Wisconsin. He has repeatedly expressed his eagerness to his undersigned attorney to address these obligations before he begins his federal prison sentence. He accepts these obligations and wants to meet them to the extent possible. It is undersigned counsel's understanding that [REDACTED] is in the process of contacting the appropriate agencies to facilitate this process.

Since his arrest in October 2015, [REDACTED] has done everything he can to meet the requests of the federal government. He has, furthermore, proactively sought to cooperate with state prosecutors to facilitate their work and child support agencies to meet his obligations. He has engaged in this proactive work despite knowing that his federal incarceration would have likely allowed him effectively to avoid his responsibilities under the Minnesota and Wisconsin legal systems. [REDACTED] is a man who is facing, without any excuse, his legal and moral culpability.

II. The quality of [REDACTED] cooperation must be judged in relation to his traumatic and abusive personal history

This Court should evaluate the quality of [REDACTED] cooperation in light of his personal history. [REDACTED] is the victim of extensive childhood physical, psychological, and sexual abuse, which led to his own lifelong addiction to substances. As an addict who is afflicted with a multitude of psychological conditions, [REDACTED] was never going to reach the higher echelons of the illegal drug trade. Instead, he has violated the law to feed his own addiction, earn enough money to get by, and to help others around him in their own drug-seeking behaviors.

A parade of negligence and childhood abuse ran through [REDACTED] childhood. After his parents divorced, [REDACTED] moved in with his mother and step-father. His step-father subjected [REDACTED] on multiple occasions to emotional, physical, and psychological abuse. Multiple times every week, [REDACTED] was kicked, smacked, hit with a shovel or pitch fork, and/or stepped on by his step-father. (Exhibit A at 3). [REDACTED] mother refused to confront [REDACTED] step-father, so the abuse continued. [REDACTED] step-father apparently liked to force [REDACTED] to partake in particularly atrocious acts. Once, he forced [REDACTED] to kill a kitten with a hammer. On another occasion, [REDACTED] step-father was hit in the face by a cow tail, so he forced [REDACTED] to cut the tails off all the adult cows that were on their farm. (See PSIR at 16).

[REDACTED] was also sexually abused by his babysitter on a regular basis when he was 8 years old. (PSIR at 16).

[REDACTED] effectively entered adulthood at the early age of 16, when he moved out on his own. (PSIR at 11). [REDACTED] entered the Army at age 17. (PSIR at 11). Given that he began to use alcohol when he was just 12 years old and cocaine and meth in his late teens, (PSIR at 14), it is no surprise that [REDACTED] was discharged (honorably) for drinking and fighting issues. (PSIR at 11, 14). His early adulthood portended both promise and despair. [REDACTED] began to live on his own, and he started a painting company at this young age. Working and living on his own, all of the responsibilities of life

fell on [REDACTED]. He tended to meet all of the day-to-day responsibilities of an adult but, perhaps not surprisingly, he was unable to completely cope with adulthood. He began to use drugs and alcohol, which resulted in [REDACTED] acquiring a consistent criminal record for most of his adult life. Although this record is lengthy, prior to 2013 it was composed of multiple DUI offenses and one disorderly conduct offense — clearly the record of a low-level addict who had not yet fallen off the deep end.³

[REDACTED] has had three guiding stars in his adult life. First, he cares for others, despite the fact that his own history as a victim of abuse makes it difficult to trust anyone. Second, [REDACTED] wants to work and make an honest living. Third, [REDACTED] regularly turns to drugs and alcohol to cope with the trauma he experienced as a small child and its persistent effects. For the vast majority of his adult life he has had alternating closer and more distant relationships with each of these guiding stars.

III. The current charges are a logical extension of [REDACTED] personal history, and his response to them reflects his ability and desire to better himself

2013 was a bad turning point. In that year, [REDACTED] turned heavily to meth, even injecting it on occasion. In a very short period of time, [REDACTED] found himself trafficking meth in the upper Midwest. True to his guiding stars, [REDACTED] saw his trafficking as a way to earn money and provide a service to others who were in need. Now sober, and having had the opportunity while in custody to reflect on his conduct, [REDACTED] realizes how perverted this view truly was. [REDACTED] has now been sober for approximately 16 months and, wherever he has been housed, he has sought drug counseling on his own accord. (PSIR at 14).

Just as he has been a model cooperator for prosecutors and law enforcement, [REDACTED] has been a model inmate. He is, in fact, optimistically looking forward to a lengthy period of incarceration. He is eager to participate in the programs that federal penitentiaries offer, including

³ In an ironic twist, [REDACTED] received 2 criminal history points for a DUI in 2008, and only one for possession with intent to deliver meth in 2013. (PSIR at 9). This makes his Criminal History Category IV, not III. One DUI committed nearly ten years ago, therefore, increases [REDACTED] sentencing range to 121-151 months from 108-135 months.

the drug rehabilitation program, cognitive-behavioral therapy, and job training. He knows that he faces a long sentence, and accepts it as a chance to get and stay clean, learn coping skills, and prepare for a return to society.

IV. [REDACTED] cooperation was both limited by and made more remarkable in light of his personal history and drug addiction

[REDACTED] would never reach the higher echelons of the illegal drug trade for two reasons. First, he was never interested in becoming wealthy or acquiring the romanticized trappings of a drug lord. He simply wanted to get high, earn enough money to live, and help other addicts in need. Second, being a drug user made him inherently untrustworthy to bigger fish. His crime, in short, is part and parcel of his childhood abuse and drug addiction. He will never be able to provide cooperation that will bring down a major drug ring or net a kingpin. Nevertheless, [REDACTED] cooperated to the fullest extent of his capacities.

This cooperation is made all the more remarkable because [REDACTED] has serious trust issues, anxiety, and post-traumatic stress disorder. (PSIR at 15-16). For someone like [REDACTED] then, it takes an act of courage to incriminate oneself knowing that (understandably) federal proffers never come with any guarantee.

V. A 121-month sentence would further the goals of uniformity and proportionality

A sentence of 121 months based on [REDACTED] cooperation is higher than the average sentence for defendants like [REDACTED] in this district, the Eighth Circuit, and nationally. It would, therefore, further the United States Sentencing Commission's goals of "uniformity . . . for similar criminal offenses committed by similar offenders" and "proportionality . . . that imposes appropriately different sentences for criminal conduct of differing severity." United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (November 1, 2016), Ch. 1, Pt. A, p. 3.

In 2015, the average sentence imposed in both North Dakota and nationally for drug trafficking crimes was 71 months (5.9 years). United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2015, District of North Dakota*, at Table 7; *but see* United States Sentencing Commission, *Quick Facts: Drug Trafficking Offenses*, at p. 1 (reporting that the average sentence for drug traffickers in 2015 was 66 months — or 5.5 years). In the Eighth Circuit, the average sentence for drug trafficking crimes was 86 months (7.2 years). United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2015, Eighth Circuit*, at Table 7.

In the same year, the average sentence for firearm offenses was 66 months (5.5 years) in North Dakota, 83 months (6.9 years) nationally, United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2015, District of North Dakota*, at Table 7, and 75 months (6.25 years) in the Eighth Circuit. United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2015, Eighth Circuit*, at Table 7.

When it comes to methamphetamine trafficking offenses specifically, offenders in 2015 received an average sentence of 85 months (7.1 years). United States Sentencing Commission, *Quick Facts: Methamphetamine Trafficking Offenses*, at p. 2. While this average has gone down slightly over the past 25 years, it has remained relatively stable, and with the usual exception of crack cocaine, meth trafficking offenders receive the highest average sentence compared to offenders who trafficked other drugs, including powder cocaine, marijuana, and heroin. United States Sentencing Commission, *Analysis of Drug Trafficking Offenders*, Jan. 2014, at Figure 3. In 2015, however, meth offenders began to receive the absolute highest sentences, higher than even crack cocaine offenders. United States Sentencing Commission, *2015 Sourcebook of Federal Sentencing Statistics*, at Figures J and L.

VI. Conclusion

████ only recently began to regularly and heavily use meth. It is not surprising that, prior to 2013, given █████ difficult early life, he made mistakes. It is remarkable that these mistakes were relatively minor. When █████ tried meth, these mistakes escalated quickly. █████ addiction led him in a direction that, now facing a long sentence mitigated only by his cooperation, could doom him. On the one hand, his addiction led him to traffick large amounts of meth. On the other hand, that same addiction prevented him from reaching the higher echelons of the illegal drug trade. He has committed a serious crime but, as a small fish, has relatively little information with which to bargain.

He has, however, done everything he could. Just as █████ mistakes quickly escalated, he has now quickly turned to cooperation and treatment for his addiction. █████ is eager for more help and he looks forward to receiving it during his prison sentence.

A 121-month sentence will reflect █████ cooperation in light of his personal history, is within his Guidelines range, is longer than average sentences for offenders like █████ and comports with the Sentencing Commission's goals of uniformity and proportionality.

████ furthermore asks that this Court recommend █████ participation in the federal drug treatment program and engagement in cognitive-behavioral therapy. Finally, █████ requests that this Court recommend to the Bureau of Prisons that he serve his sentence in FCI Sandstone.

Respectfully,

/s/ Steven R. Morrison

1526 Robertson Court
Grand Forks, North Dakota 58201
Phone: 617-749-7817
Email: steven.r.morrison@gmail.com

Dated: February 14, 2017

No. [REDACTED]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

UNITED STATES OF AMERICA

VS.

[REDACTED]

**[REDACTED] CURRENT PSYCHOLOGICAL
EVALUATION AND
PAST PSYCHOLOGICAL AND MEDICAL REPORTS**

Steven R. Morrison (MA ID #669533)
1526 Robertson Court
Grand Forks, North Dakota 58201
Telephone: (617) 749-7817
Email: steven.r.morrison@gmail.com
ATTORNEY FOR THE DEFENDANT
[REDACTED]

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Inmates are:

TBI:

25-87% of inmates report having suffered TBI.

https://www.cdc.gov/traumaticbraininjury/pdf/prisoner_tbi_prof-a.pdf

60% of inmates have suffered TBI. <https://www.scientificamerican.com/article/traumatic-brain-injury-prison/>

Within 5 years of the TBI, 1/3 of individuals report involvement with the criminal justice system. <http://www.apa.org/pi/disability/resources/publications/newsletter/2014/12/incarceration.aspx>

TBI can lead to anxiety or depression, drug use, inability to control anger, and violence, difficulty following directions. https://www.cdc.gov/traumaticbraininjury/pdf/prisoner_tbi_prof-a.pdf

Childhood abuse:

It is believed that the “vast majority” of incarcerated felons suffered from childhood abuse or neglect. Possibly 68% experienced some form of victimization and 23% reported multiple forms of abuse and neglect. <https://www.ncjrs.gov/pdffiles/fs000204.pdf>.

Nearly 50% of female and 10% of male inmates report pre-incarceration physical or sexual abuse. http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5525017/k.5115/Justice_Study_Prior_Abuse_Reported_by_Inmates.htm

BJS reports the same numbers. <https://www.bjs.gov/content/pub/pdf/parip.pdf>

Abuse results in higher rates of individuals engaging in violent crime and drug/alcohol abuse. http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5525017/k.5115/Justice_Study_Prior_Abuse_Reported_by_Inmates.htm.

Childhood trauma can lead to violent and aggressive behavior, criminality, emotional disorders, and drug/alcohol abuse. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3386595/>

Mental illness:

More than half the people incarcerated have a mental health problem.

<https://www.bjs.gov/content/pub/pdf/mhppji.pdf>

Drug addiction:

65% of inmates are addicts. <https://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II>

Low IQ:

In England, 25% of inmates have an IQ below 80.

http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6364343.stm

A study of Texas inmates found that 23% had an IQ below 80. <http://criminal-justice.iresearchnet.com/crime/intelligence-and-crime/3/>

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

No. [REDACTED]

United States of America

v.

[REDACTED] [REDACTED] [REDACTED]

DEFENDANT'S MOTION FOR FUNDS FOR EXPERT PSYCHOLOGIST

The defendant, [REDACTED] [REDACTED] [REDACTED] respectfully requests that the Court provide \$3,000 to hire an expert psychologist. [REDACTED] faces a mandatory minimum sentence of life. [REDACTED] is a victim of extensive childhood abuse, with resulting emotional trauma, chemical dependency and mental illness. A psychologist's evaluation will serve two important goals in this case. First, it will assist the government in determining whether justice is served by a mandatory life sentence, or a sentence less than life. Second, it will help the Court determine an appropriate sentence under 18 U.S.C. § 3553(a).

On April 21, 2016, the government charged [REDACTED] with possession with intent to distribute more than 500 grams of methamphetamine, possession of a firearm in furtherance of a drug trafficking crime, and conspiracy to possess with intent to distribute more than 500 grams of methamphetamine. On April 29, [REDACTED] entered a plea of not guilty. On June 30, [REDACTED] notified the Court that he intended to change his plea.

On April 4, the government certified two of [REDACTED] prior convictions under 21 U.S.C. § 851. This certification exposes [REDACTED] to a mandatory minimum life sentence.

On August 29, [REDACTED] retained attorney, [REDACTED] moved the Court to withdraw as [REDACTED] counsel because of a conflict. The Court granted the motion, and on

September 6 appointed the undersigned counsel, Steven R. Morrison, to represent [REDACTED] under the Criminal Justice Act. [REDACTED] has, therefore, been declared indigent.

Since September 6, Attorney Morrison has become acquainted with the case, met with his client on three occasions, and has obtained discovery from the government. Notably, the discovery initially provided by the government had a technical issue that rendered the discovery unreadable. Attorney Morrison notified the government of the issue; the government has fixed the issue and Attorney Morrison is now familiar with all aspects of the case, and he has been able to formulate a litigation strategy.

Review of this case reveals that [REDACTED] experienced childhood physical, verbal, and sexual abuse. This extensive abuse resulted in drug and alcohol use beginning at an early age and resulting in lifelong chemical dependency and mental illnesses, potentially including PTSD, ADHD, and depression. Significantly, [REDACTED] neither seeks to escape liability for his criminal charges nor deny culpability for them. [REDACTED] life experiences, however, can provide critical context necessary for both the government and the Court to ensure that justice is served. Specifically, a psychological evaluation will help the government and the Court determine what sentence is most appropriate for [REDACTED]

On October 11, 2016, Attorney Morrison spoke with the Assistant United States Attorney assigned to this case, [REDACTED] [REDACTED]. While skeptical, Attorney [REDACTED] did indicate his willingness to reconsider his certification of [REDACTED] prior convictions upon receipt and review of [REDACTED] psychological evaluation.

Should Attorney [REDACTED] de-certify one or both of [REDACTED] prior convictions, [REDACTED] psychological evaluation will help the Court to determine a just sentence under the 18 U.S.C. § 3553(a) factors.

In order to provide as accurate a picture of [REDACTED] life as possible, Attorney Morrison has consulted with Dr. [REDACTED] [REDACTED] of [REDACTED], Minnesota. Dr. [REDACTED] CV is provided at Exhibit 1. Dr. [REDACTED] has worked with the Federal Public Defender as well as state prosecutors for many years. He indicated that he has appeared numerous times in this court. He has also indicated that he would be able to help the government and the Court determine (1) the relationship that [REDACTED] childhood trauma has with his subsequent drug and alcohol abuse, mental illnesses, and criminal conduct, (2) the role that [REDACTED] mental illnesses have played in his criminal conduct, (3) the likelihood that, in light of his mental illnesses and chemical dependency, [REDACTED] would commit suicide in prison if faced with a life sentence, (4) the incarcerative setting that would best address [REDACTED] mental illnesses, chemical dependency, and criminal conduct, and (5) whether, if faced with a sentence of less than life in an optimal incarcerative setting, [REDACTED] would return to a life of crime once released.

Dr. [REDACTED] can perform this work for \$3,000.¹

Because Attorney [REDACTED] has indicated his willingness to consider Dr. [REDACTED] evaluation, and because this evaluation could help the Court determine a just sentence under the § 3553(a) factors, this evaluation is reasonably necessary. See Edwards v. Roper, 688 F.3d 449, 462 (8th Cir. 2012).

For these reasons, [REDACTED] requests that this court provide \$3,000 in funds to hire Dr. [REDACTED] to review [REDACTED] case and evaluate [REDACTED]

¹ Attorney Morrison consulted with Dr. Stacey Benson, of Benson Psychological Services, Fargo, North Dakota. She noted that she would require the same \$3,000 fee. For reasons unrelated to this fee or the merits of the case, she is unable to perform the evaluation.

Respectfully,

/s/ Steven R. Morrison

1526 Robertson Court
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Phone: 617-749-7817
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Dated: October 11, 2016

Certificate of Service

I hereby certify that on October 11, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of North Dakota by using the CM/ECF system. Because this motion is *ex parte*, participants in the case who are registered CM/ECF users will not be served by the CM/ECF system.

/s/ Steven R. Morrison

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

No. 3:15-cr-00080

United States of America

v.

Edward

**ATTORNEY STEVEN R. MORRISON'S AFFIDAVIT IN SUPPORT OF
DEFENDANT'S *EX PARTE* MOTION FOR FUNDS FOR EXPERT
PSYCHOLOGIST**

1. My name is Steven R. Morrison, and I am an attorney licensed in Massachusetts, BBO # 669533, this court, the Eighth Circuit Court of Appeals, the United States Supreme Court, and numerous other federal Courts of Appeal.
2. I have been appointed under the Criminal Justice Act to represent Edward in this court, case no. in this court, case no.
3. I have reviewed the discovery in this case, consulted with on three occasions, and consulted with attorney colleagues about this case. As a result, I have formulated a litigation strategy that I believe will provide effective assistance of counsel to and the best chance for a just result for.
4. has expressed to me that he suffered from various types of childhood abuse, leading to a lifetime of chemical dependency and bouts with mental illness. At the same time, is prepared to accept legal and moral responsibility for his current criminal charges.
5. I have been a criminal defense attorney for nine years. I have also been a professor at the University of North Dakota School of Law for six years. During that time, I have taught criminal procedure, criminal law, and sentencing. I have written law review articles on

criminal conspiracy, the Fourth Amendment, Miranda warnings, and other topics. I am an active member of the National Association of Criminal Defense Lawyers, and have drafted numerous white papers for that organization. I have presented CLEs on various topics in criminal law.

6. Given my experience, I believe that an expert psychologist's evaluation of a defendant like [REDACTED] would be a highly important part of a litigation strategy and would inform the government and this court of important facts about the defendant that are relevant to charging and sentencing decisions. Were [REDACTED] retained, I would advise him to pay for this evaluation. I believe that such an evaluation is necessary to provide [REDACTED] with effective assistance of counsel.
7. Were [REDACTED] to have privately retained me, I would not notify the Government that I am seeking a psychological evaluation. Filing this motion *ex parte*, therefore, assures [REDACTED] the same quality of legal representation as that which I would provide were I privately retained.

Signed under the pains and penalties of perjury,

on October _____, 2016,

Steven R. Morrison

Child porn suspect says it was very easy to get

By Norman Miller/Daily News staff

Posted Jul 2, 2008 at 12:01 AM

Updated Jul 2, 2008 at 2:03 AM

A Framingham man does not deny downloading child pornography from the Internet, but said he did so only to find out how easy it would be for children to find it online.

A Framingham man does not deny downloading child pornography from the Internet, but said he did so only to find out how easy it would be for children to find it online.

Paul Franke, 43, pleaded not guilty yesterday in Framingham District Court to 11 child pornography-related charges and was released without bail.

After his court appearance, Franke, father of an 11-year-old boy, admitted he downloaded the more than 200 images from a file-sharing network, but not for personal gratification.

“I was only looking to see how easy it was to get it,” said Franke, of 93 Alexander St. “It was very easy, only a couple of clicks. It was nothing. A child could have found it. A kid my son’s age could find it.”

State police assigned to the Middlesex district attorney’s office’s cyber protection unit began an investigation in April, prosecutor Dave Clayton said.

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They logged onto a peer-to-peer network, in which people can share different audio, video and picture files via the Internet.

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On that site, they located a file they knew to be a child pornography video, and the investigators tracked down a computer in Framingham that had downloaded the video.

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Clayton said.

They then remotely searched the computer and found at least nine other files consistent with child pornography and obtained a search warrant for Franke's Alexander Street home.

The state police served the warrant Monday night.

"The defendant was present during the execution of the warrant," said Clayton. "He stated he was the one in possession of the child pornography, and it was his computer."

Police searched the computer files and found at least 200 different child pornography files, the prosecutor said.

Franke was charged with six counts of possession of child pornography, three counts of possession of obscene matter, distribution of an image or video of a child performing a sexual act and distribution of an image or video of a nude child.

Clayton requested that Franke be released without bail, but with the conditions that he not use a computer, not use any device that can access the Internet, have no contact with children under 16 and to stay at least 50 yards from a school or playground.

Clayton said the conditions are necessary "to ensure the safety of the community and the children in the community."

Judge Paul Healy Jr. allowed the conditions.

"Children are our most vulnerable victims and we take child pornography cases extremely seriously," said Middlesex District Attorney Gerry Leone. Franke said he understands why police thought what he was doing was wrong, but insists he was just trying to find out how to protect children.

"No one asked my side of the story," he said. "I don't know how a site that you have to pay for can have this stuff so easy to get. All you have to do is log on and it is there. It's that simple. It

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(Norman Miller can be reached at 508-626-3823 or nmiller@cnc.com.)

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United States Sentencing Commission



Statistical Information Packet

Fiscal Year 2016

Eighth Circuit

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Table 7

**LENGTH OF IMPRISONMENT BY PRIMARY OFFENSE CATEGORY
Fiscal Year 2016**

PRIMARY OFFENSE	National			Eighth Circuit		
	Mean Months	Median Months	N	Mean Months	Median Months	N
TOTAL	50	27	58,291	74	54	4,032
Murder	244	210	84	199	185	11
Manslaughter	72	68	55	74	48	3
Kidnapping/Hostage Taking	252	235	37	349	390	4
Sexual Abuse	148	120	604	139	108	93
Assault	38	25	616	33	27	121
Robbery	75	60	678	96	63	59
Arson	73	60	41	62	49	8
Drugs - Trafficking	71	57	17,889	90	72	1,577
Drugs - Communication Facility	36	36	194	38	37	32
Drugs - Simple Possession	5	6	1,557	5	3	3
Firearms	80	57	6,876	70	53	880
Burglary/B&E	16	15	15	17	11	6
Auto Theft	105	63	40	--	--	1
Larceny	20	12	381	22	15	23
Fraud	34	24	4,690	30	24	334
Embezzlement	19	12	123	15	14	14
Forgery/Counterfeiting	23	18	337	19	15	22
Bribery	29	20	142	58	30	3
Tax	20	16	303	22	18	20
Money Laundering	40	28	530	53	39	12
Racketeering/Extortion	94	60	824	62	57	27
Gambling/Lottery	11	6	24	--	--	0
Civil Rights	44	24	25	57	52	3
Immigration	15	10	18,292	12	6	290
Child Pornography	148	100	1,889	145	120	289
Prison Offenses	14	12	434	13	8	67
Administration of Justice Offenses	25	18	736	22	18	86
Environmental/Wildlife	12	12	28	12	8	3
National Defense	65	40	85	--	--	0
Antitrust	8	7	10	--	--	0
Food & Drug	23	15	35	--	--	1
Other Miscellaneous Offenses	47	12	717	73	24	40

Of the 67,742 guideline cases, 9,451 cases were excluded for one of the following reasons: zero months of prison ordered (8,946), or missing or indeterminable sentencing information (505).

Of the 4,744 guideline cases from the Eighth Circuit, 712 cases were excluded due to one of the following reasons: zero months of prison ordered (705) or missing or indeterminable sentencing information (7).

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Table 8

**COMPARISON OF SENTENCE IMPOSED AND
POSITION RELATIVE TO THE GUIDELINE RANGE
Fiscal Year 2016**

	National		Eighth Circuit	
	N	%	N	%
TOTAL CASES¹	66,961	100.0	4,728	100.0
CASES SENTENCED WITHIN GUIDELINE RANGE	32,519	48.6	2,092	44.2
CASES SENTENCED ABOVE GUIDELINE RANGE	1,617	2.4	151	3.2
DEPARTURE ABOVE GUIDELINE RANGE	419	0.6	38	0.8
Upward Departure From Guideline Range ²	317	0.5	31	0.7
Upward Departure With <i>Booker</i> /18 U.S.C. § 3553 ³	102	0.2	7	0.1
OTHERWISE ABOVE GUIDELINE RANGE	1,198	1.8	113	2.4
Above Guideline Range With <i>Booker</i> /18 U.S.C. § 3553 ⁴	1,131	1.7	108	2.3
All Remaining Cases Above Guideline Range ⁵	67	0.1	5	0.1
GOVERNMENT SPONSORED BELOW RANGE⁶	18,882	28.2	1,180	25.0
§5K1.1 Substantial Assistance Departure	7,443	11.1	646	13.7
§5K3.1 Early Disposition Program Departure	5,960	8.9	56	1.2
Other Government Sponsored Below Range	5,479	8.2	478	10.1
NON-GOVERNMENT SPONSORED BELOW RANGE	13,943	20.8	1,305	27.6
DEPARTURE BELOW GUIDELINE RANGE	1,868	2.8	100	2.1
Downward Departure From Guideline Range ²	1,321	2.0	46	1.0
Downward Departure With <i>Booker</i> /18 U.S.C. § 3553 ³	547	0.8	54	1.1
OTHERWISE BELOW GUIDELINE RANGE	12,075	18.0	1,205	25.5
Below Guideline Range With <i>Booker</i> /18 U.S.C. § 3553 ⁴	11,684	17.4	1,182	25.0
All Remaining Cases Below Guideline Range ⁵	391	0.6	23	0.5

¹ This table reflects the 67,742 cases sentenced nationally in fiscal year 2016, 4,744 of which were from the Eighth Circuit. Of these, 781 cases nationally and 16 cases from the Eighth Circuit were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range.

² All cases with departures in which the court did not indicate as a reason either *United States v. Booker*, 18 U.S.C. § 3553, or a factor or reason specifically prohibited in the provisions, policy statements, or commentary of the *Guidelines Manual*.

³ All cases sentenced outside of the guideline range in which the court indicated both a departure (see footnote 2) and a reference to either *United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system.

⁴ All cases sentenced outside of the guideline range in which no departure was indicated and in which the court cited *United States v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing outside of the guideline system.

⁵ All cases sentenced outside of the guideline range that could not be classified into any of the three previous outside of the range categories. This category includes cases in which no reason was provided for a sentence outside of the guideline range.

⁶ Cases in which a reason for the sentence indicated that the prosecution initiated, proposed, or stipulated to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.

Table 10

**SENTENCES RELATIVE TO THE GUIDELINE RANGE
BY SELECTED PRIMARY OFFENSE CATEGORY**

Fiscal Year 2016

National

PRIMARY OFFENSE	TOTAL	WITHIN GUIDELINE RANGE		UPWARD DEPARTURE		UPWARD DEPARTURE W/BOOKER		ABOVE RANGE W/BOOKER		REMAINING ABOVE RANGE	
		N	%	N	%	N	%	N	%	N	%
TOTAL	66,961	32,519	48.6	317	0.5	102	0.2	1,131	1.7	67	0.1
Robbery	701	365	52.1	5	0.7	1	0.1	28	4.0	3	0.4
Drugs - Trafficking	19,222	6,921	36.0	66	0.3	12	0.1	137	0.7	14	0.1
Drugs - Simple Possession	1,624	1,466	90.3	8	0.5	0	0.0	135	8.3	2	0.1
Firearms	7,293	3,836	52.6	53	0.7	26	0.4	257	3.5	9	0.1
Larceny	978	571	58.4	6	0.6	0	0.0	13	1.3	1	0.1
Fraud	6,389	2,730	42.7	30	0.5	15	0.2	88	1.4	4	0.1
Embezzlement	310	175	56.5	0	0.0	1	0.3	5	1.6	0	0.0
Forgery/Counterfeiting	449	256	57.0	1	0.2	2	0.4	11	2.4	0	0.0
Immigration	19,969	11,616	58.2	59	0.3	20	0.1	230	1.2	13	0.1
Other Miscellaneous Offenses	10,026	4,583	45.7	89	0.9	25	0.2	227	2.3	21	0.2

Eighth Circuit

PRIMARY OFFENSE	TOTAL	WITHIN GUIDELINE RANGE		UPWARD DEPARTURE		UPWARD DEPARTURE W/BOOKER		ABOVE RANGE W/BOOKER		REMAINING ABOVE RANGE	
		N	%	N	%	N	%	N	%	N	%
TOTAL	4,728	2,092	44.2	31	0.7	7	0.1	108	2.3	5	0.1
Robbery	59	42	71.2	1	1.7	0	0.0	2	3.4	0	0.0
Drugs - Trafficking	1,691	594	35.1	6	0.4	1	0.1	18	1.1	1	0.1
Drugs - Simple Possession	6	5	83.3	0	0.0	0	0.0	1	16.7	0	0.0
Firearms	938	488	52.0	13	1.4	3	0.3	40	4.3	0	0.0
Larceny	68	38	55.9	1	1.5	0	0.0	2	2.9	0	0.0
Fraud	489	227	46.4	1	0.2	0	0.0	8	1.6	0	0.0
Embezzlement	38	16	42.1	0	0.0	0	0.0	2	5.3	0	0.0
Forgery/Counterfeiting	31	16	51.6	0	0.0	0	0.0	0	0.0	0	0.0
Immigration	333	217	65.2	0	0.0	0	0.0	5	1.5	0	0.0
Other Miscellaneous Offenses	1,075	449	41.8	9	0.8	3	0.3	30	2.8	4	0.4

National

PRIMARY OFFENSE	§5K1.1 SUBSTANTIAL ASSISTANCE		§5K3.1 EARLY DISPOSITION		OTHER GOV'T SPONSORED		DOWNWARD DEPARTURE		DOWNWARD DEPARTURE W/BOOKER		BELOW RANGE W/BOOKER		REMAINING BELOW RANGE	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	7,443	11.1	5,960	8.9	5,479	8.2	1,321	2.0	547	0.8	11,684	17.4	391	0.6
Robbery	56	8.0	0	0.0	72	10.3	18	2.6	13	1.9	136	19.4	4	0.6
Drugs - Trafficking	4,342	22.6	1,280	6.7	2,043	10.6	331	1.7	195	1.0	3,798	19.8	83	0.4
Drugs - Simple Possession	1	0.1	1	0.1	4	0.2	1	0.1	0	0.0	4	0.2	2	0.1
Firearms	711	9.7	9	0.1	712	9.8	94	1.3	60	0.8	1,490	20.4	36	0.5
Larceny	57	5.8	0	0.0	113	11.6	11	1.1	13	1.3	182	18.6	11	1.1
Fraud	1,073	16.8	12	0.2	575	9.0	86	1.3	93	1.5	1,619	25.3	64	1.0
Embezzlement	10	3.2	0	0.0	35	11.3	7	2.3	2	0.6	72	23.2	3	1.0
Forgery/Counterfeiting	47	10.5	1	0.2	41	9.1	4	0.9	1	0.2	83	18.5	2	0.4
Immigration	214	1.1	4,624	23.2	451	2.3	612	3.1	74	0.4	1,940	9.7	116	0.6
Other Miscellaneous Offenses	932	9.3	33	0.3	1,433	14.3	157	1.6	96	1.0	2,360	23.5	70	0.7

Eighth Circuit

PRIMARY OFFENSE	§5K1.1 SUBSTANTIAL ASSISTANCE		§5K3.1 EARLY DISPOSITION		OTHER GOV'T SPONSORED		DOWNWARD DEPARTURE		DOWNWARD DEPARTURE W/BOOKER		BELOW RANGE W/BOOKER		REMAINING BELOW RANGE	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	646	13.7	56	1.2	478	10.1	46	1.0	54	1.1	1,182	25.0	23	0.5
Robbery	3	5.1	0	0.0	1	1.7	0	0.0	0	0.0	9	15.3	1	1.7
Drugs - Trafficking	455	26.9	0	0.0	164	9.7	10	0.6	26	1.5	414	24.5	2	0.1
Drugs - Simple Possession	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Firearms	64	6.8	0	0.0	82	8.7	5	0.5	9	1.0	231	24.6	3	0.3
Larceny	3	4.4	0	0.0	4	5.9	2	2.9	1	1.5	16	23.5	1	1.5
Fraud	67	13.7	0	0.0	37	7.6	6	1.2	5	1.0	135	27.6	3	0.6
Embezzlement	2	5.3	0	0.0	4	10.5	2	5.3	0	0.0	12	31.6	0	0.0
Forgery/Counterfeiting	5	16.1	0	0.0	7	22.6	0	0.0	0	0.0	3	9.7	0	0.0
Immigration	4	1.2	56	16.8	4	1.2	4	1.2	5	1.5	38	11.4	0	0.0
Other Miscellaneous Offenses	43	4.0	0	0.0	175	16.3	17	1.6	8	0.7	324	30.1	13	1.2

Of the 67,742 guideline cases, 781 cases were excluded because information was missing from the submitted documents that prevented the comparison of the sentence and the guideline range.

Of the 4,744 guideline cases from the Eighth Circuit, 16 cases were excluded because information was missing from the from the submitted documents that prevented the comparison of the sentence and the guideline range.

SOURCE: U.S. Sentencing Commission, 2016 Datafile, USSCFY16.



Quick Facts

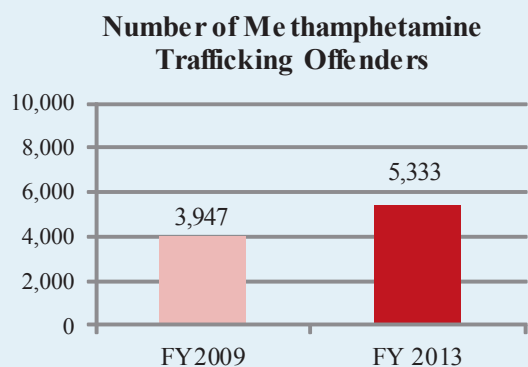
► THERE WERE 80,035 CASES REPORTED TO THE UNITED STATES SENTENCING COMMISSION IN FISCAL YEAR 2013.

► OF THESE CASES, 22,215 INVOLVED DRUG TRAFFICKING.¹

► 24.0% OF DRUG TRAFFICKING OFFENSES INVOLVED METHAMPHETAMINE.

Methamphetamine Trafficking Offenses

In fiscal year 2013, there were 5,333 methamphetamine offenders, who accounted for 24.0% of all offenders sentenced under the drug trafficking guidelines. The number of methamphetamine offenders has increased by 35.1% since fiscal year 2009.



Top Five Districts Methamphetamine Trafficking Offenders FY 2013

Southern District of California
(N=765)

Western District of Texas
(N=261)

District of Arizona
(N=221)

Northern District of Texas
(N=204)

Central District of California
(N=201)

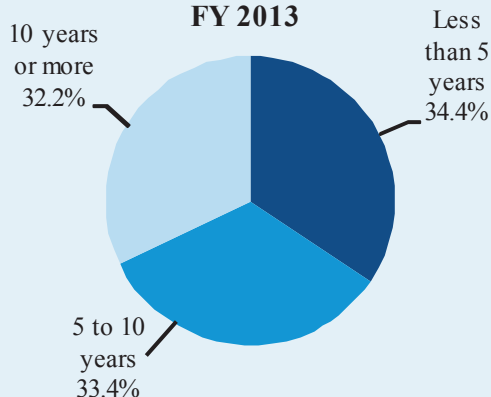
Offender and Offense Characteristics

- In fiscal year 2013, most offenders convicted of methamphetamine trafficking were male (79.0%).
- More than half were Hispanic (55.4%) followed by White (37.5%), Black (3.2%), and Other Races (4.0%).
- The average age of these offenders at sentencing was 35 years.
- More than two-thirds (69.6%) of methamphetamine traffickers were United States citizens.
- Half (50.1%) of methamphetamine traffickers had little or no prior criminal history (i.e., assigned to Criminal History Category I).
- The median base offense level in these cases was 34. This corresponds to a quantity of drugs between 3.3 and 11 pounds of methamphetamine.
- Methamphetamine trafficking sentences were increased for:
 - ◆ 15.7% of offenders because the offense involved the possession of a weapon;
 - ◆ 5.2% of offenders for having a leadership or supervisory role in the offense.
- Methamphetamine trafficking sentences were decreased for:
 - ◆ Almost a quarter (23.1%) of offenders because they were a minor or minimal participant in the offense;
 - ◆ Nearly forty percent (37.7%) of offenders because they met the safety valve criteria in the sentencing guidelines.

Punishment

- Most methamphetamine trafficking offenders were sentenced to imprisonment (98.8%).
- The average sentence length for methamphetamine traffickers was 92 months.
- Most methamphetamine traffickers were convicted of a drug offense carrying a mandatory minimum penalty (83.2%).
 - ◆ However, over sixty percent (61.4%) of these offenders were not subject to any mandatory minimum penalty at sentencing because:
 - ◇ 20.1% provided the government with substantial assistance in the investigation or prosecution of other offenders, 31.0% were eligible for relief through the statutory safety valve provision, and 10.3% received both forms of relief.

Sentence Length of Methamphetamine Trafficking Offenders FY 2013



¹ Drug trafficking offenses include cases with complete guideline application information in which the offender was sentenced under USSG §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), 2D1.10 (Endangering Human Life) or 2D1.14 (Narco-Terrorism).

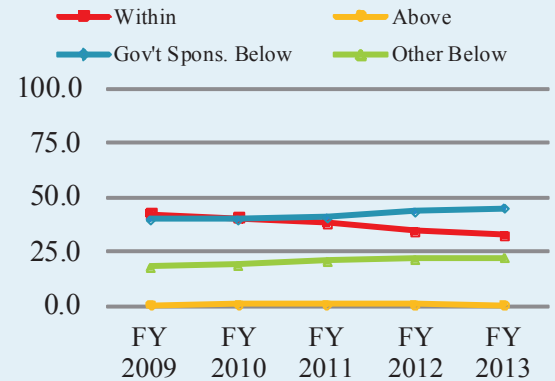
Quick Facts

Methamphetamine Trafficking Offenses

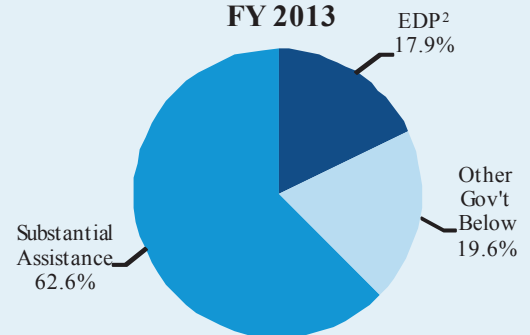
Sentences Relative to the Guideline Range

- Over the last five years, the proportion of methamphetamine trafficking offenders sentenced within the guideline range has decreased substantially from 42.0% in fiscal year 2009 to 32.6% in fiscal year 2013.
- In each of the last five years, the proportion of methamphetamine trafficking offenders sentenced below the applicable guideline range because the government sponsored the below range sentence has increased from 39.7% in fiscal year 2009 to 45.0% in fiscal year 2013.
 - Substantial assistance departures were granted in approximately thirty percent of methamphetamine trafficking cases over the past five years.
 - In fiscal year 2013, these offenders received an average reduction in their sentence of 43.9%.
 - Early Disposition Program (EDP) departures² have increased in each of the last five years from 2.5% in fiscal year 2009 to 8.0% in fiscal year 2013.
 - In fiscal year 2013, these offenders received an average reduction in their sentence of 42.0%.
 - A growing proportion of methamphetamine traffickers received a below range sentence sponsored by the government for reasons other than substantial assistance or participation in an Early Disposition Program.
 - The rate of other government sponsored below range sentences has increased in each of the last five years from 4.6% in fiscal year 2009 to 8.8% in fiscal year 2013.
 - In fiscal year 2013, these offenders received an average reduction in their sentence of 35.2%.
- The rate of non-government sponsored below range sentences for methamphetamine traffickers has increased in each of the last five years from 17.9% in fiscal year 2009 to 22.0% in fiscal year 2013.
 - In fiscal year 2013, these offenders received an average reduction in their sentence of 31.3%.
- Over the last five years, the average guideline minimum for methamphetamine traffickers has slightly increased while the average sentence has decreased.
 - The average guideline minimum increased slightly to 124 months in fiscal year 2013 after holding steady at 121 months from fiscal year 2010 through fiscal year 2012.
 - The average sentence decreased from 96 months in fiscal year 2009 to 92 months in fiscal years 2012 and 2013.

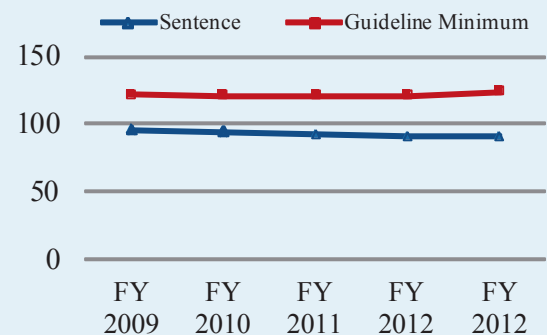
Sentence Relative to the Guideline Range



Government Sponsored Below Range Sentences FY 2013



Average Sentence and Average Guideline Minimum (in months)



² "Early Disposition Program (or EDP) departures" are departures where the government sought a sentence below the guideline range because the defendant participated in the government's Early Disposition Program, through which cases are resolved in an expedited manner. See USSG §5K3.1.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

No. [REDACTED]

United States of America

v.

[REDACTED] [REDACTED] [REDACTED]

DEFENDANT'S STATUS REPORT

The defendant, [REDACTED] [REDACTED] submits this status report to expedite his change-of-plea hearing, which is scheduled for December 5, 2016.

On April 21, 2016, in a superseding indictment, Mr. [REDACTED] was charged with possession with the intent to distribute over 500 grams of methamphetamine, conspiracy to possess over 500 grams of meth, and possession of a firearm in furtherance of a drug crime. He pleaded not guilty on April 29, but on June 30 gave notice that he intended to change his plea. On April 4, the government certified two prior convictions under 21 U.S.C. § 851.

With these certified prior convictions, Mr. [REDACTED] faces a mandatory statutory minimum life sentence for these charges. There is currently no written plea agreement.

This court set a change of plea hearing on September 7. Mr. [REDACTED] attorney had a conflict, however, and on August 29 filed a motion to withdraw from representing Mr.

[REDACTED] On the next day, this Court granted that motion. The plea hearing was continued, ultimately to December 5, and undersigned counsel was appointed to represent Mr.

[REDACTED]

In order to make the best decision possible as to his plea, Mr. [REDACTED] seeks clarification as to four issues.

The first issue is whether the government will file a motion for downward departure for cooperation under U.S.S.G. § 5K1.1 and (more importantly, given that Mr. [REDACTED] faces a mandatory life sentence) 18 U.S.C. § 3553(e).

The second and third issues are subservient to the first. The second issue is the number of months that the government and this Court will consider to equate to a “life” sentence. The third issue is the number of months downward departure the government will recommend and this Court is likely to award.

The fourth issue is whether the government will decertify one prior conviction to expose Mr. [REDACTED] to a 20-year mandatory minimum. This would give Mr. [REDACTED] the opportunity to argue for a sentence that reflects the § 3553(a) factors.

Attorney Morrison has communicated with the Assistant United States Attorney assigned to this case, [REDACTED] regarding these issues. Attorney Morrison has obtained many of Mr. [REDACTED] past medical and psychological records, and has employed a psychologist to perform an examination of Mr. [REDACTED]. Attorney Morrison has submitted this evaluation and records to AUSA [REDACTED], which detail Mr. [REDACTED] childhood abuse, drug addition, and history of mental illness, as well as his attempts to seek assistance for his problems. Given these materials, Attorney Morrison has asked AUSA [REDACTED] to exercise his discretion to decertify one prior conviction so that this Court may consider these materials in its sentencing.

Mr. [REDACTED] has also been cooperating consistently, completely, and honestly. He has signed a proffer agreement, engaged in two separate proffers with federal investigators, and is willing to proffer again and testify against other defendants. Mr. [REDACTED] is also preparing to proffer in a Minnesota state case out of Fergus Falls. Attorney Morrison and the state prosecutor have been in communication regarding this proffer. It is delayed

because Mr. [REDACTED] must obtain a Minnesota public defender to formalize the proffer agreement (Attorney Morrison is not a registered attorney in Minnesota). Attorney Morrison has discussed this with AUSA [REDACTED] and it is Attorney Morrison's understanding that AUSA [REDACTED] has discussed this with the Minnesota prosecutor.

Mr. [REDACTED] understands that all four of these issues might not be resolved with perfect clarity by the time of his plea hearing on December 5. He is hopeful, however, that he will be able to change his plea with as much clarity as is possible at this point.

Respectfully,

/s/ Steven R. Morrison

1526 Robertson Court
Grand Forks, North Dakota 58201
Phone: 617-749-7817
Email: steven.r.morrison@gmail.com

Dated: December 4, 2016

Certificate of Service

I hereby certify that on December 4, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of North Dakota by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Steven R. Morrison

No. ____

**In the
Supreme Court of the United States**

JODI RICHTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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June 20, 2017

QUESTION PRESENTED

1. Amendments 780, 782, and 788 to the Federal Sentencing Guidelines, promulgated in 2014, provide for resentencing — and a potentially much lower sentence — for certain federal prisoners without regard to their prior statutory mandatory minimums. The Fourth, Seventh, and Eleventh Circuits have confirmed this, but the Eighth, Ninth, and Tenth Circuits continue to give dispositive force to these prisoners' mandatory minimums, declaring these prisoners ineligible for resentencing. Which set of circuits is correct?

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APPENDIX

Judgment in the United States Court of Appeals for the Eighth Circuit (June 5, 2017).....	App. 1
(Text Only) Order by Chief Judge Ralph R. Erickson Granting Sealed Motion to Reduce Sentence in the United States District Court for the District of North Dakota (February 29, 2016)	App. 2
Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) in the United States District Court for the District of North Dakota (February 29, 2016)	App. 3
(Text Only) Order by Chief Judge Ralph R. Erickson Denying Motion for Reconsideration in the United States District Court for the District of North Dakota (March 18, 2016)	App. 4
Opinion in the United States Court of Appeals for the Eighth Circuit, <i>United States of America v. Koons</i> (March 10, 2017)	App. 5
18 U.S.C. § 3582(c)(2)	App. 16
U.S.S.G. § 1B1.10(c)-(e)	App. 17
U.S.S.G. § 5G1.1	App. 18

TABLE OF AUTHORITIES

Cases

<i>Dean v. United States</i> , 137 S. Ct. 1170 (2017)	2
<i>United States v. C.D.</i> , 848 F.3d 1286 (10th Cir. 2017)	6
<i>United States v. Freeman</i> , 586 Fed.Appx. 237 (7th Cir. 2014)	4, 8, 9
<i>United States v. Hope</i> , 642 Fed.Appx. 961 (11th Cir. 2016)	9
<i>United States v. Koons</i> , 850 F.3d 973 (8th Cir. 2017)	2, 5, 6, 7
<i>United States v. Rodriguez-Soriano</i> , 855 F.3d 1040 (9th Cir. 2017)	6
<i>United States v. Williams</i> , 808 F.3d 253 (4th Cir. 2015)	7, 8

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U.S.S.G. 2015, App. C Supp., Am. 782.....	<i>passim</i>
U.S.S.G. 2015, App. C Supp., Am. 788.....	1, 2, 4, 7

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Other Sources

U.S.S.C., <i>2014 Drug Guidelines Amendment Retroactivity Data Report</i> , April 2016	4

PETITION FOR WRIT OF CERTIORARI

In 2014, the United States Sentencing Commission promulgated Amendments 780, 782, and 788 to the Federal Sentencing Guidelines. These amendments gave certain inmates the right to seek a lower sentence without regard to their statutory mandatory minimums. The Fourth, Seventh, and Eleventh Circuits have followed the clear rules that the Commission set forth, finding that these inmates are indeed eligible. The Eighth, Ninth, and Tenth Circuits, in contrast, have found that the congressional statutes mandating minimum sentences trump the amendments, making these inmates ineligible for resentencing.

Hundreds, perhaps even thousands, of inmates have sought resentencing under these amendments. Their success now depends in large part not on the merits of their cases, but on the circuit in which they fortuitously find themselves. In the Eighth, Ninth, and Tenth Circuits, these inmates will find the doors to the district court closed and locked because those circuits effectively overturned a delegated legislative action (promulgation of the amendments) in favor of a different legislative action (passage of statutory mandatory minimums).

This case offers the Court the opportunity to resolve a clear circuit split, address an issue that has confounded district and circuit courts across the country in countless cases, clarify the law that has profound and disparate consequences for inmates seeking resentencing, and address the extent to which the judicial branch may intrude upon the legislature's internal rule-making authority.

OPINION BELOW

The Eighth Circuit issued no full opinion in this case. Instead, it filed a one-sentence order vacating the judgment and remanding to district court in light of *United States v. Koons*, 850 F.3d 973 (8th Cir. 2017), and *Dean v. United States*, 137 S. Ct. 1170 (2017).

JURISDICTION

The Eighth Circuit rendered its decision on June 5, 2017. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

18 U.S.C. § 3582(c)(2), U.S.S.G. § 1B1.10(c)-(e) (which entails all relevant provisions of Amendments 780, 782, and 788), and U.S.S.G. § 5G1.1 are reproduced in the Appendix.

STATEMENT OF THE CASE

This case presents a clear, wide-ranging, and consequential circuit split that has developed in light of the United States Sentencing Commission’s promulgation of Amendments 780, 782, and 788 in 2014.

In 2010, the petitioner, Jodi Richter, pleaded guilty to one count of conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. § 846. (DCD 556, at p.1).¹ Richter’s role in the conspiracy is one with which any addict is all too familiar: although she was, for a short time, part of some drug

¹ “DCD” refers to the district court docket, No. 3:10-cr-49, and the corresponding docket entry number and page number(s).

transactions in a much larger conspiracy, (PSR, pp.7-8),² she most often found herself to be the buyer of drugs, not a kingpin. *Id.* at 7. Around the time she entered the conspiracy, she was, as she put it, “crazy for anything injectable.” *Id.* at 15.

Richter was sentenced in 2011. (DCD 649, at p.1). She faced a mandatory life sentence based on two prior drug convictions. 21 U.S.C. § 841(b)(1)(A)(viii). These convictions that supposedly made her deserving of life in prison were those of an addict: possessing a pipe on one occasion, (DCD 196-1, at p.9), and possessing two syringes and a spoon on another. (DCD 196-2, at p.7). The government filed a § 5K1.1 and § 3553(e) motion for departure for substantial assistance, (DCD 649, at p.6), releasing Richter from the mandatory life sentence.

Richter’s base Federal Sentencing Guidelines level was 32. (PSR, p.9). Because she pleaded guilty and accepted responsibility, her level was lowered to 29. (*Id.* at 10; DCD 649, at p.5). Her criminal history — clearly that of an addict, (PSR, pp.14-16) — gave her a Criminal History Category of IV. (PSR, pp.12; DCD 649, at p.5). Her undisputed Guidelines range, therefore, was 121-151 months. (PSR, p.17; DCD 649, at pp.5-6).

At Richter’s original sentencing in 2011, the government recommended a sentence of 240 months. (DCD 649, at p.9). Richter recommended a sentence within the 121-151-month Guidelines range. *Id.* at 11.

The district court imposed a 216-month sentence. (*Id.* at 19; DCD 556, at p.2).

² “PSR” refers to the presentence investigation report prepared in the petitioner’s case, and the corresponding page number(s).

In 2014, the United States Sentencing Commission promulgated, and Congress approved, Amendments 780, 782, and 788 to the Sentencing Guidelines. Amendment 782 reduced by two levels the offense levels assigned to drug quantities that trigger mandatory minimum sentences. U.S.S.G. 2015, App. C Supp., Am. 782. Amendment 788 made Amendment 782 retroactive. U.S.S.G. 2015, App. C Supp., Am. 788. Amendment 780 provided that upon resentencing under § 3582(c)(2), district courts are not to consider defendants' mandatory minimums. *United States v. Freeman*, 586 Fed.Appx. 237, 239 (7th Cir. 2014). All three amendments became effective on November 1, 2014. *Id.*; U.S.S.C., *2014 Drug Guidelines Amendment Retroactivity Data Report*, April 2016.

Under these new amendments, Richter's amended and undisputed Guidelines range became 100-125 months. (DCD 966, at p.3; DCD 976, at p.1; DCD 979, at p.1).

Richter and her attorney filed separate motions to reduce Richter's original sentence. (DCD 966; DCD 968). The district court reduced Richter's sentence to an above-Guidelines 179 months. (DCD 978, at p.1; DCD 979, at p.1). The court acknowledged the accuracy of the new 100-125-month range. (DCD 979, at p.1).

Richter timely filed a pro se motion for reconsideration, again requesting a Guidelines-range sentence. (DCD 984, at p.1). The district court denied her motion. (DCD 985). Richter then filed a timely pro se notice of appeal on March 7, 2016. (DCD 982, at p.1).

On appeal, Richter argued that she was eligible for a sentence reduction under § 3582(c)(2) and Amendments 782 and 788. The Eighth Circuit disagreed.

Exercising its jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment, which itself had jurisdiction under 18 U.S.C. § 3231, the Eighth Circuit referred Richter to its opinion in *United States v. Koons*, in which it held that defendants who are sentenced based on a mandatory minimum are not eligible for sentencing reduction under § 3582(c)(2). 850 F.3d 973, 979 (8th Cir. 2017). In doing so, the Eighth Circuit contradicted the holdings of other circuits, resulting in a circuit split.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding created a circuit split on a legal issue that is both confronted by countless district and circuit courts and is of exceptional importance. Hundreds, or perhaps even thousands, of cases concerning this issue have arisen since 2014. The practical result is that a defendant who was sentenced in one circuit may be resentenced and enjoy a profoundly favorable outcome on resentencing, whereas a defendant in the very same situation but in a different circuit will find the doors to the district court closed and locked, leaving her with her original sentence and no recourse under § 3582(c)(2).

I. A circuit split exists

In *United States v. Koons*, and by reference, *Richter*, the Eighth Circuit (implicitly siding with the Ninth and Tenth Circuits) created a split between itself and the Fourth, Seventh, and Eleventh Circuits.

A. *United States v. Koons*

In *Koons*, the Eighth Circuit considered whether § 3582(c)(2) relief was available to defendants who had an initial Guidelines range below the mandatory minimum, and who were sentenced below that mandatory minimum based on the government's § 3553(e) motion for substantial assistance departure. 850 F.3d at 974.

That court held that relief was not available because the defendants' sentences were not "based on" a Guidelines range subsequently lowered by the Sentencing Commission. *Id.*³

The Eighth Circuit first looked to § 3582(c)(2), which permits resentencing in limited circumstances where a defendant's sentencing range has been subsequently lowered by the Sentencing Commission. *Id.* at 976.

Amendment 782 is one such circumstance, if it serves to lower a defendant's applicable Guideline range. *Id.*

The court then observed that normally § 5G1.1(b) would prevent a defendant's applicable guideline range from being lowered, *id.*, because that provision requires that where statutory mandatory minimums are greater than the maximum of the applicable Guideline range, then the statutory minimum shall be the Guideline sentence. U.S.S.G. § 5G1.1(b).

However, the federal prosecutor in *Koons* (as well as the prosecutor in Richter's case) interpreted U.S.S.G. § 1B1.10(c) to allow for a reduction, because § 1B1.10(c)

³ Accord *United States v. C.D.*, 848 F.3d 1286 (10th Cir. 2017); *United States v. Rodriguez-Soriano*, 855 F.3d 1040 (9th Cir. 2017).

provided that an “amended guideline range shall be determined without regard to the operation of § 5G1.1.” 850 F.3d at 975.

The Eighth Circuit pushed back, claiming the prosecutor, and the Sentencing Commission itself, ignored a critical “threshold question” raised by the plain language of § 3582(c)(2), which is whether the defendant was sentenced “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” *Id.* at 977. The court found that the defendant’s sentence was based on a mandatory minimum, not a Guidelines range. *Id.*

Contrary, then, to the Sentencing Commission and the prosecutors in *Koons* and *Richter*, the Eighth Circuit held that defendants like Koons and Richter are categorically ineligible for the sentence reduction that § 3582(c)(2) and Amendments 780, 782, and 788 provide. *Id.* at 979. This runs counter to holdings in the Fourth, Seventh, and Eleventh Circuits.

B. United States v. Williams

In *Williams*, the Fourth Circuit considered the case of a defendant who was sentenced just as Koons and Richter were. 808 F.3d 253, 255-56 (4th Cir. 2015). Just as Koons and Richter did, Williams sought resentencing under § 3582(c)(2). *Id.* at 256. The United States Attorney and the Probation Office both agreed that Williams was eligible. *Id.* at 255-56.

The Fourth Circuit began by acknowledging that “Congress has empowered the [Sentencing] Commission to amend the Guidelines . . . Those amendments are

effective unless ‘otherwise modified or disapproved by Act of Congress.’” *Id.* at 257 (quoting 28 U.S.C. § 994).

Congress, furthermore, anticipated that the Commission can use its amendment process to resolve disagreements among courts of appeals, *id.* at 258, and that the Commission has the power to override circuit court precedent through the amendments process. *Id.*

The Fourth Circuit turned to § 3582(c)(2) and U.S.S.G. § 1B1.10(c), which together provided that defendants like Richter, Koons, and Williams are eligible for resentencing without regard to the operation of U.S.S.G. § 5G1.1. *Id.* at 260. Thus, the “applicable policy statement now requires a sentencing court to remove Guidelines section 5G1.1 from the § 3582(c)(2) eligibility determination.” *Id.* at 261.

As such, the Fourth Circuit agreed with Williams, the prosecutor, and the Probation Office that Williams was eligible for a sentence reduction. *Id.* at 263.

C. United States v. Freeman

In *Freeman*, the Seventh Circuit held that in ruling on Amendment 780 motions for cooperators, district courts should no longer consider the effect of the statutory minimum trumping provisions of Sections 5G1.1 and 5G1.2. 586 Fed.Appx. 237, 239 (7th Cir. 2014) (citing U.S.S.G. § 1B1.10(c)).

The *Freeman* district court originally imposed a statutory minimum sentence of 240 months, which was below the defendant’s Guidelines range of 292 to 365 months. *Id.* at 237. On a Rule 35(b) motion, the court later reduced the defendant’s sentence to 180 months. *Id.* at 238-39. The district court denied the defendant’s

motion under Section 3582(c)(2) because it had initially sentenced him based on a statutory minimum. *See id.* at 239.

The Seventh Circuit vacated the ruling and held that Freeman was eligible for resentencing because he had been sentenced to a period below his mandatory minimum. *Id.* The Seventh Circuit noted that in light of Amendment 780, Section 5G1.1 no longer limits defendants' eligibility for a reduced sentence. *Id.*

D. United States v. Hope

In *Hope*, the Eleventh Circuit considered the case of a defendant who had a Guideline range of 168-210 months and a statutory mandatory life sentence, and was, in fact, sentenced to life because he did not cooperate. 642 Fed.Appx. 961, 962-63 (11th Cir. 2016).

The Eleventh Circuit rejected Hope's claim only because U.S.S.G. § 1B1.10(c) is reserved for defendants, like Richter, who cooperated. *Id.* at 964-65. For defendants like Richter, then, the Eleventh Circuit held that § 1B1.10(c) permits "defendants originally sentenced below the mandatory minimum due to substantial assistance to be resentenced under § 3582(c)(2)." *Id.* at 965.

II. The issue presented is raised countless times in district and circuit courts

While it is impossible to determine just how many courts have considered the issue that *Richter* presents, it is clearly in the hundreds, and perhaps even thousands. This issue, furthermore, is relatively new, and is likely to continue to be a contentious one. Finally, this issue implicates the role that the Guidelines have

vis-à-vis statutory law, as well as the role that courts ought to play in, effectively, overturning clear Guidelines amendments in light of statute. This separation of powers issue goes to the heart of our tripartite form of government and will inevitably arise again when the Commission endeavors to promulgate future amendments.

III. The issue has profound and disparate consequences for defendants across circuits

This issue is incredibly impactful for hundreds or perhaps thousands of individual defendants across the country. Consider Jodi Richter.

Richter was initially sentenced to 216 months. With her attorney, the government, and the district court all under the belief that she was eligible for resentencing, Richter received a new sentence of 179 months. She may, in fact, have been eligible for a much lower sentence. But she snatched defeat from the jaws of victory. Not only did the Eighth Circuit reject Richter's argument for a lower sentence, but it nullified her 179-month sentence and will force her to serve the entire 216 months. She would have been better off not appealing.

Richter would have been even better off living in the Fourth, Seventh, or Eleventh Circuit, where she would have been eligible for a substantial sentencing reduction.

There are countless Richters across the country. In some circuits, they are eligible for substantial sentence reductions. In other circuits, they find the doors to the district court closed and locked. The circuit split that *Richter* represents has

wide-ranging consequences for courts, the structure of our government, and individual defendants.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,


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June 20, 2017

No. ____

**In the
Supreme Court of the United States**

BRUCE CHARLES TOLLEFSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Criminal defendants have the right to self-representation at trial, but not on direct appeal. The Court has yet to determine the force of this right in sentence reduction proceedings under 18 U.S.C. § 3582(c)(2). The Sixth Circuit has stated that there is a right and other circuits are approaching the same holding, but the Eighth Circuit has held that there is no such right. Which circuits are correct?

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PETITION FOR WRIT OF CERTIORARI

This case offers the Court an ideal vehicle for clarifying the right that a criminal defendant has to self-representation in post-conviction proceedings. The Court has clearly stated that a defendant has a Sixth Amendment right to self-representation at trial, *Faretta v. California*, 422 U.S. 806 (1975), and does *not* have such a right on appeal. *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000). It has not, however, spoken clearly about that right in the *Faretta-Martinez* interstice, when it comes to post-conviction proceedings.

As a result, different circuit courts of appeals have filled this interstice with conflicting case law. Specifically, the Sixth Circuit, in contrast to the Eighth Circuit, has found that there is a right to self-representation during § 3582(c)(2) proceedings. Now, therefore, defendants may enjoy or not enjoy the right to self-representation depending upon the circuit in which they find themselves.

The right to self-representation arises directly from the Sixth Amendment itself, and raises the important constitutional value of an individual's autonomy to deal with legal proceedings as that individual sees fit. It is important that this Court offer much-needed clarity regarding the right to proceed pro se in the *Faretta-Martinez* interstice. It can do so by granting Tollefson's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The Eighth Circuit's opinion (Pet.App.1) is available at 853 F.3d 481 (8th Cir. 2017). The denial of the petition for *en banc* rehearing is included in the Appendix. (Pet.App.2).

JURISDICTION

The Eighth Circuit rendered its decision on April 6, 2017. Tollefson's subsequent petition for en banc rehearing was denied on May 3, 2017. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Constitution's Sixth Amendment is reproduced in the appendix, along with 28 U.S.C. § 1654.

STATEMENT OF THE CASE

This case presents an important gap in Supreme Court rulings on the *Faretta* right to self-representation that has been filled with conflicting circuit court case law and undermines defendants' interest in autonomy as they proceed through the criminal justice system.

In 2005, the petitioner, Bruce Charles Tollefson, pleaded guilty to one count of conspiracy to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. § 846, and one count of violent crime in aid of racketeering activity, in

violation of 18 U.S.C. § 1959(a)(3). (DCD 325, at p.1; DCD 344, at p.1).¹ In December of 2005, Tollefson was sentenced. (DCD 344, at p.1). He was subject to a mandatory minimum sentence of 120 months in prison. (DCD 324, at p.1).

Tollefson provided substantial assistance to the United States, which released him from the mandatory minimum sentence. (DCD 325, at p.1).

Tollefson's Federal Sentencing Guidelines range was 324-405 months. The district court imposed a sentence of 227 months. (DCD 324, at pp.1-2).

In 2014, the United States Sentencing Commission promulgated, and Congress approved, Amendments 782 and 788 to the Sentencing Guidelines. Amendment 782 reduced by two levels the offense level assigned to drug quantities that trigger mandatory minimum sentences. (U.S.S.G. 2015, App. C Supp., Am. 782). Amendment 788 made Amendment 782 retroactive. (U.S.S.G. 2015, App. C Supp., Am. 788). Both Amendments became effective on November 1, 2014. U.S.S.C., *2014 Drug Guidelines Amendment Retroactivity Data Report*, April 2016.

Upon application of Amendment 782, Tollefson's new amended Guidelines range became 262-327 months. (DCD 519, at p.2).

Unbeknownst to Tollefson, in August 2014 the Federal Public Defender ("FPD") was assigned to represent Tollefson in seeking a new sentence. (DCD 506, at p.1). On May 18, 2015, Tollefson filed a pro se motion to reduce his sentence under 18 U.S.C. § 3582(c) and Amendment 782. (DCD 504). In his pro se motion, Tollefson argued that based on his excellent disciplinary record and rehabilitative efforts

¹ "DCD" refers to the district court docket for case no. 3:04-cr-153 (D.N.D.), and the listed docket entry number(s) and page number(s).

while in the custody of the Bureau of Prisons he deserved a new sentence of 165 months. (DCD 504, at pp.8-9). In addition, Tollefson asked for his sentence to be reduced to 141 months, with the application of a credit of 24 months for time served in state prison. (DCD 504, at p.10).

Six months later, on November 23, the FPD filed a supplemental motion to reduce sentence, requesting a new Guidelines sentence of 183 months. (DCD 506). The FPD's only argument was that Tollefson's sentence should be reduced to 70% of the low end of the amended guideline range, because Tollefson's original sentence was 70% of the low end of his original guideline range. (DCD 506, at p.3). The attorney made no mention of Tollefson's exemplary disciplinary record or rehabilitative efforts.

Prior to filing this supplemental motion, the attorney never communicated with Tollefson nor made his supposed client aware that he undertook to represent him. His first communication with Tollefson appears to have been in a November 24, 2015, letter. (DCD 509-1). The FPD was, therefore, appointed to represent Tollefson 15 months before he ever communicated with his supposed client.

In fact, this first communication with Tollefson was to inform Tollefson that the FPD had *already* filed a supplemental motion on Tollefson's behalf. *Id.*

On December 7, Tollefson submitted a letter to the district court, as well as to the FPD, asking the FPD to rescind his supplemental motion to reduce sentence. Tollefson raised five points in support of his request: he had already filed a pro se motion to reduce sentence; he did not believe that the FPD was his attorney; the

FPD failed to consult with Tollefson on matters regarding his motion; the FPD's supplemental motion to reduce sentence conflicted with Tollefson's pro se motion to reduce sentence; and during each of his attempts to contact the FPD, Tollefson was referred to a person who was continually unavailable. Tollefson specifically noted that he did "not wish to have representation that [did] not consult with [him] prior to moving forward." Id.

On December 15, the United States filed a response in opposition to both motions to reduce sentence. (DCD 510).

On December 22, the FPD filed a reply to the government's response, stating that if the district court were to construe Tollefson's December 7 letter as a request to remove him from representation, then the district court should disregard the reply to the government's response and consider Tollefson's May 18 pro se motion. (DCD 511, at pp.1-2).

On March 1, 2016, the district court denied Tollefson's motion to reduce sentence. (DCD 519). On March 21, Tollefson timely filed a pro se motion to reconsider his request for a reduced sentence. (DCD 522). The district court denied Tollefson's motion for reconsideration in a two-line order. (DCD 523). Tollefson filed his timely pro se notice of appeal on April 7, 2016. (DCD 524, at p.1).

On appeal to the Eighth Circuit, Tollefson argued that his Sixth Amendment right to self-representation, pursuant to *Faretta v. California*, was violated because the district court ignored Tollefson's own pro se filings in preference to those of an attorney who was thrust upon Tollefson without Tollefson's knowledge or consent.

The Eighth Circuit rejected Tollefson’s claim. *United States v. Tollefson*, 853 F.3d 481 (8th Cir. 2017). That Court based its opinion on the undisputed law that *Faretta* provides for the right to self-representation at trial, *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), provides for no such right on appeal, and *McKaskle v. Wiggins*, 465 U.S. 168 (1984), permits standby counsel outside the presence of a jury to provide unsolicited counsel. *Tollefson*, 853 F.3d at 484-85.

Yet *Faretta*, *Martinez*, and *McKaskle* do not answer the question presented in this case. Tollefson was not in trial, was not pursuing an appeal, and never once acquiesced to “standby counsel.” Indeed, his purported “standby counsel” never even made himself known to Tollefson before acting on his behalf.

The Eighth Circuit, therefore, had to make new law. It did so by extending the holding of *Martinez* to postconviction sentence reduction proceedings. *Tollefson*, 853 F.3d at 485 (“we find no reason why we should not extend the holding of *Martinez* to postconviction sentence reduction proceedings”). Now, therefore, in the Eighth Circuit unwilling defendants can be forced to accept legal representation in at least one part of the *Faretta-Martinez* interstice, even if they are highly competent to represent themselves, do so in good faith, and clearly communicate that to the court and counsel in a timely fashion.

This is in direct contrast to a holding in the Sixth Circuit, and in near contrast to holdings in the Fifth, Ninth, and Tenth Circuits.

The Eighth Circuit had jurisdiction to hear this case under 28 U.S.C. § 1291, as did the district court before that, under 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's opinion created new law by expanding *Martinez* into the *Faretta-Martinez* interstice, implicitly undermining the *Faretta* justifications for the Sixth Amendment right to self-representation.

First, the Court should grant certiorari to address the Eighth Circuit's creation of new law. It should reverse the Eighth Circuit's opinion and hold that *Faretta*, not *Martinez*, applies to § 3582(c)(2) proceedings. This holding would reaffirm the Court's sentiment in *Faretta* and Congress' sentiment in § 1654 that defendants have the right to manage their own cases, so long as they do so competently, in good faith, and assert that right in a timely fashion.

Second, the Court should grant certiorari because the Eighth Circuit's opinion conflicts with the Sixth Circuit's holding in *United States v. Jones*, 407 Fed.Appx. 22, 26-27 (6th Cir. 2011), and puts it on a collision course with contrary holdings from a number of other circuits, which, unlike the Eighth Circuit, have expanded *Faretta* into the *Faretta-Martinez* interstice.

Third, the Court should grant certiorari because the issue presented is an important one. The *Faretta* right is of dubious permanence after *Martinez*, and is unsettled in the *Faretta-Martinez* interstice. This case presents the Court with the opportunity to either affirm or revisit its holding in *Faretta*.

I. The Court should grant review to address the Eighth Circuit’s creation of new law

A. *Faretta* and *Martinez* define the outer boundary of the *Faretta-Martinez* interstice, and this Court has yet to define the right to self-representation within that interstice

i. *Faretta v. California*

In *Faretta*, the Court considered the issue “whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.” 422 U.S. 806, 807 (1975). The Court held that a state may not constitutionally do so. *Id.*

The Court noted that the right to self-representation in federal courts “has been protected by statute since the beginnings of our Nation.” *Id.* at 812. 28 U.S.C. § 1654 provides that “[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.” This statute reflects the constitutional right to proceed pro se. As the Court wrote, “To thrust counsel upon the accused, against his considered wish, . . . violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.” *Faretta*, 422 U.S. at 820.

Section § 1654 did nothing less than codify a widespread sentiment of the early colonists. The Court wrote:

No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable,

much less advisable . . . In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an “assistance” for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.

Id. at 832.

The importance of the right to proceed pro se has existed since the founding of the country, *id.* at 812, and “[i]n the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber.”

Id. at 821.

Indeed, § 1654 was part of the Judiciary Act of 1789, *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964), a statute that Justice O’Connor once called “the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself.” Sandra Day O’Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990). Unsurprisingly, most, if not all, federal appellate courts have held that the right to self-representation is implicit in the Fifth and Sixth Amendments, *see Faretta*, 422 U.S. at 817, and with few exceptions, every state accords defendants the right to represent themselves. *Id.* at 813.

Unless the defendant has acquiesced to representation, the defense presented by the unwanted counsel is not the defense guaranteed to the defendant under the Constitution, because it is actually not his defense. *Id.* at 821. If a defendant wishes

to proceed pro se, then, he should not be forced to accept representation by undesired counsel. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (“the Constitution does not force a lawyer upon a defendant”).

To determine whether a defendant’s right to self-representation is violated, courts must determine “whether the defendant had a fair chance to present his case in his own way.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984). When a defendant attempts to proceed pro se, counsel may undermine his objectives through participation that is “unsolicited and excessively intrusive.” *Id.* Each pro se defendant is entitled to maintain actual control over the way in which he presents his case to the fact finder. *Id.* at 178. The fact finder’s perception of a defendant’s self-representation is destroyed if standby counsel is permitted to participate without the consent of the defendant. *Id.*

In the end, then, this Court recognized “a nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.” *Faretta*, 422 U.S. at 817.

ii. *Martinez v. Court of Appeal of California*

In *Martinez*, the Court considered whether the *Faretta* right to self-representation ought to extend to appeals. 528 U.S. 152, 154 (2000). In holding that it did not, the *Martinez* Court made clear that *Faretta* applied only to trials. *Id.*

The *Martinez* Court went further, calling into question the validity of *Faretta* itself. The Court noted that *Faretta* had been premised on three arguments: first, the right of self-representation had been protected throughout U.S. history; second,

the nation's English and colonial background entailed support for the right to self-representation; and third, the law ought to respect individual autonomy. *Id.* at 156.

By *Martinez*' time, however, these bases came to provide less support for the *Faretta* right. In the past, unlike in *Martinez*' day, lawyers were mistrusted and unavailable to the average person accused of crime. *Id.* It therefore made sense to depend upon self-representation.

Appeals, furthermore, were quite different than trials. In the appellate context, defendants are no longer presumed innocent. It is generally defendants who hale themselves into appellate courts, whereas the State compels them into trial courts. Thus, *Faretta*'s autonomy principle is weakened. *Id.* at 162-63. Criminal appellants, furthermore, have no right to be present during appellate proceedings. It would make little sense, therefore, to extend *Faretta* to the appellate context. *Id.* at 163-64.

iii. No clear holding in the *Faretta-Martinez* interstice exists from the Court

The Court has made no ruling extending the *Faretta* right of self-representation, or imposing a *Martinez* limitation, into the *Faretta-Martinez* interstice. The Eighth Circuit has done so, creating new law. In doing so, it has created a direct circuit split and broader inter-circuit inconsistency when it comes to the right of self-representation in the *Faretta-Martinez* interstice.

II. The Eighth Circuit extended *Martinez* into the *Faretta-Martinez* interstice, whereas other circuits have expanded *Faretta* into this interstice. The Eighth Circuit has created a direct circuit split and broader inter-circuit inconsistency

A. *United States v. Jones*

In *United States v. Jones*, the Sixth Circuit considered a case not unlike Tollefson's. 407 Fed.Appx. 22 (6th Cir. 2011). In that case, Jones had filed a motion to reduce his sentence under § 3582(c)(2). *Id.* at 24. The magistrate judge appointed an attorney to represent Jones, but Jones stated that he wanted to proceed pro se. *Id.*

On appeal to the Sixth Circuit, Jones claimed that the district court violated his Sixth Amendment right to represent himself. *Id.* at 26.

It appears that the attorney acted merely as standby counsel and did not interfere with Jones' pro se advocacy. *Id.* For these reasons, the Sixth Circuit rejected Jones' claim. *Id.* at 26-27. However, the court did acknowledge that the Sixth Amendment right inhered in § 3582(c)(2) proceedings, concluding that the right was "fully vindicate[ed]." *Id.* at 26-27.²

B. *United States v. Davis*

Beyond the direct circuit split with the Sixth Circuit, the Eighth Circuit has created a broader inter-circuit inconsistency when it comes to the right of self-representation in the *Faretta-Martinez* interstice. The Eighth Circuit has put itself on a collision course veering toward future circuit splits.

² The Ninth Circuit appears to be in line with the Sixth Circuit, assuming *arguendo* that the Sixth Amendment right to self-representation exists in § 3582(c)(2) proceedings. *United States v. Braswell*, 347 Fed.Appx. 342, 343 (9th Cir. 2009).

The Fifth Circuit has provided the most robust and expansive defense of *Faretta*'s applicability in the *Faretta-Martinez* interstice. In *United States v. Davis*, the Fifth Circuit considered the case of Len Davis, who had been found guilty of a civil rights murder and sentenced to death. 2001 WL 34712238, *1 (5th Cir. 2001) (*Davis I*).

Davis had asked the district court to allow him to represent himself at the death penalty phase of his case — after he had been found guilty at trial. *Id.* The district court denied this request, finding that *Faretta* did not extend to sentencing. *Id.*

On interlocutory appeal, the Fifth Circuit recognized the Supreme Court's then-recent holding in *Martinez*, but reversed and remanded, writing, "Nothing in *Martinez* can be read to push the ending point for the Sixth Amendment right to self-representation in criminal proceedings back to the end of the guilt/innocence phase of a bifurcated trial proceeding." *Id.* at *2.

Judge Dennis dissented for one legal and one factual reason. Legally, he concluded that a defendant's autonomy interest wanes in favor of the State's interest in the fair and efficient administration of justice after the defendant is found guilty at trial. *Id.* at *5. Factually, he believed that Davis actually sought a death sentence and intended to sabotage his own defense. *Id.* The *Faretta* right was not, Judge Dennis thought, meant to allow defendants "to flout the dignity of the courts and the Constitution by betraying one's pretended cause." *Id.* at *6.

The case was remanded to district court. *United States v. Davis*, 180 F.Supp.2d 797 (E.D.La. 2001) (*Davis II*). On remand, the district court recognized that Davis

intended to present no mitigation evidence on his behalf. *Id.* at 797. The court, therefore, appointed an independent counsel “to investigate and present mitigation evidence at the penalty phase.” *Id.* at 798. The court’s purpose was to further the public interest in a full and fair sentencing proceeding. *Id.*

Davis once again appealed, arguing that the district court’s appointment of an independent counsel “completely eviscerate[d] his *Faretta* right to represent himself pro se.” *United States v. Davis*, 285 F.3d 378, 380 (5th Cir. 2002) (*Davis III*).

The Fifth Circuit agreed, observing that “[a]n individual’s constitutional right to represent himself is one of great weight and considerable importance in our criminal justice system,” *id.* at 381, and that “the right of self-representation [is] at the very heart of the Sixth Amendment.” *Id.* at 384.

Judge Dennis again dissented, this time focusing primarily on Davis’ apparent intent to sink his own case. *Id.* at 385-86.

Eleven years after *Davis III*, the district court considered a motion by Davis’ standby counsel to vacate that court’s grant of relief under *Faretta*. *United States v. Davis*, 2013 WL 1455760, *1 (E.D.La.) (*Davis IV*).

The district court was therefore called upon to determine the extent to which *Faretta* extended to post-conviction review under 28 U.S.C. § 2255. *Id.* The court suggested that this was a case of first impression, writing that neither party had cited “a case that resolves the issue whether a person moving for post-conviction relief under 28 U.S.C. § 2255 has an absolute right to represent himself.” *Id.* The court found that neither *Faretta* nor *Martinez* resolved the issue because *Faretta*

was limited to the right of self-representation at trial and *Martinez* was limited to addressing the right on appeal. *Id.*

The district court found that Davis did not have the absolute right to self-representation in § 2255 proceedings, but attempted to fashion a balanced remedy, with Davis representing himself on some matters and standby counsel representing Davis on other matters. *Id.* at *2.

For Davis, this wasn't good enough. He appealed again, and again the Fifth Circuit found that he had the right to represent himself. *United States v. Davis*, 629 Fed.Appx. 613, 615 (5th Cir. 2015) (*Davis V*). The Fifth Circuit's opinion appeared to rest on Davis' § 1654 statutory right, and not Davis' Sixth Amendment right, *id.* at 618, but the court did not explicitly reject a Sixth Amendment basis for Davis' claim.

C. Other circuits support *Davis*

Other circuits are in line with *Davis*'s expansion of *Faretta* into the *Faretta-Martinez* interstice. The Fifth, Sixth, Ninth, and Tenth Circuits have all held that the right to self-representation extends to sentencing. *United States v. Evans*, 559 Fed.Appx. 475, 479 (6th Cir. 2014) (based on the Sixth Amendment); *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008) (based on the Sixth Amendment); *United States v. Jones*, 489 F.3d 243, 248 (6th Cir. 2007) (based on § 1654); *United States v. Estrada*, 25 Fed.Appx. 814, 819 (10th Cir. 2002) (based on § 1654 and the Sixth Amendment); *Lopez v. Thompson*, 202 F.3d 1110, 1112 (9th Cir. 2000) (based on the Sixth Amendment).

Indeed, the Ninth Circuit has assumed, *arguendo*, that the Sixth Amendment right to self-representation exists in § 3582(c)(2) proceedings. *United States v. Braswell*, 347 Fed.Appx. 342, 343 (9th Cir. 2009).

D. The Fourth Circuit rejects *Davis*

It appears that the Fourth Circuit is alone in not extending *Faretta* at all into the *Faretta-Martinez* interstice. In *United States v. Hyman*, that Circuit held that once a defendant is represented at trial, the defendant does not have the right to self-representation at sentencing. 141 F.3d 1161, *3 (4th Cir. 1998). *Hyman* appears to remain good law in the Fourth Circuit. *United States v. Gore*, 2007 WL 9606835, *2 (D.S.C.).

E. The Eighth Circuit sides with the minority Fourth Circuit, putting it on a collision course with the Fifth, Sixth, Ninth, and Tenth Circuits

Sentencing and § 2255 proceedings, as in *Davis*, are different than resentencing proceedings under § 3582(c)(2), as in *Tollefson*. But all of these proceedings lie in the uncharted *Faretta-Martinez* interstice, and § 2255 proceedings and § 3582(c)(2) proceedings are similar enough to raise the specter of an inter-circuit conflict. Individual autonomy interests in both proceedings appear similar, as does the extent of the State's interest in fairness and efficiency — both factors that courts like *Davis* have used to determine *Faretta*'s reach.

F. The Court’s silence has caused confusion in district courts

The Court has not yet declared that the right to self-representation does or does not exist in the *Faretta-Martinez* interstice, yet most circuit courts to weigh in on the matter have found or strongly suggested that it does exist. Nevertheless, district courts have apparently departed from the circuit norm by finding no such right.

Despite the Ninth Circuit’s *Faretta*-expansive case law, a district court in California found that the Sixth Amendment is not applicable in § 3582(c)(2) proceedings. *United States v. Addison*, 2008 WL 4816627, *1 (N.D.Cal.).

A district court in Florida found that “[b]ecause a defendant possesses no corresponding Sixth Amendment right to counsel in a post-conviction collateral proceeding . . . a defendant possesses no right to self-representation in a collateral proceeding.” *Ramirez v. Secretary, Dept. of Corr.*, 2007 WL 2113659, *9 (M.D.Fla.). Beyond the dubious logic of this proposition, the Fifth Circuit case cited in its support actually does not speak so clearly. *Id.*; *Shields v. Dretke*, 122 Fed.Appx. 133, 145 (5th Cir. 2005). In that case, the Fifth Circuit reviewed a petitioner’s habeas corpus petition from a state court conviction, and found only that, based on *Martinez*, it was “implausible” that there is a right to self-representation on collateral review. *Shields*, 122 Fed.Appx. at 145.

In another case from the Florida Middle District, a magistrate judge recommended denying relief because the judge found that a petitioner has no right to self-representation in federal habeas proceedings. *Rose v. Crosby*, 2006 WL 4701821, *3 (M.D.Fla.).

Finally, a district court in Delaware, reviewing a habeas petition on a state court conviction, found that “there is no federal or constitutional right to self-representation in a direct appeal from a criminal proceeding, and thus, by logical extension, there is also no right to self-representation during a collateral proceeding.” *McCleaf v. Carroll*, 416 F.Supp.2d 283, 294 (D.De. 2006).

The underlying premise of all of these cases is that *Martinez* extends into the *Faretta-Martinez* interstice. They find a kindred spirit in the Eighth Circuit, but certainly not in the Sixth Circuit and a number of other circuits. The Court should grant certiorari to resolve the circuit split between the Eighth and Sixth Circuits, the collision course between the Eighth Circuit and numerous other circuits, and the departure that district courts have apparently taken from numerous *Faretta*-expansive circuit court opinions.

III. The question is an important one because the *Faretta* right is one of dubious permanence.

In *Faretta*, the “Court exalted the value of autonomy” and therefore supported a defendant’s robust right of self-representation. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1148 (2010). Since then, however, “the Court’s enthusiasm for this interest has dissipated . . . As a result, lower courts increasingly have shifted control from defendants to their lawyers.” *Id.* One scholar predicted that the Court would eliminate the right of self-representation in the foreseeable future. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 622 (2005).

Martinez lends substantive support to this soothsaying. The *Martinez* Court undercut *Faretta*'s very foundation, suggesting that the historical justifications for the right of self-representation no longer exist, even at trial. 528 U.S. at 156-58. The concurring Justices sounded the alarm for *Faretta*. Justice Kennedy observed that it was "unnecessary to cast doubt upon the rationale of *Faretta*," *id.* at 164, Justice Breyer recognized that "judges closer to the firing line have sometimes expressed dismay about the practical consequences of" *Faretta, id.*, and Justice Scalia did "not share the apparent skepticism of [the *Martinez*] opinion concerning the judgment of the Court . . . in *Faretta*." *Id.* at 165.

If *Martinez* represented a swipe at *Faretta*, the instant case presents an opportunity for the Court either to continue the *Faretta*-limiting case law that *Martinez* began, or to reaffirm *Faretta* and address the concerns of the *Martinez* concurring Justices. Either way, the instant case provides the Court with the opportunity to clarify a dubiously permanent area of criminal procedure.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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July 11, 2017

No. 17-1278

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PATRICK LLOYD HOFSTAD

APPELLANT

VS.

UNITED STATES OF AMERICA

APPELLEE

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR APPELLANT

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CASE SUMMARY AND REQUEST FOR ORAL ARGUMENT

The appellant, Patrick Lloyd Hofstad, was indicted on February 13, 2013, for conspiracy to possess with intent to distribute over 500 grams of meth, and three counts of distribution of meth. On February 12, 2015, Hofstad was brutally assaulted while in custody, leaving him with a fractured skull, the need for multiple surgeries, screw and plate inserts in his head, and the daily threat of anything from blindness to even death if he is reinjured or gets an infection.

On January 18, 2017, Hofstad requested that the district court sentence him based on U.S.S.G. § 5H1.4, which permits courts to sentence based upon a defendant's extraordinary physical condition.

The court had previously found that Hofstad's severe head injury and its complicating factors was a "rare," "serious," "out of the ordinary," "uncommon," and "exceptional" physical condition. It found, however, that it was not "extraordinary," and therefore did not depart downward based on § 5H1.4. The court clearly erred.

Pursuant to Fed. R. App. P. 34(a), Hofstad requests fifteen minutes to present an oral argument. This case meets the standards set forth in Rule 34(a)(2).

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JURISDICTIONAL STATEMENT

This is a direct appeal from the final decision of the United States District Court, North Dakota. The appellant, Patrick Lloyd Hofstad, files this appeal. The district court possessed jurisdiction over this matter pursuant to 18 U.S.C. § 3231. The district court filed its judgment on January 26, 2017. A notice of appeal was timely filed on January 30.

The United States Court of Appeals for the Eighth Circuit possesses jurisdiction in this case pursuant to 28 U.S.C. § 1291, which gives this Court jurisdiction of appeals from all final decisions of the district courts.

STATEMENT OF THE ISSUE

- I. UNITED STATES SENTENCING GUIDELINE § 5H1.4 PERMITS DISTRICT COURTS TO APPLY A DOWNWARD DEPARTURE TO A DEFENDANT'S SENTENCE WHEN THE DEFENDANT HAS AN "EXTRAORDINARY PHYSICAL IMPAIRMENT." HOFSTAD'S HEAD INJURY IS LIFE-THREATENING, MAKES HIM A VULNERABLE INMATE, AND MAKES HIS HEALTH "FRAGILE." THE DISTRICT COURT FOUND HIS CONDITION TO BE "RARE," "SERIOUS," "OUT OF THE ORDINARY," AND "EXCEPTIONAL." DID THE DISTRICT COURT CLEARLY ERR IN FINDING THAT HOFSTAD'S CONDITION WAS NOT EXTRAORDINARY?

U.S.S.G. § 5H1.4

United States v. Charles,
531 F.3d 637 (8th Cir. 2008)

United States v. Coughlin,
500 F.3d 813 (8th Cir. 2007)

STATEMENT OF THE CASE

On February 13, 2013, Patrick Lloyd Hofstad was indicted on various drug charges. (DCD 2). He pleaded not guilty on February 25, 2013, and was released on personal recognizance with conditions. (DCD 25).

On November 18, 2014, Hofstad was placed into custody. (DCD 201). His detention continued after a December 8 hearing on the matter. (DCD 221).

The brutal assault on Hofstad and his precarious physical condition

On March 10, 2015, Hofstad requested a detention review hearing, noting that on February 12, 2015, he had been assaulted while in custody in the Stutsman County Jail. (DCD 254, p. 3). As a result of this assault, Hofstad “suffered multiple fractures on his face around his eye.” Id. From the date of the assault to March 10, Hofstad experienced “severe headaches and double/triple vision on a daily basis” Id. Hofstad noted that his medical needs went “beyond what the North Dakota penal system is willing/able to provide.” Id.

On April 3, the court denied Hofstad’s request for a detention review hearing. (DCD 281).

On May 13, Hofstad filed an expedited motion for a review of his detention order. (DCD 297). This motion elaborated on Hofstad’s assault and precarious physical condition.

Hofstad was attacked by a fellow inmate on February 12, who fractured Hofstad's skull. (DCD 297-4, p. 1). The inmate had ordered Hofstad to enter a cell, and sit in the cell's only chair. Id. Hofstad did as he was instructed. Id. The inmate accused Hofstad of snitching, noting that "[s]omething [didn't] sound right in [Hofstad's] paperwork." Id. The inmate hit Hofstad perhaps 40 times. Id. at 2. As the inmate punched Hofstad, he shouted at Hofstad: "I should fucking kill you! You fucking snitch! I should fucking kill you!" Id. By the time the attack was over, Hofstad was bleeding all over the place. Id.

Hofstad was taken to the emergency room and underwent a CT scan. Id. Discovering Hofstad's skull fracture, the doctor observed to Hofstad, "Whoever got you, got you real good. They fractured your skull." Id.

Bradley Skari, MD, treated Hofstad for his injuries. (DCD 297-1, p. 1). Dr. Skari noted that Hofstad had sustained a "right inferior orbital fracture." Id. After Dr. Skari's treatment, Hofstad had to undergo surgery near his eye to prevent long term double vision and bulging eye. Id. Hofstad underwent surgery in April, when doctors installed a metal plate and drove screws into Hofstad's skull in an attempt to repair the fracture that took place more than two months prior. Id.

Dr. Skari noted that prisons are "confined place[s], with a lot of people, and intense amount of germs." Hofstad, therefore, was at a significantly increased risk of infection while recovering from surgery. Id. at 2. Skari wrote,

“If Mr. Hofstad develops an infection, his life will be in danger as the infection could go directly to his central nervous system and brain.” Id. Skari went on to state that “[a]nother major concern . . . is if Mr. Hofstad is attacked like he was in February. If Mr. Hofstad sustains severe trauma to his head again the following could occur: [b]reak the plate or dislodge the screw which would cause additional surgery; [p]ermanent loss of vision; [d]eath is possible.” Id. Skari’s medical opinion was that Hofstad would be better off if he were able to recover out of custody and out of jail. Id.

Jonathan Cohen, MD, attended to Hofstad on April 30, 2015. (DCD 302-1, p. 1). Hofstad was operated on under anesthesia. Id. It was during this surgery that the metal plate was fastened to Hofstad’s skull. (DCD 303, p. 1). Twenty days later, Hofstad saw Raymond Larsen, MD, an ophthalmologist. Id. Dr. Larsen concluded that “the surgery was not desirably successful as Patrick Hofstad was not able to move his eye by looking up and because Patrick still had double vision.” Id. Indeed, Hofstad’s condition had worsened: “Mr. Hofstad’s eye is now more swollen, is now bleeding, . . . there is now a liquid seeping from his eye, . . . the skin around his eye is hard to the touch, and this area is more red with blackness below the eye.” Id.

Hofstad, for his part, reported that his pain level had increased from 5 to 8 (with a range of 1-10, where 10 is the highest level of pain), his eye was bleeding and seeping liquid, his eye was swollen and “hard to the touch and

feels like fish scales,” and the area around his eye was redder with blackness below the eye. (DCD 302, at p. 2).

Dr. Larsen concluded that Mr. Hofstad needed to be seen as soon as possible by an ophthalmology specialist, because “[t]he symptoms described to me could be indication of a serious infection or could be indication of a thrombus or blood clot, both of which, if untreated, could lead to blindness or death.” (DCD 303, p. 1).

The government did not oppose Hofstad’s pretrial release, (DCD 312), and the court released him on personal recognizance with conditions. (DCD 315).

On September 21, 2015, Hofstad filed a motion to continue the court’s motions deadline and trial date, noting that he had a medical appointment on September 28 and another potential eye surgery after that. (DCD 357, p. 1). Hofstad reported that he has constant double vision, and his sister noted that he “frequently falls down . . . steps and runs into walls. It is virtually impossible for one with double vision to concentrate or function.” *Id.* The court granted this motion three days later. (DCD 360).

On March 31, 2016, Hofstad gave notice of his intent to change his plea to guilty. (DCD 415).

On April 15, Hofstad filed his brief on pre-sentence release, noting that since his assault he had attended nearly 40 different medical appointments in

connection to his skull fracture. (DCD 433, p. 3). From February 12, 2015, through April 15, 2016, that amounts to almost three appointments every month! Further appointments after April 15, 2016, were scheduled, which involved Hofstad's eye as well as his shoulder, which was also injured during the assault and which itself might have needed surgery Id.

As of April 15, Hofstad's physical and mental health remained "fragile." (DCD 433-1, at p. 1). Were he to receive another blow to his eye, Hofstad was at risk of blindness, additional brain injury, or even death. Id. at 2. Along with his head injury, Hofstad's "dominant arm is disabled and useless." Id. at 3. He is "vulnerable," and has been attacked on two different occasions while in the U.S. Marshals Service's custody. Id.

Hofstad argued that he was eligible for pre-trial release based on the "exceptional circumstances" provision of 18 U.S.C. § 3145(c). (DCD 433, at p. 4). That provision permits courts to release defendants before trial in light of "circumstances that would render the hardships of prison unusually harsh for a particular defendant." Id.

On April 26, the court ordered Hofstad's release. (DCD 435). The court noted Hofstad's argument that his medical needs are "so rare and serious in nature [as] to constitute 'exceptional reasons' for release pending sentencing pursuant to 18 U.S.C. § 3145(c)." Id. at 1-2. The court went on to recognize this Court's definition of "exceptional reasons" as "clearly out of the ordinary,

uncommon, or rare reasons.” Id. at 2, citing United States v. Brown, 368 F.3d 992, 993 (8th Cir. 2004). The court found that Hofstad had “met the burden of showing that ‘exceptional reasons’ exist in this case for presentence release.” The court elaborated: “On February 12, 2015 Hofstad was brutally assaulted while in custody and sustained a right orbital blowout fracture. Hofstad’s medical needs are serious. Hofstad’s medical condition requires his presence at numerous medical appointments and may likely require he undergo additional surgery in the very near future.” Id.

On August 5, 2016, Hofstad filed a brief regarding proposed sentencing enhancements. (DCD 492). Even on the eve of sentencing, it was clear that Hofstad’s medical condition remained serious and not fully addressed. (DCD 492-1). Hofstad’s double vision, pain, and lack of ocular mobility persisted. (DCD 492-2). The type of care he continues to need can only be found in a place such as the University of Minnesota in Minneapolis or the Mayo Clinic. Id.

On January 18, 2017, Hofstad filed his sentencing memorandum, requesting a sentence based in part on U.S.S.G. § 5H1.4. (DCD 545, at p. 8). The court denied this request, concluding that Hofstad’s physical condition was not “extraordinary,” “unusual,” or “rare[].” (TR., 1-19-17, pp. 58-59). The court did note that Hofstad “undoubtedly needs to be placed in a federal medical

center, and [it] will do whatever [it] can to make sure that that's what happens.”

Id. at 59-60.

The court sentenced Hofstad to 156 months, and recommended placement in the federal medical center in Rochester, Minnesota. (DCD 552, at p. 2). Hofstad is currently housed at FCI Danbury — not a medical center.

Hofstad's mental condition exacerbates the danger to his physical health

While Hofstad's physical condition is precarious, it is only exacerbated by his mental condition.

On July 1, 2015, psychologist Dr. Richard Ascano evaluated Hofstad. (DCD 357-1, p. 1). Ascano reported that Hofstad had been suicidal in his late teens, id. at 2, struggles to communicate well with people, and has post-concussion syndrome. Id. at 3. He has a history of head injuries and “[m]ultiple head assault due to child maltreatment.” Id. His psychological functioning is severely impaired. Id. at 5. He struggles to explain his ideas and reasoning, and has never had a lot of friends. Id. at 3.

Hofstad is “socially isolated.” He has “limited social skills, with particular difficulty interpreting the normal nuances of interpersonal behavior that provide the meaning to personal relationships.” Id. at 5. As a result of childhood abuse, Hofstad has “low interpersonal effectiveness, diminished social skills, inability to understand social interactions, poor perspective taking abilities, and poor boundaries.” Id. at 6. He suffers from “fairly rapid and

extreme mood swings.” Id. at 5. He may also suffer from “visual disturbances . . . judgment problems, depression, and anxiety.” Id. at 8.

Because of Hofstad’s complex of mental conditions, Dr. Ascano opined that Hofstad ought to be placed in a BOP psychiatric facility, not a general prison population. Id. at 10.

Dr. James Christenson, who attended to Hofstad, similarly observed that Hofstad “struggle[s] with cognitive dysfunction that has led to problems with complex problem solving and easily adapting to new situations and circumstances.” (DCD 549). Dr. Christenson concluded that “being incarcerated in a penitentiary would both be detrimental to [Hofstad’s] mental health and . . . his mental health problems would leave him vulnerable to manipulation or harm by other inmates.” Id.

Those closest to Hofstad confirmed these medical diagnoses. Character letters indicated that Hofstad “is very easy for people to take advantage of,” has “trouble organizing or completing executive function,” “is gullible to a fault,” and is easily influenced by people. (DCD 545, at p. 3)

SUMMARY OF THE ARGUMENT

While death is a distant and abstract inevitability for most of us, Hofstad walks with that grim specter every moment of his life. His skull is broken, held together by metal pieces. That fragile, cracked casement is the only thing separating him from his doom at the fist of a mess hall malcontent, the foot of a cell block bully, or an errant germ in the lavatory.

The district court acknowledged that Hofstad's condition was sufficiently exceptional, unusual, rare, and serious for pretrial release, but it clearly engaged in a potentially deadly error in concluding the very opposite when it came to sentencing. This Court should so find, and allow a terribly crippled man, who walks on the edge of death, to have his condition considered pursuant to U.S.S.G. § 5H1.4. It should reverse the district court's rejection of the applicability of § 5H1.4, find that that section of the Guidelines does apply, and remand to district court for resentencing based on this issue alone.

ARGUMENT

I. United States Sentencing Guideline § 5H1.4 permits district courts to apply a downward departure to a defendant's sentence when the defendant has an "extraordinary physical impairment." Hofstad's head injury is life-threatening, makes him a vulnerable inmate, and makes his health "fragile." The district court found his condition to be "rare," "serious," "out of the ordinary," and "exceptional." Did the district court clearly err in finding that Hofstad's condition was not extraordinary?

A. **Standard of review**

This Court reviews district courts' interpretation and application of the Federal Sentencing Guidelines de novo. United States v. Porter, 439 F.3d 845, 848 (8th Cir. 2006). It reviews for clear error district courts' factual finding as to whether defendants suffer extraordinary physical impairments. United States v. Coughlin, 500 F.3d 813, 817 (8th Cir. 2007).

This Court is able to review district courts' denials of § 5H1.4 departures. United States v. Robinson, 409 F.3d 979, 981 (8th Cir. 2005); United States v. Rabins, 63 F.3d 721, 728 (8th Cir. 1995). It will reverse a district court's decision not to depart downward where the district court believed it was without authority to grant the departure. United States v. Varner, 678 F.3d 653, 658 (8th Cir. 2012). One basis for a § 5H1.4 departure is a defendant's extraordinary physical impairment. Id. Thus, this Court must determine whether the district court erred in finding that Hofstad does not suffer from an extraordinary physical impairment. If it does so find, it must

vacate Hofstad's sentence, remand for resentencing, and order the district court to resentence Hofstad based on § 5H1.4. The district court should, then, consider a shorter sentence or an alternative to incarceration. United States v. Adonis, 744 F.Supp. 336, 343 (D.C.D.C. 1990).

B. The Coughlin and Charles factors

Section § 5H1.4 provides that district courts may depart from a Guidelines sentence if a defendant suffers from a “[p]hysical condition” that is “present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.” Such a physical condition is to be evaluated “individually or in combination with other offender characteristics.” An “extraordinary physical impairment” is a basis for a downward departure. Courts may also consider the fact that “home detention may be as efficient as, and less costly than, imprisonment.” Section 5H1.4 departures may be crafted “to accomplish a specific treatment purpose.” U.S.S.G. § 5H1.4.

At the core of Eighth Circuit caselaw to determine whether a defendant has the requisite extraordinary physical impairment is a three-part inquiry: this Court asks (1) whether the defendant's physical condition is such that he would find imprisonment more difficult than the normal hardship; (2) whether imprisonment will subject the defendant to more than the normal inconvenience or danger — specifically, either whether imprisonment will worsen the defendant's condition or whether the defendant requires special

care not provided by the BOP; and (3) whether the defendant's physical condition has any substantial present effect on the defendant's ability to function. Coughlin, 500 F.3d at 818.

These are not, however, the only questions this court asks to determine whether a defendant suffers from an extraordinary physical impairment. This Court has expanded upon Coughlin's first question, noting that an "abnormal hardship" is shown by (1) present evidence other than the defendant's own testimony; (2) substantive evidence, not conjecture; (3) evidence that the defendant's condition has a substantial present effect on his ability to function; (4) evidence that prison would worsen his condition; and (5) evidence that the Bureau of Prisons will not accommodate the defendant's treatment needs. United States v. Charles, 531 F.3d 637, 641 (8th Cir. 2008).

Finally, this Court assesses a defendant's physical condition "in the light of the situation that the defendant would encounter while imprisoned." United States v. Johnson, 318 F.3d 821, 826 (8th Cir. 2003).

Based on these criteria, Hofstad clearly suffers from an extraordinary physical condition. The district court therefore necessarily clearly erred in finding that Hofstad does not have such a condition.

C. Hofstad's condition meets all of the Coughlin and Charles criteria

Hofstad provided evidence of his physical condition through extensive medical documentation and expert testimony. This was, of course, not his own

testimony, nor was it conjecture. Quite the contrary: the record is replete with the attestations of numerous medical experts that Hofstad's condition is precarious and life-threatening.

These experts proved three vital points. First, Hofstad's skull fracture has left him vulnerable to further injury, blindness, and even death. Second, Hofstad's shoulder injury has debilitated him, leaving him even more vulnerable and unable to defend himself. Third, Hofstad's mental condition makes it difficult for him to perceive social cues, regulate his conduct in relation to those around him, and communicate effectively with others. Furthermore, Hofstad has already been labeled a snitch, and received at least one brutal beating for it.

These four factors set him on a collision course with other inmates. He cannot read other inmates well, he is physically infirm, and he teeters on the brink of brain injury or death. His condition debilitates his ability to function in prison.

Medical documentation adduced in Hofstad's case also shows that prison will worsen his condition. Dr. Skari asserted that prison entails tight physical spaces, many people,¹ an intense amount of germs,² and the risk that

¹ See John Fitzgerald & Stephen E. Vance, *How Today's Prison Crisis is Shaping Tomorrow's Federal Criminal Justice System*, 79-SEP FED. PROBATION 24, 24 (2015) (noting the need to "alleviate overcrowding in the Federal Bureau of Prisons" and that the Department of Justice "has identified prison overcrowding as a

Hofstad will again be the victim of a life-threatening assault. Prison could not only worsen Hofstad's condition; according to Dr. Skari, it could kill him.

And this Court need look no further than Hofstad's prison designation to conclude that the BOP will not accommodate Hofstad's medical needs. The district court judge strongly recommended placement in a federal medical facility, and both Dr. Skari and Dr. Ascano recommended medical facilities, not general population prisons, for Hofstad. Nevertheless, the BOP has chosen not to meet Hofstad's needs, instead rolling the dice on Hofstad's life in a federal correctional institution. This is not uncommon, as the BOP's inability to care for — or choice not to care for — inmates is well-documented. John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447,

significant management issue"); Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1161 (2013) (noting that while spending on corrections has increased, "it has failed to reach a level sufficient to support and expand the needed infrastructure to match the population influx"); Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191 (2016) (describing the contemporary reality of mass incarceration and prison overcrowding).

² See Ingrid A. Bingswanger, MD, MPH, *Chronic Medical Diseases Among Jail and Prison Inmates*, American College of Correctional Physicians, Mar. 3, 2010, available at <http://societyofcorrectionalphysicians.org/corrdocs/corrdocs-archives/winter-2010/chronic-medical-diseases-among-jail-and-prison-inmates> ("Jail and prison inmates are known to have a higher burden of infectious diseases . . . than the general, non-institutionalized population."); Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 291-92 (1992) ("In many areas of this country, prison inmates constitute high-risk populations for the contraction and spread of [HIV, TB], and other communicable diseases."); Alan Elsner, *Prison Health Issues*, 28-AUG CHAMPION 40, 42 (2004) ("it is clear . . . that prisons and jails are a serious incubator of disease").

457, 471 (2005) (noting prison healthcare is “costly” and “[m]any prisoners suffer from chronic illnesses such as asthma, diabetes, and hypertension, and prisons generally fail to provide appropriate chronic care services”); Kevin Johnson, *Feds Struggle to Provide Prison Medical Care*, USA TODAY, Mar. 28, 2016 (“Federal prison authorities are struggling to provide adequate medical care to thousands of inmates because of persistent staffing shortages”); Joel H. Thompson, *Today’s Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635 (2010) (describing the growing costs of prison healthcare, which represents approximately 10% of overall prison spending, and how prisons minimize these costs by providing inadequate medical care while still appearing to meet their Eighth Amendment obligations); Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, AM. J. PUBLIC HEALTH, 2009; 99(4): 666-72 (concluding that “[m]any inmates with a serious chronic physical illness fail to receive care while incarcerated.”).

D. The overwhelming weight of § 5H1.4 caselaw compels a finding in Hofstad’s favor

Beyond the Coughlin and Charles criteria, a broad review of legal opinions regarding § 5H1.4 reveals just how erroneous it was to find that Hofstad does not suffer from an extraordinary physical impairment.

1. Hofstad's condition is life-threatening, and the BOP will not address it

This Court has observed that a condition is extraordinary “if it is substantially more dangerous for prisoners than non-prisoners. Then imprisonment would shorten the defendant’s life span, making a given term a more harsh punishment than the same term for a healthy person.” Johnson, 318 F.3d at 826 (quoting United State v. Krilich, 257 F.3d 689, 693 (7th Cir. 2001)). Other courts have followed suit.

In ruling on § 5H1.4 issues, the Seventh Circuit has asked whether a “defendant needs constant medical care, or” whether “the care he does need will not be available to him should he be incarcerated.” United States v. Albarran, 233 F.3d 972, 979 (7th Cir. 2000). In practice, one district court in the Seventh Circuit applied this rule by looking to whether a defendant’s condition was “life threatening.” United States v. Rosche, 239 F.Supp.2d 858, 866 (E.D.Wi. 2002); see also United States v. Paradies, 14 F.Supp.2d 1315, 1321 (N.D.Ga. 1998) (life-threatening conditions may be viewed as extraordinary); United States v. Jefferson, 786 F.Supp. 1267, 1268 (N.D.W.Va. 1992) (where a prisoner’s condition is neither “acute” nor “life threatening,” home confinement under § 5H1.4 isn’t called for).

In another district court in the First Circuit, the court’s decision to impose home confinement under § 5H1.4 presaged Hofstad’s case. That court

noted that the defendant's condition was "unstable, with several conditions interrelating and potentially exacerbating each other." United States v. Baron, 914 F.Supp. 660, 663 (D.Mass. 1995). Furthermore, "a number of quite ordinarily found factors could upset the balance, including stress and the exposure to even common germs." Id. Finally, "if the medical balance [were to be] upset, the result would be a rapid deterioration to a life-threatening illness." Id. Incarceration, in short, "could trigger a life-threatening event." Id. at 664.

This Court will determine whether a condition is life-threatening in part based on whether the BOP can meet a defendant's treatment needs. United States v. Patterson, 17 Fed.Appx. 496, 497-98 (8th Cir. 2001); see also Krilich, 257 F.3d at 693 ("If the medical condition is extraordinary in the sense that prison medical facilities cannot cope with it, then a departure may be appropriate."); United States v. Woody, 55 F.3d 1257, 1276 n.15 (7th Cir. 1995) ("[t]erminal or life threatening conditions" are generally not "extraordinary" because the BOP has the "medical personnel and facilities" to adequately treat prisoners with such conditions); United States v. Hernandez, 89 F.Supp.2d 612, 616 (E.D.Pa. 2000) (citing United States v. LeBlanc, 24 F.3d 340, 348-49 (1st Cir. 1994)) ("If the Bureau of Prisons can adequately provide for a defendant's health care needs, courts have been reluctant to grant departures on the basis of ill health.').

The BOP has decided, for whatever reason, that it will not meet Hofstad's medical needs as prescribed by his doctors and the district court. Not only is this the very picture of life-or-death negligence, but it also violates Hofstad's right to receive treatment. Estelle v. Gamble, 429 U.S. 97, 103 (1976); Maddox v. Davis, 164 Fed.Appx. 559, 561 (8th Cir. 2005) (prisoners' constitutional rights are violated if they are "denied medically appropriate care for a serious medical need"); Jolly v. Knudsen, 205 F.3d 1094, 1096 (8th Cir. 2000) (prisons are deliberately indifferent when they are aware of but deliberately disregard a prisoner's demonstrated serious medical need); see also Robinson, 409 F.3d at 981 (If "the Bureau of Prisons will be unable to accommodate [a defendant's] condition and provide appropriate medical care," the condition may be extraordinary).

The BOP's decision also ignores the competent evidence of medical experts' opinions in favor of a § 5H1.4 departure for Hofstad. Multiple medical experts and the district court itself concluded that Hofstad's treatment needs would not be met in a general prison population. See Albarran, 233 F.3d at 979 ("The district court when considering a departure based upon a physical impairment must ascertain, through competent medical testimony, that the defendant needs constant medical care, or that the care he does need will not be available to him should he be incarcerated.") (internal quotations omitted).

For Hofstad, the court's error in not departing based on § 5H1.4 was compounded by its decision to throw Hofstad to the whims of the BOP, knowing that Hofstad desperately needed medical care and that the BOP might choose to not provide that care. Sure enough, Hofstad isn't getting that care, making his condition even more extraordinary and dire than it was before. This is Hofstad's actual reality in prison, and is the reality against which this Court must evaluate his physical condition.

2. Hofstad is vulnerable, making his condition extraordinary

Section 5H1.4 departures may be warranted when a defendant suffers from "extreme vulnerability" in a prison. Rabins, 63 F.3d at 729 (citing United States v. Long, 977 F.2d 1264 (8th Cir. 1992)) ("an extraordinary physical impairment which results in extreme vulnerability is a legitimate basis for departure."); Adonis, 744 F.Supp. at 343 (citing United States v. Lara, 905 F.2d 599 (2d Cir. 1990) (upholding a departure based on the "extreme vulnerability" of the defendant in a correctional institution)). Hofstad's condition, relative to that of other defendants who have received § 5H1.4 departures, makes him particularly vulnerable.

The Second Circuit has upheld a § 5H1.4 downward departure for "vulnerability due to [the defendant's] immature appearance, sexual orientation and fragility." Lara, 905 F.2d at 603.

Similarly, the Seventh Circuit held that a defendant's "[homosexual] sexual orientation and [passive, meek] demeanor" could justify a downward departure for vulnerability. United States v. Wilke, 156 F.3d 749, 753-54 (7th Cir. 1998).

The Fourth Circuit upheld a § 5H1.4 departure because "the defendant is 5'6" tall, weighs about 90 pounds and looks much younger than his years." United States v. Spring, 108 Fed.Appx. 116, 124 (4th Cir. 2004). Like Hofstad, this particular defendant had also been the victim of two prior assaults in prison. Id. at 125.

A district court in New York departed downward because a defendant had severe polio, walked with crutches, and because the BOP would not supply him with the metal crutches he was used to. United States v. McClean, 822 F.Supp. 961, 962 (E.D.N.Y. 1993). Wrote the court: "In view of the apparent reluctance of the warden to adequately address his disability problems, defendant will suffer more than the average inmate. He is also vulnerable to being taken advantage of by other inmates." Id.

Yet another district court departed downward because the defendant had been attacked while in custody, resulting in "head trauma, possibly brain damage." Adonis, 744 F.Supp. at 343. This defendant could not sleep at night, was frightened, had headaches, believed he was losing sight in one eye, and might have suffered from PTSD. He also had mental retardation. Id.

Measuring and comparing traumas in a game of one-upmanship is unseemly, but Hofstad must do so to meet his burden on appeal. Hofstad wins that unseemly game: if Wilke and Spring's physical appearance and sexual orientation make them vulnerable, then Hofstad's life-threatening cracked skull and mental condition that makes it difficult to relate to others can only make him more vulnerable. If McClean's polio and the BOP's refusal to address that disease makes him vulnerable, then Hofstad's severely injured and useless arm, precarious head trauma, and the BOP's refusal to treat his condition makes him vulnerable as well. And if Adonis' head trauma and losing sight in one eye makes him vulnerable, then the same injuries, and more, should also make Hofstad vulnerable.

In contrast to these other cases, Hofstad's potential for a quick death at the fists of an inmate or the germs of the prison is beyond conjectural, possible, or even probable; Hofstad's death is literally the medical prognosis of many doctors.

3. Hofstad's condition is worse than many others

Just as courts have departed downward under § 5H1.4 for defendants less vulnerable than Hofstad is, so too have they departed downward for conditions much less serious and life-threatening than Hofstad's.

The Fourth Circuit upheld a downward departure based on the fact that a defendant had lost both legs below the knee during the Korean War, and that

incarceration would jeopardize the treatment he had been receiving at the Veterans Administration Hospital. United States v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991). The Ninth Circuit has held that a degenerative hip and knee condition with nonactive tuberculosis and Hyperactive Adjustment Disorder is an appropriate basis for departure. United States v. Boy, 1994 WL 59781, *2-3 (9th Cir. 1994).

Courts have departed downward because defendants suffered from kidney cancer, United States v. Basey, 1995 WL 567356, *1 (8th Cir. 1995); a broken nose, three broken ribs, a broken leg, and a broken ankle, United States v. Williamson, 2013 WL 4677838, *2 (C.D.Cal.); brain aneurism resulting in memory loss, loss of strength in one arm, headaches, and blurred vision, United States v. Jimenez, 212 F.Supp.2d 214, 216 (S.D.N.Y. 2002); positive HIV status, United States v. Blarek, 7 F.Supp.2d 192, 212 (E.D.N.Y. 1998); amyotrophic lateral sclerosis (Lou Gehrig's Disease), United States v. Roth, 1995 WL 35676, *1 (S.D.N.Y. 1995); liver cancer, United States v. Maltese, 1993 WL 222350, *9, 11 (N.D.Ill. 1993); terminal metastatic cancer, United States v. Velasquez, 762 F.Supp. 39, 40 (E.D.N.Y. 1991); and pregnancy, United States v. Denoncourt, 751 F.Supp. 168, 170 (D.Haw. 1990).

These cases describe serious conditions that were appropriate bases for § 5H1.4 departures. They were, however, either not life-threatening or had relatively predictable treatment regimes and prognoses for recovery (however

slim those prognoses may have been). Hofstad's condition, in contrast, is absolutely life-threatening and highly precarious because the prognosis of death is probable and imminent. It should certainly be viewed as extraordinary.

E. Relief requested

Hofstad's life is in this Court's hands. Medical experts convinced the district court that Hofstad's condition is exceptional, unusual, rare, and serious. That condition exposes Hofstad to a greater degree of danger in prison than an otherwise healthy inmate would face. Germs or a violent inmate could easily injure, blind, or kill Hofstad. Hofstad has been labeled a snitch and assaulted at least once over this accusation, making him particularly vulnerable. Should he need to defend himself again, his arm will be of no use. Hofstad's mental condition makes it particularly difficult to navigate the complex social dynamics of a tightly-packed prison, making confrontation all the more likely. Finally, the BOP will not treat Hofstad according to the recommendations of multiple medical experts and the district court itself.

Hofstad's physical condition is extraordinary, and the district court clearly erred in finding otherwise. To protect Hofstad's life, this Court should so find, vacate Hofstad's sentence, and remand to district court for resentencing, with an order to resentence Hofstad based on § 5H1.4.

CONCLUSION

The caselaw in this circuit and across the country is replete with cases involving § 5H1.4 departures based on physical conditions that are highly painful, inconvenient, or expensive to treat in prison. Hofstad's condition partakes of all these characteristics, and more: prison might kill him. Multiple medical experts testified to the myriad ways that Hofstad could require additional surgery, go blind, or die as the result of his physical impairment. The district court recognized this when it came to pretrial release, but, for no apparent reason, found the opposite when it came to sentencing. The court's own opinion regarding the seriousness and rarity of Hofstad's condition and the caselaw speak in one voice: Hofstad deserved a § 5H1.4 departure, and the court clearly erred in not awarding it.

Respectfully,

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Dated: April 24, 2017

2017 DWI Update

Jeffrey S. Sheridan
Sheridan & Dulas
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DWI CASE LAW UPDATE

JULY 31, 2016 – AUGUST 8, 2017

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Additional Testing

1. Right to additional chemical test is not prevented or delayed when an officer provides Driver with a county-issued medical-grade specimen cup to collect urine sample.

Willits v. Comm’r of Pub. Safety, 891 N.W.2d 79 (Minn. Ct. App. March 6, 2017)

Driver was arrested for DWI, read an implied consent advisory, and submitted to a breath test. Driver also requested an independent test and made a phone call to arrange it. When Driver’s ex-wife arrived at the station with a Tupperware container to collect a urine sample, Officer offered Driver a county-issued urine-specimen cup to provide his sample. Driver accepted and used the county-issued container. At the implied consent hearing, Driver argued his right to an additional test was denied as the Officer ordered him to use the specimen cup and interfered with his right to an additional test. The court disagreed and sustained the revocation.

The court of appeals held that the Officer did not prevent or delay Driver’s right to an additional chemical test and affirmed the revocation.

Blood Testing

1. Minnesota’s test refusal statute violated Driver’s right to substantive due process to the extent it criminalizes refusal to submit to a warrantless blood test.

State v. Trahan, 886 N.W.2d 216 (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a urine test. Driver agreed, but could not produce a sample. Officer then asked Driver if he would submit to a blood test, which he refused. Driver was charged with first-degree test-refusal. Driver pleaded guilty but later moved to withdraw his guilty plea. The district court denied the motion, and the court of appeals upheld the conviction. The Supreme Court granted further review but stayed its review pending *Bernard*. The Supreme Court then remanded back to the court of appeals for reconsideration of the constitutional issue considering the *Bernard* decision.

On remand, the court of appeals held that the search-incident-to-arrest exception does not apply to warrantless blood testing and the test-refusal statute violates a driver’s right to due process by criminalizing the refusal to submit to a warrantless blood test. The conviction was reversed.

On appeal, the supreme court applied *Birchfield* and held: 1) Driver could not be prosecuted under the test refusal statute when refusing a blood test absent a warrant or exigent circumstances, 2) no exigent circumstance existed, 3) a good-faith exception to the exclusionary rule did not apply, and 4) the test refusal statute is unconstitutional as applied to blood and urine testing.

Breath Testing

1. District court may take judicial notice that the commissioner of public safety has approved the DataMaster for use by law enforcement.

State v. Norgaard, 2017 WL 2414832, 2017 WL 2414832 (Minn. Ct. App. Jun. 5, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and consented to a breath test. At trial, the officer testified that he administered the DataMaster test, was trained to operate the device, and was a certified operator. The state introduced the results of the DataMaster and the pro se driver objected, arguing the state failed to produce evidence regarding reliability of the DataMaster. The district court then took judicial notice of the fact that the commissioner of public safety approved the DataMaster and the driver objected to the court taking judicial notice in a criminal proceeding. The district court found driver guilty of driving with an alcohol concentration of 0.08 or more and he appealed.

The court of appeals affirmed and held the district court may take judicial notice of legislative facts (the DataMaster was approved by the commissioner) and that the trial court did not abuse its discretion in admitting the test results.

2. PBT results used to investigate underage drinking are not admissible under Minn. Stat. §169.41 if there is no reason to believe the test subject had been driving.

Matter of T. D. B., A16-0944, 2017 WL 1208755 (Minn. Ct. App. Apr. 3, 2017) (unpublished opinion)

T.B.D., a 17-year-old high school student smelled of alcohol on Monday morning and was questioned. He admitted drinking in Wisconsin over the weekend and alleged the smell was coming from his clothes. The school resource officer brought T.B.D. to his office and administered a PBT which showed an alcohol concentration of 0.34. T.B.D. was cooperative with questioning and did not request a parent or attorney. Officer was in plain clothes, carried a badge and a gun, and did not tell T.B.D. he was under arrest. T.B.D. was charged with underage consumption of alcohol and found guilty.

On appeal, T.B.D. challenged the admissibility of the PBT under Minn. Stat. § 169.41 since there was no evidence of driving and no search warrant was obtained prior to administration of the PBT. The court of appeals agreed that the PBT was not admissible under Minn. Stat. § 169.41 and remanded the search issue to the district court.

T.B.D. also argued that his statement to police should be suppressed as he was not given a *Miranda* warning and that Minnesota did not have jurisdiction since the alcohol consumption occurred in Wisconsin. The court of appeals relied on the brevity of the encounter with the officer (5-7 minutes) and found the totality of the circumstances indicated T.B.D. was not in custody during questioning. The court also found that since evidence of his consumption was observed in Minnesota, jurisdiction was proper.

3. Instructing Driver to “keep blowing” until they provide over four times the breath volume required by the DataMaster does not constitute a violation of Driver’s due process rights.

Patten v. Comm’r of Pub. Safety, A16-0546, 2016 WL 7337099 (Minn. Ct. App. 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, was read the implied consent advisory, and agreed to take a breath test. Driver provided the 1.5 liters of air required by the DataMaster after about five seconds of blowing, at which point he was well below the legal limit. Officer encouraged Driver to keep blowing for an additional 15 seconds, which caused him to provide four times the required amount of breath and raised his test result above the legal limit. Driver argued his due process rights were violated when the officer manipulated the test by requiring a sample greater than what was required by law. The district court determined Driver failed to establish the test results were inaccurate or that his due process rights were violated.

The court of appeals rejected the due process claim and sustained the revocation as Driver failed to provide evidence the test administration was manipulated or any different from than the way the test was administered to others.

4. Warrantless breath test and statutorily implied consent to investigate boating while intoxicated are not automatic under Iowa state constitution.

State v. Pettijohn, 14-0830, 2017 WL 2823027 (Iowa June 30, 2017)

Officer observed a passenger’s feet hanging off a moving boat near the area of the motor. Officer stopped the boat to inform the occupants of the danger as careless, reckless or

negligent operation is a misdemeanor offense. Officer then developed suspicion Driver was intoxicated, which was beyond his authority to investigate. Officer called a conservation officer to investigate, issued a warning for negligent operation, and instructed Driver to proceed to a dock to await the conservation officer's arrival. Driver was arrested, read an implied consent advisory, and consented to a breath test. Driver failed to suppress evidence obtained after the Officer stopped the boat. He was convicted of operating a motorboat while under the influence of alcohol and appealed to the Supreme Court, pending the *Birchfield* decision.

On appeal, the Supreme Court determined the Officer had a reasonable articulable suspicion of criminal activity at the time of the stop and considering *Birchfield*, the Fourth Amendment of the U.S. Constitution permitted administration of a warrantless breath test to investigate boating while intoxicated. However, they also held that the evanescent nature of blood alcohol evidence did not justify a warrantless breath test incident to arrest under the state constitution. This is due, in part, to the fact that an officer with probable cause should be able to complete and submit an electronic warrant application within minutes. Further, Driver did not validly consent to the breath test as he was intoxicated at the time and had not been adequately advised of his right to withhold consent. The Supreme Court reversed the district court and remanded for a new trial as there was not valid consent to the warrantless breath test nor an exception to the warrant requirement of the state constitution.

Criminal Vehicular Operation

1. Intoxicated passenger who grabs the steering wheel is considered “operating” a motor vehicle under CVO statute.

State v. Henderson, 890 N.W.2d 739, (Minn. Ct. App. 20147) *rev. granted* (Apr. 26, 2017)

Defendant was the intoxicated passenger in a vehicle driven by a sober driver. The driver testified that following an argument regarding directions, defendant grabbed the steering wheel and pulled it toward himself. This caused an accident which injured the occupants and defendant was charged with one count of CVO under Minn. Stat. § 609.21, subd. 1(1), and three counts of CVO under Minn. Stat. § 609.21, subd. 1(2)(i). Defendant gave conflicting testimony of his recollection of the event but denied grabbing the steering wheel. The trial court found defendant guilty of four counts of criminal vehicular operation. The defendant appealed and argued that even if he grabbed the wheel, that constituted only physical control as opposed to operation, and was insufficient to support a CVO conviction.

The court of appeals found that manipulation of the steering wheel of a moving motor vehicle by a passenger constitutes “operation” under Minn. Stat. § 609.21 and affirmed the CVO convictions. The court of appeals reversed and remanded count one as it arose out of the same behavioral incident and involved the same victims as the other three CVO convictions.

Due Process

1. Implied consent advisory which inaccurately states refusal to take urine test is a crime violated due process and the remedy is rescission of revocation.

Johnson v. Comm’r of Pub. Safety, 887 N.W.2d 281 (Minn. Ct. App. 2016) *rev. granted* (May 30, 2017)

Driver was arrested following an accident on suspicion of driving while impaired by narcotics or medication. Driver was read the implied consent advisory at the hospital. The officer informed Driver that refusal to take a urine test was a crime. Driver spent over an hour attempting to contact an attorney, at which time the officer offered a blood test. Driver once again indicated that he wanted to consult an attorney. A breath test was not offered since the officer did not believe driver was under the influence of alcohol. Driver did not submit to a blood or urine test, and his license was revoked based on refusal. Driver argued his right to due process was violated when the officer informed him refusal to take a urine test was a crime, and he successfully petitioned for rescission of the revocation.

The court of appeals found there was no search-incident-to-arrest or exigent circumstance exception to the warrant requirement for a urine test and that the implied consent advisory inaccurately informed driver that refusal to take a urine test was a crime. The inaccurate advisory misinformed the driver regarding the potential penalty for refusing to submit to a urine test. This violated his right to due process as established in *McDonnell* and the order rescinding the revocation was affirmed.

2. Driver not entitled to rescission of revocation when he failed to show a violation of unconstitutional-conditions doctrine and failed to raise a procedural due process claim.

Erickson v. Comm’r of Pub. Safety, A16-0587, 2017 WL 164415 (Minn. Ct. App. January 17, 2017) (unpublished opinion)

Driver was in an accident and arrested on suspicion of DWI at the hospital. Officer read Driver the implied consent advisory and Driver refused both blood and urine tests. As a

result, Driver's license was revoked. Driver petitioned for judicial review of the license revocation and argued that his due process rights were violated since the revocation was based on refusal to consent to an unconstitutional search. The district court rescinded the revocation. Commissioner appealed and Driver did not file an appellate brief.

The court of appeals reversed the rescission, indicating Driver failed to show a violation of the unconstitutional-conditions doctrine and failed to make a procedural due process claim.

3. Driver's due process rights are violated when the implied consent advisory is misleading and inaccurate. Subsequent consent to testing does not remedy the due process violation.

Gangestad v. Comm'r of Pub. Safety, A16-0729, 2016 WL 7438720 (Minn. Ct. App. Dec. 27, 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, read the implied-consent advisory, and submitted to a urine test. As a result, Driver's license was revoked. Officer did not obtain a warrant prior to requesting the urine sample. Driver petitioned for reinstatement of his driver's license arguing: 1) the urine test was obtained in violation of his Fourth Amendment rights, 2) the advisory was misleading and violated his right to due process by threatening criminal charges the state was unauthorized to impose.

The Commissioner argued that Driver consented to the warrantless urine test. The district court agreed that Driver consented to the urine test but the advisory misstated Minnesota law and was, therefore, a due process violation despite Driver's consent. The court of appeals affirmed the rescission on due-process grounds.

4. Driver's due process rights are violated when implied consent advisory is inaccurate and misinforms driver of the penalties for refusal.

Hendrickson v. Comm'r of Pub. Safety, A16-0581, 2016 WL 7337100 (Minn. Ct. App. May 30, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and read an implied consent advisory. Officers suspected he was under the influence of a controlled substance. Driver refused blood and urine tests. As a result, his license was revoked. Driver challenged the revocation and argued the advisory violated his due process rights because it materially misstated the law. The district court denied the petition and sustained the revocation.

On appeal, commissioner argued that since *Birchfield*, *Trahan*, and *Thompson* had not been decided at the time the advisory was read, it was in fact accurate at that time. The court of appeals cited *Johnson* and held that since the test-refusal charge would have been unconstitutional the advisory was inaccurate and misinformed driver of the penalties he would face if he refused, in violation of his due process rights. The revocation was rescinded.

5. Misleading implied consent advisory violated Driver's due process rights and entitles Driver to rescission of license revocation.

Jirik v. Comm'r of Pub. Safety, A16-0710, 2016 WL 6826298 (Minn. Ct. App. May 30, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and read the implied consent advisory, including "refusal to take a test is a crime." Driver was then offered a urine test and agreed. Officer did not obtain a warrant for a search of Driver's urine. Driver's license was subsequently revoked and Driver petitioned for rescission, arguing the advisory was inaccurate regarding the penalties for refusal, violated their due process rights, and that consent was, therefore, not valid. The district court agreed and rescinded the revocation.

On appeal, the commissioner argued the warrantless search did not violate Driver's Fourth Amendment rights because the implied consent statute is not unconstitutional, Driver validly consented to the search, Driver was not criminally prosecuted for refusal, and a good-faith exception applied to the exclusionary rule. The court of appeals disagreed and sustained the rescission.

6. Driver entitled to rescission of license revocation when due process rights are violated by inaccurate implied consent petition.

Susa v. Comm'r of Pub. Safety, A16-0569, 2006 WL 7188703 (Minn. Ct. App. 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, read the implied consent advisory, and asked to provide either a blood or urine sample. Driver provided a urine sample and their license was subsequently revoked. The district court concluded the warrantless collection of Driver's urine was unconstitutional and rescinded the revocation.

On appeal, the commissioner argued the district court erred as the collection was performed pursuant to Minnesota's Implied Consent law and was permissible under the Fourth Amendment since *Birchfield*, *Trahan*, and *Thompson* had not been decided at the time the advisory was read. Driver argued that under *McDonnell* his due process rights

were violated because the implied consent advisory incorrectly informed him refusal to take a test was a crime. The court of appeals determined that there is no reason to differentiate between criminal and administrative proceedings when considering a due process challenge and upheld the rescission.

7. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm’r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver’s license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied consent hearing as a test result over 0.16 was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied consent hearing.

The court of appeals reversed and remanded, holding that whether driver’s alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Enhanceability

1. A uncounseled, uncontested implied consent license revocation may be used to enhance a DWI charge to the felony level when the Driver was acquitted in the companion test-refusal case.

State v. Vaughn, A16-0817, 2017 WL 1214479, (Minn. Ct. App. Apr. 3, 2017)
(unpublished opinion)

Driver was charged with two DWI offenses in 2014 which were enhanced to felonies based in part on a 2011 implied consent license revocation. Driver prevailed in the companion criminal case on the test refusal charge and claimed that a combination of traumatic brain injury, indigence, and lack of right to appointed counsel in the license revocation proceeding foreclosed the opportunity for him to challenge the 2011 revocation. The district court disagreed and used the 2011 conviction as a qualified prior impaired incident in finding him guilty of felony DWI.

The court of appeals reaffirmed its position that the indigent are not entitled to appointed counsel in an implied consent proceeding and rejected the argument that Driver's TBI rendered him incompetent to challenge the 2011 revocation. Driver argued that based on his 2012 acquittal in the companion refusal case, he would likely have prevailed in the implied consent proceeding on the same legal theory if he would have been provided counsel. The court of appeals "declined to speculate" as to the possible outcome of that case and affirmed the felony conviction.

2. Criminal Vehicular Operation conviction under previous statute, which is not listed under the first-degree DWI statute, is a predicate felony for purposes of enhanceability.

State v. Boecker, 893 N.W.2d 348 (Minn. 2017)

Driver was charged with first degree DWI based on a prior CVO conviction from a year not specifically listed in the current first degree DWI statute. Driver challenged whether there was probable cause to sustain a first-degree charge when the prior CVO conviction was under a statute not specifically listed as a predicate felony under the first-degree DWI statute. The district court denied the motion, and Driver pleaded guilty to first-degree DWI. Driver appealed and argued that he was entitled to withdraw his guilty plea.

The court of appeals affirmed and held that a prior felony CVO conviction was a predicate felony under the first-degree DWI statute because the relevant portion of the prior CVO statute was identical to the current statute referenced in the first-degree DWI statute and the Supreme Court affirmed.

3. Criminal Vehicular Operation cannot be treated as a qualified prior incident to enhance a DWI charge when it is not specifically listed as a qualified offense.

State v. Smith, A15-0570, 2017 WL 3045517 (Minn. July 19, 2017)

Driver was convicted of first-degree DWI after the district court ruled his three prior impaired driving convictions could be used to enhance the charge. One of the three predicate prior convictions included a CVO, which is not specifically included in the list of offenses found in Minn. Stat. §169A.03, subd. 22. The court of appeals agreed CVO is not included in the list of qualifying offenses but upheld the conviction since excluding the CVO conviction would lead to an absurd result regardless of the statute's plain language.

The supreme court pointed out the absurdity canon has only been permitted to override the plain and unambiguous language of a statute once in the history of the court, for a tax

case. The supreme court held the CVO conviction was not a qualified prior impaired driving incident for enhancing the current charged and reversed the court of appeals.

Exigent Circumstances

1. 15-20 minute window to collect a blood sample before driver is transported to another hospital is a sufficiently exigent circumstance which absolves officers of warrant requirement.

State v. Trousil, A16-0831, 2017 WL 1316112 (Minn. Ct. App. June 28, 2017)
(unpublished opinion)

Law enforcement responded to an ATV rollover accident. Upon arrival, they found Driver injured and lying in a ditch. Driver smelled of alcohol and had difficulty remaining conscious. Officers contacted the county attorney's office regarding a warrant and were advised to get a warrant if Driver would stay at a local hospital, but to draw blood if Driver would be flown to another hospital. One officer left the scene to obtain a warrant and another went to the hospital. Shortly after arriving at the local hospital, officers were advised Driver would be flown to another hospital in 15-20 minutes and requested a warrantless blood draw. Driver was charged with second and third degree DWI.

Prior to trial, Driver moved to suppress the evidence from the warrantless blood draw and the court concluded exigent circumstances absolved the officers of the warrant requirement. Driver appealed the pretrial suppression-motion ruling and argued the blood draw was unconstitutional since the officers had sufficient time to obtain a telephonic warrant.

The court of appeals applied *Stavish* factors to determine if an exigent circumstance exception to the warrant requirement existed and determined the 15-20 minute window provided by medical personnel constituted an exigency sufficient to absolve the officers of the warrant requirement.

Expungement

1. DWIs are eligible for expungement under the newly enacted expungement statute, and the court is required to perform a case-specific analysis.

State v. J.E.H., A15-1948, 2016 WL 3659290 (Minn. Ct. App. July 11, 2016)
(unpublished opinion)

Driver petitioned for expungement of all records related to his 2008 DWI conviction. The prosecuting agencies opposed the petition and argued that because a DWI conviction is enhanceable for ten years, it “would be very difficult to use this prior offense for enhancement” if the record was sealed. The referee denied the petition and concluded that Driver had not met his burden.

The court of appeals reversed and remanded finding that the referee committed clear error in his analysis. Although the need for complete and accurate records is significant, there is nothing to suggest that a sealed record would be inaccessible to interested government agencies. The statute specifically allows agencies to share expunged records with one another.

The court of appeals also noted that the referee’s analysis with respect to the nature of severity of the crime appeared related to DWIs generally, as opposed to a case-specific analysis. Because the legislature enacted the new expungement statute, which provides that expungement is available to DWI offenders, the district court erred in its analysis of the nature and severity of the underlying crime.

Good Faith Exception to Exclusionary Rule

1. Minnesota’s test-refusal statute violated Driver’s right to substantive due process to the extent it criminalizes refusal to submit to a warrantless blood test.

State v. Trahan, 886 N.W.2d (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a urine test. Driver agreed, but could not produce a sample. Officer then asked Driver if he would submit to a blood test, which he refused. Driver was charged with first degree test refusal. Driver pleaded guilty but later moved to withdraw his guilty plea. The district court denied the motion, and the court of appeals upheld the conviction. The Supreme Court granted further review but stayed its review pending *Bernard*. The Supreme Court then remanded back to the court of appeals for reconsideration of the constitutional issue in light of *Bernard*.

The court of appeals held that the search-incident-to-arrest exception does not apply to warrantless blood testing. The test-refusal statute violates a driver’s right to due process by criminalizing the refusal to submit to a warrantless blood test.

On appeal, the supreme court applied *Birchfield* and held Driver could not be prosecuted for violating the test refusal statute for refusing a blood test absent a warrant or exigent

circumstances, no exigent circumstance existed, a good-faith exception to the exclusionary rule did not apply, and the test refusal statute is unconstitutional as applied relative to blood and urine testing.

Hazardous Substances

1. 1, 1-difluoroethane (DFE) is a hazardous substance under Minnesota Statutes §169A.

State v. Carson, 884 N.W.2d 917 (Minn. Ct. App. 2016) *rev. granted* (Nov. 23, 2016)

Driver was arrested under suspicion of DWI after officers found her parked at the drive-thru of a restaurant with a can of gas duster between her right arm and body. Her behavior indicated inhalant abuse and a blood test was positive for DFE and clonazepam. Two similar incidents occurred within the next three months and driver was charged with multiple counts of DWI. Driver moved to dismiss all three complaints, arguing there was insufficient evidence she was under the influence of a hazardous substance. The district court denied driver's motion after it heard testimony from the BCA and found DFE is a hazardous substance under Minnesota Statutes §169A.

The court of appeals concluded DFE is a hazardous substance under the Minnesota Impaired Driving Code and affirmed the district court.

Implied Consent Advisory

1. Implied consent advisory which inaccurately states refusal to take urine test is a crime is a due process violation, and the remedy is rescission of revocation.

Johnson v. Comm'r of Pub. Safety, 887 N.W.2d 281 (Minn. Ct. App. 2016) *rev. granted* (May 30, 2017)

Driver was arrested following an accident on suspicion of driving while impaired by narcotics or medication and was read the implied consent advisory at the hospital. Officer informed driver refusal to take a urine test was a crime. Driver spent over an hour attempting to contact an attorney, at which time Officer offered a blood test. Driver once again indicated that he wanted to consult an attorney. A breath test was not offered since the officer did not believe driver was under the influence of alcohol. Driver did not submit to a blood or urine test and his license was revoked based on his refusal. Driver argued his right to due process was violated when the officer informed him refusal to take a urine test was a crime, and he successfully petitioned for rescission of the revocation.

The court of appeals found there was no search-incident-to-arrest or exigent circumstance exception to the warrant requirement for a urine test and that the implied consent advisory inaccurately informed driver that refusal to take a urine test was a crime. The inaccurate advisory misinformed the driver regarding the potential penalty for refusing to submit to a urine test. This violated his right to due process as established in *McDonnell*. The order rescinding the revocation was affirmed.

Implied Consent Proceedings

1. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm’r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver’s license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied-consent hearing as a test result over 0.16 was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied-consent hearing.

The court of appeals reversed and remanded, holding that whether driver’s alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Jurisdiction

1. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm’r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver’s license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied-consent hearing as a test result over 0.16

was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied-consent hearing.

The court of appeals reversed and remanded, holding that whether driver's alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Postconviction Relief

1. The rules announced in *Birchfield*, *Thompson*, and *Trahan* regarding the search-incident-to-arrest exception are new rules of federal constitutional criminal procedure that generally do not apply retroactively.

Brooks v. State, 897 N.W.2d 811 (Minn. Ct. App. 2017)

Driver petitioned for postconviction relief following lengthy appeal processes for three DWI convictions. He relied on *Birchfield*, *Thompson*, and *Trahan* to argue his consent to testing was involuntary because it was based on inaccurate and misleading implied consent advisories. He also asserted ineffective assistance of counsel relative to both his trial and appellate attorneys as trial counsel did not obtain an independent blood alcohol test or object to deficient waivers of his right to testify and his appellate counsel failed to raise the ineffectiveness of trial counsel.

The court of appeals indicated *Teague v. Lane* provides the standard for determining retroactive applicability of a new rule of federal constitutional criminal procedure and found the postconviction courts did not err by refusing to retroactively apply *Birchfield*, *Thompson*, and *Trahan* as there was no contention that either of the *Teague* exceptions applied.

The court of appeals also determined the post-conviction courts did not err by denying the claims of ineffective assistance of trial or appellate counsel as there was no support for the assertion that trial counsel's failure to challenge the waivers was ineffective or that failing to obtain independent blood alcohol tests was anything other than unreviewable, investigative strategy.

2. Driver not entitled to withdraw guilty plea when the district court imposed a five-year conditional release term after he accepted a plea deal that did not include the conditional release term.

Smith v. State, A15-1740, 2016 WL 3223210 (Minn. Ct. App. June 13, 2016)
(unpublished opinion)

Driver pleaded guilty to first-degree DWI and received a stayed 42-month sentence, but the mandatory conditional release period for first-degree DWI offenders was not imposed at the time his sentence was pronounced. Driver's probation was later revoked, and his sentence was executed. At that time, the court informed Driver for the first time that he was subject to the conditional release term. Driver then moved to withdraw his guilty plea, arguing that the court erred in imposing the conditional release term when it was not pronounced. The court disagreed and denied Driver's motion.

The court of appeals upheld the lower court's ruling after finding the Driver was aware of the conditional release term since it was included on Driver's plea petition and the plea was intelligently made.

3. The court properly revoked Driver's probation and imposed the mandatory five-year conditional-release term for felony DWI.

State v. Wilczek, A16-1247, 2017 WL 563306, (Minn. Ct. App. Feb. 13, 2017)
(unpublished opinion)

Driver challenged imposition of a five-year conditional-release term and revocation of probation for felony DWI in 2009. The signed plea petition stated, "I understand I am subject to a five-year conditional release period." After two probation violations, the district court executed his 48-month sentence to be followed by five years of conditional release. Driver appealed and alleged the court erred by imposing the mandatory conditional-release term when executing the stayed sentence and by revoking probation.

The court of appeals affirmed and found the district court did not err by imposing the mandatory conditional-release term when executing the sentence and did not abuse its discretion by revoking probation.

Prosecutorial Misconduct

1. There is no requirement that a prosecutor act in good faith when voluntarily dismissing charges and later re-indicting.

State v. Olson, 884 N.W.2d 395 (Minn. 2016)

Driver was charged with DWI. The state was unprepared on the date of trial as their only witness, the arresting officer, failed to appear in court. The state's request for a continuance was denied and the charge was dismissed under rule 30.01 despite Driver's request that the court dismiss the case with prejudice. The state refiled the case less than two weeks later, and Driver unsuccessfully moved for dismissal. Driver was found guilty following a stipulated fact trial and appealed denial of the motion to dismiss. The court of appeals reversed the district court's decision and characterized the state's tactics as a "do-it-yourself continuance" and an act of bad faith. The state appealed.

The Supreme Court held there is no requirement that a prosecutor act in good faith when voluntarily dismissing charges and re-indicting and that the district court acted within its discretion when it denied Driver's motion to dismiss the refiled charges.

2. A motion to reopen may be granted after the state has rested, failed to prove an element of its prima facie case, and the defense moved for judgment of acquittal.

State v. Thomas, 891 N.W.2d 612 (Minn. 2017)

Driver was found sleeping in a running vehicle and charged with second degree DWI based on enhancements from two prior convictions. Driver refused to stipulate to the prior convictions and the state presented its case-in-chief, eliciting testimony from two officers. After the testimony, the state rested without offering certified copies of the prior convictions. Driver moved for a judgment of acquittal since the state failed to offer proof of the two aggravating factors needed to prove second-degree DWI. The district court denied the motion for judgment of acquittal and allowed the state to reopen their case to submit the certified conviction records. Driver was found guilty and appealed.

The court of appeals, in an issue of first impression, held the district court has discretion to grant or deny a motion to re-open even after the state has rested, failed to prove an element of its prima facie case, and the defense had moved for judgment of acquittal. In affirming the court of appeals, the Supreme Court held that the district court is not required to rule on a motion for judgment of acquittal before ruling on the state's motion to re-open its case in chief, even when the motion for acquittal was brought first.

Reasonable Articulable Suspicion

1. Officer does not have reasonable articulable suspicion of criminal activity when they observe a vehicle travel down a narrow dirt road that leads only to a closed business.

Schlicher v. Comm’r of Pub. Safety, A16-1200, 2017 WL 1376704 (Minn. Ct. App. Apr. 17, 2017) (unpublished case)

Officer observed Driver turn down a narrow dirt road in the early morning hours. Officer knew the road led only to a commercial business which was closed, so followed driver. As Officer drove down the road, Driver’s car came toward him, and Officer backed up to the end of the road. Another squad arrived at that time. Officer exited his car while Driver’s car was still moving and approached Driver’s car. After an investigation, driver was arrested for DWI. Driver refused a breath test and his license was revoked. Driver challenged the revocation and argued Officer did not have a reasonable, articulable suspicion of criminal activity for the stop. The district court found turning on to a road the Officer knew led to a closed business constituted a reasonable, articulable suspicion and sustained the revocation.

On appeal Driver argued the revocation should be rescinded since: 1) Officer’s actions constituted a seizure, and 2) he did not possess RAS at the time of the seizure. The court of appeals agreed Driver was seized and Officer did not have RAS at the time of the seizure. The revocation was rescinded.

2. Warrantless breath test and statutorily implied consent to investigate boating while intoxicated are not automatic under Iowa state constitution.

State v. Pettijohn, 14-0830, 2017 WL 2823027 (Iowa June 30, 2017)

Officer observed a passenger’s feet hanging off a moving boat near the area of the motor. Careless, reckless or negligent operation is a misdemeanor offense, so Officer stopped the boat to inform the occupants of the danger. Officer then developed suspicion Driver was intoxicated, which was beyond his authority to investigate. Officer called a conservation officer to investigate, issued a warning for negligent operation, and instructed Driver to proceed to a dock to await the conservation officer’s arrival. Driver was arrested, read an implied consent advisory, and consented to a breath test. Driver failed to suppress evidence obtained after the Officer stopped the boat. He was convicted of operating a motorboat while under the influence of alcohol and appealed to the Supreme Court, pending the *Birchfield* decision.

On appeal, the Supreme Court determined the Officer had a reasonable articulable suspicion of criminal activity at the time of the stop and considering *Birchfield*, the Fourth Amendment of the U.S. Constitution permitted administration of a warrantless breath test to investigate boating while intoxicated. However, they also held that the evanescent nature of blood alcohol evidence did not justify a warrantless breath test incident to arrest under the state constitution. This is due, in part, to the fact that an

officer with probable cause should be able to complete and submit an electronic warrant application within minutes. Further, Driver did not validly consent to the breath test as he was intoxicated at the time and had not been adequately advised of his right to withhold consent. The Supreme Court reversed the district court and remanded for a new trial as there was not valid consent to the warrantless breath test nor an exception to the warrant requirement of the state constitution.

Timely Filing

1. Statute of limitations for filing an implied consent petition does not begin if notice of order and revocation is given to emergency personnel, driver is asked to sign an electronic version, or driver is verbally informed of revocation.

Johnson v. Comm’r of Pub. Safety, 889 N.W.2d 36 (Minn. Ct. App. 2016)

Driver was arrested on suspicion of DWI and did not submit to a test. Driver refused to electronically sign a copy of the notice and order and revocation. While an officer was preparing paperwork for driver’s signature, driver developed an acute medical condition which required emergency transportation via ambulance. The officer did not hand driver the notice and order of revocation as driver was unresponsive on the floor of the station, but believed he placed the notice and order of revocation with driver’s personal belongings prior to transport to the hospital. Driver denied receiving the paperwork.

Driver filed an implied consent petition well after the 30-day deadline and the district court dismissed it as he had been properly served with the notice and order of revocation. The district court concluded the officer effectively notified Driver through a combination of three events: 1) placing the notice with driver’s personal belongings to be taken by paramedics to the hospital, 2) asking driver to sign an electronic copy of the notice, which driver refused to sign, and 3) informing driver his license would be revoked.

The court of appeals reversed and remanded as the record was insufficient to support Driver’s receipt of a complete notice and order of revocation by document or other means. Simply verbally informing him of the revocation was insufficient.

Test Refusal

1. Warrantless breath tests are permitted incident to lawful arrest and test refusal convictions are constitutionally valid.

State v. Olson, 887 N.W.2d 692 (Minn. Ct. App. Dec. 5, 2016)

Driver was arrested on suspicion of DWI following a car chase. Driver repeatedly told the arresting trooper that he wished the trooper would be killed and refused a breath test after being read the implied consent advisory. He was charged and convicted of fleeing, terroristic threats, test refusal, fourth degree DWI, obstruction, failure to obey an officer, and fifth degree assault.

Driver appealed and argued his statements were not threats to terrorize, the test refusal statute is unconstitutional, insufficient evidence to support DWI conviction, and that he could not be sentenced for both test refusal and DWI as they arose out of the same incident. The court of appeals reversed the terroristic threats conviction, finding that expressing hope something would happen to the trooper in the future did not constitute a threat within the meaning of the statute. The test refusal conviction was upheld since warrantless breath tests are permitted incident to arrest, as was the sufficiency of evidence for the DWI conviction. The court of appeals reversed the fourth degree DWI sentence and remanded for sentencing on the test refusal since it was the more serious crime.

Urine Testing

1. Minnesota's test refusal statute is unconstitutional to the extent it criminalizes refusal to submit to a warrantless blood or urine test.

State v. Thompson, 886 N.W.2d 224 (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a blood or urine test. Driver refused and was charged with second degree test refusal. Driver challenged the constitutionality of the test-refusal statute at an omnibus hearing. District court found the statute to be constitutional, and the issue proceeded under Minn. R. Crim. P. 26.01, subd. 4. Driver was convicted of second-degree test-refusal.

The court of appeals reversed and held that Driver's substantive due process rights were violated when he was charged with refusing to submit to a warrantless blood or urine test. The search-incident-to-arrest exception does not apply to blood and urine testing.

The Supreme Court applied *Birchfield* and held that warrantless urine testing is not a search incident to arrest, the Fourth Amendment does not allow the state to prosecute for a violation of the test refusal statute based on refusal of a blood test, and that the test refusal statute is unconstitutional as applied to warrantless blood or urine tests.

Vehicle Forfeiture

1. Owner of vehicle must claim vehicle is not subject to forfeiture in timely civil complaint. Forfeiture does not include right to insurance proceeds arising from a crash.

Briles v. 2013 GMC Terrain, 892 N.W.2d (Minn. Ct. App. Mar. 13, 2017) *rev. granted* (May 30, 2017)

Driver/son used father's vehicle without permission while father was on a camping trip. Driver was observed speeding and led police on a high-speed chase culminating in an accident, which totaled the vehicle. Son had five prior alcohol-related driving incidents, was charged with second-degree impaired driving, and the vehicle was seized. The Notice of Seizure and Intent to Forfeit did not indicate the department planned to seize or forfeit insurance proceeds related to the accident. Briles received the notice of forfeiture on the same day a letter was also sent to his insurer indicating they were not to disburse insurance proceeds until the forfeiture matter resolved. Briles was not copied on that letter.

Briles filed a civil complaint seeking a judicial determination of the forfeiture after the 60-day deadline expired. The district court found Briles's complaint was not timely and that insurance proceeds were subject to forfeiture. The court of appeals affirmed that Briles's claims were forfeited as the complaint was not timely but reversed the district court's finding that insurance proceeds arising from a crash are subject to forfeiture.

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CHAPTER 83--H.F.No. 179

An act relating to criminal justice; modifying certain statutory provisions; amending ignition interlock performance standards; prohibiting use of devices enabled with location tracking capabilities; ensuring inmate case planning information is private data; requiring a search warrant in DWI and DWI-related cases to obtain blood or urine samples; providing for license revocation; establishing guidelines for license revocation hearings; amending rulemaking authority; amending Minnesota Statutes 2016, sections 97B.066, subdivisions 1, 2, 3, 4, 8, 9, by adding a subdivision; 169A.03, subdivision 21; 169A.20, subdivision 2; 169A.51, subdivisions 2, 3, 4; 169A.53, subdivisions 2, 3; 169A.54, subdivision 6; 169A.60, subdivision 10; 171.306, subdivisions 1, 2, 3, 8; 241.065, subdivision 2; 360.0753, subdivisions 2, 3, 7, 9, by adding a subdivision; 624.7143, subdivisions 1, 2, 3, 4, by adding a subdivision; proposing coding for new law in Minnesota Statutes, chapter 171.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

ARTICLE 1

CRIMINAL JUSTICE-RELATED DATA PRACTICES

Section 1. Minnesota Statutes 2016, section 171.306, subdivision 1, is amended to read:

Subdivision 1. **Definitions.** (a) As used in this section, the terms in this subdivision have the meanings given them.

(b) "Ignition interlock device" or "device" means equipment that is designed to measure breath alcohol concentration and to prevent a motor vehicle's ignition from being started by a person whose breath alcohol concentration measures 0.02 or higher on the equipment.

(c) "Location tracking capabilities" means the ability of an electronic or wireless device to identify and transmit its geographic location through the operation of the device.

~~(c)~~ (d) "Program participant" means a person who has qualified to take part in the ignition interlock program under this section, and whose driver's license has been:

(1) revoked, canceled, or denied under section 169A.52, 169A.54, or 171.04, subdivision 1, clause (10); or

(2) revoked under section 171.17, subdivision 1, paragraph (a), clause (1), or suspended under section 171.187, for a violation of section 609.2113, subdivision 1, clause (2), item (i) or (iii), (3), or (4); subdivision 2, clause (2), item (i) or (iii), (3), or (4); or subdivision 3, clause (2), item (i) or (iii), (3), or (4); or 609.2114, subdivision 2, clause (2), item (i) or (iii), (3), or (4), resulting in bodily harm, substantial bodily harm, or great bodily harm.

~~(d)~~ (e) "Qualified prior impaired driving incident" has the meaning given in section 169A.03, subdivision 22.

EFFECTIVE DATE. This section is effective the day following final enactment.

Sec. 2. Minnesota Statutes 2016, section 171.306, subdivision 2, is amended to read:

Subd. 2. **Performance standards; certification; manufacturer and provider requirements.** (a) The commissioner shall establish performance standards and a process for certifying devices used in the ignition

interlock program, except that the commissioner may not establish standards that, directly or indirectly, require devices to use or enable location tracking capabilities without a court order.

(b) The manufacturer of a device must apply annually for certification of the device by submitting the form prescribed by the commissioner. The commissioner shall require manufacturers of certified devices to:

(1) provide device installation, servicing, and monitoring to indigent program participants at a discounted rate, according to the standards established by the commissioner; and

(2) include in an ignition interlock device contract a provision that a program participant who voluntarily terminates participation in the program is only liable for servicing and monitoring costs incurred during the time the device is installed on the motor vehicle, regardless of whether the term of the contract has expired.

(c) The manufacturer of a certified device must include with an ignition interlock device contract a separate notice to the program participant regarding any location tracking capabilities of the device.

EFFECTIVE DATE. This section is effective the day following final enactment.

Sec. 3. Minnesota Statutes 2016, section 171.306, subdivision 3, is amended to read:

Subd. 3. **Program requirements.** (a) The commissioner shall establish guidelines for participation in the ignition interlock program. A person who seeks to participate in the program shall sign a written acknowledgment that the person has received, reviewed, and agreed to abide by the program guidelines.

(b) The commissioner must enter a notation on a person's driving record to indicate that the person is a program participant.

(c) A person under the age of 18 years is not eligible to be a program participant.

(d) A program participant shall pay costs associated with an ignition interlock device on every motor vehicle that the participant operates or intends to operate.

(e) A program participant shall participate in any treatment recommended in a chemical use assessment report.

(f) A program participant shall bring the device-equipped motor vehicle or vehicles operated by the program participant to an approved service provider for device calibration and servicing according to the schedule established by the commissioner and as indicated by the ignition interlock device.

(g) The commissioner shall not permit location tracking capabilities on any ignition interlock device to be enabled except as provided in this paragraph. The commissioner shall require the activation of location tracking capabilities on an ignition interlock device when ordered by a court.

Sec. 4. Minnesota Statutes 2016, section 171.306, subdivision 8, is amended to read:

Subd. 8. **Rulemaking.** In establishing the performance standards and certification process of subdivision 2 ~~and, the program guidelines of subdivision 3, the commissioner is exempt from chapter 14, including section 14.386. If and any other rules are otherwise necessary to implement this section, the commissioner may adopt, amend, and repeal rules using the exempt procedures of section 14.386, except that paragraph (b) shall not apply is subject to chapter 14.~~

EFFECTIVE DATE. This section is effective the day following final enactment and applies for rules proposed on or after that date.

Sec. 5. Minnesota Statutes 2016, section 241.065, subdivision 2, is amended to read:

Subd. 2. **Establishment; access to data.** (a) The Department of Corrections shall administer and maintain a computerized data system for the purpose of assisting criminal justice agencies in conducting official duties and in monitoring and enforcing the conditions of conditional release imposed on criminal offenders by a sentencing court or the commissioner of corrections.

(b) The adult data and juvenile data, as defined in section 260B.171, in the statewide supervision system are private data on individuals, as defined in section 13.02, subdivision 12, ~~but~~. Subject to paragraph (c), the data are accessible to:

- (1) criminal justice agencies as defined in section 13.02, subdivision 3a, ~~to~~;
- (2) the Minnesota sex offender program as provided in section 246B.04, subdivision 3, ~~to~~;
- (3) public defenders as provided in section 611.272, ~~to~~;
- (4) all trial courts and appellate courts; ~~and to~~
- (5) criminal justice agencies in other states ~~in the conduct of their official duties.~~

(c) Case planning data in the statewide supervision system are private data on individuals, as defined in section 13.02, subdivision 12. Case planning data are accessible to state prison facility staff, correction staff in community corrections act counties and county probation counties, and Department of Corrections field services staff for purposes of monitoring and enforcing conditions of conditional release. A finalized case plan may be provided to community service providers for the purposes described under paragraph (a).

(d) Adult data in the statewide supervision system are accessible to the secretary of state for the purposes described in section 201.157.

ARTICLE 2

DWI LAW CHANGES

Section 1. Minnesota Statutes 2016, section 169A.03, subdivision 21, is amended to read:

Subd. 21. **Prior impaired driving-related loss of license.** (a) "Prior impaired driving-related loss of license" includes a driver's license suspension, revocation, cancellation, denial, or disqualification under:

(1) section 169A.31 (alcohol-related school bus or Head Start bus driving); 169A.50 to 169A.53 (implied consent law); 169A.54 (impaired driving convictions and adjudications; administrative penalties); 171.04 (persons not eligible for drivers' licenses); 171.14 (cancellation); 171.16 (court may recommend suspension); 171.165 (commercial driver's license, disqualification); 171.17 (revocation); 171.177 (revocation; pursuant to search warrant); or 171.18 (suspension); because of an alcohol-related incident;

(2) Minnesota Statutes 2012, section 609.21 (criminal vehicular homicide and injury, substance-related offenses), subdivision 1, clauses (2) to (6);

(3) Minnesota Statutes 1998, section 169.121 (driver under influence of alcohol or controlled substance); 169.1211 (alcohol-related driving by commercial vehicle drivers); or 169.123 (chemical tests for intoxication);

(4) Minnesota Statutes 2006, section 609.21 (criminal vehicular homicide and injury, substance-related offenses), subdivision 1, clauses (2) to (6); subdivision 2, clauses (2) to (6); subdivision 2a, clauses (2) to (6); subdivision 2b, clauses (2) to (6); subdivision 3, clauses (2) to (6); or subdivision 4, clauses (2) to (6);

(5) section 609.2112, subdivision 1, clauses (2) to (6); 609.2113, subdivision 1, clauses (2) to (6), subdivision 2, clauses (2) to (6), or subdivision 3, clauses (2) to (6); or 609.2114, subdivision 1, clauses (2) to (6), or subdivision 2, clauses (2) to (6); or

(6) an ordinance from this state, or a statute or ordinance from another state, in conformity with any provision listed in clause (1), (2), (3), (4), or (5).

(b) "Prior impaired driving-related loss of license" also includes the revocation of snowmobile or all-terrain vehicle operating privileges under section 84.911 (chemical testing), or motorboat operating privileges under section 86B.335 (testing for alcohol and controlled substances), for violations that occurred on or after August 1, 1994; the revocation of snowmobile or all-terrain vehicle operating privileges under section 84.91 (operation of snowmobiles and all-terrain vehicles by persons under the influence of alcohol or controlled substances); or the revocation of motorboat operating privileges under section 86B.331 (operation while using alcohol or drugs or with a physical or mental disability).

(c) "Prior impaired driving-related loss of license" does not include any license action stemming solely from a violation of section 169A.33 (underage drinking and driving), 171.09 (conditions of a restricted license), or 340A.503 (persons under the age of 21, illegal acts).

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 2. Minnesota Statutes 2016, section 169A.20, subdivision 2, is amended to read:

Subd. 2. **Refusal to submit to chemical test crime.** It is a crime for any person to refuse to submit to a chemical test:

(1) of the person's ~~blood, breath, or urine~~ under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license); or

(2) of the person's blood or urine as required by a search warrant under sections 626.04 to 626.18 and 171.177.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 3. Minnesota Statutes 2016, section 169A.51, subdivision 2, is amended to read:

Subd. 2. ~~Implied consent~~ **Breath test advisory.** ~~(a) Subject to paragraph (b),~~ At the time a breath test is requested, the person must be informed:

(1) that Minnesota law requires the person to take a test:

(i) to determine if the person is under the influence of alcohol, ~~controlled substances, or hazardous substances;~~ and

(ii) ~~to determine the presence of a controlled substance listed in Schedule I or II or metabolite, other than marijuana or tetrahydrocannabinols; and~~

~~(iii) if the motor vehicle was a commercial motor vehicle, to determine the presence of alcohol;~~

(2) that refusal to ~~take~~ submit to a breath test is a crime; and

(3) ~~if the peace officer has probable cause to believe the person has violated the criminal vehicular homicide and injury laws, that a test will be taken with or without the person's consent; and~~

~~(4) that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test.~~

~~(b) A peace officer who is not pursuing an implied consent revocation is not required to give the advisory described in paragraph (a) to a person whom the officer has probable cause to believe has violated section~~

~~609.2112, subdivision 1, clause (2), (3), (4), (5), or (6); 609.2113, subdivision 1, clause (2), (3), (4), (5), or (6); or 609.2114, subdivision 1, clause (2), (3), (4), (5), or (6); or Minnesota Statutes 2012, 609.21, subdivision 1, clause (2), (3), (4), (5), or (6) (criminal vehicular operation DWI-related provisions).~~

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 4. Minnesota Statutes 2016, section 169A.51, subdivision 3, is amended to read:

Subd. 3. ~~**Type of test Blood or urine tests; search warrant required.** The peace officer who requires a test pursuant to this section may direct whether the test is of blood, breath, or urine. Action may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered~~ (a) Notwithstanding any contrary provisions in sections 169A.51 to 169A.53, a blood or urine test may be conducted only pursuant to a search warrant under sections 626.04 to 626.18, or a judicially recognized exception to the search warrant requirement. In addition, blood and urine tests may be conducted only as provided in sections 169A.51 to 169A.53 and 171.177.

(b) When, under the provisions of section 169A.20, 169A.51, or 171.177, a search warrant is required for a blood or urine test, that requirement is met if a judicially recognized exception to the warrant requirement is applicable.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 5. Minnesota Statutes 2016, section 169A.51, subdivision 4, is amended to read:

Subd. 4. **Requirement of urine or blood test.** ~~Notwithstanding subdivision 3,~~ A blood or urine test may be required pursuant to a search warrant under sections 626.04 to 626.18 even after a breath test has been administered if there is probable cause to believe that:

(1) there is impairment by a controlled substance or a hazardous substance that is not subject to testing by a breath test; ~~or~~

(2) a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols, is present in the person's body; ~~or~~

(3) the person is unconscious or incapacitated to the point that the peace officer providing a breath test advisory, administering a breath test, or serving the search warrant has a good-faith belief that the person is mentally or physically unable to comprehend the breath test advisory or otherwise voluntarily submit to chemical tests.

Action may be taken against a person who refuses to take a blood test under this subdivision only if a urine test was offered and action may be taken against a person who refuses to take a urine test only if a blood test was offered. This limitation does not apply to an unconscious person under the circumstances described in clause (3).

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 6. Minnesota Statutes 2016, section 169A.53, subdivision 2, is amended to read:

Subd. 2. **Petition for judicial review.** (a) Within ~~30~~ 60 days following receipt of a notice and order of revocation or disqualification pursuant to section 169A.52 (revocation of license for test failure or refusal), a person may petition the court for review. The petition must be filed with the district court administrator

in the county where the alleged offense occurred, together with proof of service of a copy on the commissioner, and accompanied by the standard filing fee for civil actions. Responsive pleading is not required of the commissioner, and court fees must not be charged for the appearance of the commissioner in the matter.

(b) The petition must:

(1) be captioned in the full name of the person making the petition as petitioner and the commissioner as respondent;

(2) include the petitioner's date of birth, driver's license number, and date of the offense; and

(3) state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation, disqualification, or denial.

(c) The filing of the petition does not stay the revocation, disqualification, or denial. The reviewing court may order a stay of the balance of the revocation or disqualification if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper.

(d) Judicial reviews must be conducted according to the Rules of Civil Procedure, except that prehearing discovery is mandatory and is limited to:

(1) the notice of revocation;

(2) the test record or, in the case of blood or urine tests, the certificate of analysis;

(3) the peace officer's certificate and any accompanying documentation submitted by the arresting officer to the commissioner; and

(4) disclosure of potential witnesses, including experts, and the basis of their testimony.

Other types of discovery are available only upon order of the court.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 7. Minnesota Statutes 2016, section 169A.53, subdivision 3, is amended to read:

Subd. 3. **Judicial hearing; issues, order, appeal.** (a) A judicial review hearing under this section must be before a district judge in any county in the judicial district where the alleged offense occurred. The hearing is to the court and may be conducted at the same time and in the same manner as hearings upon pretrial motions in the criminal prosecution under section 169A.20 (driving while impaired), if any. The hearing must be recorded. The commissioner shall appear and be represented by the attorney general or through the prosecuting authority for the jurisdiction involved. The hearing must be held at the earliest practicable date, and in any event no later than 60 days following the filing of the petition for review. The judicial district administrator shall establish procedures to ensure efficient compliance with this subdivision. To accomplish this, the administrator may, whenever possible, consolidate and transfer review hearings among the locations within the judicial district where terms of district court are held.

(b) The scope of the hearing is limited to the issues in clauses (1) to ~~(11)~~ (12):

(1) Did the peace officer have probable cause to believe the person was driving, operating, or in physical control of a motor vehicle or commercial motor vehicle in violation of section 169A.20 (driving while impaired)?

(2) Was the person lawfully placed under arrest for violation of section 169A.20?

(3) Was the person involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death?

(4) Did the person refuse to take a screening test provided for by section 169A.41 (preliminary screening test)?

(5) If the screening test was administered, did the test indicate an alcohol concentration of 0.08 or more?

(6) At the time of the request for the test, did the peace officer inform the person of the person's rights and the consequences of taking or refusing the test as required by section 169A.51, subdivision 2?

(7) Did the person refuse to permit the test?

(8) If a test was taken by a person driving, operating, or in physical control of a motor vehicle, did the test results indicate at the time of testing:

(i) an alcohol concentration of 0.08 or more; or

(ii) the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols?

(9) If a test was taken by a person driving, operating, or in physical control of a commercial motor vehicle, did the test results indicate an alcohol concentration of 0.04 or more at the time of testing?

(10) Was the testing method used valid and reliable and were the test results accurately evaluated?

(11) Did the person prove the defense of necessity?

(12) Did the person prove the defense of controlled substance use in accordance with a prescription?

(c) It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds.

(d) Certified or otherwise authenticated copies of laboratory or medical personnel reports, records, documents, licenses, and certificates are admissible as substantive evidence.

(e) The court shall order that the revocation or disqualification be either rescinded or sustained and forward the order to the commissioner. The court shall file its order within 14 days following the hearing. If the revocation or disqualification is sustained, the court shall also forward the person's driver's license or permit to the commissioner for further action by the commissioner if the license or permit is not already in the commissioner's possession.

(f) Any party aggrieved by the decision of the reviewing court may appeal the decision as provided in the Rules of Appellate Procedure.

(g) The civil hearing under this section shall not give rise to an estoppel on any issues arising from the same set of circumstances in any criminal prosecution.

(h) It is an affirmative defense for the petitioner to prove a necessity.

(i) It is an affirmative defense to the presence of a Schedule I or II controlled substance that the person used the controlled substance according to the terms of a prescription issued for the person according to sections 152.11 and 152.12, unless the court finds by a preponderance of the evidence that the use of the controlled substance impaired the person's ability to operate a motor vehicle.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 8. Minnesota Statutes 2016, section 169A.54, subdivision 6, is amended to read:

Subd. 6. **Applicability of implied consent revocation.** (a) Any person whose license has been revoked pursuant to section 169A.52 (license revocation for test failure or refusal) or 171.177 (revocation; pursuant

to a search warrant) as the result of the same incident, and who does not have a qualified prior impaired driving incident, is subject to the mandatory revocation provisions of subdivision 1, clause (1) or (2), in lieu of the mandatory revocation provisions of section 169A.52 or 171.177.

(b) Paragraph (a) does not apply to:

(1) a person whose license has been revoked under subdivision 2 (driving while impaired by person under age 21); or

(2) a person whose driver's license has been revoked for, or who is charged with (i) an alcohol concentration of twice the legal limit or more as measured at the time or within two hours of the time of the offense; or (ii) a violation of section 169A.20 (driving while impaired) with an aggravating factor described in section 169A.03, subdivision 3, clause (3).

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 9. Minnesota Statutes 2016, section 169A.60, subdivision 10, is amended to read:

Subd. 10. **Petition for judicial review.** (a) Within ~~30~~ 60 days following receipt of a notice and order of impoundment under this section, a person may petition the court for review. The petition must include proof of service of a copy of the petition on the commissioner. The petition must include the petitioner's date of birth, driver's license number, and date of the plate impoundment violation, as well as the name of the violator and the law enforcement agency that issued the plate impoundment order. The petition must state with specificity the grounds upon which the petitioner seeks rescission of the order for impoundment. The petition may be combined with any petition filed under section 169A.53 (administrative and judicial review of license revocation).

(b) Except as otherwise provided in this section, the judicial review and hearing are governed by section 169A.53 and must take place at the same time as any judicial review of the person's license revocation under section 169A.53. The filing of the petition does not stay the impoundment order. The reviewing court may order a stay of the balance of the impoundment period if the hearing has not been conducted within 60 days after filing of the petition upon terms the court deems proper. The court shall order either that the impoundment be rescinded or sustained, and forward the order to the commissioner. The court shall file its order within 14 days following the hearing.

(c) In addition to the issues described in section 169A.53, subdivision 3 (judicial review of license revocation), the scope of a hearing under this subdivision is limited to:

(1) if the impoundment is based on a plate impoundment violation described in subdivision 1, paragraph (d), clause (3) or (4), whether the peace officer had probable cause to believe the violator committed the plate impoundment violation and whether the evidence demonstrates that the plate impoundment violation occurred; and

(2) for all other cases, whether the peace officer had probable cause to believe the violator committed the plate impoundment violation.

(d) In a hearing under this subdivision, the following records are admissible in evidence:

(1) certified copies of the violator's driving record; and

(2) certified copies of vehicle registration records bearing the violator's name.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 10. **[171.177] REVOCATION; PURSUANT TO SEARCH WARRANT.**

Subdivision 1. **Search warrant-required testing advisory.** At the time a blood or urine test is directed pursuant to a search warrant under sections 626.04 to 626.18, the person must be informed that refusal to submit to a blood or urine test is a crime.

Subd. 2. **Type of test.** The peace officer who directs a test pursuant to a search warrant shall direct a blood or urine test as provided in the warrant. If the warrant authorizes either a blood or urine test, the officer may direct whether the test is of blood or urine. If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine. Action may be taken against a person who refuses to take a blood test only if a urine test was offered and action may be taken against a person who refuses to take a urine test only if a blood test was offered.

Subd. 3. **License revocation pursuant to search warrant.** After executing a search warrant under sections 626.04 to 626.18 for the collection of a blood or urine sample based upon probable cause of a violation of section 169A.20, the peace officer acting under sections 626.13 to 626.17 shall certify to the commissioner of public safety:

- (1) when a person refuses to comply with the execution of the search warrant; or
- (2) if a person submits to the test and the test results indicate:
 - (i) an alcohol concentration of 0.08 or more;
 - (ii) an alcohol concentration of 0.04 or more, if the person was driving, operating, or in physical control of a commercial motor vehicle at the time of the violation; or
 - (iii) the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols.

Subd. 4. **Test refusal; license revocation.** (a) Upon certification under subdivision 3 that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and that the person refused to comply with the execution of the search warrant under sections 626.04 to 626.18, the commissioner shall revoke the person's license or permit to drive or nonresident operating privilege. The commissioner shall revoke the license, permit, or nonresident operating privilege:

- (1) for a person with no qualified prior impaired driving incidents within the past ten years, for a period of not less than one year;
- (2) for a person under the age of 21 years and with no qualified prior impaired driving incidents within the past ten years, for a period of not less than one year;
- (3) for a person with one qualified prior impaired driving incident within the past ten years or two qualified prior impaired driving incidents, for a period of not less than two years;
- (4) for a person with two qualified prior impaired driving incidents within the past ten years or three qualified prior impaired driving incidents, for a period of not less than three years;
- (5) for a person with three qualified prior impaired driving incidents within the past ten years, for a period of not less than four years; or
- (6) for a person with four or more qualified prior impaired driving incidents, for a period of not less than six years.

(b) When a person who had been driving, operating, or in physical control of a commercial motor vehicle refuses to comply with the search warrant and permit testing, the commissioner shall disqualify the person from operating a commercial motor vehicle and shall revoke the person's license or permit to drive or

nonresident operating privilege according to the federal regulations adopted by reference in section 171.165, subdivision 2.

Subd. 5. **Test failure; license revocation.** (a) Upon certification under subdivision 3, pursuant to a search warrant under sections 626.04 to 626.18, that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more or the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols, the commissioner shall revoke the person's license or permit to drive or nonresident operating privilege:

(1) for a period of 90 days or, if the test results indicate an alcohol concentration of twice the legal limit or more, not less than one year;

(2) if the person is under the age of 21 years, for a period of not less than 180 days or, if the test results indicate an alcohol concentration of twice the legal limit or more, not less than one year;

(3) for a person with one qualified prior impaired driving incident within the past ten years or two qualified prior impaired driving incidents, for a period of not less than one year or, if the test results indicate an alcohol concentration of twice the legal limit or more, not less than two years;

(4) for a person with two qualified prior impaired driving incidents within the past ten years or three qualified prior impaired driving incidents, for a period of not less than three years;

(5) for a person with three qualified prior impaired driving incidents within the past ten years, for a period of not less than four years; or

(6) for a person with four or more qualified prior impaired driving incidents, for a period of not less than six years.

(b) On certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a commercial motor vehicle with any presence of alcohol and that the person submitted to a test and the test results indicated an alcohol concentration of 0.04 or more, the commissioner shall disqualify the person from operating a commercial motor vehicle under section 171.165 (commercial driver's license disqualification).

(c) If the test is of a person's blood or urine by a laboratory operated by the Bureau of Criminal Apprehension or authorized by the bureau to conduct the analysis of a blood or urine sample, the laboratory may directly certify to the commissioner the test results, and the peace officer shall certify to the commissioner that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and that the person submitted to a test. Upon receipt of both certifications, the commissioner shall undertake the license actions described in paragraphs (a) and (b).

Subd. 6. **Unlicensed drivers; license issuance denial.** If the person is a resident without a license or permit to operate a motor vehicle in this state, the commissioner shall deny to the person the issuance of a license or permit after the date of the alleged violation for the same period as provided in this section for revocation, subject to review as provided in subdivisions 10 and 11.

Subd. 7. **Notice of revocation or disqualification; review.** A revocation under this section, or a disqualification under section 171.165 (commercial driver's license disqualification), becomes effective at the time the commissioner or a peace officer acting on behalf of the commissioner notifies the person of the intention to revoke, disqualify, or both, and of revocation or disqualification. The notice must advise the person of the right to obtain administrative and judicial review as provided in subdivisions 10 and 11. If mailed, the notice and order of revocation or disqualification is deemed received three days after mailing to the last known address of the person.

Subd. 8. Test refusal; driving privilege lost. (a) On behalf of the commissioner, a peace officer requiring a test or directing the administration of a chemical test pursuant to a search warrant under sections 626.04 to 626.18 shall serve immediate notice of intention to revoke and of revocation on a person who refuses to permit a test or on a person who submits to a test, the results of which indicate an alcohol concentration of 0.08 or more.

(b) On behalf of the commissioner, a peace officer requiring a test or directing the administration of a chemical test of a person driving, operating, or in physical control of a commercial motor vehicle pursuant to a search warrant under sections 626.04 to 626.18 shall serve immediate notice of intention to disqualify and of disqualification on a person who refuses to permit a test or on a person who submits to a test, the results of which indicate an alcohol concentration of 0.04 or more.

(c) The officer shall:

(1) invalidate the person's driver's license or permit card by clipping the upper corner of the card in such a way that no identifying information including the photo is destroyed, and immediately return the card to the person;

(2) issue the person a temporary license effective for only seven days; and

(3) send the notification of this action to the commissioner along with the certificate required by subdivision 5 or 6.

Subd. 9. Notice of action to other states. When a nonresident's privilege to operate a motor vehicle in this state has been revoked or denied, the commissioner shall give information of the action taken in writing to the official in charge of traffic control or public safety of the state of the person's residence and of any state in which the person has a license.

Subd. 10. Administrative review. (a) At any time during a period of revocation imposed under this section, or a period of disqualification imposed under section 171.165 (commercial driver's license disqualification), a person may request in writing a review of the order of revocation or disqualification by the commissioner, unless the person is entitled to review under section 171.166 (review of disqualification). Upon receiving a request, the commissioner or the commissioner's designee shall review the order, the evidence upon which the order was based, and any other material information brought to the attention of the commissioner and determine whether sufficient cause exists to sustain the order. Within 15 days of receiving the request, the commissioner shall report in writing the results of the review. The review provided in this subdivision is not subject to the contested case provisions of the Administrative Procedure Act in sections 14.001 to 14.69.

(b) The availability of administrative review for an order of revocation or disqualification has no effect upon the availability of judicial review under this section.

(c) Review under this subdivision must take place, if possible, at the same time as any administrative review of the person's impoundment order under section 169A.60, subdivision 9.

Subd. 11. Petition for judicial review. (a) Within 60 days following receipt of a notice and order of revocation pursuant to this section, a person may petition the court for review. The petition must be filed with the district court administrator in the county where the alleged offense occurred, together with proof of service of a copy on the commissioner, and accompanied by the standard filing fee for civil actions. Responsive pleading is not required of the commissioner, and court fees must not be charged for the appearance of the commissioner in the matter.

(b) The petition must:

(1) be captioned in the full name of the person making the petition as petitioner and the commissioner as respondent;

(2) include the petitioner's date of birth and driver's license number, and the date of the offense; and

(3) state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation, disqualification, or denial.

(c) The filing of the petition does not stay the revocation, disqualification, or denial. The reviewing court may order a stay of the balance of the revocation or disqualification if the hearing has not been conducted within 60 days after filing the petition upon terms the court deems proper.

(d) Judicial reviews must be conducted according to the Rules of Civil Procedure, except that prehearing discovery is mandatory and is limited to:

(1) the notice of revocation;

(2) the certificate of analysis of the blood or urine test;

(3) the peace officer's certificate and any accompanying documentation submitted by the arresting officer to the commissioner; and

(4) disclosure of potential witnesses, including experts, and the basis of their testimony.

Other types of discovery are available only upon order of the court.

Subd. 12. Judicial hearing; issues, order, appeal. (a) A judicial review hearing under this section must be before a district judge in any county in the judicial district where the alleged offense occurred. The hearing is to the court and may be conducted at the same time and in the same manner as hearings upon pretrial motions in the criminal prosecution under section 169A.20 (driving while impaired), if any. The hearing must be recorded. The commissioner shall appear and be represented by the attorney general or through the prosecuting authority for the jurisdiction involved. The hearing must be held at the earliest practicable date, and in any event no later than 60 days following the filing of the petition for review. The judicial district administrator shall establish procedures to ensure efficient compliance with this subdivision. To accomplish this, the administrator may, whenever possible, consolidate and transfer review hearings among the locations within the judicial district where terms of district court are held.

(b) The scope of the hearing is limited to the issues in clauses (1) to (13):

(1) Did the peace officer have probable cause to believe the person was driving, operating, or in physical control of a motor vehicle or commercial motor vehicle in violation of section 169A.20 (driving while impaired)?

(2) Was the person lawfully placed under arrest for violation of section 169A.20?

(3) Was the person involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death?

(4) Did a licensed peace officer apply for a search warrant in accordance with the requirements set forth in sections 626.04 to 626.18?

(5) Did a neutral magistrate review the application for a search warrant and determine there was probable cause to believe that the person was driving, operating, or in physical control of a motor vehicle or commercial motor vehicle in violation of section 169A.20 (driving while impaired)?

(6) Was the search warrant and the process by which it was obtained valid?

(7) At the time of directing the person to take the test, did the peace officer inform the person that refusing the test was a crime as required by subdivision 1?

(8) Did the person refuse to permit the test?

(9) If a test was taken by a person driving, operating, or in physical control of a motor vehicle, did the test results indicate at the time of testing:

(i) an alcohol concentration of 0.08 or more; or

(ii) the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols?

(10) If a test was taken by a person driving, operating, or in physical control of a commercial motor vehicle, did the test results indicate an alcohol concentration of 0.04 or more at the time of testing?

(11) Was the testing method used valid and reliable and were the test results accurately evaluated?

(12) Did the person prove the defense of necessity?

(13) Did the person prove the defense of controlled substance use in accordance with a prescription?

(c) Certified or otherwise authenticated copies of laboratory or medical personnel reports, records, documents, licenses, and certificates are admissible as substantive evidence.

(d) The court shall order that the revocation or disqualification be either rescinded or sustained and forward the order to the commissioner. The court shall file its order within 14 days following the hearing. If the revocation or disqualification is sustained, the court shall also forward the person's driver's license or permit to the commissioner for further action by the commissioner if the license or permit is not already in the commissioner's possession.

(e) Any party aggrieved by the decision of the reviewing court may appeal the decision as provided in the Rules of Appellate Procedure.

(f) The civil hearing under this section shall not give rise to an estoppel on any issues arising from the same set of circumstances in any criminal prosecution.

(g) It is an affirmative defense for the petitioner to prove a necessity.

(h) It is an affirmative defense to the presence of a Schedule I or II controlled substance that the person used the controlled substance according to the terms of a prescription issued for the person according to sections 152.11 and 152.12, unless the court finds by a preponderance of the evidence that the use of the controlled substance impaired the person's ability to operate a motor vehicle.

Subd. 13. **Test refusal; no test given.** (a) If a person refuses to permit a blood or urine test as required by a search warrant and the provisions of this section, then a test must not be given. However, the applicable provisions of this section, section 169A.52, subdivision 1, and other law apply.

(b) Notwithstanding paragraph (a), if a peace officer has probable cause to believe that a person has violated section 609.2112, 609.2113, 609.2114, or Minnesota Statutes 2012, section 609.21 (criminal vehicular homicide or injury), a test may be required and obtained despite the person's refusal. A refusal to submit to a test does not constitute a violation of section 609.50 (obstructing legal process), unless the refusal was accompanied by force or violence or the threat of force or violence.

Subd. 14. **Definitions.** The definitions in section 169A.03 apply to this section.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

ARTICLE 3
DWI-RELATED CONFORMING CHANGES

Section 1. Minnesota Statutes 2016, section 97B.066, subdivision 1, is amended to read:

Subdivision 1. **Mandatory chemical testing.** (a) A person who takes wild animals with a bow or firearm in this state or on a boundary water of this state is required, subject to the provisions of this section, to take or submit to a test of the person's blood, breath, or urine for the purpose of determining the presence and amount of alcohol or a controlled substance. The test shall be administered at the direction of an officer authorized to make arrests under section 97B.065, subdivision 2.

(b) Taking or submitting to ~~the~~ a test of the person's breath is mandatory when requested by an officer who has probable cause to believe the person was hunting in violation of section 97B.065, subdivision 1, paragraph (a) or (c), and one of the following conditions exists:

(1) the person has been lawfully placed under arrest for violating section 97B.065, subdivision 1, paragraph (a) or (c);

(2) the person has been involved while hunting in an accident resulting in property damage, personal injury, or death;

(3) the person has refused to take the preliminary screening test provided for in section 97B.065, subdivision 3; or

(4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

(c) Taking or submitting to a test of the person's blood or urine is mandatory when requested by a peace officer under the conditions described in paragraph (b) if the officer is acting pursuant to a search warrant under sections 626.04 to 626.18.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 2. Minnesota Statutes 2016, section 97B.066, is amended by adding a subdivision to read:

Subd. 1a. **Blood or urine test; search warrant required.** Notwithstanding any contrary provision in this section, a blood or urine test may be conducted only pursuant to a search warrant under sections 626.04 to 626.18, or a judicially recognized exception to the search warrant requirement. When, under the provisions of this section, a search warrant is required for a blood or urine test, that requirement is met if a judicially recognized exception to the search warrant is applicable.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 3. Minnesota Statutes 2016, section 97B.066, subdivision 2, is amended to read:

Subd. 2. **Penalties; refusal; revocation of hunting privilege.** (a) If a person refuses to take a test required under subdivision 1, none must be given but the officer authorized to make arrests under section 97B.065, subdivision 2, shall report the refusal to the commissioner of natural resources and to the authority having responsibility for prosecution of misdemeanor offenses for the jurisdiction in which the incident occurred that gave rise to the test demand and refusal.

On certification by the officer that probable cause existed to believe the person had been hunting while under the influence of alcohol or a controlled substance, that in the case of a blood or urine test the officer

was acting pursuant to a search warrant, and that the person refused to submit to testing, the commissioner shall impose a civil penalty of \$500 and shall prohibit the person from hunting for one year.

On behalf of the commissioner, an officer requiring a test or directing the administration of a test shall serve on a person who refused to permit a test immediate notice of intention to prohibit the person from hunting, and to impose the civil penalty set forth in this subdivision. If the officer fails to serve a notice of intent to suspend hunting privileges, the commissioner may notify the person by certified mail to the address on the license of the person. The notice must advise the person of the right to obtain administrative and judicial review as provided in this section. The prohibition imposed by the commissioner takes effect ten days after receipt of the notice. The civil penalty is imposed 30 days after receipt of the notice or upon return of the certified mail to the commissioner, and must be paid within 30 days of imposition.

(b) A person who hunts during the period the person is prohibited from hunting as provided under paragraph (a) is guilty of a misdemeanor.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 4. Minnesota Statutes 2016, section 97B.066, subdivision 3, is amended to read:

Subd. 3. **Rights and obligations.** At the time a test is requested, the person must be informed that:

(1) Minnesota law requires a person to take a test to determine if the person is under the influence of alcohol or a controlled substance;

(2) if the person refuses to take the test, the person is subject to a civil penalty of \$500 and is prohibited for a one-year period from hunting, as provided under subdivision 2; and

(3) that, in the case of a breath test, the person has the right to consult with an attorney, but that this right is limited to the extent it cannot unreasonably delay administration of the test or the person will be deemed to have refused the test.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 5. Minnesota Statutes 2016, section 97B.066, subdivision 4, is amended to read:

Subd. 4. ~~**Requirement of urine**~~ **Type of test.** ~~Notwithstanding subdivision 1,~~ (a) A peace officer who directs a test pursuant to this section may direct a breath test.

(b) A peace officer, acting pursuant to a search warrant, may direct a blood or urine test as provided in the warrant. If the warrant authorizes either a blood or urine test, the officer may direct whether the test is of blood or urine. If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine.

(c) If there is probable cause to believe there is impairment by a controlled substance that is not subject to testing by a breath test, a blood or urine test may be required pursuant to a search warrant even after a breath test has been administered.

(d) Action under this section may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 6. Minnesota Statutes 2016, section 97B.066, subdivision 8, is amended to read:

Subd. 8. **Judicial review.** (a) Within ~~30~~ 60 days following receipt of a notice and order imposing sanctions under this section, a person may petition the court for review. The petition must be filed with the district court administrator in the county where the incident occurred giving rise to the test demand and refusal, together with proof of service of a copy on the commissioner and the prosecuting authority for misdemeanor offenses for the jurisdiction in which the incident occurred. A responsive pleading is not required of the commissioner of natural resources, and court fees may not be charged for the appearance of the representative of the commissioner in the matter.

(b) The petition must be captioned in the name of the person making the petition as petitioner and the commissioner as respondent. The petition must state specifically the grounds upon which the petitioner seeks rescission of the order imposing sanctions.

(c) The filing of the petition does not stay the revocation or prohibition against hunting. However, the filing of a petition stays imposition of the civil penalty. The judicial review shall be conducted according to the Rules of Civil Procedure.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 7. Minnesota Statutes 2016, section 97B.066, subdivision 9, is amended to read:

Subd. 9. **Hearing.** (a) A hearing under this section must be before a district court judge in the county where the incident occurred which gave rise to the test demand and refusal. The hearing must be to the court and may be conducted at the same time as hearings upon pretrial motions in the criminal prosecution under section 97B.065. The hearing must be recorded. The commissioner must be represented by the prosecuting authority for misdemeanor offenses for the jurisdiction in which the incident occurred which gave rise to the test demand and refusal.

(b) The hearing must be held at the earliest practicable date and in any event no later than 60 days following the filing of the petition for review. The reviewing court may order a temporary stay of the balance of the prohibition or revocation if the hearing has not been conducted within 60 days after filing of the petition, upon the application of the petitioner and upon terms the court deems proper.

(c) The scope of the hearing must be limited to the issues of:

(1) whether the officer had probable cause to believe that the person violated section 97B.065;

(2) whether one of the conditions in subdivision 1 existed;

(3) if the test involved blood or urine, whether a licensed peace officer applied for a search warrant in accordance with the requirements set forth in sections 626.04 to 626.18, and, if so, whether a neutral magistrate reviewed the application for the search warrant and determined there was probable cause to believe that the person violated section 97B.065, and whether the warrant and the process by which it was obtained was valid;

(4) whether the person was informed as prescribed in subdivision 3; and

~~(4)~~ (5) whether the person refused to submit to testing.

(d) It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds.

(e) The court shall order that the prohibition or revocation be either sustained or rescinded and shall either sustain or rescind the civil penalty. The court shall forward a copy of the order to the commissioner.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 8. Minnesota Statutes 2016, section 360.0753, subdivision 2, is amended to read:

Subd. 2. **Implied consent; conditions; election of test.** (a) Any person who operates or attempts to operate an aircraft in or over this state or over any boundary water of this state consents, subject to the provisions of this section and section 360.0752, to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence or amount of alcohol, controlled substances, or hazardous substances. The test shall be administered at the direction of a peace officer.

~~The~~ (b) A test of the person's breath may be required of a person when an officer has probable cause to believe the person was operating or attempting to operate an aircraft in violation of section 360.0752 and one of the following conditions exists:

- (1) the person has been lawfully placed under arrest for violation of section 360.0752;
- (2) the person has been involved in an aircraft accident or collision resulting in property damage, personal injury, or death;
- (3) the person has refused to take the screening test provided for by section 360.0752;
- (4) the screening test was administered and recorded an alcohol concentration of 0.04 or more or the presence of a controlled substance listed in Schedule I or II other than marijuana or tetrahydrocannabinols; or
- (5) the officer had probable cause to believe that the person was operating or attempting to operate an aircraft with any amount of alcohol present in the person's body.

(c) A test of the person's blood or urine may be required by an officer under the conditions described in paragraph (b) if the officer is acting pursuant to a search warrant under sections 626.04 to 626.18.

~~(b)~~ (d) At the time a test is requested, the person shall be informed:

- (1) that Minnesota law requires the person to take a test to determine the presence or amount of alcohol or a controlled substance listed in Schedule I or II other than marijuana or tetrahydrocannabinols, or to determine if the person is under the influence of alcohol, controlled substances, or hazardous substances;
- (2) that whether a test is taken or refused, the person may be subject to criminal prosecution for an alcohol, controlled substance, or hazardous substance-related offense relating to the operation of an aircraft;
- (3) that if testing is refused, the person may be subject to criminal prosecution because the person refused testing and the person will be disqualified from operating an aircraft for a minimum period of one year;
- (4) if the peace officer has probable cause to believe the person has violated the criminal vehicular homicide and injury laws, that pursuant to a search warrant a test will be taken with or without the person's consent; and
- (5) that, in the case of a breath test, the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test.

~~(e) The peace officer who requires a test pursuant to this subdivision may direct whether the test shall be of blood, breath, or urine. Action may be taken against a person who refuses to take a blood test only if an alternative test was offered, and action may be taken against a person who refuses to take a urine test only if an alternative test was offered.~~

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 9. Minnesota Statutes 2016, section 360.0753, is amended by adding a subdivision to read:

Subd. 2a. **Blood or urine test; search warrant required.** Notwithstanding any contrary provision in this section, a blood or urine test may be conducted only pursuant to a search warrant under sections 626.04 to 626.18, or a judicially recognized exception to the search warrant requirement. When, under the provisions of this section, a search warrant is required for a blood or urine test, that requirement is met if a judicially recognized exception to the search warrant is applicable.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 10. Minnesota Statutes 2016, section 360.0753, subdivision 3, is amended to read:

Subd. 3. ~~Requirement of urine or blood~~ **Type of test.** ~~Notwithstanding subdivision 2,~~ (a) A peace officer who directs a test pursuant to this section may direct a breath test.

(b) A peace officer, acting pursuant to a search warrant, may direct a blood or urine test as provided in the warrant. If the warrant authorizes either a blood or urine test, the officer may direct whether the test is of blood or urine. If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine.

(c) A blood or urine test may be required pursuant to a search warrant even after a breath test has been administered if there is probable cause to believe that: (1) there is impairment by a controlled substance or hazardous substance that is not subject to testing by a breath test; or (2) a controlled substance listed in Schedule I or II, other than marijuana or tetrahydrocannabinols, is present in the person's body. ~~Action may be taken against a person who refuses to take a blood test under this subdivision only if a urine test was offered, and action may be taken against a person who refuses to take a urine test only if a blood test was offered.~~

(d) Action under this section may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 11. Minnesota Statutes 2016, section 360.0753, subdivision 7, is amended to read:

Subd. 7. **Refusal to permit test; cease and desist order.** If a person under arrest refuses to permit chemical testing, none shall be given, but the commissioner of transportation, upon the receipt of a certificate of the peace officer that the officer had reasonable and probable grounds to believe the arrested person had been operating or attempting to operate an aircraft in violation of section 360.0752, that in the case of a blood or urine test the officer was acting pursuant to a search warrant, and that the person had refused to permit the test, shall issue a cease and desist order prohibiting the operation of an aircraft for a period of one year. However, if a peace officer has probable cause to believe that the person has violated section 609.2112, 609.2113, or 609.2114, a test may be required and obtained despite the person's refusal. When a test is obtained pursuant to this section after the person refused to submit to testing, the commissioner of transportation shall issue a cease and desist order under this section based on the person's refusal. However, if the test is of the person's blood or urine, the test must have been taken pursuant to a search warrant in order for a cease and desist order to be issued.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 12. Minnesota Statutes 2016, section 360.0753, subdivision 9, is amended to read:

Subd. 9. **Hearing.** The hearing shall be before a district court in the county where the arrest occurred, unless there is agreement that the hearing may be held in some other county. The hearing shall be recorded and proceed as in a criminal matter, without the right of trial by jury, and its scope shall cover the issues of whether the peace officer had reasonable and probable grounds to believe the person was operating or attempting to operate an aircraft in violation of section 360.0752; whether the person was lawfully placed under arrest; if the test involved blood or urine, whether a licensed peace officer applied for a search warrant in accordance with the requirements set forth in sections 626.04 to 626.18, and, if so, whether a neutral magistrate reviewed the application for the search warrant and determined there was probable cause to believe that the person violated section 360.0752, and whether the warrant and the process by which it was obtained was valid; whether the person refused to permit the test, and if the person refused whether the person had reasonable grounds for refusing to permit the test; and whether at the time of request for the test the peace officer informed the person that the right to fly will be denied if the person refused to permit the test and of the right to have additional tests made by someone of the person's own choosing. The court shall order either that the denial be rescinded or sustained and refer the order to the commissioner of transportation for further action.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 13. Minnesota Statutes 2016, section 624.7143, subdivision 1, is amended to read:

Subdivision 1. **Mandatory chemical testing.** (a) A person who carries a pistol in a public place on or about the person's clothes or person is required, subject to the provisions of this section, to take or submit to a test of the person's blood, breath, or urine for the purpose of determining the presence and amount of alcohol or a controlled substance. The test shall be administered at the direction of an officer authorized to make arrests under section 624.7142.

(b) Taking or submitting to ~~the~~ a test of the person's breath is mandatory when requested by an officer who has probable cause to believe the person was carrying a pistol in violation of section 624.7142, and one of the following conditions exists:

(1) the person has been lawfully placed under arrest for violating section 624.7142;

(2) the person has been involved while carrying a firearm in a firearms-related accident resulting in property damage, personal injury, or death;

(3) the person has refused to take the preliminary screening test provided for in section 624.7142; or

(4) the screening test was administered and indicated an alcohol concentration of 0.04 or more.

(c) Taking or submitting to a test of the person's blood or urine is mandatory when requested by a peace officer under the conditions described in paragraph (b) if the officer is acting pursuant to a search warrant under sections 626.04 to 626.18.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 14. Minnesota Statutes 2016, section 624.7143, is amended by adding a subdivision to read:

Subd. 1a. **Blood or urine test; search warrant required.** Notwithstanding any contrary provision in this section, a blood or urine test may be conducted only pursuant to a search warrant under sections 626.04 to 626.18, or a judicially recognized exception to the search warrant requirement. When, under the provisions

of this section, a search warrant is required for a blood or urine test, that requirement is met if a judicially recognized exception to the search warrant is applicable.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 15. Minnesota Statutes 2016, section 624.7143, subdivision 2, is amended to read:

Subd. 2. **Penalties; refusal; revocation.** (a) If a person refuses to take a test required under subdivision 1, none must be given but the officer shall report the refusal to the sheriff and to the authority having responsibility for prosecution of misdemeanor offenses for the jurisdiction in which the incident occurred that gave rise to the test demand and refusal. On certification by the officer that probable cause existed to believe the person had been carrying a pistol on or about the person's clothes or person in a public place while under the influence of alcohol or a controlled substance, that in the case of a blood or urine test the officer was acting pursuant to a search warrant, and that the person refused to submit to testing, a court may impose a civil penalty of \$500 and may revoke the person's authority to carry a pistol in a public place on or about the person's clothes or person under the provisions of a permit or otherwise for a period of one year from the date of the refusal. The person shall be accorded notice and an opportunity to be heard prior to imposition of the civil penalty or the revocation.

(b) Revocations under this subdivision must be reported in the same manner as in section 624.714, subdivision 12a.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 16. Minnesota Statutes 2016, section 624.7143, subdivision 3, is amended to read:

Subd. 3. **Rights and obligations.** At the time a test is requested, the person must be informed that:

(1) Minnesota law requires a person to take a test to determine if the person is under the influence of alcohol or a controlled substance;

(2) if the person refuses to take the test, the person is subject to a civil penalty of \$500 and is prohibited for a period of one year from carrying a pistol in a public place on or about the person's clothes or person, as provided under subdivision 2; and

(3) that, in the case of a breath test, the person has the right to consult with an attorney, but that this right is limited to the extent it cannot unreasonably delay administration of the test or the person will be deemed to have refused the test.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 17. Minnesota Statutes 2016, section 624.7143, subdivision 4, is amended to read:

Subd. 4. ~~**Requirement of blood or urine**~~ **Type of test.** ~~Notwithstanding subdivision 1,~~ (a) A peace officer who directs a test pursuant to this section may direct a breath test.

(b) A peace officer, acting pursuant to a search warrant, may direct a blood or urine test as provided in the warrant. If the warrant authorizes either a blood or urine test, the officer may direct whether the test is of blood or urine. If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine.

(c) If there is probable cause to believe there is impairment by a controlled substance that is not subject to testing by a breath test, a blood or urine test may be required pursuant to a search warrant even after a breath test has been administered.

(d) Action under this section may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered.

EFFECTIVE DATE. This section is effective July 1, 2017, and applies to acts committed on or after that date.

Sec. 18. **REVISOR'S INSTRUCTION.**

The revisor of statutes shall add cross-references to Minnesota Statutes, section 171.177, in Minnesota Statutes sections that contain cross-references to driver's license revocations under Minnesota Statutes, section 169A.52, as necessary. The revisor may make technical and other necessary changes to language and sentence structure to preserve the meaning of the text of the statute.

EFFECTIVE DATE. This section is effective July 1, 2017.

Presented to the governor May 20, 2017

Signed by the governor May 23, 2017, 3:21 p.m.

Reconciling the Law with the Science of Eye-Witness Identification

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Reconciling the Law with the Science of Eyewitness Identification

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Root cause analyses of DNA exonerations have revealed that over seventy percent of wrongful convictions have included eyewitness misidentifications. See Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008)(“[T]he vast majority of exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these witnesses were incorrect.”). “Virtually all of the pertinent studies since 1932 have pinpointed eyewitness misidentification as the single most pervasive factor in the conviction of the innocent.” Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill. L. Rev. 337, 358 (2006). Social scientists have developed a comprehensive body of research on the nature of memory and the factors that can impact the accuracy and reliability of an eyewitness’s identification. We now have the opportunity, if not the obligation, to reconcile the law with the science of eyewitness identification.

This handout contains two sections. The first section discusses the scientific research on eyewitness identification. The 2014 Report from the National Academy of Sciences: Identifying the Culprit: Assessing Eyewitness Identification (2014)(“NAS Report”), provides a thorough review and outline of this research. The Report can be found at: <https://www.innocenceproject.org/wp-content/uploads/2016/02/NAS-Report-ID.pdf>.¹ The second section provides a non-exhaustive list of ways that science has been reviewed and adopted in the law. A good starting point is State v. Henderson, 27 A.3d 872 (N.J. 2011), which has been cited by nearly every court that has subsequently incorporated the science of eyewitness identification into the law.

¹ The internet contains other prepublication drafts of this report that are substantively the same as the published version. The page citations will vary depending on the draft. The citations in this handout refer to the report located at the above web address.

I. SOCIAL SCIENCE RESEARCH ON EYEWITNESS IDENTIFICATION

Background: Human memory is not like a video recording that a witness need only replay to remember what happened. Henderson, 27 A.3d at 894. It consists of three stages: acquisition, retention, and recall. The acquisition stage occurs when a witness perceives an event, and the information is encoded into a memory in his or her brain. The retention stage refers to the time period between acquisition and the witness's attempt to recall the information. The retrieval stage occurs when the witness attempts to recall the stored information.

“The accuracy and reliability of eyewitness identification are critically modulated by variables that include a witness' extant cognition and memory and related psychological and situational factors at the time of the event, over the ensuing intervals, and at all stages of recall.” NAS Report, at 16. “Because a crime is an unexpected event, one can draw a critical distinction between variables that reflect the witness' unplanned situational or cognitive state and the variables that reflect controllable conditions and internal states following the witnessed events. Researchers categorize these factors, respectively, as estimator variables and system variables.” Id.

A. System Variables: System variables are factors that the criminal justice system can influence through the use of best practices. The following is a list of system variables identified in the research.

1. Blind v. Non-blind Administration of Lineups: The “experimenter expectancy effect” is a well-established phenomenon where experimenters obtain the results that they expect, in part, because they have helped shaped that response. Henderson, 27 A.3d at 896 (citing R. Rosenthal & D.B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 Behav. & Brain Sci. 377-86 (1978)). This phenomenon occurs in identification procedures when the person administering the lineup knows the identity of the suspect. The administrator may consciously or unconsciously give

suggestive information to the witness. Henderson, 27 A.3d at 896; State v. Lawson, 291 P.3d 673, 705-06 (Or. 2012). Nonverbal cues such as tone, demeanor, body language, pauses, and facial expressions give information to the witness that can significantly affect reliability of an identification. Henderson, 27 A.3d at 896-97; Lawson, 291 P.3d at 705-06.

Double-blind or blinded identification procedures should be used to guard against conscious and unconscious administrator influence. See Amy Klobuchar, Nancy Steblay, Hilary Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 389-90 (2006); NAS Report, at 106. Double-blind administration of an eyewitness identification procedure occurs when the person administering the procedure does not know which lineup member is the police suspect. "[T]he purpose of double blinding is to prevent the conscious or subconscious expectations of the administrator from influencing the witness...outcomes." NAS Report, at 26. A similar effect can be achieved by "blinding" an administrator: when the person administering the identification procedure knows which individual is the police suspect but employs a procedure to prevent him or her from knowing which lineup member is being viewed by the witness. See Id.; Henderson, 27 A.3d at 896-97; Lawson, 291 P.3d at 705-06. For example, an administrator could place the line-up photographs into individual folders and shuffle them before being handed to the eyewitness. This procedure is called the Folder Shuffle Method. Id. at 18. Witnesses should also be told the administrator is blind so they do not attempt to infer information from the administrator's behavior. Lawson, 291 P.3d at 706.

2. Pre-identification Instruction: Research has demonstrated that informing the witness in advance that the suspect may not be present in the lineup and that they need not make a choice reduced relative judgment and substantially reduced misidentifications. See Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction*

Effects, 21 L. & Hum. Behav. 283 (1997). “Relative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses’ memory **relative** to other lineup members.” Id. (quoting Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. Applied Soc. Psychol. 89, (1984)). Relative judgment may cause an eyewitness to choose the best look-alike even when the actual perpetrator is not in the lineup. Ibid. “Identification procedures should [therefore] begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification.” Henderson, 27 A.3d at 897; see NAS Report, at 107-08.

3. Lineup and Photo Array Construction: “Lineup composition may bias not only witnesses’ choices, but also their confidence in those choices....” Steve D. Charman, et al., *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications*, 35 L. & Hum. Behav. 479, 481 (2011). Mistaken identifications are more likely to occur when the suspect stands out from the other members of a lineup, otherwise known as a biased lineup. Henderson, 27 A.3d at 898; Lawson, 291 P.3d at 706-07. Witnesses who select a suspect from a biased lineup are also more likely to be confident in the identification when compared with a witness who made the identification from a fair lineup. Steve D. Charman, et al., *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications*, at 494.

Research has identified methods for constructing a fair lineup. The suspect should not be made to stand out from the other lineup members. Henderson, 27 A.3d at 898; Lawson, 291 P.3d at 706-07. Lineups should include a minimum of five fillers and only one suspect per lineup. Ibid. Fillers should also be chosen with reference to the witness’s description rather than to the suspect’s appearance. Lawson, 291 P.3d at 706-07. Fillers should match the suspect if the suspect differs in appearance from the witness’s description but the investigation has led to other information

suggesting that the police suspect is the perpetrator. Lawson, 291 P.3d at 706-07. If a suspect has distinctive features such as scars or tattoos, they should be concealed or artificially added to all of the lineup fillers. Lawson, 291 P.3d at 707.

4. Suggestive Feedback and Recording Confidence: Information provided both before and after an identification procedure can affect the witness's memory. Henderson, 27 A.3d at 899; Lawson, 291 P.3d at 709. External information or assumptions used in questioning have the ability to contaminate a witness's memory, often without the witness's awareness. Lawson, 291 P.3d at 709. Confirmatory or post-identification feedback can reduce a witness's doubt and inflate confidence. Henderson, 27 A.3d at 899; Lawson, 291 P.3d at 710; Nancy K. Steblay, et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychol., Pub. Policy & L. 1, 11 (2014). News accounts, statements of other witnesses, and the normal evolution of a criminal investigation into a prosecution are all sources of post-event information that can contaminate a witness's memory. Henderson, 27 A.3d at 909; Lawson, 291 P.3d at 710. Research has also shown that the contaminating effect of misinformation is stronger when other factors compromise the witness' ability to encode information about the event. Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 Learning & Memory 361, 362 (2005).

5. Multiple Viewings: "The reliability of an identification may suffer if the witness has viewed the suspect more than once during the investigation." Young v. State, 374 P.3d 395, 421 (Alaska 2016). Research has shown prior mugshot exposure decreases accuracy at a subsequent identification procedure and increases the risk of misidentification. See Kenneth A. Deffenbacher, et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 L. & Hum. Behav. 287, 306 (2006). Prior exposures can create

“source confusion” where the witness is unaware of whether the subsequent identification stems from a memory of the original events or from the earlier identification procedures. Id. at 289; see also Henderson, 27 A.3d at 900; Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. of Applied Res. in Memory and Cognition 284 (2016). The best practice therefore is to shield witnesses from viewing both suspects and fillers more than once during an investigation.

6. Simultaneous v. Sequential Lineups: A large body of research demonstrates that sequential lineups are superior to simultaneous lineups in preventing misidentifications. See Nancy K. Steblay, et al., *Seventy-two tests of the sequential lineup superiority effect: a meta-analysis and policy discussion*, 17 Psych., Pub. Policy & L. 99 (2011); Gary L Wells, et al., *Double Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure*, 39 L. & Hum. Behav. 1 (2015). The prevailing explanation for this difference is that simultaneous lineups allow the witness to easily engage in relative judgments instead of independent recollection.

7. Showups: “Showups are essentially single person lineups: a single suspect is presented to a witness to make an identification.” Henderson, 27 A.3d at 902. Showups are inherently suggestive and create a substantial risk for misidentifications. Id. “[I]n contrast to lineups and photo arrays, which allow a witness with a faulty memory to pick someone other than the suspect, every positive identification in a showup implicates the suspect.” Young, 374 P.3d at 421. “Showups seemingly provide little protection against witnesses who are inclined to guess, as witnesses tend to base their identifications on clothing.” Id. (citing Jennifer E. Dysart et al., *Showups: The Critical Issue of Clothing Bias*, 20 Applied Cognitive Psychol. 1009, 1019-21 (2006)). “Research shows that an innocent suspect who resembles the actual perpetrator is more likely to be

incorrectly identified in a showup than in a lineup.” Id. (citing Nancy K. Steblay et al., *Eyewitness accuracy rates in police showups and lineup presentations: A Meta-Analytic Comparison*, 27 L. & Hum. Behav. 523 (2003)).

Showups should be done only in the immediate aftermath of the crime, when the witness’s memory is fresh. Research has shown that using a showup procedure even a relatively short period of time after the event can increase the risk of misidentification. See A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav. 459, 464-65 (1996).

B. Estimator Variables: Estimator variables are those which are present either at the time of the event or during the retention interval. The following is a list of commonly recognized estimator variables.

1. **Stress:** “Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification.” Henderson, 27 A.3d at 904; *see also* NAS Report at 94-95; Lawson, 291 P.3d at 701. According to one meta-analysis, correct identification rates fell from approximately 59 percent in low stress situations to 39 percent in high stress situations. See Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behav. 687, 695 (2004). Another study found that exposing subjects to physical threats of violence substantially decreased correct identifications and drastically increased the percentage of false identifications. *See* Charles A. Morgan III, et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J. L. & Psychiatry 265, 272 (2004).

2. **Weapons Focus:** “Weapons focus refers to the visual attention that eyewitnesses give to a perpetrator’s weapon during the course of a crime.” Nancy M. Steblay, *A Meta-Analytic Review*

of the Weapons Focus Effect, 16 L. & Hum. Behav. 413, 414 (1992). “Research suggests that the presence of a weapon at the scene of a crime captures the visual attention of the witness and impedes the ability of the witness to attend to other important features of the visual scene, such as the face of the perpetrator.” NAS Report, at 93. “The ensuing lack of memory of these other key features may impair recognition of a perpetrator in a subsequent lineup.” Id.

3. Exposure Duration: Research has demonstrated that a witness’s short viewing time generally reduces the accuracy of an identification. See Brian H. Bornstein, et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy*, 18 Psychol., Crime & L. 473, 481 (2012). “[T]he additional information available from longer viewing times reduces uncertainty and enables better detection and discrimination of visual stimuli.” NAS Report at 98; see Henderson, 27 A.3d at 905; Lawson, 291 P.3d at 702. Moreover, research has shown that witnesses consistently tend to overestimate the duration of a short event, particularly where much was going on or the event was stressful. Henderson, 27 A.3d at 905 (citing Elizabeth F. Loftus et al., *Time Went By So Slowly: Overestimation of Event Duration by Males and Females*, 1 Applied Cog. Psychol. 3, 10 (1987)).

4. Lighting and Distance: “[G]reater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.” Henderson, 27 A.3d 906. Research has shown that the total amount of visually extractable information is effectively reduced when luminance is low and distance is greater. Geoffrey R. Loftus, *Picture Perception: Effects of Luminance on Available information and Information Extraction Rate*, 114 J. Applied Psychol. 324, 354 (1985); Geoffrey R. Loftus & Erin M. Harley, *Why is it easier to identify someone closer than far away?*, 12 Psychonomic Bull. and Rev. 43 (2005). People also have difficulty estimating distances, id. (citing R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports*

and Identification Accuracy, 32 L. & Hum. Behav. 526 (2008)), and tend to estimate a shorter distance to an observed event. Lawson, 291 P.3d at 702 (citing Gary L. Wells and Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitness Distorts their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360 (1998)).

5. Witness Characteristics: The age of both the witness and the suspect can also bear on reliability. Research has shown that both children and elderly persons are more likely to make misidentifications. Henderson, 27 A.3d at 906 (citing Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 L. & Hum. Behav. 549, 563-565 (1998) and James C. Bartlett & Anna Memon, *Eyewitness Memory in Young and Older Adults*, 2 The Handbook of Eyewitness Psychology: Memory for People 309, 317-19 (2007)). Moreover, some research has identified an “own-age bias” where the witnesses are better able to recognize members of their own age group than people of other ages. Id. at 906.

Drug and alcohol impairment can also affect the reliability of an identification. High levels of alcohol consumption promote false identifications. Id.

6. Characteristics of the Perpetrator: “Disguises and changes in facial features can affect a witness’ ability to remember and identify a perpetrator.” Henderson, 27 A.3d at 907. Research has shown that the encoding process for storing information about a face is impaired when a perpetrator is wearing glasses, a hat, or has facial hair. “Disguises as simple as hats have been shown to reduce identification accuracy.” Henderson, 27 A.3d at 907 (citing Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. Applied Psychol. 629, 635 (1987)); see Brian L. Cutler, *A Sample of Witness, Crime and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol’y & Ethics J. 327, 333 (2006); Lawson, 291 P.3d at 703.

7. **Memory Decay:** The more time that passes between the incident and identification, the less reliable the identification becomes. Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 142 (2008). The effect of time on memory retention depends largely on the strength of the original memory, which is impacted by estimator variables present during the memory encoding process. *Id.* at 139. Moreover, the rate of memory loss is not constant. “Rate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time.” *Id.* at 148.

8. **Cross-Racial Identifications:** People have greater difficulty identifying members of another racial group. *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own–Race Bias in Memory for Faces: A Meta–Analytic Review*, 7 Psychol. Pub. Pol’y & L. 3, 21 (2001). The NAS Report cited research by the Innocence Project recognizing that “cross racial (mis)identification was present in 42 percent of cases in which an erroneous identification was made.” *See* NAS Report at p. 96; The Innocence Project, *What Wrongful Convictions Teach Us About Racial Inequality*, at p. 3. “The existence of “cross-race effect (CRE)—that people are generally less accurate at identifying members of other races than they are at identifying members of their own race—has [similarly] reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike.” *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 880–81 (Mass. 2015) (citing *Commonwealth v. Gomes*, 22 N.E.3d 897 (2015); *State v. Guilbert*, 49 A.3d 705, 721–22 (Conn. 2012); *State v. Cabagbag*, 277 P.3d 1027 (Haw. 2012); *Henderson*, 27 A.3d at 907; and *Lawson*, 291 P.3d at 703).

9. **Co-Witness Feedback:** “Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed.” *Henderson*, 27 A.3d at 908; *see* Helen M.

Patterson & Richard I. Kemp, *Comparing Methods of Encountering Post-Event Information: The Power of Co-Witness Suggestion*, 20 *Applied Cognitive Psychol.* 1083, 1083 (2006). Similar research has also shown that witness confidence in an identification rose when the witnesses were told that a co-witness agreed with them and fell when the co-witness disagreed. C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 *J. of Applied Psychol.* 717-18 (1994). The best practice is for the officer administering the identification procedure to ask questions designed to determine whether the witness has spoken to anyone about the event and, if so, what was discussed. Henderson, 27 A.3d at 909.

II. APPLICATIONS OF EYEWITNESS IDENTIFICATION RESEARCH IN THE LAW

On July 14, 2017, the Minnesota Supreme Court issued an Order directing the Advisory Committee on the Rules of Evidence to review and evaluate research concerning the reliability and fallibility of eyewitness identification testimony. The Court ordered the Committee to report its findings and any recommendations by March 1, 2018. The Court explicitly directed that recommendations need not be limited to modification of the Rules of Evidence.

Jurisdictions throughout the United States have used several different methods to incorporate eyewitness identification science evidence into the law. The list below provides some examples.

A. Legislation: Wisc. Stat. §175.50; Colo. Stat. §16-1-109; Conn. Gen. Stat. §54-1p; Ga. Code Ann. §17-20; 75 Ill. Comp. Stat. Ann. §5-107A; Md. Cod. Ann., Public Safety §3-506.1; Neb. Rev. Stat. §81-1455; Nev. Rev. Stat. §171.1237; N.C. Gen. Stat. §15A-284.52; Ohio Rev. Code Ann. §2933.83; Texas Code Crim. Proc. Art. 38.20; Utah Code Ann. §77-8-4; Vt. Stat. Ann. §5581; Va. Code Ann. §19.2-390.02; W. Va. Code Ann. §62-1E.

B. Law Enforcement Policies: Many law enforcement agencies now have policies that incorporate research to dictate when and how to conduct identification procedures. The Minneapolis

Police Department has such a policy. See Minneapolis Police Department Policy and Procedure Manual § 10-208. The policy can be found at: http://www.minneapolismn.gov/police/policy/mpdpolicy_10-200_10-200

C. Rules of Evidence: State v. Lawson, 291 P.3d 673 (Or. 2012).

D. Due Process: Young v. State, 374 P.3d 395 (Alaska 2016); State v. Almaraz, 301 P.3d 242 (Idaho 2013); State v. Dickson, 141 A.3d 810 (Conn. 2016).

E. Expert Testimony: State v. Clopten, 223 P.3d 1103 (Utah 2009); State v. Guilbert, 49 A.3d 705 (Conn. 2012); People v. Lerma, 47 N.E.3d 985, 994 (Ill. 2016); Commonwealth v. Walker, 92 A.3d 766, 789 (Pa. 2014); State v. Almaraz, 301 P.3d 242, 258 (Idaho 2013); Minor v. United States, 57 A.3d 406, 414-16 (D.C. Ct. App. 2012); Tillman v. State, 354 S.W.3d 425, 442-43 (Tex. Crim. App. 2011).

F. Jury Instructions: State v. Henderson, 27 A.3d 872 (N.J. 2011); Commonwealth v. Gomes, 22 N.E.3d 897 (Mass. 2015); Commonwealth v. Bastaldo, 32 N.E.2d 873 (Mass. 2015); State v. Cabagbag, 277 P.3d 1027 (Haw. 2012).

High Tech Crimes: Smart Phones, The Internet of Things and The Dark Web

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**“Recommendations for Electronically Stored
Information (ESI) Discovery Production
in Federal Criminal Cases”**

**Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO)
Joint Working Group on Electronic Technology in the Criminal Justice System
(JETWG)**

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Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases. JETWG was established in 1998 by the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of U.S. Courts' (AOUSC) Office of Defender Services (ODS), the Department of Justice (DOJ), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.
3. **ESI Discovery Checklist.** A one-page Checklist for addressing ESI production issues.

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. (See #4 of the Recommendations.)

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. (See #4 of the Recommendations.)

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful. (See #5 of the Recommendations and Strategies.)

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's

integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. (See #6 of the Recommendations and Strategies.)

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. (See #6 of the Recommendations and Strategies.)

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. (See #5(s) of the Strategies.)

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. (See #7 of the Recommendations and Strategies.)

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney. (See #8 of the Recommendations and Strategies.)

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. (See #9 of the Recommendations.)

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. (See #10 of the Recommendations.)

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient, secure, and less costly.

Recommendations for ESI Discovery Production in Federal Criminal Cases

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery¹ between the Government and defendants charged in federal criminal cases, and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery, and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

- a) the parties must comply with their legal discovery obligations;
- b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;
- c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;
- d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry standard formats;
- e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production²; and
- f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their

¹ The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

² One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.³ In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production - The Meet and Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any "meet and confer" process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The Strategies and Checklist provide detailed recommendations on planning for ESI discovery.

³ Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, non-standard and proprietary software formats; and/or (3) multiple defendant cases accompanied by a significant volume of ESI.

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are:

- a. The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.⁴
- b. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in a reasonably usable format(s).
- c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.
- d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these

⁴ An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduce costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney⁵ and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple defendant cases.

9. Informal Resolution of ESI Discovery Matters

- a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.
- b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.

⁵ Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

- c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices⁶ should institute procedures that require line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.
- d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet and confer and before ESI discovery is produced, the parties should discuss whether there is confidential, private or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contains additional guidance in sections 5(f), 5(p), and 7(e).

⁶ For private attorneys appointed under the Criminal Justice Act (CJA), this subsection (c) is not applicable.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced? Categories may include:
 - ☐ Investigative reports and materials
 - ☐ Witness statements
 - ☐ Tangible objects
 - ☐ Third party ESI digital devices (computers, phones, etc.)
 - ☐ Photos, video and audio recordings
 - ☐ Third party records
 - ☐ Title III wire tap information
 - ☐ Court records
 - ☐ Tests and examinations
 - ☐ Experts
 - ☐ Immunity and plea agreements
 - ☐ Discovery materials with special production considerations
 - ☐ Related matters
 - ☐ Discovery materials available for inspection but not produced digitally
 - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
 - ☐ Table of contents?
 - ☐ Production of paper records as either paper or ESI?
 - ☐ Proprietary or legacy data?
 - ☐ Attorney-client, work product, or other privilege issues?
 - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?
 - ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
 - ☐ Incarcerated defendant's access to discovery materials?
 - ☐ ESI discovery volume for receiving party's planning purposes?
 - ☐ Parties' software or hardware limitations?
 - ☐ Production of ESI from 3rd party digital devices?
 - ☐ Forensic images of ESI digital devices?
 - ☐ Metadata in 3rd party ESI?
 - ☐ Redactions?
 - ☐ Reasonable schedule for producing party?
 - ☐ Reasonable schedule for receiving party to give notice of issues?
 - ☐ Appropriate security measures during transmission of ESI discovery, e.g., encryption?
 - ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
 - ☐ Need for protective orders, clawback agreements, or similar orders or agreements?
 - ☐ Collaboration on sharing costs or tasks?
 - ☐ Need for receiving party's access to original ESI?
 - ☐ Preserving a record of discovery produced?
- ☐ Have the parties memorialized their agreements and disagreements?
- ☐ Do the parties have a system for resolving disputes informally?
- ☐ Is there a need for a designated discovery coordinator for multiple defendants?
- ☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?

Defending the Title IX Student Discipline Case: Strategies for Effective Representation

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Defending the Title IX Student Discipline Case

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Introduction

Male students disciplined by universities after being falsely accused of sexual misconduct often file lawsuits.¹ Judges oftentimes rule at least partially in favor of these male plaintiffs.² The Title IX claims in these lawsuits are often based on: (a) erroneous outcomes, (b) selective enforcement/hostile environments, (c) deliberate indifference, and/or (d) retaliation. These lawsuits can trigger hostile reactions which *Brown Univ.* discussed by noting:

“ . . . the Court is an independent body . . . [that] cannot be swayed by emotion or public opinion. After issuing the preliminary injunction this Court was deluged with emails resulting from an organized campaign to influence the outcome. These tactics, while perhaps appropriate and effective in influencing legislators or officials in the executive branch, have no place in the judicial process. This is basic civics, and one would think students and others affiliated with a prestigious Ivy League institution would know this. Moreover, having read a few of the emails, it is abundantly clear that the writers, while passionate, were woefully ignorant about the issues before the Court. Hopefully, they will read this decision and be educated.”³

Attorneys who regularly represent the falsely accused would likely agree individuals with political agendas are attempting to shape the legal landscape facing male Title IX plaintiffs. This is partly because universities face tremendous internal and external pressure to discipline male students

¹ See generally, *Stop Abusive and Violent Environments’ Oct. 2016 Special Report: Victim-Centered Investigations: New Liability Risk for Colleges and Universities* (detailing how thirty lawsuits filed by plaintiffs accused of sexual misconduct resulted in judicial decisions which at least partially favored the plaintiffs in claims against their universities). Available at <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>.

² *Id.*

³ *Doe v. Brown Univ.*, Case No. 16–017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016).

accused of sexual misconduct.⁴ This pressure is often linked to discredited allegations that “1 in 4” or “1 in 5” female college students are sexually assaulted by their male counterparts.⁵

Complaints detailing how anti-male bias violated plaintiffs’ Title IX rights can defeat motions to dismiss.⁶ This is because some courts recognize discovery is the tool for Title IX plaintiffs to unearth definitive evidence of the gender-bias.⁷ On the other hand, some courts dismiss Title IX complaints after finding plaintiffs did not advance plausible evidence of anti-male

⁴ See e.g., Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law*, 84 Fordham L. Rev. 2289 (2016), pgs. 2304-5 (discussing universities’ concerns regarding enforcement actions by the US Department of Education’s Office of Civil rights which commentators believe “incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused.”). *Id.*, pgs.2320-24 (addressing same).

⁵ It should be noted sexual assaults on college campuses are far less prevalent than the often-repeated “1 in 4” and “1 in 5” allegations widely repeated at America’s universities. For example, a report issued by The American Association of University Women noted that over 90% of the colleges and universities in the United States reported none of their students were raped in 2014. See, American Association of University Women, *91 Percent of Colleges Reported Zero Incidents of Rape in 2014*, (Nov. 23, 2015). Similarly, a “special report from the Bureau of Justice Statistics titled ‘Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013’ . . . found . . . female college . . are less likely to be victims of sexual assault than their peers who are not enrolled in college. The report found . . . the incidence [of sexual assault] . . . was far lower than anything approaching 1 in 5: 0.76 percent for nonstudents and 0.61 percent for students.” Emily Yoffe, *The Problem with Campus Sexual Assault Surveys*, SLATE, Sept. 24, 2015, http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html. In addition, academics conducting a research study found approximately 50% of sexual assault allegations at two Midwestern American colleges were false. See, Eugene J. Kanin, *False Rape Allegations* Archives of Sexual Behavior, Vol. 23 No.1 (1994) available <https://archive.org/details/FalseRapeAllegations>). Another academic paper exposed the lack of objective proof behind a “consensus among legal academics that only two percent” of sexual assault allegations are false. See, Edward Greer, *The Truth behind Legal Dominance Feminism’s Two-Percent False Rape Claim Figure*, 33 Loy. L.A.L. Rev. 947(2000); available <http://digitalcommon.imu.edu/llr/vol33/iss3/3>). Issues such as these are addressed in detail in Stuart Taylor Jr. and KC Johnson’s recent book *The Campus Rape Frenzy: The Attack on Due Process at America’s Universities*. The rationale behind some of the false allegations is detailed in an academic research paper which reviewed multiple academic studies. See, Reggie D. Yager, *What’s Missing From Sexual Assault Prevention and Response*, (April 22, 2015) <http://ssrn.com/abstract=2697788>. This paper determined a high percentage of sexual assault allegations are false and based on the alleged victims’: (1) need for a cover story or alibi; (2) retribution for a real or perceived wrong, rejection or betrayal; and/or (3) desire to gain sympathy or attention. *Id.*

⁶ See e.g., *Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811 (D. Md. Aug. 21, 2015)(finding allegations of governmental pressure to find male students responsible for sexual misconduct coupled with other allegations of gender-bias were sufficient to deny university’s motion to dismiss Title IX claim).

⁷ *Id.*, *15 (noting that “[w]hile these crucial allegations are all based solely ‘upon information and belief,’ this is a permissible way to indicate a factual connection that a plaintiff reasonably believes is true but for which the plaintiff may need discovery to gather and confirm its evidentiary basis.”).

gender-bias.⁸ As a result, plaintiffs filing Title IX complaints must be particularly vigilant in drafting complaints and engaging in discovery. This article is designed to help plaintiffs move closer to these goals.

A. Common Title IX claims filed by students falsely accused of sexual misconduct

(A)(1) Title IX erroneous outcome claims

Federal courts generally rely on the Second Circuit's *Yusuf* decision in evaluating Title IX claims alleging universities erroneously disciplined students alleged to have engaged in sexual misconduct.⁹ These claims are referred to as "erroneous outcome" claims. Pursuant to *Yusuf*, an erroneous outcome claim is properly plead when a plaintiff: "asserts that he or she was innocent and wrongly found to have committed the offense. . . (or) regardless of guilt, the severity of the penalty was affected by the student's gender."¹⁰ Stated another way, *Yusuf* contemplates "erroneous outcome" claims based on both:

1. The discipline of students who did not engage in sexual misconduct; and
2. Students who may have engaged in misconduct, but were disproportionately disciplined because of their male gender.¹¹

Consequently, plaintiffs may advance Title IX claims in situations where penalties such as expulsion or extensive suspensions are imposed for relatively minor policy violations. To establish these claims, plaintiffs must allege female students who engaged in similar offenses were subject to lesser sanctions. But, once past the motions to dismiss stage, things can be more complex as detailed in the *Vassar* decision, which rejected a Title IX claim in part because:

1. A male student - other than plaintiff - was found "not responsible in a sexual misconduct case;"
2. Vassar "expelled female students for making false bias claims;"¹²
3. There was "no suggestion that the decision to expel [plaintiff] was motivated by gender-bias;"¹³

⁸ See e.g., *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 (S.D.N.Y. 2015)

⁹ See e.g., *Scott v. WorldStarHipHop, Inc.*, No. 10-CV-9538-PKC, 2011 U.S. Dist. LEXIS 123273, 2011 WL 5082410, at *4 (S.D.N.Y. Oct 25, 2011) (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-16 (2d Cir. 1994)).

¹⁰ *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448; 2015 U.S. Dist. LEXIS 43253, 714-16 (2d Cir. 1994)(citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-16 (2d Cir. 1994)).

¹¹ *Id.*

¹² *Id.*, *87.

¹³ *Id.*, *65-66, fn.19.

4. “The fact that another male student was suspended for the same offenses as [plaintiff] while [plaintiff] was expelled” tended to disprove plaintiff’s gender-bias argument; and
5. Plaintiff’s lack of previous discipline related to sexual misconduct, three character references, and impact statement did not require the university to impose a lesser sanction than expulsion.¹⁴

However, as detailed below, district courts often issue rulings in favor of Title IX plaintiffs that conflict with *Vassar’s* views on Title IX. Nevertheless, plaintiffs should use the discovery process to factually distinguish their Title IX claims from *Vassar* whenever possible.

(A)(2) Title IX selective enforcement /sexual harassment claims

Title IX plaintiffs often advance sexual harassment claims based on the gender-biased application of university policies. These plaintiffs allege their universities treat male students differently than similarly situated female students. A district court in Ohio explained these claims may be advanced even if male plaintiffs admit engaging in sexual misconduct as long as the plaintiff:

“... allege[s] ‘that a female was in circumstances sufficiently similar to his own and was treated more favorably by [defendant university].’ Moreover, [plaintiff] must allege facts that would demonstrate that the difference in treatment was because of his gender.”¹⁵

In response, universities sometimes seek to dismiss these claims because male plaintiffs did not allege they were sexually assaulted or demeaned in a sexual way. But, since courts evaluate Title IX by looking to Title VII,¹⁶ this argument may fail. For, Title VII allows hostile environment claims based on “non-sexual conduct” evidencing “anti-[male] animus” which cause “unequal treatment . . . that would not occur but for . . . [plaintiff’s] gender”¹⁷ In back-up arguments, universities may cite facts that suggest they treat all students the same regardless of their gender. However, decisions such as the Sixth Circuit’s *Waldo* decision may prohibit such a reinterpretation of a plaintiff’s gender-bias evidence because in Title VII cases:

¹⁴ *Id.*, *64.

¹⁵ *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 U.S. Dist. LEXIS 155291, at *17-18 (S.D. Ohio Nov. 17, 2015)(citations omitted).

¹⁶ See e.g., *Sahm v. Miami Univ.*, 2015 U.S. Dist. LEXIS 65864, *11 (S.D. OH. 2015)(“*Sahm 2*”) (stating, “[t]he allegations of causation sufficient to state a Title IX claim can be similar to those sufficient to state a Title VII discrimination claim.”).

¹⁷ *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 815 (6th Cir. 2013) (quoting *Williams v. CSX Transp. Co.*, 643 F.3d 502, 565 (6th Cir. 2011)).

“‘[f]acially neutral incidents may be included’ in a hostile-work-environment analysis of the *totality of the circumstances* when there is ‘*some circumstantial or other basis for inferring that incidents sex-neutral on their face were in fact discriminatory.*’”¹⁸

In advancing Title IX hostile environment claims, Title IX plaintiffs should also look to federal circuit decisions such as the Sixth Circuit’s *Klemencic* decision.¹⁹ *Klemencic* identifies the three elements for such a claim as: (1) a “sexually hostile environment”; (2) the university’s “actual notice” of this environment and “authority to take corrective action to end discrimination”; and (3) the university’s response to the hostile environment “amounted to deliberate indifference.”²⁰

The Fourth Circuit’s *Jennings* decision identifies the four elements of a Title IX hostile environment claim as: (1) plaintiff was a student at an educational institution receiving federal funds, (2) he/she was subjected to harassment based on his/her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution.²¹ The Fourth Circuit’s *Ziskie* decision noted Title IX’s “[s]everity” criteria can be satisfied if a “disparity in power [exists] between the harasser and the victim.”²² In Title IX claims, it should be fairly easy to show the harassing university has far more power than the male student. Finally, the Fourth Circuit’s *Brzonkala* decision explained universities can be held liable if the school “knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action.”²³ Therefore, falsely accused students should submit written complaints to their universities when their Title IX rights are violated.

In making hostile environment claims, male plaintiffs may feel they face stricter scrutiny than females after reviewing how some courts evaluate females’ Title IX claims. One such decision is *Rouse* which rejected Duke University’s (“Duke”) motion to dismiss a lawsuit because of Duke’s mishandling of the female plaintiff’s allegations of rape.²⁴ *Rouse* found this mishandling could be interpreted as creating a “hostile educational environment based on gender”²⁵ In

¹⁸ *Id.*, 726 F.3d 815 (quoting *Alfano v. Costello*, 294 F.3d 365, 378 (2d Cir. 2002)(emphasis added).

¹⁹ *Klemencic v. The Ohio State Univ.*, 263 F.3d 505 (6th Cir. 2001).

²⁰ *Id.*

²¹ *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), en banc. See also, *Jane Doe v. Erskine Coll.*, No.8:04-23001RBH, 2006 U.S. Dist. LEXIS 35780, *32-38 (D.S.C. May 25, 2006)(rejecting a motion for summary judgment in a Title IX claim filed by a female because “a jury issue” was created with regards to “whether [the college] was deliberately indifferent” to Title IX discrimination); *Doe v. Bd. of Educ.*, 982 F. Supp. 2d 641, 652 (D. Md. 2012)(stating “severe or pervasive” harm can occur when Title IX plaintiff suffers “humiliat[ion] . . . serious anxiety, fear, or discomfort”)(citations omitted).

²² *Ziskie v. Mineta*, 547 F.3d 220, 225 (4th Cir. 2008).

²³ *Brzonkala v. Va. Polytechnic Inst.* 132 F.3d 949, 958 (4th Cir. 1997) overturned on other grounds by *Brzonkala v. Va. Polytechnic Inst.*, (en banc)(applying Title VII case law to Title IX cases).

²⁴ *Rouse v. Duke Univ.*, 869 F. Supp. 2d 674 (M.D.N.C., Apr. 5, 2012).

²⁵ *Id.*, 684-85.

doing so, *Rouse* relied on the plaintiff's allegations that Duke's conduct was part of Duke's culture of hostility towards students regarding sexual assault issues.²⁶

Similarly, a female plaintiff in *Doe v. University of Kentucky* defeated a motion to dismiss her Title IX claims based on the university's handling of her allegations that a male student sexually assaulted her.²⁷ The female alleged the university violated Title IX by granting an accused male student's internal appeals which were based on:

1. The university's granting of the accused student's first appeal which was based on the university's rejection of his request to continue his initial disciplinary hearing because he was incarcerated and could not attend;
2. Granting the accused student's second appeal which addressed how inadmissible testimony tainted his second disciplinary hearing;
3. The university's granting the accused student's third appeal because his third disciplinary panel "improperly prohibited [him] from whispering to his advisor . . . among other procedural violations."²⁸

In evaluating the female plaintiff's claims, *Univ. of Ky.* identified the following "three *prima facie* elements of a Title IX claim arising out of student-on-student sexual harassment: (1) the harassment was so severe, pervasive, and objectively offensive that it deprives the Plaintiff of access to educational opportunities or benefits provided by the university; (2) the funding recipient had actual knowledge of the sexual harassment; and (3) the funding recipient was deliberately indifferent to the harassment."²⁹ *Univ. of Ky.* went on to discuss these three elements as follows:

1. "Sexual assault of the violent nature described in Plaintiff's complaint 'obviously qualifies as being severe, pervasive, and objectively objective sexual harassment that could deprive [the plaintiff's] of access to the educational opportunities provided by her school'",³⁰
2. "To demonstrate Defendant's actual knowledge of the harassment in a case based on a sexual assault, a plaintiff may show the university had preexisting knowledge of the harasser's prior misconduct."³¹ and;

²⁶ *Id.*

²⁷ *Handout 17* (containing *Doe v. University of Ky.*, No.5:150cv-296-JMH (E.D. Ky. Aug. 31, 2016).

²⁸ *Id.*, p.2.

²⁹ *Id.*, (quoting *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir., 1999))(summarizing the holding in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)).

³⁰ *Id.*, p.3 (citing *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir., 1999).

³¹ *Id.*, (citing *Williams v. Bd. of Regents of the Univ. Sys. of Ga.* (11th Cir. 2007) for the following proposition: defendants' "preexisting knowledge of [the harasser]'s past sexual misconduct'—committed against people other than the plaintiff' is relevant when determining' whether the plaintiff had stated a claim under Title IX).").

3. “[A] plaintiff may demonstrate defendant’s deliberate indifference to discrimination only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”³²

Regarding the third point, *Univ. of Ky.* determined the university did not engage in deliberate indifference by granting the male student’s appeals. But, the court found the Title IX complaint could not be dismissed since it alleged sufficient deliberate indifference because of: (a) the university’s “lack of action” regarding scheduling a fourth hearing even though the university maintained plaintiff’s lawsuit preempted this hearing, and (b) “information and belief” allegations that the university “failed to schedule a fourth hearing [] because [it] is hesitant to interrupt [the male student’s] football schedule at his new school.”³³

As a result, male Title IX plaintiffs may wish to cite *Univ. of Ky.* in opposing motions to dismiss arguments regarding sufficiency of gender-bias evidence and/or hostile environment claims. This is because most well pled Title IX complaints filed by male plaintiffs would likely satisfy *Univ. of Ky.*’s low bar for defeating a motion to dismiss.

(A)(3) Title IX deliberate indifference.

It is common to see falsely accused students include “deliberate indifference” claims in Title IX complaints.³⁴ The three elements of a Title IX deliberate indifference claim have been described as requiring plaintiffs to establish that:

- (1) “an official of the institution had authority to institute corrective measures had actual notice of, and was deliberately indifferent to, the misconduct;” (2) the university’s conduct caused the student “to undergo harassment or make [him/her] liable or vulnerable to it;” and (3) the university’s “response to the harassment . . . is clearly unreasonable in light of the known circumstances.”³⁵

(A)(4) Title IX Retaliation

Increasingly, Title IX plaintiffs suffer retaliation for engaging in protected activities related to defending themselves from false allegations during university disciplinary proceedings. This retaliation takes many forms. Some examples of Title IX retaliation are detailed in complaints

³² *Id.*, p.4 (citing *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253,260 (6th Cir. 2000)).

³³ *Id.*, p.4.

³⁴ It should be noted courts are split on whether “deliberate indifference” is an independent cause of action. See e.g., *Sahm* 2, 2015 U.S. Dist. LEXIS 65864, *9-10 (stating: “[t]he parameters for a Title IX claim based on deliberate indifference are unsettled within the Sixth Circuit. At least one district court in the Sixth Circuit has held that the sexual harassment is a ‘critical component’ of a Title IX deliberate indifference claim. See, *Univ. of the S.*, 687 F. Supp. 2d 757-58. A sister court in the Southern District of Ohio refused to adopt the reasoning of *University of the South*. See *Wells*, 7 F. Supp. 3d., 751-52. The *Wells* court recognized that sexual harassment is the ‘classic case of Title IX deliberate indifference[,]’ but it did not limit the deliberate indifference theory to only sexual harassment cases. *Id.* at 751 n.2.”).

³⁵ *Mallory v. Ohio Univ.*, 76 F. App’x. 634, 638 (6th Cir. 2003).

filed against the University of Chicago, Columbia College Chicago, and Salisbury University.³⁶ For instance, the plaintiff in *Columbia College Chicago* based his retaliation claim in part on his university's failure to discipline students who retaliated against plaintiff.³⁷ This complaint describes how the university failed to discipline students who physically assaulted, harassed, and defamed plaintiff after he engaged in protected activities by defended himself against false sexual assault allegations made by fellow student/defendant Jane Roe.

The complaints in *Univ. of Chicago* and *Salisbury University* detail how universities charged plaintiffs with engaging in sexual misconduct after the plaintiffs engaged in protected activities by putting their universities on notice of Title IX violations by fellow students and/or university employees.³⁸ The plaintiff in *Univ. of Chicago* detailed how the university knowingly prosecuted false sexual assault allegations made by defendant Jane Doe.³⁹ After filing suit, plaintiff reached a settlement with defendant Jane Doe under which she executed a letter stating:

“Based on [Jane Doe’s] personal knowledge, [John Doe’s] conduct did not violate any of the University of Chicago’s policies or the laws of the State of Illinois relating to sexual relations involving me or any other persons.”⁴⁰

The plaintiff then added Jane Doe’s letter to an amended complaint advancing Title IX retaliation and hostile environment claims against The University of Chicago.⁴¹ In *Salisbury Univ.*, a district court in Maryland rejected a motion to dismiss plaintiff’s claim based on a retaliatory investigation.⁴² After the university lost its motion to dismiss, it settled the lawsuit.

Unfortunately, retaliation is becoming more prevalent as falsely accused students engage in protected activities by filing Title IX complaints with their universities. Gender-biased retaliatory conduct by universities violate Title IX’s guarantee that: “[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁴³ As a result, Title IX is violated when a school fails to prevent or remedy sexual harassment or other forms of discrimination.⁴⁴

³⁶See e.g., *Handouts 1-3* (containing Title IX complaints filed by Eric Rosenberg’s clients against University of Chicago, Columbia College Chicago, and Salisbury University).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Handout 22* (containing Amended Complaint filed by Eric Rosenberg’s clients against the University of Chicago).

⁴¹ *Id.*

⁴² *Doe v. Salisbury Univ.*, Case No. JKB-14-3853, 2015 U.S. Dist. LEXIS 70982, *17-19 (June 2, 2015)(rejecting university motion to dismiss Title IX retaliation claim).

⁴³ 20 U.S.C. § 1681(a).

⁴⁴ See e.g., *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (as to harassment); *Yusuf*, 35 F.3d 709, 715 (2d Cir. 1994) (as to decision to discipline).

The Seventh Circuit applies Title VII's retaliation framework to evaluate retaliation claims under Title IX.⁴⁵ Under this framework, a plaintiff establishes a Title IX retaliation claim by showing: (1) he/she engaged in protected activity under Title IX; (2) defendant took an adverse action against plaintiff; and (3) there is a causal connection between plaintiff's protected activity and the adverse action.⁴⁶ The plaintiff can prove his/her retaliation claim using either direct or indirect evidence.⁴⁷

Although there have been relatively few Title IX retaliation claims filed by falsely accused male students, some current lawsuits suggest plaintiffs possess the facts to raise such claims. Once such lawsuit involved a 2016 complaint filed by a male student against Cornell University.⁴⁸ The male plaintiff and a female student in this case "accused each other of sexual offenses" which allegedly violated Cornell's sexual misconduct policy.⁴⁹ During the investigation of these offenses, the male plaintiff "identified numerous instances of . . . gender based bias on the part of [Cornell's] Title IX investigator."⁵⁰ He then filed a complaint with Cornell regarding the investigator.⁵¹ While Cornell allowed the male plaintiff to raise gender-bias issues in defending himself against female student's allegations, Cornell refused to investigate the investigator's conduct until after Cornell adjudicated the female student's allegations.⁵² In rejecting this approach, a New York court noted Cornell:

" . . . ignores the reality that [Cornell] has placed [plaintiff] in a procedurally more vulnerable position. Rather than pursuing his complaint against [Cornell's investigator, plaintiff] is required to pursue his claim while simultaneously defending himself against both his accuser and the investigator . . . further by forcing [plaintiff] to pursue his complaint in the context of his defense [regarding allegations by the female student], he is denied the opportunity to have his complaint promptly investigated and adjudicated on its own merits . . . The Court finds no provision [in Cornell's policy] which would require, much less permit, [Cornell] to treat [plaintiff] any differently than any other student filing a complaint" related to Cornell's sexual misconduct policies.⁵³

Although *Cornell* did not address Title IX retaliation, the facts highlight potential Title IX retaliation in situations where universities take disciplinary action against a student prior to addressing the student's Title IX complaint. This is because (a) student complaints regarding a school's Title IX investigator would likely be deemed a "protected activity," and (b) a causal

⁴⁵ See e.g., *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 388 (7th Cir. 2012).

⁴⁶ *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 508 (7th Cir. 2014).

⁴⁷ *Milligan*, 686 F.3d 378, 388 (7th Cir. 2012).

⁴⁸ See, *Handout 16* (containing Jan. 20, 2017 Order in *Doe v. Cornell Univ., State of N.Y. Sup. Ct., Tomkins Co.* Case No. EF2016-0192).

⁴⁹ *Id.*, p.2.

⁵⁰ *Id.*

⁵¹ *Id.*, p.2-3.

⁵² *Id.*, p.3.

⁵³ *Id.*, p.6.

connection could be alleged connecting the student's erroneous discipline with the university's failure to investigate his Title IX complaint.

Therefore, plaintiffs may want to add retaliation claims to complaints when possible since these claims may circumvent some of the negative court decisions regarding other Title IX claims. For example, plaintiffs advancing retaliation claims may not be required to establish the adverse actions they suffered were motivated by a gender-bias.⁵⁴

(B) Establishing gender-bias in Title IX

With the possible exception of retaliation claims, Title IX claims require direct or indirect/circumstantial evidence of a defendant university's gender-bias. Generally, gender-bias is established in one of three ways. The first approach is discussed in the *Wells* decision which stated a plaintiff can establish gender-bias by detailing how his university:

“react[ed] against [the plaintiff], as a male, to demonstrate to [a governmental agency] that [defendant university] would take action, as [it] had failed to in the past, against males accused of sexual assault.”⁵⁵

Consequently, when available, Title IX complaints should include facts related to any Title IX investigation of defendant universities by governmental agencies such as the United States Department of Education's ("DOE") Office of Civil Rights ("OCR").

However, the *Waters* decision highlights the importance of obtaining gender-bias documentation related to OCR investigations during the discovery process.⁵⁶ *Waters* involved a Title IX claim filed by Ohio State University's ("OSU") band director.⁵⁷ In rejecting the band director's gender-bias arguments, *Waters* distinguished OCR's investigation of OSU as being driven by a "compliance review" instead of a "complaint."⁵⁸ *Waters* also rejected the band director's OCR argument by relying heavily on OSU employee deposition testimony that downplayed OCR's review and highlighted the university's self-disclosure of Title IX concerns.⁵⁹

Plaintiffs advancing OCR arguments should also be aware of the *Boston College* decision which granted a motion for summary judgment because plaintiff provided "no evidentiary support to show how [] outside pressures" from the federal government "influenced the disciplinary proceedings"⁶⁰ Therefore, to avoid these types of adverse rulings, plaintiffs are advised to issue subpoenas and discovery requests for un-redacted copies of all documents exchanged between defendant universities and OCR. Then, if possible, plaintiffs should use these documents to obtain deposition testimony to thwart *Waters* or *Boston College* arguments.

⁵⁴ See generally, *Infra* §B (discussing same).

⁵⁵ *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014).

⁵⁶ *Waters v. Drake*, Case No: 2:14-cv-1704, 2016 WL 4264350 (S.D. OH. Aug. 12, 2016).

⁵⁷ *Id.*

⁵⁸ *Id.*, *8.

⁵⁹ *Id.*, *8-9.

⁶⁰ *Doe v. Trs. of Bos. Coll.*, Case No. 15-cv-10790, 2016 WL 5799297, *24 (D. Mass. Oct. 4, 2016).

The last two methods for establishing gender-bias involve: “statements by pertinent university officials, or patterns of decision-making that [] tend to show the influence of gender.”⁶¹ In *Washington and Lee*, a district court rejected a university’s motion to dismiss in part because the plaintiff’s complaint alleged all three aforementioned examples of gender-bias.⁶² Specifically, the court found plaintiff’s complaint:

1. Alleged university disciplinary policies had been modified and/or applied in a gender-biased fashion because of pressure from the federal government.⁶³
2. Discussed how gender-bias against males could be attributed in part to the university’s fear of losing federal funding;⁶⁴
3. Identified statements by university officials that addressed federal government pressure to discipline more students accused of sexual assault;⁶⁵
4. Presented circumstantial evidence of gender-biased conduct by university employees involved in his disciplinary proceeding;⁶⁶

⁶¹ See e.g., *Sahm v. Miami Univ.*, 2015 U.S. Dist. LEXIS 1404, *11-12 (S.D. OH. Jan. 7, 2015)(“*Sahm 1*”)(emphasis added); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *54-55 (S.D.N.Y. 2015)(same).

⁶² *Washington & Lee*, 2015 U.S. Dist. LEXIS 102426, No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426 (W.D. Va., Aug. 5, 2015).

⁶³ *Id.*, *24 (discussing plaintiff’s allegations that in response to “OCR’s guidance, W&L made changes that one could infer were designed to secure more convictions. W&L removed protections that had previously been afforded to the accused, such as the right to counsel, and adopted a low burden of proof, preponderance of the evidence, rather than the beyond a reasonable doubt standard used for honor code violations.”).

⁶⁴ *Id.*, *21 (discussing plaintiff’s allegations that Washington and Lee was concerned about federal directives that stated “universities could lose federal funding or face other consequences if they failed to address problems with sexual violence on campus.”).

⁶⁵ *Id.*, *20-21 (discussing a statement by Washington and Lee’s president which “mentioned the fact that many universities were under currently under investigation for violating Title IX.”).

⁶⁶ *Id.*, *28-29 (stating “gender-bias could be inferred from [W&L’s investigator’s] alleged . . . presentation, wherein she introduced and endorsed the article, *Is It Possible That There Is Something In Between Consensual Sex And Rape . . . And That It Happens To Almost Every Girl Out There?* That article, written for the female-focused website *Total Sorority Move*, details a consensual sexual encounter between a man and the female author of the article, who comes to regret the incident when she awakens the next morning. As Plaintiff describes it, the article posits that sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express. This presentation is particularly significant because of the parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct. Bias on the part of [W&L’s investigator] is material to the outcome of JD’s disciplinary hearing due to the considerable influence she appears to have wielded in those proceedings.”)(footnotes omitted).

5. Discussed how the university adopted gender-bias language;⁶⁷ and

6. Identified violations of university policies during his disciplinary proceedings.⁶⁸

Similarly, a district court rejected a motion to dismiss Title IX claims filed against Georgia Tech University in part because the male student/plaintiff:

1. Alleged his discipline was tainted by the university's response to pressure related to allegations that it had failed to properly discipline male students' sexual misconduct against female students;⁶⁹ and

2. Presented circumstantial evidence that individuals involved in adjudicating his case harbored anti-male gender-bias.⁷⁰

In 2016, similar evidence defeated a motion to dismiss Title IX claims filed by Indiana University.⁷¹ In that case a male student defeated this motion in part because the complaint:

1. Alleged he was treated differently than similarly situated females because the university ignored allegations that males were sexually assaulted by females;⁷² and

2. Maintained the university unfairly restricted access to evidence that could have established gender-bias.⁷³

⁶⁷ *Id.*, *29-30 (discussing gender specific language in Washington and Lee's sexual misconduct training materials).

⁶⁸ *Id.*, *27 (discussing plaintiff's allegations that Washington & Lee violated its policies during plaintiff's disciplinary proceeding).

⁶⁹ *Handouts 4-5* (containing unpublished orders from *Doe v. Bd. Of Regents of the Univ. Sys. of Ga.*, case no.1:15-cv-4079)(D.GA. 2015-16)(“Georgia Tech”). In particular, *Handout 4*, pages 15, 34-35 – contains *Georgia Tech Docket 31* – which discusses plaintiff's Title IX “erroneous outcome” claim and how news reports and allegations about fraternity members disrespecting females could be interpreted as supporting the plaintiff's claim that gender-bias at defendant university motivated Defendants' discipline of plaintiff). *See also*, *Handout 5* (containing *Georgia Tech Docket 40* which at pgs.9-10 discusses how plaintiff's Title IX claim could not be dismissed because he cited news reports suggesting gender-bias).

⁷⁰ *Handout 4* (containing *Georgia Tech Docket 31* which at pgs. 15-16, 31 discusses circumstantial evidence of gender-bias on the part of the investigator that ultimately found the plaintiff “responsible” for sexual misconduct).

⁷¹ *See generally*, *Marshall v. Ind. Univ.*, Case No. 1:15-cv-00726, 2016 U.S. Lexis 32999 (S.D. Ind. Mar. 15, 2016).

⁷² *Id.* **3-4, 18-19 (discussing how plaintiff established a claim of “selective, gender-based enforcement” because after being charged with sexual misconduct, plaintiff informed defendant university that he “had been sexually assaulted by another female student . . . [yet] Defendants never investigated [plaintiff's] reported sexual assault.”).

⁷³ *Id.* *20 (refusing to dismiss a Title IX complaint for lack of gender-bias evidence in part because defendants restricted plaintiff's access to documents and as a result, “cannot have it both ways, restricting access to the facts and then arguing that [plaintiff's] pleading must be dismissed for failure to identify more particularized facts.”).

Furthermore, a plaintiff suing Brown University defeated a motion to dismiss Title IX claims by alleging “upon information and belief”:

1. Brown University stacked the deck against male students accused of sexual misconduct;⁷⁴
2. The faculty of Brown University harbored animus against male students and favored female students;⁷⁵ and
3. Brown University engaged in a pattern and practice of gender-bias evidenced by: (a) previous lawsuits against the university; and (b) allegations of discrimination against males in years prior to the plaintiffs’ unlawful discipline.⁷⁶

It should be noted *Brown* is not alone in finding male Title IX plaintiffs can establish gender-bias via “information and belief” allegations. For, district courts in *Salisbury*, *Prasad*, and *Ritter* cited “information and belief” allegations as a basis for rejecting motions to dismiss Title IX claims.⁷⁷

In an attempt to circumvent a complaint’s evidence of gender-bias, universities often argue Title IX complaints must be dismissed because they mirror allegations contained in court decisions dismissing these claims such as *Marshall*.⁷⁸ Nevertheless, a properly pled complaint should be able to distinguish itself from *Marshall* which involved a Title IX complaint by a male student that:

1. Did “not . . . allege that members of the hearing panel or university officials made statements indicating gender bias against men;”
2. Did not allege plaintiff was innocent of charges that he violated the university’s sexual misconduct policy;

⁷⁴ *Doe v. Brown Univ.*, No. 15-144 S, 2016 U.S. Dist. Lexis 21027, *27 (D.R.I. Feb. 22, 2016) (discussing same).

⁷⁵ *Id.*

⁷⁶ *Id.*, **4, 10, and 27 (discussing how plaintiff established gender-bias in part by citing a lawsuit filed against defendant/university from at least four years prior plaintiff’s discipline by defendant/university).

⁷⁷ See e.g., *Doe v. Salisbury Univ.*, CIVIL NO. JKB-15-517, 2015 U.S. Dist. LEXIS 110772, *41 (Aug. 21, 2015)(finding alleging gender-bias “based solely ‘upon information and belief,’ [] is a permissible . . . even after the *Twombly* and *Iqbal* decisions”(internal citations omitted); *Prasad v. Cornell Univ.*, No.5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016)(rejecting a motion to dismiss a Title IX claim filed by a male student which was based in part on “information and belief” allegations; *Handout 7* (containing *Ritter v. Oklahoma*, no.16-0438 (U.S. W.D. Ok, (May 6, 2016) which granted– at original p.4 - a temporary restraining order in part because plaintiff established Title IX claim based on “information and belief” allegations).

⁷⁸ *Marshall*. 2015 U.S. Dist. LEXIS 155291, at *15.

3. Did not maintain the university “failed to follow its disciplinary proceeding procedures or . . . attempted to influence the outcome of the disciplinary proceeding;” and
4. Did “not . . . allege the investigator/advocate in the disciplinary proceeding also functioned as the decision-maker who ultimately determined” the plaintiff violated the university’s sexual misconduct policy.⁷⁹

Similarly, universities’ motions to dismiss commonly rely on the following five court decisions in seeking the dismissal of Title IX claims: (1) *Sahm 2*; (2) *University of the South*, (3) *King*, (4) *Case Western*, and (5) *Vassar*.⁸⁰ However, properly pled Title IX complaints should be able to distinguish these cases. This is because the plaintiffs in *Sahm 2*, *Univ. of the South*, *Case Western*, *Yu*, and *King*, did not allege their universities failed to discipline female students for initiating nonconsensual physical contact with male students.⁸¹ *Sahm 2* and *University of the South* involved cases where the plaintiff did not establish gender-bias.⁸² In addition, during the motion to dismiss stage, a citation to *King* would be unpersuasive because *King* addressed the “likelihood of success” element of a TRO motion – a much higher evidentiary hurdle than required at the motion to dismiss stage.⁸³

(B)(1) Causation issues related to biased adjudicators

Title IX complaints filed by male students often raise issues of (a) gender-biased views held by adjudicators in disciplinary proceeding or (b) conflicts of interest between adjudicators

⁷⁹ *Id.*, *15-16. (emphasis added).

⁸⁰ *Sahm 2*, 2015 U.S. Dist. LEXIS 65864; *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009); *King v. DePauw Univ.*, No. 2:14-CV-70-WTL-DKL, 2014 WL 4197507, (S.D. Ind. Aug. 22, 2014)); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015); *Doe v. Case W. Reserve.*, U.S. 2015 U.S. Dist. Lexis 123680 (N.D. OH. Sept. 16, 2015).

⁸¹ *Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *12 (granting university’s motion to dismiss because the plaintiff “assert[ed] no facts to suggest” university “would have acted differently in a disciplinary procedure against a female accused of sexual assault.”); *Univ. of the S.*, 687 F. Supp. 2d 757 (detailing how plaintiff did not “plead facts or provide the Court with any evidence that . . . a similarly situated woman would not have been subjected to the same disciplinary proceedings.”); *Yu*, 2015 U.S. Dist. LEXIS 43253, *4-7 (containing no discussion of plaintiff alleging gender-bias based on university’s failure to discipline female student for violating university policies by initiating physical contact with plaintiff when he was incapacitated); and *Case W. Reserve.*, U.S. Dist. LEXIS 123680 (same).

⁸² *Univ. of the S.*, 687 F. Supp. 757 (detailing how plaintiff did not “plead facts or provide the Court with any evidence that the University’s actions against JD were motivated by his gender”); *Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *11 (dismissing plaintiff’s complaint because he did “not allege[] that any members of the disciplinary tribunal made statements indicating gender-bias.”); *Id.*, *13 (granting motion to dismiss in part because plaintiff not “established a pattern of biased decision making” by the defendant/university).

⁸³ *King*, 2014 U.S. Dist. LEXIS 117075, *27-29.

and the plaintiffs’ accusers.⁸⁴ As discussed in part in Section B above, such circumstances can trigger Title IX violations.⁸⁵

Nevertheless, bias challenges sometimes come up short. The plaintiff in *Bleiler* alleged his disciplinary panel was unlawful in part because: (a) “two student panel members had social connections to [plaintiff’s accuser] . . . [but a college administrator] refused to remove them from the panel,”⁸⁶ and (b) one panel member participated “in a ‘rape play’ whose message was that ‘when friends who were drinking engaged in sexual activity it was considered rape.’”⁸⁷ In dismissing these concerns, *Bleiler* noted the college administrator “concluded [the] panel members believed that they did not have a conflict of interest and . . . did not know [accuser] well and there was no suggestion . . . [they] knew [plaintiff].”⁸⁸ More importantly, *Bleiler* found plaintiff failed to establish he was “disciplined and expelled because of his gender.”⁸⁹ In support of these positions, *Bleiler* cited:

1. The First Circuit’s *Gorman* decision which stated: “[i]n the intimate setting of a college or university, prior contact between the participants is likely and does not *per se* indicate bias or partiality;”⁹⁰ and
2. The Eighth Circuit’s *Ikpeazu* decision which found a university disciplinary body “is entitled to a presumption of honesty and integrity absent a showing of actual bias such as animosity, prejudice, or a personal or financial stake in the outcome.”⁹¹

Defendant universities will also likely cite *Vassar* which rejected a “conflict of interest” argument based on the accuser’s father being employed by Vassar.⁹² But, *Vassar*’s basis for rejecting this argument was plaintiff’s inability to establish: (a) “any resulting erroneous outcome

⁸⁴ See e.g., *Handouts 1-3, 8-12* (containing Title IX complaints filed by Eric Rosenberg’s clients against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, and Occidental College).

⁸⁵ *Supra*, §B. See also, *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at 16 (E.D. Va. Sept. 16, 2015)(determining a plaintiff satisfied the first prong of the *Yusuf* analysis by alleging that the school’s procedure was flawed based on its “failure to provide a neutral arbiter without prior involvement in the case”).

⁸⁶ *Bleiler v. Coll., of the Holy Cross*, No. 11-11541, 2013 U.S. Dist. LEXIS 127775, *39 (D. Ma. Aug. 28, 2013)

⁸⁷ *Id.*, *40.

⁸⁸ *Id.*, *39-40.

⁸⁹ *Id.*, *42.

⁹⁰ *Id.*, *40 (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988))(emphasis added).

⁹¹ *Id.*, *40-41 (quoting *Ikpeazu v. University of Neb.*, 775 F.2d 250, 254 (8th Cir. 1985).

⁹² *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *33-35.

would have been caused by gender-bias”,⁹³ and (b) “any evidence . . . that would raise a triable issue as to the panelists' bias toward Complainant because of her father.”⁹⁴

As a result, most Title IX plaintiffs should navigate *Vassar* and *Bleiler* challenges by including facts in their complaints and/or engaging in discovery that distinguishes these cases. In addition, during university level disciplinary proceedings, falsely accused students should present universities with written questions for disciplinary panel members that might expose conflicts of interest or gender-bias. These students should also document the basis for gender-bias and conflict of interest challenges during disciplinary proceedings to preserve these challenges for litigation.

(B)(2) Direct vs. indirect evidence of gender-bias

Title IX plaintiffs can establish gender-bias via direct or indirect/circumstantial evidence.⁹⁵ In defining these terms, courts will likely look to Title VII. Under Title VII, direct evidence is often defined as evidence that does not require an inference to conclude unlawful discrimination motivated an employer's action.⁹⁶ In Title IX, an example of direct evidence would likely involve statements favoring female students over male students (or) statements hostile to males with regard to allegations of sexual misconduct. Indirect evidence requires an inference of unlawful discrimination.⁹⁷ When relying on indirect/circumstantial evidence, Title VII plaintiffs should identify other indicia of discriminatory conduct to establish temporal causal connections.⁹⁸ This evidence sometimes includes campus sponsored events related to the Hunting Ground, Clothesline Project, or affiliations with organizations that portray males as perpetrators of sexual misconduct.

Unfortunately, in Title IX claims, very few courts have evaluated temporal causal links between a plaintiff's discipline and gender-bias. One such case is *Washington and Lee* which rejected a motion to dismiss in part because plaintiff's gender-bias allegations articulated temporal connections between his discipline and a *Rolling Stone* article entitled “*A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*.”⁹⁹ Similarly, a district court rejected a motion to dismiss because the plaintiff established gender-bias in part by citing a lawsuit filed against his university at least four years prior plaintiff's discipline.¹⁰⁰

⁹³ *Id.*, *35, fn11.

⁹⁴ *Id.*, *34.

⁹⁵ See e.g., *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 255 (6th Cir. 2000)(finding Title IX discrimination can be established by “circumstantial evidence.”).

⁹⁶ See e.g., *Spengler v. Worthington Cyllinders*, 615 F.3d 481, 491 (6th Cir. 2010)(defining direct evidence as evidence, which if believed, does not require an inference to conclude that unlawful retaliation motivated an employer's action).

⁹⁷ See e.g., *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363–64 (6th Cir.2001); *Nguyen v. City of Cleveland*, 229 F.3d 559, 566–67 (6th Cir.2000).

⁹⁸ *Id.*

⁹⁹ *Washington and Lee*, 2015 U.S. Dist. LEXIS 102426, *20-21

¹⁰⁰ *Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, **4, 10, and 27 (discussing how plaintiff established gender-bias in part by citing a lawsuit filed against defendant/university from at least four years' prior plaintiff's discipline by defendant/university).

On the other hand, *Sahm 2* granted a university's motion to dismiss after maintaining gender-bias evidence 2½ to 4 years old would be too remote in time.¹⁰¹ Likewise, *Vassar* determined the plaintiff could not establish a "pattern" of gender-bias in part because he relied on a single "twenty-year-old decision allowing a complaint to survive a motion to dismiss"¹⁰² As a result, Title IX plaintiffs should consult Title VII circuit court decisions addressing the outer limits of temporal connections. In doing so, plaintiffs may avoid *Vassar* and *Sahm 2* arguments alleging gender-bias evidence is too old.

In addition to disputes about whether gender-bias evidence is too dated, courts seem to be struggling with how to evaluate individual pieces of gender-bias evidence within the totality of plaintiffs' causation arguments. To address this issue, Title IX plaintiffs may ask courts to view "causation" in non-retaliation claims by looking to cases like the Supreme Court's Title VII decision in *Nassar* which stated:

"An employee alleging status-based discrimination under [Title VII] need not show 'but-for' causation. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives for the decision."¹⁰³

If courts adopt this Title VII evidentiary requirement, Title IX plaintiffs should not be required to establish "but for" causation between their discipline and a university's gender-bias in non-retaliation Title IX cases. Rather, Title IX plaintiffs should only be required to prove gender-bias was a "motivating factor" for their discipline.

But, plaintiffs should not be surprised if universities argue *Nassar's* requirement that Title VII retaliation plaintiffs establish "but-for" causation¹⁰⁴ applies in Title IX cases. If this happens, plaintiffs advancing Title IX retaliation claims should note district courts have not determined *Nassar's* "but-for" causation standard applies in Title IX.¹⁰⁵ If *Nassar* applies to Title IX,

¹⁰¹ *Sahm 2*, 2015 U.S. Dist. LEXIS 65864, *13-16 (referencing: (a) *Worthy v. Mich. Bell Tel. Co.*, 472 Fed. Appx. 342, 347 (6th Cir. 2012) which found "discriminatory comment made two and one-half years earlier to be "remote in time"; and (b) *Myers v. Cuyahoga Cty., Ohio*, 182 F. App'x 510, 512, 520 (6th Cir. 2006) which noted "a slur made at least one year before performance problems arose and at least three years prior to termination was not evidence of discrimination.").

¹⁰² *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *69 (quoting *Mallory v. Ohio Univ.*, 76 Fed. App'x 634, 640 (6th Cir. 2003) which determined one claim filed six years ago "by an individual who was subjectively dissatisfied with a result does not constitute a 'pattern of decision-making.'")

¹⁰³ *Univ. of Tex. Sw. Med. Cent. v. Nassar*, 133 S.Ct. 2517, 2532, 2520 (June 4, 2013)(emphasis added).

¹⁰⁴ *Id.* (requiring Title VII plaintiffs establish "but for" causation).

¹⁰⁵ See e.g., *Miller v. Kutztown Univ.*, 2013 U.S. Dist. LEXIS 173878, at *3 (E.D. Pa. Dec. 11, 2013)(stating: "[w]hile it is true that the legal analysis in Title VII and Title IX is often similar, the Court made clear in *Nassar* that its holding regarding but-for causation applied to Title VII, not Title IX.")(citing *Nassar*, 133 S.Ct. at 2529-30); *Doe v. Rutherford County*, 2014 U.S. Dist. LEXIS 114477, *48-50 (M.D. Tenn., Aug. 24, 2014)(stating, "[i]n the wake of *Nassar*, what are the implications for the causation standard applicable to Title IX claims? The answer is not self-evident . . . [t]he parties have not addressed these potential complexities in their briefing . . . [as a result] the court need not resolve the issue at this stage."); *Meyers v. Cal. Univ. of Pa.*, 2014 U.S. Dist. LEXIS 29828, *41 (W.D. Pa., July 31, 2014)(determining

plaintiffs should be prepared to respond to university arguments that plaintiffs need to establish concrete proof that their protected activities were the sole basis for a university's disciplinary sanction. In doing so, plaintiffs should cite the Supreme Court's *Burrage* decision which clarified *Nassar* by noting plaintiffs need only establish retaliation "was [a] but-for cause of the challenged employment action."¹⁰⁶ In addition, the First Circuit's *Hobgood* decision found *Nassar* does not require "smoking gun" evidence "akin to an admission" to establish but-for causation.¹⁰⁷

(B)(3) Responding to "disparate impact" challenges to plaintiff's causation evidence

Many universities allege Title IX claims must be dismissed because these claims are allegedly based on "disparate impact" theories which are not permitted under Title IX.¹⁰⁸ But, most well pled Title IX complaints do not include "disparate impact" claims. Instead, plaintiffs use statistics to show how defendant universities are engaging in patterns of decision-making that tend to show gender-bias motivated their unlawful discipline.¹⁰⁹ Courts' confusion between "pattern" and "disparate impact" issues was addressed in *Prasad*.¹¹⁰ *Prasad* rejected a university's "disparate impact" argument in a motion to dismiss by stating:

"It is possible that [p]laintiff could, after conducting discovery, produce statistical evidence indicating that males are invariably found guilty in sexual assault proceedings at Cornell . . . [w]hile statistical evidence of a disparate impact on one gender cannot form the basis of a Title IX claim, this type of evidence might support Plaintiff's claim that gender influenced the outcome of his disciplinary proceeding . . . [for] statistics may be used as circumstantial evidence to support an individual disparate treatment claim".¹¹¹

Plaintiffs should also look to *Vassar* to fend off disparate impact arguments. This is because *Vassar* determined the plaintiff could not establish a "pattern" of gender-bias in part because he: "failed to provide any statistical evidence that 'males invariably lose' when charged with sexual

the court would delay its determination of whether *Nassar*'s but-for causation applied to Title IX until trial in part because of Justice Ginsburg's dissent in *Nassar* which stated: "trial judges [] will be obliged to charge discrete causation standards" to jurors who "will puzzle over the rhyme or reason for the dual standards")(citing *Nassar*, 133 S. Ct. at 2535 (Ginsburg, J., dissenting)).

¹⁰⁶ *United States v. Burrage*, 134 S. Ct. 881, 889 (2013)(bracketed [a] in original).

¹⁰⁷ *Hobgood v. Ill. Gaming Bd., et al.*, 731 F.3d 643 (7th Cir. 2013).

¹⁰⁸ *Doe v. Univ. of Cinn.*, 2016 WL 1161935, *14 (S.D. Oh. Mar. 23, 2016)(dismissing at Title IX claim in part because the court maintained the plaintiff was advancing an impermissible disparate impact liability claim).

¹⁰⁹ See e.g., *Sahm 1*, 2015 U.S. Dist. LEXIS 1404, *11-12 (discussing how plaintiff established Title IX liability via patterns of decision-making that tend to show gender-bias motivated their unlawful discipline); *Yu*, 2015 US Dist. Lexis 43253 *54-55 (same).

¹¹⁰ *Prasad*, 2016 WL 3212079 (emphasis added).

¹¹¹ *Id.* (internal citations and quotations omitted).

misconduct”¹¹² Therefore, plaintiffs should cite *Prasad* and *Vassar*’s “statistical” commentary if universities refuse to provide discovery related to sexual misconduct investigations/adjudications for the 2-4 year period preceding plaintiff’s discipline.

(B)(4) Addressing university defenses based on Title VII’s heightened standards of proof in reverse discrimination claims

Falsely accused male students may encounter defendant universities arguing courts should apply Title VII’s heightened standards in Title IX claims filed by male students. These universities may allege Title IX claims are akin to Title VII reverse discrimination claims filed by Caucasian males. This argument was made in *Waters* which involved a plaintiff/band director at OSU.¹¹³ Although *Waters* rejected the argument in granting OSU’s motion for summary judgment, *Waters* detailed the argument as follows:

“Ohio State . . . [alleges] Waters cannot establish a *prima facie* case . . . [under the] first *McDonnell Douglas* factor, [which requires] a plaintiff in a reverse discrimination case [to] satisfy a heightened standard of establishing that ‘background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.’ *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985) (quoting *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). Ohio State’s position has some support in the case law. See *Sutherland v. Michigan Dep’t of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (applying *Murray*). In response, Waters argues that the court should reject imposing a heightened standard in reverse discrimination cases. This position too has some support in the case law. See *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 257 (6th Cir. 2002) (“[W]e note that the ‘background circumstances’ prong, only required of ‘reverse discrimination’ plaintiffs, may impermissibly impose a heightened pleading standard on majority victims of discrimination.”) (citing cases); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n.7 (6th Cir. 1994) (“We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts.”). Because Ohio State has so clearly demonstrated that it is entitled to summary judgment on the basis of its second argument (concerning the absence of a similarly-situated individual), the court declines to decide whether it believes the heightened “background circumstances” standard remains good law in reverse discrimination cases in the Sixth Circuit.”¹¹⁴

A Male Title IX plaintiff should study the court decisions cited by *Waters* if the defendant university alleges plaintiff must show the university is “unusual” in how it “discriminates against” male students. This is because *Waters* determined it did not need to decide whether Title VII’s

¹¹² *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 2015 US Dist. Lexis 43253 *68-69 (S.D.N.Y. 2015)(emphasis added).

¹¹³ *Waters v. Drake*, 2016 WL 4264350 (S.D. Ohio Aug. 12, 2016).

¹¹⁴ *Id.*, *10.

reverse discrimination standard applied in Title IX. Moreover, Title IX plaintiffs should anticipate summary judgment arguments based on Title VII's heightened standards by engaging in discovery in accordance with relevant circuit court decisions that address this issue.

(B)(5) Disproving universities' "gender-neutral" arguments

As discussed below, some district courts grant motions to dismiss after providing alternative explanations for gender-bias in Title IX complaints. In doing so, these courts likely violate the Supreme Court's *Twombly* decision which states a *McDonnell Douglas* burden-shifting analysis cannot occur at the motion to dismiss stage.¹¹⁵

This issue was prominently discussed in the Second Circuit's *Doe v. Columbia* decision which found a district court erred in dismissing a male student's Title IX claims.¹¹⁶ In doing so, the Second Circuit clarified its earlier *Yusuf* decision which many courts look to for guidance in addressing Title IX claims.¹¹⁷ Specifically, the Second Circuit stated that even though it did "not explicitly state in *Yusuf* that we were incorporating *McDonnell Douglas*'s burden-shifting framework into Title IX jurisprudence" this framework applies.¹¹⁸ As a result, the Second Circuit stated:

" . . . a complaint under Title IX, alleging that the plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, is sufficient with respect to the element of discriminatory intent, like a complaint under Title VII, if it pleads specific facts that support a minimal plausible inference of such discrimination."¹¹⁹

¹¹⁵ See e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007) (stating that at the motion to dismiss stage, Title VII complaints need not contain facts establishing a defendant's alleged legitimate non-discriminatory rationale for an adverse action is a pretext for unlawful discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). See also, *Horner v. Ky. Athletic Ass'n*, 206 F.3d 685, 689-92 (6th Cir. 2000) (discussing how analytical framework of Title VI should be used to interpret Title IX).

¹¹⁶ *Doe v. Columbia University*, 831 F.3d 46 (2nd Cir. July 29, 2016).

¹¹⁷ See e.g., *Mallory*, 76 F. App'x. 638-39 (discussing *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994)).

¹¹⁸ *Columbia*, 2016 U.S. App. Lexis 13773, *22-23. The Second Circuit detailed this burden-shifting framework as follows: "[I]n the initial phase of the case, the plaintiff can establish a prima facie case without evidence sufficient to show discriminatory motivation . . . If the plaintiff can show . . . [among other things] some minimal evidence suggesting an inference that the employer acted with discriminatory motivation, such a showing will raise a temporary 'presumption' of discriminatory motivation, shifting the burden of production to the employer and requiring the employer to come forward with its justification for the adverse employment action against the plaintiff. However, once the employer presents evidence of its justification for the adverse action, joining issue on plaintiff's claim of discriminatory motivation, the presumption 'drops out of the picture' and the *McDonnell Douglas* framework 'is no longer relevant.' At this point, in the second phase of the case, the plaintiff must demonstrate that the proffered reason was not the true reason (or in any event not the sole reason) for the employment decision, which merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against her. *Columbia*, 2016 U.S. App. Lexis 13773, *18-19 (citing *Littlejohn v. City of New York*, 795 F.3d 297,307-08 (2d Cir. 2015)(footnote omitted)(emphasis added).

¹¹⁹ *Id.*, *13-14 (emphasis added).

In discussing this “minimal plausible inference,” the Second Circuit looked to its *Littlejohn* decision.¹²⁰ For instance, the Second Circuit noted:

“*McDonnell Douglas* temporary presumption *reduces* the facts . . . needed to be pleaded under *Iqbal* . . . [b]ecause ‘[t]he discrimination complaint, by definition, occurs in the first stage of the litigation . . . the complaint also benefits from the temporary presumption and must be viewed in light of the plaintiff’s minimal burden to show discriminatory intent.’”¹²¹

“For this reason,” the Second Circuit noted it has “often vacated 12(b)(6) and 12(c) dismissals of complaints alleging discrimination” and “cautioned district courts against imposing too high a burden on plaintiffs alleging discrimination at the 12(b)(6) stage.”¹²² In addition, the Second Circuit warned district courts against dismissing Title IX lawsuits based on otherwise reasonable “proffered explanation[s]” of gender-bias.¹²³ This is because “[i]t is not the court’s function in ruling on a motion to dismiss for insufficiency of the complaint to decide which was the defendant’s true motivation.”¹²⁴ After setting forth the law, the Second Circuit detailed reasons why plaintiff’s facts satisfied the “minimal plausible inference” standard. Those facts included plaintiff’s allegations that

1. “Columbia’s hearing panel (which erroneously imposed discipline on the Plaintiff), its Dean (who rejected his appeal), and its Title IX investigator (who influenced the panel and the Dean by her report and recommendation), were all motivated in those actions by pro-female anti-male bias;”¹²⁵
2. “[A]lleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students’ charges of sexual assaults by male students;”¹²⁶
3. The “investigator and the [disciplinary] panel failed to act in accordance with [u]niversity procedures designed to protect accused students;”¹²⁷
4. University officials were reacting to “substantial criticism of the [u]niversity . . . accusing the [u]niversity of not taking seriously complaints of female students alleging sexual assault by male students;”¹²⁸ and

¹²⁰ *Id.*, *2, 20-22, 33 (discussing *Littlejohn v. City of New York*, 795 F.3d 297 (2d Cir. 2015)).

¹²¹ *Id.*, *20 (quoting *Littlejohn*, 795 F.3d 310-11)(emphasis added).

¹²² *Id.*, *21, fn.8 (citations omitted).

¹²³ *Id.*, *25-26.

¹²⁴ *Id.*, *26.

¹²⁵ *Id.*, *24.

¹²⁶ *Id.*, *25.

¹²⁷ *Id.*

¹²⁸ *Id.*, *27-28.

5. The “investigator, the panel, and the reviewing Dean . . . reached conclusions that were incorrect and contrary to the weight of the evidence.”¹²⁹

The rationale in the Second Circuit’s *Columbia* decision is echoed in *Brown Univ.* which refused to follow the lead of the now reversed district court’s *Columbia* decision by noting:

“the type of evidence called for by the [district court decision in] *Columbia* [] is more akin to what would be required at summary judgment. . . . *Iqbal* and *Twombly* did not convert the standard for surviving a motion to dismiss into a quasi-summary judgment standard . . . [m]oreover, the court in *Columbia* did not appear to consider how a potential plaintiff would acquire any of this type of information without discovery.”¹³⁰

In fact, *Columbia* has had an immediate impact on the way courts construe Title IX complaints with numerous district courts citing *Columbia* as a basis for rejecting motions to dismiss Title IX claims. One such decision is *Doe v. Regents of Univ. of California*.¹³¹ In that case, a district court revisited its earlier dismissal of the plaintiff’s Title IX erroneous outcome claim in light of *Columbia* and concluded the Title IX claims withstood the motion to dismiss. Specifically, this court noted that:

“Although [it] previously held that the Plaintiff’s allegations failed to give rise to a plausible inference of gender bias under *Iqbal* and *Twombly*, the Court now finds that the Plaintiff has satisfied the minimal burden necessary to give rise to a temporary presumption of discriminatory intent as outlined in *Columbia*.”¹³²

The court made clear that it is the plaintiff’s version of events that hold sway at the 12(b)(6) stage by noting:

“It is not the Court’s finding that the outcome of the disciplinary proceedings was definitively erroneous. The Court has only considered the Plaintiff’s version of events, as is proper at the pleading stage of the litigation, when all inferences must be made in favor of the non-moving party. As a result, it is entirely possible that the Plaintiff’s claims are simply untrue, or that there was persuasive evidence to justify the committee’s ultimate decision to credit Jane Doe’s version of events over the Plaintiff’s. After the evidence is collected and presented, the Plaintiff’s allegations of an erroneous outcome may no longer be plausible. However, such

¹²⁹ *Id.*, *25.

¹³⁰ *Brown Univ.*, 2016 U.S. Dist. LEXIS 21027, *23-24 (internal citation omitted).

¹³¹ See, *Handout 24* (containing unreported *Doe v. Regents of Univ. of California* 2:15-cv-02478-SVW-JEM (June 8, 2017, C. Dist. CA)).

¹³² *Id.*

considerations are inappropriate for this Court at the motion to dismiss phase of the trial.”¹³³

The Southern District of Ohio reached a similar determination in *Ohio State Univ.* when it noted the burden shifting arguments in *McDonnell Douglas* are “an evidentiary standard, not a pleading requirement.” This court added:

“The Supreme Court ‘has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. . . . the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases’ . . . Instead, a complaint must contain only a short and plain statement of the claim showing that the pleading is entitled to relief.”¹³⁴

In relying on these bedrock legal principles to reject a motion to dismiss a plaintiff’s Title IX claim, *Ohio State Univ.* joined *Neal*,¹³⁵ *Lynn Univ.*,¹³⁶ and *Collick*¹³⁷ which rejected motions to dismiss Title IX claims in the wake of *Columbia*.

¹³³ *Id.*

¹³⁴ *Doe v. Ohio State Univ.*, Case No.: 2:16-cv-171 at *21 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-511 (2002)).

¹³⁵ *Neal v. Colorado State University-Pueblo*, No. 16–cv–873–RM–CBS, 2017 WL 633045, **11-14 (D. Col., Feb. 16, 2017)(citing *Columbia* in rejecting motion to dismiss a male plaintiff’s Title IX claim in part because: (a) defendant university subjected plaintiff to disciplinary proceedings despite his accuser’s statements acknowledging plaintiff did not engage in sexual misconduct; (b) the university employee charged with investigating allegations of sexual misconduct engaged in conduct that could be interpreted as manifesting gender bias; (c) plaintiff alleged the university took adverse actions against him because of pressure from OCR to “issue more guilty findings against male students accused of sexual misconduct;” (d) the university feared pressure from “internal[]” sources and the federal government to “aggressively discipline male students accused of sexual misconduct;” and (d) university implements policies so as to favor female students alleging males engaged in sexual misconduct.)

¹³⁶ *Doe v. Lynn Univ., Inc.*, No. 9:16–cv–80850, 2017 WL 237631, **4-5 (S.D. Fla. Jan. 19, 2017)(citing *Columbia* in rejecting motion to dismiss a male plaintiff’s Title IX claim in part because defendant university took adverse actions against plaintiff because of pressure from internal and external sources such as OCR to: (a) produce “false positives” against male student alleged to have engaged in sexual misconduct; and (b) “vouchsafe [the university’s] federal funding.”)(distinguishing plaintiff’s complaint from a Title IX claim dismissed by the Sixth Circuit in *Doe v. Cummins*, No. 16–3334, 2016 WL 7093996 (6th Cir. Dec. 6, 2016).

¹³⁷ *Collick v. William Paterson Univ.*, Civ. No. 16–471(KM) (JBC), 2016 WL 6824374, *12 (D.N.J. Nov. 17, 2016)(citing *Columbia* in rejecting a university’s motion to dismiss a Title IX claim based on allegations of procedural shortcomings during plaintiff’s disciplinary proceeding and anti-male pressure from ORC which the court found warranted a: “commonsense inference that the public’s and the policymakers’ attention to the issue of campus sexual assault may have caused [defendant] university to believe it was in the spotlight” and therefore caused the university to use plaintiff to show it would sanction males accused

On the other hand, district courts in *Denison*,¹³⁸ *Miami*,¹³⁹ *Wooster*,¹⁴⁰ and *Austin*¹⁴¹ sidelined *Columbia* and dismissed Title IX claims. They did so in large part by alleging any bias favoring sexual assault victims is not actionable bias because these victims might be male.¹⁴² In doing so, these district courts violate bedrock U.S. Supreme Court decisions by misconstruing, ignoring, and/or recasting male plaintiffs' gender-bias evidence against the plaintiffs and in favor of defendant universities.

These violations were addressed in Sixth Circuit appeal briefs filed in *Denison* and *Miami*.¹⁴³ For, example, the male plaintiff in *Denison* detailed how the district court ignored and/or misconstrued gender-bias evidence which included: (a) court filings from four lawsuits filed against Denison University by male students alleging they were erroneously subjected discipline proceedings after being falsely accused of sexual misconduct; (b) documentation from OCR's investigation of Denison University which triggered gender-bias that contributed to plaintiff's erroneous expulsion; (c) anti-male statements and/or conduct by adjudicators involved in plaintiff's expulsion; and (d) documented examples of how Denison University: (i) equated victim/complainants in sexual misconduct proceedings as being females who must receive preferential treatment, and (ii) severely punished males accused of sexual assault regardless of guilt.¹⁴⁴

Similarly, the *Miami* appeal details how the following four types of gender-bias evidence was construed against the male plaintiff: (1) the university's gender biased policy application established by its refusal to discipline the female who initiated sexual contact with plaintiff when the female knew plaintiff was incapacitated because of alcohol; (2) an affidavit from an attorney who witnessed examples of the university refusing to discipline female students who initiated sexual contact with male students who were incapacitated because of alcohol; (3) anti-male statements and/or conduct by adjudicators involved in plaintiff's suspension; and (4) the university's embracing internal and external pressure to: (i) equate victim/complainants in sexual

of sexual misconduct).

¹³⁸ See, *Handout 25* (containing unreported *Doe v. Denison Univ.* 2:16-cv-00143-MHW-KAJ (S.D.Oh. Mar. 30, 2017).

¹³⁹ *Doe v. Miami Univ.*, No.1:15cv605, 2017 WL 1154086 (S.D.Oh. Mar. 28, 2017).

¹⁴⁰ *Doe v. College of Wooster*, No.5:16-cv-979, 2017 WL 1038982, (N.D.OH. Mar. 17, 2017).

¹⁴¹ *Austin v. Univ. of Oregon*, No. 6:15-cv-02257-MC, 2016 WL 4708540, (D. Oregon Sept. 8, 2016).

¹⁴² See e.g., *College of Wooster*, 2017 WL 1038982, *5.

¹⁴³ See *Handouts 26-27* (containing appellants' Sixth Circuit appeal briefs in *Denison* and *Miami*).

¹⁴⁴ *Id.* *Handout 26* (containing appellants' Sixth Circuit appeal brief in *Denison*).

misconduct proceedings as being females who must receive preferential treatment, and (ii) severely punish males accused of sexual assault regardless of guilt.¹⁴⁵

The male Title IX plaintiff in *Wooster* also had his gender bias evidence construed against him. He alleged his erroneous discipline was caused in part by anti-male gender-bias chronicled in the university's newspaper.¹⁴⁶ Nevertheless, the district court dismissed his Title IX claims by alleging his evidence:

“. . . may supply a possible motive for favoring assault victims. It does not, however, suggest a basis for discrimination against male students. ‘Demonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students.’”¹⁴⁷

In reaching this conclusion, *Wooster* like the district courts in *Denison* and *Miami* likely violated *Twombly* and *Iqbal*. This is because the plausible inferences that should be made from the gender-bias evidence in *Wooster*, *Denison*, and *Miami* is that the defendant universities: (1) advocated on behalf of females who alleged males engaged in sexual misconduct; (2) manifested minimal or no advocacy on behalf of males alleged to have engaged in sexual misconduct towards females; (3) exhibited minimal or no advocacy for protecting females from sexual misconduct perpetrated by other females; and/or (4) manifests minimal or no advocacy for protecting males from sexual misconduct perpetrated by females.

In addition to likely running afoul of *Twombly* and *Iqbal*, *Wooster* appears to misapply the Sixth Circuit's *Mallory* decision.¹⁴⁸ With regard to this issue, *Wooster* stated:

“*Wooster* [] criticizes plaintiff's reliance on *Doe v. Columbia Univ.* on the ground that it improperly applied the ‘minimal plausibility’ standard to the plaintiff's pleading requirements under Title IX. *Wooster* complains that the Sixth Circuit has

¹⁴⁵ *Id.* Handout 27 (containing appellants' Sixth Circuit appeal brief in *Miami*).

¹⁴⁶ *College of Wooster*, 2017 WL 1038982, *4 (detailing how plaintiff's complaint alleged that, “[d]uring the period preceding the disciplinary hearing, there was substantial criticism of the College, both in the student body and in the public media, accusing the College of not taking seriously complaints of female students alleging sexual assault by male students . . . [and] cited articles in the university's newspaper highlighting the need for awareness of a ‘rape culture’ on campus that was biased against victims of rape. In that same paragraph, he cited a comment from a rape survivor criticizing the school for enabling sexual assaults ‘by sweeping them under the rug, and allowing privileged individuals to do whatever they want on campus.’ the paragraph ends with a quotation from an article written by a *Wooster* professor who revealed that she is unnerved “when tensions flare on campus regarding issues of sexual assault and violence.”)(internal citations omitted).

¹⁴⁷ *Id.*, *5 (quoting *Sahm v. Miami Univ.*, 110 F.Supp.3d 774, 778 (S.D. Ohio 2015) (collecting cases).

¹⁴⁸ *College of Wooster*, 2017 WL 1038982, *5 fn.4 (quoting *Austin v. Univ. of Oregon*, 205 F.Supp.3d 1214, 1227 (D. Or. 2016)).

not adopted this reduced pleading standard, and, instead, continues to apply the traditional *McDonnell Douglas* burden-shifting framework to all Title IX claims, which “requires a plaintiff to demonstrate that the conduct of the university in question was motivated by a sexual bias.” (Mot. Amend Opp’n at 755, quoting *Mallory*, 76 Fed.Appx. at 639.) The Court agrees with *Wooster*.¹⁴⁹

Wooster’s embrace of *Wooster Univ.*’s interpretation of *Mallory* lacks merit because *Mallory* contains no reference to *McDonnell Douglas*.¹⁵⁰ Rather, *Mallory* cites *Yusef* for the proposition that male Title IX plaintiffs must “demonstrate that the conduct of the university in question was motivated by a sexual bias.”¹⁵¹ At the motion to dismiss stage, *Yusef* stated the “pleading burden” for establishing gender bias is “not heavy.”¹⁵² In fact, the plaintiff in *Yusef* successfully pled gender bias sufficient to defeat a motion to dismiss by merely alleging:

“various actions by the presiding official of the disciplinary tribunal [] prevented [plaintiff] from fully defending himself . . . [and] males accused of sexual harassment at [defendant/university] are ‘historically and systematically’ and ‘invariably found guilty, regardless of the evidence or lack thereof.’”¹⁵³

Instead of embracing this low bar for defeating a motion to dismiss, *Wooster* suggested male plaintiffs should be held to a pleading higher standard than females in order to avoid the “double bind” alleged in the district court decision in *Austin*.¹⁵⁴ Specifically, *Austin* declined to implement *Columbia*’s “pleading standard” because it:

“would put universities in a double bind. Either they come under public fire for not responding to allegations of sexual assault aggressively enough or they open themselves to Title IX claims simply by enforcing rules against alleged perpetrators.”¹⁵⁵

To date, no court of appeals has evaluated whether a court can construe gender-bias evidence against a male plaintiff in order to protect universities from “double bind” litigation that occurs when they favor one group of students over another in disciplinary proceedings. But, Title IX plaintiffs encountering the “double bind” argument should point to *Neal* which: (a) found the “double bind” proposition conflicted with the Supreme Court’s *Davis* decision and the Second

¹⁴⁹ *Id.*

¹⁵⁰ See generally, *Mallory v. Ohio Univ.*, 76 F. App’x. 634 (6th Cir. 2003).

¹⁵¹ *Id.*, 638 (citing *Yusef*, 35 F.3d 709, 714-15 (2nd Cir. 1994)).

¹⁵² *Yusef*, 35 F.3d 715.

¹⁵³ *Id.*, 716.

¹⁵⁴ *College of Wooster*, 2017 WL 1038982, *5 fn.4 (quoting *Austin v. Univ. of Oregon*, 205 F.Supp.3d 1214, 1227 (D. Or. 2016)).

¹⁵⁵ *Austin v. Univ. of Oregon*, 205 F.Supp.3d 1214, 1227 (D. Or. 2016).

Circuit's *Columbia* and *Yusuf* decisions; (b) determined *Austin*'s "double bind" comment was dicta; and (c) found *Wooster* failed to appreciate the dicta nature of *Austin*'s "double bind" comment.¹⁵⁶

Additionally, Title IX plaintiffs should expect universities to continue to rely on decisions such as *Univ. of Mass.* which likely engaged in the impermissible *McDonnell Douglas* burden shifting calculation rejected by the Second Circuit's *Columbia* decision.¹⁵⁷ For, *Univ. of Mass.* dismissed a plaintiff's Title IX claim after citing the now reversed district court's decision in *Columbia*.¹⁵⁸ A similar error likely occurred in *Doe v. Univ. of Cincinnati* where a district court granted a motion to dismiss after finding gender neutral explanations excused the fact that more males than females were disciplined for sexual misconduct.¹⁵⁹

Consequently, Title IX plaintiffs should be prepared to explain why the Second Circuit's *Columbia* decision and *Brown* prove *Univ. of Cinn.* and *Univ. of Mass* reached incorrect results. In doing so, plaintiffs should emphasize the decision in *Waters*, where the court rejected a university's motion to dismiss a Title IX claim, notwithstanding the plaintiff's inability to establish the university's alleged non-discriminatory rationale for termination was "pretextual."¹⁶⁰ Specifically, *Waters* noted the burden shifting arguments in *McDonnell Douglas* are:

"an evidentiary standard, *not a pleading requirement.*' . . . [t]he Supreme Court 'has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. . . . the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases' . . . Instead, a complaint must contain only a short and plain statement of the claim showing that the pleading is entitled to relief."¹⁶¹

Stated another way, a plaintiff should articulate how courts must reject arguments at the motion to dismiss stage that *McDonnell Douglas* burden shifting requirements apply.

However, the summary judgment decision in *Waters* sheds light on the sorts of "pretext" challenges male Title IX plaintiffs will face once *McDonnell Douglas* comes into play. *Waters* identified OSU's legitimate non-discriminatory rationale for terminating the plaintiff/band directors as: plaintiff's "fail[ure] in leadership and destroy[ing] any sense of trust that could have

¹⁵⁶ *Neal*, 2017 WL 633045, *15 (discussing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999)).

¹⁵⁷ *Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 U.S. Dist. LEXIS 91995, at *27 (D. Ma. July 14, 2015).

¹⁵⁸ *Id.*, at *27.

¹⁵⁹ *Univ. of Cinn.*, 20116 WL 1161935, *47 (citing Loree Cook-Daniels, *Female Perpetrators and Male Victims of Sexual Assault: Why They Are So Invisible* (2011) for the following proposition: "male sexual assault victims are far less likely than female sexual assault victims to report the crime against them."); *Id.*, *29, 44 (containing district judge's alternative explanations for plaintiff's gender-bias evidence).

¹⁶⁰ *Waters v. Drake*, 105 F. Supp. 3d 780, 803, (S.D. Ohio, Apr. 24, 2015).

¹⁶¹ *Id.*, p.804 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002)(emphasis in original)).

made his failings correctable.”¹⁶² As result, the burden shifted to the plaintiff to establish this rationale was a “pretext” by showing the proffered reason: “(1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to warrant the adverse action.”¹⁶³

In an attempt to establish pretext under the insufficiency prong, the plaintiff/band director argued he was disciplined more severely than a female cheerleading coach.¹⁶⁴ *Waters* rejected this argument because the “record establishes beyond genuine dispute that [plaintiff] engaged in more serious conduct than” the female cheerleading coach.¹⁶⁵ Next, plaintiff argued pretext existed because the university replaced him with his associate band director even though this associate band director was equally tainted with knowledge of the “band’s sexualized culture.”¹⁶⁶ *Waters* dismissed this argument because plaintiff – and not the associate band director – had the “authority and responsibility” to correct the sexualized culture and plaintiff’s failure to do so caused his termination.¹⁶⁷

In an attempt to establish OSU’s proffered rationale did not actually motivate plaintiff’s termination, the plaintiff maintained “the actual motivation for his termination was Ohio State’s desire to appease” OCR.¹⁶⁸ In rejecting this argument, *Waters* relied heavily on deposition testimony of university employees.¹⁶⁹ *Waters’* heavy reliance on the depositions of OSU

¹⁶² *Waters*, 2016 WL 4264350, *14.

¹⁶³ *Id.*, (quoting *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir. 2009)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*, *15.

¹⁶⁹ *Id.*, (stating: “Plaintiff’s theory is not supported by the record. [OSU’s Assistant Vice President of Compliance and Investigations, Christopher Glaros] testified that no one at OCR said or did anything to influence how [OSU] conducted the investigation or what conclusions it reached. (Glaros Dep. at 245-46, 248). That is, OCR did not provide any advice on how [OSU] should conduct the *Waters* investigation, nor did it suggest what action [OSU] should take against him. (*Id.* at 246, 250). OCR did not threaten to fine [OSU] or take away funding or otherwise go easier on [OSU] if it terminated *Waters* or male employees. (*Id.* at 249-50). Further, no one at . . . [OSU] exhibited any concerns about how OCR might react to the *Waters* investigation or its resolution. (*Id.* at 247; Tobias Dep. at 90-91). Moreover, this theory offers no support to plaintiff as to the ultimate issue in this case – whether [OSU] terminated *Waters* because he is a man. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) (‘The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.’); *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012). Even if the real reason that [OSU] terminated *Waters* was to appease OCR, there is no evidence to support an inference that a discriminatory animus against men motivated the alleged effort to scapegoat *Waters*. Drake testified that gender played no role in his decision to terminate *Waters*. (Drake Dep. at 115-17, 284). Glaros testified that he does not have an animus against men and that the *Waters* investigation was not handled any differently because of *Waters’* gender. (Glaros Dep. at 243-44). And no one at OCR communicated or conveyed to [OSU] that it had an animus against *Waters* or against men. (*Id.* at 250-51). *Waters* makes much of [OSU’s] decision to wait until after-the-fact to inform OCR of the investigation and his termination. He contends that [OSU] did this so it could control the narrative of the situation and that it

employees should serve as a guide for future Title IX plaintiffs. Specifically, whenever possible, plaintiffs should seek to establish pretext via subpoenas and discovery requests for documents that undermine defendant universities' attempts to portray their institutions as gender neutral. This evidence may include interactions between defendant universities and OCR which support an inference that discriminatory animus against men at the university motivated the discipline underlying their Title IX claims. Regarding this issue, plaintiffs can look to *Waters* which "ordered [OSU] to produce over 800 pages of draft or 'redline' versions of the Investigation Report . . . [which showed] many changes that were made prior to the final Investigation Report."¹⁷⁰

(B)(6) Responding to universities' "similarly situated" and "different decision maker" arguments

In summary judgment motions, male Title IX plaintiffs should expect arguments alleging: (a) they failed to identify similarly situated female comparators, and/or (b) that their harsh disciplinary sanctions are not actionable because the adjudicators imposing these sanctions were not involved in the university's imposition of lesser sanctions on comparable female students. This argument was successfully made in *Waters* where the terminated plaintiff attempted to establish gender-bias by showing a female coach was initially disciplined less severely when she mishandled issues related to Title IX.¹⁷¹ *Waters* rejected this argument in part because:

1. The plaintiff and the female coach "did not engage in the same or substantially similar conduct;"¹⁷²
2. The plaintiff and female coach were employed in different departments and received discipline from different supervisors;¹⁷³

did so successfully, as evidenced by OCR simply accepting [OSU's] findings and recommendations without further scrutiny. Again, this contention in no way suggests gender-based animus. The example of the purported comparator, [a female cheerleading coach named Buchman], is telling. When Buchman became the subject of a complaint and was terminated after an investigation found that she had continued to associate with [other terminated OSU employees] after she became aware that they had engaged in misconduct, [OSU] did not inform OCR of the matter until after-the-fact. In other words, [OSU] took the same approach of informing OCR of the terminated female employee as it did of the terminated male employee.")

¹⁷⁰ *Id.*, *16.

¹⁷¹ *Id.*, *5-7.

¹⁷² *Id.*, *13 (noting "In order for the conduct of a comparable employee and the Title VII plaintiff to be considered the 'same conduct,' it must be similar in kind and severity.")(quoting *Barry v. Noble Metal Processing, Inc.*, 276 F. App'x 477, 483 (6th Cir. 2008)).

¹⁷³ *Id.*, *11 ("Different employment decisions, concerning different employees, made by different supervisors, are seldom sufficiently comparable to establish a prima facie case of discrimination for the simple reason that different supervisors may exercise their discretion differently")(quoting *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000)).

3. The supervisor who disciplined the plaintiff/band director was not aware of the university's interactions with the female coach when the supervisor terminated the plaintiff;¹⁷⁴ and
4. The university's termination of the plaintiff involved different criteria, standards and policies than those applied in evaluating the allegations against the female coach.¹⁷⁵

In most Title IX cases involving male students, plaintiffs should be able to distinguish their disciplinary proceedings from *Waters*. This is because student Title IX disciplinary proceedings generally involve the same criteria, standards, and policies. Moreover, student disciplinary proceedings generally involve the same university employees and allegations of sexual misconduct.

Male Title IX plaintiffs should also expect defendant universities to argue a student's internal appeals void any gender-bias occurring prior to the appeal. Specifically, universities will likely allege plaintiffs cannot establish pretext because they cannot prove the person(s) who adjudicated their appeals possessed anti-male bias. In these situations, Title IX plaintiffs may establish pretext via a Title VII concept known as the "cat's paw." This strategy was unsuccessfully employed by the Title IX plaintiff in *Waters*.¹⁷⁶ *Waters* described the "cat's paw theory" as a Title VII liability theory which arises when "one who uses another to accomplish his improper purposes."¹⁷⁷ *Waters* explained the cat's paw theory unfolds in Title VII cases as follows:

"When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias . . . the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability.' A plaintiff proceeding under a cat's paw theory must show: (1) [the non-decisionmaking individual was] motivated by discriminatory animus; (2) who intended to cause an adverse employment action; and (3) proximately caused the adverse employment action."¹⁷⁸

¹⁷⁴ *Id.*, *12 (noting plaintiffs and comparators, who work in different departments for different supervisors, could still be similarly situated "if plaintiff could establish that his supervisor was 'well-aware of the discipline meted out to past violators' by the employer")(quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480 (6th Cir. 2003)).

¹⁷⁵ *Id.*, (stating a "managerial employee and non-managerial employee could be similarly situated if a uniform company policy applied the same to both"(citing *White v. Duke Energy-Kentucky, Inc.*, 603 F. App'x 442, 448 (6th Cir. 2015)).

¹⁷⁶ *Id.*, *15-16.

¹⁷⁷ *Id.*, *15 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011)).

¹⁷⁸ *Id.*, (internal citations omitted). It should also be noted, a cat's paw type analysis occurred the Sixth Circuit's recent *Cummins* decision where the court suggested a public university can escape due process liability if a biased investigator was not on the plaintiff's disciplinary hearing panel. See generally, *John Doe 1 v. Cummins*, No. 16-3334, 2016 WL 7093996, *11 (6th Cir. Dec. 6, 2016)(stating: "any claim regarding the allegedly biased investigative report is weakened by the fact that [the investigator] did not

OSU argued the cat's paw theory "should not be allowed in Title IX cases" because "vicarious liability is not available" under "Title IX, [which] unlike Title VII, does not include the actions of an 'agent' in defining the scope of liability."¹⁷⁹ Plaintiff countered by arguing OSU's "distinction regarding agency law makes sense only for harassment claims . . . and not for claims based on an adverse disciplinary action by the educational institution."¹⁸⁰ In the end, *Waters* "decline[d] to address the issue" in part because "the record is devoid of any evidence to support an inference that" OSU's non-decisionmaker investigators were "motivated" by "gender animus against men."¹⁸¹ This was partly because the non-decisionmaker investigators "cleared" plaintiff of a Title IX complaint that alleged plaintiff "retaliated against a female student for having reported a rape."¹⁸²

In an attempt to circumvent these facts, the plaintiff in *Waters* alleged the non-decisionmaker investigators conducted an "inept investigation" that applied "faulty methodology."¹⁸³ *Waters* rejected this argument by stating plaintiff's:

"critique of the Investigation Report does not in any way show a gender-based animus on the part of [the non-decisionmaker investigators]. [Plaintiff] has not demonstrated that the investigation was such a sham that one could conclude that it was pretext for discriminatory animus."¹⁸⁴

Although *Waters* did not rule on whether the cat's paw applied in Title IX cases, plaintiffs should engage in discovery designed to support cat's paw arguments which show how: (a) non-decisionmakers' gender-bias contaminated plaintiffs' disciplinary proceeding; and (b) the ultimate decisionmaker(s) did not engage an independent investigation sufficient to break the causal chain of bias created by non-decisionmakers.

(B)(7) Addressing universities' "same actor" arguments

When male university employees render disciplinary sanctions against male Title IX plaintiffs, universities may attempt to use "same actor" arguments to dismiss Title IX claims. The "same actor" doctrine is a Title VII concept sometimes used to dismiss sex discrimination claims

ultimately serve on the [Hearing] panels that adjudicated appellants' culpability. Instead, appellants' responsibility was adjudicated by an independent panel that considered all of the evidence allegedly left out of [the investigator's] investigative report.").

¹⁷⁹ *Id.*, *16 (discussing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) which found "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.").

¹⁸⁰ *Id.*, (citing David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 Wake Forest L. Rev. 311 (2004) for the proposition that "agency principles should be applied to determine institutional liability in non-harassment Title IX cases").

¹⁸¹ *Id.*

¹⁸² *Id.*, (citing *Voltz v. Erie Cty.*, 617 F. App'x 417, 425 (6th Cir. 2015) which held "a cat's paw theory failed where the purported influencer had drafted a report exonerating the plaintiff of wrongdoing.").

¹⁸³ *Id.*

¹⁸⁴ *Id.*

if the defendant's employee - who engaged in an adverse employment action - is the same gender as the plaintiff/employee. Title IX plaintiffs should understand how these arguments work since some federal circuit courts dismiss discrimination claims when decisionmakers implementing adverse employment actions belong to the same protected group as the plaintiff.¹⁸⁵ Such courts proceed under this rationale despite the Supreme Court's *Oncale* decision finding that:

“[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”¹⁸⁶

This may be why, the Third, Sixth, and Seventh Circuits, often reject “same actor” arguments. For instance, the Third Circuit emphasized triers of fact, not courts, should decide whether an exculpatory inference should be drawn from the fact that a plaintiff and decisionmaker were members of the same protected group.¹⁸⁷ The Sixth Circuit held that it was reversible error for a district court to draw an exculpatory inference from the fact that the decisionmaker in an ADEA case was older than the plaintiff.¹⁸⁸ And, the Seventh Circuit has repeatedly rejected “same actor” arguments.¹⁸⁹ Numerous law review articles address the split between circuit courts’

¹⁸⁵ See e.g., *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996)(granting summary judgment in an ADEA case in part because the plaintiff “was hired at the age of 54, by the then 56 year old” decision maker while noting: “[t]he fact that the actor involved in [the] employment decision[] is also a member of the protected class ... enhances the inference [that there was no discrimination]. By expressing our approval of this inference, we do not rule out the possibility that an individual could prove a case of discrimination in a similar situation. We hold only that the facts in this particular case are not sufficiently egregious to overcome the inference that CSC Logic’s stated reason for discharging Davis was not pretext for age discrimination. Because Davis has failed to meet his evidentiary burden on the issue of pretext, his case must be dismissed.”); *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir.), *cert. denied*, 534 U.S. 951 (2001)(holding summary judgment in an ADEA case was warranted in part because plaintiff’s “supervisors at the time were also members of the protected class.”)

¹⁸⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, (1998) (internal quotation marks omitted).

¹⁸⁷ *Hankins v. City of Phila.*, 189 F.3d 353, 366 (3d Cir. 1999)(noting that while “[t]he District Court ... found it “virtually inconceivable that [Dr. Ross] [the plaintiff’s black supervisor] would intentionally discriminate against plaintiff because he is black.” ... [w]e concede that th[is] argument [is a] valid one for the City to raise in attempting to convince the trier of fact that plaintiff was not the victim of intentional discrimination.... [but] [w]e find especially troublesome the District Court’s implication that because Dr. Ross is black, he would not have intentionally discriminated against another African-American. The Supreme Court has long counseled against such reasoning.”).

¹⁸⁸ *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003) (en banc).

¹⁸⁹ See e.g., *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361 (7th Cir. 2001) (explaining the Seventh Circuit’s “emphatic” rejection in a prior case of the idea that one member of a protected class is unlikely to discriminate against another member of the same protected class in race-discrimination cases “applies with equal force to proof of age discrimination”); *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 530 (7th Cir. 2003)(rejecting defendant’s argument that there should be a presumption of nondiscrimination where an African-American supervisor is the person who fired an African-American employee because: “[i]t is wrong; no such presumption exists, nor should one be created. To the contrary, the Supreme Court has explicitly rejected exactly this idea: ‘Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.’”)(quoting *Castaneda v. Partida*, 430 U.S. 482, 299 (1976)); *Baker v. Macon Resources, Inc.*, 750 F.3d 674 (7th Cir. 2014)(finding triers of fact, not

handling of “same actor” argument.¹⁹⁰ Consequently, Title IX plaintiffs should consult law review articles and relevant circuit court decisions during the discovery phase and/or in motions to dismiss where universities raise “same actor” arguments.

(B)(8) Addressing universities’ “honest belief” arguments

Title IX plaintiffs may encounter university defendants asserting “honest belief” defenses which are frequently used by employers in Title VII cases. This defense stems from the Supreme Court’s *Burdine* decision which states plaintiffs satisfy their pretext burden by either: “directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”¹⁹¹ In the Title IX context, a university would allege its rationale for disciplining a male plaintiff was worthy of credence even if it was wrong because it was based on an honest mistake that did not involve gender-bias.

Courts’ acceptance of Title VII “honest belief” arguments in motions for summary judgment vary depending on the federal circuit in which a plaintiff files suit.¹⁹² The Sixth Circuit’s

courts should determine what inference if any should be drawn from the age of a decisionmaker in part because of the Supreme Court noted “it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”)(quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998)).

¹⁹⁰ See e.g., Natasha Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 358 (2010); Natasha Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 Conn. L. Rev. 1117, 1117 (2008); Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 Va. L. Rev. 1533, 1535 (2007); Jennifer Taylor, *The “Same Actor Inference:” A Mechanism for Employment Discrimination?*, 101 W. Va. L. Rev. 565, 581-82 (1999); Anna Bryant, *Using The Same Actor “Inference” in Employment Discrimination Cases*, 1999 Utah L. Rev. 255, 256 (1999).

¹⁹¹ *Tex. Dept. of Cmty Affairs v. Burdine*, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)(emphasis added).

¹⁹² See e.g., *Kariotis v. Navistar Int’l Trans. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)(granting summary judgment to employer who provided an honest reason for firing the plaintiff/employee, as long as “the company honestly believed in those reasons [for the termination] . . . even if the reasons are foolish or trivial or baseless.”); *Plotke v. White*, 405 F.3d 1092, 1104 (10th Cir. 2005)(finding “credibility determination is appropriately made only by the fact finder” in determining the timing and reasoning for terminating plaintiff was “unworthy of credence” because a reasonable jury could infer defendant’s decision was covering up a discriminatory purpose). *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) (“The law is clear that, even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any *prima facie* case of disparate treatment by showing that it honestly believed the employee committed the violation.”); *Parker v. Verizon, Inc.*, 309 Fed. Appx. 551, 563 (3rd Cir. 2009) (stating an “employer who discharges employee based on reasonable and honest belief that employee has been dishonest would not be in violation of the FMLA even if its conclusion is mistaken.... [r]egardless of [plaintiffs] denial that he actually misrepresented his health condition, [defendant employer’s] honest suspicion that [plaintiff] misused his leave prevents it from being found liable for violating the FMLA.”); *Deines v. Tex. Dep’t of Protective & Reg. Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) (“In Title VII cases, ‘we do not try in court the validity of [an employer’s] good faith belief as to [one] employee’s competence [in comparison to another.]’”)(internal citations omitted);

sometimes grant summary judgment motions even if employers' adverse employment actions are "mistaken, foolish, trivial, or baseless" as long as employers have an "honest belief" for taking the adverse action.¹⁹³ An "employer's proffered reason is considered honestly held if the employer can establish it reasonably reli[ed] on particularized facts that were before it at the time the decision was made."¹⁹⁴ To rebut the assertion, a Title VII plaintiff may: (a) present evidence of "an error on the part of the employer that is too obvious to be unintentional,"¹⁹⁵ or (b) show "more than a dispute over facts upon which the [adverse employment decision] was based."¹⁹⁶

There do not appear to be any judicial opinions evaluating "honest belief" defenses in Title IX cases, but courts sometimes give "deference" to university decisions in granting universities' motions for summary judgment in complaints filed by falsely accused students.¹⁹⁷ This fact

Fercello v. County of Ramsey, 612 F.3d 1069, 1082 (8th Cir. 2010) ("[T]he essential question is not whether [the plaintiff] was actually unqualified for the position; it is whether the School District *honestly believed* that she was unqualified."); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("Rather, courts 'only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.'"); *Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Once the employer has articulated a nondiscriminatory explanation for its action, as did the District here, the issue is not 'the correctness or desirability of [the] reasons offered ... [but] whether the employer honestly believes in the reasons it offers.'")(internal citations omitted).

¹⁹³ *Seeger v. Cincinnati Bell Tele. Co., LLC*, 681 F.3d 274, 286 (6th Cir. 2012).

¹⁹⁴ *Id.*, 285.

¹⁹⁵ *Id.* See also, *Smith v. Chrysler Corp.*, 155 F.3d 799, 807-08 (6th Cir. 1998). But see, *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)(finding the honest belief rule applies in the event a plaintiff alleges defendant's proffered reason has no basis in fact or is insufficient to warrant the conduct, but does not apply where a plaintiff is asserting that the defendant's reason did not actually motivate the conduct).

¹⁹⁶ *Braithwaite v. Timken Co.*, 258 F.3d 488, 493-94 (6th Cir. 2001). But, it should be noted, Sixth Circuit decisions often contain dissenting opinions regarding the majority's decision to reject plaintiff's arguments and dismiss Title VII complaints. See e.g., *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 596-597 (6th Cir. 2014) (Clay, J., dissenting and noting disagreement in application of honest belief rule); *Lynch v. ITT Educ. Servs.*, 571 Fed. Appx. 440, 458 (6th Cir. Jul. 8, 2014) (quoting *Anderson*, 477 U.S. at 255) (Daughtrey, J., dissenting) ("This circuit has developed an unfortunate practice of resolving the overwhelming majority of civil rights cases that come before it by routinely affirming summary judgment granted to defendants by the district courts, thereby depriving arguably meritorious plaintiffs of their day in court. It is time we adopted a more respectful approach, one that recognizes that employment actions are inherently fact-based. In so doing, we would honor the admonition of the Supreme Court that 'credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'")(internal citation omitted).

¹⁹⁷ *Doe v. Trustees of Boston Coll.*, 2016 WL 579297, *18 (noting defendant Boston college "moves for summary judgment on the ground that ample evidence existed to support the outcome of the proceeding. The Court need only find that there was enough 'evidence, which, if believed, could have supported the board's decision.' *Schaer*, 432 Mass. at 479 n.9. Simply because conflicting evidence exists does not mean that the burden of proof was not met. *Id.* That this Court or a jury may have come to a different outcome than the hearing board is not the determinative test. See *Walker*, 82 F. Supp. 3d at 531-32 (stating '[i]t is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject') (quoting *Schaer*, 432 Mass. at 481); *Havlik*, 509 F.3d at 35; *Morris*, 2004 WL 369106, at *2 (2004) (stating, when evaluating a breach of contract claim, '[g]reat deference is

notwithstanding, the Third Circuit noted: “academic institutions . . . are not *ipso facto* entitled to special treatment under federal laws prohibiting discrimination.”¹⁹⁸ Therefore, Title IX plaintiffs should utilize the discovery process to rebut “honest belief” and “deference” arguments defendant universities may raise in motions for summary judgment.

(C) Intoxication v. incapacitation

Disputes about whether a female accuser’s alcohol intake rendered her incapable of consenting to sexual contact are common in Title IX lawsuits filed by male plaintiffs.¹⁹⁹ For instance, some complaints allege universities discipline male students after erroneously determining a female student was incapable of consenting to sexual activity due to incapacitation.²⁰⁰ Other times, complainants detail how universities: (a) failed to discipline female students who initiated sexual contact with the male plaintiff while he was incapacitated, while (b) simultaneously disciplining the plaintiff who engaged in these sexual contacts.²⁰¹

In advancing these claims, some plaintiffs reference organizations that train colleges on how to implement Title IX policies.²⁰² One of these groups is the Association of Title IX Administrators (“ATIXA”) which published a “Tip of the Week” that addressed how universities should adjudicate sexual misconduct allegations involving alcohol.²⁰³ This “Tip” explained how five colleges “got it completely wrong” in finding male students responsible for “hook-ups” when

extended to university decision-making on academic and disciplinary matters’). Instead, the issue is whether there was sufficient evidence to support the board’s decision, that it was more likely than not, that Doe committed the indecent assault and battery for which the board found him responsible.”)(internal cites to evidence in the record omitted).

¹⁹⁸ See e.g., *Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3rd Cir. 1980). See also, *Elghanmi v. Franklin Coll. of Ind., Inc.*, 2000 U.S. Dist. Lexis 16667, *23 (S.D. Ind., Indianapolis Div. Oct. 2, 2000)(finding, “Congress did not intend that institutions of higher learning enjoy immunity from the Nation’s anti-discrimination statutes.”)(citing *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979)); *Schneider v. Northwestern*, 925 F. Supp. 1347, 1368 (N.D. Ill. 1996)(observing “courts will not subject institutions to a more deferential standard of review or a lesser obligation to repair the adverse effects of discrimination”)(quoting William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* § 3.3.2.1 at 214-15 (Jossey-Bass, 3d ed. 1995).

¹⁹⁹ See e.g., *See e.g., Handouts 2, 10-12* (containing Title IX complaints filed by Eric Rosenberg’s clients against Columbia College Chicago, Indiana University, Denison University, and Occidental College).

²⁰⁰ *Id.*

²⁰¹ *Handout 13* (containing Title IX complaints filed by Eric Rosenberg’s clients against Miami University of Ohio).

²⁰² See e.g., *Handouts 2, 11 and 13* (containing Title IX complaints filed by Eric Rosenberg’s clients against Columbia College Chicago, Denison University and Miami University of Ohio which reference ATIXA).

²⁰³ *Id.*, (containing discussions of ATIXA’s “Tip of the Week”).

alcohol was involved.²⁰⁴ ATIXA expressed concerns that these colleges were manufacturing male “Title IX Plaintiffs” by imposing erroneous discipline.²⁰⁵ ATIXA also noted:

“A common policy problem comes from failing to distinguish between intoxicated and incapacitated. Yet, the most serious issue comes from failing to implement a *mens rea*, if you will, within the definition. Certainly, criminal concepts like mens rea are not strictly applicable to the campus conduct process, but if we agree as I stated above that having sex with a willing, yet intoxicated person is not an offense, there must be something that the respondent does, beyond having sex, that makes a lawful act (sex) into a policy violation . . . there has to be something more than an intent to have sex to make this an offense. Otherwise, men are simply being punished for having sex, which is gender discrimination under Title IX, because their partners are having sex too and are not being subject to the code of conduct for doing so. Without a knowledge standard, a respondent will suffer an arbitrary and capricious application of the college’s rules.”²⁰⁶

Nevertheless, Vassar relied on the Federal Rules of Evidence to reject “credibility” challenges to testimony regarding an accuser’s level of intoxication during her sexual encounter with plaintiff.²⁰⁷ In doing so, however, Vassar left the door open for future plaintiffs by noting the plaintiff’s Title IX claim failed because he could not show gender-bias motivated the adjudicators’ acceptance of testimony that his accuser was incapacitated rather than just intoxicated.²⁰⁸

On the other hand, Vassar rejected plaintiff’s argument that Vassar violated his rights by failing to recognize plaintiff’s “own intoxication was ‘relevant to whether he knew or should have known [his accuser] was incapacitated since his own judgment was clouded that evening.’”²⁰⁹ In

²⁰⁴ See e.g., *Handouts 7 and 8* (containing Title IX complaints filed by Eric Rosenberg’s clients against Denison University and Miami University of Ohio which reference ATIXA).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *54-55 (“In a judicial proceeding under the Federal Rules of Evidence, ‘[t]here is near universal agreement that lay opinion testimony about whether someone was intoxicated is admissible’ *United States v. Horn*, 185 F. Supp. 2d 530, 560 (D, Md. 2002). The Federal Rules do not require a specific definitional breakdown of the components of intoxication, nor past familiarity with an individual’s drunken habits, but merely a direct statement, ‘assuming adequate observation and common experience,’ that the person ‘seemed drunk’ *Id.* (the witness is ‘not confined to descriptions of glazed eyes, problems in speech or motor coordination, changes in behavior or mood or affect, but may say directly . . . that the person seemed drunk or under the influence’ (quoting *Mueller and Kirkpatrick*, Evidence § 7.4 (4th ed. 1995)). [Plaintiff] gives no reason why a school disciplinary proceeding would be held to a higher evidentiary standard than a federal court proceeding, nor why the only witnesses competent to testify as to drunkenness are those who are familiar with a particular person’s drunkenness, or why commonplace testimony as to intoxication could not be accepted as credible but for gender-bias.”).

²⁰⁸ *Id.*, *56.

²⁰⁹ *Id.*, *80.

support of this argument, the plaintiff presented the following email exchange involving Vassar's President as evidence that a gender-biased "double standard" existed:

Vassar President: "It is very scary, though. Two drunk kids, both out of it. Is it always the male at risk?"

Vassar Title IX employee: "She was drunk. He wasn't according to the panel."²¹⁰

In evaluating this email exchange, *Vassar* determined neither the president's "questions" about "whether male students are more likely than female students to be the accused in sexual misconduct cases," nor the Title IX employee's response suggested "any sort of intentional gender-bias."²¹¹ This was partly because Vassar's policies did not allow the college to consider the plaintiff's subjective belief regarding his intoxication level. Instead, Vassar's policies required plaintiff's conduct be evaluated through the eyes of what a "reasonable person in the position of the accused should have known" regarding whether "the complainant was incapacitated."²¹²

Title IX plaintiffs sometimes address their universities' double standard regarding alcohol in complaints that detail how universities fail to investigate and discipline female students who initiated sexual contact with plaintiffs when they are impaired by alcohol.²¹³ At the university level, these plaintiffs sometimes disprove their accusers' allegations of incapacitation by submitting toxicologist expert reports, polygraph reports, and/or witness testimony during their university disciplinary proceedings.²¹⁴ If universities attempt to prohibit the introduction of this type of evidence during university level proceedings, students should direct universities to OCR guidelines which suggest expert testimony from toxicologists and polygraph examiners should be allowed.²¹⁵ If all else fails, falsely accused students should proffer their evidence into the

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*, p.80-81.

²¹³ See e.g., *Handouts 10, 12-13* (containing Title IX complaints filed by Eric Rosenberg's clients against Miami University of Ohio, Occidental College, and Indiana University).

²¹⁴ See e.g., *Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

²¹⁵ OCR's 2014 *Questions and Answers On Title IX and Sexual Violence*, p. 25 ("[w]hen investigating an incident of alleged sexual violence for Title IX purposes, to the extent possible, a school should coordinate with any other ongoing school or criminal investigations of the incident and establish appropriate fact-finding roles for each investigator . . . If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a *forensic expert* to ensure that the evidence is correctly interpreted by school officials" (emphasis added). *Id.*, p. 26 "If the school permits one party to submit third-party *expert testimony*, it must do so equally for both parties." (emphasis added). Available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>). However, one district court determined the "right to present live expert-witness testimony is not a clearly established due process right in the student disciplinary context." *Doe v. The Ohio State Univ.*, Case No. 2:15-cv-2830 2016 WL 6581843, *11 (S.D. Ohio Nov. 7, 2016). *Id.*, (finding the "fiscal and administrative burden on a university would be significant if it had to retain experts, present live expert testimony at student disciplinary hearings, and prepare a cross-examination of the other side's expert witness. In short,

university record and create a paper trail detailing the universities' exclusion of the evidence and the prejudice resulting from the exclusion.²¹⁶

(D) Universities': (i) ignoring exculpatory evidence, (ii) withholding exculpatory evidence; and/or (iii) biased dispensations of accommodations to students involved in Title IX disciplinary proceedings

Title IX lawsuits will often highlight how universities turn a blind eye to evidence proving a female student consented to sexual contact.²¹⁷ However, *absent a showing of gender-bias*, *Vassar* refused to find a disciplinary proceeding flawed even though the plaintiff's accuser authored the following three Facebook posts which undermined her allegation that plaintiff sexually assaulted her:

1. "I'm really sorry I led you on last night;"
2. "I had a wonderful time last night I'm just too close to my previous relationship to be in one right now;" and
3. "I will stand up for you because you were not [hurting anyone]."²¹⁸

As a result, Title IX plaintiffs' complaints and/or discovery should focus on identifying instances where a university's anti-male gender-bias motivated the university's decision to ignore exculpatory evidence.

Male falsely accused students also frequently encounter universities that secretly provide academic and other accommodations to female students who allege sexually assaults.²¹⁹ This issue was successfully raised in *Doe v. The Ohio State University*.²²⁰ In that case, a district court rejected a motion to dismiss a due process claim because OSU withheld exculpatory evidence related to "accommodations" that OSU provided plaintiff's female accuser in a sexual misconduct

the *Mathews* test tilts away from requiring this procedure, even in this case where there was only one expert witness offered.")(citing *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976)).

²¹⁶ See e.g., *Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

²¹⁷ See e.g., *Handouts 1-2, 12* (containing Title IX complaints filed by Eric Rosenberg's client against University of Chicago, Columbia College Chicago, and Occidental College).

²¹⁸ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *70, 69-77.

²¹⁹ See e.g., *Handout 2* (containing Eric Rosenberg's clients' Title IX complaint filed against Columbia College Chicago).

²²⁰ *Doe v. The Ohio State Univ.*, Case No. 2:15-cv-2830 2016 WL 6581843, *11-12 (S.D. Ohio Nov. 7, 2016).

case.²²¹ This was because the plaintiff alleged he could have relied on these “accommodations” to impeach his accuser’s credibility during his disciplinary hearing.²²²

On the other hand, *Vassar* addressed a related issue in rejecting an argument that gender-bias caused Vassar to provide plaintiff’s accuser with assistance not provided to male students accused of sexual misconduct.²²³ *Vassar* rejected this argument because plaintiff “admitted in his deposition that he had never requested such assistance.”²²⁴ Therefore, during university level disciplinary proceedings, male falsely accused students should - when possible - document: (a) their requests for accommodations and/or services; (b) university’s gender-biased rejections of these requests; and/or (c) similarities between accommodations and/or services provided to female students which were requested but denied to the falsely accused.

²²¹ *Id.*

²²² *Id.*, *12 (stating: “[t]he right to some form of cross-examination in university expulsion hearings is a clearly established due process right when cross-examination is ‘essential to due process,’ as in a case that turns on ‘a choice between believing an accuser and an accused.’ See *Flaim*, 418 F.3d at 641 (dicta). Given the facts alleged, it is plausible that Doe’s right to cross examination was effectively denied by the Administrators’ failure to turn over critical impeachment evidence. But the right to mandatory disclosures of any impeachment evidence is not a clearly established constitutional right in the student disciplinary context. Given the flexibility of the Due Process Clause, this situation may call for the disclosure of key impeachment evidence. If the Administrators knew that Jane Roe lied about the timing of her accommodation at the hearing and permitted her testimony to stand un rebutted, that plausibly violated John Doe’s right to a fundamentally fair hearing, regardless of whether the issue is construed as one of cross-examination or disclosure.”)(quoting *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005).

²²³ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *84-86.

²²⁴ *Id.*, *85.

(E) Universities’ policy violations during a sexual misconduct proceedings

Plaintiffs frequently advance Title IX claims that factually overlap with their breach of contract and/or tort claims based on a university’s failure to comply with university policies.²²⁵ Courts often reject attempts to dismiss these claims.²²⁶ For example, *Brandeis* noted a university’s:

“authority to discipline its students is not entirely without limits . . . the university’s disciplinary actions may [] be reviewed by the courts to determine whether it provided ‘basic fairness’ to the student. While that concept is not well-defined, and no doubt varies with the magnitude of the interests at stake, it is nonetheless clear that the university must provide its students with some minimum level of fair play.”²²⁷

Brandeis manifests a court’s willingness to look behind the curtains of university policies to determine if the university’s adjudication of sexual misconduct allegations are implemented with fairness towards the accused. This practice is supported by the First Circuit’s *Cloud* decision which determined school disciplinary hearings must be “conducted with basic fairness.”²²⁸ In this regard, two district court decisions involving Brown University are worth reviewing. The first

²²⁵ See e.g., *Handouts 1-3, 7-13* (containing Title IX complaints filed by Eric Rosenberg’s client against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, Occidental College, and Miami University of Ohio).

²²⁶ See e.g., *Doe v. Brandeis Univ.*, No. 15-11557, 2016 U.S. Dist. Lexis 43499, (D. Mass. Mar. 31, 2016); *Doe v. Middlebury Coll.*, No.1:15-cv-192, 2015 U.S. Dist. Lexis 124540, *11-12 (D. Vt. Sept. 16, 2015)(granting a male student’s motion for preliminary injunction based on breach of contract and/or Title IX because plaintiff “demonstrated sufficiently serious questions . . . [regarding] breached duties . . . [during] instituting and prosecuting [of] investigation. . . .”); *Salisbury*, 2015 U.S. Dist. LEXIS 110772, *23-27 (refusing to dismiss negligence and Title IX claims – pled in the alternative - against a university that violated the rights of male students disciplined for allegedly sexual misconduct); *Univ. of the South*, 2011 U.S. Dist. LEXIS 35166, *47-55 (rejecting a university’s motion for summary judgment to dismiss male student’s contract and quasi-contract claims based on violations of university policies occurring during a sexual misconduct investigation); *Dempsey v. Bucknell Univ.*, No. 4:11-cv-1679, 2012 U.S. Dist. LEXIS 62043, *18-*19 (M.D. Pa. May 3, 2012)(finding valid breach of contract claim when “Defendant Bucknell withheld some relevant information that [a plaintiff’s] attorney requested” when the handbook required “Bucknell . . . provide an accused with a copy of the charges against him, along with supporting information”(emphasis added); *Bleiler v. Coll., of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775, *15 (finding Massachusetts law recognizes that student handbooks and other college materials create a contract between a school and a student). See also, Samantha Harris, *Heritage Found., Campus Judiciaries on Trial: An Update from the Courts* 6 (2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM165.pdf, p.7. But see *Wash. & Lee Univ.*, 2015 WL 4647996, *11 (stating: “[c]ourts applying Virginia law routinely reject the notion that a ‘Student Handbook’ creates a mutuality of engagement where the terms of the handbook are subject to change.”); Harvey A. Silverglate, Josh Gewold, William Creeley, *FIRE’s Guide To Due Process and Campus Justice*, p. 41-47 (discussing contractual obligations of private universities to adhere to university policies), available at <https://www.thefire.org/fireguides/firesguidetodueprocessandcampusjustice/>.

²²⁷ *Brandeis Univ.*, 2016 U.S. Dist. Lexis 43499, *12 (emphasis added).

²²⁸ *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983).

case involved a district court's rejection of Brown University's motion to dismiss the complaint of a male student because he alleged:

1. A violation of university policies in part because of pressure from OCR;²²⁹ and
2. Brown University improperly discounted or excluded exculpatory evidence which caused the artificial inflation of evidence of alleged wrongdoing.²³⁰

The second case involved a plaintiff who prevailed – in a bench trial against Brown University – in a breach of contract claim after the court rejected of his gender-bias arguments.²³¹ In explaining its decision the district court noted:

“ . . . certain procedures Brown employed in conducting Doe's hearing fell outside of a student's reasonable expectations based on the Code of Student Conduct . . . and that these procedural errors likely affected the panel's decision in Doe's case. Accordingly, Doe is entitled a new [university level disciplinary] hearing that remedies these infirmities.”²³²

The plaintiff in *Brown* raised policy violations commonly found in many Title IX complaints. For instance, *Brown* involved the retroactive imposition of definitions of sexual misconduct which did not exist when the plaintiff sexually engaged with his accused. Specifically, at the time of the disciplinary proceeding, the university's Title IX Policy stated “consent” could not be obtained through “coercion.”²³³ But, in 2014-15, when plaintiff sexually interacted with his accuser, the policy required sexual misconduct stem from “force or threat of force.”²³⁴ Nevertheless, the university found plaintiff “responsible” for violating the university's subsequently issued policy and suspended him “until after [his accuser] graduated.”²³⁵ Plaintiff then obtained a temporary restraining order based on the university's retroactive application of policies.²³⁶ *Brown* elaborated on this issue after a bench trial with at least three findings relevant to Title IX claims:

²²⁹ *Doe v. Brown Univ.*, 2016 U.S. Dist. Lexis 21027, *37-38.

²³⁰ *Id.*, *42-43.

²³¹ *Doe v. Brown Univ.*, 2016 WL 5409241, *25.

²³² *Id.*, *2 (emphasis added). *But see, Id.*, (noting: “[t]his is not to say that the Court passes judgment on whether the outcome—that Doe was found responsible—was an error. The Court makes no finding as to Doe's responsibility; that is for the Brown panel to decide if it chooses to represent the matter after correcting the errors cited.”).

²³³ *Doe v. Brown Univ.*, 2016 U.S. Dist. Lexis 21027, *12. It should be noted, other district courts have found retroactive application of university policies can trigger Title IX violations. *See e.g., Doe v. Western New England Univ.*, No. 15-30192-MAP, 2017 WL 113059 (D. Mass. Jan. 11, 2017)(finding a plaintiff “adequately alleged that the proceeding was flawed—and the outcome possibly erroneous—due to the [defendant university's] retroactive application of the Title IX Policy's definition of sexual misconduct); *See also, Salisbury Univ.*, 123 F. Supp. 3d at 766 (quoting *Yusuf*, 35 F.3d at 715).

²³⁴ *Id.*

²³⁵ *Id.*, *13.

²³⁶ *Id.*, *14.

1. “. . . courts interpret the terms of a student handbook ‘in accordance with the parties’ reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them.” [Gorman v. St. Raphael Acad., 853 A.2d 28, 39 (R.I. 2004)] (citing Mangla v. Brown Univ., 135 F.3d 80, 84 (1st Cir. 1998)). Any “[a]mbiguities in a contract must be construed against the drafter of the document,” Haviland v. Simmons, 45 A.3d 1246, 1259–60 (R.I. 2012), which in the case of a student handbook is the university.”²³⁷
2. “Most, if not all, of the issues in this case—including the main issue regarding the definition of consent—stem from this fundamental disconnect. While the new Complaint Process procedures applied, Doe retained his substantive rights under the 2014–15 Code. Some of these rights, such as the right to “[t]o be given every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer” are in tension with the [Brown’s subsequently enacted] Complaint Process, which allows the investigator substantial discretion to determine what information to present to the panel . . . [therefore] for this case and any others remaining under the 2014–15 Code, Brown is contractually required to provide the rights it promised students in the Code.”²³⁸ and;
3. Brown breached the terms of its 2014-15 Code by denying plaintiff the opportunity to present a rebuttal statement during his disciplinary hearing.²³⁹

²³⁷ *Id.*, *16. *But see, id.*, (“However, ‘[b]ecause contracts for private education have unique qualities, we must construe them in a manner that leaves the school administration broad discretion to meet its educational and doctrinal responsibilities.’ *Gorman v. St. Raphael Acad.*, 853 A.2d 28, 34 (R.I. 2004); *see also Schaer v. Brandeis Univ.*, 432 Mass. 474, 735 N.E.2d 373, 381 (2000) (‘[C]ourts are chary about interfering with academic and disciplinary decisions made by private colleges and universities. . . . ‘A college must have broad discretion in determining appropriate sanctions for violations of its policies.’” (quoting *Coveney v. President & Trs. of the Coll. of the Holy Cross*, 388 Mass. 16, 445 N.E.2d 136, 139 (1983)). Therefore, the rules set out in a university’s handbook are ‘enforceable as long as [they are] not against public policy or law.’ *Gorman*, 853 A.2d at 39. A rule ‘violates public policy only if it is: ‘[1] injurious to the interests of the public, [2] interferes with the public welfare or safety, [3] is unconscionable; or [4] tends to injustice or oppression.’ *Id.* (quoting *City of Warwick v. Boeing Corp.*, 472 A.2d 1214, 1218 (R.I. 1984)). Courts may also ‘provid[e] a judicial remedy to members of private voluntary organizations aggrieved by the arbitrary and capricious application of otherwise reasonable rules by the officers of those organizations.’ *King v. Grand Chapter of R.I. Order of E. Star*, 919 A.2d 991, 998 (R.I. 2007)).”

²³⁸ *Id.*, *17. (internal citations omitted)(emphasis added).

²³⁹ *Id.*, *23 (stating: “[t]he 2014–15 Code gives Doe the right to have “every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer.” At the hearing, Doe was required to give his statement before Ann. He asked for the opportunity to give a rebuttal, but that request was denied because the Complaint Process does not provide for rebuttal statements. This is another, perhaps less critical, example of where the rights promised by the 2014–15

Brown is also pertinent to Title IX claims with regard to issues related to a university's training on how to adjudicate sexual misconduct allegations. In *Brown*, this training included sessions taught by "a Sexual Harassment & Assault Resources & Education ('SHARE') advocate [who] presented a training session to Title IX Council members" regarding "[t]he impacts of trauma on sexual assault victims."²⁴⁰ *Brown* explained the university:

"provided this training to comply with guidance documents issued by OCR, which state that decision-makers in Title IX processes should understand the potential impacts of trauma. During [this training the instructor] stated that some reactions of sexual assault survivors might be counterintuitive, for example not being able to recount a consistent set of facts, or 'communicating with someone who has assaulted them or having any kind of interaction with someone who has assaulted them.'"²⁴¹

This victim centered training likely triggered bias against the plaintiff. For, one hearing panel member testified at trial that:

" . . . she did not consider any of [the accusers] post-encounter conduct, including the text messages and the testimony of [a witness for the accuser], as evidence as to whether or not [the accuser] had been sexually assaulted one way or another.' This was, at least in part, based on the SHARE Advocate training about counterintuitive behaviors exhibited by sexual assault survivors. [The hearing panel member] concluded, based on the SHARE presentation, 'that it was beyond [her] degree of expertise to assess [the accuser's] post-encounter conduct ... because of a possibility that it was a response to trauma.'"²⁴²

Code are in conflict with the later adopted Complaint Process. Again, *Brown* has every right to design its process so that each party presents in the order the panel requests, and may deny rebuttal statements. The problem is that, in this case, this process runs up against Doe's right to have "every opportunity to articulate relevant concerns and issues, express salient opinions, and offer evidence before the hearing body or officer." As the Court stated in a previous decision, "*Brown* chose to draft its Code to give students the right to 'every opportunity' to 'articulate relevant concerns' and 'offer evidence'; now it must abide by that decision." *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 195 (D.R.I. 2016). Therefore, for cases adjudicated under the 2014–15 Code, *Brown* must, if requested, allow respondents to give a rebuttal statement at the hearing. That said, while this error, standing alone, would not be enough for Doe to get a new hearing because he has presented no evidence that, if he had been given the opportunity to give a rebuttal, the panel would not have found him responsible; when combined with other errors as set forth herein, it is clear that Doe's contract rights were violated." (internal citations footnotes and evidence presented at bench trial omitted).

²⁴⁰ *Id.*, *6.

²⁴¹ *Id.*, (internal citations omitted).

²⁴² *Id.*, *13 (internal citations and footnote omitted).

Brown found this hearing panel’s testimony “concerning”²⁴³ and suggested the university take steps to correct any bias caused by the victim centered sexual misconduct training.²⁴⁴

A third relevant issue is how Brown University - like many universities across the country – revised its sexual misconduct policies to strip away rights previously afforded the accused. In *Brown*, the university’s previous disciplinary proceeding allowed evidence to be “presented directly to a [university level] hearing panel.”²⁴⁵ These types of proceedings generally involve quasi administrative law settings where accusers and accused present evidence and arguments directly to disciplinary panels. In its place, Brown University’s 2015-16 policy imposed a single investigator (“SI”) model whose role was:

“ . . . to gather ‘information through interviews of the complainant, respondent, and witnesses and synthesize the information in a report.’ ‘The investigator has the discretion to determine the relevance of any witness or other evidence and may exclude information in preparing the investigation report if the information is irrelevant, immaterial, or more prejudicial than informative.’ The Complaint Process dictates that ‘[t]he investigator’s report will include credibility assessments based on their experience with the complainant, respondent, and witnesses, as well as the evidence provided.’ However, it also states that “[t]he investigator will not make a finding or recommend a finding of responsibility.’ The investigator model has become increasingly popular among colleges and universities, particularly ‘peer institutions of Brown.”²⁴⁶

Not only did the SI possess great discretion on how to conduct her investigation, the SI also reported to Brown’s Title IX Officer who both: (a) participated in edits to the SI’s report prior to plaintiff receiving the report; and (b) oversaw the selection of plaintiff’s all female disciplinary hearing panel.²⁴⁷ During plaintiff’s disciplinary hearing, the SI testified about text messages exchanged between plaintiff and his female accuser and maintained the female accusers’ allegations of hesitancy towards engaging in sexual interactions

²⁴³ *Id.*, *24.

²⁴⁴ *Id.*, *25 (stating: “[i]t appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence. Although for the reasons stated, the Court need not decide whether this rises to the level of arbitrary and capricious conduct, it clearly comes close to the line. The Court is not suggesting that Brown is not permitted to give training on the effects of trauma, or that it should provide the same process that occurs in court. However . . . Brown would be wise to consider some sort of explicit instruction to panelists before they deliberate, reminding them that all the evidence in the investigator’s report has been deemed relevant, and they, as fact-finders, are fully capable of, and obligated to, consider it. And moreover, if certain evidence could be considered counter-intuitive such that expertise may be helpful in order for the fact-finder to properly consider it, this could be presented through the investigator, which in turn would give both parties the notice and opportunity to deal with it. In contrast, if no one is making this claim, it might be useful to tell the panel this so that situations like this could be avoided.”).

²⁴⁵ *Id.*, *5.

²⁴⁶ *Id.*, (citations omitted).

²⁴⁷ *Id.*, *6, 9-11.

“appear[d] to be more consistent with the pattern that is in the text messages.”²⁴⁸ In providing this testimony, *Brown* determined the SI violated plaintiff’s contractual rights by “making a recommendation of a finding of responsibility”²⁴⁹ *Brown* also discussed additional deficiencies in SI’s investigation and subsequent report relevant in Title IX cases. For example, *Brown* noted:

The SI’s “commentary on the merits of [plaintiff’s] conspiracy claim [involving collusion between his accuser and her witness] comes, at a minimum, dangerously close to an improper recommendation on responsibility and effectively doubles down on the improper implicit recommendation made by [SI] discussed above. [SI] does not simply say that, based on her interviews, she found [the accuser] credible; she says that there is insufficient evidence for the panel to find that [accuser] fabricated the claim, which of course she must have done if [plaintiff] were to be believed. Second, [SI’s] assessment that there was insufficient evidence to support [plaintiff’s] fabrication claim was particularly problematic given that she had refused to ask for evidence that might have proven it so and been exculpatory to [plaintiff] . . . The problem here was that [SI] made the initial decision to include the conspiracy claim and corresponding character evidence, but then chose not to complete the evidence-gathering and went on to say that there was insufficient evidence to support [Plaintiff’s] fabrication claim. Because of this, her failure to request the text messages between [accuser] and [accuser’s witness] was a violation of Doe’s right ‘[t]o be given every opportunity to ... offer evidence before the hearing body or officer.’”²⁵⁰

As a result, Title IX plaintiffs should draft complaints that highlight how university investigators engaged in the erroneous violations of policies addressed in *Brown*.

On the other hand, plaintiffs should be aware courts sometimes reject breach of contract/Title IX claims involving policies that explicitly manifest a bias against the accused.²⁵¹ For instance, a district court recently granted Boston College’s motion for summary judgment even though it’s “policies identified accusers as ‘victims’ and ‘survivors’ and accused students as ‘perpetrator[s].’”²⁵² In doing so, the district court cited other district court decisions that

²⁴⁸ *Id.*, *12.

²⁴⁹ *Id.*, *20.

²⁵⁰ *Id.*, *22.

²⁵¹ See e.g., *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 481-82, (S.D.N.Y. 2015); *Bleiler v. Coll., of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775, *15 (finding college adequately followed its procedures and therefore did not breach its contract to plaintiff).

²⁵² *Doe v. Trs. of Bos. Coll.*, 2016 WL 579297, *25. *Id.*, (stating in footnote 7 that “Doe contends that *Doe v. Columbia*, No. 15-1536, 2016 WL 4056034 (2d Cir. July 29, 2016), provides support that Doe’s erroneous outcome claim should survive summary judgment. The Court disagrees. The Columbia court largely based its decision to allow the plaintiff’s claim to survive because “minimal support to a plausible inference of sex discrimination [will] survive a Rule 12(b)(6) motion to dismiss.” In this case, however, the parties have reached the summary judgment stage and Doe must demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender-bias. In his summary judgment

determined university policies that “favor[] alleged victims of sexual assault claims [are] not the equivalent of demonstrating bias against male students, even if accused students are generally male.”²⁵³ Moreover, *Boston College*, largely rejected²⁵⁴ plaintiff’s arguments that Boston College violated 13 different provisions of its policies when it found plaintiff responsible for sexual misconduct.²⁵⁵ Then, the court dismissed plaintiff’s Title IX erroneous outcome claim in part

record, Doe provides no evidence to support his Title IX erroneous outcome based upon gender-bias claim.”)(internal citations omitted).

²⁵³ *Id.*, *25 (Citing, *Univ. of Cincinnati*, 2016 WL 1161935, at *14; *King v. DePauw Univ.*, No. 14-cv-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

²⁵⁴ *Id.*, *13 (stating a breach of contract claim could have been made if the plaintiff could have shown: (a) “how his defense would have been different if he had received notice of the lesser included offense of which he was found responsible; and (b) what evidence plaintiff would have proffered or different arguments he would have made if [the college] had provided express prior notice of this lesser included charge.”). The court also left open the possibility of a breach of contract claim based on the college policy that gave plaintiff the right to “adequate time to prepare a response to the charges” under certain circumstances. *Id.*, *13. In advancing this argument, the plaintiff alleged he needed additional time to present “forensic evidence” such as DNA evidence that would have proved his innocence. *Id.* But, the court found the DNA evidence that plaintiff wanted to produce did not explicitly exonerate him. *Id.* The plaintiff made a similar argument regarding a need for extra time to obtain an “enhanced” version of a video that would have established his innocence. *Id.* However, the court found plaintiff did not provide the college any indication of when this video would become available. *Id.* As a result, when falsely accused students need additional time to present forensic evidence, these students should request additional time and inform their universities when that evidence can be obtained.

²⁵⁵ *Id.*, *10-21 (D. Mass. Oct. 4, 1026). It should be noted the plaintiff in *Boston College* appealed the district court’s rejection of plaintiff’s argument that the college breached its policies by not conducting its own investigation independent. Regardless of the outcome of this appeal, a quick review of *Boston College*’s handling of the breach of contract claims is relevant for the Title IX practitioner. For example, *Boston College* addressed a policy provision that stated the college “will probably conduct an [its own] investigation of the alleged incident . . .” *Id.*, *11. The court found this language “does not require” the college to conduct an investigation separate from that conducted by the college’s hearing panel that adjudicated the claims against plaintiff. *Id.* In addition, *Boston College* rejected a breach of contract claim based on the college’s refusal to stay the disciplinary proceeding until after a criminal proceeding had been resolved. *Id.*, *12-13. This was because the college policy stated it “may elect to stay the disciplinary process if a student is summarily suspended and the criminal matter remains open.” *Id.*, *12. The court also dismissed plaintiff’s breach of contract claim based on a policy that limited the role his attorney could play during disciplinary proceeding. *Id.*, *15. It did so because the policy put plaintiff on notice that his lawyer would be limited in such a fashion. *Id.* Similarly, *Boston College* rejected a breach of contract claim based on the college prohibiting plaintiff from calling his private investigator as a witness at the hearing. *Id.*, *15-16. This was because the court construed the college’s policy to limit witness testimony to those who had first-hand knowledge of the incident in question. *Id.* Additionally, the court dismissed plaintiff’s argument that the college violated its policy prohibiting hearing board members who “are not able to be impartial in the hearing of the case.” *Id.*, *16. It did so even though one hearing panel member was affiliated with a group that advocated for women harmed by men in the context of domestic violence. *Id.* Similarly, *Boston College* rejected plaintiff’s argument that his hearing was not impartial because a hearing panel member “acted as a prosecutor and was hostile toward Doe” as evidenced by her cross-examination questions of Doe while “providing ‘softball’ questions to other witnesses.” *Id.* Additionally, the court rejected evidence presented by plaintiff’s expert witness who

because plaintiff provided no “causal relationship between the alleged procedural irregularities in [his disciplinary proceeding] and a pattern of decision-making based upon gender-bias.”²⁵⁶ Finally, the court dismissed plaintiff’s Title IX deliberate indifference claim because he could not establish: (a) gender-bias or (b) that Boston College’s “response or inaction [were] clearly unreasonable given the known circumstances.”²⁵⁷

Only decisions by federal courts of appeals will provide guidance on wildly diverging decisions like *Brown University*, *Brandeis*, and *Boston College*. In the meantime, students facing false allegations of sexual assault should be prepared to detail how their facts: (a) mirror *Brown* and *Brandeis* rather than *Boston College*, and (b) are distinguishable from court decisions that suggest universities can violate university policies without incurring Title IX liability.

(F) Universities’ vaguely written disciplinary policies, ambiguous disciplinary decisions, and poor record keeping that undermine students’ defense

Increasingly, universities attempt to head off lawsuits by enacting vaguely worded policies that eliminate previously afforded rights afforded to students accused of sexual misconduct. These vaguely worded policies allow universities to: (a) issue disciplinary decisions devoid of rationale necessary draft university level appeals, and/or (b) withhold or destroy materials plaintiffs need to support defend themselves against false allegations. But, even though constitutional due process

maintained the college’s Title IX training violated college policy “training” requirements. *Id.*, *17-18. The court also dismissed plaintiff’s claim that the college breached its obligations to create a record of the hearing. *Id.*, *19-20. In doing so, the court relied on a provision of the college’s policy prohibiting parties involved in the hearing from making “any type of” recording of the hearing. *Id.* *19. Likewise, the court rejected a breach of contract argument based on improper interference with the hearing board deliberations by the college’s dean and general counsel. *Id.*, *19. The plaintiff advanced this argument because: (a) the student code required the hearing board to “meet in private to determine whether the accused is responsible or not...”; and (b) the dean’s office communicated to a board member that the dean discouraged any attempt by the hearing panel to issue a “no findings” result. *Id.* The court found the college circumvented plaintiff’s arguments because board members testified they did not recall hearing that the Dean’s office discouraged “no finding” results. *Id.* The court also dismissed a breach of contract claim based on a lack of meaningful notice of the charges. *Id.*, *13-14. The court did so because the college provided plaintiff a generalized version of the charges against him as well as his accuser’s statements against him which put plaintiff on notice of the charges. *Id.*, *14. In reaching this decision, the court rejected plaintiff’s argument that he should have been provided notice of any lesser included charges. *Id.* *Boston College* rejected this argument because the college’s policies state plaintiff could have been found “responsible for a lesser inclusive charge.” *Id.*

²⁵⁶ *Id.*, *26 (citing *Mallory v. Ohio Univ.*, 76 Fed.Appx. 634, 640 (6th Cir. 2003) (holding that plaintiff did not demonstrate a genuine issue of material fact because he did not show how alleged procedural irregularities were based upon sex); *Univ. of Cincinnati*, 2016 WL 1161935, at *14 (concluding that plaintiff “fail[ed] to create a reasonable inference that the disciplinary hearing procedures adopted ... were motivated by a desire to discriminate against male students”); *Salau*, 139 F. Supp. 3d at 999 (dismissing claim when plaintiff pointed to his case only and not a broader pattern of decision-making to show gender-bias); *Doe v. Case W. Reserve Univ.* 2015 WL 5522001, at *5 (explaining that the pleadings do not show how sexual bias motivated the procedural flaws).”).

²⁵⁷ *Id.*, *26-27.

does not apply at private universities, a Massachusetts district court in *Bleiler* determined a “private university, college, or school may not arbitrarily or capriciously dismiss a student.”²⁵⁸

Similarly, the First Circuit’s *Cloud* decision noted school disciplinary hearings must be “conducted with basic fairness.”²⁵⁹ Therefore, plaintiffs sometimes advance Title IX claims based on universities denying certain rights *not* appearing in a university’s policies. Plaintiffs do so in part because *Bleiler* suggests a disciplinary proceeding may be “flawed” if a university failed to honor mandates contained in OCR’s Dear Colleague Letter which *Bleiler* described as requiring a:

“‘prompt and equitable resolution’ of sexual misconduct allegations under which ‘schools should provide notice to students of the procedures, conduct an ‘adequate, reliable, and impartial investigation of complaints,’ provide ‘the opportunity for both parties to present witnesses and other evidence,’ and provide prompt notice of the final outcome . . . ‘a school’s investigation and hearing processes cannot be equitable unless they are impartial[,] [t]herefore, any real or perceived conflict of interest between the fact-finder or decision-maker and the parties should be disclosed’ . . . [e]very person involved in implementing the procedures and deciding a complaint in a sexual violence case ‘should have adequate training or knowledge regarding sexual violence.’”²⁶⁰

Consequently, plaintiffs’ Title IX complaints should include breaches of the Cleary Act²⁶¹ and/or OCR mandates which include: (a) “equitable grievance procedures,” (b) equal opportunities for both parties in the disciplinary proceeding to present witnesses and evidence, (c) the ability to review the opposing party’s statements, and (d) the ability to appeal disciplinary proceeding outcomes.²⁶² Plaintiffs should do so even though OCR has been widely viewed as undermining the rights of accused students under President Obama’s administration²⁶³ through mandates issued

²⁵⁸ *Bleiler*, 2013 U.S. Dist. LEXIS 127775, *14.

²⁵⁹ *Cloud*, 720 F.2d 721, 725 (1st Cir. 1983).

²⁶⁰ *Bleiler*, 2013 U.S. Dist. LEXIS 127775, *9-10 (quoting OCR’s 2011 Dear Colleague Letter).

²⁶¹ *Infra*, fn.297 (containing the Cleary Act’s mandates regarding Title IX disciplinary proceedings involving allegations of sexual misconduct).

²⁶² See e.g., Dear Colleague Letter (2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/AVD5-K5R6>].

²⁶³ See e.g., Emily D. Safko, *Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law*, 84 Fordham L. Rev. 2289 (2016), pgs. 2304-5 (discussing universities’ concerns regarding OCR enforcement actions that commentators believe “incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused.”). *Id.*, pgs.2320-24 (addressing same); *Handout 14* (containing *Open Letter From Sixteen Members of Penn Law School Faculty* (Feb. 17, 2014) which states in part: “Although we appreciate the efforts of Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”); Barclay Sutton Hendrix, *A Feather On One Side, A Brick On The Other: Tilting The Scale Against Males Accused of Sexual Assault In Campus Disciplinary Proceedings*, 47 Ga. L. Rev. 591,

by OCR.²⁶⁴ Yet, surprisingly, in the waning days of the Obama presidency OCR actually took a different approach in determining Wesley College violated male students' rights in sexual misconduct disciplinary proceedings.²⁶⁵ As a result, Title IX complaints should cite OCR's Wesley decision if their universities engage in the following prohibited practices outlined in that decision:

1. Violating Title IX by destroying documents related to sexual misconduct disciplinary proceedings;²⁶⁶

(2013); Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. Ky. L. Rev. 49 (2013); *Handout 15* (containing *Rethink Harvard's Sexual Harassment Policy*, LETTER TO EDITOR, BOSTON GLOBE, Oct. 15, 2015); Janet Halley, *Trading the Megaphone for the Gravel Gavel in Title IX Enforcement*, HARV. L. REV. F. 103, 103-17, (2014); Samantha Harris, *Campus Judiciaries on Trial: An Update from the Court*, HERITAGE FOUNDATION, Oct. 6, 2015; <http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts> (accessed 1/4/17); Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, Yale Law and Policy Review Volume 33; Issue 2 (2015); Robin Wilson, *Presumed Guilty*, CHRONICLE OF HIGHER EDUCATION (Sept. 3, 2014) http://chronicle.com/article/Presumed-Guilty/148529/?cid=a&utm_medium=en (accessed 1/4/17) (noting: "Under current interpretations of colleges' legal responsibilities, if a female student alleges sexual assault by a male student after heavy drinking, he may be suspended or expelled, even if she appeared to be a willing participant and never said no. That is because in heterosexual cases, colleges typically see the male student as the one physically able to initiate sex, and therefore responsible for gaining the woman's consent."); *Dershowitz and Other Professors Decry 'Pervasive and Severe Infringement' of Student Rights*, Jacob Gershman (May 18, 2016), <http://blogs.wsj.com/law/2016/05/18/dershowitz-and-other-professors-decry-pervasive-and-severe-infringement-of-student-rights/> (accessed 1/4/17).

²⁶⁴ It should be noted many college presidents have expressed an intent to continue to enforce OCR mandates issued under President Obama's administration even if President Trump's administration rolls back some of these mandates. See e.g., See e.g., Jake New's January 26, 2017 article for insidehighered.com entitled *Do Not Step Away*. Available at <https://www.insidehighered.com/news/2017/01/26/collegeleadersdiscussfuturetitleixsexualassaultpreventionefforts>; Bradford Richardson, *Trump faces uphill battle undoing campus rape scares inherited from Obama*, available <http://www.washingtontimes.com/news/2017/feb/8/campus-rape-epidemic-still-facing-trump-after-inhe/>.

²⁶⁵ OFFICE FOR CIVIL RIGHTS LETTER TO ROBERT E. CLARK, Oct. 12, 2016, available at: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>

²⁶⁶ *Id.*, p.18 (stating: "While Title IX does not require a recipient to make a recording of hearings, to the extent that such a recording is made, it constitutes a record and must be kept in order to be available to enable OCR to ascertain whether the College is carrying out its legal obligations under the Title IX regulations. Destroying hearing records after the hearing or appeal necessarily means that the College was undertaking steps that would result in relevant information not being available to OCR during its investigation and monitoring to assess whether the College is carrying out its legal obligations under the Title IX regulations. OCR is obligated to review pertinent practices and policies of the College, the circumstances in which the noncompliance occurred, and other factors relevant to a determination of whether the College has corrected its noncompliance with Title IX. Similarly, the document destruction prevents any external review, including pursuant to judicial proceedings, should a participating student wish to challenge the equity of the College's administrative process in court. Finally, destruction of the hearing records prevents the College itself, and specifically its Title IX Coordinator, from being able to

2. Running afoul of Title IX by: “failing to offer the opportunity to accused students to provide witnesses and other evidence. . . .”²⁶⁷; and
3. Violating Title IX if the accused student is not: (a) “given an opportunity to share his version of events and to benefit from an investigation of the accuracy of that version of events;” (b) “provided with the opportunity to challenge evidence that the College relied upon in imposing his interim suspension;” (c) “afforded his resolution options;” (d) “provided an adequate opportunity to defend himself at the Hearing;” or (e) “provided sufficient time to participate in the process.”²⁶⁸

In response, defendant universities will likely cite *Vassar* which was decided prior to OCR’s Wesley decision. For, *Vassar* cited OCR’s “Dear Colleague Letter” as a basis for rejecting a “flawed proceeding” argument which relied on: (a) the university’s vaguely written disciplinary decisions and (b) “inaudible” audio recordings of plaintiff’s disciplinary hearing.²⁶⁹ If universities rely on *Vassar*, plaintiffs should note how *Vassar* determined the plaintiff might have survived Vassar’s summary judgment if he established facts showing:

“he would have more effectively appealed his case if these purported obstacles were not in his way or how these purported procedural flaws were motivated by gender-bias.”²⁷⁰

review information to determine whether patterns of conduct exist, or whether further steps are necessary for the College to take to ensure student safety, or whether the College is satisfied with the fairness of its own administrative process as applied in particular cases.”); *Id.*, p.26 (finding that a review of Wesley’s sexual assault disciplinary files proved “. . . the College violated the requirements of Title IX by, in many cases, failing to offer the opportunity to accused students to provide witnesses and other evidence, failing to provide students who alleged sexual harassment including sexual assault with appropriate interim remedies including counseling and/or academic services, and by failing to provide the complainant with written notice of the outcome of the complaint.”).

²⁶⁷ *Id.*, p. 26.

²⁶⁸ *Id.*, p.24-25.

²⁶⁹ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *57-58 (“Indeed, the Dear Colleague Letter provides that, to comply with Title IX, a school must provide notice of the outcome of the disciplinary proceeding to the complainant and the respondent, ‘i.e., whether harassment was found to have occurred.’ *Dear Colleague Letter* at 13. There is no mention of any detailed written finding. Moreover, as the Dear Colleague Letter points out, postsecondary institutions are subject to the Clery Act, which requires that ‘[b]oth the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense,’ and defines ‘outcome’ as ‘only the institution’s final determination with respect to the alleged sex offense and any sanction that is imposed,’ with no requirement of a detailed factual finding. *Dear Colleague Letter* at 14; 34 C.F.R. § 668.46(b)(11)(vi)(B)”).

²⁷⁰ *Id.* *58 (emphasis added).

In summary, falsely accused students should use their university level disciplinary proceedings to document how universities prejudiced them by: (a) refused to honor OCR or Cleary Act mandates; (b) issuing vague investigative reports or disciplinary decisions which hogtied students' defense; (c) withheld or destroyed materials plaintiffs need to defend themselves during disciplinary proceedings; and/or (d) otherwise undermined students' ability to defend themselves.

(G) Universities' gender-biased Title IX Training

During disciplinary hearings, it is fairly common for universities to refuse falsely accused students' requests for access to university Title IX training materials.²⁷¹ This is likely because universities fear these training materials will fuel students' gender-bias arguments. Universities also likely withhold training materials because Title IX complaints often detail how defendant universities fail to properly train adjudicators of sexual misconduct allegations.²⁷²

Doe v. The Ohio State Univ. provides an example of how gender-biased Title IX training can trigger the rejection of a university's motion to dismiss. In that case, a district court refused to dismiss a due process claim advanced by a male plaintiff who alleged anti-male training corrupted adjudicators involved in his sexual misconduct disciplinary proceeding.²⁷³ However, the district court noted it would likely grant a motion for summary judgment if OSU offset this gender-bias training with other training about adjudicators' need to serve as "fair and neutral" adjudicators.²⁷⁴ *Vassar* similarly rejected a plaintiff's lack of training argument because there was: "nothing in the record suggesting that 'a few hours of [training] is somehow inconsistent with Vassar's understanding of 'specialized training' or that [a] failure to remember certain specifics about the training at a later date is in violation of the [r]egulations.'" ²⁷⁵

In 2016 and 2017, two United States Courts of Appeals affirmed the dismissal of Title IX and due process claims.²⁷⁶ One of these decisions was the Sixth Circuit's *Cummins* decision

²⁷¹ See e.g., *Handout 2* (containing Title IX complaint filed by Eric Rosenberg's client against University of Chicago).

²⁷² See e.g., *See e.g., Handouts 1-3, 8-12* (containing Title IX complaints filed by Eric Rosenberg's clients against University of Chicago, Columbia College Chicago, Salisbury University, Ohio State University, Indiana University, Denison University, and Occidental College).

²⁷³ *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *8 (rejecting a university's motion to dismiss plaintiff's due process claims in part because the complaint alleged plaintiff's disciplinary hearing panel received "statistical evidence that '2-57% of college men report perpetrating a form of sexual aggressive behavior.' . . . And, '[c]ollege men view verbal coercion and administration of alcohol or drugs as permissible means to obtain sex play or sexual intercourse.' . . . 'Repeat perpetrators are aware of myths and how to present and empathic.' . . . 'Sex offenders are experts in rationalizing behavior.' . . . [and] panel members were trained to 'identify and understand characteristics of individuals who pose a risk to the safety of the community.'")(internal citations omitted).

²⁷⁴ *Id.*, *9.

²⁷⁵ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *59-60.

²⁷⁶ *John Doe 1 v. Cummins*, No. 16-3334, 2016 WL 7093996 (6th Cir. Dec. 6, 2016); *Plummer v. Univ. of Houston*, No.15-20350, 2017 WL 2704014, *7 (5th Cir. June 26, 2017)(affirming dismissal of Title IX claim in summary judgment properly because the defendant university: (a) made "no finding" against 41 percent

which addressed gender-bias allegations based on: “panel members receiv[ing] biased training that emphasized the rights of the complaining party over the due-process rights of the accused, and that the panel members had a history of finding in favor of victims in sexual-misconduct cases.”²⁷⁷ But, at least three facts suggest *Cummins* is distinguishable from many Title IX and/or due process complaints. First, the university had granted plaintiffs’ new disciplinary hearings after their appeals highlighted “inadequate [] procedures” in their initial hearings.²⁷⁸ Second, the university found one of the plaintiffs “not responsible” for an allegation of sexual misconduct.²⁷⁹ Third, *Cummins* determined plaintiffs’ complaint did not include plausible evidence of gender-bias against male students.²⁸⁰

Until additional courts weigh in on these issues, plaintiffs should continue drafting Title IX complaints based in part on: (a) biased training materials, and (b) roadblocks universities erect to plaintiffs’ access to these materials. For, *Marshall* rejected a motion to dismiss a Title IX claim in part because the university withheld documents critical to plaintiff’s ability to establish gender bias.²⁸¹ In discussing this issue, the court noted the university:

“cannot have it both ways, restricting access to the facts and then arguing that [plaintiff’s] pleading must be dismissed for failure to identify more particularized facts. Instead, whether the facts alleged sufficiently support a claim for intentional gender discrimination under Title IX is a question for a later stage of this litigation, after fair and robust discovery on both sides.”²⁸²

Consequently, *Marshall* should be cited to substantiate properly pled “information and belief” allegations when defendant universities refuse to provide Title IX plaintiffs documentation that may evidence gender-bias.

(H) Universities’ insufficient notice, denial of opportunities to be heard, and/or restricted access to attorneys

of the predominately male students charged with sexual misconduct, and (b) “treated” the male and female plaintiffs “equally” with regard to their sexual assault of another female student).

²⁷⁷ *Cummins*, 2016 WL 7093996, *12-13 (finding plaintiffs “alleged due-process violations—e.g., the limited right to cross-examination, the limited access to an advisor, and the improper allocation of the burden of proof—evidence gender discrimination in UC’s disciplinary process” cannot substantiate Title IX claims because plaintiffs “fail to show how these alleged procedural deficiencies are connected to gender-bias . . . these deficiencies at most show a disciplinary system that is biased in favor of alleged victims and against those accused of misconduct. But this does not equate to gender-bias because sexual-assault victims can be both male and female.”)(internal footnote omitted).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Supra*, fn.250 (discussing same).

²⁸¹ *Marshall v. Ind. Univ.*, 2016 U.S. LEXIS 32999, *18-20.

²⁸² *Id.*, *20.

As OCR's investigation of Wesley College proves, universities can violate Title IX if students are disciplined without granting them sufficient time and/or opportunity to defend themselves.²⁸³ However, universities will still maintain decisions like *Vassar* sanction short deadlines that limit male students' ability to mount defenses. This is because *Vassar* determined a disciplinary proceeding was not flawed when Vassar: (a) expelled plaintiff eight days after giving him notice of the charges against him, and (b) conducted a hearing three days after giving the plaintiff access to documents contained in the university's disciplinary file.²⁸⁴ In fact, plaintiffs should expect universities to point to court decisions that suggest "one day" notice of a hearing "would seem [to be] sufficient."²⁸⁵

Consequently, male students in Title IX university level disciplinary proceedings regularly face incredibly short deadlines to respond to reports or directives that universities commonly issue late on Friday afternoon or just before holiday weekends. But if these deadlines conflict with the universities policies – and are driven by gender-bias – Title IX violations should be pled in Title IX complaints. Additionally, male plaintiffs should pursue Title IX claims when universities deny their requests for deadline extensions while granting extensions requested by female accusers.

Title IX complaints also involve universities' denial of plaintiffs' access to attorneys during interrogations, hearings, and other segments of Title IX disciplinary proceedings.²⁸⁶ This issue was raised in *Brandeis* which refused to dismiss a complaint filed by a male student who was denied an attorney in a sexual misconduct proceeding.²⁸⁷ Universities violate the Cleary Act and the Violence Against Women Reauthorization Act ("VAWA") when they prohibit attorneys from assisting students involved in Title IX disciplinary proceedings.²⁸⁸ For instance, VAWA states "the accuser and the accused [are] entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice."²⁸⁹ This "advisor of choice" can be an attorney as detailed in the Federal Register/Violence Against Women Act which states:

²⁸³ *Supra*, p.44-45 (discussing OCR's investigation of Wesley College).

²⁸⁴ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *36-37 (S.D.N.Y. 2015).

²⁸⁵ *Id.*, *38 (citing *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 755 (E.D. Tenn. 2009) and noting *Donohue v. Baker*, 976 F. Supp. 136,145-46 (N.D.N.Y. 1997) found "telephonic notice of charges at least three days prior to the hearing and written notice one day before the hearing 'would seem [to be] sufficient'. See also, *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at 6 (W.D.N.C. July 22, 2015) (finding that 'at a minimum due process requires adequate notice' and that less than twenty-four-hours' notice of a charge against plaintiff warranted denying the defendant's motion to dismiss (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975))."

²⁸⁶ See e.g., *Handout 11* (containing Title IX complaint filed by Eric Rosenberg's client against Denison University).

²⁸⁷ *Brandeis*, 2016 U.S. Dist. Lexis 43499, *100-105.

²⁸⁸ Violence Against Women Reauthorization Act of 2013. *Infra*, fn.297 (containing the Cleary Act's requirement" that the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.").

²⁸⁹ SEC. 304. CAMPUS SEXUAL VIOLENCE, DOMESTIC VIOLENCE, DATING, VIOLENCE, AND STALKING EDUCATION AND PREVENTION. VAWA (emphasis added).

“At the outset of the discussion of this issue, the Department made clear that its interpretation of the statutory language was that the accused and the accuser are entitled to an advisor of their choice, including an attorney... [and] that the institution cannot limit the choice or presence of advisor for either the accuser or the accused in any meeting or institutional disciplinary proceeding.”²⁹⁰

Despite these protections, universities commonly conduct initial interrogations of students when neither attorneys nor advisors are present. These interrogations often prejudice the falsely accused. In fact, attorneys who regularly represent students at disciplinary proceedings often talk to students who were expelled solely on basis of their initial statements to university police and/or Title IX employees. This situation often arises when a female student tells another student something sexual may have happened with a male student while the female was drinking alcohol. This information then circulates within the female student’s community and ultimately reaches a resident advisor or other “mandatory reporter” who is required to inform the university’s Title IX office of the allegations. Since OCR requires universities investigate all allegations of sexual misconduct,²⁹¹ the Title IX office or campus police then interrogate the male student. This interrogation is often conducted without providing the male student: (a) specific information about the allegations against him; (b) notice of his right to an attorney; (c) notice that his statements will be used against him; (d) notice that the students’ statements can be provided to law enforcement officials; or (e) notice of the exact provisions of the university’s sexual misconduct policy the student allegedly violated. Instead, the student is lulled into a belief that the truth will set him free. So, the male student tells the university how the female student either initiated or consented to engaging in sexual contact when she was not incapacitated. After making these statements, the male student’s own testimony is then used to suspend or expel him even though his female accuser: (a) did not definitively identify what sexual contact allegedly occurred between herself and the male student, and (b) may have initially never wanted disciplinary charges filed against the male student. Stated another way, if the male student had remained silent regarding his interactions with the female student, his university would not have been able to discipline him.²⁹²

²⁹⁰ 10/30/2014 Federal Register | Violence Against Women Act
https://www.federalregister.gov/articles/2014/06/20/2014-14384/violence-against-women-act#print_view 68/104 (emphasis added).

²⁹¹ OCR’s 2014 *Questions and Answers on Title IX and Sexual Violence*, p.2 (“When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E)).” Available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>).

²⁹² But, it should be noted, the author does not suggest falsely accused students refuse to provide statements to investigators in all university level Title IX disciplinary proceedings. This is because universities routinely construe a male student’s silence as evidence of guilt. As a result, the falsely accused should document a desire to potentially provide exculpatory testimony and evidence after the university provides the student full access to the allegations against them. In addition, falsely accused students should review their university policies carefully to determine how long they can delay telling their side of the story without incurring prejudice. On the other hand, if criminal charges are pending or likely, falsely accused students must understand prosecutors routinely subpoena university Title IX investigatory files. In these situations, the author sometimes advises clients against providing personal narratives of their interactions with accusers. Instead, the author helps clients mount defenses via evidence such as polygraphs, toxicologist experts, security camera footage, and/or third-party affidavits.

Attorneys regularly involved in university Title IX proceedings attempt to help falsely accused students support their initial unrepresented statements to university officials by presenting polygraphs, toxicologist reports, and third-party affidavit testimony proving accusers were not incapacitated when they initiated or consented to sexual contact.²⁹³ But, this evidence does not always prevent universities from expelling the students.²⁹⁴ As a result, some national organizations such as SAVE are advocating for legislation that would return traditional due process concepts of fairness and equity to university level disciplinary hearings.²⁹⁵

Except in certain circumstances, plaintiffs should continue to expect courts to push back on arguments based on restrictions placed on attorneys' advocacy and participation in university level disciplinary proceedings.²⁹⁶ The Sixth Circuit's *Cummins* decision defines one of these exceptions.²⁹⁷ *Cummins* determined a student's due process rights may allow a more active role for attorneys in public university level disciplinary "hearings" that are "unusually complex or when the university itself utilizes an attorney."²⁹⁸ Moreover, an Ohio district court determined "due

Additionally, the author helps clients develop strategies to minimize prejudice which will likely occur during disciplinary hearings where the client presents this type of evidence while also refusing to personally testify about his interactions with the accused.

²⁹³ See e.g., *Handout 2* (containing Title IX complaint filed by Eric Rosenberg's client against University Columbia College Chicago).

²⁹⁴ *Id.*

²⁹⁵ See, <http://www.saveservices.org/sexual-assault/cefta/> (detailing Stop Abusive And Violent Environments' model bill designed to bring fairness to the campus sexual assault issue. This legislation is titled the Campus Equality, Fairness, and Transparency Act (CEFTA) which supports the rights and interests of both the complainant and accused student and encourages the involvement of local criminal justice authorities).

²⁹⁶ See e.g., *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *37 (maintain the "general consensus . . . [is] that 'at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel. . . .'" (quoting *Johnson v. Temple Univ.-Of Commonwealth Svs. of Higher Educ.*, 2013 U.S. Dist. LEXIS 134640, 2013 WL 5298484, at *10 (E.D. Pa. Sept. 19, 2013) (quoting *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993))).

²⁹⁷ *John Doe 1 v. Cummins*, 2016 WL 7093996.

²⁹⁸ *Id.*, *10 (stating: "We have recognized that a student may have a constitutional right to counsel in academic disciplinary proceedings where the hearing is unusually complex or when the university itself utilizes an attorney. See *Flaim*, 418 F.3d at 640 (citing *Jaksa*, 597 F.Supp. at 1252). Neither scenario is present here. And appellants fare no better under *Mathews* balancing. Although appellants' advisors were not allowed to actively participate in the hearing, they were still permitted to be present and advise appellants in presenting their cases. The added benefit of allowing active participation by an advisor here is minimal given the limited cross-examination of witnesses, the lack of complexity, and the fact that knowledge of evidentiary rules was not required. Moreover, the burden on UC of allowing this level of participation by counsel in every disciplinary hearing would be significant due to the added time, expense, and increased procedural complexity. See *Flaim*, 418 F.3d at 640-41 ('Full-scale adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity.'). The inability of appellants' advisors to actively participate in their hearings, therefore, does not present a due-process violation under *Mathews*."). *Id.*, *13 (finding plaintiffs' 'alleged

process” may allow attorneys to actively participate in university level disciplinary proceedings when the student faces criminal charges related to the disciplinary proceeding.²⁹⁹

Although universities often insist attorneys in Title IX disciplinary proceedings must assume the role of “potted plants,” attorneys sometimes workaround these restrictions. For instance, some attorneys assist clients with ghostwriting documentation during disciplinary proceedings. This documentation includes: (a) emails to college employees involved in the disciplinary proceeding; (b) responses to accuser’s allegations and/or investigators’ reports; (c) opening and closing statements; (d) cross examination and direct questions to be asked at hearings; and (e) appeals of disciplinary findings.³⁰⁰ Falsely accused students engaging attorneys familiar with preparing these types of documents can greatly increase their chances of being found “not responsible” and/or developing facts necessary for a Title IX complaint. This is because attorneys who regularly represent falsely accused students are better equipped to navigate the Stalinist disciplinary proceedings employed by many universities.

One example of the star-chamber qualities of some Title IX proceedings are barriers universities erect to prohibit the exposure of the truth by prohibiting the accused student from presenting witnesses or cross-examining his accuser or her witnesses. Fortunately, many district courts have determined a university’s denial of a student’s opportunity to present witnesses can

due-process violations—e.g. . . . the limited access to an advisor’ cannot substantiate Title IX claims because plaintiffs “fail to show how these alleged procedural deficiencies are connected to gender-bias.”).

²⁹⁹ *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *10 (citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)).

³⁰⁰ It should be noted, some universities erect roadblocks that prohibit falsely accused students from having attorney/advisors that help students defend themselves. For instance, Stanford University’s “Student Title IX Process” provides: “[w]hile an advisor may offer guidance to a party, each party is expected to submit their own work, which should be signed by the party attesting it is their work. The Support Person may not speak or advocate on behalf of the party in University proceedings. Stanford students are expected to speak for themselves, and express themselves, including in writing, on all matters relating to University concerns, including Title IX-related matters and Prohibited Conduct. Any Support Person who violates these expectations may be directed to resign as the Support Person.” <https://titleix.stanford.edu/investigationgrievance-administrative-policy-and-procedures>. Policies such as these violate the letter and spirit of VAWA and/or the Cleary Act. Moreover, Stanford’s limitation of students’ advocacy abilities may have triggered a student backlash as detailed in Stanfordreview.org’s Feb. 7, 2016 article entitled *Dear Betsy: Restore Justice to Title IX*. <https://stanfordreview.org/dearbetsy-restorejusticetotitleixc7c72df7616c#.dys995lkg>. In this article, Stanfordreview.org’s editorial board detailed how Stanford’s implementation of OCR’s “preponderance of evidence” standard is a “lose-lose” for both accusers and accused students. *Id.* For example, this article noted: “[r]ather than imposing legally dubious standards that failed to stem the tide of sexual assault, the Department of Education should allow colleges to pioneer their own, more effective sexual assault investigation policies. We could imagine a burden of proof proportional to the punishment: low evidence could result in the victim or accused being moved to a different residence hall, while clear and convincing evidence could trigger expulsion. Individually tailored policies would serve justice while still protecting due process so long as Title IX’s other requirements remain in place.” *Id.*

trigger a flawed proceeding.³⁰¹ Additionally, a university's disregard of exculpatory evidence and or obstructionism during disciplinary proceedings can trigger Title IX liability.³⁰² Numerous district courts have also determined Title IX liability can occur when students accused of sexual misconduct are prohibited from questioning their accused and/or witnesses.³⁰³

But, district courts have also determined universities may require students to submit their questions to panel members and allow the panel to decide which questions to ask.³⁰⁴ This type of restriction is likely attributed to OCR's "Dear Colleague" letter which "strongly discouraged schools from allowing the parties personally to question or cross-examine each other during the hearing."³⁰⁵

Even so, *Vassar* noted a disciplinary panel's decision to prohibit a student from asking particular questions could be considered a Title IX violation if the questions could have caused the panel to erroneously find the student responsible.³⁰⁶ Ultimately, however, *Vassar* determined the plaintiff could not establish a "genuine issue of material fact as to whether [Vassar's impediments

³⁰¹ *Sahm* 2, 110 F. Supp. 3d 774, 778-79 (finding the Title IX investigator's "discouraging a witness from testifying at the disciplinary hearing ... troubling"); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

³⁰² See e.g., *George Mason Univ.*, 2015 WL 5553855, at 16 (finding university's "failure to consider witness statements" when combined with other alleged flaws in the complaint satisfied the first prong of the *Yusuf* analysis); *Univ. of Mass.-Amherst*, 2015 WL 4306521, *8 (stating plaintiff's "difficulties getting information" with respect to his disciplinary along with other alleged defects was "sufficient to raise at least some questions about the outcome of his disciplinary proceeding"); *Id.* (noting "the misuse of witness testimony by the hearing board" contributed to court's determination that a flawed disciplinary proceeding occurred); *Doe v. Salisbury Univ.*, 2015 WL 5005811, *13 (finding plaintiffs' Title IX complaint could not be dismissed in part because their university barred plaintiffs from reviewing witness statements and the list of witnesses prior to the hearing, and failed to provide plaintiffs with all evidence that was to be presented to the Board."); *Wash. & Lee Univ.*, 2015 WL 4647996, *10 (finding a flawed disciplinary proceeding occurred in part because of "critical omissions" by university investigators in preparing witness summaries).

³⁰³ See, e.g., *Doe v. Salisbury*, 2015 WL 5005811, *13 (discussing concerns with a university's denial of plaintiffs' ability to ask witnesses particular questions); *Univ. of Mass.-Amherst*, 2015 WL 4306521, *8 (finding "limits placed on [the plaintiff's] ability to cross-examine witnesses" in conjunction with other procedural flaws was "sufficient to raise at least some questions about the outcome of his disciplinary proceeding"); *Brandeis*, 2016 U.S. Dist. Lexis 43499, *13-14 (discussing a lack of cross-examination in a university disciplinary hearing as follows: [h]ere, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding."). See also *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972)(noting; "if this case had resolved itself into a problem of credibility, cross examination of witnesses might have been essential to a fair hearing.").

³⁰⁴ *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465-66 (S.D.N.Y. 2015).

³⁰⁵ Dear Colleague Letter, at p.12.

³⁰⁶ *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465-66 (S.D.N.Y. 2015).

to plaintiff asking questions] led to an erroneous outcome or was motivated by gender-bias.”³⁰⁷ Regarding the erroneous outcome prong, *Vassar* maintained the plaintiff could not: (a) identify the questions the hearing panel refused to ask; (b) prove the questions were “relevant to the proceedings;” (c) establish that the questions were not “redundant”; or (d) detail how plaintiff was “prejudiced” by the hearing panel’s refusal to ask the questions.³⁰⁸

Similarly, within the due process context, the Eleventh Circuit’s *Nash* decision determined there “was no denial of appellants’ constitutional rights to due process [during a university disciplinary proceeding] by their inability to question the adverse witnesses in the usual, adversarial manner.”³⁰⁹ In *Cummins*, the Sixth Circuit cited *Nash* in dismissing due process claims filed by male students who alleged unlawful discipline by the University of Cincinnati.³¹⁰ But, the Sixth Circuit determined a complete denial of a student’s rights to cross examination could trigger a valid due process claim if the student’s potential disciplinary penalties involved “[l]ong[] suspensions or expulsions.”³¹¹ In addition, just prior to *Cummins*, two district courts in Ohio acknowledged the importance of cross examination in college Title IX disciplinary hearings within the context of a due process claims filed against OSU and the University of Cincinnati.³¹² Specifically, both courts noted: “. . . where a disciplinary proceeding depends on ‘a choice between believing an accuser and an accused . . . cross-examination is not only beneficial, but essential to due process.’”³¹³

In the *Univ. of Cincinnati* decision, the court determined “cross-examination was essential to due process” because university adjudicators lacked “‘particularized knowledge of a student’s trustworthiness that exists in a high school with a smaller student population.’”³¹⁴ Consequently, the court found the university denied the plaintiff the right to cross examine his accuser with: (a) questions at the disciplinary hearing, or (b) written questions submitted to the hearing panel in the event his accuser did not appear at the hearing.³¹⁵ However, *Ohio State University* found no error

³⁰⁷ *Id.*, (quoting *Donohue v. Baker*, 976 F. Supp. 136,147 (N.D.N.Y. 1997)(emphasis added).

³⁰⁸ *Id.*,

³⁰⁹ *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987)(emphasis added); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465-66 (same).

³¹⁰ *John Doe 1 v. Cummins*, 2016 WL 7093996, *10 (discussing *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987). *Id.*, *13 (finding plaintiffs’ “alleged due-process violations—e.g., the limited right to cross-examination” cannot substantiate Title IX claims because plaintiffs “fail to show how these alleged procedural deficiencies are connected to gender-bias).

³¹¹ *Id.*, *10 (discussing *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987)(quoting *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

³¹² *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *10 (quoting *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)). *Doe v. Univ. of Cincinnati* 2016 WL 6996194, *4-5 (same).

³¹³ *Id.*

³¹⁴ *Doe v. Univ. of Cincinnati* 2016 WL 6996194, *4-5 (citing *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988)).

³¹⁵ *Id.* (noting: “The Student Code of Conduct provides: ‘[t]he accused and the complainant shall have the right to submit evidence and written questions to be asked of all adverse witnesses who testify in the

in a hearing panel’s “re-wording[]” of questions plaintiff wished to ask his accuser in a sexual misconduct hearing.³¹⁶

In *Heredia*, a state court addressed a male student’s rights to cross examine his accuser in a case which did not involve a Title IX claim.³¹⁷ The university received the plaintiff’s written cross examination questions but failed to include the questions in the “record” required for “judicial review” under Washington state law.³¹⁸ Fortunately, the record reflected how the university did not honor plaintiff’s request that his accuser be asked questions about a text message she sent a friend suggesting the accuser wanted to interact sexually with plaintiff on the night in question.³¹⁹ In remanding the case to the university for a new hearing, *Heredia* stated:

“The credibility of the [accuser] and [plaintiff] was a primary issue that each Board member had to resolve . . . [and] the existence of the ‘Shackin’ text message, which was purportedly the subject of some of [plaintiff’s] written cross-examination questions, was highly relevant to the issue of consent and to [accuser’s] credibility.”³²⁰

Although it is impossible to read the tea leaves to predict where future courts will travel regarding a Title IX student’s right to question his accuser and/or adverse witnesses, students should – when appropriate – ensure the disciplinary record includes documents detailing the

matter. The hearing chair, in consultation with the ARC, has the right to review and determine which written questions will be asked.”).

³¹⁶ *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *10 (finding, “none of the panel’s re-wordings so blunted Doe’s questions as to render them useless. Furthermore, nothing prevented Doe from arguing these points in his closing statement. Further still, all of the questions Doe alleges the panel re-worded do not so alter their content that the panel could not understand their significance.”).

³¹⁷ *Handout 20* (containing *Heredia v. Wash. State Univ.*, Case No. 16-2-000085-0, Whitman County Superior Court, Oct. 12 2016 Memorandum Decision and Order On Judicial Review of Administrative Order). It should be noted, some states like Washington, Arizona, California, and Tennessee have laws that allow students to appeal some types of university level disciplinary proceedings to state courts. In these types of states, falsely accused students who do not avail themselves to administrative appeals may find their lawsuits dismissed under a Title VII doctrine which allows employers to dismiss lawsuits if plaintiffs did not exhaust their administrative remedies. In addition, students filing administrative appeals should include §1983 and/or Title IX arguments within these appeals because at least one federal district court determined the doctrine of *res judicata* barred a falsely accused male student/plaintiff from prosecuting §1983 claims and other causes of actions not contained in his earlier state court filed pursuant to Arizona’s Administrative Review Act. See generally, *Handout 23* (containing *Hemington v. Arizona Bd. of Regents*, No.CV-11-58-TUC-FRZ (D.AZ. July 1, 2015).

³¹⁸ *Id.*, p.7.

³¹⁹ *Id.*, p.4-5.

³²⁰ *Id.*, p.8. See also, *Handout 21* (containing *Arishi v. Washington State Univ.*, Case No. 33306-0-III, Wash. St. Ct. of Appeals Div. III, Dec. 1 2016 in which a Washington Court of appeals determined Washington State University violated a student’s rights by not engaging in a “brief” disciplinary proceeding instead of a “full adjudication” proceeding which are required for sexual misconduct allegations which “amount to a felony under criminal law” or trigger a potential “expulsion” sanction).

questions they want asked. That way, in subsequent litigation, these students can circumvent pitfalls in cases like *Vassar* by articulating how their university's failure to ask these questions triggered Title IX violations.

(I) Flawed university investigations of allegations of sexual misconduct

Plaintiffs often base Title IX claims on their university's flawed and/or gender-biased investigation of allegations of sexual misconduct.³²¹ In fact, at least one Title IX plaintiff brought breach of contract and tort claims against his university's third-party investigator.³²² In advancing claims based on flawed investigations, *Bleiler* suggested plaintiffs look beyond the four corners of university policies to OCR's Dear Colleague Letter which states:

"... a school's investigation and hearing processes cannot be equitable unless they are impartial[,] [t]herefore, any real or perceived conflict of interest between the fact-finder or decision-maker and the parties should be disclosed" . . . [e]very person involved in implementing the procedures and deciding a complaint in a sexual violence case 'should have adequate training or knowledge regarding sexual violence.'³²³

Moreover, if universities allege their policies need not incorporate OCR mandates that might benefit the accused, plaintiffs should look to the Cleary Act which codified many OCR mandates.³²⁴ But, facts matter. This is because *Vassar* determined a plaintiff did not establish a

³²¹ See e.g., *Handout 13* (containing Title IX complaint filed by Eric Rosenberg's clients against Denison University).

³²² *Id.* It should be noted, many of complaints filed by Rosenberg & Ball's Title IX clients also include tort claims against their false accusers. *Id.* During university level disciplinary proceedings, these clients often advise their universities and accusers that they will be forced to file a lawsuit if they are erroneously found responsible. *Id.* Threatened litigation was addressed in *Ha v. Northwestern Univ.*, No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014)). In that case, a female Title IX plaintiff alleged a college professor—who she claimed sexually assaulted her - engaged in retaliation by threatening to "to file a defamation lawsuit" *Id.*, *2. But, *Ha* rejected this argument stating: "the threatened suit does not constitute retaliation either. *Mlynchak v. Bodman*, 442 F.3d 1050, 1061 (7th Cir.2006) ('The lawsuit—at least in the absence of a showing not made here that it was independently an abuse of process—was not the kind of adverse action that the retaliation statute reaches.')." *Id.*, *3.

³²³ *Bleiler v. Coll., of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775, *9-10 (quoting OCR's 2011 Dear Colleague Letter)(emphasis added).

³²⁴ See e.g., 20 U.S.C. §1092(f)(8)(B) (stating: "The policy described in subparagraph (A) shall address the following areas: (i) Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include—(I) primary prevention and awareness programs for all incoming students and new employees, which shall include— (aa) a statement that the institution of higher education prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking; (bb) the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction; (cc) the definition of consent, in reference to sexual activity, in the applicable jurisdiction; (dd) safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual; (ee) information on risk reduction

Title IX claim based on a flawed investigation in part because he did not present “material evidence” favoring plaintiff’s innocence which a good faith investigator would reasonably uncover during an investigation (or) anti-male gender-bias on the part of the investigator.³²⁵ As a result, when possible, accused students should: (a) document how gender-bias taints investigators and/or

to recognize warning signs of abusive behavior and how to avoid potential attacks; and (ff) the information described in clauses (ii) through (vii); and (II) ongoing prevention and awareness campaigns for students and faculty, including information described in items (aa) through (ff) of subclause (I). (ii) Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking. (iii) Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about— (I) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protection order; (II) to whom the alleged offense should be reported; (III) options regarding law enforcement and campus authorities, including notification of the victim’s option to— (aa) notify proper law enforcement authorities, including on-campus and local police; (bb) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and (cc) decline to notify such authorities; and (IV) where applicable, the rights of victims and the institution’s responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court. (iv) Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that— (I) such proceedings shall— (aa) provide a prompt, fair, and impartial investigation and resolution; and (bb) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability; (II) the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and (III) both the accuser and the accused shall be simultaneously informed, in writing, of— (aa) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking; (bb) the institution’s procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding; (cc) of any change to the results that occurs prior to the time that such results become final; and (dd) when such results become final. (v) Information about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law. (vi) Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community. (vii) Written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement. (C) A student or employee who reports to an institution of higher education that the student or employee has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off campus, shall be provided with a written explanation of the student or employee’s rights and options, as described in clauses (ii) through (vii) of subparagraph (B).”

³²⁵ *Yu v. Vassar Coll.*, 2015 US Dist. Lexis 43253 *41-49 (S.D.N.Y. 2015)(quoting *Donohue v. Baker*, 976 F. Supp. 136,147 (N.D.N.Y. 1997). See also, *Doe v. The Ohio State Univ.*, 2016 WL 6581843, *8 (rejecting plaintiff’s due process claim based on inadequate and biased investigation because he “identifie[d] no violation of a clearly established right to a thorough and neutral investigation.”).

others involved in disciplinary proceedings, and (b) provide investigators and adjudicators exculpatory evidence which disproves the false allegations against them, such as polygraphs, expert reports, security camera footage, medical records, and/or notarized affidavits from witnesses.

A related issue is whether universities lack Title IX authority to discipline students for allegations of sexual misconduct occurring off-campus. This issue was well researched by teams participating in the American Bar Association's 2016 moot court competition.³²⁶ Falsely accused students in these types of disciplinary proceedings should review these briefs and/or OCR rulings that address Title IX's limits on addressing off-campus allegations of sexual misconduct.³²⁷

(J) Universities' violations of generally accepted rules of evidence

Attorneys involved in university level disciplinary proceedings regularly witness irreparable damage inflicted upon the falsely accused by the absence of the most basic rules of evidence such as relevancy and hearsay. Yet, courts oftentimes find defendant universities need not apply traditional evidence rules in sexual misconduct disciplinary proceedings.³²⁸ Nevertheless, Title IX plaintiffs should not abandon evidentiary arguments if they can: (a) establish a gender-biased application of evidentiary decision making, and (b) detail how these decisions contributed to an erroneous finding that they engaged in sexual misconduct. This is partly because the Sixth Circuit's *Cummins* decision determined public universities may violate due process if plaintiffs' complaints explicitly articulate how "hearsay was actually [used] against them in their hearings."³²⁹

Cummins also addressed commonly used "victim impact statements" in sexual misconduct disciplinary proceedings. These statements result from university policies which request accusers detail how the alleged sexual assault impacted them. In an attempt to mirror criminal proceedings where juries do not hear this often highly prejudicial evidence unless the defendant is found guilty, university policies generally state adjudicators cannot review victim impact statements until after a student is found "responsible." This is a sound practice because attorneys regularly involved in

³²⁶ *Handout 18* (containing ABA's 2016 Moot Court Competition Brief of Team 489).

³²⁷ *Id.*, See also, *Handout 19* (containing OCR's June 10, 2004 Determination Letter Case No. 06032054 *Oklahoma State Univ.* which states: "a university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.").

³²⁸ See e.g., *Doe v. Brown Univ.*, 2016 WL 5409241, *21 (finding universities are not required to adjudicate sexual misconduct allegations pursuant to rules of evidence applicable in America's courts).

³²⁹ *John Doe 1 v. Cummins*, 2016 WL 7093996, *9 (stating: "[a]ppellants make several arguments regarding the procedures actually employed at their ARC hearings, all of which ultimately fail to state a due-process violation. First, appellants challenge the use of hearsay evidence without adequate safeguards. Appellants' complaint, however, fails to indicate what hearsay was actually allowed against them in their hearings. The only reference to the use of hearsay involves appellants' initial hearings. As discussed above, any procedural deficiencies in appellants' initial hearings were cured when they received new hearings. Because there is no claim that hearsay evidence was introduced in the second hearings, this allegation is irrelevant to our analysis.").

Title IX disciplinary proceedings often see victim impact statements containing highly prejudicial hearsay and inflammatory commentary that their male clients have never seen before.

But even though university policies state adjudicators should not receive victim impact testimony prior to determining “responsibility,” this testimony is commonly provided to adjudicators prior to these decisions. As a result, *Cummins* determined public universities may violate a plaintiff’s due process right if adjudicators receive “victim impact testimony” *before* making a responsibility finding.³³⁰ Therefore, whenever possible, Title IX complaints should: (a) identify all victim impact testimony provided to adjudicators *prior to* adjudicators issuing a responsibility finding; (b) identify how this testimony caused erroneous results; and (c) detail – if necessary through “information and belief” allegations – how gender-bias caused adjudicators to rely on victim impact testimony in rendering an erroneous responsibility finding.

(K) Expungement of sexual misconduct disciplinary from university records

The primary motivation of most male plaintiffs who file Title IX claims is the removal of erroneous sexual misconduct findings from the student’s academic record. This is because such a notation devastate the student’s educational and lifetime career opportunities, earnings potential, and emotional well-being. For, as *Brandeis* noted:

“ . . . the stakes [male college students face in sexual misconduct disciplinary proceedings are] very high . . . carry[ing] the potential for substantial public condemnation and disgrace. . . . [which] may permanently scar [the student’s] life and career.”³³¹

Similarly, Judge Edith Jones of Fifth Circuit noted in her dissenting opinion in Title IX case that:

“Sexual assault is not plagiarism . . . [i]ts ramifications are more longlasting and stigmatizing in today’s society. The University wants to have it both ways, degrading the integrity of its factfinding procedures, while congratulating itself for

³³⁰ *Id.*, *9 (noting: “[w]hile due process does not necessarily require that formal ‘rules of evidence, [or] rules of civil or criminal procedure’ be applied in a school-disciplinary setting, *Flaim*, 418 F.3d at 635, this allegation is potentially problematic under *Mathews*. Exposure to victim-impact statements prior to an adjudication on the merits may prejudice the accused and lead to an erroneous outcome based on emotion, as opposed to reason. This is especially true in Doe II’s case given that the victim testified that Doe II was ‘a rapist’ and was ‘going to Hell.’ . . . But UC has a strong interest in avoiding the bifurcation of proceedings into multiple phases—i.e., a guilt phase and a punishment phase—that would add time, expense, and complexity to every disciplinary hearing. Additionally, there were procedural protections in place to counteract any potential for error from allowing the victims’ statements, including the panel’s ability to make credibility determinations of the victims’ statements and appellants’ own opportunity to refute the victims’ accounts. Moreover, the limited prejudicial impact of allowing the ARC panels to consider the victim-impact statements prior to determining appellants’ responsibility is illustrated in this case. Although the victim’s statements in Doe II’s hearing were more prejudicial than those in Doe I’s, Doe II ultimately received a more lenient punishment. On balance, therefore, we find that the introduction of victim-impact statements prior to determining appellants’ responsibility did not impact appellants’ due-process rights under *Mathews*.’)(citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) and *Mathews v. Eldridge*, 424 U.S. 319, (1976)).”).

³³¹ *Brandeis*, 2016 U.S. Dist. Lexis 43499, *109.

vigorously attacking campus sexual misconduct. Overprosecution is nothing to boast about.”³³²

dissenting

In attempting to avoid these scars, it is important to note the Sixth Circuit’s *Cummins* decision determined complaints seeking the expungement of sexual misconduct disciplinary notations from a plaintiff’s college records at a public university: (a) cannot be dismissed pursuant to the 11th Amendment, and (b) qualifies as “prospective equitable relief” amounting to a “continuing violation sufficient to trigger the *Ex Parte Young* exception”³³³ In addition, plaintiffs seeking the expungement of their records should direct courts to OCR’s Wesley College decision which recommended monetary damages and the expungement of sexual misconduct disciplinary notations in male students’ college transcripts when these students’ Title IX rights are violated.³³⁴

³³² *Plummer*, 2017 WL 2704014, *13 (5th Cir. June 26, 2017).

³³³ *John Doe 1 v. Cummins*, 2016 WL 7093996, *6 (discussing *Ex Parte Young*, 209 U.S. 123, 155–56 (1908)).

³³⁴ OFFICE FOR CIVIL RIGHTS LETTER TO ROBERT E. CLARK, Oct. 12, 2016, *available at*: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>. p. 28 (stating: “[i]n accordance with the Agreement, the College agrees to . . . provide specific remedial actions if warranted, including, but not limited to, removal of each expulsion from all relevant educational records, as well as an offer to allow the accused Student and/or Students 1, 2 and 3 to complete their degrees at the College and reimburse them for documented costs incurred for enrollment at a different educational institution, and any other appropriate measure.”).

Comparative Recidivism: An Imperfect Measure of Early Release Sentencing Options

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Problem-solving courts, specialized courts, early release programming, boot camps, sentencing circles, and other sentencing alternatives that effectively shorten incarceration durations are often touted as nearly miraculous panaceas for all that ails the criminal justice system. For example, their supporters and evaluators have variously claimed that these sentencing alternative programs: reduce recidivism, reduce incarceration costs, improve reintegration and reentry outcomes, re-unify families, and on a grand scale reduce overall criminal justice system costs. But do they really?

Are the creators, supporters, and evaluators of early release sentencing options sometimes falling afoul of the “DARE Syndrome”; that is, are they merely touting programs that feel good, sound good, have some logical appeal, but have not been objectively and reliably evaluated, considering all of the programs’ true net costs and benefits? Once empirical research caught up with the hugely popular DARE programs, researchers determined there was no discernible benefit to DARE at all. After having spent perhaps millions of dollars on DARE nationwide, research finally determine it was all for naught. Once research catches up with some of these early release sentencing options, might they suffer the same fate?

On the plus side, many program evaluations of Minnesota sentencing alternatives rest on a solid empirical base, driven by such program evaluation experts as Grant Duwe and others. However, even here in Minnesota and its neighbors, some evaluations of sentencing alternative programs are more qualitative than quantitative and worse, are more marketing than assessment.

This short paper and presentation offer a few observations and suggestions for those social scientists who conduct these program evaluations and to criminal justice practitioners and decision-makers who must decide upon which programs to fund and to what degree. In particular, the focus here is on the potential pitfalls of evaluating sentencing alternative programs based solely or even predominantly on recidivism reduction for program participants.

What is Recidivism?

That seems a simple question, but the definition of recidivism is at the core of many of the program evaluation challenges in criminal justice. In spite of reams of scholarly work on recidivism, the research and practitioner communities have yet to settle on a single, universally accepted definition. Is it re-offense, re-arrest, or re-conviction? Is it over one month, three months, six months, one year, three years, or more? When does the clock start to tick: release from incarceration, release from supervision? Must the new crime involve the same family or category of crimes as the original offense? How serious must the new offense be to constitute a

recidivism offense? Is one recidivism offense enough to count? Where there are more than one recidivism offenses, how is that computationally handled in the program evaluation? And many more definitional questions linger. Thus, when one prepares a program evaluation of these programs and uses recidivism as a measure of program impact, one must carefully define the term. Similarly, when criminal justice practitioners and decision-makers read these program evaluations, they must closely consider and bear in mind the recidivism definition the researcher used.

Evaluation Design: Experimental or Quasi-Experimental? It Matters.

Ideally, when evaluating the impact of a new program, the researcher wants to compare the program participants against a control group that as closely as possible matches the participant group in all material respects. So, when evaluating a drug court program, for example, the researcher would want to identify, say, 200 persons who would be eligible for that drug court opportunity, had committed similar offenses, with similar criminal histories, of similar socio-economic, racial, ethnic, and age characteristics, and soon. The more similar the better. Then, in an experimental design, the researcher would have half, that is, 100, of them participate in the drug court, and would preclude the other half – the other 100 (the control group) – from participation in the program. Assuming the researcher believes the program is beneficial to participants, it would be unethical to forbid program entry for half.

Instead, therefore, most researchers use a quasi-experimental design. Following that design, the researcher identifies 100 people who participated in the drug court program, then finds another 100, otherwise similar as above, but who did not participate in a drug court program to serve as the control group. This is where one of the data threats enters the analysis. Have we selected an appropriate and comparable control group? If so, comparisons between the participant group and the control group would be meaningful – apples to apples. If not, comparisons between participant and controls would not be meaningful – apples to oranges.

Evaluation Design: The Pre-Ordination Problem

Some alternative sentencing programs impose eligibility requirements some of which are express and some of which are implicit. And some of those requirements for eligibility and for successful completion of the program, coupled with scarce resources, beds, or slots in these programs, cause criminal justice decision makers to grant admission to those most likely to succeed in the alternative sentencing program and deny admission to those most likely to fail. Thus, in some cases, those pre-ordained to succeed in the alternative sentencing program are more likely to be admitted into the program. Thus, their better recidivism results compared to those not admitted to the program offers no useful measure of the program's impact. Those better recidivism results were pre-ordained.

Evaluation Design: The Volunteer (Self-Selection) Problem

Some alternative sentencing programs impose eligibility requirements some of which are explicit and some of which are implicit. For example, the La Crosse County Drug Treatment Court guidelines provide:

The person, if accepted, must agree to abide by all Drug Treatment Court rules and modifications. Once a participant, he/she must agree to abide by any future rule modifications while they are in the Drug Treatment Court by signing the Drug Treatment Court contract and releases of information.

One can easily imagine a person, knowing they were not likely to successfully adhere to all those program rules, and persons who do not want to be impeded or controlled by such program rules, would choose not to enter the program. Still other such programs implicitly require adherence to strict testing, treatment, or counseling regimens that some who might otherwise participate in the program may find onerous or impossible to meet, and therefore may choose not to participate in the program. In other situations, the potential program applicant may choose to avoid the hassle and intrusion that some of these programs require by not enrolling in the program.

Of course, the opposite situation also occurs. A person who is particularly rule-compliant may know that they would thrive in a program with copious rules. Or a person who expects to be able to complete treatment and remain abstinent without a hitch may relish the opportunity to enter the program to be successful in it.

The volunteer problem, as it relates to program evaluation, is a function of these realities. Persons who are not likely to succeed in the program or follow program rules and persons who resent control and oversight are more likely to decline participation in one of these alternative sentencing programs. Conversely, those most likely to succeed in the program, manage and adhere to the rules, and thrive under close supervision and intrusion are relatively more likely to enroll in an alternative sentencing program. The former group refuse to enter these programs; the latter group are the “volunteers.”

Can Propensity Matching Correct for These Biases?

Researchers are increasingly using propensity matching in an attempt to normalize the participant and control groups. In short, propensity matching creates a control group from those who did not participate in the program by identifying a set of characteristics of the participant group then developing a control group comprised of people with similar characteristics. Often, those characteristics include age, race, and crime of conviction for those who might otherwise be eligible to participate in the alternative sentencing program but did not participate (because, among other things, they declined, they were not chosen to participate, or the program was not offered in the county where they were sentenced). An example makes the point. In the June 2012 Minnesota Statewide Adult Drug Court Evaluation, the control group was selected to include “1. Participants eligible for drug court but receiving traditional case processing during the same time period . . . 2. Participants eligible for drug court but who were from a different court within a court’s jurisdiction from which individuals were not eligible to participate in the drug court [; and] 3. Participants eligible for drug court who had similar charges and were matched on certain characteristics.”

Without more, however, this propensity matched control group from this 2012 Minnesota study violates both the pre-ordination and volunteer problems identified above. Further, this propensity matched control group was not really matched based on “propensity” at all. Indeed,

although that control group shared some similar characteristics with the drug court participant group, propensity to recidivate was not one of those similar characteristics. This was, inadvertently, an apples-to-oranges comparison, and any effort to credit the alternative sentencing program (in that case, Minnesota's drug courts) with recidivism impacts based on recidivism differences between the participant group and the control group is misguided.

That is not an indictment of this 2012 Minnesota drug court study, but is a cautionary tale for researchers and consumers of their research. If the control group is matched on time or crime of sentencing or age or race of offender, those matching characteristics need not reflect matched propensity at all. This sort of quasi-experimental approach, as the 2012 Minnesota researchers themselves acknowledged, is far inferior to a truly experimental approach. So then, how might a truly experimental approach be applied to allow researchers to truly measure the impact of an alternative sentencing program on recidivism?

By way of another example, a 2008 Duwe and Kirschner study of Minnesota's Challenge Incarceration (Boot Camp) Program ("CIP") created its control group using the following characteristics:

The treatment [that is, participant] group consisted of individuals who participated in CIP from its inception in October 1992 through June 30, 2002.

* * * * *

The comparison group was composed of all individuals released from a Minnesota correctional facility from January 1, 1993 to December 31 who did not participate in CIP and were matched to individuals in the treatment group on the following variables: offender sex, offender race, offense type (property, drug, or other), metro area, length of stay, disciplinary history, age at release, age at first arrest, age at first felony conviction, age at first prison commitment, prior arrests, prior felony convictions, and prior prison commitments (N=1,555). The comparison excluded individuals who were incarcerated for sex and other person crimes or were discharged (as opposed to being placed on supervised release).

Consider whether using these characteristics to create a control group truly ensured that the CIP participant group and the control group were propensity-matched or if there may be a better way to ensure that.

The flaw of these quasi-experimental and propensity matching approaches is that researchers and practitioners may attribute positive impacts (such as recidivism reduction) to alternative sentencing programs that did not verifiably or actually cause those positive impacts (that is, where the program did not actually reduce recidivism for participants). The problem is not solely that the recidivism impact assessment is incorrect; the problem is that, quite often, dollar savings are assigned to those incorrect recidivism impact assessments, thereby overstating the savings flowing from alternative sentencing programs. That savings overstatement that afflicts some alternative sentencing program evaluations can fuel unfortunate government decisions to fund some programs over others based on savings that were a mirage – the program

costs will be real but the estimated program savings were not. Governments in tight economic times cannot afford to invest in programs based on flawed cost-benefit evaluations.

A Sample Experimental Approach to Recidivism Scoring for Minnesota Alternative Sentencing Programs

As noted by many researchers and program evaluators, an experimental approach (where participants and control group members are randomly selected from an appropriate universe) would be vastly superior to the quasi-experimental approaches used too frequently today to measure recidivism impacts flowing from alternative sentencing programs. The pitfall of experimental designs in this alternative sentencing program evaluation context, however, is similar to the pitfall when using experimental designs for any “treatment” the researchers a priori believe to be beneficial. That is, when a researcher randomly relegates an otherwise eligible participant to the control group, and thus denies that person the purportedly beneficial “treatment,” how can that be done ethically? Is it ethical to deny the purportedly beneficial “treatment” to every other prospect? How about choosing based on alphabetical array by last name? Or could one ethically deny the beneficial “treatment” to those over or under a certain age? Or deny “treatment” to persons from one community or another?

This may seem like an intractable problem. However, I submit that the current situation with limited state budgetary support for some of these programs offers more opportunity than threat in terms of program evaluation. Let’s say, for example, that combined state and county funds plus donations are available to support just 100 participants each year in an intensive, treatment-based court for adult drug offenders in County X, but at least 200 offenders in County X are qualified and interested in participating each year. In that situation, not unheard of in the current budgetary squeeze, one could randomly select the 100 participants from among the 200 qualifying and interested prospects without violating ethics, because funding absolutely restricted the maximum number of participants in County X. Now we have a usable and valid participant group and a usable, valid, and truly propensity- and characteristic-matched control group. By following that path, the researcher can follow the much more reliable experimental design (not a quasi-experimental design) approach, through which more valid comparisons between participant and control groups can be assured and by which much more accurate cost-benefit assessments of recidivism reduction can be computed to drive wiser public choices on which alternative sentencing projects are cost-effective and therefore are best to fund.

In the brief presentation at the 2017 Minnesota CJI, the presenter and participants will discuss these concepts, apply them to one or more actual programs and one or more paradigm programs, then will together discuss ethical paths for using true experimental methods to better assess alternative sentencing program successes at recidivism reduction.

Of course, there may be benefits to alternative sentencing programs aside from recidivism reduction (such as reducing the total cost to the criminal justice system by using these alternative sentencing programs rather than full incarceration); however, if one is using recidivism reduction as part of the purported “benefit” of these programs to compare against program costs, one must ensure that recidivism reduction is actually caused by the program

(rather than an artifact of control group selection methodology) and is accurately and objectively measured in the program evaluation.

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Implementation of Microcrystal Testing at the BCA

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Bureau of Criminal Apprehension
Saint Paul

Microcrystal Tests to Reduce Turnaround Time in the Drug Section

The Issue

As of mid-2017, the average turnaround time (TAT) for the BCA Drug Chemistry Section is over 6 months and the number of backlogged cases is over 2500. As is true throughout forensic labs in the U.S., the BCA FSS is experiencing the highest volume of submissions we have ever seen. BCA FSS recognizes the importance of returning the TATs to an acceptable level and has identified a new testing scheme with the goal to provide efficient and useful laboratory results.

Background on Microcrystal Testing

Microcrystal (MC) tests provide a fast and inexpensive alternative to instrumental methods to indicate the presence of controlled substances. The result is the formation of highly specific crystals associated with a controlled substance when viewed using a polarized light microscope with appropriate filters. Three MC tests (cocaine, methamphetamine, and heroin) were validated by the BCA Drug Chemistry Section. The validation supported the combined use of microcrystal tests, visual observations, and color/spot tests to provide a strong indication of the presence of a controlled substance.

SUMMARY OF ACTIONS TAKEN

January 2016 – BCA Lab Management met with representatives from Hennepin County prosecutors, defense, and the bench to present the results of the MC Testing validation conducted at the BCA and the proposed procedure as a potential answer to that jurisdiction's large caseload. Microcrystal testing was initiated for Hennepin County cases that qualified in late March of 2016.

September 2016 – Hennepin County microcrystal cases were being reported within a few weeks of submission. Cases that didn't qualify for MC testing were reported in approximately 30 days and there is currently no backlog for Hennepin County cases.

February 2017 – Representatives from BCA met with prosecutors, defense, law enforcement officers, and judges in Dakota County and St. Louis County to propose the institution of MC testing. To date, a handful of MC cases have been tested in these counties and more are sought.

July 2017 – Representatives from BCA met with prosecutors, defense, and law enforcement officers in Carlton County to propose the institution of MC testing. Work is set to begin MC testing on all suitable candidate cases.

BCA Drug Section Microcrystal Testing Procedure

Implement MC testing for candidate cases suspected of containing methamphetamine, cocaine, and heroin (excluding trace amount, liquids, pharmaceuticals, and tar form of suspected heroin).

BCA Drug Section Microcrystal Test Reports

- A weight and uncertainty will be reported for each item/sub-item tested up to the maximum charging limit.
- Positive results will be reported as "indicates the presence of x", where x is methamphetamine, cocaine, or heroin; positive results must have been observed for all of the spot/color tests and one microcrystal test for each item/sub-item to be reported in this manner (NOTE: Because of the presumptive nature of the test and the lack of a structural elucidation technique, the term "indicates" is being used in the report.).
- Negative results will automatically be tested by GC-MS for confirmation. GC-MS testing will either confirm the absence of controlled substances or detect substances that were below the sensitivity level of the MC testing procedure.
- If the case proceeds to trial, we request at least 4 weeks notification to perform the GC-MS confirmation testing.

BCA Drug Section Microcrystal Testing Statistics as of July 31, 2017

1,622 MC tests have been performed

- 42 of those were MC negative (2.6%) but 40 of 42 went on to confirm the presence of a controlled substance by GC-MS
- 204 of the 1622 tests performed (13%) were returned for confirmation testing. All contained the controlled substance reported by MC testing (i.e. there were no false positives).

70% of BCA submissions can be tested with MC testing

8 MC cases can be worked in the time it takes to do 1 GC-MS test.

Bottom Line: You can get a report with a weight (plus uncertainty measurement) and a result that is accurate and reliable (but not confirmatory) for your earliest hearings instead of waiting to set the case for trial.

For more information about Microcrystal Testing please contact Glenn Langenburg at the BCA-FSS (651) 793-2967

Microcrystal Testing FAQ Sheet

Why is microcrystal testing beneficial to my case/my client?

Because of the high number of submissions of drug evidence to the BCA FSS, turn-around times are extremely long for drug testing. This results in numerous hearings with the defendant, opposing attorneys, court appearances, etc. while waiting for the BCA FSS to weigh and test the suspected drug. Microcrystal (MC) testing has been demonstrated to be an extremely fast, accurate, and reliable process, allowing attorneys to have a BCA FSS report with the weight of the substance and MC test results for early hearings. This allows attorneys to make more informed decisions earlier in the process.

What if we go to trial?

The BCA FSS will request to be notified that a jury trial date has been set. We require a minimum notice of approximately 4 weeks. We will perform standard GC-MS testing and issue a confirmation report for use at trial.

What if a microcrystal test is negative?

Due to the higher sensitivity of the GC-MS, microcrystal-tested evidence that produced a negative result will proceed *directly* to GC-MS testing for confirmation (i.e. the case will not go back into the backlog queue). We will not issue a report until the absence of a controlled substance is confirmed by GC-MS testing.

How accurate is microcrystal testing?

Internal validation of the MC testing process utilized by the BCA FSS supports the use of this highly accurate test on forensic evidence. Additionally, the BCA FSS has not discovered a false positive result to date using the MC testing due to the design of the MC testing approach currently in use. Confirmation testing has been requested for approximately 12% of cases with MC results and each of these tests confirmed the originally reported controlled substance from the MC test.

Why is microcrystal testing so much faster?

We estimate that a scientist can complete approximately 8 MC cases in the time it takes to do 1 GC-MS case. This is because:

- The MC testing process is very lean and streamlined.
- The MC testing process is limited to cases that are good candidates for the test and readily lend themselves to the process. Complex controlled substances, testing matrices (e.g. pharmaceutical tablets, liquids, edible food, etc.), and preparation techniques are avoided.
- The MC testing process does not include instrumental techniques that require additional quality control steps (e.g. performance checks, blanks, and reference materials) and generate a significant amount of data for multiple analysts to review.

Is microcrystal testing a new technique?

No, these techniques have been used for over a 100 years. In the 1940's through 1970's, these tests were confirmatory for the presence of controlled substances in crime labs in the United States. When GC-MS instrumentation became cheaper, smaller, and accessible, laboratories favored instrumentation over MC tests. MC tests lack a testing component that gives a measurement or data regarding the molecular structure of the compound (i.e. it lacks a "structural elucidation" component). Primarily for this reason, the microscopic tests fell out of favor. Furthermore, the Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) requires more than a microcrystal test to "identify" (confirm) the presence of a controlled substance.

Why aren't more laboratories using microcrystal testing?

Likely simply due to what appears to be a cultural stigma associated with the use of testing that lacks instrumental analysis. However, when properly conducted by a trained and qualified analyst, MC tests are fast, cheap, accurate, reliable, and very specific to the target drug and we anticipate the use of MC testing to increase as laboratories across the country experience record submissions. MC testing is currently used in a handful of laboratories in California to report a controlled substance. Other labs that use these tests do so in addition to instrumental testing.

Where can I go to get more information about microcrystal testing?

The McCrone Research Institute in Chicago, IL (a world-renowned center for microscopy) was recently awarded funding by the National Institute of Justice to conduct comprehensive testing of MC methods. The results are available at:

<https://www.mcri.org/v/777/Modern-Compendium-of-Microcrystal-Tests-for-Illicit-Drugs-and-Diverted-Pharmaceuticals>

For more information about Microcrystal Testing please contact Glenn Langenburg at the BCA-FSS (651) 793-2967

Making the Record and Avoiding Trial Mistakes

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Preserving Record for Appeal and Avoiding Trial Mistakes

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- **Objections. The specific basis for all objections, and the basis for the district court's rulings, must be placed on the record. Objection to errors in district court is often a condition to review by an appellate court.**

Minn. R. Evid. 103(a)(1): An error may not be predicated upon a ruling admitting evidence unless “a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”

Examples:

- Speedy trial.*
- Evidence obtained in violation of constitution*
- Other evidence, Spreigl (other bad acts evidence)*
- *Relationship evidence (Minn. Stat. § 634.20)*
- Voir Dire.*
- State's questions of witnesses.*
- Improper argument.*

If the district court's ruling is unclear, ask the court to clarify the basis for the ruling for the record.

State v. Campbell, 861 N.W.2d 95, 100–01 (Minn. 2015): Defense attorney raises a general objection to the admission of interview statements, but the basis for the objection is not apparent based on context or on the record. As in State v. Brown, 792 N.W.2d 815 (Minn. 2011), the Minnesota Supreme Court reviewed whether the admission of the statement was error, but did so under the plain error standard. *See also*, State v. Rossberg, 851 N.W.2d 609 (Minn. 2014) (Court unable to determine specific ground for objection in question; reviewed under plain error standard)

State v. Washington, 693 N.W.2d 195 (Minn. 2005): Although the defense attorney objected to the admissibility of Spreigl evidence, when the objection was overruled she did not object to the scope of the evidence—the inflammatory details surrounding the incident, which were arguably inadmissible. And after those details were testified to, counsel did not move to strike, seek a curative instruction or request a mistrial. The Minnesota Supreme Court ultimately reviewed the admissibility of the details, but it did so under the plain error standard. *See also*, State v. Manthey, 711 N.W.2d 498, 505 (Minn. 2006).

State v. Holt, 772 N.W.2d 470 (Minn. 2009): Examination of juror for bias should be on record.

State v. Wren, 738 N.W.2d 378, 393–94 (Minn. 2007): A modified plain error test should be applied to unobjected-to prosecutorial misconduct, while a harmless error test based on the severity of the misconduct should be applied to objected-to prosecutorial misconduct.

State v. Ramey, 721 N.W.2d 294, 296–301 (Minn. 2006): When prosecutorial misconduct was not objected but is in plain error, “the state bears the burden of showing that the error did not affect the defendant's substantial rights.”

State v. Kelley, 855 N.W.2d 269, 277 (Minn. 2014): The appellate court will apply the law in existence at the time of appeal when determining whether the trial judge committed plain error.

*****Always ensure that the court reporter is recording your objections, particularly with bench conferences and in-chambers discussions.***

- **To get evidence admitted, make concise offers of proof that specify the nature of the evidence that the party seeks admitted.**

Minn. R. Evid. 103(a)(2): Error cannot be predicated on a ruling excluding evidence unless “the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked.”

Even when not required by a rule or a case, an offer of proof should be made when there is a dispute about the admissibility of a piece of evidence. The better the offer is, the more likely the evidence will be admitted at trial.

Offers of proof are typically required under the following circumstances:

-Alternative perpetrator claims: The defense must lay a foundation “by offering evidence that has an inherent tendency to connect the alternative perpetrator to commission of the charged crime.” State v. Atkinson, 774 N.W.2d 584 (Minn. 2009); State v. Nissalke, 801 N.W.2d 82 (Minn. 2011); State v. Ferguson, 804 N.W.2d 586 (Minn. 2011) (reversal where foundation sufficient to allow defense to present evidence of alternative perpetrator).

-Other-Acts Evidence: An offer of proof under the clear and convincing standard is required to admit other-acts or reverse-Spreigl evidence. Minn. R. Evid. 404(b); State v. Gutierrez, 667 N.W.2d 426, 437 (Minn. 2003). The purpose of other-acts evidence must be to prove a fact consequential to a disputed issue of the case. State v. Ness, 707 N.W.2d 676 (Minn. 2006).

-Self-Defense: If the defendant knew about the victim’s prior acts of violence, evidence of the victim’s reputation may be admitted to show that the defendant was reasonably in

apprehension of serious bodily harm. State v. Penkaty, 708 N.W.2d 185 (Minn. 2006). Evidence of the victim's reputation for violence is admissible to show that the victim was the aggressor even if the defendant was not aware of the reputation. Penkaty, 708 N.W.2d at 201; *see also* State v. Charles, 634 N.W.2d 425 (Minn. App. 2001).

-Rape Shield: An offer of proof is required where a defendant seeks to introduce evidence of a victim's prior sexual conduct. Minn. R. Evid. 412; Minn. Stat. § 609.347; State v. Olson, 824 N.W.2d 334 (Minn. App. 2012).

An offer of proof may be made by:

- 1) submitting a written summary of testimony, or
- 2) questioning a witness outside the presence of the jury, or
- 3) explaining to the judge what a witness would say.

Appellate courts generally review the offer of proof to determine whether trial court erred. But sometimes the court refuses to consider the claim at all on appeal. State v. Lee, 494 N.W.2d 475 (Minn. 1992) (Supreme Court declined to consider the defendant's claim of improperly excluded testimony of victim's husband pursuant to marital privilege because the defense had failed to make an adequate offer of proof showing the nature of the alleged testimony).

- **Make a comprehensive record regarding impeachment evidence.**

-When attempting to impeach a witness with a conviction, counsel should make a record that includes the date of the conviction, the specific offense of conviction, and, if possible, a summary of the conduct underlying the conviction.

State v. Sims, 526 N.W.2d 201 (Minn. 1994): Convictions are only automatically admissible under Minn. R. Evid. 609 if they involve dishonest or false statements. Some offenses, such as theft, may (shoplifting) or may not (swindle) be crimes of dishonesty depending on "what kind of act of thievery was involved[.]"

-When challenging state's motion to impeach the defendant with prior convictions, make a motion in limine before trial to exclude the evidence and object again when the state offers during trial. Also, make a record of whether the defendant's decision to testify turns on the ruling. State v. Gassler, 505 N.W.2d 52 (Minn. 1993) (indicating erroneous admission of prior convictions for impeachment may infringe on a defendant's right to testify); *see also*, State v. Swanson, 707 N.W.2d 645 (Minn. 2006).

- **Create a transcript of audiotaped or videotaped statements that will be offered at trial, and make a record that both parties stipulate to the accuracy of the transcript. That transcript should then be admitted as a court exhibit, regardless of whether the jury views it.**

Minn. R. Crim. P. 28.02, subd. 9: “If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the district court record, it becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. If the exhibit must be transcribed, the court reporter need not certify the correctness of this transcript.”

State v. Green, 747 N.W.2d 912 (Minn. 2008): Only after the defendant was convicted of criminal sexual conduct involving penetration, did defense counsel realize that the defendant’s statement to the police had been inaccurately transcribed, and the word “in,” should have been “um.” Court denied new trial because defense counsel had responsibility to ensure accuracy of transcribed statement to police before admission at trial.

- **Provide written proposed jury instructions and make a record of any discussions about or objections to jury instructions to be given.**

Minn. R. Crim. P. 26.03, subd. 19(1): “Any party may request specific jury instructions at or before the close of evidence. The request must be provided to all parties.”

State v. White, 684 N.W.2d 500 (Minn. 2004) (failure to object to jury instructions or to propose specific instructions generally waives the issue for the appeal; court ultimately reviewed the alleged error under the plain error standard); *see also* State v. Yang, 774 N.W.2d 539 (Minn. 2009).

State v. Landa, 642 N.W.2d 720 (Minn. 2002) (defense counsel’s failure to provide a proposed alibi instruction where no standard jury instruction existed was a factor that the Minnesota Supreme Court considered in holding that the district court did not abuse its discretion in denying the defendant’s request for an alibi instruction).

State v. Bustos, 861 N.W.2d 655 (Minn. 2015) (jury instruction erroneous because broader than the statutory definition of “domestic abuse”).

State v. Ihle, 640 N.W.2d 910 (Minn. 2002) (jury instruction erroneous because not reflect narrow limits of prior Supreme Court opinions).

- **When defense stipulates to an element of the offense to remove it from the jury’s consideration,**
 - 1) **The defendant must personally waive the right to a jury trial on that element of the offense;**
 - 2) **The stipulation should mirror the language of the statute in effect at the time of the offense; and**

3) The jury should not consider the element that is the subject of the stipulation.

State v. Hinton, 702 N.W.2d 278 (Minn. App. 2005) (district court erred in failing to obtain defendant's personal waiver of the right to a jury trial on stipulated element of an offense, but found error to be harmless).

State v. Kuhlman, 806 N.W.2d 844 (Minn. 2011) (failure to obtain defendant's personal waiver of jury trial rights for stipulated element not structural error; Court reviewed for plain error).

State v. Davidson, 351 N.W.2d 8 (Minn. 1984) (Supreme Court noted that purpose of a stipulation to an element of an offense is to remove inflammatory evidence from jury's consideration).

- **Counsel should make the proper records in Stipulated-Facts/Stipulated-Evidence court trials.**

The type of trial you elect will govern the waivers required in the district court and the scope of appellate review.

Stipulated-facts court trial, Minn. R. Crim. P. 26.01, subd. 3.

- Full scope of appellate review is available, including sufficiency of the evidence.
- A "super waiver" of rights is required (orally on the record or in writing, or both). The rule lists all of the rights that a defendant must waive, which include the right to confront witnesses and the right to testify.
- A separate waiver is necessary if the defendant is also waiving a sentencing jury.

NEW: *Stipulated-evidence court trial, Minn. R. Crim. P. 26.01, subd. 3.* Amended in 2017.

- Same requirements as above.
- New provision added to Rules after decision in Dereje v. State, 837 N.W.2d 714 (Minn. 2013), where Supreme Court held that Rule 26.01, subd. 3, doesn't apply to a court trial on stipulated evidence.

Stipulated-facts court trial to preserve a dispositive issue, Minn. R. Crim. P. 26.01, subd. 4 (a.k.a. Lothenbach proceeding)

- Appellate review is limited to the dispositive issue (suppression of the evidence, for example), and a defendant cannot challenge the sufficiency of the evidence.
- A “super waiver” of rights is required (orally on the record or in writing).
- In addition to the waiver, the parties must agree on the record that the pretrial issue is dispositive, and the defendant must acknowledge the limited scope of appellate review.
- A separate waiver is necessary if the defendant is also waiving a sentencing jury.

State v. Antrim, 764 N.W.2d 67 (Minn. App. 2009) (the waiver requirements of Minn. R. Crim. P. 26.01 are strictly enforced).

- ***Make sure exhibits, including demonstrative exhibits, power points, emails, etc. are included in the record, even if court exhibits.***
- **Make record on any Sentencing Challenges.**
 - Departure reasons, dispositional vs durational.
 - Criminal history score/prior record
 - Jail credit

Practical and Ethical Considerations When Admitting Social Media and Other Electronic Evidence

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E-Discovery has been a hot topic in the civil law arena for many years but it is just as important in the practice of criminal law. While it is commonplace to have large volumes of data to wade through in the typical white collar criminal matter, understanding and managing e-discovery is potentially important in all criminal cases. It is an inescapable reality that e-discovery plays a part in even routine criminal cases involving drugs, homicide, sexual assault and theft and at times this discovery can be voluminous in nature or complicated in the execution.

Criminal v. Civil E-Discovery

The rules governing civil and criminal discovery are fundamentally dissimilar due to the different public policies underlying criminal and civil litigation, constitutional requirements, and special ethical obligations of prosecutors and defense counsel. An essential difference between civil and criminal discovery is that of breadth: a criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any non-privileged information sought if it is relevant to the party's claims or defense and proportional to the needs of the case. Rule Civ. Proc. 26(b)(1).

In addition, criminal defendants are entitled to the effective assistance of counsel at trial and during plea negotiations. Defense counsel's effectiveness may depend on whether they have reviewed and understands the e-discovery in time to enter into informed plea negotiations. Criminal investigations and third-party subpoenas by both the prosecution and defense often bring vast quantities of ESI to criminal e-discovery. Complex ESI cases usually require litigation support resources not typically found in criminal defense practices.

E-Discovery can be a quagmire which traps the unwary lawyer resulting in sanctions, complaints and negative results. There may be endless systems, devices and repositories of data that may be arguably probative in a criminal case but there remain significant questions regarding the accessibility of such data as well as the impact that the collection of this data may have on personal and constitutional rights of the individuals. These questions are further compounded by

the lawyer's ethical obligations to the client. Criminal e-discovery matters because technology changes the rules of the legal ballgame. Increasing advances in legal technology are making it cheaper and easier for the government to conduct searches in criminal matters. To protect the public, while still respecting constitutional and civil liberties, the law, both civil and criminal, needs to keep pace with technology and attorneys need to raise their game.

Counsel Competency

One of the primary ethical obligations of counsel in the area of e-discovery is that of competency. The Minnesota Rules of Professional Conduct clearly apply to the handling of e-discovery by lawyers. Minnesota Rule of Professional Conduct 1.1, Competence, Comment [1], mandates that practitioners are expected to learn about e-discovery software and services or to associate with counsel of established competence in e-discovery when the need arises. Necessary study or association with competent counsel prior to the making of an expensive e-discovery request is a key to professionalism. (*See also* Minn. R. Prof'l Conduct 1.1, comment 8 (part of a lawyer's duty to provide "competent representation" includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." [Amended June 11, 2015])).

Consider the implications, ethically and even criminally, of an attorney arriving at the crime scene of a homicide. Maybe the victim is still present at the scene. Perhaps the gun that delivered the fatal shot is still lying on the floor. Imagine the ethical implications if the attorney walks through the crime scene, picks up and examines the gun, maybe rifles through the victim's pockets and scrolls through the text messages on the victim's phone. Those same ethical implications are present, although not nearly as obvious, when an attorney handles digital data on a client's phone, computer, social media site or any device. Handling the data may well destroy the evidence through spoliation of metadata much like handling a gun at a crime scene may destroy fingerprints.

Discovery is an essential part of any case and even seasoned attorneys may lack the necessary knowledge and skills required to meet the rapidly changing challenges of e-discovery. The complexity involved in the identification, preservation and collection of data required by today's criminal matters require an enhanced knowledge of technology and data that may be beyond that possessed by the standard criminal attorney. To meet the competency requirement counsel may

need to associate with counsel providing a much deeper knowledge of data, information management systems, and/or network architecture. Understanding what devices and systems may contain relevant data, and how to access that data in a manner that preserves the data's forensic defensibility, requires a specialized skill set. Failing to obtain and handle data properly can often result in the inability to adequately authenticate the data resulting in its inability to be used as evidence at the trial of a criminal matter.

The increase in available data is fueled by the growing intrusion of technical data and devices into everyday life. This technical proliferation results in an ever-increasing sea of data which may ultimately prove probative in a criminal matter. The standard smartphone, and any number of applications thereon, is constantly tracking your location to within a few feet. The blackbox within your car is recording not only the performance and condition of the car but also the application of the brakes, vehicle speed and even if the lights or radio are in use. Beyond the issues raised by data on personal devices, there are myriad external and third party devices and systems capable of tracking and recording individual activities. For example, today's thermal imaging devices can be used to identify and document marijuana growing operations without the need for law enforcement to even step foot on the premises.

Courts are already facing the challenges posed by the new devices and the data created by these devices. A recent criminal case out of Arkansas, *State v. Bates*, illustrates this fact quite well. In *State v. Bates*, a few friends, one of whom was Bates, spent an evening drinking and watching football at Bates' residence. When the morning light hit the hot tub, the body of one friend was discovered floating lifeless. Bates, the owner of the residence, called 911 and the police arrived on the scene. During the investigation, the police noticed what appeared to be signs of a struggle in the area and suspected homicide. Police proceeded to obtain a search warrant for the residence.

When police entered the Bates' home, pursuant to the search warrant, they noticed an array of "smart" devices including a Nest thermostat, a wireless home alarm system, wireless weather monitoring station and an Amazon Echo. The police seized the Amazon Echo as they stated that they had reason to believe that it may contain words or audio related to the suspected homicide.

By way of explanation, the Amazon Echo is one of a new breed of “smart” electronic home devices that essentially listens for audible commands at all times. The Amazon Echo is a wireless speaker and voice command device with a seven-piece collection of microphones that operates the Alexa Voice Service. A user sets the device to recognize a wake word, choosing between the two pre-set options of either “Alexa” or “Echo”. Once the device hears the designated wake word it will begin recording the user’s audio requests, execute commands and offer helpful advice. Once the device hears the wake word, and actually for a fraction of a second prior to the wake word as the device is always listening, the Echo begins streaming the recorded audio to the designated cloud repository. Once in the Amazon cloud, the recording and transcription of the audio is logged and stored in the Amazon Alexa app and must be manually deleted. The system retains the time and content of all audio within the system.

The police, seeking the data communicated from the Alexa device to the Amazon cloud, requested that Amazon provide the data and served Amazon with a search warrant. Amazon refused to comply with the search warrant and sought to quash the warrant. The controversy became moot when Bates agreed to allow Amazon to release the data from his Echo device to the prosecutors.

In another technology twist, the investigators in *State v. Bates* also recovered digital data from a specialized water meter with hourly water usage computations that would be used by the prosecution to show Bates’s inordinate consumption of water during a one-hour period which they will suggest resulted from his washing blood from the crime scene.

This type of evidence wouldn’t have even existed just a few years ago and the collection and preservation of such evidence requires specialized technical knowledge. Failing to recognize the existence of such evidence, as well as the special handling required by such evidence, can result in mistakes, ethical failings and complaints.

Restrictions on Criminal Discovery

Criminal discovery is more restricted than civil discovery. The Constitution provides criminal defendants with several discovery-related procedural protections including the right against self-incrimination and the right to confront witnesses. Because of these constitutional guarantees,

criminal discovery tends to be rather unbalanced. For example, under the U.S. Supreme Court's decisions in *Brady v. Maryland* and *Giglio v. United States*, the prosecution must turn over to the defendant all exculpatory and impeachment evidence in the government's possession. A criminal defendant has no equivalent duty because of the right against self-incrimination. Additionally, in jurisdictions that require limited forms of pretrial disclosures or court-ordered depositions, requesting evidence in possession of a defendant may be useless; any evidence in the defendant's possession that tends to support a finding of guilt is protected by the constitutional right against self-incrimination. Therefore, while the prosecution is frequently ignorant of the defense's evidence, the defense should be well-versed in the prosecution's evidence. In essence, although police and prosecutors can search and seize your data in a criminal matter, rather than going through the niceties of a document request, the Fourth Amendment will often provide extra protection for the person being investigated, requiring police and prosecutors to obtain search warrants.

Social Media Data in Criminal Matters

Access to Social Media

The pervasive reach of social media has resulted in social media evidence becoming ubiquitous in criminal matters. A survey of court decisions published in just January 2017, where social media evidence played a meaningful role in the litigation, is in excess of 1200.

(<https://blog.x1discovery.com/2017/02/08/criminal-conviction-overturned-due-to-failure-to-authenticate-social-media-evidence/>). In addition, Social media has become an important tool for law enforcement officials who use it for everything from enabling witness identifications of suspects, investigating gang affiliations to going undercover to gather evidence against suspected criminals. Defense attorneys are also using this data and social media sites to mine for information on their clients, witnesses, and other key players. In fact, a number of jurisdictions have begun holding attorneys to a higher standard when it comes to making use of online resources, including demonstrating due diligence and even locating and using exculpatory evidence in criminal cases. *Cannedy v Adams*, 706 F.3d 1148 (9th Cir. 2013) (holding that a lawyer's failure to locate a sexual abuse victim's recantation on her social media profile could constitute ineffective assistance of counsel).

How counsel actually obtains social media information can raise some interesting ethical concerns. While there generally is no ethical prohibition against an attorney (or someone working for that attorney) viewing the publicly available portion of an individual's social networking profile or social media site, they may not try to "friend" someone in order to gain access to the privacy-restricted portions of that profile? Ethics opinions from the Philadelphia Bar Association (March 2009), the New York City Bar (September 2010), the New York State Bar (September 2010), the Oregon Bar (February 2013) the New Hampshire Bar (June 2013), and others have made it clear that the rules of professional conduct against engaging in deceptive conduct or misrepresentations to third parties extend to cyberspace as well. As the New York City Bar ethics opinion emphasizes, with deception being even easier in the virtual world than in person, this is an issue of heightened concern.

Preservation of Social Media

What is a criminal defense attorney to do, if, during a meeting with a client, the client informs counsel that there are numerous photographs on his Facebook profile of him taking drugs, brandishing weapons, or engaging in other illegal activities? Should the lawyer advise the client to delete the Facebook page? Although some have taken this route to their detriment, lawyers who choose this course of action will run afoul of both their ethical obligations and the law. Under Rule 3.4 of the Model Rules of Professional Conduct (Fairness to Opposing Party and Counsel), lawyers may not "unlawfully . . . destroy or conceal a document or other material having potential evidentiary value," nor may they counsel any other person to do so. (emphasis added.) The commentary to the rule clarifies that the prohibition "applies to evidentiary material generally, including computerized information," and to information that has potential evidentiary value to "a pending proceeding or one whose commencement can be foreseen." (emphasis added.) Moreover, destroying evidence relevant to pending litigation—or causing someone else to do so—is a criminal offense in addition to being an ethical violation. For these reasons, lawyers should exercise great caution when advising clients about the possibility of deleting potentially relevant social networking materials.

One notable case where the attorney for a party provided the wrong advice to a client regarding the deletion of data from a social media account is the case *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013). Lester was a recent widower as the result of a tragic car/truck accident

which killed his then 25 year old wife. The lawsuit against the driver of the truck and his employer resulted in a massive \$10.6 million verdict to Lester. Unfortunately for Lester and his counsel, roughly a year later, a judge issued a final order cutting that verdict in half and issuing additional sanctions against Lester and his counsel totaling \$722,000.00. Of that total, Lester was obligated to pay \$180,000.00 and his counsel to pay \$542,000.00. The court, in providing its rationale for the sanctions stated; “Whereas, the court, having reviewed the evidence and arguments of counsel and carefully considered the extensive pattern of deceptive and obstructionist conduct of Murray and Lester resulting in the sanction award”. The obstructionist conduct giving rise to the sanctions began in March of 2009 when Murray, counsel for Lester, received a request for the contents of Lester’s Facebook account. The request was accompanied by a photo, clearly taken from Lester’s Facebook page, showing Lester partying with buddies and wearing a t-shirt emblazoned with the message “I [heart] hot moms”. Murray, through his paralegal, advised his client to “clean up” the Facebook page and eventually told him to deactivate the page the day that Lester signed the discovery responses. It was found that Lester deleted a total of 16 photos prior to producing material to defense counsel. More shenanigans ensued and culminated in Murray leaving the practice of law.

The depth of the information found on social media sites is staggering. Not surprisingly, social media posts can contain admissions or incriminating photos in addition to other evidence. Just on Facebook alone, the available information may include the user’s profile information, wall posts, photos that the user uploaded, photos in which the user was tagged by other Facebook users, GPS or location data and timestamps on the acquisition of that location data, a comprehensive list of the user’s friends and their Facebook IDs as well as a long table of login and IP data. Take the case of John McAfee who, while on the run from possible murder charges, posted a “selfie” on his blog. He was forced out of hiding when it was discovered by law enforcement that the “selfie” contained embedded GPS data pinpointing his exact location in Guatemala.

The ethical challenge facing counsel is that they must understand the process of e-discovery to be able to manage it. They must possess the requisite competency to employ the proper collection and preservation techniques needed to obtain the social media data in a manner that permits the authentication of the data and preserves the data and metadata needed to lay the foundation for its introduction into evidence. If an attorney does not personally possess the

specialized knowledge required for e-discovery they are ethically required to seek out the assistance of attorneys who do possess this specific skill set. An attorney cannot merely hand off the decisions and should stay engaged to ensure that they have performed all of their supervisory responsibilities. Taking a photograph may not be enough, a simple screenshot may not work and it generally requires specialized tools and technology to obtain the social media data with the requisite metadata intact and unaltered. It is important for counsel to work with skilled resources who understand the need to memorialize each step of the collection and production process in addition to considering how counsel will ultimately seek to authenticate the tweet, Facebook post, Instagram photo or blog post.

Texting While Driving: A Case Study, Best Practices, and GPS Demonstrations of Mobile Devices and the Cloud

John J. Carney
Carney Forensics
Scandia

Bruce N. Ringstrom
Ringstrom Law
Moorhead

Texting While Driving Criminal Case Checklist

Bruce Ringstrom Jr.

- **Build the right team**
 - An investigator who understands criminal vehicular operation cases
 - A forensic photographer (ideally the same investigator)
 - A mobile device digital forensics expert
 - Depending on your case, an accident reconstructionist
 - Assistance in forming an optimal juror profile (this is crucial, whether you are retained, appointed, or prosecuting)
- **Undertake an exhaustive investigation**
 - Mechanics of the accident
 - Accident reconstruction
 - Shape of the actual scene
 - You—the lawyer—need to visit the scene
 - What are all the possible causal factors of the accident?
 - Your client/defendant's behavior
 - Other driver's/person's behavior: car, motorcycle, bicycle, pedestrian? Did they have mobile digital devices?
 - Animals?
 - Weather?
 - Signs?
 - Find all witnesses
 - Consider all possible mobile digital devices
 - Phone
 - Second phone/passenger phone
 - Built-in GPS
 - Portable GPS
 - Smartwatch/other devices linked to a phone
 - Airbag control module/event data recorder (so-called “black box”)
 - What about the other driver's airbag control module?
 - Any other devices gathering data?
- **Client interaction**
 - Get the whole story as early as possible
 - You and client must understand the sequence second by second
 - Be careful to not overprepare your client (don't strip your client of emotion)
- **Construct the case/the defense**
 - The lawyer should understand the science
 - Take full advantage of your expert to understand how the science works in your case
 - What is gross negligence? How does it differ from negligence?

Texting While Driving Criminal Case Checklist

Bruce Ringstrom Jr.

- o Comparative negligence? Be careful. Being able to raise it doesn't mean you should.
 - Did AV's actions make accident unavoidable? (*State v. Kline*, 209 N.W. 881 (Minn. 1926))
 - AV's behavior is relevant, and defendant entitled to causation instruction (*State v. Nelson*, 806 N.W.2d 558 (Minn. App. 2012))
- o Expert report/findings
 - Keep it within the bounds of that which is supported by the facts
 - What purpose do you have in offering it (resolution, or trial)?
- **Have a juror questionnaire**
- **Pre-trial/Motions in limine**
 - o Argue what digital data are relevant
 - o Are the proposed exhibits consistent with the uncontested data?
 - *State v. Stewart*, 643 N.W.2d 281 (Minn. 2002)
- **Trial**
 - o As usual, jury selection is likely dispositive
 - Accidents, loss of family members, civil cases
 - Prospective juror constitutionally opposed to using digital devices in cars?
 - Someone on the jury needs to be able to deeply understand the JIGs
 - o In a no-drug and no-alcohol criminal vehicular case, gross negligence is the contested issue
 - o Should your client testify? What is the function?
 - o Make use of a direct examination outline provided by the expert
 - Rehearse the direct; think from a juror's perspective
 - Prepare your expert for cross examination
 - o Your expert should observe the testimony of the opposing expert
 - o Consider lower-tech exhibits (charts and photographs shown on a projector)
 - o Memorize the numbers (times down to the second)
 - o Motion for judgment of acquittal
 - Circumstantial evidence (A district court is required to apply the *Al-Naseer/Silvernail* analysis when presented with a motion for judgment of acquittal when the state's case rests largely or entirely on circumstantial evidence. *State v. Sam*, 859 N.W.2d 825, 831 (Minn App. 2015)) See also *State v. Harris*, 895 N.W.2d 592, (Minn. 2017), reaffirming Minnesota's circumstantial evidence standard
 - o Motion for lesser included offense
 - Should you forgo this? Be careful
 - Juxtaposing gross negligence and negligence helps the jury understand the standard

Digital Forensics Checklist
Johny J. Carney

CHECK LIST

Collect relevant, material evidence

- Consider ALL possible mobile devices related to collision
- Consider ALL possible cellular services related to collision
- Move to compel production of mobile devices and provide expert witness testimony
- Defeat ineffective arguments by opposing party
 - Forensic incompetence
 - Convenience
 - Past practice

Consider all transportation modalities of collision with defendant vehicle

- Pedestrian
- Bicycle
- Motorcycle
- Automobile
- Truck or Semi-Tractor Trailer

Conduct independent examination of all relevant mobile devices

- Defendant's mobile devices
 - Smart phone
 - SMS, MMS, iMessages
 - Mobile messaging apps
 - Navigation apps
 - GPS unit
 - Track points
 - Date and time stamps
- Defendant's correspondent's mobile device, if relevant
- Victim's mobile devices
 - Smart phone
 - GPS watch
- Victim's correspondent's mobile device, if relevant

Examine mobile device immediately for successful evidence recovery

- Messages, calls, GPS can be deleted, overwritten, and lost forever
- Continued device usage after collision results in deletion and overwriting
- Beware failure to seize and isolate mobile device at earliest opportunity

Examine mobile devices with multiple, upgraded tools

- Cross validate your mobile evidence (wisdom in multitude of counselors)
- Re-examine mobile device with upgraded tools not available many months earlier

What about text messages marked as "open"?

- Role of read or unread message status flag
- Role of read receipt
- Neither proves driver physically read the text message

Digital Forensics Checklist
Johny J. Carney

What about text messages marked as “open”?

- Messaging app behavior when conversation or thread is already open
- Complex behavior of messaging app in use on lock screen
- Use of other apps on lock screen while messaging app is in use
- Smart phone settings control lock screen behavior (document during exam)
- Smart phone settings control messaging app behavior (document during exam)

Consider possibility of spoliation of mobile device evidence

- Spoliation by wiping phone remotely or resetting to factory conditions
- Spoliation by using third party “cleaner” apps

Examine online cloud accounts for GPS locations

- Google Location History tracked from mobile device
 - Passive GPS locations tracked every few minutes for past few years
 - More GPS locations are sampled when tracked mobile device is moving
 - Time stamps of GPS locations are precise to the second
- Google Location History shows GPS location maps

Always request and persist in obtaining cell phone service provider business records

- Request defendant’s and victim’s business records
- Request Call Detail Records (CDRs) for voice calls
 - Date and time stamps to the second are critical
- Request Text Message Logs (SMS Logs)
 - Date and time stamps to the second are critical
 - Message content is not available
- Can request 3G/4G Data Records for mobile app activity
- Can request cell tower site data for approximate locations
 - Switch
 - Tower
 - Sector (Usually three antennas per tower)

Always request E-911 call records to determine outside limit of collision event time

- Request from local E-911 center
- Request all E-911 calls placed to center (usually defendant and eye witnesses)
- Date and time stamps to the second for all E-911 reports are critical

Consider vehicle forensics examination

- Infotainment evidence
 - Communications like incoming and outgoing text messages and phone calls
 - Internet or phone enabled content like traffic, sports, and weather forecasts
 - Audio content, movies, games, and social networking
- Telematics evidence
 - Tracking, navigation, favorite locations, safety communications and warnings
 - Logs for vehicle lights, vehicle doors, Bluetooth connections, etc.

Digital Forensics Checklist
Johny J. Carney

Oppose prejudicial evidence

- Consider how precise evidence may be improperly applied by opposing party
- For example, Google Earth Flyover Video
 - Challenge arbitrary movie making choices like animation speed
 - Challenge margin of error inherent in civilian GPS devices
 - Challenge “ghost” vehicle images in satellite imagery

Ask expert to draft a direct examination outline for attorney

- Provided by expert witness to attorney conducting direct examination
- Purpose is to eliminate any oversights of important evidence and scientific arguments
- Expert can assist attorney to internalize the outline and the science behind it
- Results in better flow of a more compelling direct examination

Offer expert cross examination assistance

- Attorney can help expert anticipate and prepare for questions on cross examination

Use pictorial demonstrative exhibits

- Eases jury comprehension of complex scientific forensic evidence
- Let the demonstrative exhibits tell the story
- Make court testimony a show and tell session

Show combined evidence from relevant mobile devices, cloud accounts, and cell services

- Correlate and integrate them to get the true picture
- Synchronize evidence using time stamps
 - Device text message timeline with GPS locations for vehicle path
 - Online cloud account timeline with tracked GPS locations for vehicle path
 - Cell service provider SMS log timeline with GPS locations for vehicle path
 - E-911 calls at the end of timeline

Show GPS locations prior to collision

- Defendant
- Victim
- Tie in with accident reconstruction analysis presented by independent expert

Counsel experts to avoid opinions and findings outside subject matter expertise

- Digital forensics
- Accident reconstruction
- Psychology of distraction

JUROR QUESTIONNAIRE

The purpose of this questionnaire is to assist the lawyers and the court in the selection of a fair, impartial, and neutral jury in a jury trial. Your answers will allow the jury selection process to proceed more efficiently.

Jury selection takes place in the courtroom and is open to the public. Similarly, the answers you give on this questionnaire are accessible to the public. If a question is asked either on this questionnaire or in court that you would not feel comfortable answering in public, please state so. The judge will then assess and determine whether you must answer in the courtroom (in public) or be allowed to answer the question in the judge's chambers, in the presence of the judge, attorneys, parties, and court reporter, who will make a record of the questions and answers. If your answer reflects a legitimate privacy interest, it will be kept confidential and sealed from access by the public.

Please answer all of the questions as completely and honestly as you can. Remember, you are under oath. Keep in mind that there are no right and wrong answers. If you do not understand a question, please write, "I do not understand," and the question will be explained to you in court.

Please use **blue or black ink** to write your answers. To make any additional comments, please use the additional blank page attached to the end of the questionnaire. (DON'T WRITE ON THE BACK of any page.)

NAME: _____

Occupation _____

Have you previously served on a jury? ____ YES ____ NO

If yes, what type of case? _____

Were you the foreperson? ____ YES ____ NO

Have you or anyone close to you ever been accused of or charged with a crime, such as assault, theft, DWI, reckless driving, or any other crime? ____ YES ____ NO

If YES, please describe: _____

Have you or anyone close to you ever been the victim of a crime? ____ YES ____ NO

If YES, please describe: _____

Have you ever been a witness to a crime, or been questioned by a police officer about a crime? ____ YES ____ NO

If YES, please describe: _____

Do you follow crime stories or criminal cases in the news? ____ YES ____ NO

If yes, what cases or stories? _____

Have you or anyone close to you ever been employed in law enforcement? ____ YES ____ NO

If YES, please describe: _____

Have you or anyone close to you ever been employed in the legal profession or courts? ____ YES ____ NO

If YES, please describe: _____

What groups or organizations do you belong to? _____

Do you hold positions of leadership in any of these groups? Please describe: _____

What are three words you would use to describe yourself? _____

Do you have any philosophical, religious, moral, or other beliefs that would prevent you from sitting in judgment on a criminal case? ____ YES ____ NO Please describe: _____

Do you have any disabilities (physical or mental) or other problems that would make it difficult for you to sit for several days as a juror? ____ YES ____ NO

If YES, please describe: _____

How stressful, right now, are the demands of your job and the separate demands of your personal life? Extraordinarily stressful, highly stressful, some stress, or no stress at all? Please explain. _____

Are there any pressing matters that would distract you or prevent you from giving jury service your complete attention? ____ YES ____ NO

If YES, please describe: _____

Have you or anyone close to you ever been involved in an accident of any kind that resulted in severe injuries or death? ____ YES ____ NO If yes, was it a vehicle accident? ____ YES ____ NO

If YES to either question, (a) please describe the general nature of the accident and injuries: _____

(b) Did you or they suffer any lasting psychological, emotional, physical, or material damage from the accident? Please describe. _____

(c) Was anyone charged criminally? Please describe: _____

(d) To your knowledge, was any civil lawsuit brought in relation to the accident? Please describe: _____

(e) Were you satisfied with the outcome of any criminal or civil proceedings? Why or why not? _____

Have you ever driven or ridden a motorcycle, snowmobile, or ATV? ____ YES ____ NO

If YES, please describe: _____

Do you or anyone close to you ever use a mobile phone at any time while in a vehicle? ____ YES ____ NO

If YES, please describe: _____

Do you or anyone close to you ever use GPS or navigation systems at any time while in a vehicle? ____ YES
____ NO

If YES, please describe: _____

Use the remaining space to explain any answers you did not have room for earlier or to outline any concerns you may have about serving as a juror. (Please indicate which question you are answering.)

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF CLAY

SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 14-CR-15-99

Plaintiff,

v.

**AFFIDAVIT OF EXPERT WITNESS
FINDINGS AND OPINIONS ON STATE'S
GOOGLE EARTH FLYOVER VIDEO**

Sarah Jo Braith,

Defendant.

1. I am a digital forensics expert and have been engaged by Sarah Jo Braith in the above captioned criminal vehicular homicide case to perform mobile device forensics and produce relevant, admissible evidence to prove her claims and defenses. I am well-qualified to perform the required work in this case. I know of the facts set forth in this report.
2. I am the President of Carney Forensics, which is an assumed name of Carney Consulting LLC, a Minnesota limited liability company. Carney Consulting LLC is a digital forensics consulting firm, which has operated in Minnesota for seven years.
3. I obtained an education (Bachelor of Science degree) from the Massachusetts Institute of Technology (MIT) and was employed as a software engineer, software architect, and chief technology officer for information technology companies in Massachusetts and Minnesota for over thirty years. I obtained an education (Juris Doctor degree) in law and dispute resolution from Hamline University School of Law and became licensed to practice law in federal and state courts in Minnesota and remain so licensed today. I operated a solo law firm in St. Paul for five years.
4. I am a faculty adviser for the Century College, White Bear Lake, MN, Cybersecurity, Virtualization and Forensics program where I sit on the advisory board, guest teach, and supervise digital forensic student interns. I am also an associate member of the American Academy of Forensic Sciences.
5. I am certified in mobile device forensics and hold a current Cellebrite Certified Logical Operator (CCLO) certification and a current Cellebrite Certified Physical Analyst (CCPA) certification. I also hold a Certificate of Completion of Mobile Forensics Specialized Training from Mobile Forensics, Inc. I am certified in computer forensics and hold a current AccessData Certified Examiner (ACE) certification.



6. I have presented nationally on mobile device forensics topics at the Department of Defense Cyber Crime Conference, the American Academy of Forensic Sciences, the Mobile Forensics World Conference, and the Paraben Forensics Innovation Conference.
7. I provide industry thought leadership in mobile device forensics and e-discovery to the mobile device forensics market leader, Cellebrite, through white papers, blog posts, and panel participation at national industry conferences.
8. I have presented scores of Continuing Legal Education (CLE) seminars on digital forensics in Minnesota for Minnesota CLE, the Minnesota State Bar Association, the Hennepin County Bar Association, the Ramsey County Bar Association, Office of the Public Defender, the Minnesota County Attorney Association, Minnesota Association of Criminal Defense Lawyers, Minnesota Society of Criminal Justice, Minnesota Paralegal Association, and many law firms in Minnesota.
9. I have authored these publications on digital forensics and electronic evidence discovery:

John J. Carney, et. al., "IT Technologies and How to Preserve ESI Cost Effectively", Minnesota E-Discovery Working Group, William Mitchell Law Review, Volume 40, Number 2, 2014.

John J. Carney, "Cellebrite Research Reveals Top Trends Shaping Mobile Forensics: Multi-Device, Field Analysis, Social Evidence, Big Data and Malware", Yahoo, Reuters, IT Business Edge, DFI News, February 26, 2014.

John J. Carney and Lynn Schmidt Walters, Esq. "What Prosecutors and Defense Attorneys Should Know About Recoverable Social Media Evidence: She Put What on Facebook?! Or Twitter, Google+, YouTube?", 2013 Criminal Justice Institute, Minnesota CLE, August 2013.

John J. Carney, "Cellebrite's Panel of Leading Industry Experts Provide Mobile Forensics Trends and Predictions for the Year Ahead", Business Wire, CNBC and Digital Forensic Investigator, January 23, 2013.

John J. Carney, "There's An App for That—Digital Forensic Realities for Mobile App Evidence, Security and, Privacy", Minnesota State Bar Association: Computer & Technology Law Institute, October 2012.

John J. Carney and Stephanie Losching. "Traps to Avoid When Using Facebook Evidence For An Aggressive Criminal Defense", The Challenger, Minnesota Association of Criminal Defense Lawyers, Fall 2012.

John J. Carney, "Today's Cell Phone Evidence Realities: Deleted Texts and Other Smoking Guns", Minnesota CLE, 2012 Criminal Justice Institute, August 2012.

John J. Carney, "Digital Forensics: How Producing Text Messages and Facebook Can Assist with OFPs, Restraining Orders, and Discovery in Divorce Cases", Family Law Institute, Minnesota CLE, March 2011.

John J. Carney, "Visualization of Mobile Forensics Data: Techniques and Case Studies", Cyber Crime Conference, Department of Defense Cyber Crime Center (DC3), January 2011.

John J. Carney, "Small Scale Digital Device Forensics – Evidence from Mobile Phones and GPS Units May Surprise You!", Criminal Justice Institute, Minnesota CLE, August 2009.

10. I have testified as an expert at trial, hearing, deposition, or by affidavit in the following cases in the previous five years:

State of Minnesota v. Emily Louise Givens (Criminal Vehicular Homicide), McLeod County District Court (MN), December 22, 2015.

Maksud Mahbub v. State of Minnesota (Post-conviction Relief), Ramsey County District Court (MN), November 19, 2015.

In Re the Matter of: Philip Rock Arnold and Amanda Margaret Hawkins (Family), Hennepin County District Court (MN), October 29, 2015.

State of Minnesota v. Nicks (First Degree Murder), Hennepin County District Court (MN), September 8, 2015 (affidavit) and September 10, 2015 (courtroom testimony).

In Re the Marriage of Veronica Anne Fitzpatrick and Andrew Thomas Alan Sudbury (Family), Hennepin County District Court (MN), June 8, 2015.

Mark Perman v. BNSF Railway Company (Personal Injury), Hennepin County District Court (MN), June 3, 2015.

Mark Perman v. BNSF Railway Company (Personal Injury), Hennepin County District Court (MN), April 27, 2015.

Imagine! Print Solutions, Inc. v. Sandra Fritz, John Ericson, and Imperial Wire, Inc. (Employment), Scott County District Court (MN), January 28, 2015.

State of Minnesota v. DeLaCruz (Sexual Assault), Waseca County District Court (MN), March 7, 2014.

Wayne A. Johnson and John G. Parkes v. St. Paul Plumbing & Heating Co. and David L. Smith (Employment Discrimination), United States District Court, District of Minnesota, July 2, 2014.

State of Minnesota v. Britten (First Degree Aggregated Robbery), Mower County District Court (MN), June 30, 2014.

State of Minnesota v. Holland (Double Homicide), Dakota County District Court (MN), November 12, 2013.

Ellen S. Ewald v. Royal Norwegian Embassy (Single Plaintiff Employment), U.S. District Court, District of Minnesota, July 29, 2013.

State of Minnesota v. Mosley (Triple Homicide), Hennepin County District Court (MN), April 2013.

In Re the Marriage of Heather McGraw and Timothy McGraw (Family), Scott County District Court (MN), December 6, 2012.

State of Minnesota v. Barta (Assault and Disorderly Conduct), Rice County District Court (MN), June 6, 2012.

State of Minnesota v. Rosillo (Burglary and Assault), Mower County District Court (MN), July 19, 2012.

State of Minnesota v. Jasnoch (Criminal Sexual Conduct), Rice County District Court (MN), May 31, 2012.

State of Minnesota v. Nicks (First Degree Murder), Hennepin County District Court (MN), April 27, 2011.

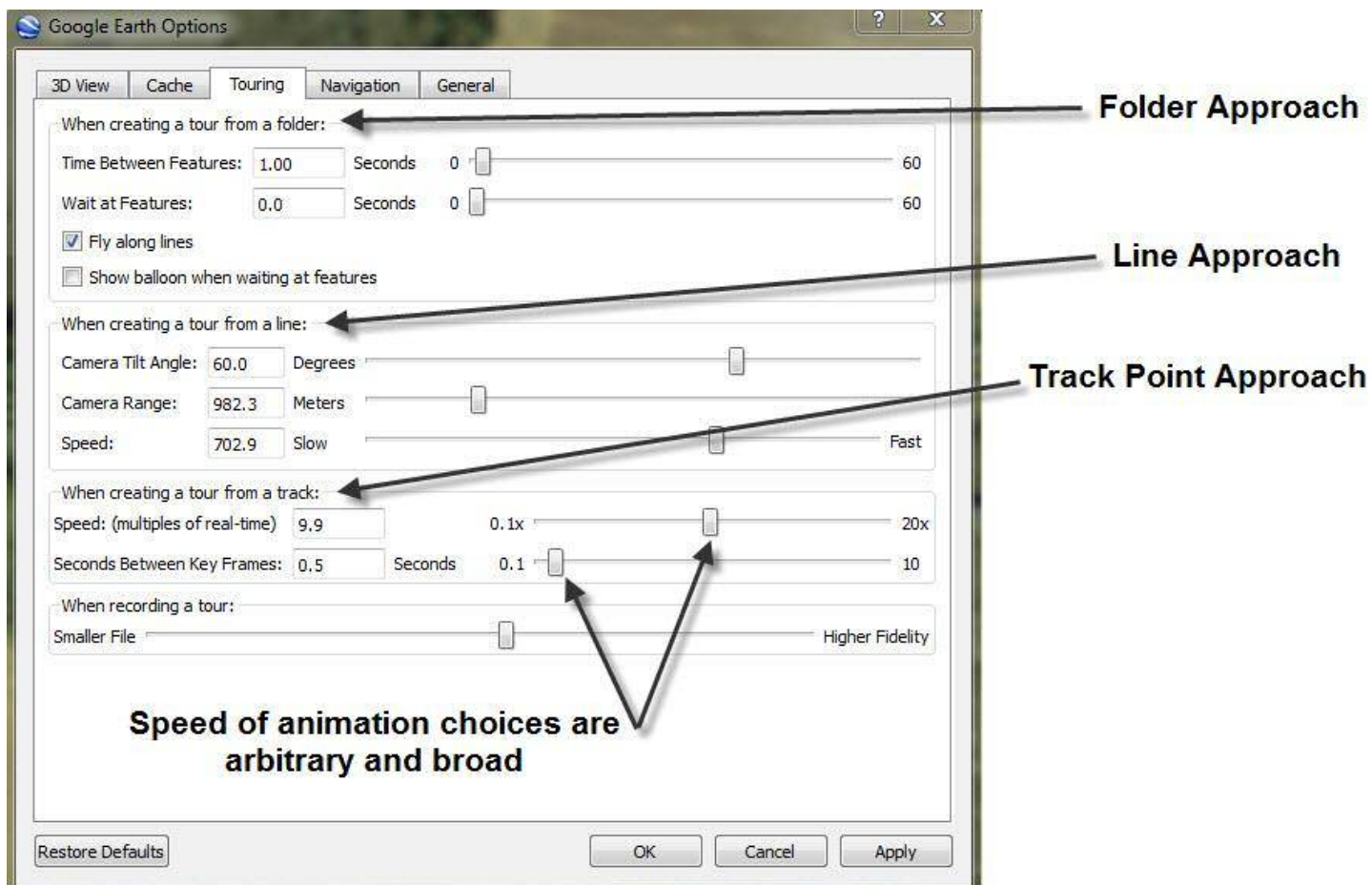
Calhoun, et. al. v. Pennington, et. al. (Constitutional Civil Rights), U.S. District Court, Northern District of Georgia, October 6, 2010.

State of Minnesota v. Muniz-Perez (First Degree Assault), Hennepin County District Court (MN), September 22, 2010.

11. I was hired by Sarah Braith's counsel to perform forensic collection and analysis of digital evidence from her mobile phone and standalone GPS unit. I was given instructions by counsel to investigate any material evidence relevant to Sarah's case at law. Specifically, I was charged to retrieve live and deleted text messages sent or received and to retrieve any live and deleted location information from these devices to show the court and its jury where Sarah traveled and when she texted on August 30, 2014 up to and including the motor accident that occurred at the junction of Interstate 94 and Minnesota Trunk Highway 9. I authored a narrative report on the requested subject matter including my findings and expert opinions last year on June 26, 2015.
12. I was asked more recently by Sarah Braith's counsel to review a multimedia demonstrative exhibit produced by the State in this case. It was a Google Earth flyover video depicting an animation of Sarah's travel immediately before and during the accident. Sarah's counsel sent me the video and all the information they possessed related to it. I do not know who produced the video and have no documentation providing any background, description, or other details about it.

13. The video took the form of an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM. It played for one minute and thirty-six seconds on my forensics workstation using Microsoft Windows Media Player. I viewed the video many times and often paused and resumed playback to examine it frame by frame for details and to capture screen shots for this affidavit.
14. I have prior experience with Google Earth as a digital forensics examiner. I used it in my earlier expert narrative report in this case to depict Sarah's journey with pictures (static photographic images) the morning of the accident. I am familiar with Google Earth's "Touring" functionality that enables users to create coarse animations, or "tours" for viewing, often referred to as "flyover videos".
15. A Google Earth tour or "flyover video" can be a powerful presentation tool. Its creator is in complete control of the content and the motion. Content can include placemarks, track points, images, and links. The resulting video is presented to the viewer as the creator sees fit to suit his or her purpose.
16. I understand the many arbitrary decisions that the creator of the flyover video must make in programming Google Earth. The primary decision the creator must make is the approach to creating it. When creating a tour from a folder the creator sets how to walk through placemarks, a position on the Earth's surface including a standard icon and a geographic location, from a folder. When creating a tour from a line the creator decides how the tour or walk through will move along an arbitrary line, a "fly along line" according to Google Earth. When creating a tour from a track the creator sets how GPS track points extracted from a GPS or mobile device will be rendered in the video. He or she must choose the length of the pause at particular locations, and the animation speed in multiples of real-time, which can vary from one-tenth speed (slow motion) to twenty-times speed (fast motion).

17. Please see Google Earth Options below from the Options choice on the Google Earth Tools menu. The “Touring” tab displays key decisions to be made and parameters to be set to create the video.



18. Which approach did the creator of the Google Earth flyover video choose? Despite Sarah’s counsel sending me the video and all the information they possessed related to it, I have seen no foundation documentation about the flyover video that describes who made it, how it was made, which approach to Google Earth touring was chosen, or the choices for each of the many Google Earth touring parameters that animate Sarah’s automobile journey on August 30, 2014.

19. The following anomalies depicted in the flyover video strain reason and common sense to a level that gives rise to my reasonable inference that they are effectively impossible. Please see Sarah driving her vehicle through automobiles taken from historic satellite imagery provided by Google Earth in a way that suggests a head-on or rear-end collision is about to occur.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.

20. The following anomalies depicted in the flyover video strain reason and common sense similarly to a level that gives rise to my conclusion that they are very unlikely:

- Sarah driving her vehicle so as to cross the center line frequently.
- Sarah driving her vehicle directly on or straddling the center line frequently.
- Sarah driving her vehicle off the highway onto the embankment several times and in one instance driving on the embankment through an intersection.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.

- Sarah driving her vehicle so as to cross the center line and drive off the highway on the opposing side of traffic onto and along the opposite embankment for a prolonged distance until she enters an intersection.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.

21. Less than one minute before the accident the video incredulously depicts Sarah driving into and beyond a ditch on the side of I94 West as she approaches and then enters the Highway 9 off ramp and exits I94. The video then shows her leave the ditch, crossover the off ramp and weave to her left onto the embankment, all at a high rate of speed as she approaches the accident intersection ahead.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.

22. The video fails to show Sarah slow down to a near-stop or stop completely at the stop sign before entering the intersection. Trooper David Keenan took Michael Pangelinan's statement (ICR #14901224) on September 16, 2014 at 4:34PM in which Mr. Pangelinan says on pages 6 and 7 that he saw Sarah slow to "maybe a two to three mile per hour crawl" and that although he didn't see Sarah stop completely, "she may have." The Google Earth flyover video fails to show either the stop or the crawl.

23. The automobiles shown in the accident intersection as a result of Google Earth satellite imagery photographed months or years prior to the accident are an abstract concept that may confuse and mislead the jury. Sarah is again incredulously depicted as driving her vehicle through one of those automobiles in the intersection shortly after impact during the accident.



Screen shot rendered by Microsoft Windows Media Player from the State's Google Earth flyover video, an MP4 video file with a file named 14-CR-15-99.mp4 and file size or capacity of 113,591 KB dated 8/3/2015 at 10:11AM.

24. The flyover video was arbitrarily created to play at a high rate of speed in what many viewers would call "extreme fast motion". The video's frames-per-second rate was artificially time-compressed causing the driving action to appear to the eye many times faster than real-time speed. "Real time" is the velocity a live, human observer would have witnessed Sarah's automobile traveling on Minnesota Trunk Highway 9 as she drove it south.
25. The creator of the flyover video arbitrarily picked the animation speed from the Google Earth Options menu pictured above in multiples of real-time from 2X, 5X, 10X, up to 20X real-time speed. The "extreme fast motion" animation chosen provides a quicker viewing experience for the viewer, but it sacrifices fidelity to the facts. What facts? The GPS track point record taken from Sarah's Garmin GPS device and its time stamps. Please see the time stamps below associated with the GPS track point data table (43 track points) for the last two and a quarter minutes of Sarah's journey before the accident on 8/30/2014.

Locations (43)

#	Name	Time	Latitude	Longitude
1		8/30/2014 11:57:12 AM(UTC-5)	46.673725	-96.420178
2		8/30/2014 11:57:15 AM(UTC-5)	46.67396	-96.420363
3		8/30/2014 11:57:16 AM(UTC-5)	46.673959	-96.420332
4		8/30/2014 11:57:17 AM(UTC-5)	46.673956	-96.42018
5		8/30/2014 11:57:18 AM(UTC-5)	46.673897	-96.420179
6		8/30/2014 11:57:19 AM(UTC-5)	46.673937	-96.420179
7		8/30/2014 11:57:20 AM(UTC-5)	46.673956	-96.42018
8		8/30/2014 11:57:21 AM(UTC-5)	46.673956	-96.42018
9		8/30/2014 11:57:22 AM(UTC-5)	46.673956	-96.42018
10		8/30/2014 11:57:23 AM(UTC-5)	46.673956	-96.42018
11		8/30/2014 11:57:24 AM(UTC-5)	46.673956	-96.42018
12		8/30/2014 11:57:33 AM(UTC-5)	46.675805	-96.42018
13		8/30/2014 11:57:36 AM(UTC-5)	46.676166	-96.42018
14		8/30/2014 11:57:37 AM(UTC-5)	46.67626	-96.42018
15		8/30/2014 11:57:38 AM(UTC-5)	46.67634	-96.42018
16		8/30/2014 11:57:39 AM(UTC-5)	46.676407	-96.42018
17		8/30/2014 11:57:40 AM(UTC-5)	46.676534	-96.419905
18		8/30/2014 11:57:41 AM(UTC-5)	46.676561	-96.419755
19		8/30/2014 11:57:49 AM(UTC-5)	46.676838	-96.418179
20		8/30/2014 11:57:54 AM(UTC-5)	46.676896	-96.417581
21		8/30/2014 11:58:00 AM(UTC-5)	46.676956	-96.416806
22		8/30/2014 11:58:08 AM(UTC-5)	46.676815	-96.415275
23		8/30/2014 11:58:16 AM(UTC-5)	46.676531	-96.413828
24		8/30/2014 11:58:17 AM(UTC-5)	46.676531	-96.413828
25		8/30/2014 11:58:18 AM(UTC-5)	46.676531	-96.413828
26		8/30/2014 11:58:19 AM(UTC-5)	46.676347	-96.413053
27		8/30/2014 11:58:20 AM(UTC-5)	46.676341	-96.413029
28		8/30/2014 11:58:29 AM(UTC-5)	46.676625	-96.413054
29		8/30/2014 11:58:30 AM(UTC-5)	46.67664	-96.413113
30		8/30/2014 11:58:31 AM(UTC-5)	46.676658	-96.413184
31		8/30/2014 11:58:32 AM(UTC-5)	46.67668	-96.413271
32		8/30/2014 11:58:49 AM(UTC-5)	46.678126	-96.417461
33		8/30/2014 11:58:50 AM(UTC-5)	46.678268	-96.417713
34		8/30/2014 11:58:51 AM(UTC-5)	46.678434	-96.417967
35		8/30/2014 11:58:59 AM(UTC-5)	46.679626	-96.419388
36		8/30/2014 11:59:06 AM(UTC-5)	46.679879	-96.420222
37		8/30/2014 11:59:12 AM(UTC-5)	46.679871	-96.420278
38		8/30/2014 11:59:13 AM(UTC-5)	46.679936	-96.420222
39		8/30/2014 11:59:14 AM(UTC-5)	46.67989	-96.420222
40		8/30/2014 11:59:15 AM(UTC-5)	46.679856	-96.420222
41		8/30/2014 11:59:16 AM(UTC-5)	46.679834	-96.420222
42		8/30/2014 11:59:17 AM(UTC-5)	46.679834	-96.420222
43		8/30/2014 11:59:28 AM(UTC-5)	46.67971	-96.420222

Screen shot rendered by Microsoft Excel from track point data acquired from Garmin nuvi 1300 GPS unit's file system with Cellebrite's UFED, version 4.1.2.8, by John J. Carney, certified mobile device forensics examiner at Carney Forensics.

26. The flyover video in this case was also seriously compromised by the limited number of GPS track points available for animation. They were arbitrarily chosen by satellite technology and not by a human observer, GPS user, or digital forensics examiner. We have access to seven or eight track

points in the intersection at the time of the accident, but we have access to no track points before and during Sarah's stop at the stop sign. The satellite GPS track point data does not mirror reality on earth at a sufficiently precise, granular level in time and space, especially at the sub-second level at short distances, for purposes of depicting digital forensics evidence accurately in an animated flyover video for a criminal vehicular homicide case.

27. The accuracy of GPS track point data to within a margin of error of 15 meters (49.2 feet) distorts the animation of Sarah's automobile motion deliberately shown at artificially high rates of speed. Garmin International, Inc., the manufacturer of Sarah's GPS device, posts on their web site at web address <http://www8.garmin.com/aboutGPS> current accuracy information for their GPS devices. They say, "Garmin GPS receivers are accurate to within 15 meters, on average."

Home > About GPS > What is GPS?

What is GPS?

The Global Positioning System (GPS) is a satellite-based navigation system made up of a network of 24 satellites placed into orbit by the U.S. Department of Defense. GPS was originally intended for military applications, but in the 1980s, the government made the system available for civilian use. GPS works in any weather conditions, anywhere in the world, 24 hours a day. There are no subscription fees or setup charges to use GPS.

How it works

GPS satellites circle the earth twice a day in a very precise orbit and transmit signal information to earth. GPS receivers take this information and use trilateration to calculate the user's exact location. Essentially, the GPS receiver compares the time a signal was transmitted by a satellite with the time it was received. The time difference tells the GPS receiver how far away the satellite is. Now, with distance measurements from a few more satellites, the receiver can determine the user's position and display it on the unit's electronic map.

How accurate is GPS?

Today's GPS receivers are extremely accurate, thanks to their parallel multi-channel design. Our 12 parallel channel receivers are quick to lock onto satellites when first turned on, and they maintain strong locks, even in dense foliage or urban settings with tall buildings. Certain atmospheric factors and other sources of error can affect the accuracy of GPS receivers. **Garmin GPS receivers are accurate to within 15 meters, on average.**

Screen shot rendered by Google Chrome browser from web address <http://www8.garmin.com/aboutGPS> on January 20, 2016.

28. In my professional and expert opinion the State's Google Earth flyover video fails as admissible evidence for lack of foundation and because it is hearsay. The video has not been authenticated. Despite Sarah's counsel sending me the video and all the information they possessed related to it, no foundation documentation is available to the defense that describes who made it, how it was made, which approach to Google Earth touring was chosen, or the human choices for each of the many Google Earth touring parameters that animate it. As described above Google Earth is capable of rendering arbitrary placemarks and not only track points extracted from a GPS device. There is no proof provided that this flyover video is what it purports to be. Even if there was an

accompanying document clearly articulating all the human choices that went into making the flyover video, it would still not be relevant and helpful to the jury because the video remains inaccurate and confusing hearsay, and contains anomalies that will strain the jury's reason and common sense. Above all it is unfair to the defendant and prejudicial to the search for truth in this case.

29. The video's creator has produced a computer animation at high speed many times faster than real-time speed. The speed chosen is human intervention with the operation of the Google Earth software program. The speed choice is a "relevant assertion" made by the video's creator, and therefore, hearsay. The chosen speed is an assumption of fact that is without evidentiary support and is based on speculation or conjecture. It disregards the location and time stamp evidence embedded in the GPS track points, which evidence has been authenticated and is capable of being rendered accurately at real-time speed.
30. In my professional and expert opinion the State's Google Earth flyover video is not a meaningfully accurate depiction of Sarah's driving, especially as she approaches and enters the intersection where the accident occurs. It should not be used with the jury or trusted as a demonstrative exhibit depicting digital forensics evidence in a criminal vehicular homicide case. When viewed through the eyes of the jury, the video erroneously and misleadingly depicts grossly negligent, reckless driving of an automobile at an extreme rate of speed on Minnesota state and federal highways. I can find nothing of value in exposing the jury to this illusory and confusing video that is irrelevant to the facts in this criminal case at law. In my expert opinion this Google Earth flyover video is highly prejudicial to the search for truth and should be excluded from the record of admissible evidence.

FURTHER, Affiant sayeth naught.



A handwritten signature of John J. Carney in cursive script, written over a horizontal line.

John J. Carney
Chief Technology Officer
Carney Forensics

Subscribed and sworn to before me this

21st day of January, 2016.

A handwritten signature of Patricia Kay Boyer-Ray in cursive script, written over a horizontal line.

Notary Public

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF CLAY

SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 14-CR-15-99

Plaintiff,

v.

**MOTION FOR JUDGMENT OF
ACQUITTAL**

Sarah Jo Braith,

Defendant.

PLEASE TAKE NOTICE that Sarah Jo Braith, by and through her attorney, Bruce N. Ringstrom Jr., moves the Court for a judgment of acquittal pursuant to Minnesota Rule of Criminal Procedure 26.03, Subd. 18.

A district court is required to apply the *Al-Naseer/Silvernail* analysis when presented with a motion for judgment of acquittal when the state's case rests largely or entirely on circumstantial evidence. *State v. Sam*, 859 N.W.2d 825, 831 (Minn App. 2015). See also *State v. Stein*, 776 N.W.2d 709, 721 (Minn. 2010), "The trial court on a motion for judgment of acquittal, and the appellate court in reviewing the claim on appeal, apply the same basic standard of review."

The Court is to apply a two-step analysis. First, the Court is to "identify the circumstances proved," construing "conflicting evidence in the light most favorable to the verdict." *State v. Silvernail*, 831 N.W.2d 594, 598-599 (Minn. 2013). In evaluating a pre-verdict motion for judgment of acquittal, the *Sam* court framed the standard as

evaluating the evidence “when taken in the light most favorable to the state.” *Sam* at 834.

Once the circumstances proved are established, the second “task properly to be performed by the district court on a motion for judgment of acquittal, is to determine whether any rational or reasonable inference is inconsistent with guilt.” *State. v. Sam*, 859 N.W.2d, 825, 835, (Minn. App. 2015). “This analysis requires that we look at the circumstances proved not as isolated facts but rather as a ‘complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude ... any reasonable inference other than guilt.’” *Sam* at 833, quoting *Al Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). “In circumstantial evidence cases, we give no deference to the fact finder's choice between reasonable inferences; this is so because our inquiry addresses not only the reasonableness of the inferences made by the fact finder, but also the reasonableness of other possible inferences that the fact finder may not have drawn. Because we give no deference to inferences not made (*i.e.*, alternative inferences that the fact finder chose to reject), we examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with innocence.” *State v. Stein*, 776 N.W.2d 709, 716 (Minn. 2010).

The state’s contention that Ms. Braith operated her vehicle in a grossly negligent manner rests largely on circumstantial evidence, and could not be proved without it. In this case, there has been no evidence of egregious driving or proof of telephonic or SMS text transmissions during or immediately before the accident. Trooper Eischens’

testimony was that the accident occurred at normal speed, and that Ms. Braith came to a stop or a near stop.

The following are circumstances proved:

On August 30, 2014, Ms. Braith was traveling down MNTH 9 from Crookston toward the I-94 interchange near Barnesville;

During her drive, Ms. Braith sent 48 text messages, and received 48 text messages;

Ms. Braith drove past the I-94 E on ramp;

She turned around shortly thereafter;

Ms. Braith sent her last text at or before the I-94 E on ramp;

Ms. Braith then took the I-94 E on ramp;

Ms. Braith's phone received her last text before the accident while still on the I-94 E on ramp;

Shortly thereafter, she made a U-turn on I-94 E, and then began driving on I-94 W;

Shortly after that, Ms. Braith took the MNTH 9 exit;

Ms. Braith approached the stop sign, and came to a stop or a near stop;¹

Ms. Braith looked both ways;²

Ms. Braith proceeded into the intersection at a normal pace;³

Ms. Braith had a panicked expression just before the accident;

It appeared to Mr. Pangelinan that Ms. Braith had a smartphone in her left hand, near

¹ As noted, the Court is to evaluate the evidence when taken in the light most favorable to the state. Here, all the evidence has come through the state's witnesses. Mr. Pangelinan testified that Ms. Braith slowed down to a crawl, and that she may have stopped, but he did not see. Ms. Strand testified that Ms. Braith definitely stopped for what seemed to be an unusually long period of time.

² As testified to by Mr. Pangelinan.

³ As testified to by Ms. Strand and Sergeant Eischens.

her left ear;⁴

No telephone call was recorded for Ms. Braith's phone number either during the accident or immediately before it (and the last phone call was at 10:24 am);

There were no text messages sent or received by Ms. Braith's phone for more than a full minute before the accident.

As held in *Sam*, "when reasonable or rational inferences exist which are inconsistent with guilt, the state has not presented sufficient evidence as a matter of law." *Sam* at 831.

The state's witnesses also gave testimony on a number of matters that directly support a reasonable inference inconsistent with guilt:

The staggered formation the motorcyclists were driving in could have yielded a smaller visual footprint for someone stopped at the stop sign (Eischens);

Signs, and combinations of signs 15 to 20 driving-seconds (how long it would take a vehicle to traverse that distance) north on MNTH 9 can obscure entire portions of the roadway (Eischens);

The angle of the intersection very likely lined up the A-pillar with MNTH 9 north;

A shorter person sitting in the driver's seat of a car at the stop sign would have a different perspective than the one depicted in the state's photographs (Eischens);

A person at the stop sign would have very little time (approximately 2 seconds) to avoid a vehicle coming from the left (Eischens);

⁴ As testified to by Mr. Pangelinan, and per his admitted statement that Mr. Pangelinan gave to Trooper David Keenan.

In this case, there is a reasonable or rational inference from the circumstances proved that is inconsistent with guilt: Sarah Jo Braith had quit texting more than one full minute before the accident; and that when she came to the stop sign at MNTH 9 she stopped, looked both ways, and proceeded into the intersection normally; that she did not see the motorcyclists despite looking, because of the difficulty of seeing motorcycles and the particular view that she had; and was not grossly negligent.

Dated January 29, 2016

Bruce N. Ringstrom, Jr.
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218.284.0484

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF CLAY

SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 14-CR-15-99

Plaintiff,

v.

**MOTION FOR LESSER INCLUDED
OFFENSE**

Sarah Jo Braith,

Defendant.

To the Honorable Michael D. Fritz, Judge of the District Court; Brian Melton, Clay County Attorney, and the Clay County Court administrator: Sarah Jo Braith, by and through her attorney Bruce N. Ringstrom Jr., makes the following motion.

Pursuant to Minnesota Statute §631.14, and caselaw cited below, Ms. Braith motions this Court for the lesser included charge of careless driving.

State v. Al-Naseer, 690 N.W.2d 744, 750-751 (Minn. 2005) (“ . . . careless driving is a lesser-included offense with respect to criminal vehicular homicide-gross negligence.”)

State v. Dahlin, 695 N.W.2d 588, 596 (Minn. 2005) (“In determining whether a lesser-included offense instruction should be given, trial courts must consider only whether a rational basis exists in the evidence to acquit of the greater charge and convict of the lesser-without considering either the strength of the evidence or the credibility of the witnesses.”)

“ . . . we hold that in evaluating whether a rational basis exists in the evidence for a jury to acquit a defendant of a greater charge and convict of a lesser, trial courts must henceforth view the evidence in the light most favorable to the party requesting the

instruction. This rule best serves the presumption of innocence while reserving to the jury its responsibility to credit or discredit the witnesses, to weigh the evidence, and to draw reasonable inferences from it.” *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005).

The jury could find that Ms. Braith operated her vehicle in a negligent manner but not a grossly negligent manner.

Ms. Braith requests CRIMJIG 29.33 Careless Driving—Defined, CRIMJIG 29.34 Careless Driving—Elements, and CRIMJIG 3.20 Lesser Crimes.

Dated February 1, 2016

Bruce N. Ringstrom, Jr.
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STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF CLAY

SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Court File No. 14-CR-15-99

Plaintiff,

MOTIONS IN LIMINE

v.

Sarah Jo Braith,

Defendant.

To the Honorable Michael D. Fritz, Judge of the District Court; Brian Melton, Clay County Attorney, and the Clay County Court administrator: Sarah Jo Braith, by and through her attorney Bruce N. Ringstrom Jr., makes the following motions in limine.

1. For an Order ...
2. For an Order ...
3. For an Order prohibiting the state from offering as evidence—or addressing in any way in front of the jury—any texting activity Ms. Braith may have engaged in, for the following reasons:
 - Both the state's digital forensics expert and the defense's digital forensics expert conclude that the last text message sent or received by Ms. Braith's phone occurred at 11:57:58 AM on 08/30/2014, and that the accident occurred at least one full minute later, sometime after 11:59:00 AM. (See N. Kyle Dennis' report from the state, at page 2, and page 5; see John Carney's report from the defense at page 4, and page 18). Both sets of experts analyzed the GPS data that proves that at 11:57:58 AM—when the last text was sent or received—Ms. Braith was in a completely different place from the accident scene.

-The state has disclosed no evidence—either digital or in any other form—about any texting activity occurring after 11:57:58 AM on 08/30/2014. (See N. Kyle Dennis’ report from the state, at page 5).

-It is not relevant to any element of any charge in the complaint (MRE 401,402);

-It would be unfairly prejudicial because it would imply to the jury that Ms. Braith’s state of mind just before the accident could (or should) be inferred from behavior far before the accident (MRE 403);

-It would mislead the jury for the same reason (MRE 403);

-It is impermissible character evidence because its function would be to prove action in conformity therewith (MRE 404(a));

-It does not comport with any requirement under MRE 404(b), including failure to notify the defense by the time of the omnibus hearing;

-It is impermissible propensity evidence (“Using *Spreigl* evidence to show a “state of mind to do bad things” improperly suggests that the defendant has a propensity to commit crimes or that the defendant is a proper candidate for punishment for other crimes.” *State v. Fardan*, 773 N.W.2d 303, 319 (Minn. 2009)).

-It shifts the burden of proof to Ms. Braith by forcing her to disprove that she acted in conformity therewith (MRE 404(a)).

4. For an Order directing the state and its witnesses to refrain from speculating about facts not in evidence. *State v. Bernstein*, 148 Minn. 301, 306, 181 N.W. 947, 949 (1921). The Order should preclude the state and its witnesses from speculating about all matters including, but not limited to: whether Ms. Braith was under the influence of a controlled substance; whether Ms. Braith was

reading or composing text messages during or just before the accident; whether Ms. Braith was under the influence of alcohol; whether Ms. Braith was going online/web surfing; whether Ms. Braith was checking voicemail; and whether Ms. Braith had a second phone in her vehicle.

5. For an Order ...
6. For an Order ...
7. For an Order precluding the state from admitting into evidence or otherwise allowing the jury to see or hear about the “Google flyover” video generated by the state on the grounds that it is not relevant to any element of the crimes charged, it is not accurate, and so distorts Ms. Braith’s driving, that the potential for undue prejudice grossly outweighs any probative value the state could even argue exists. *State v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002) (Error to admit computer animation without proper foundation, relevancy, accuracy); and animation in that particular case “did not merely re-create what was in the record, but created impressions depicting . . . actions favorable to the state’s theory of the case.”) *Stewart at 295*. See also affidavit of John Carney.
8. For an Order ...
9. For an Order ...
10. For an Order ...
11. For an Order ...
12. For an Order ...
13. For an Order ...
14. For an Order ...
15. For an Order ...

16. For an Order declaring that where a mistrial is necessitated by prosecutorial impropriety designed to avoid an acquittal, that reprosecution will be barred.
U.S. Const. amend. V (double jeopardy clause); *Oregon v. Kennedy*, 456 U.S. 667 679 (1982) (retrial following defendant's request for mistrial barred when mistrial the result of prosecutorial misconduct "intended to provoke the defendant into moving for a mistrial.")
17. For such other relief as the Court may deem proper.

Dated January 21, 2016

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Collateral Consequences: Practical and Ethical Considerations for Pleas and Sentencing

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Criminal Expungement in Minnesota

Yaima Couso

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Criminal Expungement in Minnesota

Yaima Couso
Volunteer Lawyers Network
Criminal Expungement Resource Attorney

Criminal Records and the Need for Expungement

In Minnesota, criminal records are created in connection with nearly every encounter with state and local law enforcement.¹ Many of these records are public, and some are accessible online. Records do not simply disappear, nor are they administratively removed from public access. Instead, because retention policies do not often account for electronic versions of records, records can be available indefinitely unless expunged. In addition, once created and stored, records can be transferred to other government agencies and/or end up in the private databases of consumer reporting agencies to be re-packaged and re-sold. With the advent of digitalization, these records have become increasingly accessible by employers and landlords who screen applicants based on criminal history.² In Minnesota, the most commonly utilized databases for accessing public and private records are the Minnesota Bureau of Criminal Apprehension (BCA) and the Minnesota Court Information System (MNCIS). This unprecedented access to records makes it extremely difficult for people with a criminal history to secure employment as well as safe and affordable housing. Expungement can alleviate some of the hardships caused by the existence and dissemination of these records.

Common Collateral Consequences Stemming from Criminal Records

Individuals with criminal records must often endure many collateral consequences, including, among other things: government-imposed barriers to employment and licensing, mandated background checks, government-imposed barriers to housing, privately-imposed barriers to employment and housing, and government-imposed barriers to adoption and fostering.

Subject to the Fair Credit Reporting Act, employers and landlords have wide access to criminal records to use in the evaluation of applicants for employment or rental housing. Historically low

¹ Such criminal records can be held by various government agencies throughout Minnesota, including, most commonly: the Bureau of Criminal Apprehension, the Minnesota Court Information System, the Department of Human Services, the State Attorney General, the Department of Corrections, police departments, sheriff's departments, city attorneys, and/or county attorneys.

² The Fair Credit Reporting Act (FCRA) outlines the procedures employers and landlords must follow in requesting and using criminal background checks.

vacancy rates³ and high unemployment rates,⁴ have made the process of securing jobs and housing not only competitive, but for many, unattainable. The mere existence of a record, regardless of the outcome, can easily and, in this climate, inevitably, lead to a denial of employment or housing.

Similarly, government-imposed barriers can keep individuals from employment opportunities. It is estimated that the Department of Human Service (DHS) conducts more than 270,000 background studies each year pursuant to Minn. Stat. Ch. 245C.⁵ These background checks, which are generally triggered by employment applications, impact many commonly-held job classifications, such as: Personal Care Assistant (PCA), Certified Nursing Assistant (CNA), and child care provider. They even impact janitorial, maintenance, and food service jobs held at DHS-licensed facilities. Disqualifying crimes, as they are called, can cover a broad range of offenses and, depending on the severity, can either trigger a permanent ban or a seven, ten, or fifteen-year disqualification. Those who exhaust or fail to timely seek DHS's disqualification remedies (which provide very short periods in which to appeal a DHS determination) are often left with no other alternative but to seek expungement.

Criminal records affect populations of color disproportionately. According to the Minnesota Uniform Report, in 2015, African Americans made up 25% of the 150,330 arrests involving criminal offenses in Minnesota.⁶ This was in spite of African Americans making up only 5.8% of the total population that year.⁷ As such, there is a strong need and demand for criminal expungement services, especially in communities of color. Furthermore, criminal records can have a significant negative ripple effect on the family system, often signifying a life sentence to poverty for the parents and for the children.⁸ Criminal expungement often serves as the only method for a person to remove his or her records from public access to move forward in life.

³ The vacancy rate throughout the 13-county Twin Cities metro has remained below 3% the past five years. *Despite apartment building boom, it's still a landlord's market*, Star Tribune, <http://www.startribune.com/despite-apartment-building-boom-it-s-still-a-landlord-s-market/392219731/> (last visited July 30, 2018).

⁴ As of June 2017, the unemployment rate in Minnesota was 3.8%. *State and National Employment and Unemployment: Current Data*, Minnesota Department of Employment and Economic Development, <https://mn.gov/deed/data/current-econ-highlights/state-national-employment.jsp> (last visited July 30, 2017).

⁵ Background Studies Division Office of Inspector General, *Improving Minnesota's Background Study System* at 3, available at, http://mn.gov/dhs/assets/bgs_presentation_tcm1053-165743.ppt.

⁶ State of Minnesota Department of Public Safety, 2015 Minnesota Uniform Crime Report at 70, available at <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2015-Minnesota-Uniform-Crime-Report.pdf>.

⁷ *Age, Race, & Ethnicity, Featured Data: Minnesota's statewide population by race and ethnicity, 2000-2015 (Excel)*, Minnesota State Demographic Center, <https://mn.gov/admin/demography/data-by-topic/age-race-ethnicity/> (last visited July 30, 2017).

⁸ *Removing Barriers to Opportunity for Parents With Criminal Records and Their Children: A Two Generation Approach*, Center for American Progress, <https://www.americanprogress.org/issues/poverty/reports/2015/12/10/126902/removing-barriers-to-opportunity-for-parents-with-criminal-records-and-their-children/> (last visited July 30, 2017).

Expungement as a Remedy

Criminal Expungement is the court-ordered sealing (not destruction) of criminal records from public access.⁹ Minnesota law allows for two types of expungement: statutory and inherent authority expungement. Statutory (full) expungement provides judicial officers authority to order the sealing of records from any number of state government agencies, including those held by the executive branch. Petitioners not eligible for statutory expungement can still seek relief pursuant to the court's inherent authority. Inherent authority (partial) expungement is limited to the sealing of judicial records only. This remedy is often regarded as of little value by petitioners because records remain publicly accessible through the BCA.

Expungement is considered an extraordinary remedy and, as such, procedures are detailed and strictly enforced. A fuller discussion of expungement grounds follows below, but suffice it to say that as a remedy, expungement is primarily available for lower-level convictions or dismissed cases. Convictions for more serious crimes such as murder, felony assault, burglary, robberies, terroristic threats, and so on, are excluded from statutory expungement. Expungement is also prohibited for cases that require registration under Minn. Stat. § 243.166 (predatory offenders).¹⁰

While there is a presumption in favor of granting expungement of dismissed cases,¹¹ those seeking expungement of conviction records must demonstrate that sealing the record will yield a benefit to them commensurate with the disadvantages to the public and public safety.¹² In deciding whether to grant expungement, judges are tasked with weighing many factors,¹³ including, among others: the nature and severity of the underlying crime; the length of time since the crime; the risk posed by the petitioner; steps towards rehabilitation; mitigating and aggravating factors; reasons for the expungement; and other factors deemed relevant by the court.

Expungement is a lengthy process, commonly taking 6-8 months. At a minimum, expungement will take 4 months due to service/notice¹⁴ and appeal-period requirements.¹⁵ For each case sought to be expunged, petitioners must serve a petition and proposed order at least 60 (+3) days before the hearing on any state and local government agencies and jurisdictions whose records would be affected by the order.¹⁶ Filing fees are assessed per case (currently ~\$320),

⁹ Minn. Stat. § 609A.01 (2016).

¹⁰ *Id.* § 609A.02, subd. 4.

¹¹ *Id.* § 609A.03 subd. 5(b)

¹² *Id.* § 609A.03 subd. 5(a)

¹³ See *id.* § 609A.03 subd. 5(c) for a complete list of factors considered by the court.

¹⁴ *Id.* § 609A.03 subd. 3-4.

¹⁵ *Id.* § 609A.03 subd. 9.

¹⁶ *Id.* § 609A.03 subd. 3 (a).

which may be waived in cases of indigency.¹⁷ Those seeking to bypass the lengthy and often costly petition process may consider a prosecutor agreement pursuant to Minn. Stat. § 609A.025, a process which varies by the individual practices of each jurisdiction.

Expungement orders are also subject to several restrictions and limitations. For example, notwithstanding an expungement order, criminal justice agencies can still have access to the record in several instances, including for investigative, prosecutorial, sentencing, correctional and/or employment purposes.¹⁸ Similarly, an expungement order does not eliminate firearms restrictions resulting from a crime-of-violence conviction.¹⁹ Furthermore, expunged records may be opened for purposes of DHS and Minnesota Department of Health backgrounds studies, unless the commissioner is properly served and the court order is directed at the commissioner of human services.²⁰ A complete list of restrictions and limitations can be found at Minn. Stat. § 609A.03 subd. 7a.

Upon successful expungement, government agencies subject to the expungement order are prohibited from disclosing the contents or the existence of the records to the public, except under court order or statutory authority.²¹ An individual whose expunged records are knowingly opened or exchanged by a government entity in a manner not authorized by law may bring an action under Minn. Stat. § 13.08.²² Private companies whose business is to sell background checks must also remove the records from the background reports, thereby enabling a person to apply for an opening without the record appearing on a background check.

Grounds for Expungement

- **Arrest records only** [Minn. Stat. § 299C.11]
 - Arrested but not charged. If there is a MNCIS file, section 299C.11 usually does not apply.
 - Not really expungement but serves a similar purpose. Instead of a petition, write a letter to each agency demanding the return of the file to the client. The Department of Human Services (DHS) is arguably not bound by this statute.
 - Only applies if there are no gross misdemeanor or felony convictions within ten years prior to the arrest at issue.
- **Juvenile offenses** [Minn. Stat. § 260B.198, subd. 6]

¹⁷ *Id.* § 609A.03 subd. 1.

¹⁸ *Id.* § 609A.03 subd. 7a (b)(1)-(3).

¹⁹ *Id.* § 609A.03 subd. 5a.

²⁰ *Id.* § 609A.03 subd. 7a (b)(4).

²¹ *Id.* § 609A.01.

²² *Id.* § 609A.04.

- Cases handled in juvenile court resulting in a dismissal, an adjudication of delinquency, a stay of adjudication, or successful completion of Extended Juvenile Jurisdiction.
 - If certified and tried in adult court, petitioners must seek expungement under Minn. Stat. § 609A.02, subd. 2.
 - The statute states that “the court may expunge all records relating to delinquency at any time it determines that expungement of the record would yield a benefit to the subject of the record that outweighs the detriment to the public and public safety.”
 - The balancing test is similar to the “burden v. benefit” balancing test found in the adult statutory and inherent authority expungement scheme discussed below.²³
- **Certain first time drug cases** [Minn. Stat. § 609A.02, subd. 1]
 - Qualify after dismissal and discharge of proceedings against a person under section 152.18, subd. 1 (certain first time drug offenders).
 - Burden of proof: Petitioners’ interest in getting an expungement is equal to or greater than the public’s interest in knowing about the records and public safety concerns.
 - Expungement obtained under this ground restores the person to the status the person occupied before the case.
- **Cases resulting in a dismissal or acquittal** [Minn. Stat. § 609A.02, subd. 3(a) (1)-(2)]
 - Presumption in favor of expungement²⁴—still not automatic. State shoulders the burden of proof if it wishes to be excluded from the expungement order.
 - *Resolved in favor*²⁵: Qualify for expungement once the case is dismissed.
 - *Stays of adjudication and diversion*: Qualify for expungement one year after completion of diversion or probation if no new charges. If new charge, you must be off probation for all cases for at least one year.
- **Cases resulting in a conviction** [Minn. Stat. § 609A.02, subd. 3(a) (3)-(5)]
 - Petitioner shoulders the burden of proof.
 - Court must weigh the 12 factors outlined in the statute to determine if the petitioners’ interest in getting an expungement is equal to or greater

²³ See *In the Matter of Welfare of J.J.P.*, 831 N.W.2d 260, 269-70 (Minn. 2013).

²⁴ Minn. Stat. § 609A.03 subd. 5(b) (“[I]f the petitioner is petitioning for the sealing of a criminal record under section 609A.02, subdivision 3, paragraph (a), clause (1) or (2), the court shall grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record.”)

²⁵ See *State v. D.J.L.*, No. A13-2341, 2014 WL 4289278, at *2 (Minn. Ct. App. Sept. 2, 2014); *State v. K.M.M.*, 721 N.W.2d 330, 333 (Minn. Ct. App. 2006); *State v. L.K.*, 359 N.W.2d 305, 308 (Minn. Ct. App. 1984) (explaining that whether a case is considered resolved in petitioner’s favor hinges on whether there was an admission or finding of guilt).

than the public's interest in knowing about the records and public safety concerns.²⁶

- o Although not fully settled, most jurisdictions have adopted the “look-back” approach to determining law-abiding wait periods, concluding that the time starts running when the petitioners’ last criminal case is closed (probation discharge).
 - **Petty Misdemeanors and Misdemeanors:** at least 2 years with no new convictions.
 - **Gross Misdemeanors:** at least 4 years with no new convictions.
 - **Felonies:** Qualifying felony²⁷ PLUS at least 5 years with no new convictions.
 - **Felonies Stays of Impositions:** Treated as felony convictions.
- **Inherent Authority Expungement** [common law expungement]
 - o Minnesota courts have the inherent power to expunge records in two instances:
 1. “[W]here the Petitioner’s constitutional rights may be seriously infringed by retention of his records”; or
 2. “[I]f a petitioner’s constitutional rights are not involved, if the court decides that expungement will yield a benefit commensurate with the disadvantages to the public from the elimination of the record and the burden of issuing, enforcing and motoring an expungement order.”²⁸
 - o Inherent authority expungement is limited to the sealing of judicial records only.

²⁶ Minn. Stat. § 609A.03 subd. 5(a).

²⁷ See Minn. Stat. § 609A.04, subd. 3 (a) for a list of qualifying felonies.

²⁸ See *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981); *In re R.L.F.*, 256 N.W.2d 803, 807-08 (Minn. 1977).

The Dirty Dozen: 12 Hot Topics in 2 Hours

Jeanine R. Brand
Cass Co Attorneys Office
Walker

Michael J. Brandt
Brandt Criminal Defense
Anoka

Kate T. Buzicky
US Attorney's Office
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Edward M. Cohen
Smart Start MN
Saint Louis Park

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Marsh J. Halberg, moderator
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Compensation for the Wrongly Convicted and Incarcerated: The Minnesota Imprisonment and Exoneration Remedies Act of 2014

Steven Z. Kaplan

In 2014, the Legislature enacted the Minnesota Imprisonment and Exoneration Remedies Act (“Act”) providing compensation for persons who are actually innocent of the felony for which they were incarcerated and who are exonerated in post-conviction. Minn. Stat. §§ 590.11 and 611.362 through 611.368. The Act provides not only substantial compensation for such persons, but also establishes a process that seeks to minimize delay.

Claim Procedure

For purposes of the Act, a person is considered “exonerated” if (1) the conviction was vacated or reversed on grounds “consistent with innocence” and the prosecutor dismissed the charges; or (2) a court ordered a new trial on grounds consistent with innocence and (i) the prosecutor dismissed the charges or (ii) the person was found not guilty at the new trial. Minn. Stat. § 590.11, Subd. 1.

To establish entitlement for compensation under the Act, the exoneree must, within two years of release from prison, petition the court where the conviction was obtained for an order certifying that exoneree is eligible for compensation. The district attorney may stipulate to or contest the petition.

If the court finds that the original complaint or indictment would not have been filed or sought or would have been dismissed if all of the facts ascertained in post-conviction had been known, it will then issue an order declaring that the petitioner is eligible to file a compensation claim under the Act .

The petitioner then files a claim with the Minnesota Supreme Court requesting that the Chief Justice appoint a three-person panel of attorneys or judges who are experienced in tort claims and the determination of damages to set the amount of compensation to which the petitioner is eligible. Minn. Stat. § 611.362. Subd. 1.

In the first two cases arising under the Act, the Chief Justice appointed panels consisting of a district court judge and two lawyers, one who usually practices on the plaintiff's side and the other on the defendant's.

The State is represented before the panel by the Department of Management and Budget ("Department") and the Attorney General's Office. Minn. Stat. § 611.362, Subd. 2. Any settlement reached or any final compensation determination made by the panel (or any appellate court) is then submitted by the Department to the Legislature for approval and funding at the next legislative session. Minn. Stat. §§ 611.636 and 611.367.

If the Legislature approves the settlement or panel award, it will include the amount of the claim in the Department's budget and the Department then remits payment to the claimant.

Claim Amounts and Limitations

Section 611.365, Subd. 2 provides that the claimant is entitled to the following compensation amounts:

1. Reimbursement for all restitution, assessments, fees, court costs, and sums paid by the claimant as required by the judgment and sentence. (Note: If a family member or friend paid any such expense on the claimant's behalf, the Department has allowed compensation for that amount, subject to the claimant's stated intention to repay it to that person.)

2. The claimant's economic damages incurred during the criminal proceeding, including reasonable attorney's fees, lost wages, and reimbursement for other criminal defense costs.

If the claimant was represented by a public defender or pro bono counsel, the Department has not regarded the value of that representation to be compensable.

If the claimant was in school or vocational training before being charged or tried, the Department has allowed compensation for the wages that the claimant will never earn for the amount of time spent in prison. If, for example, the claimant was studying for a position that would pay \$40,000 per year upon completion of the educational or training program and was then incarcerated for four years, the Department will consider treating the amount of "lost wages" as \$160,000.

4. Reimbursement for medical and dental expenses incurred or to be incurred in the future as a result of imprisonment.

5. Non-economic damages for personal physical injuries or sickness and non-physical injuries or sickness incurred as a result of imprisonment.

6. Reimbursement for tuition and fees for each semester of education or employment or developmental training up to the equivalent value of a four-year degree at a public university and reasonable payment for future unpaid costs for education and training, not to exceed the anticipated cost of a four-year degree at a public university.

7. Reimbursement for unpaid child support payments and accruals on those payments arising during the period of imprisonment

8. Re-integrative costs of housing, transportation, subsistence, re-integrative services, and medical and dental expenses immediately following release.

9. Reasonable attorney's fees incurred in bringing the claim for compensation.

There is no overall damage limitation for the amount that can be awarded under § 611.365, except that the aggregate amounts payable for reasonable criminal defense attorney's fees and expenses, lost wages, education/training/developmental services, unpaid child support, and re-integrative services and expenses cannot exceed \$100,000 for each year of

incarceration or \$50,000 for each year of supervisory release or registered predatory offender status.

The amounts awarded for non-physical illness and legal fees/expenses incurred in pursuing a claim for compensation are not capped and are based on their actual amounts.

The wild card relates to the amounts that can be awarded for psychological damage which can be significant. “*Psychological Consequences of Wrongful Conviction and Imprisonment*,” Grounds, Canadian Journal of Criminology and Criminal Justice, January 2004; “*It Never Ends*”: *The Psychological Impact of Wrongful Conviction*,” Scott, American University Criminal Law Brief, 5, no.2, (2010); “*The Psychological and Legal Aftermath of False Arrest and Imprisonment*,” Simon, Bull Am Acad. Psychiatry Law, Vol. 21, No. 4, 1993; “*Rebuilding a Life: The Wrongfully Convicted and Exonerated*,” Weigand, Public Interest Law Journal, Vol. 18:427; and “*Psychological Consequences of Wrongful Convictions*,” Konvisser, published online, August 31, 2010.

Placing a value on the mental and emotional harm that an actually innocent person suffers as a result of incarceration is difficult, but the following cases reflect the compensatory amounts awarded to exonerees for such harm: *Odom v. District of Columbia*, Case No. 2013 CA 3239 (Sup. Ct. D.C.) (\$1,000 per day of incarceration for emotional harm); *Restivo & Halstead v. Nassau County, et. al.*, (\$1 million for each of the 18 years of

incarceration); *Jimenez v. City of Chicago*, 732 F.3d 710 (7th Cir. 2013) (\$1.5 million for each of the 16 years of incarceration); *Slevin v. Bd. of Comm’rs for Cnty of Dona Ana*, 934 F.Supp.2d 1270, 1274-78 (D. N.M. 2012) (\$15.5 million for 22 months of wrongful solitary confinement); *White v. McKinley*, 605 F.3d 525 (10th Cir. 2010) (\$2.5 million for each of the 5.5 years of wrongful incarceration); *Newton v. City of N.Y.*, (S.D.N.Y) (approximately \$1.5 million for each of the 12 years of wrongful incarceration); *Johnson v. Guevera & City of Chicago*, (N.D. Ill.) (approximately \$1.8 million for each of the 11.5 years of wrongful incarceration); *Waters v. Town of Ayer*, 2009 U.S. Dist. LEXIS 98741 (D.Mass. 2009) (approximately \$580,000 for each of the 18.5 years of wrongful incarceration); *Limone v. U.S.*, 579 U.S. 79, 103-07 (1st Cir. 2009) (\$1 million for each year of wrongful incarceration); *Dominquez v. Hendley*, 545 F. 3d 585 (7th Cir. 2008) (\$2.25 million for each the four years of wrongful incarceration that was followed by six years of registration as a sex offender); *McGee v. City of Toledo*, (N.D. Okla.) (approximately \$1.04 million for each of the 14 years of incarceration); *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003), (\$1 million for each of the 15 years of wrongful incarceration); *Smith v. City of Oakland*, 538 F. Supp. 2d 1217 (N.D. Cal. 2008) (\$3 million for 4½ months of wrongful conviction); *Sarsfield v. City of Marlborough*, (D. Mass. 2006) (approximately \$1.37 million for each of the 9.5 years of wrongful incarceration); *Ayers v. City of Cleveland*, (N.D. Ohio 2014), (approximately \$1.2 million for each of the 11 years of wrongful conviction); *Bravo v. Giblin*,

(Ca. Ct. App. 2002) (approximately \$1.1 million for each of the 3.23 years of wrongful incarceration); *Ramirez v. Los Angeles County Sheriff's Office*, 2006 WL 1428310 (C.D. Cal. 2006) (\$18 million).

In no event, however, will the total amount that any claimant receives under § 611.365 for all claims be less than \$50,000 for each year of incarceration or \$25,000 for each year on supervisory release or on registered predator offender status.

Income Tax Treatment

When the Act was passed 2014, federal and Minnesota income tax law treated exoneree compensation or damage awards as taxable, except to the extent that such were for a physical injury. 26 U.S.C. §104. That exception, however, did not include any amount for “emotional distress” (unless and to the extent that such caused a physical injury).

In the Wrongful Conviction Tax Relief Act of 2015, however, Congress **excluded** exoneree compensation and damage awards from gross income if the individual: (1) was convicted of a state or federal offense; (2) served all or part of a prison sentence for that offense; (3) was pardoned, granted clemency for the offense, or had the conviction reversed or vacated; or (4) the indictment, information, or other accusatory instrument was dismissed or the person was found not guilty at a new trial after reversal or vacating of the conviction. 26 U.S.C. § 139F.

Because this federal tax law change excludes these amounts from federal gross income, they are also not subject to Minnesota individual income tax. Minn. Stat. § 290.01, Subd. 20.

The significance of this tax law treatment cannot be minimized. Before this change, the claimant would be taxed on the entire amount received, but could not deduct the amount of legal fees and expenses incurred to secure the award or settlement.

If, for example, the claimant received \$1,000,000, paid legal fees, expert witness fees, and other litigation expenses totaling \$400,000, and owed \$300,000 in federal and Minnesota income taxes on the \$1,000,000, the claimant would net only \$300,000. Even if the judgment or settlement included a specific award of attorney's fees in addition to the amount payable to the claimant, that attorney's fees amount was also taxable to the claimant and non-deductible.

In the typical case, the process for obtaining compensation under the Act will be far less time-consuming and costly than would be the case if the claimant had to pursue civil litigation for damages under state and/or federal civil rights laws which are subject to defense claims of absolute and qualified immunity. That said, a claimant under the Minnesota Imprisonment and Exoneration Remedies Act without prejudice to the right to pursue any other state or federal claims that may be available.

“Phone Psychics” and “Theatrical Understud[ies]:”¹
Standby and Advisory Counsel.

Matthew Frank

I. Substitute Counsel

A. Hearing?

A court may have to conduct a hearing when the defendant raises substantial complaints about the representation amounting to exceptional circumstances, “particularly when a defendant voices serious allegations of inadequate representation before trial has commenced.” *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

If necessary, a record should be made by any means necessary to preserve the attorney-client relationship. *Id.* at 464 n.2 (citing *State v. Eling*, 355 N.W.2d 286, 294-95 (Minn. 1984)).

“But here it is evident from the record that the trial court was satisfied that appointed counsel had conducted a proper investigation, was thoroughly prepared for trial, and had, in fact, maintained contact with Clark.” *Clark*, 722 N.W.2d at 464.

B. Standard

A defendant does not have the right to appointed counsel of his choosing. *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970).

A request for substitute counsel will be granted “only if exceptional circumstances exist and the demand is timely and reasonably made.” *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977).

While not specifically defined, “exceptional circumstances are those that affect a court-appointed attorney’s ability or competence to represent the client.” *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). This is referred to as the “ability or competence” standard. *Id.*

See also State v. Voorhees, 596 N.W.2d 241, 255 (Minn. 1999) (“personal tension” not enough).

II. Advisory and Standby Counsel

A. Minn. R. Crim. P. 5.02, subd. 2. Appointment of Advisory Counsel

“... court may appoint ... waives the right to counsel.”

¹ *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996).

(1) “. . . because of concerns about fairness of the process . . .”

- record and advise

(2) “. . . because of concerns about delays in completing the trial, the potential disruption by the defendant, or the complexity of length of the trial . . .”

- record and advise

(3) “. . . must be present . . . and served with all documents . . .”

A defendant has the right to self-representation. *Faretta v. California*, 422 U.S. 806, 832 (1975). Recognizing that a defendant may choose to represent himself “ultimately to his own detriment” and that some criminal defendants may use the right “for deliberate disruption of their trials,” the Supreme Court noted that “a State may – even over objection by the accused – appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.” *Id.* at 834 & n.46.

B. *State v. Chavez-Nelson*, 882 N.W.2d 579 (Minn. 2016)

1. Facts:

Six days before trial, Defendant advised the district court that he had discharged his appointed counsel and would retain private counsel. He requested a continuance, which the district court denied.

The district court treated this as a request for substitute counsel, and denied it.

Defendant declined the district court’s repeated offers to have the same counsel reappointed.

The trial court determined that because of “complexities and serious issues” in the case, it would appoint advisory counsel as provided by Minn. R. Crim. P. 5.02, subd. 2. The court appointed two lawyers who had no prior involvement.

Just prior to voir dire, Defendant asked the trial court to order his advisory counsel to assume full representation of his case.

The trial court denied the request “because it believed Chavez-Nelson was attempting to use the advisory-counsel mechanism to obtain substitute counsel after the district court had specifically ruled that he was not entitled to substitute counsel.” Defendant pointed to Minn. R. Crim. P. 5.04, subd. 2(2)(b), but the court persisted, and offered to reappoint the public defenders at any time.

After two days of voir dire, Defendant told the court he was willing to have his original counsel reappointed to represent him. The court did so, and granted a short continuance to allow them to prepare. They represented him throughout the trial.

2. Holdings:

a) Because the court made the decision to appoint advisory counsel under Rule 5.04, subd. 2(2), “the district court was not free to disregard the text of the rule.” *Chavez-Nelson*, 882 N.W.2d at 586. “As a result, Chavez-Nelson had a rule-based right to request that his advisory counsel take over representation of his case, and the district court’s denial of that request was an error.[.]” *Id.* (footnote omitted).

In the footnote, the Court observed that if the trial court had appointed advisory counsel under Rule 5.04, subd. 2(1), the trial court may have had discretion to decide whether advisory counsel would take over. *Id.* at 586 n.3.

b) Because there is no Sixth Amendment right to advisory counsel and Chavez-Nelson was unrepresented by choice, his Sixth Amendment right to counsel was not violated and so the error was not structural (requiring automatic reversal). Therefore, the harmless-error standard applies to whether he gets a new trial. *Id.* at 587.

c) It appears Chavez-Nelson “ultimately benefited from any error because, in the end, he was represented at trial by his original public defenders.” It is highly unlikely his advisory counsel would have provided better representation than his original public defense team. “Therefore, we conclude that Chavez-Nelson suffered no prejudice as a result of the district court’s error.” *Id.* at 587-88.

C. Minn. Stat. § 611.26, subd. 6

“The district public defender must not serve as advisory counsel or standby counsel.”

D. Role of Standby and Advisory Counsel

“Is their role akin to that of the phone psychics . . . [o]r is it more like that of a theatrical understudy” *State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996).

State v. Clark, 722 N.W.2d 460 (Minn. 2006)

McKaskle v. Wiggins, 465 U.S. 168 (1984)

Jona Goldschmidt, *Judging the Effectiveness of Standby Counsel: Are They Phone Psychics? Theatrical Understudies? Or Both?*, 24 S. Cal. Rev. L. & Soc. Just. 133 (2015)

Anne Bowen Poulin, *Ethical Guidance for Standby Counsel In Criminal Cases: A Far Cry From Counsel?*, 50 Am. Crim. L. Rev. 211 (2013)

Anne Bowen Poulin, *The Role of Standby Counsel In Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U.L. Rev. 676 (2000)

Petition for expungement can be filed if...

All pending actions/proceedings were
resolved in favor of Petitioner.
(Burden on State)

Petitioner has completed **diversion**
program or **stay of adjudication** and
1 year without charges.
(Burden on State)

Certain **convictions**:
(Burden on Petitioner)

At any time for records of **juvenile**
delinquency.
(Burden on Petitioner)

THREE RULES TO REMEMBER:

1. TIME TOLLS UPON DISCHARGE OF SENTENCE/COMPLETION OF PROBATION.
2. NO PETITION REQUIRED WITH PROSECUTOR AGREEMENT.
3. ALL RECORDS (JUDICIAL AND EXECUTIVE) CAN BE EXPUNGED.

PMD or MSD and 2 years without convictions.

GMD and 4 years without convictions.

Specified FEL and 5 years without convictions.

STRANGULATION IN SEXUAL ASSAULT CASES

Jeanine R. Brand, Assistant Cass County Attorney

- ▶ Lethality of Strangulation and Suffocation is often minimized by victims, LE and dispatchers, court personnel, and defendants.
 - ▶ Victims of attempted strangulation are 7x or 800% more likely of becoming a homicide victim and 6x or 700% more likely of becoming an attempted homicide victim.
 - ▶ 50% of intentional homicides of on-duty LE committed by abusers who have strangled their partner.
 - ▶ 50% of the strangulation cases, children were present
 - ▶ 50% of the strangulation cases, there are no visible injuries
 - ▶ Most often seen in the context of sexual assault or domestic violence
- ▶ 25% of sexual assault victims suffer strangulation and 1/4 – 3/4 of domestic violence victims
- ▶ It is among the leading risk factors for femicide
- ▶ So, if 1 in 4 women are sexually assaulted
 - ▶ And 1 in 5 college women are assaulted
 - ▶ And 1 in 3 Native American women are assaulted
 - ▶ And 25% of them entail strangulation, there are many, many sexual assaults that are not fully investigated or treated.

A. § 609.2247 DOMESTIC ASSAULT BY STRANGULATION—a Level 4 Offense

Subdivision 1. Definitions.

- (a) As used in this section, the following terms have the meanings given.
- (b) "Family or household members" has the meaning given in section 518B.01, subdivision 2.
- (c) "Strangulation" means intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.

B. Criminal Sexual Conduct Definitions-- § 609.341

Subd. 3.Force.

"Force" means the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Subd. 4.Consent.

"Consent" means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

C. Permissive Consecutive/Cruelty

State v. Huffman—2016 WL 3659280 (Minn. Ct. App. July 11, 2016), rev. denied, Sept. 20, 2016. — Consecutive sentences for DMA by Strangulation and Terroristic Threats to the CSC sentence did not unduly exaggerate the criminality of the acts.

State v. Calel—2008 WL 4908689 (November 18, 2008). Kidnapping, Threats, Strangulation and CSC 1 and 2. Acquitted on the CSC. "Particular cruelty" must be defined to the jury.

D. Inability to recall

State v. Williams 2009 WL 2852073 (Minn. Ct. App. Sept. 8, 2009)—Williams was charged with CSC, Strangulation, and Terroristic Threats. He was convicted only on the strangulation and DMA. Victim testified that she "did not remember half the things [she] said" on the recording. Red marks on the neck and her initial statement amounted to sufficient evidence of DMA by Strangulation.

But an expert can explain the neurobiology of the lack of oxygen's effect on the brain.



Hippocampus

The hippocampus is critical for forming memory, organizing and storing.

Hippocampus is most sensitive to lack of oxygen.

If no blood flow, the brain is NOT working.

No blood flow. No memory.

No memory means damage to hippocampus.

Instead of blaming the victim, or jumping to the conclusion that drugs, alcohol, or fabrication is involved, start asking questions about strangulation.

Most CSC/Strangulation cases involve domestic partners. However, many do not, and questions are not being asked. This could affect someone's life.

Training Institute on Strangulation Prevention • www.strangulationtraininginstitute.com

"I gratefully acknowledge the National Family Justice Center Alliance for allowing me to reproduce, in part or in whole, the Suffocation and Strangulation Seminar of 2015."

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Introduction

The Commissioner of the Minnesota Department of Commerce is responsible for the regulation of laws pertaining to many of the commercial industries in Minnesota, including insurance. Bail bonds are an insurance product marketed and sold by sureties, insurance agencies and insurance producers, commonly called bail bondsmen. In Minnesota, bail is a constitutional right required for all persons before conviction except for certain capital offenses.¹

To sell bail bonds, a person is required to have an insurance producer license with authority to sell under the Property & Casualty line of insurance or the limited line of bail bonds. Any applicant who pays the appropriate fees and is not prohibited from getting a license, unless they have engaged in certain prohibited practices such as having been convicted of a felony involving moral turpitude. Unlike insurance producers who sell life, health automobile or homeowners insurance, the limited line bail bond agent (bail agent) does not have any educational requirements before or after obtaining their license.

A bail bond license does not allow a bail agent to sell bail bonds until they are appointed by a company or surety to sell its bail bond contracts. An appointment is the insurer's grant of permission to sell its bail bonds. The appointment consists of the surety submitting a statutorily required form and paying a fee to the Department of Commerce to notify the Commissioner that the bail bond agent has been approved to sell the surety's bail bonds. Bail agents are agents of the surety, not the person purchasing the bail bond.²

Several years ago, the department received several complaints concerning bail agents in Anoka, Dakota and Stearns counties that were engaged in inappropriate activity including disruptive behavior in jail and court buildings, overzealous solicitation of business, payment of commissions to unlicensed individuals, failure to abide by approved rate schedules and offering rebates to customers.

After our department completed some initial investigations, we found what appeared to be serious problems in the bail bond industry but it was not clear whether the problems were systemic across the industry or limited to certain agencies and bail agents. To determine if the issues were industry wide, we decided to initiate market conduct examinations to complete our investigations of sureties, agencies and bail agents writing bail bonds in Minnesota. The below systemic issues were found during our market conduct examinations. To resolve the issues, the commissioner entered into consent orders with all of the sureties licensed to write bail bonds in Minnesota. The consent orders can be found on the Minnesota Department of Commerce's website:

<https://www.cards.commerce.state.mn.us/CARDS/>

Market Conduct Findings

Full Premiums

The bail bonds industry is highly competitive. One of the major issues identified was that bail agents were engaged in price competition with each other. Some agents were giving discounts. Others were charging partial payments but never intended to collect the balance due for the bond. In Minnesota, most insurance rates are required to be filed with our department and they must be actuarially supported. Rates shall not be excessive, inadequate or unfairly discriminatory, nor shall an insurer use rates to engage in unfair price competition.³ Bail bondsman must charge the insurer's filed rates for bonds which in Minnesota are typically 10% of the face value of the bond. The amount charged to defendants for a particular bail requirement must be the same if it is the same risk and one defendant not be given an advantage over another. Further, a decision by the court to set a certain amount of bail or a statutorily required bail amount is set with a purpose and the defendant is required to pay to bail but if that premium amount is not met, it undermines the authority of both the legislature and the courts.

Paying Commissions to Unlicensed Individuals

Bail agents are prohibited from paying or offering to pay, giving incentives or promising other valuable consideration to unlicensed individuals to solicit bail bond business on their behalf.⁴ In some instances, we found bail agents paying unlicensed inmates to solicit bail bonds to other inmates needing a bail bond or promising payments to others, such as the inmate's girlfriend, for soliciting bail bonds. These practices violate Minnesota Law.

Rebating

Bail bond industry competition also led bail agents to offer to give the defendant who purchased the bond or their co-signer a kickback of some of the premium charged for the bond, which is called a rebate. Rebating is prohibited by Minnesota law.⁵

Collateral

There were not uniform requirements for the handling of cash or non-cash collateral taken to secure bonds. The consent order created uniform standards for handling, record keeping and the return of collateral, among other things.

Record Keeping

Pursuant to the consent order, sureties agreed to keep and require their bail agents to keep certain bail bond records. The records are subject to audit by the department and the surety.

Surety's Annual Audit of Bail Bondsman Records

In order to resolve the above issues, the consent order requires sureties to audit an adequate sample of each bail agent's financial records annually. The surety must also audit each bail agent's collateral records. Sureties are required to file their annual audits with the department. The audit report must include information about an agency or bail agent's violations that the surety identified during the audit.

Solicitation

Certain bail agents purchase investigation reports about persons who were in jail. The records are used to cold call relatives to see if they were interested in posting bond for the defendant. The department received complaints from individuals who were not happy that a bail agent called their relatives and informed them that the family member had been arrested and was in jail. Minnesota law prohibits the collection and disclosure of personal information about individuals related to an insurance transaction.⁶

State Court Administrator

Finally, bail agents were found to be engaging in improper activity in and around court buildings. To resolve these issues, sureties agreed to make their bail agents comply with the State Court Administrator's Bail Bond Procedures and Standards of Conduct.

Outcome

All sureties issuing bail bonds in Minnesota were invited to participate in the drafting of the consent order to resolve the issues. During the past two years, all sureties have required their bail agents to sign affidavits of compliance with the terms of the order and have provided the affidavits to our department. All sureties that were writing bail bonds at the end of 2015 signed the consent order which became effective 1/1/16. The first surety audit reports were due in June and we are still reviewing those reports.

Footnotes Index:

1. Minnesota Constitution, Art. 1 sec. 5
2. Minn. Stat. § 60K.49
3. Minn. Stat. § 70A.04, subd. 1
4. Minn. Stat. § 60K.48, subd. 1
5. Minn. Stat. § 72A.08, subd 1
6. Minn. Stat. §§ 72A.501 and 72A.502

STIPULATED TRIALS

Presented by: Jessica L. Stott, Assistant Washington County Attorney

TRIAL ON STIPULATED FACTS AND/OR STIPULATED EVIDENCE. (Minn. R. Crim. Pro. 26.01, Subd. 3)

Leading case on the distinction between Stipulated Evidence Trial and Stipulated Facts Trial:

- *Dereje v. State*, 837 N.W.2d 714 (Minn. 2013)

Stipulated Evidence Trial: An agreement between opposing parties to stipulate to “a body of evidence containing contrary versions of events,” and the court must make material factual determinations regarding the events prior to rendering a decision. *See Dereje v. State*, 837 N.W.2d 714, 720-21 (Minn. 2013).

Stipulated Fact Trial: An agreement between opposing parties “regarding the actual event or circumstances,” and therefore the court need not resolve conflicts in evidence. The court will simply apply the law to the parties’ stipulated facts. *See Dereje v. State*, 837 N.W.2d 714, 720-21 (Minn. 2013).

Required Waiver of Rights:

1. Right to a trial by jury,
2. Right to testify at trial,
3. Right to have the prosecution witnesses testify in open court in my presence,
4. Right to question those prosecution witnesses, and
5. Right to require any favorable witnesses to testify for me in court.

When to use: Rule 26.01, subd. 3 should be used if there is no pretrial ruling dispositive of the case, and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence. Comments to Rule 26. *See also State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002).

STIPULATION TO PROSECUTION’S CASE TO OBTAIN REVIEW OF A PRETRIAL RULING (Minn. R. Crim. Pro. 26.01, subd. 4)

Stipulation to Prosecution’s Case: A trial to the court based on stipulated evidence (prosecution’s evidence), where the parties agree that a pretrial ruling is dispositive of the case.

Record must include:

1. Clear record as to precisely what pretrial ruling(s) are being preserved,
2. Acknowledgment by both parties that the preserved ruling(s) is/are dispositive of the case,
3. Acknowledgment by both parties that if the defendant were to prevail on the issue on appeal, a contested trial would be unnecessary; and
4. Waiver of Rights (see Minn. R. Crim. Pro. 26.01, subd. 3(b)(1)-(4)).

Limited Right to Appeal: Appellate review is limited to dispositive pretrial issue and appellate court will not review sufficiency of the evidence for finding of guilt or other issues that could arise at a contested trial.

Amendment effective October 1, 2017

- Applies to all cases pending on, or commenced on or after, the effective date.

5. Amend Rule 26.01, subd. 3, as follows:

Subd. 3. Trial on Stipulated Facts; Trial on Stipulated Evidence.

- (a) The defendant and the prosecutor may agree that a determination of the defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based entirely on stipulated facts, stipulated evidence, or both. ~~Before proceeding, the defendant must acknowledge and personally waive the rights to:~~
- (b) The defendant, after an opportunity to consult with counsel, must waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), or subdivision 1 (2)(b), or both, and must personally waive the following specific rights:
- (1) to testify at trial;
 - (2) to have the prosecution witnesses testify in open court in the defendant's presence;
 - (3) to question those prosecution witnesses; and
 - (4) to require any favorable witnesses to testify for the defense in court.

~~(b)(c)~~ The agreement and the waiver must be in writing or be placed on the record.

- ~~(e)~~(d) If the parties use this procedure to determine the issues of the defendant's guilt, and the existence of facts to support an aggravated sentence, the defendant must make a separate waiver of the above-listed rights as to each issue.
- ~~(d)~~(e) On submission of the case entirely on stipulated facts, stipulated evidence, or both, the court must proceed under subdivision 2 of this rule as in any other trial to the court.
- ~~(e)~~(f) If the court finds the defendant guilty based entirely on the stipulated facts, stipulated evidence, or both, the defendant may appeal from the judgment of conviction and raise issues on appeal as from any trial to the court.

6. Amend Rule 26.01, subd. 4, as follows:

Subd. 4. Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling.

- (a) When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary, the following procedure must be used to preserve the issue for appellate review.
- (b) The defendant must maintain the plea of not guilty.
- (c) The defendant and the prosecutor must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.
- (d) The defendant, after an opportunity to consult with counsel, must waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and must ~~also~~personally waive the rights specified in Rule 26.01, subdivision 3~~(a)~~(b)(1)-(4).
- (e) The defendant must stipulate to the prosecution's evidence in a trial to the court, and acknowledge that the court will consider the prosecution's evidence, and that the court may enter a finding of guilt based on that evidence.
- (f) The defendant must also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial.
- (g) The defendant and the prosecutor must make the preceding acknowledgments personally, in writing or on the record.
- (h) After consideration of the stipulated evidence, the court must make an appropriate finding, and if that finding is guilty, the court must also make findings of fact on the record or in writing as to each element of the offense(s).

7. Amend the comments to Rule 26, paragraphs 1 through 7, as follows:

Comments

Rule 26.01, subd. 1(1) (Right to Jury Trial). In cases of felonies and gross misdemeanors, the defendant has the right to a jury trial under Minn. Const. Art. 1, § 6, which guarantees the right to jury trial in “all criminal prosecutions.” The term “criminal prosecution” includes prosecutions for all crimes defined by Minn. Stat. § 609.02. See Peterson v. Peterson, 278 Minn. 275, 281, 153 N.W.2d 825, 830 (1967); State v. Ketterer, 248 Minn. 173, 176, 79 N.W.2d 136, 139 (1956). The defendant’s right to jury trial for offenses punishable by more than six months imprisonment is also guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 159 (1968); Baldwin v. New York, 399 U.S. 66, 69 (1970).

Since misdemeanors in Minnesota are punishable by no more than 90 days of incarceration or a fine or both, Minn. Stat. § 609.03, subd. 3, no federal constitutional right exists to a jury trial on a misdemeanor. However, a state constitutional right to a jury trial exists in any prosecution for the violation of a misdemeanor statute punishable by incarceration. See Minn. Const. Art. 1, § 6 as interpreted in State v. Hoben, 256 Minn. 436, 444, 98 N.W.2d 813, 819 (1959).

Rule 26.01, subd. 1(2)(a) establishes the procedure for waiver of the right to trial by jury on the issue of guilt. A jury waiver must be knowing, intelligent, and voluntary. State v. Ross, 472 N.W.2d 651, 653-54 (Minn. 1991). “The focus of [an] inquiry [regarding a jury waiver] is on whether the defendant understands the basic elements of a jury trial.” Id. at 654. The Minnesota Supreme Court has recommended the following guidelines: “the defendant should be told that a [felony] jury . . . is composed of 12 members of the community, that the defendant may participate in the selection of the jurors, that the verdict of the jury must be unanimous, and that, if the defendant waives a jury, the judge alone will decide guilt or innocence.” Id.

Rule 26.01, subd. 1(2)(b) establishes the procedure for waiver of the right to trial by jury on the issue of an aggravated sentence. See generally Blakely v. Washington, 542 U.S. 296 (2004) and State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) as to the constitutional limitations on imposing aggravated sentences based on findings of fact beyond the elements of the offense and the conviction history. Also, see Rules 1.04 (d), 7.03, and 11.04, subd. 2 and the comments to those rules. Whether a defendant has waived or demanded a jury trial on the issue of guilt, that defendant may still have a jury trial on the issue of an aggravated sentence, and a valid waiver under Rule 26.01, subd. 1(2)(b) must be made before an aggravated sentence may be imposed based on findings not made by jury trial. The requirements for a valid jury waiver are discussed in the comment regarding Rule 26.01, subd. 1(2)(a).

Rule 26.01, subd. 1(3) (Withdrawal of Jury-Trial Waiver) provides that waiver of jury trial may be withdrawn before commencement of trial. Trial begins when jeopardy attaches.

Rule 26.01, subd. 3 (Trial on Stipulated Facts; Trial on Stipulated Evidence) previously applied only to court trials on stipulated facts. In Dereje v. State, 837 N.W.2d 714 (Minn. 2013), the Minnesota Supreme Court clarified that Rule 26.01, subd. 3, does not apply to a court trial on a stipulated body of evidence. Rule 26.01, subd. 3, was amended in 2017 to apply to court trials on stipulated evidence, as well as court trials on stipulated facts. A defendant who agrees to a court trial on stipulated facts, stipulated evidence, or both, must acknowledge and personally waive the rights listed in Rule 26.01, subd. 3(b)(1)-(4).

The rules do not permit conditional pleas of guilty by which the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. Rule 26.01, subd. 4 implements the procedure authorized by State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980), which allows a defendant to stipulate. This rule supersedes Lothenbach as to the procedure for stipulating to the prosecution's case to obtain review of a pretrial ruling. Rule 26.01, subd. 4, "replaced Lothenbach as the method for preserving a dispositive pretrial issue for appellate review in a criminal case." State v. Myhre, 875 N.W.2d 799, 802 (Minn. 2016). Rule 26.01, subd. 4, limits appellate review to the dispositive pretrial issue. This rule also distinguishes the Lothenbach type procedure it implements from Rule 26.01, subd. 3 (Trial on Stipulated Facts). Rule 26.01, subd. 3 should be used if there is no pretrial ruling dispositive of the case, and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence. See State v. Busse, 644 N.W.2d 79, 89 (Minn. 2002).

The phrase in the first sentence of Rule 26.01, subd. 4(a) – “or that the ruling makes a contested trial unnecessary” – recognizes that a pretrial ruling will not always be dispositive of the entire case, but that a successful appeal of the pretrial issue could nonetheless make a trial unnecessary, such as in a DWI case where the only issue is the validity of one or more qualified prior impaired driving incidents as a charge enhancement. See, e.g., State v. Sandmoen, 390 N.W.2d 419, 423 (Minn. App. 1986). The parties could agree that if the defendant prevailed on appeal, the defendant would still have a conviction for an unenhanced DWI offense. Where a conviction for some offense is supportable regardless of the outcome of the appeal, but a contested trial would serve no purpose, Rule 26.01, subd. 4 could be used.

8. **Amend Appendix A to Rule 15, as shown on pages 6–11, herein.**
9. **Amend Appendix B to Rule 15, as shown on pages 12–15, herein.**
10. **Adopt Appendix G to Rule 15, Alford Addendum, as shown on pages 16–17, herein.**
11. **Adopt Appendix H to Rule 15, Norgaard Addendum as shown on pages 18–19, herein.**
12. **Delete Form 32; adopt Form 32a, as shown on page 20, herein.**
13. **Adopt Form 32b, as shown on pages 21–23, herein.**
14. **Adopt Form 32c, as shown on pages 24–26, herein.**

**FORM 32b - WAIVER OF RIGHTS AND AGREEMENT REGARDING RULE
26.01, SUBD. 3**

State of Minnesota

District Court

County

Judicial District: _____

Court File Number: _____

Case Type: _____

Criminal

State of Minnesota, Plaintiff

vs.

**Waiver of Rights and Agreement
Regarding Rule 26.01, subd. 3,
Trial on Stipulated Facts,
Stipulated Evidence, or Both**

_____, Defendant

TO THE ABOVE-NAMED COURT:

PROSECUTOR'S AGREEMENT

1) The prosecutor agrees to a trial based entirely on stipulated facts, stipulated evidence, or both as set forth in paragraphs 2 and 6 of this document.

Dated: _____

Signature of Prosecutor

**DEFENDANT'S AGREEMENT, NOT GUILTY PLEA, WAIVER OF TRIAL BY
JURY AND ASSOCIATED RIGHTS, STIPULATION, AND ACKNOWLEDGMENT
OF APPELLATE REVIEW**

2) I, _____, Defendant in the
above-entitled action, agree that **(mark one or both lines)**

_____ a determination of my guilt

_____ the existence of facts to support an aggravated sentence

may be submitted to and tried by the court based entirely on stipulated facts, stipulated evidence, or both.

3) I maintain my plea of not guilty.

4) I have been advised by the court of my right to a trial by jury on the issue of guilt and the issue of an aggravated sentence. I understand that:

a. a jury is composed of the number of jurors required by law, selected from the community,

- b. I may participate in the selection of the jurors,
- c. the jury's general verdict and answer(s) to any special interrogatory(ies) must be unanimous, and
- d. if I waive a jury, the judge alone will determine my guilt or innocence, whether facts exist to support an aggravated sentence, or both.

Mark one or both lines:

_____ I have had an opportunity to consult with counsel, and I waive my right to a trial by jury on the issue of guilt.

_____ I have had an opportunity to consult with counsel, and I waive my right to a trial by jury on the existence of facts to support an aggravated sentence.

5) I have had an opportunity to consult with counsel regarding the following trial rights:

- a. to testify at trial,
- b. to have the prosecution witnesses testify in open court in my presence,
- c. to question those prosecution witnesses, and
- d. to require any favorable witnesses to testify for me in court.

Mark one or both lines:

_____ I acknowledge these trial rights and I hereby waive them for the purpose of the determination of guilt.

_____ I acknowledge these trial rights and I hereby waive them for the purpose of the determination of the existence of facts to support an aggravated sentence.

6) I stipulate to the existence of the following facts, the court's consideration of the following evidence, or both, for the purpose(s) described in paragraph 2 of this document **(describe stipulations here or refer to on-the-record recitation of stipulations)**.

7) I understand that if the court finds me guilty based on the stipulated facts, stipulated evidence, or both, I may appeal from the judgment of conviction and raise issues on appeal as from any trial to the court.

Dated: _____

Signature of Defendant

Name: _____

Street Address: _____

City/State/Zip: _____

E-mail address: _____

FORM 32c - WAIVER OF RIGHTS AND AGREEMENT REGARDING RULE 26.01, SUBD. 4

State of Minnesota

County

District Court

Judicial District: _____

Court File Number: _____

Case Type: _____

Criminal

State of Minnesota, Plaintiff

vs.

**Waiver of Rights and Agreement
Regarding Rule 26.01, subd. 4,
Trial on Stipulation to
Prosecution's Case to Obtain
Review of a Pretrial Ruling**

_____, Defendant

TO THE ABOVE-NAMED COURT:

PROSECUTOR'S AGREEMENT THAT PRETRIAL RULING IS DISPOSITIVE

1) The prosecutor acknowledges and agrees that the court's ruling on the following pretrial issue is dispositive of the case or that a trial will be unnecessary if the defendant prevails on appeal (describe pretrial ruling):

Dated: _____

Signature of Prosecutor

DEFENDANT'S AGREEMENT, NOT GUILTY PLEA, WAIVER OF TRIAL BY JURY AND ASSOCIATED RIGHTS, STIPULATION, AND ACKNOWLEDGMENT OF LIMITED APPELLATE REVIEW

2) I, _____, Defendant in the above-entitled action, acknowledge and agree that the court's pretrial ruling described in paragraph 1 of this document is dispositive of this case or that a trial will be unnecessary if I prevail on appeal.

3) I maintain my plea of not guilty.

- a. I have been advised by the court of my right to a trial by jury. I understand that: a jury is composed of the number of jurors required by law, selected from the community,
- b. I may participate in the selection of the jurors,
- c. the jury's verdict must be unanimous, and
- d. if I waive a jury, the judge alone will determine my guilt or innocence.

Having had an opportunity to consult with counsel, I waive my right to a trial by jury.

4) I have had an opportunity to consult with counsel regarding the following trial rights. I acknowledge and waive my rights:

- a. to testify at trial,
- b. to have the prosecution witnesses testify in open court in my presence,
- c. to question those prosecution witnesses, and
- d. to require any favorable witnesses to testify for me in court.

5) I stipulate to the prosecution's evidence in a trial to the court. I acknowledge that the court will receive and consider the prosecution's evidence and that the court may find me guilty based on that evidence. Specifically, I stipulate to the following evidence **(describe stipulations or refer to on-the-record recitation of stipulations):**

6) I acknowledge that appellate review in this case will only be of the pretrial ruling described in paragraph 1 of this document and not of my guilt or of other issues that could arise at a contested trial.

Dated: _____

Signature of Defendant

Name: _____

Street Address: _____

City/State/Zip: _____

E-mail address: _____

Crimmigration Basics: The Intersection of Criminal and Immigration Law

Erica E. Davis

The Davis Law Firm
Minneapolis

Lucy S. Egberg

Contreras Edin & Associates
Saint Paul

Common Criminal-Related Grounds of <u>Inadmissibility</u>	
Crime Involving Moral Turpitude (CIMT) - Note that an applicant is not inadmissible for a single CIMT if the CIMT is for a petty offense. (Maximum penalty possible for the crime did not exceed one year and the imposed sentence did not exceed imprisonment of more than six months.) - Not well-defined, but likely includes: giving peace officer a false name, indecent exposure, drug sale, forgery, bribery, perjury, CSC	212(a)(2)(A)(i)(I)
Conviction of Two or More Offenses of Any Type with an Aggregate Sentence of Imprisonment of at Least Five Years	212(a)(2)(B)
Controlled Substance Violations (Drug Offenses) - Potential waiver for one-time offense for possession of 30 grams or less of marijuana - Avoid trafficking/sale	212(a)(2)(A)(i)(II)
Prostitution	212(a)(2)(D)(i)
Solicit Prostitution	212(a)(2)(D)(i)
Common Criminal-Related Grounds of <u>Removability</u>	
Crime Involving Moral Turpitude (CIMT)	237(a)(2)(A)(i)
Aggravated Felony Murder, rape, sex abuse of a minor, drug trafficking, firearm trafficking, money laundering, crime of violence (at least one year in prison), theft/burglary/receipt of stolen property offense (at least one year in prison), welfare fraud (loss over \$10,000), perjury/witness bribery where sentence is at least one year in prison.	237(a)(2)(A)(iii)
High Speed Flight	237(a)(2)(A)(iv)
Failure to Register as a Sex Offender	237(a)(2)(A)(v)
Controlled Substance Violations (Drug Offenses)	237(a)(2)(B)(i)
Firearm Violation	237(a)(2)(C)
Crime of Domestic Violence, Stalking or Child Abuse Domestic assault "harm," "fear," allocation on the record (domestic relationship).	237(a)(2)(E)(i)
Violation of Order for Protection - Can include violations of HROs, OFPs, DANCOs. - Admission to contacting the protected party is sufficient to trigger.	237(a)(2)(E)(i)
Prostitution	212(a)(2)(D)(i)
Solicit Prostitution	212(a)(2)(D)(i)
Common Criminal Bars to <u>N-400</u>	
Aggravated Felony	101(f)(8)
Controlled Substance Violations (Drug Offenses)	101(f)(3)
Crime Involving Moral Turpitude (CIMT)	101(f)(3)
Conviction of Two or More Offenses of Any Type with an Aggregate Sentence of Imprisonment of at Least Five Years	101(f)(3)
Conviction of two or more gambling offenses	101(f)(5)
Confinement, as a result of conviction, to a penal institution for an aggregate period of 180 days or more	101(f)(7)

ICE Detention
*Assuming no prior removal
(deportation) orders



ICE makes initial bond
determination; serves Notice to
Appear



IJ can reevaluate bond



Administrative Closure for relief
before other agency or
prosecutorial discretion
OR
Individual Merits Hearing (IH)



Additional MCHs (usually 1-3) to
find an attorney, file application for
relief, etc.



Initial Master Calendar Hearing
(MCH); Immigration Judge (IJ) takes
pleadings.



IJ decision
-Grant Relief
-Deny Relief and Order Removal
-Deny Primary Relief and Grant
Voluntary Departure
-Terminate Proceedings



Either party may appeal to BIA

10 Tips to Make Your Conventional Briefing Format Appropriate for E-Briefing

Lisa Lodin Peralta
Robins Kaplan LLP
Minneapolis

I. WHY?

Why do we need to care about how our document is formatted?

- A. Paper-less: Even lawyers don't generate as much paper as they used to. Nearly everything we write and read is now electronic. Many of our words are never reduced to paper.
- B. This includes judges: One federal appellate court estimates that 70% of its judges read briefs on screens, not paper. They experience the same screen-reading phenomena the rest of us do.
 - o Numerous courts issue iPads
- C. The unknown medium: Beyond knowing one's audience, lawyers ideally would know the medium that the audience uses to read their submissions. But legal writers can't even guess at their readers' visual medium of choice — paper? 19" monitor? tablet? smartphone? The variable-sized screens usually require compromises — like using fonts and typefaces that properly display on all media, that are more broadly installed, and that still follow court rules (e.g., serifs) that were designed for paper.
- D. Studies conclude that screen reading takes longer and negatively affects comprehension. Experts point to several potential reasons:
 - 1. Reading on low-resolution screens is more cognitively demanding — perhaps attributed to lower dot pitch (pixel density per inch) — increasing fatigue and stress.

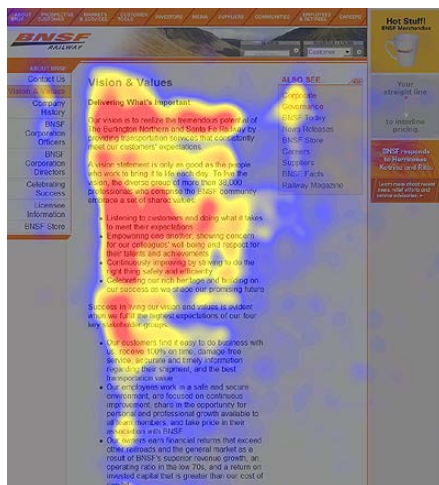
Screen Resolution vs. Paper Resolution

CRT Monitors	60 ppi
LCD Monitors	110 ppi
iPad and Nexus displays	~326 ppi
Paper	300–600 ppi

2. Many readers, perhaps subconsciously, view screen reading as less serious than reading on paper. Justified or not, screen readers read more quickly and less carefully.
3. With paper, readers can more-easily orient their page location; on scrollable screens, readers lose track.

E. Internet users may have simply formed poor habits. To cope with e-avalanches, readers quickly scan e-mail and webpages to discern authors' intent. Screen readers skim. This may explain why many people prefer to proofread final drafts on paper. Errors skimmed on screen often materialize on paper.

Internet habits also affect how eyes physically move across text. Eye-tracking studies show that screen readers' eyes skim in an "F" pattern (decreasing comprehension while progressing down a page) — relying upon authors to aid comprehension by providing visual variety and structure.



The sought-after visual landmarks include headings, summaries, images, and typographic emphasis (e.g., bold, italics, color). Screen readers' eyes seek variety, and those elements are what I will share with you.

II. 10 Tips to Format Your E-Brief

A. The type you use...

TIP 1: RETHINK YOUR FONT STYLE (TRASH TIMES NEW ROMAN)

- o Serif vs. Sans Serif fonts



- o Many court rules require use of serif fonts. *See, e.g., Fed. R. App. P. 32(a)(5)* (“A proportionally spaced [type]face must include serifs, but sans-serif type may be used in headings and captions.”)

- o Serifs –

Studies show that long passages of serif type are easier to read and comprehend than sans serif. *See Practitioner’s Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit at 140* (2017 edition) (available at <http://www.ca7.uscourts.gov/forms/handbook.pdf>) (attached).

- For legal writing (whether electronically submitted or not!) do not use Times New Roman. This was designed for newspapers to use in very narrow columns. (The only reason this font is popular is because Microsoft made it the default in 1992.)
- Since 2007 the default in Microsoft is Calibri, but this is a Sans Serif font that is inconsistent with most court rules.
- Since you need to change your font from Microsoft’s default of Calibri anyway, choose a typeface designed for

books. The U.S. Supreme Court and the Solicitor General use Century. Professional typographers use, among others: New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style. *See* 7th Circuit Handbook at 143.

- The 7th Circuit states that “faces in the Bookman and Century families are preferable to faces in the Garamond and Times families.” *Id.* at 144.
 - Robins Kaplan LLP appellate group generally uses Book Antiqua.
- o In many court rules, Sans Serif fonts are permitted for Headings. *See, e.g.,* Fed. R. App. P. 32(a)(5) (sans-serif type may be used in headings and captions).
 - o Robins Kaplan uses sans serif fonts for all of its headings, specifically Franklin Gothic.

TIP 2: INCREASE YOUR FONT SIZE

- o “Size doesn’t matter” – for the document itself; but size does matter for the font:
 - Most rules measure by word count, not by page count, so increasing the type size doesn’t matter
 - Many courts are requiring increased font size anyway: “at least 13-point” for the Minnesota appellate courts, Minn.R.Civ.App.P. 132.01, subd. 1; and 14-point in the federal appellate courts, Fed.R.App.P. 32(a)(5)(A).
 - Remember that: some of the devices being used can be quite small; a number of judges are elderly and can have poor eyesight; and the average age to need bifocals is the early 40s! So bigger is better.
- o Increase the size of the headings from the body text

- o Robins Kaplan generally uses 13-point for body text and 14-point for headings

B. The look of your page...

TIP 3: INCREASE THE SIDE MARGINS

- o Because of the need for white space on the “page” of the device, which you can’t always control up and down due to scrolling, make sure you increase that 1-inch side margin.
- o Robins Kaplan generally uses side margins of 1.3 inches.

TIP 4: ELIMINATE (mostly) FOOTNOTES

- o Footnotes are a big problem for screen readers. Some lawyers and judges find them merely annoying on paper, but they’re nearly impossible to navigate on a smaller iPad screen (pinch, scroll, re-orient). As such, lawyers who use footnotes may want to reconsider. On screens, footnotes get lost.

C. Breaking up the text...

TIP 5: CREATE EXTRA WHITE SPACE

- o Consider larger than regular “double space” above headings.
 - Robins Kaplan generally places 24 pt before a heading.
- o Consider larger than regular “double space” between ordinary paragraphs.
 - Robins Kaplan generally uses 6 pt before and after body text paragraphs.

TIP 6: WRITE HEADINGS, SUB-HEADINGS AND SUB-SUB-HEADINGS

- o These keep readers oriented by providing visual landmarks. Headings make points in easily digestible chunks.

- o Numerous headings and sub-headings make it easier for the e-reader who is scrolling through the document to keep track of where they are in the document.
- o The more detailed headings have the added benefit of allowing for a better table of contents, which can be one of the first parts of your document a judge looks to.

TIP 7: USE BULLETS AND LISTS

- o These provide alternative structures that give readers visual cues about the content relationships.
- o AND, they provide the eye a needed break from the ordinary block of text in full paragraph form.

TIP 8: BE SHORT. BE SHORT. DID I SAY BE SHORT?

- o Keep sentences short and paragraphs shorter. Provide clear, simple syntax. If you avoid long, dense text, you give readers a visual break, permitting pause and reflection.

TIP 9: USE GRAPHICS

- o Images provide visual variety and structure, providing respite from occasionally dense text. They also provide clarity without increasing word counts.

TIP 10: FOLLOW THE RULES!!!

- o These are only guidelines based on research suggesting best practices for a most readable electronic document. First and foremost, one must always know and follow the rules – or the preferences – of whatever jurisdiction in which one is filing.
 - *See, e.g.,* Board of Immigration Appeals Practice Manual 3.3(c)(vii) (“Times New Roman 12-point font is preferred.”). Of course, this is for paper/conventional filing because the BIA doesn’t yet have electronic filing!

III. Summary

The courts think the look of the brief makes a difference:

A. Seventh Circuit: 7th Circuit Handbook

- o “This section of the handbook also includes some suggestions to help you make your submissions more legible – and thus more likely to be grasped and retained.” Page 139
- o The court chooses in its handbook to give “advice, offered for mutual benefit of counsel seeking to make persuasive presentations and judges who want the most legible briefs so that they can absorb what counsel has to offer.” The handbook notes, however, that nothing in the “advice” section is mandatory. Page 142. As part of that advice, the handbook states:
 - “You can improve your chances by making your briefs typographically superior. It won’t make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That’s a valuable advantage, which you should seize.” Page 142

B. Eighth Circuit: 7th Circuit Handbook

- o On the 8th Circuit’s Rules & Procedures page, <http://www.ca8.uscourts.gov/rules-procedures>, the court provides a link to the 7th Circuit’s handbook.

(The link currently is still to the prior edition of the handbook. The current, 2017 edition, is provided here and also available directly from the 7th Circuit’s website.)

PRACTITIONER'S HANDBOOK FOR APPEALS



TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

2017 EDITION

<http://www.ca7.uscourts.gov/forms/handbook.pdf>

XXIII. REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS

Federal Rule of Appellate Procedure 32 contains detailed requirements for the production of briefs, motions, appendices, and other papers that will be presented to the judges. Rule 32 is designed not only to make documents more readable but also to ensure that different methods of reproduction (and different levels of technological sophistication among lawyers) do not affect the length of a brief. The following information may help you better understand Rule 32 and associated local rules. The Committee Note to Rule 32 provides additional helpful information.

This section of the handbook also includes some suggestions to help you make your submissions more legible — and thus more likely to be grasped and retained. In days gone past lawyers would send their work to printers, who knew the tricks of that trade. Now composition is in-house, done by people with no education in printing. Some tricks of that trade are simple to master, however, if you think about them. Subsection 5, below, contains these hints.

1. Rule 32(a)(1)(B) requires text to be reproduced with “a clarity that equals or exceeds the output of a laser printer.” The resolution of a laser printer is expressed in dots per inch. First generation laser printers broke each inch into 300 dots vertically and horizontally, creating characters from this 90,000-dot matrix. Second generation laser printers use 600 or 1200 dots per inch in each direction and thus produce a sharper, more easily readable output; commercial typesetters use 2400 dots per inch.

Any means of producing text that yields 300 dots per inch or more is acceptable. Daisy-wheel, typewriter, commercial printing, and many ink-jet printers meet this standard, as do photocopies of originals produced by these methods. Dot matrix printers and fax machines use lower resolution, and their output is unacceptable. Although Rule 32(a) applies only to briefs and motions, we urge counsel to maintain this standard of clarity in appendices. A faxed copy of the district court’s opinion, or text from Lexis or Westlaw printed by a dot-matrix printer, is needlessly hard to read. Use photocopies of the district court’s original opinion and other documents in the record.

2. Rule 32(a)(5) distinguishes between proportional and monospaced fonts, and between serif and sans-serif type. It also requires knowledge of points and pitch.

Proportionally spaced type uses different widths for different characters. Most of this handbook is in proportionally spaced type. A monospaced face, by contrast, uses the same width for each character. Most typewriters produce monospaced

type, and most computers also can do so using fonts with names such as “Courier,” “Courier New,” or “Andale Mono.” The rule leaves to each lawyer the choice between proportional and monospaced type.

This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.

This sentence is in a monospaced font; as you can see, the m and i have the same width.

Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. The next line shows two characters enlarged for detail. The first has serifs, the second does not.



Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions if it is used at all.

This sentence is in Century Schoolbook, a proportionally spaced font with serifs. Baskerville, Bookman, Caslon, Garamond, Georgia, and Times are other common serif faces.

This sentence is in Helvetica, a proportionally spaced sans-serif font. Arial, Eurostile, Trebuchet, Univers, and Verdana are other common sans-serif faces.

Variations of these names imply similar type designs.

Type must be large enough to read comfortably. For a monospaced face, this means type approximating the old “pica” standard used by typewriters, 10 characters per horizontal inch, rather than the old “elite” standard of 12 characters per inch. Because some computer versions of monospaced type do not come to exactly 10 characters per inch, Rule 32(a)(5)(B) allows up to 10½ per inch, or 72 characters (including punctuation and spaces) per line of type.

Proportionally spaced characters vary in width, so a limit of characters per line is not practical. Instead the rules require a minimum of 12-point type. Circuit Rule 32 permits the use of 12-point type in text and 11-point type in footnotes; Fed. R. App. P. 32(a)(5)(A) standing alone would have required you to use 14-point type throughout.

“Point” is a printing term for the height of a character. There are 72 points to the inch, so capital letters of 12-point type are a sixth of an inch tall. This advice is in 12-point type. Your type may be larger than 12 points, but it cannot be smaller. *See* Circuit Rule 32(b). Word processing and page layout programs can expand or condense the type using tracking controls, or you may have access to a condensed version of the face (such as Garamond Narrow). Do not use these. Condensed type is prohibited by Rule 32(a)(6). It offers no benefit to counsel under an approach that measures the length of briefs in words rather than pages, and it is to your advantage to make the brief as legible as possible.

This is a 9-point type.

This is a 10-point type.

This is 11-point type.

This is 12-point type.

This is 12-point type, condensed. Condensed type is not acceptable.

This is 13-point type.

This is 14-point type.

3. Rule 32(a)(6) provides that the principal type must be a plain, roman style. In other words, the main body of the document cannot be bold, italic, capitalized, underlined, narrow, or condensed. This helps to keep the brief or motion legible. Italics or underlining may be used only for case names or occasional emphasis. Boldface and all-caps text should be used sparingly.

4. Circuit Rule 32(c) determines the maximum length of a brief. It permits you to present as much argument as a 50-page printed brief. The variability of proportionally spaced type makes it necessary to express this length in words rather than pages. Other rules extend this approach to other documents. For example, Fed. R. App. P. 29(a)(5) provides that an *amicus* brief may be no more than half the length allowed for a party’s principal brief.

Lawyers who choose monospaced type may avoid word counts by counting lines of type. Unless the brief employs a lot of block quotes or footnotes it will be enough to count pages and multiply by the number of lines per page. (Fifty pages at 26 lines per page is 1,300 lines.) The line-count option is not available when the brief uses proportional type.

Principal briefs of 30 pages or less, and reply briefs of 15 pages or less, need not be accompanied by a word or line count. Think of Rule 32(a)(7)(A) as a safe harbor. Lawyers who need more should use Circuit Rule 32(c). A brief that meets the type volume limitations of Circuit Rule 32(c) is acceptable without regard to the number of pages it contains.

5. What has gone before has been a description of requirements in Fed. R. App. P. 32 and Circuit Rule 32. Now we turn to advice, offered for mutual benefit of counsel seeking to make persuasive presentations and judges who want the most legible briefs so that they can absorb what counsel has to offer. Nothing in what follows is mandatory.

Typographic decisions should be made for a purpose. *The Times of London* uses Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach – different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

This requires planning and care. Any business consultant seeking to persuade a client prepares a detailed, full-color presentation using the best available tools. Any architect presenting a design idea to a client comes with physical models, presentations in software, and other tools of persuasion. Law is no different. Choosing the best type won't guarantee success, but it is worthwhile to invest some time in improving the quality of the briefs appearance and legibility.

Judges of this court hear six cases on most argument days and nine cases on others. The briefs, opinions of the district courts, essential parts of the appendices, and other required reading add up to about 1,000 pages per argument session. Reading that much is a chore; remembering it is even harder. You can improve your chances by making your briefs typographically superior. It won't make your arguments better, but it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize.

Two short books by Robin Williams can help lawyers and their staffs produce more attractive briefs. *The PC is not a Typewriter* (1990), and *Beyond the PC is not a Typewriter* (1996), contain almost all any law firm needs to know about type. These books have counterparts for the Mac OS: *The Mac is not a Typewriter* and *Beyond the Mac is not a Typewriter*. Larger law firms may want to designate someone to learn even more about type. For this purpose, curling up with Robert Bringhurst, *The Elements of Typographic Style*, has much the same value for a brief's layout and type as Strunk & White's *The Elements of Style* and Bryan A. Garner's *The Elements of Legal Style* do for its content.

Another way to improve the attractiveness and readability of your brief or motion is to emulate high-quality legal typography. The opinions of the Supreme Court, and the briefs of the Solicitor General, are excellent models of type usage. The United States Reports are available online in Acrobat versions that retain all of their original typography. You can find them at <<http://www.supremecourtus.gov/opinions/boundvolumes.html>>. Briefs of the Solicitor General also are available online in Acrobat versions. Go to <<http://www.usdoj.gov/osg/briefs/search.html>>. The Supreme Court's opinions and the SG's briefs follow all of the conventions mentioned below, as do the printed opinions of the Seventh Circuit.

Here are some suggestions for making your briefs more readable.

- Use proportionally spaced type. Monospaced type was created for typewriters to cope with mechanical limitations that do not effect type set by computers. With electronic type it is no longer necessary to accept the reduction in comprehension that goes with monospaced letters. When every character is the same width, the eye loses valuable clues that help it distinguish one letter from another. For this reason, no book or magazine is set in monospaced type. If you admire the typewriter look nonetheless, choose a slab-serif face with proportional widths. Caecilia, Lucida, Officina, Serif, Rockwell, and Serifa are in this category.
- Use typefaces that are designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

- Use the most legible face available to you. Experiment with several, then choose the one you find easiest to read. Type with a larger “x-height” (that is, in which the letter x is taller in relation to a capital letter) tends to be more legible. For this reason faces in the Bookman and Century families are preferable to faces in the Garamond and Times families. You also should shun type designed for display. Bodoni and other faces with exaggerated stroke widths are effective in headlines but hard to read in long passages.

Professional typographers avoid using Times New Roman for book-length (or brief-length) documents. This face was designed for newspapers, which are printed in narrow columns, and has a small x-height in order to squeeze extra characters into the narrow space. Type with small x-height functions well in columns that contain just a few words, but not when columns are wide (as in briefs and other legal papers). In the days before Rule 32, when briefs had page limits rather than word limits, a typeface such as Times New Roman enabled lawyers to shoehorn more argument into a brief. Now that only words count, however, everyone gains from a more legible typeface, even if that means extra pages. Experiment with your own briefs to see the difference between Times and one of the other faces we have mentioned.

- Use italics, *not* underlining, for case names and emphasis. You don’t see case names underlined in the United States Reports, the Solicitor General’s briefs, or law reviews; for good reason. Underlining masks the descenders (the bottom strokes of characters such as g, j, p, q and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.

- Use real typographic quotes (“and”) and real apostrophes (’), not foot and inch marks. Reserve straight ticks for feet and inches.

- Put only one space after punctuation. The typewriter convention of two spaces is for monospaced type only. When used with proportionally spaced type, the extra spaces lead to what typographers call “rivers”—wide, meandering areas of white space up and down a page. Rivers interfere with the eyes moving from one word to the next.

- Do not justify your text unless you hyphenate it too. If you fully justify unhyphenated text, rivers result as the word processing or page layout program adds white space between words so that the margins line up.

- Do not justify monospaced type. Justification is incompatible with equal character widths, the defining feature of a monospaced face. If you want

variable spacing, choose proportionally spaced face to start with. Your computer *can* justify a monospaced face, but it does so by inserting spaces that make for big gaps between (and sometimes within) words. The effects of these spaces can be worse than rivers in proportionally spaced type.

- Indent the first line of each paragraph $\frac{1}{4}$ inch or less. Big indents disrupt the flow of text. The half-inch indent comes from the tab key on a typewriter and is never used in professionally set type.

- Cut down on long footnotes and long block quotes. Because block quotes and footnotes count toward the type volume limit, these devices do not affect the length of the allowable presentation. A brief with 10% text and 90% footnotes complies with Rule 32, but it will not be as persuasive as a brief with the opposite ratio.

- Avoid bold type. It is hard to read and almost never necessary. Use italics instead. Bold italic type looks like you are screaming at the reader.

- Avoid setting text in all caps. The convention in some state courts of setting the parties' names in capitals is counterproductive. All-caps text attracts the eye (so does boldface) and makes it harder to read what is in between — yet what lies between the parties' names is exactly what you want the judge to read. All-caps text in outlines and section captions also is hard to read, even worse than underlining. Capitals all have one same rectangular shape, so the reader cannot use shapes (including ascenders and descenders) as cues. Underlined, all-caps, boldface text is almost illegible.

One common use of all-caps text in briefs is argument headings. Please be judicious. Headings can span multiple lines, and when they are set in all-caps text are very hard to follow. It is possible to make heading attractive without using capitals. Try this form:

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

This form is harder to read:

ARGUMENT

I. THE SUIT IS BARRED BY THE STATUTE OF LIMITATIONS

A. Perkins had actual knowledge of the contamination more than six years before filing suit

If you believe that italics and underscores are important to getting your idea across, try something like this (replacing underlining with a rule line beneath the text):

ARGUMENT

I. The Suit is Barred by the Statute of Limitations

A. Perkins had actual knowledge of the contamination more than six years before filing suit

2017 Legislative Update

Angela Kiese
MN Attorney General's Office
Saint Paul

2017 LEGISLATIVE UPDATE

Angela Helseth Kiese

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I. GENERAL CRIMINAL PROVISIONS

A. Minn. Stat. § 609.475 – Impersonating a Military Service Member, Veteran, or Public Official

Amended from “a police or military officer or public official” to “an active or reserve component military service member, veteran, or public official” to wrongfully obtain money, property, or any other tangible benefit.

It is a misdemeanor.

B. Minn. Stat. § 609.4751 – Impersonating a Peace Officer

Added to move misdemeanor peace officer impersonation with intent to mislead another into believing the impersonator is actually an officer.

Also adds a gross misdemeanor for anyone who impersonates an officer while

- (1) gaining access to a public building or government facility that is not open to the public;
- (2) without legal authority, directing or ordering another person to act or refrain from acting;
- (3) violating section 169.64, subd. 2, 3, or 4 (prohibited lights), or the siren provisions of 169.68 (prohibited sirens).
- (4) Operating a vehicle marked with the words “police, patrolman, sheriff, deputy, trooper, state patrol, conservation officer, agent, or marshal” or with any lettering, marking, or insignia, or colorable imitation thereof, such as stars, badges, or shields identifying the vehicle as a law enforcement vehicle.

Adds a felony violation for violating the section within five years of a previous violation with sentence of up to two years and \$4000.

C. Minn. Stat. § 609.595 – Damage to Property

Added a first degree crime if the property damaged is a public safety motor vehicle, the defendant knew it was, and the damage to the vehicle caused a substantial interruption or impairment of public safety service or a reasonably foreseeable risk of bodily harm.

Added a third degree crime if the property damaged was a public safety motor vehicle and the defendant knew it.

Added definition for “public safety motor vehicle” to include law enforcement, fire, ambulances, and DNR vehicles.

Damage includes tampering and acts that obstruct or interfere with the vehicle’s use.

D. Minn. Stat. § 609.605 – Trespass

Added a misdemeanor for trespass on a school bus. A person who boards a school bus when the bus is on its route or otherwise in operation, or while it has pupils on it, and who refuses to leave the bus on demand of the operator, is guilty.

E. Minn. Stat. § 609.748 – Harassment; Restraining Order

Amended service provisions to change references from “sheriff” to “peace officer.”

Added short-form notification providing that in lieu of personal service, a peace officer may serve a person with a short-form notification. It must include the respondent’s name; date of birth, if known; the petitioner’s name; the names of other protected parties; the date and county in which the TRO or RO was filed; the court file number; the hearing date and time, if known; the conditions that apply to the respondent, either in checklist form or handwritten; and the name of the judge who signed the order.

The short-form notification must be in bold print in the following form:

“The restraining order is now enforceable. You must report to your nearest sheriff’s office or county court to obtain a copy of the restraining order. You are subject to arrest and may be charged with a misdemeanor, gross misdemeanor, or felony if you violate any of the terms of the restraining order or this short-form notification.”

Upon verification of the identity of the respondent and the existence of an unserved harassment order against the respondent, a law enforcement officer may detain the respondent for a reasonable time necessary to complete and serve the short-form notification.

When service is made, it may be proved by the affidavit of the officer making service.

Service may occur at any time, including Sundays and legal holidays.

The BCA is to provide the short-form to law enforcement agencies.

Effective 30 days following the publication of a notice on the BCA website that a computer system is available to send harassment restraining order data from the Minnesota Judicial Branch to law enforcement.

Added paragraph that in addition to peace officers, corrections officers, including but not limited to probation officers, court services officers, parole officers, and employees of jails or correctional facilities, may serve a temporary restraining order or restraining order.

TRO relief by court provisions were amended to provide that a request for a hearing must be made within 20 days of the date of completed service of the petition, rather than 45 days after the order is issued.

F. Minn. Stat. § 624.714 – Carrying of Weapons Without Permit

Amended to state that the owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms by a peace officer within the private establishment or deny the officer access to the weapons, except when specifically authorized by statute. The owner or operator may require the display of official credentials issued by the agency that employs the peace officer prior to granting the officer entry into the private establishment.

Also amended paragraph related to security guards to state that the owner or operator of a private establishment may require the display of official credentials issued by the company, which must be licensed by the Private Detective and Protective Agent Services Board, that employs the security guard and the guard's permit card prior to granting the guard entrance into the private establishment.

G. Minn. Stat. § 609.48 – Perjury

Amended to provide that perjury by writing in court documents may be prosecuted in the county where the statement under penalty of perjury was signed or the county in which the statement was filed.

II. CONTROLLED SUBSTANCE RELATED PROVISIONS

A. Minn. Stat. § 152.02 – Schedules of Controlled Substances

Added nine new synthetic drugs to schedule I including two Opiates, three Hallucinogens, three stimulants, and a synthetic cannabinoid.

The Board of Pharmacy indicated the substances could be abused, are potentially addictive, and have no approved medical uses.

B. Minn. Stat. § 152.25 – Medical Cannabis Manufacturers

Amended to address revocations, non-renewals, and transfer denials of manufacturer registrations. Provides for chapter 14 contested cases after manufacturer notified in writing of the action.

Also added temporary suspension proceedings for up to 90 days if a manufacturer violates any of the medical cannabis registration requirements; permits, aids, or abets the commission of any violation of state law at the manufacturer's location for cultivation, harvesting, manufacturing, packaging, and processing or at any site for distribution of medical cannabis; performs any act contrary to the welfare of a registered patient or registered designated caregiver; or obtains, or attempts to obtain, a registration by fraudulent means or misrepresentation.

Added language for notice to patients of revocation or non-renewal of a manufacturer registration that may affect the ability of the patient to obtain medical cannabis from the manufacturer subject to the enforcement action.

C. Minn. Stat. § 152.28 – Health Care Practitioner Duties

Added a subdivision containing advertising restrictions related to medical cannabis.

Cannot include false or misleading statements about medical cannabis or the registry program; use colloquial terms such as pot, weed, or grass; state or imply endorsed by the Department of Health or the registry program; include images of cannabis in its plant or leaf form or of cannabis-smoking paraphernalia; or contain medical symbols that could be confused with symbols of established medical associations or groups.

Violators prohibited from certifying that patients have a qualifying medical condition for purposes of patient participation in the registry program.

D. Minn. Stat. § 152.33 – Medical Cannabis Violations

Added penalties for intentionally transferring medical cannabis to a person other than allowed by law and in doing so transporting or directing the transport of medical cannabis outside the state of Minnesota.

III. TRAFFIC SAFETY AND RELATED PROVISIONS

A. Minn. Stat. § 169A.51 – Chemical Tests for Intoxication

Implied Consent Advisory amended to Breath Test Advisory.

Also, blood or urine test search warrant requirements added. Blood or urine tests may only be conducted pursuant to a search warrant or a judicially recognized exception to the search warrant requirement.

Added that a blood or urine test may be required pursuant to a search warrant even after a breath test has been administered if the person is unconscious or incapacitated to the point that the peace officer providing a breath test advisory, administering a breath test, or serving the search warrant has a good-faith belief that the person is mentally or physically unable to comprehend the breath test advisory or otherwise voluntarily submit to chemical tests.

Alternative test limitations do not apply to unconscious person.

Due to *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).

B. Minn. Stat. § 171.177 – Revocation; Pursuant to Search Warrant

New statute providing for advisory and procedures for blood or urine tests pursuant to search warrants.

At the time a blood or urine test is directed pursuant to search warrant, the person must be informed that refusal to submit to a blood or urine test is a crime.

The peace officer who directs the test shall direct a blood or urine test as provided in the warrant. If the warrant authorizes either, the officer may direct whether the test is of blood or urine. If the person objects to the test, the officer shall offer the person an alternative test of either blood or urine. Action may be taken against a person who refuses to take one of the tests if the alternative test was offered.

As with breath tests, after executing a search warrant for the collection of a blood or urine sample based upon probable DWI, the peace officer shall certify to the commissioner of public safety when a person refuses to comply or if a person submits to the test and the test results indicate:

- (1) An alcohol concentration of .08 or more;
- (2) An alcohol concentration of .04 or more, if the person was driving, operating, or in physical control of a commercial motor vehicle at the time of the violation; or
- (3) The presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana or tetrahydrocannabinols.

Upon certification that a person has been driving, operating, or in physical control of a motor vehicle while impaired and that the person has refused to comply with the search warrant, the commissioner shall revoke the license, permit, or nonresident operating privilege for the terms under the statute.

Upon certification that the person failed the test given pursuant to search warrant, the commissioner shall revoke the license, permit, or nonresident operating privilege for the terms under the statute.

If the test is by a laboratory operated by the BCA, the BCA may directly certify the test results to public safety and the peace officer shall certify that there existed probable cause to believe the person had been driving while impaired and had submitted a test. Upon receipt of both certifications, the commissioner shall undertake license actions.

The other provisions are similar to section 169A.52 for other test refusal or failure.

Sections regarding administrative and judicial review of the license revocation decision were also added that are similar to section 169A.53.

Additional issues for scope of judicial review hearings are included related to whether a licensed peace officer applied for a search warrant in accordance with the requirements of 626.04 to 626.18 and whether a neutral magistrate reviewed the application for a search warrant and determined there was probable cause the person was driving while impaired. Also, was the search warrant and the process by which it was obtained valid?

C. Minn. Stat. § 169A.03 – Driving While Impaired - Definitions

Added revocation pursuant to search warrant under § 171.177 in definition of “prior impaired driving-related loss of license.”

D. Minn. Stat. § 169A.20 – Driving While Impaired

Amended refusal to submit to chemical test crime to include refusal if the person's blood or urine testing was required by a search warrant.

E. Minn. Stat. § 169A.53 – Administrative and Judicial Review of License Revocation

Amended to increase the time to petition the court for review from 30 to 60 days following receipt of a notice and order of revocation.

Added to scope of revocation hearing the issue of whether the person proved the defense of controlled substance use in accordance with a prescription.

Added affirmative defense to the presence of a Schedule I or II controlled substance that the person used the controlled substance according to the terms of a prescription issued to the person unless the court finds by a preponderance of the evidence that the use of the controlled substance impaired the person's ability to operate a motor vehicle.

F. Minn. Stat. § 169A.54 – DWI Convictions, Adjudications; Administrative Penalties

Added revocation of license pursuant to test refusal after a search warrant under § 171.177 to mandatory revocation provisions.

G. Minn. Stat. § 169A.60 – Administrative Impoundment of Plates

Amended to increase the time to petition the court for review from 30 to 60 days following receipt of a notice and order of impoundment.

H. Minn. Stat. § 624.7143 – Firearms Chemical Testing

Amended to reflect mandatory testing only for breath tests and to include search warrant requirements for blood and urine tests.

If warrant authorizes blood or urine, the officer may direct whether blood or urine. If the person objects to the test, the officer shall offer the person the alternative of either blood or urine. Action under the section may be taken only if the alternative test was offered.

I. Minn. Stat. § 97B.066 – Hunting While Under the Influence

Amended to reflect mandatory testing only for breath tests and to include search warrant requirements for blood and urine tests.

If warrant authorizes blood or urine, the officer may direct whether blood or urine. If the person objects to the test, the officer shall offer the person the alternative of either blood or urine. Action under the section may be taken only if the alternative test was offered.

For hearings added provision for challenging failure to obtain a search warrant and whether the warrant was valid.

J. Minn. Stat. § 360.0753 – Airports and Aeronautics Chemical Testing

Amended to reflect mandatory testing only for breath tests and to include search warrant requirements for blood and urine tests.

If warrant authorizes blood or urine, the officer may direct whether blood or urine. If the person objects to the test, the officer shall offer the person the alternative of either blood or urine. Action under the section may be taken only if the alternative test was offered.

For hearings added provision for challenging failure to obtain a search warrant and whether the warrant was valid.

K. Minn. Stat. § 169.011 – Traffic Regulations Definitions

Added a definition for “all-electric vehicle.” Solely able to be powered by an electric motor drawing current from rechargeable storage batteries, fuel cells, or other portable sources of electrical current. Excludes plug-in hybrid vehicles.

Amended definition of “neighborhood electric vehicle” to include “three or” four wheels.

L. Minn. Stat. § 169.18 – Driving Rules

Amended driving left of center to provide that a motor vehicle may be driven to the left side of the roadway to safely overtake a bicycle under appropriate circumstances.

Amended to allow school busses to stop in bicycle lanes.

M. Minn. Stat. § 169.224 – Neighborhood and Medium-Speed Electric Vehicles

Amended to provide a person may operate a three-wheeled neighborhood electric vehicle without a two-wheeled vehicle endorsement, provided the person has a valid driver’s license.

N. Minn. Stat. § 171.306 – Ignition Interlock Device Program

Added definition of “location tracking capabilities.” The ability of an electronic or wireless device to identify and transmit its geographic location through the operation of the device.

Also, commissioner may not establish standards that, directly or indirectly, require devices to use or enable location tracking capabilities without a court order.

And, commissioner shall not permit location tracking capabilities on any ignition interlock device except when ordered by the court.

Manufacturer must include a notice in the contract to participant regarding any location tracking capabilities of the device.

O. Minn. Stat. § 169A.63 – Limitations on Vehicle Forfeiture

Amended to provide that a motor vehicle is not subject to forfeiture if any of its owners who petition the court can demonstrate by clear and convincing evidence that the petitioning owner did not know it would be used or operated in an unlawful way.

IV. CRIMINAL RELATED STATUTES

A. Minn. Stat. § 609.6057 – Geographic Restriction

Added to provide for pretrial orders and probationary conditions that include “geographic restriction” limiting a defendant or juvenile offender from entering a designated property or geographic area.

The court may issue upon a finding that its issuance will serve the interests of protecting public safety or property considering the following factors:

- (1) Whether a defendant’s presence in the area creates a risk to public safety or property;
- (2) A defendant’s criminal history;
- (3) The likelihood of future criminal activity within the restricted area; and
- (4) Any other factors deemed relevant by the court.

A court may grant any exceptions that it deems necessary to avoid the imposition of significant hardship upon a defendant but should also consider the impact of the exception on the interests of protecting public safety or property.

If a person knows of the restriction and intentionally enters or remains in the restricted area, the person is guilty of a misdemeanor.

Independent of any condition of pretrial release or probation imposed on the defendant.

It may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation.

It shall be issued in a proceeding separate from but that may be held immediately following, a proceeding in which any pretrial release or sentencing issues are decided.

The court shall notify the defendant of the area subject to a geographic restriction and that violation of the geographic restriction order is a crime.

A court shall cancel a pretrial geographic restriction order at the final disposition of the underlying criminal case.

A court shall cancel a postconviction geographic restriction order when an offender completes a period of probationary supervision or is committed to the commissioner of corrections.

A court may cancel a postconviction geographic restriction order at any time during which an offender is under probationary supervision.

B. Minn. Stat. § 626.8469 – Training in Crisis Response, Conflict Management, and Cultural Diversity

Beginning July 1, 2018, requires law enforcement training in crisis intervention and mental illness crises; conflict management and mediation; and recognizing and valuing community diversity and cultural differences to include implicit bias training.

At least 16 continuing education credits within an officer's three-year licensing cycle.

C. Minn. Stat. § 609.14 – Revocation of Stay

Amended to require a probation agent to present the court with local options to address and correct probation violations, including, but not limited to inpatient CD treatment when the defendant at a summary hearing is:

A nonviolent controlled substance offender; subject to supervised probation; appearing based on a technical violation; and admitting or found to have violated probation conditions.

D. Minn. Stat. § 243.05 – Revocation of Conditional Release

Amended to require that prior to revoking a nonviolent controlled substance offender's parole or probation based on a technical violation, when the offender does not pose a risk to the public and is amenable to continued supervision in the community, a parole or probation agent identify community options to address and correct the violation, including but not limited to, inpatient CD treatment.

If an agent determines that community options are appropriate, the agent shall seek to restructure the terms of release to incorporate those options and, if the offender is on probation and agrees to the restructure, forward a report to the court about the restructure.

The recommended restructuring of probation becomes effective when confirmed by a judge.

If a nonviolent controlled substance offender's parole or probation is revoked, the offender's agent must first attempt to place the offender in a local jail.

E. Minn. Stat. § 244.05 – Supervised Release Term

Amended to require that prior to revoking a nonviolent controlled substance offender's supervised release based on a technical violation, when the offender does not pose a risk to the

public and is amenable to continued supervision in the community, the DOC identify community options to address and correct the violation, including but not limited to, inpatient CD treatment.

If the DOC determines that community options are appropriate, it shall seek to restructure the terms of release to incorporate those options.

If a nonviolent controlled substance offender's supervised release is revoked, the offender's agent must first attempt to place the offender in a local jail.

F. Alternatives to Incarceration Pilot Program Fund

Agencies providing supervision to offenders on probation, parole, or supervised release are eligible for grants to facilitate access to community options including, but not limited to, inpatient CD treatment for nonviolent controlled substance offenders to address and correct behavior that is, or is likely to result in, a technical violation of the conditions of release.

The DOC is to establish criteria for selecting grant recipients and is to report to the legislature by January 15, 2019, the grant award information.

G. Minn. Stat. § 634.36 – Evidence of Videotapes, Audiotapes, or Other Recordings.

Amended to include videotape, audiotape, or electronic or digital recording from recording equipment “on the officer’s person” and not just in a law enforcement vehicle as evidence that shall not be excluded on the ground that a written transcript was not prepared and available prior to trial.

H. Minn. Stat. § 356.116 – Court Documents

Amended to provide that in addition to documents filed with the court, documents presented to a judge or judicial officer in support of a request for a court order, warrant, or other relief, are not required to be notarized and that signing those documents constitutes “verification upon oath or affirmation” required under that section.

Principles and Practices for Representing Veterans

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Echoes of War:

Defending Combat Veterans in Criminal Court¹

By
BROCKTON D. HUNTER



“They carried all they could bear, and then some, including a silent awe for the terrible power of the things they carried.” — **TIM O'BRIEN, *THE THINGS THEY CARRIED* (1990).**

¹ These CLE materials provide a brief overview of the unique problems facing criminally-involved veterans with service-related disorders and how attorneys can effectively defend their veteran-clients. For a much more thorough treatment of these issues, see *THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT* (Brockton Hunter & Ryan Else, eds., 2014). To learn more about the *Defending Veterans* book or to order a copy, visit the Veterans Defense Project web site at www.veteransdefenseproject.org.

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I. Overview

More than 2.6 million Americans have now served in Iraq or Afghanistan.² A U.S. government study, released in July 2012 estimated that up to 20%, approximately 500,000 of these veterans are suffering from Post Traumatic Stress Disorder.³ The same study also noted, however, that the true numbers are likely higher.⁴ A 2008 RAND Corporation study found that 320,000 veterans are suffering from Traumatic Brain Injury (“TBI”).⁵ Both reports concluded that less than half of these PTSD or TBI-suffering veterans had previously reported or sought help for their condition.⁶

Untreated, many of these psychologically injured veterans are acting out in reckless, self-destructive and, sometimes violent ways that bring them into contact with the criminal justice system. History tells us that as the wars in Iraq and Afghanistan wind down, the numbers of troubled veterans flooding into our criminal courts will swell. Our criminal justice system and, particularly, the defense bar can and must be better prepared than previous generations.

² INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT 39 (2012).

³ *Id.*

⁴ *Id.*

⁵ TERRI TANELIAN ET AL., RAND CORP., INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 64 (2008) [hereinafter INVISIBLE WOUNDS OF WAR].

⁶ *Id.*, *Supra* note 2.

II. Links Between Combat Trauma and Criminal Behavior

A. Historic Post-War Spikes in Veteran-Committed Crimes

Historical research reveals a pattern of veteran-committed crime waves following every major conflict. Though scientific studies have only recently been conducted on this issue, a look back at history through this lens clearly reveals this pattern.

Following the American Revolutionary War, one author noted a marked increase in crime that caused many states to institute new laws and penalties in response.⁷ A Revolutionary veteran, describing conditions in South Carolina after the war, wrote, “highway robbery was a common occurrence, and horse-stealing so frequent that the Legislature made it a crime punishable with death.”⁸

Studies conducted after the Civil War, World War I and World War II found a disproportionate number of veterans in the criminal justice system. Following the Civil War a great wave in crime and disorder was documented.⁹ One prison in Pennsylvania reported a large influx of prisoners in the last three months of 1865, “most in poor physical condition, and nine-tenths incapacitated and demoralized by the war.”¹⁰ In 1866 they reported an unprecedented influx, three-fourths of whom had fought in the war and were “shattered” by their experiences.¹¹ Nationwide, in 1866 two-thirds of all commitments to state prisons in northern states were men who had seen service in the war.¹²

⁷ ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789* 454 (1924).

⁸ *Id.* (citing JOSEPH JOHNSON, *TRADITIONS AND REMINISCENCES* 400 (1851)).

⁹ Edith Abbott, *Crime and the War*, 9 J. AM. INST. CRIM. L & CRIMINOLOGY 41 (1918).

¹⁰ *Id.* at 43.

¹¹ *Id.*

¹² E.C. Wines & Theodore Dwight, *The Reformation of Prison Discipline*, 105 N. AM. REV., 580–81 (1867), available at

http://books.google.com/books?id=Kn8FAAAAQAAJ&pg=PP7&lpg=PP7&dq=Ticknor+and+Fields,+The+North+American+Review,+Boston,+Vol.+CV,+1867&source=bl&ots=5JWYeUkEQ4&sig=01A0d6Lbo61dQYVxwFXhEvCXwYc&hl=en&sa=X&ei=_OSDT-S8Boqk8AST6PjsBw&ved=0CElQ6AEwBQ#v=onepage&q=Ticknor%20and%20Fields%2C%20The%20North%20American%20Review%2C%20Boston%2C%20Vol.%20CV%2C%201867&f=false.

Many Civil War veterans also headed west after the war. In fact they are largely responsible for putting the “wild” in the “wild west.” Jesse James and his brother Frank, for instance, served in a Confederate guerilla unit similar to today’s special operations forces. When the war ended, they and other members of their unit formed the James Gang and headed west, plying their war-honed skills in robbing trains, stagecoaches and banks.¹³

A similar pattern of veteran-committed crimes was noted in Europe following WWI. In 1920, one English writer observed:

The war has destroyed with a hand more desolating than the Black Death or the most terrible plagues of history. But its consequences do not end with destruction. The people who have taken serious part in it are not the same people as those who went into it. . . . They are changed peoples. They have passed through an experience which has altered habits, temper, outlook, in five years, more than fifty years of ordinary life would have altered them. Some of the consequences of that experience are obviously bad. The epidemic of crimes of violence is the natural sequel of war, for men learn in that school to think little of life. The same increase of crime of this kind followed the Napoleonic Wars both here and in France.¹⁴

In the United States, post-WWI veteran-committed crimes were also a cause for grave concern. The President of the Institute of Criminal Law and Criminology, in his annual address in 1919, stated:

Last year saw the ending of the War. From England to France, and in our own country, statistics have been gathered which show that

¹³ “Jesse James Was His Name”; William A Settle

Deseret News; Visitors Drawn to Jesse James’ Hometown; Amy Shafer; July 2000:

<http://www.deseretnews.com/article/772331/Visitors-drawn-to-Jesse-James-hometown.html>

PBS: Interview: Guerilla Tactics:

<http://www.pbs.org/wgbh/americanexperience/features/interview/james-guerrilla/>

PBS: Biography: Jesse James: <http://www.pbs.org/wgbh/americanexperience/features/biography/james-jesse/>

The State Historical Society of Missouri: Jesse James (1847-1882):

<http://shs.umsystem.edu/famousmissourians/folklegends/james/>

US News; How the Civil War Shaped Jesse James; James M. McPherson:

<http://www.usnews.com/news/articles/2007/06/24/how-the-civil-war-shaped-jesse-james>

¹⁴ Edith Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 SOC. SERV. REV. 212 (Jun., 1927) (citing NATION, XXVI, 498 (Jan. 10, 1920)).

serious crime, which had been on the decrease during the period of the War was again stalking in the foreground. . . . The newspapers are filled with accounts of crimes of such daring and boldness as to make the average citizen stand aghast at the manner in which the security of life and rights of property are ruthlessly disregarded and imperiled.”¹⁵

A study entitled *Military Service and Criminality*,¹⁶ published in 1952, a few years after WWII, tallied the number of men committed to 11 prisons in the upper-Midwest during 1947, 1948 and 1949 and found that fully one third of them were veterans. Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980’s found that almost half of all Vietnam veterans suffering from PTSD had been arrested or in jail at least once, 34.2 percent more than once, and 11.5 percent reported being convicted of a felony.¹⁷

In the case of the Vietnam generation, involvement in the criminal justice system has lingered for decades. A 1998 Department of Justice study found that more than 20 years after the war, approximately a quarter million veterans, a large portion from the Vietnam era, were still housed in our nation’s prisons.¹⁸

Those who attempt to deny the link between war trauma and crime often cite this same 1998 Department of Justice study, pointing out that veterans are imprisoned in smaller percentages than the civilian population. What they overlook, however, is that since WWI, the military has aggressively screened out those it deems psychologically or morally unfit. During the call-up for World War II, for instance, 1,681,000 men were rejected and excluded from the draft for emotional, mental, or educational disorders or deficiencies.¹⁹ Another 500,000 were subsequently separated from the Army during training on psychiatric or behavioral grounds.²⁰ This recruit screening continued through Vietnam and into

¹⁵ Betty Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY, 730 (1940) (citing Hugo Pam, *Annual Address of the President of the Institute of Criminology*, 10 J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY 327 (1919)).

¹⁶ Walter A. Lunden, *Military Service and Criminality*, J. CRIM. L., CRIMINOLOGY, & POLICE SCI., 766–73 (1952).

¹⁷ RICHARD KULKA, ET AL., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY, VII-21-1 (1990).

¹⁸ CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL, NCJ 178888 (2000), <http://www.ojp.usdoj.gov/bjs/>.

¹⁹ Marlowe, *supra* note **Error! Bookmark not defined.**, at 48.

²⁰ *Id.*

our current conflicts. Thus, any direct comparison of incarceration rates between veterans and the civilian population is flawed. Given the military's screening, the fact that veterans are incarcerated at even close to the same rates as the civilian population is alarming and is *prima facie* evidence that military service, itself, played a role.

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly-publicized wave of homicides and other violent crimes committed by recently-returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON, for short.²¹

Epidemiology is the branch of medicine that seeks to study the factors affecting the health and illness of entire populations. Most of the time, epidemiologists focus on infectious disease, but increasingly the Army has used its experts to look at behavioral health issues. A team of 24 physicians and Ph.D.s from Walter Reed Institute of Research descended on Ft. Carson, studying soldiers who had acted out violently, looking for common factors.

The EPICON team, first, found that violent crime among the soldiers at Ft. Carson was well outside normal levels of crime in civilian society. The murder rate for Ft. Carson had doubled since the start of the Iraq war. Rape arrests had tripled and stood at nearly twice the rate of other Army posts.²²

Second, the EPICON team ruled out the “bad seed” theory. Long a favorite of military commanders, the “bad seed” theory posits that the only troops acting out criminally were troubled before their military service and would have acted out whether they had served or not. The EPICON team found no such common tie. Soldiers who had acted out had disparate pre-service criminal backgrounds and mental health issues. They also came from diverse racial, socioeconomic, and educational backgrounds.

²¹ U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE, EPIDEMIOLOGIC CONSULTATION NO. 14-HK-OB1U-09: INVESTIGATION OF HOMICIDES AT FORT CARSON, COLORADO NOVEMBER 2008–MAY 2009, ES-1 (2009).

²² *Id.* at 10–11.

The common thread among all those who had committed violent crimes was that they had seen serious combat. From a public health standpoint, combat seemed to be a contagion. PTSD, drug and alcohol abuse, violence, and murder were just the symptoms. The more soldiers were exposed to combat, the more they showed the effects.

The EPICON study also concluded that the crimes reported on and around Ft. Carson were just the tip of the iceberg. Of the Ft. Carson soldiers surveyed, 40% reported choking, beating, kicking, or pointing a gun at someone—in other words they had committed some kind of felony assault.²³

In the end, the EPICON team found two major factors contributed to post-deployment violent behavior: (1) repeated deployments and (2) the intensity of combat in those deployments. The study concluded with a carefully worded assertion that “[s]urvey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes.”²⁴ In other words, the military finally confirmed what civilian sociologists had long believed: combat contributes to crime. Soldiers come home different. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

Closely linked to the criminal justice system is the homeless population. A 2006 study found that fully 24% of Minnesota’s male homeless population are veterans. More than half of those homeless veterans were deemed to have a “serious mental illness.”²⁵ Nationally,

An estimated 136,334 veterans spent at least one night in an emergency shelter or transitional housing program between October 1, 2008 and September 30, 2009. This accounts for 1 of every 168 veterans in the U.S. or 1 out of every 10 veterans living in poverty.²⁶

This statistic illustrates just how difficult it can be for veterans to make the transition from military to civilian life.

²³ *Id.* at 12–13.

²⁴ *Id.* at 18.

²⁵ WILDER RESEARCH, OVERVIEW OF HOMELESSNESS IN MINNESOTA 2006, 40–41 (2007).

²⁶ U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS i (2009).

B. How Combat Trauma Sometimes Manifests in Criminal Behavior

Combat trauma can be linked to criminal behavior in two primary ways. First, symptoms of PTSD can incidentally lead to criminal behavior. Second, offenses can be directly connected to the specific trauma that an individual experienced.²⁷ Many symptoms of PTSD can lead to behaviors likely to result in criminal behavior and/or sudden outbursts of violence. Individuals with PTSD are often plagued by memories of the trauma, chronically anxious, and unable to sleep without terrifying nightmares. They often self-medicate with drugs and alcohol in an attempt to calm their nerves and sleep. The emotional numbness many trauma survivors experience can lead the survivor to engage in sensation-seeking behavior in an attempt to experience some type of emotion. Some combat veterans also may seek to recreate the adrenaline rush experienced during combat. “Hypervigilance,” feeling the need to be always “on guard” can cause veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat. It is common for trauma survivors to feel guilt and to resort to self-destructive behaviors, which can sometimes lead them to commit crimes that will likely result in their apprehension, punishment, serious injury, or death.²⁸

A particular traumatic stressor can lead an individual suffering combat trauma to commit a specific crime in three primary ways. First, crimes at times literally or symbolically recreate important aspects of a trauma. The second way that traumatic stressors can be linked to specific crimes is that environmental conditions similar to those existing at the time of the trauma can induce behavior similar to that exhibited during the trauma, in particular, violent responses. The final way that traumatic stressors can be linked to specific crimes is that life events immediately preceding the offense can realistically or symbolically force the

²⁷ Claudia Baker & Cessie Alfonso, *PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet*, <http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html>.

²⁸ *Id.*

individual to face unresolved conflicts related to the trauma. This creates a disturbed psychological state in which otherwise unlikely behaviors emerge.²⁹

III. Defending the Combat Veteran in Criminal Court

There are opportunities to make the veteran's service and service-related trauma relevant throughout the case, from pre-charge to sentence mitigation. If possible, before charges are even filed the prosecutor should be made aware of the veteran's service, any service-related mental health problems, and available treatment options to allow this to be considered in the charging decision. The veteran's service, connection to the community, available treatment resources, and veterans' organizations that may supervise the release can all be used to argue for pretrial release. If the veteran is suffering from service-related PTSD or TBI, the need for treatment and available treatment resources can be used both in plea negotiations and sentencing. When such conditions are present to an extreme degree, they may even be exculpatory in negating the *mens rea* requirements of the crime. These materials will provide an introductory overview of the strategies in defending the military veteran, which are fully addressed in *The Attorney's Guide to Defending Veterans in Criminal Court*.

A. The Changing Terrain: State Statutes And Veterans Courts

Fortunately, federal, state, and local governments are beginning to recognize the unique situation of combat veterans in criminal courts. To prevent reliving the mistakes made with the Vietnam generation of veterans, the federal government has made military service a relevant consideration for departures in sentencing;³⁰ a few states have passed legislation to expressly allow the Court to consider the Defendant's service and service-related mental illness at sentencing; and many

²⁹ *Id.*

³⁰ U.S. SENTENCING GUIDELINES MANUAL, § 5H1.11 (2010) ("Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.")

counties have created veterans specialty courts to directly address veterans' unique situations and to supervise the veterans rehabilitation. These are all evidence of a changing legislative intent that pervades at all levels of government, showing any court that there is a popular-public interest in providing veteran-defendants special consideration and, when necessary, the treatment resources necessary to ensure their combat service does not lead into a perpetual cycle of incarceration.

In 2007 and 2008, along with other Minnesota veterans advocates, I, Brockton Hunter, led an effort to draft and pass legislation that addresses deficiencies in the way the Minnesota's criminal courts deal with psychologically-injured veterans.³¹ The law is designed to ensure that mental health diagnoses and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal offense. The law does not force a judge to do anything in a particular case. Rather, it gives the judge the tools to make an informed decision, recognizing that probationary treatment is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long-term public safety. This is not a "get out of jail free card" for veterans. Completion of treatment is a condition of probation and failure to follow through can result in execution of a jail or prison sentence.

In 2007, California also updated past legislation that had been found ineffective at dealing with the veterans returning from wars in Afghanistan and Iraq.³² Like the Minnesota statute cited above, California has given judges the express authority to utilize treatment over incarceration while not mandating that the Courts follow any particular type of sentence.

What the Minnesota and California statutes do, in effect, is make the veteran's service a relevant sentencing consideration, just as the United States Sentencing Guidelines § 5H1.11 did in 2010 in stating that "Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an

³¹ Minn. Stat § 609.115 Subd. 10.

³² Adam Caine, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 U.M.K.C. L. REV. 215, 225–29 (2009).

unusual degree and distinguishes the case from the typical cases covered by the guidelines.” This multi-state and federal push for such sentencing mitigation guidelines shows that the public’s interests have shifted towards placing a higher priority on the treatment of a veteran’s service-related impairment and less of a priority on a strictly punitive approach to veteran-defendants. It seems that, amidst the recent wars in Iraq and Afghanistan, the American public and the policy makers working on their behalf have made an affirmative decision not to relive the mistakes made when the Vietnam generation of veterans first came in contact with the criminal justice system.

Veterans treatment courts are further evidence of this trend in changing policy interests and show that this trend is not limited to the legislative branch. As of June 2, 2011, there were at least 62 county veterans courts in 26 different states.³³ In December 2011, *The Atlantic* reported that “[n]early 80 veterans courts have sprung up across the country over the past four years, and 20 more are expected to open by the end of this year,”³⁴ showing a rapid growth of these courts across the country that signals a national acceptance of their underlying principles. Texas, California, Colorado, Illinois, Oregon and Virginia have passed legislation specifically permitting the establishment of county veterans treatment courts.³⁵ Other states have done so directly through county court systems.

These courts follow a variety of models, but all offer a defense attorney a way to lessen their client’s exposure to incarceration and, sometimes, conviction through diversion to judicially supervised rehabilitation programs if the veteran is willing to accept responsibility for his actions and get help for his underlying conditions, usually PTSD and/or substance abuse. This structure is quite similar to long-used

³³ Nat’l Ass’n of Drug Court Prof’ls, Justice for Vets: The National Clearinghouse for Veterans Treatment Courts, <http://www.nadcp.org/JusticeForVets> (last visited June 1, 2011).

³⁴ Kristina Shevory, *Why Veterans Should Get Their Own Courts: As Troops Surge Back into Domestic Life, Incarceration Isn’t Always the Answer*, ATLANTIC MAGAZINE, Dec. 2011, <http://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/8716/>.

³⁵ Nat’l Ass’n of Drug Court Prof’ls, Veterans Treatment Court Legislation, <http://www.nadcp.org/JusticeForVets-Legislation> (last accessed June 1, 2011); CAL. PENAL CODE, § 1170.9 (2010); COL. REV. STAT., §§ 13-3-101; 13-5-144 (2010); 730 ILL. COMP. STAT. ANN. 167 (2010); OR. REV. STAT. § 135.886(2)(j)(3) (2010); TEX. HEALTH & SAFETY CODE, § 617 (2010); VA. CODE, § 2.2-2001.1 (2010).

drug and mental health specialty court models, but, by using the existing structure and resources of the VA, these courts are an attractive option to districts that are under budget strains. Even in districts where there is not a veterans problem-solving court, this fiscal reasoning is a strong argument in favor of probationary treatment that is unique to veteran-defendants. These courts are not “get out of jail free” courts that are showing veterans a preferred status. Rather, these courts often use longer terms of probation than the defendant would be exposed to in a standard criminal court in order to provide the court with the proper leverage to ensure the veteran stays committed to the treatment program until rehabilitated. The level of oversight and accountability is often very demanding. By having other veterans hold the veteran-client accountable, these courts “offer the most easily accepted ‘tough love’ support.”³⁶

Both the statutes and the veterans courts have arisen out of the public’s recognition that when our Nation is sending young men and women to prepare for and fight wars, as San Diego Prosecutor William C. Gentry so eloquently stated, “you are unleashing certain things in a human being we don’t allow in civic society, and getting it all back in the box can be difficult for some people.”³⁷ The public and courts nationwide are recognizing that the responsibility for these veterans falls on all of the American public. Thus, even where these statutes are not applicable and these courts are not available, this change in public sentiment should be used to argue to the Court that it, as well, has a duty to show compassion toward, and promote the rehabilitation of, veteran-defendants.

B. Voir Dire

Studies on conducted on public attitudes toward military service-connected PTSD indicate potential jurors are more empathetic in this context than toward

³⁶ Michael Daly Hawkins, *Coming Home: Accommodating The Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

³⁷ *Id.* at 569 (quoting Deborah Sontag & Lizette Alvarez, Across America, *Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008).

other mental health issues. For example, in a 1988 study of the effects of various stigmas,

Participants viewed service-related PTSD as highly treatable and having an uncontrollable onset and thus attributed low responsibility for the illness and low blame in general. The diagnosis of PTSD elicited greater liking and pity and less anger than any other mental-behavioral stigma in the study. Participants who viewed veterans with PTSD as less blameworthy also exhibited charitable attitudes and a tendency toward helping behavior with such individuals, pointing to a possible link between attitudes and behavior.³⁸

A 2003 study had similar findings when applied directly to excuse defenses in the criminal justice context:

Not surprisingly, mock jurors viewed the PTSD defense as highly excusable, with low criminal culpability and control over illness relative to other defenses. Thus, jurors generally tend to view people with PTSD as less responsible for criminal offenses. Such beliefs, together with feelings of sympathy, could influence verdicts and sentencing behavior of judges, jurors, and prosecutors.³⁹

Finally, a 2011 study found a “positive juror bias toward veterans with PTSD [that] represents a strong indicator of community support for this group of individuals, support documented by various public surveys.”⁴⁰ When these findings are taken with the fact that “research has revealed a generally high level of public support for troops in recent years,”⁴¹ the defense for the veteran-client can afford to be slightly more cautiously optimistic about trial than with a non-veteran client and perhaps push the envelope on the above defenses a little bit further.

³⁸ Jennifer Kelly Wilson, Stanley L. Brodsky, Tess M.S. Neal, & Robert J. Cramer, *Prosecutor Pretrial Attitudes and Plea-Bargaining Behavior Toward Veterans with Posttraumatic Stress Disorder*, 8 PSYCHOL. SERVS. 319 (2011) (discussing B. Weiner, R. Perry, & J. Magnusson, *An Attributional Analysis of Reactions to Stigmas*, J. PERSONALITY & SOC. PSYCHOL., 55, 738–48 (1988)).

³⁹ *Id.* (discussing W.P. Heath, J. Stone, J.M. Darley, & B.D. Granneman, *Yes I Did It, But Don't Blame Me: Perceptions of Excuse Defenses*, J. PSYCHIATRY & L., 187–226 (2003)).

⁴⁰ Jennifer Kelly, *Veterans on Trial: Juror Attitudes and Behaviors Toward Veterans with Posttraumatic Stress Disorder* 28 (2011) (unpublished M.A. thesis, University of Alabama), *available at* http://acumen.lib.ua.edu/content/u0015/0000001/0000579/u0015_0000001_0000579.pdf.

⁴¹ Wilson, Brodsky, Neal, & Cramer, *supra* note 86 (citing D.L. Leal, *American Public Opinion Toward the Military: Differences by Race, Gender, and Class*, ARMED FORCES & SOC., 123–38 (2005); PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, *TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987 – 2007* (2007); & B. Knickerbocker, *This Time, Vets Return to Welcome*, CHRISTIAN SCI. MONITOR, Nov. 9, 2007, at 1-4.

In addition to seeking jurors who are open and empathetic towards PTSD, an obvious choice would be jurors who have served in the military. A veteran on your jury can be your best friend or your worst enemy. Some veterans, particularly higher ranking officers may have a rigid attitude towards PTSD and those who profess to suffer from it, particularly if they never served in combat, themselves. Great caution is warranted here. Look for veterans from the lower ranks who served as close as possible to the front lines. Even then, beware of those who may have served in such a capacity and may be in denial about their own combat trauma. Veterans, regardless of their attitudes toward PTSD, are likely to assume a leadership role among other jurors who did not serve, so be very careful. When you pick a veteran, you are very likely picking the foreman of your jury. Choose wisely.

Family members and friends of veterans are often a safer bet. They will be familiar with the service and sacrifice of veterans, in general, and their own stories and experiences with those veterans may play a large educational role with other jurors.

Jurors who are familiar with and sensitive to mental health issues, in general, are also often good choices. They will understand these issues are real and can often educate their fellow jurors on these issues during deliberation.

Emphasize during voir dire that you are seeking a “few good men and women” your particular case. Emphasize that some of the information about your client’s military service and actions that led to the criminal charges may be difficult to hear. That is ok. They just need to be honest if they don’t think they can hear them weigh the evidence fairly.

C. Trial Defenses: Insanity and Self Defense

Sometimes, trial will be necessary. In cases of extreme service-related disorders, the veteran’s service may be relevant to the determination of guilt or innocence because the disorder may negate the requisite intent of the crime or

mitigate the veteran's culpability.⁴² PTSD meets the scientific criteria of admissibility requirements laid down in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.⁴³

PTSD or TBI-related defenses can be separated into four categories: (1) insanity defenses, negating all culpability; (2) self-defense defenses based on the veteran's altered belief of the amount of force necessary to protect him or herself; (3) an automatism defense when the veteran is acting out of reflex, sleep-walking, or conditioned stimulus response; and (4) *mens rea* defenses other than insanity defenses, mitigating the veteran's culpability in order to reach a lesser-included-offense.⁴⁴ A brief overview of each is provided below. For more detailed discussion of these defenses, see Brockton Hunter & Ryan Else, *Legal Strategies for Defending the Combat Veteran in Criminal Court*, THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton Hunter ed., 2012).

1. Insanity Defenses

The applicability of insanity defenses "will vary depending on the jurisdiction's applicable insanity test and the severity of the individual's [disorder]."⁴⁵ To meet the minimum threshold of any of the four insanity tests used in the US,⁴⁶ the Defendant must make a prerequisite showing that the criminal activity was the result of a "mental disease," which typically requires a psychotic

⁴² See also Marku Sario's description of the Jessie Bratcher case in Chapter 19 of *The Attorney's Guide to Defending Combat Veterans in Criminal Court*, in which he successfully asserted an insanity defense in a murder trial based on the Defendant's PTSD and conditioned stimulus-response based on his combat training.

⁴³ Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 30 (2001).

⁴⁴ Thomas Hafemeister & Nicole Stockey, *Last Stand? The Criminal Responsibility Of War Veterans Returning From Iraq and Afghanistan With Posttraumatic Stress Disorder*, Ind. L.J. 87, 107–32 (2010); see also Daniel Burgess, Kara Coen & Nicole Stockey, *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility In a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, (2010); Alyson Sincavage, *The War Comes Home: How Congress' Failure to Address Veterans' Mental Health Has Led to Violence in America*, 33 NOVA. L. REV. 481, 496 (2010).

⁴⁵ Hafemeister & Stockey, *supra* note, 44 at 112.

⁴⁶ There are four insanity tests currently used in US jurisdictions: (1) The M'Naghten Rule, or Cognitive Test; (2) the Product Test; (3) the American Law Institute (ALI)/Control Test; and (4) the Model Penal Code (MPC) Rule.

disorder involving a “gross impairment in reality testing.”⁴⁷ Most, but not all, of the successful service-related-PTSD insanity defenses have been cases of dissociative flashbacks, in which the Defendant had believed he was back in combat, where violence was not only acceptable but rewarded, when he committed the crime, thus did not appreciate the wrongful nature of his actions.⁴⁸

2. Self-Defense: A Parallel with Battered Women’s Syndrome

A veteran-defendant’s service-related disorder can also support a claim of self-defense in a situation that the Defendant’s conduct would not normally be “reasonable” in reacting to a perceived threat but for the effect of the military experience on his perception of and reaction to threats. Model Penal Code (MPC) § 3.04(1) states that, “a person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other on the present occasion.” The defendant’s service is relevant to a self-defense claim because the defendant’s combat service altered what defendant reasonably believed was the immediately necessary amount of force to protect himself, much like battered women’s syndrome is invoked to claim that past violent trauma “can alter an individual’s perception of the surrounding environment and cause the individual to react unexpectedly to certain cues or events that are perceived to be threatening.”⁴⁹

Limited case law is available, but what is available shows that war veterans in some jurisdictions can raise self-defense claims when there is a diagnosis of PTSD, “supported by findings that the disorder impacted a defendant’s cognitive and emotional state and causes him or her to react to a situation differently than would otherwise be expected” in a reasonable person.⁵⁰ In *State v. Mizell*, the District Court of Appeal for Florida held that the Defendant’s service-related PTSD was admissible as state of mind evidence, as opposed to diminished capacity evidence, and expert

⁴⁷ Hafemeister & Stockey *supra* note 44, at 113 (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297 (4th ed. 2009)[hereinafter DSM-IV-TR]).

⁴⁸ Michael Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 424–29 (1980).

⁴⁹ Hafemeister & Stockey, *supra* note 44, at 128–29.

⁵⁰ *Id.* at 127.

testimony of PTSD is relevant to the defendant's actual belief that the danger was real in the same way that battered women's syndrome is admissible and relevant.⁵¹

3. Unconsciousness/Automatism During the Criminal Act

Although seldom used, the defense of unconsciousness or automatism may be available to veteran-defendants who have an unconscious dissociative flashback, act reflexively, or are sleepwalking while committing the offense.⁵² This defense is operative when the Defendant was not acting voluntarily, will result in full acquittal, and is recognized in "virtually all jurisdictions."⁵³ Because this defense is based upon the defendant's inability to control his or her actions, it is close to the ALI standard's control test for an insanity defense, but does is not dependent on an established mental illness.

Though rare, this defense may be more relevant in the representation of combat veterans than the civilian population. Chronic traumatic brain injury (TBI) has been proven to contribute to the development of REM behavior disorder (RBD),⁵⁴ in which sufferers appear to be unconsciously acting out their dreams in ways that can be violent in nature and in some cases will result in injury to either the patient or their bed partner. PTSD can cause dissociative flashbacks that cause a person to believe they are in a situation similar to the combat trauma.⁵⁵ Sleep-related violence during dreaming, similar to the RBD experienced by TBI sufferers, is also a problem for PTSD sufferers.⁵⁶ Since TBI and PTSD are more common in the

⁵¹ State v. Mizell, 773 So. 2d 618, 620-621 (Fla. Dist. Ct. App., 2000).

⁵² Burgess, Coen & Stockey, *supra* note 44, at 71.

⁵³ *Id.*

⁵⁴ Arunima Verma, Vivek Anand, & Narayan P. Verma, *Sleep Disorders in Chronic Traumatic Brain Injury*, 3 J. CLINICAL SLEEP MED. 357, 357-62 (2007).

⁵⁵ Arturo Silva, Dennis Derecho, Gregory Leong, Robert Weinstock, & Michelle Ferrari, *A Classification of Psychological Factors Leading to Violent Behavior in Posttraumatic Stress Disorder*, 46 J. FORENSIC SCI. 311, 311-312 (2001).

⁵⁶ *Id.* at 312 (citing J.A. Silva, G.B. Leong, C. Gonzales, & J. Ronan, *Dangerous Misidentification of People Associated with Post-Traumatic Stress Disorder*, 19 AM. J. FORENSIC PSYCHIATRY 17, 17-32 (1988); C.N. Scherick, S.R. Bundlie, M.G. Ettinger, & M.W. Mahowald, *Chronic Behavioral Disorders in Human REM Sleep: A New Category of Parasomnia*, 9 SLEEP 293, 293-308 (1986); I. Oswald & J. Evans, *On Serious Violence During Sleepwalking*, 147 BRIT. J. PSYCHIATRY 688, 688-91 (1985)).

veteran population than the civilian population, it stands to reason that these issues will be more common among veteran clients than non-veteran clients.

4. *Mens rea* Mitigation of Culpability

Even if complete acquittal cannot be secured, a veteran's service-related disorder may be used to mitigate culpability and reach a lesser-included offense because the disorder may have made the defendant incapable of forming the requisite *specific intent* of the offense.⁵⁷ Such an approach will be widely available to defendants because "the defendant claiming a lack of *mens rea* is not limited to when the PTSD induced a psychotic state – as is typically required for an insanity defense—but can include various other PTSD symptoms."⁵⁸ Such a defense may be the difference between a conviction of first-degree murder and manslaughter, so is worth considering as a trial strategy.

D. Sentencing Mitigation

In 2009, the United States Supreme Court stated that,

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [the Defendant] did. Moreover, the relevance of [the Defendant's] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [the Defendant].⁵⁹

In fact, *Porter* held that for a defense attorney to fail to present the Defendant's combat service and its related trauma as a mitigating factor at sentencing in a capital case is proper grounds for a *Strickland*⁶⁰ claim of prejudicially

⁵⁷ Hafemeister & Stockey, *supra* note 44, at 126.

⁵⁸ *Id.*

⁵⁹ *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

⁶⁰ *Strickland v. Washington*, 466 U.S. 668 (1984) "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

ineffective assistance of counsel.⁶¹ As discussed in the section on statutes and veterans courts above, this “leniency” is often coupled with a desire to provide veterans with rehabilitative treatment to ensure they do not reoffend and there are an increasing number of creative options to structure such treatment. Of course, no matter what the Court wants to do, it must also know it has the authority and public support to do so. There is a three-step process that has worked well in this our office for arguing at a veteran-defendant’s sentencing: (1) make the court want to be lenient toward this veteran in particular and veterans in general; (2) provide the Court with a structured treatment or rehabilitation plan that will ensure the Defendant is well supervised and has a likelihood of not reoffending; and (3) provide the Court with the history of public, judicial, and legislative support for leniency towards combat veterans, and any law on the matter that gives the court the authority to act on the desires seeded in steps one and two.

An essential element of arguing to the Court for a lenient or treatment-based sentence is to let the Court get to know the veteran, his or her service history, and the history of veterans with combat trauma in the criminal justice system. By the time the case reaches sentencing, the Court will already know that the Defendant is a veteran, so the argument needs to make the Defendant a unique veteran by focusing in detail on exceptional service records, combat experiences, personal hardships caused by service, readjustment issues, service to the community, support of friends from the military, or any other evidence that will separate this veteran-defendant from the pack.

The A+ versions of the veteran-defense-counsel’s arguments often become more than 40-page-long memoranda, half of which is devoted to providing this evidence of the veteran as an individual service member in a chronological story format.⁶² Of course, this story should be supported by official service documents,

performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* at 687.

⁶¹ Porter v. McCollum, 130 S. Ct. 447, 455 (2009).

⁶² See Andrea George, Position of Def. with Respect to Sentencing, U.S. v. Carson, Criminal No. 10-26 PJS-AJB, Doc. 31, Jun. 11 (U.S. Dist. Ct. Minn., 2010); Brockton Hunter, Mem. of Law in Supp. of Mot. for

such as the veteran's DD-214; corroborating letters or affidavits from people that served with the veteran; and any relevant medical treatment records. The veteran's individual story should then be put in context with the plight of combat-stress inflicted veterans historically and the medical/psychological significance of the veteran's disorder, if any. Once the court is convinced that it wants to help this veteran, it is the defense attorney's job to structure a treatment or supervised release program that will make it feasible for the court to, at the same time, not imprison the defendant and still not endanger public safety.

Elimination of Bias: Understanding Problem Gambling

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SELECTED RESOURCES ON MENTAL HEALTH AND SUBSTANCE MISUSE AND COMPULSIVE BEHAVIORS, INCLUDING PROBLEM GAMBLING

Lawyers Concerned for Lawyers (Minnesota)

651-646-5590; 877-525-6466 (toll-free) www.mncl.org; help@mncl.org

Lawyers Concerned for Lawyers is the provider of Minnesota's Lawyers Assistance Program for lawyers, judges, law students and their immediate family members. We offer free, confidential help with addictions, mental health disorders, chronic stress and personal and career related issues. LCL services include: 24-hour crisis response; professional clinical assessments and referrals; interventions; short term counseling; support groups facilitated by licensed counselors; peer mentoring and support and education.

PROBLEM GAMBLING RESOURCES

ABA Problem Gambling Articles

Never Enough: One Lawyer's True Story of How He Gambled His Career Away, by Michael J. Burke is available directly from ABA Publishing and on-line book sites. An excerpt is at

http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/burke.html

Gambling, by Chadwick, Meloney Crawford (2004) Bumps in the Road II. American Bar Association: GPSOLO, 21(7).

http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/gambling.html

Other Bumps in the Road, Gambling, by Ashe, Paul R (2001) American Bar Association: GPSOLO, Volume 18, Number 5.

http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/ashe.html

Northstar Problem Gambling Alliance

<http://www.northstarproblemgambling.org/>

The Northstar Problem Gambling Alliance (NPGA), Minnesota's affiliate to the National Council on Problem Gambling, is a non-profit, gambling-neutral organization dedicated to improving the lives of Minnesotans affected by problem gambling.

MN Dept. of Human Services

www.nojudgement.com Minnesota's Problem Gambling Program, a division of the Minnesota Department of Human Services, funds inpatient and outpatient treatment, research, a resource library, public education and awareness efforts, in-service training; and a statewide, toll-free, confidential 24-hour helpline at (800) 333-HOPE.

National Council on Problem Gambling

www.ncpgambling.org. The Mission of the National Council on Problem Gambling is to increase public awareness of pathological gambling, ensure the widespread availability of treatment for problem gamblers and their families, and to encourage research and programs for prevention and education. It resource pages include fact sheets for specific populations (such as seniors, youth and military) and specific issues (such as smoking and domestic violence) <http://www.ncpgambling.org/programs-resources/resources/>

For an electronic copy of this list, please contact LCL at help@mnlcl.org.

South Oaks Gambling Screen

http://www.stopgamblingnow.com/sogs_print.htm

This test allows you to assess gambling problems in yourself or someone you care about.

North American Training Institute

www.nati.org

The mission of the NATI is to provide information, to facilitate research and conduct professional training about gambling addiction. The NATI studies treatment techniques, methods and programs, provides public education and prevention services, and develops and implements problem gambling helpline services.

Financial Resources

The National Endowment for Financial Education has produced two resources that are available free of charge: *Personal Financial Issues for Loved Ones of Problem Gamblers* at

http://www.ncpgambling.org/wp-content/uploads/2014/08/loved_ones_guide_ncpg_booklet.pdf and *Problem Gamblers and their Finances*(for professionals) at http://www.ncpgambling.org/wp-content/uploads/2014/08/problem_gamblers_finances-a-guide-for-treatment-profs.pdf.

Minnesota Lottery

https://www.mnlottery.com/gambling/gambling_concerns/ The lottery provides a number of links to resources regarding problem gambling.

OTHER RESOURCES

American Bar Association

<http://www.americanbar.org/colap> provides lawyer assistance resources and information across the country. A new ABA CoLAP and Hazelden Betty Ford joint study provides updated information on substance use, mental health and help seeking behaviors. Krill, Patrick, Johnson, Ryan, Albert, Linda, "The Prevalence Of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*: Jan./Feb. 2016.

http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx

GP Solo, a publication of the ABA General Practice, Small Firm and Solo Division, include five theme issues "Bumps in the Road." Many topics related to addiction, mental illness, stress and others are available. Back issues may be viewed at http://www.americanbar.org/publications/gp_solo/2016/july-august.html

Other Lawyers Assistance Programs

Lawyer Assistance Programs (LAPs) are available nationwide. Some are independent, some are under the auspices of the court and some are part of the bar association. They are listed at

http://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state.html

www.lawyerswithdepression.com

This comprehensive website, founded by a lawyer, offers support and resources.

U. S. Department of Health and Human Services and Substance Abuse and Mental Health Services Administration (SAMHSA) clearinghouse for alcohol and drug information

<http://www.samhsa.gov> This organization has a great deal of information for individuals seeking help, professionals in the helping professions and researchers. Searches may be performed by topic, demographic information and other criteria.

For an electronic copy of this list, please contact LCL at help@mnlcl.org.

American Psychological Association

www.apa.org

This site offers numerous resources on many mental health and wellness topics.

National Alliance on Mental Illness

www.nami.org

NAMI has information on a wide variety of mental illnesses including ADHD, Bipolar Disorder, Personality Disorders, Depression, Eating Disorders, OCD, PTSD and others. There are also national and local support resources. The Minnesota website is www.namihelps.org.

National Institute of Mental Health

<http://www.nimh.nih.gov/health/topics/index.shtml>

Information regarding various mental health issues, including anxiety disorders and depression.

Recovery Month

<http://www.recoverymonth.gov/>

This annual event is held every September. It features events and resources for those with substance use issues and those who care about them.

National Institute on Drug Abuse

<http://drugabuse.gov/nidahome.html>

This division of the National Institutes of Health provides information on the science of drug and alcohol addiction. There are links to a wide variety of substances. An excellent pamphlet, The Science of Addiction, is available by mail or as a PDF, in English or Spanish.

12 Step Support Meetings – the following sites will direct you to 12 step meetings and other resources.

<http://www.aaminneapolis.org> – includes links to St. Paul and greater Minnesota sites

<http://www.al-anon-alateen-msp.org/>

<http://www.naminnesota.org>

www.womenforsobriety.org – includes on-line chat

www.aaonline.net is one example of on-line AA meetings

<http://www.gamblersanonymous.org/>

<http://www.gam-anon.org/>

<http://www overeaters.org/>; <http://www.eatingdisordersanonymous.org>

<http://www.minnesotarecovery.info/OtherMN12StepGroups.htm>

<http://www.sexaa.org/Meetings/UnitedStates/meeting.php?state=MN>

<http://www.allina.com/ahs/grief.nsf/>

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