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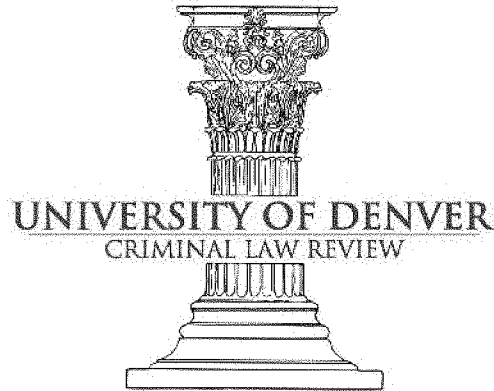
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## REQUIRING *MIRANDA* WARNINGS FOR THE CHRISTMAS DAY BOMBER AND OTHER TERRORISTS

Malvina Halberstam\*

### I. INTRODUCTION

Just before noon on December 25, 2009, Umar Farouk Abdulmutallab, a 23-year-old Nigerian man, tried to detonate a bomb on a Northwest flight from Amsterdam to Detroit carrying 278 passengers.<sup>1</sup> Fortunately, the device malfunctioned; although it caused a fire, the airplane did not explode.<sup>2</sup> The man, dubbed the Christmas Day Bomber ("CDB") by the media, was subdued by other passengers and arrested when the plane landed in Detroit.<sup>3</sup> FBI agents questioned him for approximately fifty minutes and he was reportedly cooperating.<sup>4</sup> The questioning was stopped to give him medical treatment for the burns he had sustained; when he returned he was given *Miranda* warnings and refused to answer any further questions.<sup>5</sup> In response to criticism, the Attorney General said that the officers questioning the CDB were legally required to give him *Miranda* warnings.<sup>6</sup>

Were they required to do so? Are law enforcement officers required to give terrorists the warnings set forth by the Supreme Court in *Miranda*? This paper suggests several lines of reasoning that might have led government officials to question the Christmas Day Bomber without giving him *Miranda* warnings and might lead government officials in future cases to question terrorists apprehended while attempting an attack without *Miranda* warnings.

### II. THE PUBLIC SAFETY EXCEPTION

In *New York v. Quarles*, decided in 1984, the United States Supreme Court established a "public safety" exception to *Miranda*.<sup>7</sup> In that case, a woman approached police officers and told them she had just been raped.<sup>8</sup> She described the man who had raped her, and told the

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<sup>1</sup> Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, Dec. 25, 2009, <http://www.nytimes.com/2009/12/26/us/26plane.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Abdulmutallab in 50 Minutes*, WALL ST. J., Jan. 26, 2010, <http://online.wsj.com/article/SB10001424052748703808904575025231056290438.html>.

<sup>5</sup> See Richard Serrano & David Savage, *Officials OK'd Miranda Warning for Accused Airline Plotter*, L.A. TIMES, Feb. 2, 2010, <http://articles.latimes.com/2010/feb/01/nation/la-na-terror-miranda1-2010feb01>.

<sup>6</sup> Letter from Att'y Gen. Eric Holder to Mitch McConnell, U.S. S. Minority Leader (Feb. 3, 2010) [hereinafter Holder Letter], available at <http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf>.

<sup>7</sup> 467 U.S. 649, 655-56 (1984).

<sup>8</sup> *Id.* at 651.

officers that he ran into a supermarket nearby and that he had a gun.<sup>9</sup> The officers went with the woman to the supermarket and saw someone fitting the description she had given.<sup>10</sup> When the suspect saw the officer, he ran to the back of the supermarket and the officer gave chase.<sup>11</sup> He apprehended the suspect, frisked him, and discovered that he was wearing an empty shoulder holster.<sup>12</sup> After he handcuffed the suspect, the officer asked him where the gun was.<sup>13</sup> The suspect responded, "the gun is over there," pointing in the direction of some empty cartons.<sup>14</sup>

The New York Court of Appeals ruled that the statement and gun were inadmissible because the defendant had not been given *Miranda* warnings.<sup>15</sup> The United States Supreme Court reversed.<sup>16</sup> The Court stated: "[W]e conclude today that there are limited circumstances where the judicially imposed strictures of *Miranda* are inapplicable."<sup>17</sup> "We believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."<sup>18</sup> "We do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."<sup>19</sup>

Applying these principles to the case before it, the Court said,

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

*We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds,*

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<sup>9</sup> *Id.* at 651-52.

<sup>10</sup> *Id.* at 652.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *People v. Quarles*, 58 N.Y. 2d 665, 666 (N.Y. Ct. App. 1982), *rev'd*, 467 U.S. 649 (1984).

<sup>16</sup> *Quarles*, 467 U.S. 649.

<sup>17</sup> *Id.* at 653.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 656.

whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.<sup>20</sup>

Given that in the past al Qaeda attacks have involved several attacks simultaneously or in close proximity — the 9/11 attacks,<sup>21</sup> the London subway attacks,<sup>22</sup> the Spanish train attacks<sup>23</sup> — the likelihood that other airplanes were in danger of being blown up was at least as great as the likelihood that an accomplice might make use of the gun, or that a customer or store employee might later find the gun (and presumably hurt himself or others accidentally) in the *Quarles* case.

And, “if the police are required to recite the familiar *Miranda* warnings before asking” about other attacks planned or in progress, a suspect in the CDB’s position “might well be deterred from responding,”<sup>24</sup> as he in fact was.<sup>25</sup> While there might be some question about the danger posed in the *Quarles* case, as was strongly argued by the dissent,<sup>26</sup> there can be no question that there was a real danger that similar attacks on other airplanes were planned or even in progress when the CDB was arrested. And, in Justice Rehnquist’s words, here, too, “had *Miranda* warnings deterred” the CDB “from responding . . . the cost would have been something more than merely the failure to obtain evidence useful in convicting” him.<sup>27</sup> How many lives might have been saved if one of the 9/11 hijackers had been apprehended and questioned before the attacks? Should law enforcement officials have been required to give him *Miranda* warnings and take the risk that he would refuse to talk? It would be difficult to find a clearer case for the application of the public safety exception than a terrorist apprehended as he was about to or in the process of committing an attack.

### III. MIRANDA

Although it is frequently stated that law enforcement officials are required to give *Miranda* warnings before questioning a suspect in custody, it is not a violation of *Miranda* for police to question a suspect without first giving him the warnings set forth in that case.<sup>28</sup> It is only

<sup>20</sup> *Id.* at 657-58 (emphasis added).

<sup>21</sup> See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES 1-35 (W.W. Norton & Co. 2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf> (discussing the terrorist attacks on the United States of September 11, 2001).

<sup>22</sup> COULD 7/7 HAVE BEEN PREVENTED? REVIEW OF THE INTELLIGENCE ON THE LONDON TERRORIST ATTACKS ON 7 JULY 2005 13-14 (2009), available at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/20090519\\_77review.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/20090519_77review.pdf) (discussing the bombing of London’s public transportation system on July 7, 2005).

<sup>23</sup> See *Madrid Train Attacks*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457031/html/> (last visited Nov. 30, 2010). See also *Atentados Terroristas Del Día 11 De Marzo De 2004 En Madrid* [Terrorist Attacks of March 11, 2004 in Madrid] Central Criminal Court of Spain Summary Number 20/2004 1,6 (2004), <http://www.elmundo.es/documentos/2006/04/11/autohtml/index.html?cual=1> (discussing the bombings of four commuter trains in Madrid on March 11, 2004).

<sup>24</sup> See *Quarles*, 467 U.S. at 657.

<sup>25</sup> Warren Richey, *Holder Letter: Why We Read Christmas Day Bomber His Rights*, THE CHRISTIAN SCIENCE MONITOR (Feb. 2, 2010), <http://www.csmonitor.com/USA/Justice/2010/0203/Holder-letter-why-we-read-Christmas-Day-bomber-his-rights>; see O’Conner and Schmitt, *supra* note 1.

<sup>26</sup> *Quarles*, 467 U.S. at 674-78 (Marshall, J., dissenting).

<sup>27</sup> See *id.* at 657.

<sup>28</sup> *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion).



a violation to use the incriminating statements in evidence against him at trial.<sup>29</sup> The Supreme Court has stated in many cases that *Miranda* is a prophylactic rule<sup>30</sup> designed to protect the Fifth Amendment provision that no one shall be compelled to be a witness against himself. The violation of the Fifth Amendment occurs at trial, not when the questions are asked.<sup>31</sup> However, the right not to be compelled to testify at trial would be of little value if the person could be compelled to answer questions before trial and the answers could be used against him at trial.<sup>32</sup> Therefore, the Supreme Court long ago held that to be admissible at trial, a pre-trial confession must be voluntary.<sup>33</sup> *Miranda* goes one step further: it prohibits the use at trial of any incriminating statement by the defendant unless police inform him prior to questioning him that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."<sup>34</sup> The purpose of the warnings is "to dispel the compelling atmosphere of the interrogation."<sup>35</sup>

Thus, questioning someone without first giving the warnings set forth in *Miranda* is not a violation of the law; *the violation is the use of the answers to incriminate him at the trial.*<sup>36</sup> In this respect, the Fourth and Fifth Amendments are very different. Although the exclusionary rule applies to both, a violation of the Fourth amendment occurs at the time of search; a violation of the Fifth Amendment occurs when the evidence is used in court.<sup>37</sup> This difference stems from the difference in the language of the two amendments.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."<sup>38</sup> The Fifth Amendment provides, in pertinent part, "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . ."<sup>39</sup> A search that is "unreasonable," or without a warrant in situations where a warrant is required, violates the Fourth Amendment regardless of whether the evidence is used at trial or not.<sup>40</sup> The Fifth Amendment is only violated

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<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., *id.* at 636; *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (plurality opinion); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

<sup>31</sup> *Patane*, 542 U.S. at 641 ("A mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule . . . potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("A constitutional violation occurs only at trial.").

<sup>32</sup> See *Patane*, 542 U.S. at 632.

<sup>33</sup> See *Bram v. United States*, 168 U.S. 532, 542–43 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.").

<sup>34</sup> *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

<sup>35</sup> *Id.* at 465.

<sup>36</sup> See *Patane*, 542 U.S. at 641 (2004).

<sup>37</sup> See *United States v. Calandra*, 414 U.S. 338, 354 (1974); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right...a constitutional violation occurs only at trial." (citing *Malloy v. Hogan*, 378 U.S. 1 (1964))).

<sup>38</sup> U.S. CONST. amend. IV.

<sup>39</sup> U.S. CONST. amend. V.

<sup>40</sup> See e.g., *Calandra*, 414 U.S. at 354 (holding that unreasonable government intrusions are "fully accomplished by the original search without probable cause.").

by the use of the "compelled" testimony at trial.<sup>41</sup> The Supreme Court has emphasized this distinction in a number of cases. For example, in the *Verdugo* case, the Court said:

[T]he Fourth Amendment . . . operates in a different manner than the Fifth Amendment . . . [A] constitutional violation [of the Fifth Amendment] occurs only at trial . . . . The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion.<sup>42</sup>

In *Quarles*, Justice O'Connor, who concurred in part and dissented in part, stated, "The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations . . . ." <sup>43</sup> Justice Marshall, who dissented, was even more emphatic that questioning a suspect without giving him *Miranda* warnings is not a violation of the Fifth Amendment or of *Miranda*:

The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place . . . when police officers . . . believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information . . . . [N]othing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.<sup>44</sup>

This was not changed by the Supreme Court decision in *Dickerson*,<sup>45</sup> which characterized *Miranda* as a "constitutional rule."<sup>46</sup> In *United States v. Patane*, decided after *Dickerson*, the Court said, "[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."<sup>47</sup>

Generally, law enforcement officers give *Miranda* warnings because they want to be able to use the defendant's statement in court to convict him. In the case of the CDB, who was caught red-handed, his incriminating statements were probably not even needed to convict him.<sup>48</sup> Moreover, in the usual criminal case, conviction is the main goal. However, in the case of a terrorist who is a member of a group such as al Qaeda, getting information about the terrorist organization, or other terrorist acts that are being planned, may be far more important than convicting any one terrorist. It might, therefore, be necessary to question him even where the other evidence is not overwhelming.

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<sup>41</sup> See *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) ("[I]t is not until [the use of compelled testimony] in a criminal case that a violation of the Self-Incrimination Clause occurs." (citing *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *Verdugo-Urquidez*, 494 U.S. at 264)).

<sup>42</sup> *Verdugo-Urquidez*, 494 U.S. at 264.

<sup>43</sup> *New York v. Quarles*, 467 U.S. 649, 669 (1984).

<sup>44</sup> *Id.* at 686 (emphasis added).

<sup>45</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>46</sup> *Id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

<sup>47</sup> 542 U.S. 630, 641 (2004) (plurality opinion). The Court further stated, "[P]olice do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*." *Id.*

<sup>48</sup> See O'Connor & Schmitt, *supra* note 1.

In response to a letter from Senator Mitch McConnell, the Senate minority leader, (joined by other Senators),<sup>49</sup> Attorney General Eric Holder wrote, "both before and after 9/11, the consistent, well-known, lawful, and publicly-stated policy of the FBI has been to provide *Miranda* warnings prior to any custodial interrogation conducted inside the United States."<sup>50</sup> He went on to say that the FBI manual for Domestic FBI Operations "provides explicitly that . . . [w]ithin the United States, *Miranda* warnings are required to be given prior to custodial interviews . . ."<sup>51</sup> The implication of the Attorney General's letter and of the FBI Manual appears to be that FBI agents are legally required to give *Miranda* warnings prior to interrogation.<sup>52</sup> As noted earlier, questioning a suspect without giving *Miranda* warnings is not a violation of the Fifth Amendment or of *Miranda*. Only use of incriminating statements elicited as a result of such interrogation is a violation of *Miranda*.<sup>53</sup> The provision in the FBI handbook apparently reflects a policy decision by the Justice Department to require FBI agents to give *Miranda* warnings before questioning a suspect in order to ensure that any incriminating statements elicited are admissible at the trial.<sup>54</sup> Its application to interrogation of terrorists, particularly those believed to be affiliated with a terrorist organization such as al Qaeda, needs to be reconsidered.

The letter from Mr. Holder also quotes, in a footnote, a section from the *FBI Legal Handbook for Special Agents*:

The warning and waiver of rights is not required when questions which are reasonably prompted by a concern for public safety are asked. For example, if Agents make an arrest in public shortly after the commission of an armed offense, and need to make an immediate inquiry to determine the location of the weapon, such questions may be asked, even of an in-custody suspect, without first advising the suspect of [his *Miranda* rights].<sup>55</sup>

While this is correct, it conveys the impression that the public safety exception is limited to very brief questioning immediately after the arrest. Although that was the situation in the *Quarles* case, the reasoning of the case is not so limited. *Quarles* permits use of evidence obtained by questioning a suspect without giving *Miranda* warnings, whenever "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."<sup>56</sup> Reasonably interpreted, questioning a terrorist – especially one captured in the process of committing, or about to commit, an attack – without *Miranda* warnings does not bar use of evidence thus obtained at trial, as long as it is plausible to believe the suspect has information that might avert another terrorist attack.

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<sup>49</sup> Letter to Att'y Gen. Eric Holder from GOP Sens. Kit Bond, Susan Collins, Jeff Sessions, & John McCain, available at [http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord\\_id=7066ef42-0cf1-49d1-5dc3-2055844d365e](http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=7066ef42-0cf1-49d1-5dc3-2055844d365e).

<sup>50</sup> Holder Letter, *supra* note 6.

<sup>51</sup> *Id.*

<sup>52</sup> See FEDERAL BUREAU OF INVESTIGATION, LEGAL COUNSEL DIVISION, *FBI Legal Handbook for Special Agents* [hereinafter *FBI Legal Handbook*], § 7-2 (rev. 2003), available at [http://foia.fbi.gov/filelink.html?file=/legal\\_handbook\\_spec\\_agent/legal\\_handbooks\\_spec\\_agent.pdf](http://foia.fbi.gov/filelink.html?file=/legal_handbook_spec_agent/legal_handbooks_spec_agent.pdf).

<sup>53</sup> See *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) ("[A] mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule . . . potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("[A] constitutional violation occurs only at trial.").

<sup>54</sup> See *FBI Legal Handbook*, § 7-3.2(6).

<sup>55</sup> Holder Letter, *supra* note 6, n.2 (quoting *FBI Legal Handbook*, §7-2).

<sup>56</sup> *New York v. Quarles*, 467 U.S. 649, 653 (1984).

In hearings before the Senate Select Committee on Intelligence, in response to a question by Senator Snowe, FBI Director Robert S. Mueller III testified,

[I]n the initial interview, we had to determine whether there were other bombs on the plane, whether there were other airplanes that had similar attacks contemplated [sic], wanted to understand who the bomb maker was, who had directed him. All of that came in the first series of questions.<sup>57</sup>

Following that initial questioning, Mr. Mueller testified, the CDB was given *Miranda* warnings.<sup>58</sup> When Senator Snowe persisted, "I don't understand why we'd want to issue the *Miranda* rights when we're worried about whatever other subsequent events that might be occurring,"<sup>59</sup> Mr. Mueller replied, "Because we also want to utilize his statements to effectively prosecute him."<sup>60</sup>

Implicit in this answer are two assumptions:

1. The public safety exception did not apply to any questioning after the initial questioning, *and*
2. Obtaining evidence that could be used to prosecute him was more important than gathering further intelligence.

Neither assumption is necessarily correct. The first cannot be assessed without knowing what information the FBI agents had obtained in the initial questioning. For example, were they absolutely sure that no other attacks were being planned? If not, then at least arguably, further questioning was necessary to ensure public safety and any statements elicited without *Miranda* warnings would be admissible. The second — that obtaining admissible evidence was more important than the intelligence that might be acquired by further questioning — seems to be clearly wrong in this case, given the numerous witnesses to the attempted attack.

The FBI Manual and Guidelines should be amended to make clear: (1) that *Miranda* does not prohibit interrogation without first providing the warnings, but only the use of the evidence obtained without *Miranda* warnings at trial; (2) that in the case of terrorist attacks, the evidence obtained might be admissible even if no *Miranda* warnings were given under the public safety exception; (3) that whether to give *Miranda* warnings in situations where it is believed the public safety exception would not apply is a policy decision that should be made by weighing the need for intelligence that might be acquired by questioning the suspect against the need to use any incriminating statement he might make at trial; and (4) that, if time permits, those decisions should be made by the Attorney General and the Director of National Intelligence, or someone specifically designated by them for that purpose, not the agent who happens to be at the scene.

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<sup>57</sup> *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. 33 (2010) (statement of Director Robert S. Mueller III, Director, Federal Bureau of Investigation).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

#### IV. GRAND JURY

The Fifth Amendment protects against self-incrimination.<sup>61</sup> It does *not* protect against incriminating others.<sup>62</sup> A witness can be legally compelled to give evidence that incriminates others, either at trial or before a Grand Jury.<sup>63</sup> If he refuses to do so, he can be held in contempt and imprisoned.<sup>64</sup> There is no requirement that a witness called before a Grand Jury be given *Miranda* warnings.<sup>65</sup> The Justice Department could convene an investigative Grand Jury — a Grand Jury to investigate al Qaeda or the threat of terrorist attacks in the United States — and ask questions about al Qaeda, its organization, its activities or, more generally, about terrorist attacks. A witness before a Grand Jury has the right to invoke the privilege against self-incrimination if the answer “might” incriminate him.<sup>66</sup> The CDB, or another terrorist, might do so, even if he is not given *Miranda* warnings; but he might not. Moreover, if he does invoke the privilege against self-incrimination, the United States Attorney could give him use immunity<sup>67</sup> — which means that only the answers he gives and any evidence obtained as a result cannot be used against him.

#### V. THE MONTREAL CONVENTION

Lastly, an attempt to blow up an airplane is a violation of the Montreal Convention on Airplane Sabotage,<sup>68</sup> which the United States has ratified.<sup>69</sup> Under that Convention several States have jurisdiction to try the alleged offender: the State in whose territory the act is committed; the State in which the airplane is registered; the State of nationality of the offender; and the State in which he is found.<sup>70</sup> The Convention provides that the State in which he is found is obligated to

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<sup>61</sup> U.S. CONST. amend. V, cl. 3.

<sup>62</sup> See *United States v. Mandujano*, 425 U.S. 564, 572 (1976) (plurality opinion) (“The [Fifth Amendment] privilege cannot . . . be asserted by a witness to protect others from possible criminal prosecution.” (citing *Rogers v. United States*, 340 U.S. 367, 371 (1951), which held that the privilege against self-incrimination is “solely for the benefit of the witness,” and is “purely a personal privilege of the witness”) (internal footnotes omitted)).

<sup>63</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 345 (1974) (“[T]he power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established.”) (citing *Kastigar v. United States*, 406 U.S. 441, 443 (1972)).

<sup>64</sup> See *United States v. Wilson*, 421 U.S. 309, 316 (1975) (holding in contempt two witnesses who refused to testify and stating that the “face-to-face refusal to comply with the court’s order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding . . . summary contempt must be available to vindicate the authority of the court . . .”) (internal footnote omitted).

<sup>65</sup> See *Mandujano*, 425 U.S. at 579 (holding *Miranda* warnings inapplicable to Grand Jury testimony).

<sup>66</sup> *Calandra*, 414 U.S. at 346.

<sup>67</sup> See *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (“Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom . . . prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.”).

<sup>68</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *ratified by the United States* Nov. 1, 1972, 24 U.S.T. 564, 974 U.N.T.S. 178, available at <http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>.

<sup>69</sup> *Id.* at 178 n.1.

<sup>70</sup> *Id.* art. 5(1) (“Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases: (a) when the offence is committed in the territory of that State; (b) when the offence is committed against or on board an aircraft registered in that State . . . .”); art. 5(2) (“Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences . . . in the case where the alleged offender is present in its territory. . . .”).

try him or to extradite him to another State that has jurisdiction.<sup>71</sup> Since most States do not exclude incriminating statements elicited without *Miranda* warnings, the United States might have the option of extraditing him to another State that would not be barred from using his incriminating statements; whether the United States would choose to do so would, of course, depend on a number of factors. It is not suggested that the United States do so, particularly not in cases such as that of the CDB, where there is unquestionably sufficient evidence to convict without using any self-incriminating statements he might have made, but only that it should not be ruled out in advance for all cases.

The United States has been criticized for sending suspects to countries where they were tortured.<sup>72</sup> The two situations are not analogous. Failure to give *Miranda* warnings is not comparable to engaging in torture. Torture is a crime under the domestic law of most states,<sup>73</sup> including the United States,<sup>74</sup> and a violation of a treaty ratified by 147 States,<sup>75</sup> including the United States.<sup>76</sup> Use of incriminating statements elicited without *Miranda* warnings is not a crime, nor a violation of international law.

## VI. SUMMARY AND CONCLUSION

In sum, a suspect in custody may be questioned without being given *Miranda* warnings, though use of the evidence obtained as a result of such questioning at the trial may be barred.<sup>77</sup> In the case of a terrorist, such as the CDB, the evidence obtained would probably be admissible under the public safety exception of *Quarles*.<sup>78</sup> Indeed, the CDB case is a far more compelling case for application of the public safety exception than the *Quarles* case, in which it was

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<sup>71</sup> *Id.* art. 7 ("The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its component authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."); art. 8(1) ("The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.").

<sup>72</sup> See Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, <http://www.nytimes.com/2005/03/06/politics/06intel.html> (last visited Nov. 1, 2010) ("[F]ormer government officials say that since the Sept. 11 attacks, the C.I.A. has flown 100 to 150 suspected terrorists from one foreign country to another, including to Egypt, Syria, Saudi Arabia, Jordan and Pakistan. Each of those countries has been identified by the State Department as habitually using torture in its prisons . . . [and that these programs] ha[ve] been bitterly criticized by human rights groups.").

<sup>73</sup> See, e.g., Canada Criminal Code, R.S.C., ch. C-46 § 269.1 (1985) (defining torture in accordance with the definition contained in Article 1 of the *Convention Against Torture* and stating that any statement obtained as a result of torture is inadmissible as evidence in any proceeding over which the Canadian Parliament has jurisdiction); Schweizerisches Strafgesetzbuch [StGB], Swiss Criminal Code, Dec. 21, 1937, art. 264a (Switz.) as amended by Gesetz, Pct. 4, 1991, AS 2465 (1992), art. 264a (f) (defining torture as "inflict[ing] severe pain or suffering or a serious injury, whether physical or mental, on a person in his or her custody or under his or her control"); Code pénal [C. pén.] art. 212-1 (Fr.) (making torture punishable by life imprisonment); Nihonkoku Kenpō [Kenpō] [Constitution], art. 36 (Japan) ("The infliction of torture by any public officer and cruel punishments are absolutely forbidden.").

<sup>74</sup> See 18 U.S.C. § 2340.

<sup>75</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (entered into force June 26, 1987), available at <http://www.state.gov/documents/organization/100296.pdf>. The Convention has 147 parties as of Apr. 2, 2011.

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* notes 28-31, 36-47 and accompanying text.

<sup>78</sup> See *supra* notes 24, 26-27 and accompanying text.

established. But, even if the evidence would not be admissible, in terrorist cases acquiring further intelligence may well be more important than reading the suspect the *Miranda* warnings, to ensure that if he makes any incriminating statements they would be admissible at trial. At present Justice Department policy and the FBI Manual and Guidelines interpret the public safety exception narrowly and require FBI agents to give *Miranda* warnings prior to questioning a suspect in custody, without weighing the need for ensuring that the evidence will be admissible at trial against the importance of acquiring further intelligence.<sup>79</sup> Whatever the pros and cons of this policy with respect to routine investigations, it should be reconsidered and changed with respect to those suspected of terrorist attacks.

The government also has the option of getting further information about the terrorist organization and attacks being planned by questioning the suspect before an investigative Grand Jury, with or without use immunity.<sup>80</sup> Lastly, if evidence was obtained without *Miranda* warnings in a case where the public safety exception does not apply — very unlikely in the case of terrorist attacks — and that evidence is necessary for conviction, the United States might consider extraditing him to another State that has jurisdiction under the applicable treaty and does not bar use of such evidence.<sup>81</sup>

## VII. EPILOGUE

In May 2010, the Attorney General stated that the government would ask Congress to enact legislation to permit FBI agents to question terrorist suspects without giving *Miranda* warnings and that this was "a new priority for the administration."<sup>82</sup> In an interview on Meet The Press, Mr. Holder said:

MR. HOLDER: We want to work with Congress to come up with a way in which we make our public safety exception more flexible and, again, more consistent with the threat that we face. And yes, this is, in fact, big news. This is a proposal that we're going to be making and that we want to work with Congress about.

MR. GREGORY: So a new priority for the administration.

MR. HOLDER: It is a new priority.<sup>83</sup>

In the many months that have elapsed since the Attorney General's statements, no such legislation has been enacted.<sup>84</sup> While such legislation might be politically helpful, it is not legally

<sup>79</sup> See *supra* notes 52-53, 55 and accompanying text.

<sup>80</sup> See *supra* Part IV.

<sup>81</sup> See *supra* Part V.

<sup>82</sup> On May 9, 2010, Attorney General Eric Holder, on ABC's "This Week" and on NBC's "Meet the Press," stated that the Obama administration is open to modifying *Miranda* protections to deal with the "threat[s] that we now face." Holder continued, "I think we have to give serious consideration to at least modifying that public safety exception." "That's one of the things that I think we're going to be reaching out to Congress to do, to come up with a proposal that is both constitutional, but that is also relevant to our time and the threat that we now face." Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 9, 2010, available at <http://www.nytimes.com/2010/05/10/us/politics/10holder.html> (last visited Mar. 7, 2011); Anne E. Kornblut, *Obama Administration Looks into Modifying Miranda Law in the Age of Terrorism*, WASH. POST, May 10, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050902062.html> (last visited Mar. 7, 2011).

<sup>83</sup> Transcript of Eric Holder Interview, *Meet the Press* (May 9, 2010), [http://www.msnbc.msn.com/id/37024384/ns/meet\\_the\\_press/page/2/](http://www.msnbc.msn.com/id/37024384/ns/meet_the_press/page/2/).

<sup>84</sup> Two bills were proposed in Congress following the Attorney General's statements. On May 27, 2010, Kansas Congressman Todd Tiahrt proposed H.R. 1413, entitled "Expressing the sense of the House of

necessary. The Justice Department has apparently come to the same conclusion.<sup>85</sup> An FBI memorandum dated October 21, 2010, but first made public March 24, 2011,<sup>86</sup> states,

In light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks, the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case.<sup>87</sup>

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Representatives that the holding in *Miranda v. Arizona* may be interpreted to provide for the admissibility of a terrorist suspect's responses in an interrogation without administration of the *Miranda* warnings, to the extent that the interrogation is carried out to acquire information concerning other threats to public safety." H.R. Res. 1413, 111th Cong., 2d Sess. (2010). The bill stated,

[I]t is [the] sense of the House of Representatives that the "public safety" exception announced in *New York v. Quarles* . . . may be interpreted such that the responses of a person interrogated in connection with an act of terrorism who has not been administered the warnings described in *Miranda* are admissible as evidence against that person in a criminal prosecution, to the extent that the interrogation is carried out because of a reasonable concern that the person has information about other threats to public safety.

*Id.* The bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on July 26, 2010. The proposed bill was cleared from the books when the 111<sup>th</sup> Congressional Session ended. On July 29, 2010, California Congressman Adam Schiff proposed H.R. 5934, entitled "Questioning of Terrorism Suspects Act of 2010." H. Res. 5934, 111th Cong., 2d Sess. (2010). The bill stated,

It is the sense of Congress that the public safety exception to the constitutional requirement for what are commonly called *Miranda* warnings allows unwarned interrogation of terrorism suspects for as long as is necessary to protect the public from pending or planned attacks when a significant purpose of the interrogation is to gather intelligence and not solely to elicit testimonial evidence. . . .

In the case of an individual who is a terrorism suspect, upon *ex parte* application made by the Government within 6 hours immediately following the person's arrest or other detention, that individual may be taken before a magistrate not later than 48 hours after arrest or other detention and any confession made within those 48 hours shall not be considered inadmissible solely because the individual was not presented to a magistrate earlier.

*Id.* The bill was referred to both the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the Subcommittee on Crime, Terrorism, and Homeland Security on Sept. 20, 2010. The proposed bill was cleared from the books when the 111<sup>th</sup> Congressional Session ended. Prior to the Attorney General's statements, Senators John McCain and Joe Lieberman introduced S. 3081, the "Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010." S. 3081, 111th Cong., 2nd Sess. (2010). The bill proposed requiring an individual suspected of engaging in hostilities against the United States or its coalition partners through an act of terrorism who may be an unprivileged enemy belligerent to be placed in military custody for purposes of initial interrogation and determination of status. The proposed bill would have allowed the detention and interrogation of such individuals for a reasonable time after capture or coming into custody and defines "unprivileged enemy belligerent" as an individual who: (1) has engaged in hostilities against the United States or its coalition partners; (2) has purposely and materially supported hostilities against the United States or its coalition partners; or (3) was a part of al Qaeda at the time of capture. *Id.* This bill was also cleared from the books when the 111<sup>th</sup> Congressional Session ended.

<sup>85</sup> See Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, Mar. 24, 2011, available at <http://www.nytimes.com/2011/03/25/us/25miranda.html> (last visited Apr. 2, 2011); Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL STREET JOURNAL, Mar. 24, 2011, available at <http://online.wsj.com/article/SB10001424052748704050204576218970652119898.html> (last visited Apr. 2, 2011).

<sup>86</sup> An FBI internal memorandum, dated Oct. 21, 2010 – which, according to the New York Times, the Justice Department had earlier refused to make public – was quoted in the Wall Street Journal and the New York Times on March 24, 2011. See Savage, *supra* note 85. The New York Times article states that, following the publication of the Wall Street Journal article, the Times "obtained access to a full copy" of the memorandum. *Id.* The article does not state whether access was provided by the Justice Department or the New York Times "obtained access" through other means. See *id.*

<sup>87</sup> FBI Memorandum, *Terrorists in the United States* (Oct. 21, 2010), <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (last visited Apr. 2, 2011) ("In these instances, agents should seek SAC approval to



The memorandum instructs FBI agents to "ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights."<sup>88</sup>

It goes on to say,

There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.<sup>89</sup>

It is difficult to understand why it took the government almost a year to reach these conclusions, and not at all clear why it initially refused to release the information. But, at least it will no longer bar questioning terrorists engaged in or attempting attacks on the United States and risk losing information that might save countless lives based on the Supreme Court's decision in *Miranda*.<sup>90</sup>

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proceed with unwarned interrogation after the public safety questioning is concluded. Whenever feasible, the SAC will consult with FBI-HQ (including OGC) and Department of Justice attorneys before granting approval.").

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Editor's Note: On October 12, 2011, Abdulmutallab unexpectedly pled guilty to all federal charges, following the prosecution's opening statement at trial. For a discussion of the *Miranda* issue in light of the guilty plea, see Charlie Savage, Developments Rekindle Debate Over Best Approach for Terrorism Suspects, N.Y. Times, Oct. 13, 2011, available at <http://www.nytimes.com/2011/10/14/us/debate-is-renewed-over-approach-for-terrorism-suspects.html>.

## MIRANDA, MORALITY, AND COURT-CREATED CAVEATS: A REPLY TO MALVINA HALBERSTAM

G. Kristian Miccio\*

There are times when I consider the Fifth Amendment right against self-incrimination to be a nuisance. There are other times when I view it as an impediment to accountability and justice. But these are not my concerns at the moment; rather, what Malvina Halberstam's article, *Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists*, has raised is a rather interesting discussion on whether *Miranda*<sup>1</sup> is either viable or desirable when discussing notions of national security. Indeed, Halberstam correctly notes that the *New York v. Quarles* decision, which crafted a public safety exception to *Miranda*,<sup>2</sup> lays the groundwork for the slow chipping away of protections afforded by the Fifth Amendment. What Professor Halberstam does not address are the moral consequences that the chipping-away process produces as well as the Court's crabbed view of *Miranda* violations within the context of police negligence or wilful refusal to follow *Miranda* admonitions. And yet, it is the moral questions raised by *Quarles* and its progeny that are worthy of discourse and debate; thus these questions will be the focus of my reply to Professor Halberstam's article.

Let's be honest, shall we? *Miranda* was fashioned to protect the Fifth Amendment right against self-incrimination, nothing more, nothing less. And, the *Miranda* warnings fashioned by the Court were a necessary maneuver because a police-dominated environment, coupled with police initiated and controlled interrogation, is inherently coercive.<sup>3</sup> We can all agree, regardless of our political, philosophical, or legal point of view, that while a police controlled environment and interrogation is coercive it triggers neither a Fourteenth Amendment Due Process concern or violation. But such a setting is nonetheless both formidable and intimidating, and thus worthy of constitutional protection under the Fifth Amendment.

Neither *Quarles*, *United States v. Patane*,<sup>4</sup> *Dickerson v. United States*,<sup>5</sup> nor Professor Halberstam's thesis disturbs this basic and fundamental notion concerning the coercive effect of custodial interrogation. Moreover, they neither contradict nor contest the view that such interrogation has a corrosive effect on the right against self-incrimination—a view not only consistent with *Miranda*'s *raison d'être*, but consonant with the moral values that establish the

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<sup>1</sup> The *Miranda* doctrine requires that "[p]rior to any questioning, the [suspect in custody] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

<sup>2</sup> 467 U.S. 649, 655-56 (1984).

<sup>3</sup> See *Miranda*, 384 U.S. at 467, 458 (concluding that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," and that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice").

<sup>4</sup> 542 U.S. 630 (2004) (plurality opinion).

<sup>5</sup> 530 U.S. 428 (2000).

right. The real bone of contention, or contested premise, is the Court's and Halberstam's location of the violation, and the ever expanding exceptions that place *Miranda* outside the ambit of either a principled deviation or digression.

## I. THE MORAL FOUNDATION FOR MIRANDA

Why should we have a right against self-incrimination? Is it embedded in our Constitution because a cadre of British ex-pats were dissatisfied with how they were treated by the Crown?<sup>6</sup> Could it be a holdover from either the romantics or the natural law aficionados? Or does this right reflect actions and social practices that are not only morally justifiable but morally grounded? In a word, yes.<sup>7</sup> The right to silence has moorings in a moral framework that ratifies the dignity of the *autonomous* individual and the inviolable nature of one's thoughts and words.<sup>8</sup> And, while the founding fathers may not have wrapped themselves in Kantian or Rawlsian conceptions of individual rights and state responsibility to protect such rights, they certainly held firm to the idea that the individual had a right to choose when and if to disclose information to another person, and most certainly to the State qua State.<sup>9</sup>

The notion of the autonomous individual was a rather novel concept in the Eighteenth Century,<sup>10</sup> but it pervades our constitutional scholarship and is supported by the moral idea that the individual and her papers, ideas, and thoughts are beyond the control of the State. Indeed, in the absence of probable cause, the State is barred from compromising the privacy of the individual in her home, papers, effects, and body.<sup>11</sup> The idea that the State can extract information from an individual through the use of police-controlled interrogation within a police-dominated environment wreaks havoc on our conceptions of the autonomy and dignity of the individual.

Unlike the Fourth Amendment, which conditions violations upon the reasonableness of State conduct, the Fifth Amendment right against self-incrimination has no such condition.<sup>12</sup> The language is unambiguous: "nor shall be compelled in any criminal case to be a witness against himself."<sup>13</sup> And, while there has been some debate about the interpretation of the word "shall" by such noted jurists as Justice Antonin Scalia,<sup>14</sup> for those of us who adhere to not only common sense but to the common understanding of such words as "shall" and "may," there really is no *principled* dispute related to these words.

I want it understood from the start that I am not addressing, debating, or critiquing issues about a *moral* duty owed by individuals to the State, to other members of society, or to oneself

<sup>6</sup> See generally LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968) (discussing the English history of the right against self-incrimination). It was not until 1848 that a statute protecting a defendant's right to silence became law in England. *Id.* at 375. Indeed, criminal defendants did not have full legal representation rights until 1836. *Id.* at 322.

<sup>7</sup> Cf. *Boyd v. United States*, 116 U.S. 616, 630-32 (1886) (discussing conceivable justifications for the right against self-incrimination).

<sup>8</sup> See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 42-43 (1981). Although Professor Greenawalt's article is devoted to silence as a private right, his analysis is applicable within the criminal law context primarily due to the fact that the autonomous nature of the individual does not change. See *id.* at 49.

<sup>9</sup> See LEVY, *supra* note 6, at 430-31.

<sup>10</sup> See *id.* at 423.

<sup>11</sup> U.S. CONST. amend. IV. Of course there is the *Terry* exception to both the probable cause and warrant requirements. *Terry v. Ohio*, 392 U.S. 1, 20, 24 (1968). But that exception does have limits and, if adhered to, creates a limited interference with Fourth Amendment protections. See *id.* at 33.

<sup>12</sup> U.S. CONST. amend. V.

<sup>13</sup> *Id.*

<sup>14</sup> *Mitchell v. United States*, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting).

regarding truth or its close approximation. Rather, I am focusing on the moral imperative that forms the basis for the right to silence and the moral impoverishment that accompanies Court-constructed caveats. Indeed, the Fifth Amendment right against self-incrimination is at once a limitation on State power to compel statements and a shield to protect defendant's decision to remain mute. The enunciation of *Miranda* standards and admonitions creates a presumption that unwarned statements are compelled.<sup>15</sup> *Miranda* was unequivocal in finding that a police-dominated environment and interrogation was State created compulsion regardless of whether police conduct was negligent or willful.<sup>16</sup> There were no caveats: not a public safety exemption, private safety exemption, nor national security exclusion.<sup>17</sup> I am sure that the Warren Court was aware of various conditions that could give rise to such exceptions, not the least of which were threats to national security and domestic tranquility precipitated by the violence of the Cold War, the Vietnam War, and Southern white supremacy movements.

Yet, the Warren Court did not yield nor compromise. And, while silence may not be golden, it is within the province of the criminal defendant to maintain her silence even in the most heinous of circumstances. Indeed, it is when we are confronted with the unthinkable or the most heinous behavior that the *moral* mettle of our beliefs is tested—and in the case of *Miranda*, we have failed miserably.

The *Quarles* decision is a stellar example of the moral paucity that frames *Miranda* jurisprudence. There was no quarrel or even discussion concerning the efficacy of police conduct in that case. The identification of a rapist by the survivor, coupled with the credible claim that the perpetrator was armed, gave the police the requisite probable cause to arrest.<sup>18</sup> The fact that the rapist was located in a public space made an arrest *sans* warrant within the ambit of Fourth Amendment jurisprudence.<sup>19</sup> And the question – “Where is the gun?” – was not only appropriate to, but necessitated by the circumstances presented to the officers at the time.<sup>20</sup>

This much is unobjectionable. The problem lies not with the inquiry by police but with the use of the defendant's response at trial. The language and message of *Miranda* are clear: unwarned statements are presumptively unconstitutional and cannot be introduced in the People's case in chief.<sup>21</sup> As the Cowardly Lion put it, “No way . . . no how.”<sup>22</sup> The *Quarles* Court, however, in an attempt to weasel out of addressing a simple legal question that admittedly implicates a profoundly complex *moral* issue, creates a “public safety exception.”<sup>23</sup> And there you have it. If there is an immediate threat to public safety, the Fifth Amendment right to silence is obviated. How incredibly simple; how incredibly offensive to our notions of justice and fundamental fairness.

What then is the morally consistent and constitutionally coherent position that the Court should have adopted? It is this: Where public safety is threatened, police ought to ask whatever questions are necessary to abate the threat. If time is of the essence, the six seconds it takes to administer *Miranda* should be abandoned. Though the warnings may be jettisoned, however, the constitutional moorings may not be compromised. Consequently, while police questioning may be warranted, *introduction* of those statements at trial is neither defensible nor justified.

<sup>15</sup> *New York v. Quarles*, 467 U.S. 649, 683 (1984).

<sup>16</sup> See *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 301 (holding officer's subjective intent to incriminate is not determinative of whether “interrogation” occurred).

<sup>17</sup> See *Miranda*, 384 U.S. at 460-61.

<sup>18</sup> See *Quarles*, 467 U.S. at 652.

<sup>19</sup> See *id.* at 652, 653 n.3.

<sup>20</sup> See *id.* at 653.

<sup>21</sup> *Miranda*, 384 U.S. at 444-45.

<sup>22</sup> *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

<sup>23</sup> See *Quarles*, 467 U.S. at 655-56.

Introduction of the statements is indefensible because the language of the Fifth Amendment and *Miranda* is unequivocal: no criminal defendant shall be compelled to speak, and compulsion is inherent in police interrogation within a police-dominated environment.<sup>24</sup> Under *Miranda*, such compulsion is not obviated by any circumstances; police-controlled interrogation constitutes a Fifth Amendment precondition for warnings by the State, period.<sup>25</sup> And introduction of a *Quarles*-like statement at trial is unjustified because the conditions that gave rise to the unwarned questions have abated. And failure to warn cannot be cured; *Miranda* did not create a "boo-boo" or "oops" doctrine.

Yet, there is a more compelling reason *not* to create such exceptions. The Constitution, and more specifically the Bill of Rights, constructs the terrain that supports notions of individual liberty. Moreover, individual liberty is grounded in moral principles of dignity; the integrity of the self, the right to be silent and to be free from compelled speech, are central to notions of the autonomous self. While a strict Kantian approach to mediating the tension between the "I" and the "We" is untenable, the scheme crafted by the *Miranda* Court incorporates a standard that diminishes neither the rights of the individual nor those of society. Indeed, there is nothing to prevent police from asking questions *sans Miranda* even absent a *Quarles*-like situation; at trial, however, the state must rely exclusively on evidence other than the unwarned statements.<sup>26</sup>

With the advent of the War on Terror, we have seen a rather frantic chipping away of basic liberties embedded in the Bill of Rights. Now, in addition to having the privacy of luggage violated, airplane travellers are forced to submit either to the dreaded body scanner or to an invasive pat down. We have jettisoned any pretext of adherence to Fourth Amendment protections against unreasonable searches and seizures under the auspices of the age old canard of "national security." But think for a minute. Any self-respecting terrorist is going to secret explosive materials in places where either the body scanner or the hyper-sexualized pat down cannot reach. Indeed, the body scanner or pat down cannot reveal objects lodged in body cavities.<sup>27</sup> Any prosecutor worth her salt knows that body cavities are the site of choice for those wishing to transport contraband through airports and across borders.<sup>28</sup> Nonetheless, we walk in line, handing over our luggage and our bodies for inspection because we are told that not to acquiesce is an unpatriotic slap in the face to our notions of national security.

The chipping-away process affects the *entire* panoply of rights that secure notions of freedom and individual liberty. And, while there is no question that our world has become less safe, one factor that contributes to an unsafe environment is the whittling away of basic liberties. The power of the state to invade not only our thoughts but our bodies has increased; indeed, the decline in individual liberty is tied to the notion that once the phrase "national security" is uttered, the Bill of Rights becomes illusory. And yet, it is at this moment, when national security is compromised, that our adherence to constitutional principles and the moral framework that shapes them is put to the test. This is true with any relationship, whether between individuals or between the individual and the polity. Should the courts enforce *Miranda* or Fourth Amendment protections only when the political or cultural environment is copacetic? Should not such protections be *strengthened* when that environment is under attack, as proof of our adherence to basic notions of ordered liberty and individual freedom? Abrogating or weakening the Fifth Amendment is as detrimental to the moral and cultural life of our society as the bombing of the

<sup>24</sup> U.S. CONST. amend. V; *Miranda*, 384 U.S. at 460-61.

<sup>25</sup> *Miranda*, 384 U.S. at 460-61.

<sup>26</sup> See *id.* at 444-45.

<sup>27</sup> Colleen Deal, Comment, *Faith or Flight?: A Religious Dilemma*, 76 J. Air L. Com. 525, 554 (2011) (citing Zack Kaldveer, *Airport Body Scanner Update DHS Answers EPIC, Nader/Paul, and Alternatives*, PRIVACY REVOLT! BLOG (Jan. 7, 2011), <http://consumercal.blogspot.com/2011/01/airport-body-scanner-update-dhs-answers.html>).

<sup>28</sup> Steven Vina, Comment, *Virtual Strip Searches at Airports: Are Border Searches Seeing Through the Fourth Amendment?*, 8 TEX. WESLEYAN L. REV. 417, 428 (2002).

World Trade Center or other criminal activity. Undoubtedly, the framers of our Constitution and the Bill of Rights were aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."<sup>29</sup> *Quarles* and its expansion reflect the very concerns expressed by the architects of our enabling documents; such prescience is at once uncanny and disturbing.

## II. LOCATING THE RIGHT

Professor Halberstam's article raises another rather intriguing question: when is the right to silence violated? According to the professor and the Court, the location of the violation is when the State attempts to admit unwarned statements at trial.<sup>30</sup> Indeed, Halberstam cites *United States v. Patane* to support the claim that the violation occurs "at trial."<sup>31</sup> Is she correct? More importantly, is *Patane* correct?

Halberstam states,

Although it is frequently stated that law enforcement officials are required to give *Miranda* warnings before questioning a suspect in custody, it is not a violation of *Miranda* for police to question a suspect without first giving him the warnings . . . . It is only a violation to use the incriminating statements in evidence against him at trial.<sup>32</sup>

I understand that Professor Halberstam relies on *Patane* as foundational to her assertion. But there is a problem with her analysis, and with her claim that *Miranda* is violated *solely* upon the introduction of unwarned statements at trial. First, such a claim defies the plain language of *Miranda*. The *Miranda* Court was unequivocal in its command; words like "shall" and "must" were used throughout the opinion and tied specifically to what the police must do to collect statements that are the product of "free will."<sup>33</sup> There is no debate, no equivocation, and no speculation whatsoever. If the State wishes to extract evidence from the defendant's own words, those words must follow adequate *Miranda* warnings.

Second, the assertion that the Fifth Amendment privilege is confined to criminal court proceedings is counter to the language and rationale of *Miranda*. The Court stated, "Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings* and serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."<sup>34</sup> The Court could not have been any clearer. But to assuage any remaining doubts, the Court reinforced when *Miranda* applies and when it is violated by the state:

The privilege against self-incrimination . . . is the essential mainstay of our adversary system and guarantees to the individual the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, during a period of custodial interrogation, as well as in the courts or during the course of other official investigations.<sup>35</sup>

<sup>29</sup> *Boyd v. United States*, 116 U.S. 616, 635 (1886).

<sup>30</sup> Malvina Halberstam, *Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists*, 2 U. DENV. CRIM. L. REV. 1, 3-4 (2012).

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 3-4.

<sup>33</sup> *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("[T]he accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."); *id.* at 474 ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.").

<sup>34</sup> *Id.* at 467 (emphasis added).

<sup>35</sup> *Id.* at 460, 467.

Third, a *Miranda* violation is a two-step process. Part one is collection of statements that are unwarned, the consequence of inadequate warnings or defective waiver; part two is the introduction of the statements at trial.<sup>36</sup> The taint is the collection of unwarned statements and their introduction at trial.<sup>37</sup> Failure to warn is a condition precedent and introduction of such statements is a condition subsequent. Absent introduction of unwarned statements at trial, the failure to warn does not create a Fifth Amendment violation. Consequently, Halberstam's claim distorts *Miranda* and the logical connection between compelled statements and the Fifth Amendment right to silence. Moreover, her assertion grossly overstates the flawed findings of *Patane*. *Patane*, rather circuitously, comes out in the same place as my two-step analysis of the "taint."<sup>38</sup> Additionally, *Patane* was concerned with the exclusion of evidence outside the scope of the statement *qua* statement.<sup>39</sup> The Court has consistently refused to extend the exclusionary rule to evidence contained within the statement absent a Fourteenth Amendment due process violation.<sup>40</sup> It is conceivable that *Patane*'s rather specious reasoning rests not only on past, equally specious plurality decisions, but on a refusal to extend the exclusionary rule beyond what was outlined in *Dickerson*.<sup>41</sup>

### III. CONCLUSION

Where do we go from here? I would like to think that as scholars we would make principled decisions when addressing constitutional protections, fundamental rights, and state interests regarding national security and criminality. The principled approach is to recognize the tension that exists between individual rights and state interests to thwart terrorism and crime, and to give law enforcement the necessary tools to ferret out such conduct, but not at the expense of vitiating Fifth Amendment protection. The State has every right to circumvent *Miranda* in order to identify potential threats to our national security. It does not have the right to do so at the expense of the right against self-incrimination. Let the defendant speak in the absence of *Miranda* warnings, but let us stand upon principle and refuse to defend introduction of such statements at trial. Perhaps, if we affirm such rights, the courts shall follow.

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<sup>36</sup> See *id.* at 478-79.

<sup>37</sup> *Id.*; see also *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (holding that coercive interrogation did not violate respondent's constitutional rights where he was not charged with any crime and his statements were not used against him in a criminal proceeding); *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (noting that negligent or intentional failure by police to provide *Miranda* warnings, without more, does not constitute a constitutional violation).

<sup>38</sup> *Patane* is truly tortured in its explanation and rational. Initially, the Court states that a failure to give *Miranda* statements, *by itself*, does not constitute a Fifth Amendment violation. 542 U.S. at 641. It then goes on to state that mere negligence or wilful conduct to withhold *Miranda* warnings does not create a violation unless those statements are introduced at trial. *Id.* The Court fails to recognize the dependent relationship that exists between pre-trial police conduct and prosecutorial conduct regarding introduction of unwarned statements.

<sup>39</sup> See *id.* at 643.

<sup>40</sup> See *id.* at 642; *Nix v. Williams*, 467 U.S. 431, 441-43 (1984).

<sup>41</sup> See *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that, since *Miranda* requirements are constitutionally based, they cannot be legislatively superseded by Congress).

## REVISITING *DURA PHARMACEUTICALS*: LOSS CAUSATION & CRIMINAL SECURITIES FRAUD SENTENCING

Todd W. Barnett\*

### I. INTRODUCTION

In securities fraud cases, it is generally difficult to determine what losses are attributable to a defendant's fraud, because downward movements in stock price may reflect market realities that have nothing to do with the fraud. The principle of loss causation has thus played an important role in civil and, more recently, criminal securities fraud cases. In the civil context, the federal courts use loss causation to determine loss attributable to the defendant and, hence, damages. In the criminal context, certain federal courts have used the loss causation principle to aid in determining the appropriate sentence.

Under the Sentencing Guidelines, the major factor influencing the securities fraud defendant's sentencing range is the size of the loss to investors. But, calculating loss attributable to a defendant's misconduct in a securities fraud case is a complicated matter.

For this reason, it is especially important for courts to adhere to strict loss causation principles, lest criminal securities defendants be made to serve time for losses they had no hand in causing. Nevertheless, a recent Ninth Circuit case, *United States v. Berger*, has rejected the application of civil loss-causation principles in criminal cases, creating a circuit split on this very important issue.<sup>1</sup>

The *Berger* decision adds another layer of arbitrariness to sentencing in criminal securities cases. In recent years, securities sentencing has caught flak due to sentencing disparities apparently dependent on the judge assigned to the case. In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were advisory, not mandatory, in order to cure a Sixth Amendment challenge to the Guidelines' constitutionality.<sup>2</sup> After *Booker*, sentencing has been more judge-dependent, especially in securities cases. Now, *Berger* has added a strong jurisdictional element to securities fraud cases.

The potential implications of this jurisdictional element are broad. Criminal securities defendants in the Ninth Circuit will face higher sentencing ranges under the Guidelines. In most cases, this will probably result in similarly higher sentences as judges adhere to the sentencing ranges prescribed by the Guidelines. In at least some cases, however, it is possible that the higher sentencing range under the Guidelines may cause judges to ignore the Guidelines and impose non-Guidelines sentences. With the matter up to judicial discretion, which defendants will be successful in availing themselves of a departure from the Sentencing Guidelines under *Booker* may ultimately be arbitrary.

This paper is divided into six parts. Part I briefly discusses the use of the loss-causation principle in the civil context. Part II outlines the mechanics of the Sentencing Guidelines in criminal securities cases. Part III describes the application of the loss-causation principle in criminal cases. Part IV discusses the circuit split created by the *Berger* case. Part V discusses the implications of this split for criminal securities defendants. And finally, Part VI further discusses those implications in light of the discretion afforded judges in *Booker*.

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<sup>1</sup> 587 F.3d 1038, 1042-45 (9th Cir. 2009).

<sup>2</sup> 543 U.S. 220, 226 (2005).



## II. CIVIL LOSS CAUSATION & *DURA PHARMACEUTICALS*<sup>3</sup>

In *Dura Pharmaceuticals, Inc. v. Broudo* — the lead case on loss causation — the Supreme Court held that merely establishing the price of a security as inflated when purchased was insufficient to prove loss causation.<sup>4</sup> As the Court noted, the point of the private securities fraud action is to protect investors against economic losses caused by defendant misconduct, not to provide broad investor insurance against market losses.<sup>5</sup> But, at the time of purchase, the plaintiff has suffered no loss because the inflated purchase price is offset by the inflated market value of the share purchased.<sup>6</sup> Thus, it is only at the time of corrective disclosure — when the market assimilates news of the false information — that plaintiff suffers any harm.<sup>7</sup> Moreover, a strong causal nexus must exist between a defendant's misconduct and the later, lower market value because the lower price may reflect extrinsic factors such as changed economic circumstances or investor expectations.<sup>8</sup>

## III. SECURITIES FRAUD SENTENCING GUIDELINES

According to the current version of the Sentencing Guidelines, a loss of just one million dollars results in an increase of 16 in the offense level,<sup>9</sup> a loss of \$100 million results in an increase of 26,<sup>10</sup> and a loss of \$400 million — the highest figure included in the Sentencing Guidelines — results in an increase of 30 levels.<sup>11</sup> Thus, failing to properly distinguish losses caused by a defendant's misconduct from other losses can cause serious problems, especially when we are dealing with large corporations. Companies in the S&P 500 often lose more than \$100 million in market capitalization per day. Where the natural ebb and flow of market prices can create losses of this size, it is imperative that criminal courts ensure that the loss figures used in sentencing actually match up with real losses caused by the defendant's fraud.

## IV. CRIMINAL LOSS CAUSATION

At first, courts limited *Dura's* stricter loss-causation requirements to civil fraud-on-the-market claims under the Private Securities Litigation Reform Act (PSLRA).<sup>12</sup> Eventually, however, the *Dura* analysis began entering into common law and, then, criminal securities fraud cases. In the criminal context, the Second and Fifth Circuits have applied the loss-causation principle when determining the size of the loss attributable to a criminal defendant.

In *United States v. Olis*, the Fifth Circuit applied *Dura's* loss-causation principle in defining loss under the criminal Sentencing Guidelines.<sup>13</sup> In that case, defendant Jamie Olis, Vice President of Finance at Dynegy Corporation, was convicted of securities fraud for his role in a fraudulent scheme to disguise a \$300 million loan as income from operations.<sup>14</sup> This scheme —

<sup>3</sup> *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005).

<sup>4</sup> *Id.* at 342.

<sup>5</sup> *Id.* at 345-46.

<sup>6</sup> *Id.* at 342.

<sup>7</sup> *Id.* at 344-45 (quoting Restatement (Second) of Torts § 548A cmt. b (1977)).

<sup>8</sup> *Id.* at 342-43.

<sup>9</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(I) (2011).

<sup>10</sup> *Id.* § 2B1.1(b)(1)(N).

<sup>11</sup> *Id.* § 2B1.1(b)(1)(P).

<sup>12</sup> *Dura Pharms.*, 544 U.S. at 345.

<sup>13</sup> 429 F.3d 540, 546 (5th Cir. 2005).

<sup>14</sup> *Id.* at 541.

nicknamed "Project Alpha" — misled investors into believing that Dynegy was more financially sound than it actually was by treating the \$300 million loan as an asset rather than a liability on the company's balance sheet.<sup>15</sup>

Rigidly applying the Sentencing Guidelines, the district court reluctantly sentenced Olis to 292 months incarceration.<sup>16</sup> Unsurprisingly, the most significant factor contributing to his sentence was the size of the loss, which added 26 levels to the base offense level.<sup>17</sup> The court of appeals reversed, citing the insufficiency of the district court's loss-causation analysis, which did not take into account the impact of extrinsic factors on the decline in Dynegy's stock price.<sup>18</sup> During the period at issue, other public energy trading firms experienced a decline in stock price, and Dynegy's own stock price had declined prior to the restatement of the Project Alpha cash flows due to its failed bid to acquire then-faltering Enron.<sup>19</sup> These facts were brought up by an expert witness at sentencing, but the court ignored the expert's analysis in favor of the government witness's trial testimony that favored a simple market capitalization test.<sup>20</sup> Because the sentencing court did not take extrinsic factors into account — and instead relied solely on the decline in Dynegy's market capitalization in calculating the size of investors' loss — the court of appeals concluded that the district court's loss-causation numbers did not adequately reflect economic reality.<sup>21</sup> On remand, the district court found the record insufficient to calculate actual investor loss and used the intended loss of \$79 million as the basis for a Guidelines sentence of 151 to 188 months—just over half the prior range.<sup>22</sup>

In *United States v. Ebbers* — a highly publicized securities fraud case against former WorldCom CEO Bernard Ebbers — the Second Circuit noted that serious loss-causation issues may arise in calculating the loss caused by a criminal securities defendant.<sup>23</sup> Like the *Olis* court, the Second Circuit noted the failure of the market capitalization test to take into account other factors that may have contributed to a decline in stock price.<sup>24</sup> Nevertheless, the Second Circuit affirmed Ebbers's 25-year sentence because even an adjusted loss figure would total over \$1 billion — far in excess of the \$100 million for which he received a 26-level Guidelines enhancement.<sup>25</sup>

In *United States v. Rutkoske*, however, the Second Circuit had more appropriate facts to delve into the applicability of the *Dura Pharmaceuticals* loss-causation analysis to criminal cases.<sup>26</sup> In that case, defendant David Rutkoske was sentenced to 108 months, in accordance with the Sentencing Guidelines, for his role in a fraudulent market-making scheme that artificially inflated the stock price of certain thinly-traded securities.<sup>27</sup> The size of the loss to investors —

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 543. This sentence was at the bottom of the Guidelines range of 292 to 365 months. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

<sup>17</sup> *Olis*, 429 F.3d at 545.

<sup>18</sup> *Id.* at 548-49.

<sup>19</sup> *Id.* at 548.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 548-49.

<sup>22</sup> *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048, at \*10 (S.D. Tex. 2006). The application notes for the Sentencing Guidelines provide that "loss is the greater of actual loss or intended loss." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.2(a) (2011).

<sup>23</sup> 458 F.3d 110, 126-28 (2d Cir. 2006).

<sup>24</sup> *Id.* at 127 (citing *Olis*, 429 F.3d at 547).

<sup>25</sup> *Id.* at 128.

<sup>26</sup> 506 F.3d 170, 179-80 (2d Cir. 2007).

<sup>27</sup> *Id.* at 174. This sentence was at the bottom of the Guidelines range of 108 to 135 months. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

calculated to be just over \$12 million — resulted in a 15-level Guidelines enhancement.<sup>28</sup> This was by far the largest contributor to the defendant's total offense level of 31, up from a base offense level of 6.<sup>29</sup> On appeal, the Second Circuit held that a sentencing court must consider other factors relevant to a decline in stock price when calculating loss, in accord with the Supreme Court's holding in *Dura Pharmaceuticals*.<sup>30</sup> In doing so, the court approvingly cited the *Ebbers* dicta and the Fifth Circuit's holding in *Olis*.<sup>31</sup> It noted that separating other causes of loss cannot be an exact science and the Guidelines allow for a "reasonable estimate" of loss.<sup>32</sup> Nevertheless, it concluded that this difficulty does not diminish the sentencing court's basic duty to approximate the loss caused by defendant's fraud separately from market forces.<sup>33</sup>

## V. THE NINTH CIRCUIT & BERGER

Until recently, the Second and Fifth Circuits had the last word on loss causation in criminal securities cases, both extending the *Dura Pharmaceuticals* holding to criminal cases. In 2009, however, in *United States v. Berger*, the Ninth Circuit rejected the *Dura Pharmaceuticals* loss-causation requirement as applied to criminal sentencing — creating a circuit split with the Fifth and Second Circuits.<sup>34</sup>

In that case, defendant Richard Berger was President, CEO, and Chairman of Craig Consumer Electronics (Craig), a publicly traded consumer electronics company.<sup>35</sup> Craig had a \$50 million revolving line of credit with a consortium of banks, and the amount that Craig could have drawn on its credit line was based on the value of inventory and accounts receivable.<sup>36</sup> During his tenure at Craig, Berger concealed Craig's financial condition from the bank consortium by employing various fraudulent accounting techniques, resulting in millions of dollars of funding based on overstated collateral.<sup>37</sup> Berger also misrepresented Craig's financial condition in SEC reports in connection with Craig's initial public offering (IPO).<sup>38</sup>

At sentencing, the district judge imposed a Guidelines sentence of 97 months after applying a 14-level enhancement — from 16 to 30 — for a loss of \$5.2 million.<sup>39</sup> In calculating the size of the loss to shareholders, the sentencing judge adopted the government's "modified market capitalization theory," comparing changes in stock price at other, unaffiliated companies following market disclosure of accounting irregularities.<sup>40</sup> The average depreciation at these companies — 26.5% — was applied to the value of Craig's IPO, resulting in a calculated loss of \$2.1 million.<sup>41</sup> To this figure was added \$3.1 million for losses to the bank consortium.<sup>42</sup>

<sup>28</sup> *Rutkoske*, 506 F.3d at 174. This figure corresponds to the enhancement for a loss greater than \$10 million. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

<sup>29</sup> *Rutkoske*, 506 F.3d at 174.

<sup>30</sup> *Id.* at 180.

<sup>31</sup> *Id.* at 178-79.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 180.

<sup>34</sup> *United States v. Berger*, 587 F.3d 1038, 1045-46 (9th Cir. 2009); cf. *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005); *Rutkoske*, 506 F.3d at 179.

<sup>35</sup> *Berger*, 587 F.3d at 1040.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1041. The Guidelines range was from 97 to 121 months. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

<sup>40</sup> *Berger*, 587 F.3d at 1041.

<sup>41</sup> *Id.*

On appeal, Berger challenged the district court's shareholder loss calculation, citing the civil standard for loss causation and the Second and Fifth Circuit precedents applying that standard in criminal cases.<sup>43</sup> Under the *Dura Pharmaceuticals* rule, Berger's appeal would have been open-and-shut. In *Dura Pharmaceuticals*, the Supreme Court in no uncertain terms prohibited civil damages based on an inflated stock price, requiring instead that a plaintiff show that the defendant's fraudulent conduct was revealed to the market and caused plaintiff's losses.<sup>44</sup> But, in *Berger*, the stock went to zero and was pulled off the exchange before the alleged corrective disclosure.<sup>45</sup> Undeterred, the sentencing court calculated shareholder loss on the theory that Craig's stock price was inflated at the time of purchase — clearly contravening the *Dura* rule.<sup>46</sup>

Nevertheless, after reviewing the case literature from its sister courts, the Ninth Circuit refused to adopt the rule espoused by the Second and Fifth Circuits, applying *Dura*'s stricter loss-causation requirements to criminal sentencing.<sup>47</sup> It provided two reasons for its decision:

First, we believe that the primary policy rationale of *Dura Pharmaceuticals* for proscribing overvaluation as a valid measure of loss does not apply in a criminal sanctions context. Second, application of *Dura Pharmaceuticals*'s [sic] civil rule to criminal sentencing would clash with the parallel principles in the Sentencing Guidelines . . . .<sup>48</sup>

The first rationale the Ninth Circuit gives is dubious at best. According to the *Berger* court, the policy implicated by *Dura Pharmaceuticals* applies only when we are concerned with the damages suffered by a particular plaintiff and not by society at large,<sup>49</sup> but it is not clear what difference this distinction makes. If no victims suffer damages, it is wholly unclear what damages society has suffered. The harm caused by the defendant — the focus of criminal sentencing — is nothing more than the aggregate loss suffered by the victims of his fraud. In a footnote, the Ninth Circuit even goes on to admit that the *Dura* rule may be applicable when calculating criminal restitution, without really detailing why restitution figures should be different from harm figures.<sup>50</sup>

The second rationale is equally unwarranted. Put simply, the *Berger* court argued that the reference to "overvaluation" in the comments to the Sentencing Guidelines conflicts with *Dura*'s insistence that an inflated stock price is insufficient to show damages.<sup>51</sup> Though the comments to the Sentencing Guidelines do reference "overvaluation," the reference is made only in passing.<sup>52</sup> The purpose of that comment is to illustrate that "[a] fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless)."<sup>53</sup> It is clear under these circumstances that the comment was not intended to serve as a guide for calculating loss — a process which is far more complicated than subtracting

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1039.

<sup>44</sup> *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344-47 (2005).

<sup>45</sup> *Berger*, 587 F.3d at 1040-41.

<sup>46</sup> *Id.* at 1043.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1044.

<sup>50</sup> *Id.* at 1044 n.7.

<sup>51</sup> *Id.* at 1045.

<sup>52</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. n.7(a) (1995) (deleted 2001).

<sup>53</sup> *Id.*

the true value of a stock from the inflated price paid by an investor. In the comment's simple illustration, the defendant "represents" that the stock has a particular price.<sup>54</sup> In the real world, the defendant would have made certain representations, but these representations only touch upon value — in the end, it is the market that is the true arbiter of value. Thus, a security may be overvalued, but that overvaluation may be the result of market sentiment in addition to fraudulent representations. The defendant is only responsible for losses causally related to the fraudulent representations made to the market.<sup>55</sup> This is the *Dura* rule.<sup>56</sup>

Despite the Ninth Circuit's reluctance to apply the civil loss-causation standard to criminal cases, this does not mean that Ninth Circuit judges are completely free to ignore loss causation as a principle. In fact, in *Berger*, the Ninth Circuit actually remanded for resentencing because of the inadequacy of the loss-calculation methodology employed by the sentencing court.<sup>57</sup> Nevertheless, the refusal to apply *Dura*'s loss-causation principle to criminal cases is significant because the methodology supported by the *Berger* opinion does not adequately address external causes of declines in stock price. The *Dura* Court's worry that defendants will be made to insure against such declines may thus come to fruition, with the added caveat that defendants will be forced to pay with years of their life and not merely money damages.

## VI. WHAT DOES THIS MEAN FOR SECURITIES FRAUD DEFENDANTS?

The Ninth Circuit has a troubled history with the loss-causation element of securities cases. It was the Ninth Circuit's formulation of loss causation that was overturned by the Supreme Court in *Dura Pharmaceuticals*. Since the Ninth Circuit has opposed loss causation in the civil context, it should be no surprise that the court would limit its application in the criminal context. But, by doing so, the Ninth Circuit has created a potentially great disparity in sentences for criminal securities defendants in these circuits. Given the Ninth Circuit's relatively lax criminal loss-causation requirement, the calculated size of the loss attributable to a defendant will likely be higher — perhaps significantly higher — in the Ninth Circuit than in other jurisdictions. And since the Sentencing Guidelines put a lot of weight on the size of the loss, criminal securities defendants in the Ninth Circuit may face significantly higher sentences than their peers in the Second and Fifth Circuits.

The potential disparity in sentences is fairly unsettling, but what is most disturbing about this state of affairs is that criminal defendants in the Ninth Circuit — whose liberty is at stake — are afforded less protection than civil defendants who are subject only to money damages.<sup>58</sup> In *Dura*, the Supreme Court noted that the purpose of the PSLRA was to provide economic recourse to plaintiffs for losses attributable to defendant's misconduct, not to insure plaintiffs against all market losses.<sup>59</sup> The same principle should be even truer in criminal securities fraud cases. Defendants ought to be punished for losses attributable to their misconduct, not for losses attributable to unrelated movements in stock price.

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<sup>54</sup> *Id.*

<sup>55</sup> *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-47 (2005).

<sup>56</sup> *Id.* at 345-46.

<sup>57</sup> *United States v. Berger*, 587 F.3d 1038, 1045 (9th Cir. 2009).

<sup>58</sup> Craig McCann, *Rethinking Sentencing Guidelines in Criminal Securities Frauds* (2005) (unpublished op-ed piece), available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/craig\\_mccann\\_on\\_the\\_ebbers\\_sentence.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/craig_mccann_on_the_ebbers_sentence.pdf).

<sup>59</sup> *Dura Pharms.*, 544 U.S. at 345.

## VII. BOOKER & JUDICIAL DISCRETION UNDER THE GUIDELINES

Prior to the Sixth Amendment challenge in *United States v. Booker*, the Sentencing Guidelines were mandatory.<sup>60</sup> *Booker* severed those provisions making them mandatory,<sup>61</sup> with the result that judges now have discretion to impose non-Guidelines sentences in addition to sentences anywhere within the Guidelines range, and many judges have exercised this discretion. Because judges have discretion to give non-Guidelines sentences, Ninth Circuit judges may be pushed to do so if the Ninth Circuit's loss-causation rules result in penalties not fitting for crimes committed.

Even prior to the loss-causation debate, certain judges have expressed concern over the harsh arithmetic approach to calculating sentencing in white-collar cases. For example, in *United States v. Adelson*, the sentencing judge criticized the emphasis on the size of the loss under the Sentencing Guidelines, concluding: "Since successful public companies typically issue millions of publicly traded shares[,] . . . the precipitous decline in stock price that typically accompanies a revelation of fraud generates a multiplier effect that may lead to Guidelines offense levels that are, quite literally, off the chart."<sup>62</sup> Needless to say, the defendant in that case, Richard Adelson, a belated participant in the alleged fraud, received a non-Guidelines sentence — 3.5 years compared to a Guidelines sentence of life imprisonment.<sup>63</sup> Although the Second Circuit in the *Ebbers* case ultimately concluded that *Ebbers*'s 25-year sentence was reasonable, the court noted that "[u]nder the Guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment . . . ."<sup>64</sup> In *Olis*, the district court on remand was charged both with revising its calculated loss under the Sentencing Guidelines and with determining the reasonableness of imposing a Guidelines sentence (the original sentence having preceded the Supreme Court's decision in *Booker*).<sup>65</sup> After revising its Guidelines sentence to almost half the previous calculation, the district court further concluded that even this sentence was unreasonable under the circumstances.<sup>66</sup>

To some extent this mitigates the negative impact of lax loss-causation rules because the Sentencing Guidelines effectively provide a ceiling and not the floor for criminal sentences.<sup>67</sup> Conscientious judges can always reduce sentences so that they more accurately reflect a defendant's moral culpability. At the same time, not all judges will be willing to ignore the Guidelines, and the *Berger* rule will increase the effect judicial discretion has on sentences in criminal securities cases. Indeed, there may be many Richard Adelsons in the Ninth Circuit's future. Rather than blindly enforcing the Sentencing Guidelines in securities cases, Ninth Circuit judges increasingly will be forced to take actual criminal culpability seriously.

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<sup>60</sup> *United States v. Booker*, 543 U.S. 220, 233 (2005).

<sup>61</sup> *Id.* at 258.

<sup>62</sup> 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006). The reference to being off the charts is indeed quite literal here: the offense level under the Guidelines in *Adelson* was 46 and the guideline charts top at 43, which translates to life imprisonment. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

<sup>63</sup> *Adelson*, 441 F. Supp. 2d at 507.

<sup>64</sup> *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006).

<sup>65</sup> *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048, at \*1-2 (S.D. Tex. 2006).

<sup>66</sup> *Id.* at \*11-13.

<sup>67</sup> Upward departures from the Sentencing Guidelines are possible but unlikely.

## UNITED STATES V. JONES: CHANGING EXPECTATIONS OF PRIVACY IN THE DIGITAL AGE

Daniel W. Edwards\*

"It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."<sup>1</sup>

Does the legitimate expectation of privacy contained in the Fourth Amendment retreat as technology advances and becomes publicly available? The Supreme Court in *United States v. Jones*<sup>2</sup> attempted to answer the question as it relates to GPS monitoring.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>3</sup>

The Amendment thus does three things: it provides what is protected, "persons, houses, papers, and effects"; it protects the people from "unreasonable searches and seizures"; and it mandates the requirements for warrants.<sup>4</sup> The issue in *Jones* was only whether the individual was protected under the Fourth Amendment from GPS monitoring when the device is placed on a personal automobile, not whether, if it is protected, a warrant or a particular degree of reasonableness was required.<sup>5</sup>

### I. THE PRE-KATZ<sup>6</sup> STANDARD: INVASION OF A PERSON, HOUSE, PAPER, OR EFFECT

Early cases required some type of trespass to create a Fourth Amendment issue. Not only was a trespass required, but the item had to be specifically the person, the physical place of the person's dwelling, the person's papers, or the person's effects. In *Hester v. United States*, the Court found no Fourth Amendment violation when government agents observed the defendant from fifty to one hundred yards away, though they were on Hester's land.<sup>7</sup> The agents recovered certain items of evidence, including broken bottles that were found to contain illegal whiskey.<sup>8</sup> The Court found no illegality in the viewing or the retrieval of the whiskey bottles, holding that,

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<sup>1</sup> *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

<sup>2</sup> *United States v. Jones*, 132 S. Ct. 945, 947-52 (2012).

<sup>3</sup> U.S. CONST. amend. IV.

<sup>4</sup> *Id.*

<sup>5</sup> *Jones*, 132 S. Ct. at 947-53.

<sup>6</sup> *Katz v. United States*, 389 U.S. 347 (1967). See discussion *infra* Section II.

<sup>7</sup> 265 U.S. 57, 58-59 (1924).

<sup>8</sup> *Id.* at 58.

although there was a trespass, there was no illegal search or seizure because it did not involve the defendant's "person, house, papers, or effects."<sup>9</sup>

One of the first cases involving the interplay of the Fourth Amendment and advancing technology concerned the invention of the telephone. In *Olmstead v. United States*, the Supreme Court held that the interception of private telephone conversations between the defendant and others did not amount to a Fourth Amendment violation:<sup>10</sup>

The well-known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will. . . .

The amendment itself shows that the search is to be of material things – the person, the house, his papers, or his effects.<sup>11</sup>

The Court held that there were no searches and no seizures involved in wiretapping, accomplished outside of the defendant's home<sup>12</sup>:

The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched. . . .

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment.<sup>13</sup>

Thirty years later the Court addressed the issue of electronic recordings of conversations *within* a dwelling in *Silverman v. United States*.<sup>14</sup> There, the government used an electronic listening device attached to an extension, attaching it next to a heating duct in a dwelling, "thus converting their entire heating system into a conductor of sound."<sup>15</sup> The Court explained, "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."<sup>16</sup> The Court found that there was actual penetration into the dwelling and thus a Fourth Amendment violation.<sup>17</sup> *Silverman* continued the notion that there had to be a physical intrusion to constitute a search or seizure.<sup>18</sup> The decision rested upon the notion that there was "an actual intrusion into a constitutionally protected area."<sup>19</sup>

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<sup>9</sup> *Id.* at 58-59.

<sup>10</sup> 277 U.S. 438, 466-67 (1928).

<sup>11</sup> *Id.* at 463-64.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 465-66.

<sup>14</sup> 365 U.S. 505, 506-08 (1961).

<sup>15</sup> *Id.* at 506-07.

<sup>16</sup> *Id.* at 509.

<sup>17</sup> *Id.* at 509-13.

<sup>18</sup> *Id.* at 508-13.

<sup>19</sup> *Id.* at 512.



## II. THE KATZ STANDARD: LEGITIMATE EXPECTATION OF PRIVACY

Finding the earlier cases unsatisfactory in resolving evolving Fourth Amendment issues, the Court in *Katz v. United States*<sup>20</sup> rejected the "physical trespass" theory in favor of a "legitimate expectation of privacy" test.<sup>21</sup> The Court dismissed any formulation of the issue focused on "constitutionally protected areas" as "misleading"<sup>22</sup>:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>23</sup>

The Court held that an individual who entered a public phone booth and closed the door was protected by the Fourth Amendment, even though there was no physical trespass to the telephone booth by the government's placement of a listening device on the outside of the booth.<sup>24</sup> An individual entering into a phone booth and closing a door has demonstrated a desire to maintain personal privacy.<sup>25</sup> Society has the expectation that when a person enters a phone booth and closes the door, his privacy should be respected.<sup>26</sup> The combination of what the individual did to protect his own privacy and what society was willing to protect created an interest that was protected by the Fourth Amendment.<sup>27</sup> Justice Harlan in his concurrence created the paradigm that was adopted in 1967 and in effect to this day: a subjective expectation of privacy based on the person's conduct plus an objective expectation of privacy based on what is recognized by society as a reasonable expectation of privacy equals a legitimate expectation of privacy that the courts are willing to protect.<sup>28</sup>

After *Katz*, for Fourth Amendment purposes, whether there is a "search" or "seizure" is determined by reference to a legitimate expectation of privacy.<sup>29</sup> Thus, a "search" is an extension of the senses into a legitimate expectation of privacy. A "seizure" is an intrusion into or interference with a legitimate expectation of privacy.<sup>30</sup>

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<sup>20</sup> 389 U.S. 347 (1967).

<sup>21</sup> See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (recognizing that *Katz* overruled *Olmstead*).

<sup>22</sup> *Katz*, 389 U.S. at 351.

<sup>23</sup> *Id.* (internal citations omitted).

<sup>24</sup> *Id.* at 352-53.

<sup>25</sup> *Id.* at 352.

<sup>26</sup> *Id.* at 353.

<sup>27</sup> *Id.* at 352-53.

<sup>28</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>29</sup> See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 151 (1978) ("Only legitimate expectations of privacy are protected by the Constitution.").

<sup>30</sup> E.g., *United States v. Jacobsen*, 466 U.S. 109, 119-20 (1984) (finding that a Drug Enforcement Administration agent's search of a damaged cardboard box discovered by employees of a private freight carrier "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment").

### III. *UNITED STATES V. JONES*<sup>31</sup>: LEGITIMATE EXPECTATION OF PRIVACY PLUS INVASION OF A POSSESSORY INTEREST

Without question, advancing technology has the power to reduce citizens' Fourth Amendment right to privacy by bringing invasive applications into general public use. In *United States v. Jones*, the Court, in an opinion authored by Justice Scalia, attempts to stem the tide of advancing technology, in particular GPS monitoring, by re-installing a Fourth Amendment prohibition against invasion of a possessory interest while leaving in place the legitimate expectation of privacy test that was introduced in *Katz*.<sup>32</sup> By including in the definition of a search an invasion of a possessory interest in a protected place ("persons, houses, papers, and effects") to obtain information, the Court determined that GPS monitoring that included the installation of a device on a defendant's car was a "search" that required either a warrant or a reasonable search under the Fourth Amendment.<sup>33</sup>

Antoine Jones was the focus of an investigation by a joint task force of the FBI and Metropolitan Police Department for the District of Columbia.<sup>34</sup> Officers watched Jones by the use of visual observation, pen registers, and wiretaps.<sup>35</sup> Law enforcement placed a GPS monitor on Jones's personal vehicle.<sup>36</sup> The government tracked the vehicle 24 hours a day, seven days a week, for the next 28 days.<sup>37</sup> The monitor relayed over 2,000 pages of data.<sup>38</sup> Using the data from the monitoring, law enforcement searched a conspirator's house that contained \$850,000 and 97 kilograms of cocaine.<sup>39</sup> The defendant was indicted.<sup>40</sup> The defendant filed a motion to suppress the data from the GPS monitoring.<sup>41</sup> The district court granted the motion in part, suppressing only the information gathered while the Jones's car was parked in his private garage.<sup>42</sup> After the first trial ended with a hung jury, the government got a second indictment, held a second trial using the same GPS information allowed in the first, and won a guilty verdict; the defendant was sentenced to life imprisonment.<sup>43</sup> The Court of Appeals for the District of Columbia reversed the conviction, holding that the GPS monitoring, even outside the garage, violated the Fourth Amendment.<sup>44</sup>

Justice Scalia, always an originalist,<sup>45</sup> held for the Court that "[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"<sup>46</sup> At oral argument, the Justice stated:

<sup>31</sup> 132 S. Ct. 945 (2012).

<sup>32</sup> *Id.* at 949-950; *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>33</sup> *Jones*, 132 S. Ct. at 949.

<sup>34</sup> *Id.* at 947.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 948-949.

<sup>40</sup> *Id.* at 948.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 948-49.

<sup>44</sup> *United States v. Maynard*, 615 F.3d 544, 568 (2010).

<sup>45</sup> An "originalist" interprets the Constitution "according to the intent of those who drafted and adopted it." BLACK'S LAW DICTIONARY 1210 (9th ed. 2009). Justice Scalia is a self-described originalist. *E.g.*, 60 *Minutes: Justice Scalia on the Record* (CBS television broadcast Feb. 11, 2009), available at [http://www.cbsnews.com/2100-18560\\_162-4040290.html?pageNum=7](http://www.cbsnews.com/2100-18560_162-4040290.html?pageNum=7).

<sup>46</sup> *Jones*, 132 S. Ct. at 950 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

However, it is one thing to add that privacy concept to the Fourth Amendment as it originally existed, and it is quite something else to use that concept to narrow the Fourth Amendment from what it originally meant. And it seems to me that when that device is installed against the will of the owner of the car on the car, that is unquestionably a trespass and thereby rendering the owner of the car not secure in his effects – the car is one of his effects – against an unreasonable search and seizure.<sup>47</sup>

To make Justice Scalia's position clear, two principles apply in determining whether there has been a search for Fourth Amendment purposes: first, a trespass into a possessory interest of a protected place to gather information, and second, the "legitimate expectation of privacy" principle originating in *Katz*.<sup>48</sup> Here, the GPS monitor was placed on a personal automobile—an invasion into a possessory interest.<sup>49</sup> Justice Scalia found that the automobile was an "effect," and thus a protected place.<sup>50</sup> The Court further held that "the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"<sup>51</sup> For Justice Scalia, the issue was whether the placement of the monitor invaded the Fourth Amendment protection afforded Jones; the actual monitoring of Jones' vehicle while on public streets was permissible by clear Supreme Court precedent.<sup>52</sup>

Duration, a key issue for the concurrence of Justice Alito,<sup>53</sup> was not an issue for Justice Scalia, who stated in oral argument:

A hundred times zero equals zero. If . . . there is no invasion of privacy for one day, there's no invasion of privacy for a hundred days. Now, it may be unreasonable police conduct, and we can handle that with laws. But if there's no invasion of privacy, no matter how many days you do it, there's no invasion of privacy.<sup>54</sup>

Justice Alito, with three Justices joining his opinion, rejected the re-establishment of the pre-*Katz* "invasion of a possessory interest" principle, but agreed that there was a Fourth Amendment violation because citizens have a legitimate expectation of privacy from lengthy GPS monitoring.<sup>55</sup> Justice Alito, citing Supreme Court precedent for the notion that a "seizure" exists when there is a "meaningful interference with an individual's possessory interest in that property,"<sup>56</sup> found that there was no Fourth Amendment seizure in *Jones* because no "meaningful interference" was caused by the placement of the monitor on the automobile.<sup>57</sup> "It is clear that the attachment of the GPS device was not itself a search . . . ."<sup>58</sup>

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<sup>47</sup> Transcript of Oral Argument at 6-7, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1259.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf).

<sup>48</sup> *Jones*, 132 S. Ct. at 949-950.

<sup>49</sup> *Id.* at 947.

<sup>50</sup> *Id.* at 949.

<sup>51</sup> *Id.* (internal footnote omitted).

<sup>52</sup> *Id.* at 951-952 (citing *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984)).

<sup>53</sup> *Id.* at 958 (Alito, J., concurring).

<sup>54</sup> Transcript of Oral Argument at 40-41, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1259.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf).

<sup>55</sup> See *Jones*, 132 S. Ct. at 957, 961-962, 964 (Alito, J., concurring).

<sup>56</sup> *Id.* at 958 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

The *Jones* case left unanswered much more than it solved. It told us that the placement of a GPS monitor upon an individual's automobile is a Fourth Amendment search because it invades a possessory interest of a constitutionally protected item to obtain information. What it did not do is establish any helpful standard for assessing the impact of developing technology on Fourth Amendment jurisprudence in the future.

#### IV. "GENERAL PUBLIC USE"

Cases pre-dating *Jones* held that as technology comes in general public use, the objective expectation of privacy is reduced and, therefore, no legitimate expectation of privacy exists. In *Dow Chemical Co. v. United States*,<sup>59</sup> the Court held that aerial photographs of a chemical company's industrial complex were not a search, even though the camera used is described in the dissent as a "\$22,000 mapping camera."<sup>60</sup> The opinion of the Court discussed the camera by saying:

Here, EPA was not employing some unique sensory device that, for example could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking. . . .

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment *not generally available to the public*, such as satellite technology, might be constitutional proscribed absent a warrant. But the photographs here are not so revealing of intimate details as to raise constitutional concerns.<sup>61</sup>

Fifteen years later, in *Kyllo v. United States*, the Court addressed the issue of thermal imaging of a dwelling.<sup>62</sup> Justice Scalia, for the Court, held that "[w]here, as here, the Government uses a device that is not in *general public use*, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."<sup>63</sup> Both *Dow Chemical* and *Kyllo* thus based their holdings on whether the technology was generally available to the public. The cases suggest that when the general public can purchase the technology for a non-exorbitant amount, the objective expectation of privacy has been reduced.

With general public use in mind, there is now an expressed concern about advanced technology becoming increasingly affordable and available to the general public. Justice Sotomayor, concurring in *Jones*, stated, "[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'"<sup>64</sup> Justice Alito, in a separate concurrence, stated, "Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap."<sup>65</sup> The implication, contrary to "general public use" reducing the objective expectation of privacy, is

<sup>59</sup> 476 U.S. 227 (1986).

<sup>60</sup> *Id.* at 250 n.12 (Powell, J., concurring in part).

<sup>61</sup> *Id.* at 238 (emphasis added).

<sup>62</sup> 533 U.S. 27, 28 (2001).

<sup>63</sup> *Id.* at 40 (emphasis added).

<sup>64</sup> *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (citing *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

<sup>65</sup> *Id.* at 964 (Alito, J., concurring).

that availability for general public use is something to be avoided, something that society needs to protect against. It is an outright rejection of the "general public use" principle.

The "general public use" doctrine, however, fits well within the *Katz* reasonable expectation of privacy analysis. To have an objective expectation of privacy, one that society recognizes, courts look to see what private citizens can do.<sup>66</sup> In *Dow Chemical*, the Court found a \$22,000 camera to be "generally available to the public" even though, while cameras in general were available to the public, a \$22,000 camera in 1986 certainly was not.<sup>67</sup> A recent check of thermal imager pricing indicates that they can be purchased for as low as \$4,000 and rented for as little as \$125 per day.<sup>68</sup> GPS tracking devices are available to the public for as low as \$138.95 used and \$199.95 new.<sup>69</sup> If the test is general public use, these prices indicate at least general public availability. The Court has only two choices: either the test as articulated in *Dow Chemical* and *Kyllo* creates a reduction in the objective expectation of privacy for thermal imaging and GPS tracking or the "general public use" doctrine must be rejected for some yet-to-be-articulated test incorporating the idea that the very affordability and availability of certain technology actually counts *against* its acceptability for Fourth Amendment purposes.

## V. LENGTH OF TIME AS A POSSIBLE GOVERNING PRINCIPLE

According to the principle adopted by five of the Justices—Justice Alito, concurring and joined by three other Justices, and Justice Sotomayor in her concurrence—the length of time GPS monitoring continues may constitute an infringement on a legitimate expectation of privacy.<sup>70</sup> While hoping for legislative action, Justice Alito stated, "The best that we can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."<sup>71</sup> Justice Alito makes a distinction between "short-term monitoring," that society recognizes as reasonable, and "longer term GPS monitoring," which "impinges on expectations of privacy."<sup>72</sup> The Justice then, without creating a workable principle, went on to state that the precise point in time where the longer-term monitoring becomes a search "was surely crossed before the 4-week mark."<sup>73</sup>

To make Justice Alito's position clear, the attachment of the GPS monitoring device is not itself a search or seizure because that action is *de minimus*; the short-term monitoring is not an invasion of objective expectations of privacy, but long-term monitoring is an invasion of a legitimate expectation of privacy. The issue for Justice Alito is not the placement of the monitor,

<sup>66</sup> See generally *id.*, 132 S. Ct. 945; *Kyllo*, 533 U.S. 27; *Dow Chemical*, 476 U.S. 227.

<sup>67</sup> *Dow Chemical*, 476 U.S. at 251 n.13; see also U.S. Census Bureau, Table H-8, *Median Household Income by State: 1984 to 2010* (2010), <http://www.census.gov/hhes/www/income/data/historical/household/> (follow "Table H-8. Median Household Income by State" link) (listing the median U.S. household income in 1986 as \$24,897).

<sup>68</sup> AMERICAN INFRARED, <http://www.americaninfrared.com/home.asp> (last visited Jan. 24, 2012) (new and used FLIR infrared cameras priced between \$4,000 and \$11,000); TESTEQUITY, <http://www.testequity.com/products/1661/#price> (last visited Jan. 24, 2012) (Fluke Ti10 thermal imager priced as low as \$4,495); AJAX ENVIRONMENTAL AND SAFETY SUPPLY, INC., <http://www.thermalcamerarentals.com/flir-i-series-cameras-i40i50i60.html> (last visited Jan. 24, 2012) (thermal camera rentals for \$125 per day and \$350 per week).

<sup>69</sup> BRICKHOUSE SECURITY, <http://www.brickhousesecurity.com/covert-small-gps-tracking-device.html> (last visited Jan. 24, 2012) (listing a police-grade, hardwired GPS vehicle tracking system for \$349.00); GPSCORNER.US, <http://gps-vehicle-monitoring.gpscorner.us/> (last visited Jan. 24, 2012) (GPS tracking unit listed from \$199.99).

<sup>70</sup> *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

<sup>71</sup> *Id.* at 964.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

which is not a constitutional violation under his analysis, but the length of the monitoring, which is a constitutional violation.

Certainly the Court knows how to impose specific time limits, as it has done so in the past. For example, the Court imposed a 48-hour time limit for a probable cause finding of a defendant who is detained for a crime in *County of Riverside v. McLaughlin*,<sup>74</sup> and in *Maryland v. Shatzer* a 14-day break in custody was declared sufficient to permit law enforcement to try to interrogate a suspect again after the suspect's assertion of a right to counsel.<sup>75</sup> Arguably, then, the Court could create a time limit for such infringements of privacy as GPS monitoring. Justice Alito chose not to suggest or even hint at any such limit.<sup>76</sup>

Justice Sotomayor agreed with Justice Alito that duration was an important consideration in determining whether there was a legitimate expectation of privacy: "[A]t the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."<sup>77</sup> But Justice Scalia criticized the duration theory, saying it "leads us needlessly into additional thorny problems."<sup>78</sup> Specifically, Justice Scalia points to the lack of any reasoned principle that would guide the Court in distinguishing between short-term and long-term monitoring.<sup>79</sup>

Can time limits actually protect the expectation of privacy? It seems unlikely anyone would support a rule saying police may enter my dwelling on a whim as long as they remain only five minutes, or may search my car without any level of suspicion or a warrant for ten minutes, but not for eleven. Such examples seem to illustrate that rigid time limitations, though perhaps workable in other areas, are simply inappropriate in a Fourth Amendment context. Or as Justice Scalia put it at oral arguments, "if there is no invasion of privacy for one day, there's no invasion of privacy for a hundred days."<sup>80</sup> Whether or not an action violates the Fourth Amendment has nothing to do with "how many days you do it."<sup>81</sup>

## VI. THE "CONTENT EXCEPTION" AS A POSSIBLE SOLUTION TO ELECTRONIC MESSAGING

Justice Sotomayor, in her concurrence, suggested that "[m]ore fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."<sup>82</sup> The Court has protected the content of letters but not the address and return address,<sup>83</sup> the content of telephone calls but not the numbers dialed,<sup>84</sup> and refused to protect bank records by the Fourth Amendment because that information was made available to third parties.<sup>85</sup> "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."<sup>86</sup>

<sup>74</sup> 500 U.S. 44, 56 (1991).

<sup>75</sup> 130 S. Ct. 1213, 1223 (2010).

<sup>76</sup> See *Jones*, 132 S. Ct. at 957-64 (Alito, J., concurring).

<sup>77</sup> *Id.* at 955 (Sotomayor, J., concurring) (internal quotation marks omitted).

<sup>78</sup> *Id.* at 954.

<sup>79</sup> *Id.*

<sup>80</sup> Transcript of Oral Argument at 40-41, *United States v. Jones*, 2011 WL 5360051 (2011) (No. 10-1259), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1259.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 957 (Sotomayor, J., concurring) (internal citations omitted).

<sup>83</sup> See *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

<sup>84</sup> *Smith v. Maryland*, 442 U.S. 735, 742-46 (1979), *superseded by statute*, Pub. L. No. 99-508, 100 Stat. 1848.

<sup>85</sup> *United States v. Miller*, 425 U.S. 435, 442-43 (1976), *superseded by statute*, Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

<sup>86</sup> *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

Lower courts have discussed what is called the "content exception" to information that might be revealed through law enforcement surveillance.<sup>87</sup> The exception finds its roots in *Ex parte Jackson*, a case holding that while the outside of a letter, i.e. mailing and return addresses, was available to the public, the contents of the letter itself remained protected.<sup>88</sup> In *Smith v. Maryland*, the Court held that a pen register installed on telephone company property was not a Fourth Amendment search.<sup>89</sup> The Court noted that pen registers, which simply record the number that is dialed, do not acquire the contents of the communications.<sup>90</sup> The Court found no legitimate expectation of privacy in the numbers being dialed because the public was aware that those numbers would be recorded and kept by the telephone company as a matter of course.<sup>91</sup> The location from which the calls were made, in that case from within the defendant's home, was found to be irrelevant to the Fourth Amendment analysis.<sup>92</sup> The Court noted that a person has no legitimate expectation of privacy in information that he turns over voluntarily to third parties.<sup>93</sup> The content of the telephone conversation itself, however, remained protected.<sup>94</sup>

Recently, a federal district court addressed the release of cell phone records in *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Information*.<sup>95</sup> The court noted:

[C]ellular service providers have records of the geographic location of almost every American at almost every time of day and night. . . .

What does this mean for ordinary Americans? That at all times, our physical movements are being monitored and recorded, and once the Government can make a showing of less-than-probable cause, it may obtain these records of our movements, study the map [of] our lives, and learn the many things we reveal about ourselves through our physical presence.<sup>96</sup>

The government sought release of this information under the Stored Communications Act, which only requires "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication . . . are relevant and material to an ongoing criminal investigation."<sup>97</sup> Or stated another way, reasonable suspicion. Instead of analyzing the request under the statute, the Court considered the Fourth Amendment and ultimately held that the government was required to obtain a warrant on the basis of probable cause.<sup>98</sup> "The fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone must be rejected."<sup>99</sup>

<sup>87</sup> See *In re U.S. for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113, 122-25 (E.D.N.Y. 2011) (discussing how federal courts apply the "content exception").

<sup>88</sup> *Jackson*, 96 U.S. at 733.

<sup>89</sup> *Smith*, 442 U.S. at 745-46.

<sup>90</sup> *Id.* at 741.

<sup>91</sup> *Id.* at 742.

<sup>92</sup> *Id.* at 743.

<sup>93</sup> *Id.* at 743-44.

<sup>94</sup> See *id.* at 741.

<sup>95</sup> 809 F. Supp. 2d 113, 113 (E.D.N.Y. 2011).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing 18 U.S.C. § 2703(d) (2009)) (internal quotation marks omitted).

<sup>98</sup> *Id.* at 127.

<sup>99</sup> *Id.*

The Sixth Circuit adopted the "content exception" to emails in *United States v. Warshak*, holding that a warrant based upon probable cause was required to compel a commercial Internet service provider to turn over the contents of emails.<sup>100</sup> In *United States v. Forrester*, the Ninth Circuit discussed surveillance of to/from addresses on e-mails, the IP addresses of websites visited, and the total amount of data transmitted to or from an account.<sup>101</sup> The court held that there was no reasonable expectation of privacy in those matters that "are voluntarily turned over in order to direct the third party's servers."<sup>102</sup> The to/from addresses from emails and IP addresses were found to be addressing information, analogized to a letter, and did not concern the content of the messages.<sup>103</sup> The court held that there was a clear line between addressing information and content that was not violated by the government in that particular case.<sup>104</sup>

Elsewhere, the Ninth Circuit has held that there is a reasonable expectation of privacy in text messages that are stored on the service provider's network,<sup>105</sup> and case law is slowly developing that finds a reasonable expectation of privacy in a person's cell phones and information stored on them, including text messages.<sup>106</sup> In *State v. Clampitt*, for example, the Missouri Court of Appeals stated that "society's continued expectation of privacy in communications made by letter or phone call demonstrates its willingness to recognize a legitimate expectation of privacy in the contents of text messages."<sup>107</sup>

Could the "content exception" have applied in *Jones*? In order to protect an individual's privacy from government invasion, the Court would have to overrule the beeper cases that held that monitoring a beeper while the beeper was on public roads was not an invasion of privacy.<sup>108</sup> Those holdings only required a logical step from law enforcement physically following a civilian in public to the monitoring of a person in public by use of a beeper. That progression arguably leads to the conclusion that GPS monitoring in a public place is not a violation of a legitimate expectation of privacy. In this case, however, applying the "content exception," while the placement of a monitor on the car would not be a constitutional violation, revealing information about the defendant's travel would be.

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<sup>100</sup> 631 F.3d 266, 287-88 (6th Cir. 2010).

<sup>101</sup> 512 F.3d 500, 509-11 (9th Cir. 2008).

<sup>102</sup> *Id.* at 510.

<sup>103</sup> *Id.* at 511.

<sup>104</sup> *Id.*

<sup>105</sup> *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008), *overruled on other grounds by City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) (where the Supreme Court assumed that there was a reasonable expectation of privacy without deciding the issue).

<sup>106</sup> See, e.g., *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008) (finding defendant "had a reasonable expectation of privacy regarding this information"); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (finding "a reasonable expectation of privacy in the call record and text messages on the cell phone"); *United States v. Davis*, 787 F. Supp. 2d 1165, 1170 (D. Or. 2011) (finding a reasonable expectation of privacy in personal cell phones, including call records and text messages); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1140 (S.D. Fla. 2011) (finding a reasonable expectation of privacy in cell phones because "the weight of authority agrees that accessing a cell phone's call log or text message folder is considered a 'search' for Fourth Amendment purposes"); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) (requiring a search warrant "to search the contents of a cell phone unless an exception to the warrant requirement exists"); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (finding a reasonable expectation of privacy in the information cell phones contain because of their multi-functional uses and storage of large amounts of private data, including text messages).

<sup>107</sup> *State v. Clampitt*, No. WD 73943, 2012 WL 177394, at \*5 (Mo. Ct. App. Jan. 24, 2012).

<sup>108</sup> *United States v. Knotts*, 460 U.S. 276, 284-85 (1983); *United States v. Karo*, 468 U.S. 705, 714 (1984).



## VII. FREQUENCY OF CONDUCT AS GUIDING EXPECTATIONS OF PRIVACY

In *Florida v. Riley*, the Supreme Court concerned itself with the issue of how a legitimate expectation of privacy was to be determined.<sup>109</sup> Riley lived in a mobile home in a rural location with a partially enclosed greenhouse approximately 20 feet away.<sup>110</sup> Though [t]he greenhouse was covered by corrugated roofing panels," two of those panels were missing, resulting in the ability to see into the greenhouse from the air.<sup>111</sup> An officer flew over the property in a helicopter at a height of 400 feet.<sup>112</sup> Based upon this and other information, a search warrant was obtained, a search was conducted, and marijuana plants were seized.<sup>113</sup> The plurality, Justice White joined by three other Justices, began with the notion from *Katz* that the police may lawfully observe what the public may see.<sup>114</sup> Because a member of the public could look into the greenhouse from the air without violating a Federal Aviation Administration (FAA) regulation, law enforcement could do the same.<sup>115</sup> The plurality also indicated that there was nothing in the record to indicate that helicopters flying at 400 feet were so rare as to substantiate Riley's claim that he could not have anticipated the observation—a failure of proof.<sup>116</sup> Finally, the plurality held "no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury."<sup>117</sup>

Justice O'Connor concurred in the judgment finding that there was no objective expectation of privacy by Riley in the greenhouse.<sup>118</sup> However, the Justice criticized the plurality in relying too heavily on whether a FAA regulation had been violated.<sup>119</sup> Justice O'Connor framed the issue as "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable."<sup>120</sup> The question is one of frequency and expectation. The burden must necessarily be on the defendant to prove that his expectation of privacy is a reasonable one that society is willing to protect.<sup>121</sup>

Justice Brennan, joined by two other Justices, filed a dissent.<sup>122</sup> The dissent reformulated the test as "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional constraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open

<sup>109</sup> 488 U.S. 445, 449 (1989) (plurality opinion).

<sup>110</sup> *Id.* at 448.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 449.

<sup>114</sup> *Id.* at 449-50.

<sup>115</sup> *Id.* at 450-51.

<sup>116</sup> *Id.* at 451-52.

<sup>117</sup> *Id.* at 452.

<sup>118</sup> *Id.* (O'Connor, J., concurring).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 454 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)) (internal quotation marks omitted).

<sup>121</sup> *Id.* at 455; see also *Jones v. United States*, 362 U.S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."); *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>122</sup> *Riley*, 488 U.S. at 456 (Brennan, J., dissenting).

society."<sup>123</sup> The dissent would frame the question whether the public's observation was "so commonplace" that the expectation of privacy could not be considered reasonable.<sup>124</sup> This dissent would place the burden on the government who has greater access to information concerning the frequency of flights.<sup>125</sup>

Justice Blackmun also filed a dissent.<sup>126</sup> The Justice pointed out that five Justices (JJ. O'Connor, Brennan, Marshall, Stevens, and Blackmun) agreed that the question was an objective expectation of privacy that could in large part be measured by frequency of conduct.<sup>127</sup> More particularly, the question is whether that form of conduct by "nonpolice" was sufficiently frequent.<sup>128</sup> Justice Blackmun would place the burden of proving frequency on the government.<sup>129</sup>

The issue in *Jones* could have been determined by gauging the frequency of conduct. The solution to the problem depends upon how the issue is framed. If the issue is how often "non-police" place items on a private automobile, the answer may well be that things are placed on automobiles all the time – flyers, business cards and the like. Because a "search" is a sensing into a legitimate expectation of privacy, there is no "search" when an item is placed on an automobile. Because a "seizure" is an interruption or interception of a legitimate expectation of privacy, there is no seizure for Fourth Amendment purposes by the mere placement of an item on an automobile.

However, if the issue is how often "non-police" place GPS monitoring devices on a private automobile and then monitor the location of that automobile, the answer is, almost never. Gauging the legitimate expectation of privacy by frequency under this framing of the issue would result in a determination that there *has* been an intrusion or interruption of a Fourth Amendment right to privacy.

### VIII. CONCLUSION: A SEIZURE SEARCHING FOR A PRINCIPLE

The *Jones* case protects against the placement of a GPS monitor on a private vehicle without a warrant or some level of suspicion.<sup>130</sup> The government in *Jones* argued that even if there was a search or seizure under the Fourth Amendment, it was reasonable, and that probable cause or even reasonable suspicion was sufficient to justify the intrusion.<sup>131</sup> The Court, however, withheld consideration of these arguments because they had not been raised in the lower courts.<sup>132</sup>

Thus, it remains unanswered whether something less than a warrant is sufficient to justify the GPS placement and monitoring. The government's position will play out in the lower courts, where GPS monitoring performed without a warrant pre-*Jones* will be litigated. Undoubtedly, the prosecution will seek to justify the monitoring by arguing that law enforcement had reasonable suspicion or probable cause.

The Court may have well enough dealt with the placement of a GPS monitoring device on an automobile by reintroducing the invasion of a possessory interest concept, but it certainly

<sup>123</sup> *Id.* (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

<sup>124</sup> *Id.* at 460.

<sup>125</sup> *Id.* at 465-66.

<sup>126</sup> *Id.* at 467.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 467-68.

<sup>129</sup> *Id.* at 468.

<sup>130</sup> See *Jones*, 132 S. Ct. at 949.

<sup>131</sup> *Id.* at 954.

<sup>132</sup> *Id.*

has not dealt with the problems created by, for example, cell phones, emails, texts, tracking of websites visited on a computer, tracking of grocery purchases, closed-circuit television video monitoring, toll road collection devices, GPS monitors installed with automobiles when they are manufactured, pharmacy purchases by seller cards, or purchases made by online retailers. Those types of invasions do not involve any type of trespass and harken back to the *Olmstead* reasoning that these invasions do not involve the "person, house, papers, or effects" of a citizen and are, therefore, not a violation of the Fourth Amendment.<sup>133</sup> Indeed, Justice Sotomayor in her concurrence in *Jones* stated that the rule relating to a person's reasonable expectation of privacy in information voluntarily disclosed to third parties must be reviewed and reformulated: "This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."<sup>134</sup>

The majority and the two concurrences in *Jones* do not provide a workable principle for the Fourth Amendment when it comes to digital technology. While answering the issue of whether the attachment or monitoring of GPS is a search or seizure for Fourth Amendment purposes, the Court did not answer whether a warrant or some lesser reasonable search based upon probable cause or reasonable suspicion is sufficient to justify the invasion. Just as much as *Quon* disappointed in assuming but not resolving the question of whether there was a legitimate expectation of privacy in texting,<sup>135</sup> so *Jones* disappoints in failing to develop a principled rule for the Fourth Amendment in the digital age.

It took the Supreme Court forty years, from *Olmstead* to *Katz*, to expand its notion of privacy to include conversations on the telephone. We can only hope it will not take them so long to fully confront the meaning of the Fourth Amendment in our rapidly advancing digital age.

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<sup>133</sup> See *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

<sup>134</sup> *Jones*, 132 S. Ct. at 957.

<sup>135</sup> See *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

## SACRIFICING FUNDAMENTAL PRINCIPLES OF JUSTICE FOR EFFICIENCY: THE CASE AGAINST ALFORD PLEAS

Brandi L. Joffrion\*

### I. INTRODUCTION

Of all federal convictions sentenced under the U.S. Sentencing Reform Act in 2010, 96.8% were obtained through a guilty plea.<sup>1</sup> According to the most recent data, 95% of state convictions obtained in the nation's 75 largest counties were also obtained through a guilty plea.<sup>2</sup> Despite its controversial nature,<sup>3</sup> it was plea bargaining<sup>4</sup> that led to the majority of these aforementioned guilty pleas.<sup>5</sup>

Out of all the pleas currently available to criminal defendants, the *Alford* plea is perhaps the most controversial. This paper seeks to demonstrate why this is the case. Part II first looks at the general history of plea bargaining, the types of pleas currently accepted, and the constitutional parameters surrounding plea bargaining. Part III discusses the history of the *Alford* plea, how it differs from the *nolo contendere* plea, jurisdictional acceptance of *Alford* pleas, and the frequency with which *Alford* pleas are used. Part IV analyzes the positive and negative consequences a defendant may experience after entering an *Alford* plea. Part V examines arguments posed both for and against the use of *Alford* pleas. Part VI concludes that if the general accuracy and the public's perception of the criminal justice system are to be improved, defendants should not be allowed to enter guilty pleas without also admitting actual guilt, so long as *nolo contendere* pleas are available.

### II. PLEA BARGAINING

#### A. A BRIEF HISTORY OF PLEA BARGAINING

Plea bargaining first emerged during the second half of the nineteenth century.<sup>6</sup> The practice was initially met with such overwhelming disapproval that some scholars have gone as far as to speculate that the United States Supreme Court likely would have invalidated plea

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<sup>1</sup> U.S. Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Table 11 (May 26, 2011), [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table11.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table11.pdf).

<sup>2</sup> Bureau of Justice Statistics, *State Court Processing Statistics, 2006: Felony Defendants in Large Urban Counties, 2006* (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

<sup>3</sup> See, e.g., WILLIAM F. McDONALD, *PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES* 1 (1985); JENIA I. TURNER, *PLEA BARGAINING ACROSS BORDERS* 7 (2009); MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY* 8 (2007).

<sup>4</sup> Andrew D. Leipold and Peter J. Henning, *Rule 11. Pleas*, 1A Fed. Prac. & Proc. Crim., § 180, (4th ed. Updated 2011). For the purposes of this article, plea bargaining is defined as the process by which a prosecutor offers an inducement to a defendant in exchange for a guilty plea.

<sup>5</sup> TURNER, *supra* note 3, at 7.

<sup>6</sup> Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979).

bargaining at this time, if given the chance.<sup>7</sup> Despite this widespread disapproval, however, by the end of the nineteenth century, plea bargaining had become the dominant method of resolving criminal cases.<sup>8</sup>

It was not until 1970 that the Supreme Court first acknowledged and expressly approved the use of plea bargaining.<sup>9</sup> In that year, the Supreme Court decided three cases that made it clear plea bargaining was not per se unconstitutional.<sup>10</sup> The next year the Court went on to state that plea bargaining "is not only an essential part of the [criminal justice] process but a highly desirable part for many reasons."<sup>11</sup> In 1975, plea bargaining in the federal system was standardized by amendments to Rule 11.<sup>12</sup>

Various reasons have been given for the use and growth of plea bargaining, including crowded court dockets;<sup>13</sup> the oppressiveness of pretrial detention;<sup>14</sup> an increase in pretrial activities accompanied by a specialization of criminal codes;<sup>15</sup> the rise of professional police and professional prosecutors;<sup>16</sup> the change from relatively simple and rapid jury trial proceedings to a "fact-finding mechanism [that] has become so cumbersome and expensive that our society refuses to provide [and fund] it";<sup>17</sup> the "due process revolution";<sup>18</sup> changes in sentencing

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<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>10</sup> *Id.*; *McMann v. Richardson*, 397 U.S. 759, 760 (1970); *Parker v. North Carolina*, 397 U.S. 790, 790 (1970).

<sup>11</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971).

<sup>12</sup> FED. R. CRIM. P. 11; H.R. REP. NO. 94-414 (1975) (Conf. Rep.).

<sup>13</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 42 ("The growing complexity of the trial process was not the only factor that contributed to the development of today's regime of plea bargaining. Urbanization, increased crime rates, expansion of the substantive criminal law, and the professionalization and increasing bureaucratization of the police, prosecution, and defense functions may have also played their parts.").

<sup>14</sup> Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 124 (2005). Discussing how the Bail Reform Act passed by Congress in 1966 could have contributed to the decrease in guilty plea and the increase in acquittals during the late 1960s, Wright states "Because defendants who remain in detention before trial are more anxious to resolve their cases, they plead guilty more often than defendants who are released pending trial; additionally, because detained defendants cannot assist their attorneys in locating witnesses and evidence, their chances of acquittal are lower." *Id.*

<sup>15</sup> Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC'Y REV. 199, 201 (1979). Where trials once served as the forum in which the basic elements of a case were explored and the jury served a major role, pretrial activities now allow the prosecution to weed out weak cases and adjust charges accordingly. *Id.* In addition, the transformation of simple criminal codes to that of lengthy catalogs describing crimes in minute detail invite challenge and negotiation by defense attorneys. *Id.*

<sup>16</sup> Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281, 284 (1979) ("When cases undergo extensive pretrial screening before they reach court, there are relatively few genuine disputes over guilt or innocence left to be resolved by juries. In felony cases, at least, the theme has emerged clearly from recent research: the vast majority of defendants in court are guilty of something, and the prosecution has the evidence to prove it."). *But see* Wright, *supra* note 14, at 123 ("[T]he right to defense counsel in particular probably helped decrease the guilty plea rates for a time. The drop in guilty plea rates between 1951 and 1971 coincided with the emergence of the right to defense counsel in routine federal criminal cases.").

<sup>17</sup> John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262 (1979). Until well into the eighteenth century, between twelve and twenty felony cases were tried per day. *Id.* See also Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 41 ("[O]ne American felony court could conduct a half-dozen jury trials in a single day in the 1890's. This figure was only half as great as the number of cases that an Old Bailey jury had been able to resolve in a single day in the eighteenth century, but it contrasts dramatically with the 7.2 days that an average felony jury trial required in Los Angeles in 1968.").

<sup>18</sup> Alschuler, *Plea Bargaining and Its History*, *supra* note 6, at 38 ("A major effect of the "due process

practices that "increased the certainty and size of the penalty for going to trial";<sup>19</sup> and the need to facilitate individualized punishment.<sup>20</sup>

## B. TYPES OF PLEA BARGAINING

Plea bargaining can take more than one form. "Charge bargaining" – a practice more commonly used at the state level because state criminal codes typically include lesser offenses allowing for the possibility of charge reduction<sup>21</sup> – is the practice whereby the prosecutor allows the defendant to plead guilty to a charge less serious than the one supported by the evidence.<sup>22</sup> Charge bargaining can be advantageous to the defendant for various reasons: the less serious charge likely will carry a lower maximum statutory penalty than the charge supported by the evidence; the defendant may avoid a high statutory minimum sentence or a statutory bar to probation; and the defendant can avoid a record of conviction on the offense actually committed.<sup>23</sup> This last reason, avoiding a record of conviction for a particular crime, is most desirable in situations that allow the defendant either to avoid a felony conviction along with its collateral consequences or to avoid a repugnant conviction label, e.g., pleading guilty to the nondescript charge of disorderly conduct when the evidence supports a sex offense charge.<sup>24</sup>

"Sentence bargaining" involves an agreement whereby the defendant pleads guilty to the original charge in exchange for the prosecutor's promise to either seek leniency or ask for a specific disposition, such as probation.<sup>25</sup> Sentence bargaining can be riskier than charge bargaining because the trial judge has the discretion to refuse to follow the prosecutor's recommendations.<sup>26</sup> A prosecutor's recommendation does carry some weight, however,<sup>27</sup> and a great number of defendants enter into this type of plea based on advice from counsel.<sup>28</sup>

A third type of plea negotiation involves the defendant pleading guilty to one charge in exchange for the prosecutor's promise to drop filed charges or not to file other charges.<sup>29</sup>

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revolution" was to augment the pressures for plea negotiation. For one thing, the Supreme Court's decisions contributed to the growing backlog of criminal cases. Prosecutors' offices were required to devote a greater share of their resources to appellate litigation, and both prosecutors and trial judges spent a greater portion of their time on pretrial motions and post-conviction proceedings. In addition, the Court's decisions probably contributed to the increased length of the criminal trial. In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965, and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968. The 'due process revolution' also led directly to more intense plea negotiation.").

<sup>19</sup> Wright, *supra* note 14, at 129. The Sentencing Reform Act of 1984 wrought massive changes on federal criminal sentencing such as abolishing parole, instituting the U.S. Sentencing Commission, and instructing the Commission to create federal sentencing guidelines that would direct the sentencing decisions of federal judges. *Id.*

<sup>20</sup> Mather, *supra* note 16, at 282 (Plea bargaining is "a way for judges and prosecutors to reach a sentence that, in their view, would be more appropriate for the needs of the individual offender.").

<sup>21</sup> WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(a) (5th ed. 2007).

<sup>22</sup> Anne D. Gooch, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional*, 63 VAND. L. REV. 1755, 1761-62 (2010).

<sup>23</sup> LAFAVE ET AL., *supra* note 21, at § 21.1(a).

<sup>24</sup> *Id.*

<sup>25</sup> Gooch, *supra* note 22, at 1762.

<sup>26</sup> LAFAVE ET AL., *supra* note 21, at § 21.1(a).

<sup>27</sup> Gooch, *supra* note 22, at 1762.

<sup>28</sup> LAFAVE ET AL., *supra* note 21, at § 21.1(a).

<sup>29</sup> Mason v. State, 488 A.2d 955, 958 (Md. 1982) ("Once the court accepts the defendant's guilty plea and the defendant complies with the terms of that agreement, the State is barred from any further prosecution

However, this type of bargain is often more illusory than actual.<sup>30</sup> Although a single criminal episode can involve the violation of several separate provisions of the applicable criminal code, multiple charges are seldom brought against a defendant who does not plead guilty.<sup>31</sup> Even if multiple charges are brought against a defendant and he or she is found guilty, the defendant is likely to serve concurrent sentences.<sup>32</sup>

### C. TYPES OF PLEAS CURRENTLY ACCEPTED

Five types of pleas currently exist in federal court: (1) guilty or not guilty plea; (2) conditional plea; (3) nolo contendere plea;<sup>33</sup> (4) Alford plea;<sup>34</sup> and (5) hybrid plea.<sup>35</sup> Rule 11 of the Federal Rules of Criminal Procedure governs the pleading process and gives the requirements for guilty pleas, not guilty pleas, conditional pleas, and nolo contendere pleas.<sup>36</sup>

A guilty plea must be entered in open court to be valid.<sup>37</sup> It involves a formal decision by the defendant to dispense of his right to a trial, thereby allowing the government to obtain a conviction without proving the defendant's guilt beyond a reasonable doubt.<sup>38</sup> A guilty plea may be invoked as such in separate civil or criminal litigation because it is a judicial admission of guilt.<sup>39</sup> In contrast, by entering a not guilty plea, a defendant preserves all of his or her rights and places the burden on the government to prove the defendant's guilt beyond a reasonable doubt.<sup>40</sup> Alternatively, a defendant may enter a conditional plea in which he or she reserves the right to have an appellate court review an adverse determination of a pretrial motion,<sup>41</sup> or may enter a nolo contendere plea, in which a defendant refuses to admit guilt but waives a trial and accepts punishment as if he or she were guilty of the charged offense.<sup>42</sup> The Alford plea is an additional plea the United States Supreme Court recognized in *Alford v. North Carolina* in 1970, whereby a defendant can affirmatively protest his or her innocence and simultaneously enter a

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on the charges so nol-prossed. In these circumstances the State cannot recharge the defendant under a new charging document or new count with any offense it previously nol-prossed.").

<sup>30</sup> LAFAVE ET AL., *supra* note 21, at § 21.1(a).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FED. R. CRIM. P. 11(a).

<sup>34</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>35</sup> FED. R. CRIM. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.").

<sup>36</sup> FED. R. CRIM. P. 11.

<sup>37</sup> FED. R. CRIM. P. 11(b)(1).

<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Berndt*, 127 F.3d 251, 258 (2d Cir. 1997) ("A guilty plea is an unconditional admission of guilt, and constitutes an admission of all the elements of a formal criminal charge. As to those elements the plea is as conclusive as a jury verdict.").

<sup>40</sup> FED. R. CRIM. P. 11(b)(1). These rights include the right to plead guilty, the right to be tried by jury, and at that trial the right to assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled incrimination. *Id.*

<sup>41</sup> FED. R. CRIM. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may withdraw the plea.").

<sup>42</sup> *Hudson v. United States*, 272 U.S. 451, 455 (1926) ("[T]his plea does not create an estoppel; but, like the plea of guilty, it is an admission of guilt for the purposes of the case.").

guilty plea.<sup>43</sup> Finally, the hybrid plea can be a combination of a conditional plea accompanied by a *nolo contendere* plea or an *Alford* plea.<sup>44</sup>

#### D. CONSTITUTIONAL REQUIREMENTS FOR ACCEPTING PLEAS

The Supreme Court mandates that "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>45</sup> Thus, before any pleas may be accepted, a court must ensure that these initial requirements are met.<sup>46</sup> In addition, before a court may accept a guilty plea, it must ensure that the plea has a factual basis<sup>47</sup> by having the accused describe the conduct that gave rise to the charge on the record.<sup>48</sup> There is no absolute right to have a guilty plea accepted,<sup>49</sup> and a court may reject a plea when exercising sound judicial discretion.<sup>50</sup> A defendant also needs the court's consent to enter either a *nolo contendere*<sup>51</sup> or *Alford* plea.<sup>52</sup> Rule 11 of the Federal Rules of Criminal Procedure requires a court to consider both parties' views and the public interest at large when determining whether to accept a *nolo contendere* plea.<sup>53</sup> A court is not bound by the prosecution's wishes, however, and may permit a *nolo contendere* plea over the government's objection.<sup>54</sup> Similarly, in *North Carolina v. Alford*, the Supreme Court, noting Rule 11, stressed that its holding did not mean that the trial judge had to accept a plea merely because the defendant wished to plead that way.<sup>55</sup>

Rule 11(b)(1) of the Federal Rules of Criminal Procedure ensures that the "knowing" aspect of the constitutional requirements for entering guilty pleas is met,<sup>56</sup> i.e., the defendant

<sup>43</sup> *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

<sup>44</sup> See *Edwards v. Carpenter*, 529 U.S. 446, 448 (2000) (defendant entered a guilty plea while maintaining his innocence in exchange for the prosecution's agreement that the guilty plea could be withdrawn if the three-judge panel that accepted the plea elected to impose the death penalty after a mitigation hearing).

<sup>45</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>46</sup> FED. R. CRIM. P. 11(b).

<sup>47</sup> FED. R. CRIM. P. 11(b)(3).

<sup>48</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971).

<sup>49</sup> *Lynch v. Overholser*, 369 U.S. 705, 719 (1962).

<sup>50</sup> *Santobello*, 404 U.S. at 262.

<sup>51</sup> FED. R. CRIM. P. 11(a)(1)-(2).

<sup>52</sup> *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970) (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)).

<sup>53</sup> FED. R. CRIM. P. 11(a)(3).

<sup>54</sup> See *United States v. Balt. & Ohio R.R.*, 543 F. Supp. 821, 823 n.4 (D.C. 1982) (finding that between 1955 and 1980, federal trial courts in antitrust cases accepted 2,845 *nolo contendere* pleas, and 1,299 of those were accepted over the objections of the government).

<sup>55</sup> *Alford*, 400 U.S. at 38 n.11 (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)).

<sup>56</sup> FED. R. CRIM. P. 11(b)(1) ("Before the court accepts a plea of guilty or *nolo contendere* plea, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or *nolo contendere*; (G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty;



understands the nature of the charges against him, the rights he is waiving, and consequences of the plea.<sup>57</sup> Rule 11(b)(2) ensures the voluntariness of the plea,<sup>58</sup> i.e., the defendant's choice to enter a plea is not the result of improper coercion, threats, or promises.<sup>59</sup>

## II. ALFORD PLEAS

### A. NORTH CAROLINA V. ALFORD

When Henry C. Alford was indicted for first degree murder, it was a capital crime in North Carolina.<sup>60</sup> However, if a defendant pleaded guilty, the maximum punishment he or she could receive was life imprisonment.<sup>61</sup> It is with this sort of dilemma Alford found himself confronted: maintain his innocence, assert his right to a jury trial, and risk the death penalty; or plead guilty and ensure his life would be spared.<sup>62</sup>

Alford's appointed counsel recommended that Alford plead guilty after various witness interviews strongly indicated Alford's guilt and no substantial evidence could be found to support his claim of innocence.<sup>63</sup> Before the trial court accepted Alford's guilty plea to second-degree murder, the court heard testimony indicating that Alford had stated his intention to kill the victim prior to the killing, taken his gun from his house, and returned home declaring that he had indeed killed the victim.<sup>64</sup> It should be noted, however, that there were no eyewitnesses to the crime.<sup>65</sup> After Alford gave his version of the events of the night of the murder, he stated, "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."<sup>66</sup> After highlighting Alford's substantial prior criminal record, the trial court bestowed the maximum penalty for second-degree murder upon Alford: thirty years' imprisonment.<sup>67</sup>

Subsequently, Alford sought post-conviction relief claiming, among other things, that his guilty plea was invalid because it was based on fear and coercion.<sup>68</sup> The Supreme Court

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(J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.").

<sup>57</sup> *Id.*

<sup>58</sup> FED. R. CRIM. P. 11(b)(2) (The court must "[d]etermine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

<sup>59</sup> *Id.*

<sup>60</sup> *Alford*, 405 F.2d at 344.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *North Carolina v. Alford*, 400 U.S. 25, 27 (1970).

<sup>64</sup> *Id.* at 28.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 28 n.2.

<sup>67</sup> *Id.* at 29.

<sup>68</sup> *Id.* at 29-30. ("The state court in 1965 after a hearing, found that Alford's plea was 'willingly, knowingly, and understandingly' made. In that same year, both the United States District Court for the Middle District of North Carolina and the Court of Appeals for the Fourth Circuit denied the writ on the basis of the state court's finding that Alford voluntarily and knowingly agreed to plead guilty. Again in 1967 without an evidentiary hearing, the District Court for the Middle District of North Carolina denied relief 'on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage

concluded, however, that simple fear of the death penalty was not enough, without additional evidence, to render a plea involuntary and therefore invalid.<sup>69</sup> In order to get around its own ruling in the previous term in *Brady v. United States*, in which the Supreme Court held that admission of guilt is normally "[c]entral to the plea and the foundation for entering judgment against the defendant,"<sup>70</sup> the Court analogized Alford's plea to a nolo contendere plea, stating that the difference between the two pleas "[i]s of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law."<sup>71</sup> The Court went on to state that admitting guilt is not a constitutional requirement for entering a guilty plea and that "an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."<sup>72</sup>

## B. DIFFERENCES BETWEEN ALFORD PLEAS AND NOLO CONTENDERE PLEAS

*Alford* pleas differ from nolo contendere pleas in two respects: (1) avoiding estoppel in civil litigation;<sup>73</sup> and (2) admission of guilt.<sup>74</sup> In contrast to the nolo contendere plea, when a defendant enters an *Alford* plea he is generally foreclosed from relitigating the issue of his guilt in subsequent civil cases arising from the same facts.<sup>75</sup> Therefore, a nolo contendere plea is better than an *Alford* plea for a defendant in this context because it protects the defendant in subsequent civil or criminal litigation.<sup>76</sup> Additionally, the defendant's admission of guilt differs between an *Alford* plea and a nolo contendere plea. When entering an *Alford* plea, the defendant affirmatively protests his innocence despite entering a guilty plea,<sup>77</sup> while a nolo contendere plea is simply a refusal to admit guilt.<sup>78</sup>

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of the proceedings, and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty.") (citing *United States v. Jackson*, 390 U.S. 570 (1968)).

<sup>69</sup> See *id.* at 31 ("That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage.").

<sup>70</sup> See *id.* at 32 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

<sup>71</sup> *Id.* at 37.

<sup>72</sup> *Id.*

<sup>73</sup> See FED. R. EVID. 410 (providing a list of pleas inadmissible against the defendant at a later civil or criminal trial, which includes nolo contendere pleas, but does not list *Alford* pleas).

<sup>74</sup> See *Alford*, 400 U.S. at 35 ("A nolo contendere plea [is] a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty."); *United States v. Vonn*, 535 U.S. 55, 69 n.8 (2002) ("[T]he *Alford* theory [is] that a defendant may plead guilty while protesting innocence . . .").

<sup>75</sup> Jenny Elayne Ronis, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1404-05 (2010) ("[C]ollateral estoppel 'bars a party from relitigating an issue that has been actually litigated and necessarily decided in [a] prior proceeding' where four factors have been met: 1) [T]he party against whom the preclusion is employed was a party to or in privity with a party to the first action; 2) [T]he issue precluded from relitigation is identical to the issue decided in the first action; 3) [T]he issue was resolved [i.e. actually litigated] in the first action by a final judgment on the merits; and 4) [T]he determination of the issue was essential to the final judgment. To be 'actually litigated,' an issue must be 'properly raised by the pleadings or otherwise,' 'submitted for determination,' and actually determined.").

<sup>76</sup> See FED. R. EVID. 410.

<sup>77</sup> *Vonn*, 535 U.S. at 69 n.8 (citing *North Carolina v. Alford*, 400 U.S. 25, 27 (1970)).

<sup>78</sup> *Alford*, 400 U.S. at 35.

### C. JURISDICTIONAL ACCEPTANCE AND FREQUENCY OF USE OF ALFORD PLEAS

Although courts typically accept guilty pleas as a matter of course,<sup>79</sup> this policy does not always apply to *Alford* pleas, as some courts, including state courts in Indiana,<sup>80</sup> Michigan,<sup>81</sup> and New Jersey<sup>82</sup> have refused to accept this type of plea. In addition, federal courts strongly discourage defendants from entering *Alford* pleas.<sup>83</sup> Since Rule 11 of the Federal Rules of Criminal Procedure prohibits federal courts from accepting a guilty plea when there is no factual basis for the plea, a court may refuse to accept an *Alford* plea by reasoning that the defendant's refusal to admit guilt undermines the factual basis finding.<sup>84</sup>

In 1997, 6.3% of state inmates who conferred with court-appointed counsel and 6.7% of those who conferred with private counsel entered an *Alford* plea.<sup>85</sup> These numbers are even lower in federal courts, where 3.0% of federal inmates who conferred with court-appointed counsel and 2.8% of those who conferred with private counsel entered *Alford* pleas.<sup>86</sup> However, *Alford* pleas occur more frequently in certain types of offenses, including sex offenses<sup>87</sup> and drunk driving offenses.<sup>88</sup>

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<sup>79</sup> See, e.g., *Robinson v. State*, 291 A.2d 279, 281 (Del. 1972) (guilty plea to manslaughter valid despite lack of admission of guilt); *Johnson v. State*, 478 S.W.2d 954, 955 (Tex. Crim. App. 1972) (guilty plea to possession of heroin not invalidated by assertion of innocence); *State v. Brown*, 477 P.2d 930, 931 (Wash. Ct. App. 1970) (upholding guilty plea to grand larceny as unequivocal despite assertion of innocence).

<sup>80</sup> *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983) ("We hold, as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error.").

<sup>81</sup> *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) ("When accepting a guilty plea, the courts of this state, then, are required to probe deeper than the mere expression of willingness by the prosecutor and defendant to strike a bargain. They must look to the ultimate guilt or innocence of the pleaders.").

<sup>82</sup> *State v. Korzenowski*, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div.) ("[E]xcept in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense.").

<sup>83</sup> See United States Attorneys' Manual § 9-16.010 (instructing federal prosecutors not to consent to nolo contendere pleas, except in the most unusual circumstances); Curtis J. Shipley, *The Alford Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1068 (stating that federal judges commonly refuse to accept *Alford* pleas even in those jurisdictions that recognize *Alford* pleas).

<sup>84</sup> FED. R. CRIM. P. 11(b)(3).

<sup>85</sup> CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 8 TBL. 17 (2000) (1997 survey of inmates in state and federal correction facilities), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (defendants entered pleas of nolo contendere to sodomy, paid fine, challenged Texas sodomy statute and won); *Smith v. Doe*, 538 U.S. 84 (2003) (John Doe I and John Doe II entered pleas of nolo contendere to sexual abuse of minors).

<sup>88</sup> See, e.g., *Nichols v. United States*, 511 U.S. 738, 754 (1994) (Blackmun, J., dissenting) (defendant entered plea of nolo contendere to misdemeanor charge of driving under influence of alcohol and received \$250 fine; defendant was later convicted of cocaine distribution and prior DUI conviction increased his Criminal History Category and thus his sentence).

### III. SHOULD DEFENDANTS BE ALLOWED TO ENTER A GUILTY PLEA WHILE ACTIVELY MAINTAINING THEIR INNOCENCE?

#### A. WHY WOULD AN INNOCENT PERSON EVER PLEAD GUILTY?

An innocent defendant may choose to plead guilty for various reasons. When faced with strong adverse evidence,<sup>89</sup> a defendant may find a plea deal offered by the government to be more attractive<sup>90</sup> than taking the risk of going to trial<sup>91</sup> where, if found guilty, a harsher penalty would likely be imposed.<sup>92</sup> A defendant may also take a plea deal simply to avoid the monetary expense of going to trial<sup>93</sup> or to spare his family and friends from prosecution.<sup>94</sup> An innocent defendant may also feel powerless or hopeless when confronted with the strength the government's prosecution can seemingly wield and, therefore, may want to expedite the process by pleading guilty.<sup>95</sup> Finally, the conditions of pretrial incarceration and pressures from family, friends, or attorneys may lead an innocent defendant to plead guilty.<sup>96</sup>

#### B. ADVANTAGES A DEFENDANT CAN REALIZE BY ENTERING AN ALFORD PLEA

*Alford* pleas allegedly allow defense attorneys to provide their clients with better odds, more certainty, and less risk, as defendants are often better off pleading than going to trial, at least when the interests of saving both monetary and emotional expense are considered.<sup>97</sup> Unlike regular guilty pleas, *Alford* pleas also allow defendants to avoid the shame of admitting guilt.<sup>98</sup> This is especially relevant in sex offense cases.<sup>99</sup> Scholars have also contended that *Alford*

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<sup>89</sup> Henderson v. Morgan, 426 U.S. 637, 648 n.1 (1976) (White, J., concurring) ("Alford is based on the fact that the defendant could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway.").

<sup>90</sup> McKune v. Lile, 536 U.S. 24, 42 (2002) (plurality opinion) ("The Court . . . has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment.").

<sup>91</sup> United States v. Vonn, 535 U.S. 55, 69 n.8 (2002) (A defendant may choose to enter an Alford plea "simply to avoid the . . . vicissitudes of trial.").

<sup>92</sup> North Carolina v. Alford, 400 U.S. 25, 28 n.2 (1970) (Alford chose to plead guilty to second-degree murder because it carried a maximum sentence of 30 years imprisonment rather than risk the death penalty being imposed if found guilty at trial.).

<sup>93</sup> Vonn, 535 U.S. at 69 n.8 (2002) (A defendant may choose to enter an Alford plea "simply to avoid the expenses . . . of trial"); Nichols, 511 U.S. at 752 (1994) (Souter, J., concurring) (noting that defendant may choose to plead guilty based on "frugal preference").

<sup>94</sup> Bryan H. Ward, A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea, 68 Mo. L. Rev. 913, n.25 (2003) (citing John L. Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?, 126 U. Pa. L. Rev. 88, 96-97 (1977)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278-306 (1975).

<sup>98</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1377-78 (2003) (In an interview of thirty-four veteran prosecutors, judges, and public and private defense attorneys, Bibas found that the most common reasons a defendant chooses to enter a guilty plea while refusing to admit guilt include: "fear of embarrassment and shame before family and friends," "psychological denial," avoidance of estoppel in collateral civil litigation, and inability to remember the facts due to intoxication.).

<sup>99</sup> *Id.* at 1393-94.

pleas reduce defendants' incentives to lie to both their attorneys and the court.<sup>100</sup> The *Alford* plea allows those risk-averse, innocent defendants, "for whom the value of ensuring a lesser sentence or removing the possibility of the death penalty is greater than the value of possibly being found not guilty at trial," to accept the plea they believe is best for them without having to admit factual guilt.<sup>101</sup>

### C. DISADVANTAGES A DEFENDANT CAN REALIZE BY ENTERING AN ALFORD PLEA

Despite assertions that *Alford* pleas minimize risks and provide definite, assured outcomes for those defendants facing sentencing, probation revocation, or parole review, *Alford* pleas can actually provide anything but these purported advantages.<sup>102</sup> Additionally, lying may become necessary in order to reap the benefits the *Alford* plea was originally intended to provide.<sup>103</sup>

During the sentencing phase, a defendant's refusal to admit guilt can become a problem if the jurisdiction in which he or she is being sentenced takes into account his or her degree of remorse.<sup>104</sup> Remorse not only reflects the defendant's contrition,<sup>105</sup> but also indicates a defendant's willingness to accept responsibility for his actions.<sup>106</sup> For sentencing purposes, remorse is thought to measure the likelihood that the defendant will discontinue engaging in criminal activity in the future.<sup>107</sup> Some jurisdictions view remorse as a mitigating factor,<sup>108</sup> while others view "lack of remorse" as an aggravating factor.<sup>109</sup> Where remorse is viewed as a mitigating factor, a defendant may receive a lighter sentence if he exhibits "a feeling of compunction or deep regret and repentance for a sin or wrong committed,"<sup>110</sup> either to the court or to the proper authorities during presentence investigations.<sup>111</sup> Courts that view "lack of remorse" as an aggravating factor may, and in some circumstances must, enhance a defendant's sentence if a "lack of remorse" is demonstrated by the defendant.<sup>112</sup>

The issue of remorse is problematic for *Alford* defendants because, by definition, all *Alford* defendants lack remorse as all *Alford* defendants refuse, at least at the time of

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<sup>100</sup> *E.g.*, Ward, *supra* note 94, at 920 (Before the existence of *Alford* pleas when an admission of guilt was required in order to enter a guilty plea, a defendant was forced to admit all the underlying facts of the crime to his or her defense attorney. Until he did so, the attorney would be restrained "from seeking a plea agreement if an admission of guilt [was] a prerequisite." Similarly, an innocent defendant would have to lie in court and admit the alleged facts if he or she wished to plead guilty.) (citing Shipley, *supra* note 82, at 1074).

<sup>101</sup> Gooch, *supra* note 22, at 1765 (citing Shipley, *supra* note 82, at 1073).

<sup>102</sup> Ward, *supra* note 94, at 920-21.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 921-22.

<sup>105</sup> *Id.* at 921.

<sup>106</sup> *Id.* at n. 41.

<sup>107</sup> See, e.g., Fair v. State, 268 S.E.2d 316 (Ga. 1980); Thomas v. Commonwealth, 419 S.E.2d 606, 619 (Va. 1992), abrogated on other grounds by Haugen v. Shenandoah Valley Dept. of Social Services, 274 Va. 27 (Va. 2007); State v. Jones, 444 N.W.2d 760, 763 (Wis. Ct. App. 1989).

<sup>108</sup> See, e.g., State v. McKinney, 946 P.2d 456, 458 (Alaska Ct. App. 1997); Commonwealth v. Mills, 764 N.E.2d 854, 866 n.9 (Mass. 2002); State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App. 1988).

<sup>109</sup> See, e.g., State v. Landrigan, 859 P.2d 111 (Ariz. 1993), *abrogated on other grounds*, Turner v. Crosby, 339 F.3d 1247, (11th Cir. 2003); People v. Gonzales, 926 P.2d 153, 156 (Colo. App. 1996); Issaks v. State, 386 S.E.2d 316, 323 (Ga. 1989); People v. Mulero, 680 N.E.2d 1329, 1337 (Ill. 1997).

<sup>110</sup> Ward, *supra* note 94, at 922 (citing Oxford English Dictionary Vol. XIII, at 598 (2d ed. 1989)).

<sup>111</sup> *Id.* at 921-22.

<sup>112</sup> *Id.*

sentencing or entering the plea, to admit to committing the elements of the crime of which they have been accused.<sup>113</sup> Of course, this would not be a problem if those defendants who chose to enter an *Alford* plea were exempt from this remorse assessment at sentencing, but courts often refuse to allow such an exemption, reasoning that the rights of *Alford* plea defendants should not differ from those of defendants who plead, or are found, guilty.<sup>114</sup>

Further complications may ensue after the sentencing phase.<sup>115</sup> While a court may allow a defendant to deny any wrongdoing at the time the plea is entered, this often is not the case going forward.<sup>116</sup> As part of probation, defendants are routinely required to participate in counseling to learn how to avoid the conduct that resulted in the criminal conviction and the resulting probation.<sup>117</sup> This routine counseling can result in revocation of the *Alford* plea defendant's probation and imposition of the underlying sentence, if and when he refuses to acknowledge his involvement with the crime for which he has pled guilty.<sup>118</sup> It should be noted that these programs do not offer immunity to the defendant if any statements of involvement are made,<sup>119</sup> nor do these programs violate the Fifth Amendment's self-incrimination privilege.<sup>120</sup> Furthermore, many states have adopted a procedure by which an inmate seeking early release from prison must appear before a parole board to state why early release is appropriate for him or her.<sup>121</sup> These hearings often consider an inmate's remorse or lack thereof.<sup>122</sup> Similar to the situation *Alford* plea defendants face when seeking probation, a defendant's parole may be denied if he or she refuses to admit any involvement in the offense for which an *Alford* plea was entered.<sup>123</sup> Refusing to "accept responsibility" for the crime for which a defendant is currently serving a sentence may also result in a harsher prison assignment or loss of prison privileges,<sup>124</sup> such as visitation rights, earnings, work opportunities, the ability to send money to family,

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<sup>113</sup> See, e.g., *State v. Weaver*, No. 91-2568-CR-FT, 1992 WL 126807, at \*2 (Wis. App. Mar. 24, 1992) ("First of all, it's always difficult when there has been an *Alford* Plea entered because, on the one hand, by virtue of an *Alford* Plea there is no acceptance of responsibility; in fact, there is a denial that the offense was committed; and I accepted that plea knowing that that was the problem in this case.")

<sup>114</sup> See, e.g., *State v. Howry*, 896 P.2d 1002 (Idaho Ct. App. 1995) (reasoning that the Supreme Court's decision in *Alford* "does not require . . . that a court accept a guilty plea from a defendant while simultaneously treating the defendant as innocent for purposes of sentencing" because, "[a]lthough an *Alford* plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions"); *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698, 707 (Wis. 1998) ("Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of a trial and to limit one's exposure to punishment.").

<sup>115</sup> *Ward*, *supra* note 94, at 926.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 365 (1998) (probation counseling, especially in the case of sex offenders, routinely requires offenders to "admit responsibility" for the underlying offenses).

<sup>119</sup> See, e.g., *McKune v. Lile*, 536 U.S. 24, 35 (2002) (noting that Federal Bureau of Prisons, Kansas, and New Hampshire do not offer immunity to sex offenders who must accept responsibility in order to participate in prison rehabilitation programs).

<sup>120</sup> *Id.* at 35.

<sup>121</sup> See, e.g., COLO. REV. STAT. ANN. § 17-22.5-404 (2011).

<sup>122</sup> *Ward*, *supra* note 94, at 932.

<sup>123</sup> *Id.*

<sup>124</sup> *McKune v. Lile*, 536 U.S. 24, 29 (2002) (plurality opinion) (upholding against Fifth Amendment challenge Kansas program which conditioned favorable prison assignment and certain prison privileges on acceptance of responsibility by incarcerated sex offender).

canteen expenditures, and access to a personal television.<sup>125</sup> Considerably worse than loss of prison privileges, an inmate further risks the possibility of transfer to a maximum security unit,<sup>126</sup> a potentially more dangerous environment where movement is limited,<sup>127</sup> if he or she refuses to accept responsibility.

"[T]he Sexual Offender Registration Act, otherwise known as Megan's law," has recently caused *Alford* plea defendants additional problems.<sup>128</sup> These laws, enacted in some form in most states, release information to the public about individuals depending on the "level of risk" that individual poses.<sup>129</sup> This level of risk is determined in part based on post-offense behavior.<sup>130</sup> Refusing to "accept responsibility" for the sexual conduct in question can lead to a more serious level of risk being calculated.<sup>131</sup> In addition, some states use this form of risk calculation to evaluate potential criminal sentences.<sup>132</sup>

#### D. ARGUMENTS POSITED IN FAVOR OF KEEPING ALFORD PLEAS

It has been argued that *Alford* pleas promote efficiency throughout the criminal justice system. *Alford* pleas may persuade a defendant to agree more readily to the plea bargaining process because the defendant is not required to lie openly in court but can still take advantage of the plea bargaining process when he or she believes the costs of going to trial are greater than the consequences of accepting a plea deal.<sup>133</sup> This same rationale applies to innocent defendants with prior convictions, for whom a criminal record is of less consequence, and to those innocent defendants who believe their odds of acquittal at trial are too slim.<sup>134</sup> The consensus among courts and scholars is that if a defendant is to be allowed the option of plea

<sup>125</sup> *Id.* at 30-31 (Kansas prison "officials informed respondent that if he refused to participate in the SATP [Sexual Abuse Treatment Program] his privilege status would be reduced[,] As part of this reduction, respondent's visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television and other privileges would be automatically curtailed."). *But see id.* at 45 (Federal sex offender rehabilitation program differs from Kansas one in that "it does not require inmates to sacrifice privileges besides housing as a consequence of nonparticipation.").

<sup>126</sup> *Id.* at 30-31 (Kansas prison "officials informed respondent that if he refused to participate in the SATP [Sexual Abuse Treatment Program] . . . respondent would be transferred to a maximum security unit where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment."); *id.* at 45 (Federal sex offender rehabilitation program "is conducted at a single, 112-bed facility that is more desirable than other federal prisons," so federal program "conditions a desirable housing assignment on inmates' willingness to accept responsibility for past behavior.).

<sup>127</sup> *Id.*

<sup>128</sup> Ward, *supra* note 94, at 934 (citing Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 359-61 (1998) (listing existing state versions of Registration, Disclosure and Notification statutes, otherwise known as "Megan's Law")).

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., *People v. J.G.*, 655 N.Y.S.2d 783, 785-86 (App. Div. 1996).

<sup>131</sup> Ward, *supra* note 94, at 934.

<sup>132</sup> E.g., TENN. CODE ANN. § 39-13-705 (2012).

<sup>133</sup> Mark Gurevich, *Justice Department's Policy of Opposing Nolo Contendere Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, 27 (2004).

<sup>134</sup> See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718-19 (2006); See also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913 (1992).

bargaining at all, he or she should be provided with the full range of plea bargaining options, including the *Alford* plea, in order to promote his or her agency.<sup>135</sup>

Additionally, in contrast to the *nolo contendere* plea, which does not collaterally estop relitigation of the issue of guilt in a civil trial, the *Alford* plea makes it easier for victims to prevail in a civil suit.<sup>136</sup> Since an *Alford* plea will not be accepted without the court's satisfaction that there is a factual basis to support the defendant's guilt,<sup>137</sup> this same factual basis can be used to satisfy the preponderance of the evidence standard that is necessary in order to prevail in subsequent civil litigation.<sup>138</sup> By collaterally estopping subsequent litigation, the *Alford* plea also adds to the long-term costs of entering such a plea, thereby creating a disincentive that purportedly limits the number of defendants who will ultimately choose to enter an *Alford* plea after weighing the costs and benefits.<sup>139</sup>

Advocates of the *Alford* plea further contend that such a plea minimizes the punishment a defendant receives, increases the certainty a defendant has regarding the imposition of his sentence, and decreases the incentive defendants have to lie "both to their attorneys and in court."<sup>140</sup> However, as discussed in the sections both above and below, these arguments lack significant merit when analyzed more closely.<sup>141</sup>

### E. ARGUMENTS FOR PROHIBITING ALFORD PLEAS

Perhaps "the most troubling aspect of an *Alford* plea is the potential to undermine . . . the most fundamental underpinning of our criminal justice system: that only the truly guilty are convicted and punished."<sup>142</sup> Arguably, the *nolo contendere* plea "has permitted [innocent people to plead guilty] for hundreds of years."<sup>143</sup> However, when a defendant enters a *nolo contendere* plea, he or she is refusing to contest his guilt, whereas when entering an *Alford* plea a defendant is actively asserting his or her innocence.<sup>144</sup>

Realizing that trials are imperfect and innocent defendants can be convicted, Albert W. Alschuler contends that "both courts and defense attorneys should recognize a 'right' of the

<sup>135</sup> Shipley, *supra* note 83, at 1073 (arguing that if general plea-bargaining system is permitted, defendants should be free to choose which plea they enter); see Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 *FORDHAM L. REV.* 987, 1013 (1995).

<sup>136</sup> Gurevich, *supra* note 133, at 2.

<sup>137</sup> *FED. R. CRIM. P.* 11(b)(3); see *United States v. Feekes*, 582 F. Supp. 1272, 1275 (E.D. Wis. 1984) (applying standards of voluntariness and factual basis).

<sup>138</sup> *Krahner v. Kronenberg*, No. 47549-5-1, 2001 WL 1463798, at \*2 (Wash. Ct. App. Nov. 19, 2001) (citing *Falkner v. Foshaug*, 29 P.3d 771, 776 (Wash. Ct. App. 2001) (requiring preponderance of proof of innocence)).

<sup>139</sup> Shipley, *supra* note 83, at 1084-85, 1088 ("[C]ourts state that issues are judicially determined by the establishment of a factual basis for a plea, and that a defendant who enters an *Alford* plea is no less guilty than one who enters a standard guilty plea . . . . If *Alford* pleas were not preclusive in subsequent actions, all criminal defendants, regardless of actual guilt, would attempt to use the pleas if there were the slightest possibility of civil liability resulting from their conduct. This would encourage guilty defendants to abuse the system by falsely proclaiming innocence in court, thereby defeating the honesty goals of the *Alford* principle.").

<sup>140</sup> Ward, *supra* note 94, at 918-20.

<sup>141</sup> See *supra* Part IV.C. and *infra* Part IV.E.

<sup>142</sup> Steven E. Walburn, *Should the Military Adopt an Aford-Type Guilty Plea?*, 44 *A.F. L. REV.* 119, 145 (1998). Walburn presents such safeguards as "the presumption of innocence, the burden of proof, the right against self-incrimination, the right to a jury trial, and the rules of evidence," *id.* at 145 n.163, as evidence of the "great pains" the United States takes "to reduce the risk of convicting an innocent defendant," *id.* at 145.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*



innocent to plead guilty. So long as a defendant has something to gain by entering a plea agreement, it is unfair to deny him the choice."<sup>145</sup> According to Judge Easterbrook, innocent defendants will plead guilty only when the plea terms offered are less than the expected sentence at trial, discounted by the probability of acquittal.<sup>146</sup> Judge Easterbrook's argument assumes, somewhat mistakenly, that all innocent defendants are "fully informed, autonomous, rational actors."<sup>147</sup> This, however, is not always the case, as "[m]any defendants . . . receive poor advice from overburdened appointed counsel of varying quality whose caseloads and incentives lead them to press clients to plead guilty."<sup>148</sup> Furthermore, those innocent defendants of low intelligence who are "poor enough to qualify for overburdened counsel" are more likely to make the mistake of pleading guilty, despite their innocence, as a result of pressure or misinformation.<sup>149</sup> In order to prevent the "troubling disparities based on wealth, mental capacity, and education" that are likely to result from allowing innocent defendants to enter *Alford* pleas, "[t]he law should instead encourage these innocent defendants to go to trial."<sup>150</sup>

In addition to considering the desires of the parties directly involved with a criminal suit, "public perceptions of accuracy and fairness" with regards to the criminal justice system as a whole must be considered.<sup>151</sup> "[S]ociety has a strong interest in ensuring that criminal convictions are both just and perceived as just."<sup>152</sup> This perception is crucial "to the law's democratic legitimacy, moral force, and popular obedience"<sup>153</sup> as society may well suspect coercion and injustice upon hearing of tales of defendants pleading guilty and being punished while simultaneously professing their innocence.<sup>154</sup> Justice Brennan illustrated the significance of this perception in discussing the importance of the reasonable doubt standard in criminal law:

[T]he reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.<sup>155</sup>

Allowing a defendant to enter an *Alford* plea also undermines a historical foundation of punishment: retribution.<sup>156</sup> It has been argued that when a defendant is allowed to escape the step of recognizing his or her own guilt, the defendant will never "atone for his crime," and therefore the goal of retribution is never satisfied and the defendant is not reconciled to

<sup>145</sup> Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1296.

<sup>146</sup> Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 311-12 (1983).

<sup>147</sup> Bibas, *supra* note 98, at 1383.

<sup>148</sup> *Id.*, citing Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1248-70.

<sup>149</sup> *Id.* at 1384.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1386.

<sup>152</sup> *Id.*

<sup>153</sup> Bibas, *supra* note 98, at 1387.

<sup>154</sup> *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971) ("[T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail.").

<sup>155</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>156</sup> David Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 866 (1992).

society.<sup>157</sup> Rather than promoting honesty, *Alford* pleas in particular allow guilty defendants to "cloak their pleas in innocence."<sup>158</sup> While it is possible to attain retribution by means other than exacting a confession, i.e., via the actual punishment of the perpetrator,<sup>159</sup> for some victims, such as sexual offense victims, the healing process cannot begin and retribution may only be obtained once the defendant actively admits his guilt.<sup>160</sup>

*Alford* pleas also violate the basic moral norms that define our criminal justice system: honesty and responsibility for one's actions.<sup>161</sup> As long as offenders deny, justify, or minimize their actions, they cannot accept responsibility and repent.<sup>162</sup> In the case of especially heinous or shameful crimes, such as sex offenses, the inability to admit to the crime is even more common.<sup>163</sup> Therefore, it is no surprise that *Alford* and *nolo contendere* pleas are used most frequently when pleading to sex offenses.<sup>164</sup> Such cognitive denials and distortions impede treatment<sup>165</sup> and can lead to the commission of more sexual offenses in the future.<sup>166</sup> Confessions in open court, even when induced by external pressure, may begin to breach an offender's denial.<sup>167</sup> Allowing a defendant to enter an *Alford* plea, on the other hand, can exacerbate the offender's denial reflex, making subsequent treatment less effective, and thus making it more likely for an *Alford* defendant to reoffend.<sup>168</sup> Exemplifying this point, one study conducted in Minnesota found that seven out of eight sex offenders who entered *Alford* pleas reoffended within five years of his or her release,<sup>169</sup> a rate two to five times higher than the general recidivism rate of sex offenders.<sup>170</sup>

Allowing defendants to enter *Alford* pleas also harms a victim's ability to recover, especially in sexual assault and molestation cases where a victim's recovery often depends directly upon the defendant's own acknowledgment of the crime committed.<sup>171</sup> When a

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<sup>157</sup> *Id.* at 865-67.

<sup>158</sup> Bibas, *supra* note 98, at 1386-87.

<sup>159</sup> Walburn, *supra* note 142, at 148.

<sup>160</sup> Claire L. Molesworth, *Knowledge Versus Acknowledgment: Rethinking the Alford Plea in Sexual Assault Cases*, 6 Seattle J. for Soc. Just. 907, 908-09 (2008)..

<sup>161</sup> Bibas, *supra* note 97, at 1386-87.

<sup>162</sup> *Id.* at 1393.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1393-94.

<sup>165</sup> Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 498-99 (2001) ("Acceptance of responsibility on the part of the offender is considered an indispensable part of treatment. Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal. It is, therefore, no wonder that the United States Department of Justice has identified admission of responsibility as a basic requirement for treatment and that the American Bar Association has concluded that individuals who deny responsibility are not amenable to treatment . . . . In addition, the disincentives for refusing treatment keep offenders active in treatment long enough to break through their psychological defenses that would otherwise result in their choice to terminate treatment before any positive change occurred.").

<sup>166</sup> Bibas, *supra* note 97, at 1394.

<sup>167</sup> Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 Nw. U. L. Rev. 1415, 1418 (1998) (noting that the legal system, by challenging denials in the adversary system, "can help to puncture false denials and reveal unpleasant truths").

<sup>168</sup> Bibas *supra* note 97, at 1397.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Molesworth, *supra* note 160, at 908.

defendant is allowed to enter an *Alford* plea, the victim is robbed of the public acknowledgment that a crime has been committed.<sup>172</sup> This lack of public acknowledgment can also increase "a victim's sense of alienation."<sup>173</sup>

As discussed above, defendants entering an *Alford* plea frequently experience negative, unanticipated consequences, including revocation of probation, denial of parole, and sentence enhancements.<sup>174</sup> Despite the fact that some courts have taken the view that it is the defense attorney's responsibility to advise the defendant of the possibility of these negative consequences before entering an *Alford* plea,<sup>175</sup> defendants do not prevail when attempting to withdraw their previous guilty plea by arguing ineffective assistance of counsel because courts view this lack of advice as a "collateral" rather than a "direct" consequence.<sup>176</sup> Similarly, defendants have not prevailed upon Fifth Amendment right against self-incrimination grounds when attempting to preclude themselves from having to admit guilt either during post-conviction treatment programs or when entering the initial plea.<sup>177</sup>

## VI. IS IT PRACTICALLY POSSIBLE TO ELIMINATE ALFORD PLEAS?

Currently, over 95% of trials are disposed of through plea bargaining.<sup>178</sup> Clearly, it is not feasible to do away with the practice altogether. *Alford* pleas, however, constitute a small percentage of all pleas, between 6.3% and 6.7% among state inmates<sup>179</sup> and between 2.8% and 3.0% among federal inmates.<sup>180</sup> Removing *Alford* pleas as an option for defendants while retaining nolo contendere pleas will not even marginally disrupt the plea bargaining system as a whole. Furthermore, while efficiency is an important value in criminal procedure, accuracy and legitimacy are far more important.

In response to those *Alford* plea proponents who believe the entire range of pleas should be available to defendants<sup>181</sup> and who applaud *Alford* pleas because this type of plea does not force a defendant to lie in court,<sup>182</sup> it is not the position of this paper that nolo contendere pleas should be removed as an option. A defendant can still reap the benefits of plea bargaining (receiving a lesser punishment, increasing the certainty of the sentence received) while refusing

<sup>172</sup> See Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 FORDHAM INT'L L. J. 512, 548 n.229 (citing STATE CRIMES: PUNISHMENT OR PARDON 93 (The Aspen Inst. ed., 1989)).

<sup>173</sup> Walburn, *supra* note 142, at 147.

<sup>174</sup> See *supra* Part IV.C.

<sup>175</sup> *People v. Birdsong*, 958 P.2d 1124, 1128 (Colo. 1998).

<sup>176</sup> Ward, *supra* note 94, at 936 (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequence of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)) (When seeking to withdraw a guilty plea, the test used is "whether, but for defense counsel's advice, the defendant would have refused to plead guilty and would have proceeded to trial." In the *Alford* plea context, this test has yet to be satisfied in any reported opinions. Courts have concluded that ineffective assistance of counsel can only arise when a defendant has not been advised of the "direct" rather than "collateral" consequences of his or her plea.)

<sup>177</sup> *Id.* at 937-38.

<sup>178</sup> U.S. Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Table 11, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table11.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table11.pdf); Bureau of Justice Statistics, *State Court Processing Statistics, 2006: Felony Defendants in Large Urban Counties, 2006*, 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>.

<sup>179</sup> HARLOW, *supra* note 85.

<sup>180</sup> *Id.*

<sup>181</sup> Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 96, at 1296.

<sup>182</sup> Ward, *supra* note 94, at 920-21.

to admit guilt by entering a *nolo contendere* plea. As with an *Alford* plea, a *nolo contendere* plea does not require the defendant to lie in court or to his attorney.

Today, only one-third of the American public expresses confidence in the criminal justice system,<sup>183</sup> and two-thirds think plea bargaining is a problem.<sup>184</sup> In order to begin to rectify the public's perception of the American criminal justice system and to better implement the goals that system is meant to serve, we should not allow defendants to enter a guilty plea without also admitting guilt. As long as *nolo contendere* pleas are available, the defendant is not forced to lie in court if he or she is truly innocent. Additionally, removing *Alford* pleas from the plea bargaining toolbox likely will encourage truly innocent defendants to persevere through trial proceedings, allowing the public to participate in the pursuit of justice and in turn improving public perception of the criminal justice system – all while allowing that system to serve its intended function.

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<sup>183</sup> Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L INST. JUST. J., Mar. 2002, at 23-24.

<sup>184</sup> AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 54-55 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996).

## RIGHT TO COUNSEL VS. RIGHT TO A SPEEDY TRIAL: HOW THE PUBLIC DEFENDER CRISIS IS CAUSING A SIXTH AMENDMENT CONFLICT

Conor R. McCullough\*

### I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . and to have the Assistance of Counsel for his defense."<sup>1</sup> When written, the Framers probably did not envision a future clash between these two clauses. Yet, precisely such a collision seems imminent as the indigent defender system faces an unprecedented crisis in the United States.

To take just a few examples, what happens to an indigent defendant who is awaiting her constitutional right to counsel to be fulfilled but in the meantime is having his or her right to a speedy trial violated? Put differently, what happens when an indigent defendant seeks to have her right to a speedy trial fulfilled but is unable to secure representation because of an overworked indigent defender's office? Additionally, what are some possible solutions to rectifying this tension, and perhaps the indigent defender system generally?

There is ample scholarship on the rights to counsel and to a speedy trial individually, but little that discusses the relationship between them and the effect, if any, that they have on each other. Taking Missouri's public defender crisis as an entry point, this comment will survey the history of the right to counsel and speedy trial clauses in the Federal Constitution, meanwhile discerning what, if any, relationship exists between them. Part II raises some of the procedural issues that relate to the discussion, and Part III discusses the potential Sixth Amendment conflict the crisis may cause. Finally, Part IV proposes that the solution to the current indigent defender crisis may be found in mere adherence to holdings already handed down by the United States Supreme Court.

### II. BACKGROUND

#### A. ORIGIN OF THE RIGHT TO COUNSEL AND RIGHT TO A SPEEDY TRIAL

An indigent's right to counsel dates back to nineteenth-century England.<sup>2</sup> In Britain, indigent defendants accused of felonies other than treason were not afforded counsel until 1836.<sup>3</sup> While American jurisdictions initially followed the British rule, a shift toward the modern practice in the colonies began as far back as 1669,<sup>4</sup> when they began to employ government-employed prosecutors.<sup>5</sup> Because of their "familiarity with procedural niceties, the 'idiosyncrasies' of juries, and the personnel of the court,"<sup>6</sup> American prosecutors enjoyed a significant advantage over *pro se* defendants, prompting courts to appoint attorneys to indigent clients

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 3 (1992).

<sup>3</sup> *Id.*

<sup>4</sup> *Powell v. Alabama*, 287 U.S. 45, 64 (1932).

<sup>5</sup> GARCIA, *supra* note 2, at 4.

<sup>6</sup> *Id.* at 4.

because it was "essential to counter the prosecutor's advantage."<sup>7</sup> Thus, after the colonies declared their independence, most states included the right to assistance of counsel in their constitutions.<sup>8</sup>

Initially, the right to "Assistance of Counsel for his defense" did not necessarily mean the right of indigent defendants to obtain appointed counsel.<sup>9</sup> Rather, it meant that defendants, indigent or otherwise, had the right to secure counsel of their choice at their own expense.<sup>10</sup> Only after Supreme Court intervention did the right to assistance of counsel connote that indigent defendants possessed the right to request counsel be appointed on their behalf.<sup>11</sup> However, this was a gradual process that lasted nearly two centuries,<sup>12</sup> coming to a head with the Supreme Court's decision in *Gideon v. Wainwright* in 1963.<sup>13</sup>

Much older than the right to counsel is the right to a speedy trial, the exemplar of "a rich historical lineage,"<sup>14</sup> dating back to 1166 with the Assize of Clarendon.<sup>15</sup> From then through the eighteenth century,<sup>16</sup> "the defendant's right to speedy justice was deemed central to notions of fairness"<sup>17</sup> in both England and the colonies. For example, the Virginia Declaration of Rights of 1776 codified the right to a speedy trial following independence,<sup>18</sup> and several other states included such a provision in their state constitutions.<sup>19</sup> Accordingly, the framers adopted the speedy trial clause into the United States Constitution.<sup>20</sup>

While steeped in tradition, "the speedy trial clause receded into relative obscurity" in the new republic and was "overshadowed by other provisions of the Bill of Rights."<sup>21</sup> In fact, the United States Supreme Court first addressed the speedy trial right in 1905 in *Beavers v. Haubert*, where the defendant contended that a waiver of jurisdiction violated his right to a speedy trial.<sup>22</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 372 U.S. 335 (1963).

<sup>14</sup> GARCIA, *supra* note 2, at 159.

<sup>15</sup> ASSIZE OF CLARENDON § 4 (1166), available at <http://avalon.law.yale.edu/medieval/assizecl.asp> ("And when a robber or murderer or thief or the receivers of them be arrested through the aforesaid oath, if the justices are not to come quite soon into the county where the arrests have been made, let the sheriffs send word by some intelligent man to one of the nearer justices that such men have been taken; and the justices shall send back word to the sheriffs where they wish to have the men brought before them; and the sheriffs shall bring them before the justices; and also they shall bring with them from the hundred and the vill where the arrests have been made two lawful men to carry the record of the county and hundred as to why the men were arrested, and there before the justices let them make their law.").

<sup>16</sup> MAGNA CARTA para. 40 (1215), available at <http://avalon.law.yale.edu/medieval/magframe.asp> ("To no one will we sell, to no one we will refuse or delay, right or justice.").

<sup>17</sup> GARCIA, *supra* note 2, at 159.

<sup>18</sup> Va. Declaration of Rights § 8 (1776), available at [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp) ("That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a *speedy trial* by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.") (*emphasis added*).

<sup>19</sup> GARCIA, *supra* note 2, at 159.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 198 U.S. 77, 84-85 (1905).

The Court denied this contention and classified the right as "relative" and quantified,<sup>23</sup> thus creating "the impression that speedy justice was not as important as other procedural rights accorded criminal defendants through the Bill of Rights."<sup>24</sup> This led lower courts to hold that the right to a speedy trial was "a privilege rather than a right . . . subordinate to the broader aims of public justice."<sup>25</sup>

## B. RIGHT TO COUNSEL

In 1932, the United States Supreme Court held that the right to counsel was a fundamental right that falls within the purview of the due process clause of the Fourteenth Amendment, thereby extending the right to counsel clause of the Sixth Amendment to the states.<sup>26</sup> In *Powell v. Alabama*, three defendants were charged with raping two girls.<sup>27</sup> Unable to secure assistance of counsel, the defendants were tried, convicted, and sentenced to death.<sup>28</sup> After the Alabama Supreme Court denied the defendants' motion for a new trial, the United States Supreme Court granted a writ of certiorari to review whether the defendants were denied right of counsel.<sup>29</sup> Upon hearing the case, the Court reversed and remanded, finding that the right to counsel had in fact been denied.<sup>30</sup>

In reaching this conclusion, Justice Sutherland first addressed the issue of whether the right to counsel provision of the Sixth Amendment is extended to the states through the Due Process clause of the Fourteenth Amendment.<sup>31</sup> The outcome of this query hinged on whether the right to counsel numbered among the "fundamental rights" that are extended to the states via the Fourteenth Amendment.<sup>32</sup> The Supreme Court found that the right to counsel in capital cases was indeed a fundamental right by deducing that it is included in the notion of a hearing, and constitutes one of the "essential" ingredients "to the passing of an enforceable judgment."<sup>33</sup> After concluding that the right to counsel is part of the historical and practical notion of a hearing, the Court had little trouble connecting the dots and designating it a fundamental right.<sup>34</sup> Of course, the Supreme Court's holding on this matter was, at this time, limited to capital cases.<sup>35</sup>

Ten years later, the right to counsel suffered a substantial setback in *Betts v. Brady*, a case where the Court decided not to extend the assistance of counsel right when the defendant did not face capital punishment.<sup>36</sup> In *Betts*, the defendant was indicted for robbery and asked for appointment of counsel because he could not afford one.<sup>37</sup> The Maryland Circuit

<sup>23</sup> *Id.* at 87; GARCIA, *supra* note 2, at 159.

<sup>24</sup> GARCIA, *supra* note 2, at 159.

<sup>25</sup> Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 61 (1951).

<sup>26</sup> *Powell v. Alabama*, 287 U.S. 45, 71, 73 (1932).

<sup>27</sup> *Id.* at 49.

<sup>28</sup> *Id.* at 50.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 71, 73.

<sup>31</sup> *Id.* at 67-68.

<sup>32</sup> *Id.* at 68.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 73.

<sup>35</sup> *Id.* at 71.

<sup>36</sup> 316 U.S. 455, 473 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (rejecting the idea that due process of the law does *not* require that in every case, regardless of circumstances, an indigent accused must be furnished counsel by the state).

<sup>37</sup> *Id.* at 456-57.

Court Judge denied Betts's request, "as it was not the practice in [that county] to appoint counsel for indigent defendants save in prosecutions for rape and murder."<sup>38</sup> Betts was convicted after proceeding pro se (although without waiving his right to counsel) and unsuccessfully appealed the conviction, based on denial of the right to counsel, to various levels of the Maryland court system.<sup>39</sup> Upon granting certiorari, the United States Supreme Court affirmed the lower court's holding and denied extension of the right to counsel in non-capital situations.<sup>40</sup>

Justice Roberts, writing for the Court, came to his conclusion by adopting a narrow interpretation of *Powell*,<sup>41</sup> deferring to state legislatures on the scope of the right,<sup>42</sup> and ultimately concluding that the right to counsel is only a fundamental right in certain instances.<sup>43</sup> The Court, looking at the legislative history of the right to counsel in individual states, concluded that "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."<sup>44</sup> The Court agreed with the lower court's analysis that if the right to counsel applied to all criminal cases, then a defendant would be able to request counsel in all matters, no matter how trivial – a holding the Court was unwilling to make.<sup>45</sup> Based on this analysis, combined with the limited application of *Powell*, the Court did not extend the right to counsel provision of the Sixth Amendment to the states through the Due Process clause of the Fourteenth Amendment, save in capital cases.<sup>46</sup>

In dissent, Justice Black (with whom Justices Douglas and Murphy concurred) viewed the issue differently. Black did not believe that an attorney would have to be appointed in all cases, only those where the defendant was denied the procedural safeguards provided by the Sixth Amendment.<sup>47</sup> Black wrote, "If this case had come to us from a federal court, it is clear that we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government."<sup>48</sup> Justice Black went on to write that he believed the Sixth Amendment was made applicable to the states through the Fourteenth Amendment.<sup>49</sup>

To fulfill his prophecy, Justice Black reconsidered the right to counsel in 1963, with the United States Supreme Court's decision in *Gideon v. Wainwright*.<sup>50</sup> In that case, Justice Black held that the Sixth Amendment's Right to Counsel provision was, contrary to the holding in *Betts*, a fundamental right and, as such, should be extended to the states in all criminal matters, through the Due Process Clause of the Fourteenth Amendment.<sup>51</sup> In *Gideon*, the defendant was charged with breaking and entering with the intent to commit a misdemeanor – a felony under

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<sup>38</sup> *Id.* at 457.

<sup>39</sup> *Id.* See generally Mark C. Milton, Comment, Why Fools Choose to be Fools: A Look at What Compels Indigent Criminal Defendants to Choose Self-Representation, 54 St. Louis U. L.J. 385 (2009) (discussing several pitfalls of proceeding pro se).

<sup>40</sup> *Betts*, 316 U.S. at 457-58, 473.

<sup>41</sup> *Id.* at 473.

<sup>42</sup> *Id.* at 471-72.

<sup>43</sup> *Id.* at 473.

<sup>44</sup> *Id.* at 471.

<sup>45</sup> *Id.* at 473.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 474.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 372 U.S. 335 (1963).

<sup>51</sup> *Id.* at 344.



Florida law.<sup>52</sup> Unable to hire an attorney, the defendant requested that the court appoint one for him, but the court denied his request, as it was Florida's policy to appoint counsel only in capital cases.<sup>53</sup> After being tried without representation and convicted of the offense, the defendant appealed his conviction.<sup>54</sup> The Florida Supreme Court denied relief, but the United States Supreme Court granted certiorari, desiring "[t]o give this problem another review."<sup>55</sup>

Justice Black, writing for the Court, held that the right to counsel is a fundamental right that is applicable to the states through the Fourteenth Amendment.<sup>56</sup> The first premise that Black posited was an assumption from *Betts*: "that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."<sup>57</sup> Here, the Court departed from its holding in *Betts*, noting, "We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."<sup>58</sup> Black held that for the *Betts* court to pen such a holding was a "break with [the Court's] own well-considered precedents."<sup>59</sup> Interestingly, while the *Betts* Court relied on the states to support its position, only two states asked the Court in *Gideon* to leave *Betts* intact, while twenty-two states were in favor of overruling *Betts* as "an anachronism."<sup>60</sup>

### C. RIGHT TO A SPEEDY TRIAL

Just as the right to counsel proved a favorite of the Warren Court era, so too did the 1960s breathe new life into the speedy trial right. In *Klopfer v. North Carolina*, the United States Supreme Court confronted a defendant who had been indicted in February 1964 for criminal trespass after failing to leave a restaurant.<sup>61</sup> Klopfer was tried in March of the same year, but the jury failed to reach a verdict and the judge declared a mistrial, continuing the case for the term.<sup>62</sup> In April of the following year, the prosecutor informed Klopfer that he intended to enter an order of "nolle prosequi with leave" on his case.<sup>63</sup> Klopfer, through his attorney, opposed the entry of the order, but the court indicated that it would approve.<sup>64</sup> Despite this, the prosecutor did not make the nolle prosequi motion and instead filed a motion for continuance, which was granted.<sup>65</sup> In August 1965, Klopfer filed a motion expressing his desire to have the charges "permanently concluded . . . as soon as is reasonably possible" because his case was not on the trial calendar.<sup>66</sup> The trial judge considered the status of the case in the same month, and the prosecutor moved for another order of nolle prosequi with leave, which was granted despite

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<sup>52</sup> *Id.* at 336-37.

<sup>53</sup> *Id.* at 337.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 337-38.

<sup>56</sup> *Id.* at 342.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 344.

<sup>60</sup> *Id.* at 345.

<sup>61</sup> 386 U.S. 213, 216-17 (1967).

<sup>62</sup> *Id.* at 217-18.

<sup>63</sup> *Id.* This "unusual North Carolina criminal procedural device" discharges an accused from custody, but allows the prosecutor the discretion to reinstate proceedings against him at any time in the future. *Id.* at 214.

<sup>64</sup> *Id.* at 217.

<sup>65</sup> *Id.* at 218.

<sup>66</sup> *Id.*

Klopfers objections.<sup>67</sup> Klopfers appealed the matter to the North Carolina Supreme Court, contending that the entry of the nolle prosequi with leave deprived him of his speedy trial right.<sup>68</sup> The North Carolina Supreme Court noted that the order of nolle prosequi with leave did not "permanently discharge the indictment," but still affirmed the lower court's order.<sup>69</sup> The United States Supreme Court granted certiorari, ultimately holding that the right to a speedy trial was a fundamental right and, as such, did indeed extend to the states through the Due Process Clause of the Fourteenth Amendment.<sup>70</sup>

To reach this holding, Chief Justice Warren looked to the history of the right to a speedy trial.<sup>71</sup> After examining the history of the clause's inclusion in the Sixth Amendment, Warren wrote, "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution."<sup>72</sup> The Court also compared the speedy trial right to its other recent holdings regarding Sixth Amendment issues, observing that "cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."<sup>73</sup> By this reasoning, the Court had no problem in branding the speedy trial clause a fundamental right and extending it to the states through the Due Process Clause of the Fourteenth Amendment.<sup>74</sup>

In 1972, the United States Supreme Court developed a balancing test in *Barker v. Wingo* to be used when determining whether a defendant's speedy trial right had been violated.<sup>75</sup> In that case, the defendant had been arrested for murder but had not been brought to trial for more than five years after the arrest.<sup>76</sup> The prosecution's strategy was to try the defendant's accomplice first so the accomplice's testimony, if convicted, could be used at Barker's trial.<sup>77</sup> However, the accomplice suffered six trials before he was finally convicted.<sup>78</sup> Shortly thereafter, a jury convicted Barker after further delays due to a witness's illness.<sup>79</sup> Following the conviction, Barker appealed the decision to the Kentucky Court of Appeals, but without success.<sup>80</sup> He then appealed the matter to the United States District Court for the Western District of Kentucky and the Sixth Circuit Court of Appeals.<sup>81</sup> The Sixth Circuit held that Barker had waived his speedy trial right by failing to object to the continuances until three and a half years into the proceedings.<sup>82</sup> The United States Supreme Court then granted certiorari to review the standard for speedy trial

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 218-19.

<sup>70</sup> *Id.* at 214, 223.

<sup>71</sup> *Id.* at 223-26.

<sup>72</sup> *Id.* at 226.

<sup>73</sup> *Id.* at 222.

<sup>74</sup> *Id.* at 222-23, 226.

<sup>75</sup> 407 U.S. 514, 530 (1972).

<sup>76</sup> *Id.* at 515, 518.

<sup>77</sup> *Id.* at 516.

<sup>78</sup> *Id.* at 516-17.

<sup>79</sup> *Id.* at 517-18.

<sup>80</sup> *Id.* at 518.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

violation claims,<sup>83</sup> creating a four-factor balancing test<sup>84</sup> and holding that dismissal was the only available remedy when a speedy trial violation occurs.<sup>85</sup>

The ad hoc test the Court developed in *Barker* revolved around four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."<sup>86</sup> Justice Powell elaborated on each of the four factors.<sup>87</sup> The length of the delay must be presumptively prejudicial before an "inquiry into the other factors" is necessary, and must be relative to the severity of the crime and other circumstances of the particular case.<sup>88</sup> The reason-for-the-delay inquiry also considered what party caused the delay.<sup>89</sup> If the defendant caused the delay, then that weighed against the defendant, and vice-versa.<sup>90</sup> If the delay was caused by a non-party, such as over-crowded courts, then that would weigh against the government, but should not be given as much weight as an intentional delay.<sup>91</sup> The third factor, that of assertion of the right, was linked to the length of the delay, as the longer the delay, the more likely it will be that the defendant asserts the right.<sup>92</sup> Justice Powell noted that the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."<sup>93</sup> Regarding prejudice to the defendant, the court aimed to address three issues: oppressive pretrial incarceration, "anxiety and concern of the accused," and the possibility of impairment to the defense.<sup>94</sup> Justice Powell concluded his analysis by saying that the Court "regard[s] none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant,"<sup>95</sup> leaving the test somewhat nebulous.

One year later in *Strunk v. United States*, the Supreme Court further clarified its holding in *Barker* that dismissal was the only remedy available when a defendant's speedy trial right was violated.<sup>96</sup> In that case, Strunk had been convicted of transporting a stolen vehicle across state lines, garnering him a five-year prison sentence.<sup>97</sup> Strunk appealed his conviction, arguing that there had been a ten-month delay between arrest and arraignment, a clear violation of his right to a speedy trial.<sup>98</sup> The appellate court agreed, but held "that the 'extreme' remedy of dismissal of the charges was not warranted," remanding the case to the trial court to reduce the sentence by 259 days – the length of the delay.<sup>99</sup> Strunk appealed this decision to the United States Supreme Court, which granted certiorari to review the "propriety of the remedy fashioned

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<sup>83</sup> *Id.* at 515.

<sup>84</sup> *Id.* at 530.

<sup>85</sup> *Id.* at 522.

<sup>86</sup> *Id.* at 530.

<sup>87</sup> *Id.* at 530-33.

<sup>88</sup> *Id.* at 530-31.

<sup>89</sup> *Id.* at 531.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 532.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 533.

<sup>96</sup> 412 U.S. 434, 439-40 (1973).

<sup>97</sup> *Id.* at 434-35.

<sup>98</sup> See *id.* at 435-36.

<sup>99</sup> *Id.*

by the Court of Appeals"<sup>100</sup> and held that "dismissal must remain . . . 'the only possible remedy'" for deprivation of this constitutional right.<sup>101</sup>

In coming to this conclusion, Chief Justice Burger contrasted the speedy trial right with other Sixth Amendment guarantees.<sup>102</sup> Whereas a violation for a non-public trial, a partial jury, and the right to counsel can "ordinarily be cured by . . . a new trial,"<sup>103</sup> granting a new trial to someone whose speedy trial right is violated would defeat the purpose of asserting the speedy trial violation and add to the prejudice that the *Barker* test is supposed to avoid.<sup>104</sup> Furthermore, Chief Justice Burger noted that while dismissal of the charges due to a speedy trial violation is severe, "such severe remedies are not unique in the application of constitutional standards."<sup>105</sup>

In March 2009, the United States Supreme Court set the stage for future speedy trial claims in *Vermont v. Brillon* by holding that delays caused by assigned counsel could not be attributed to the state because such counsel were not, in fact, state actors.<sup>106</sup> There, the defendant was arrested for domestic assault and held without bail due to his "status as a habitual offender."<sup>107</sup> Though assigned a total of six attorneys – a combination of public defenders and contract attorneys – the defendant was ultimately convicted after three years.<sup>108</sup> On appeal, the Vermont Supreme Court reversed, concluding that the conviction (and charges) must be dismissed due to violation of Brillon's "Sixth Amendment right to a speedy trial."<sup>109</sup> In support of this decision, the Vermont Supreme Court "found that the three-year delay in bringing Brillon to trial was 'extreme' and weighed heavily in his favor,"<sup>110</sup> and that much of the delay was attributable to the public defenders' failure to "move his case forward," which also weighed against the state, based on the *Barker* Test.<sup>111</sup> The state appealed this decision, and the United States Supreme Court granted certiorari to review whether delays potentially caused by court appointed attorneys were attributable to the state.<sup>112</sup>

The Court, in an opinion penned by Justice Ginsburg, found that delays attributed to court-appointed counsel weighed against the defendant and not against the state.<sup>113</sup> This is because assigned counsel "act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent."<sup>114</sup> In dicta, Justice Ginsburg wrote that "the State may bear responsibility if there is 'a breakdown in the public defender system,'"<sup>115</sup> noting that the record did not demonstrate such a breakdown.<sup>116</sup> This is of particular import to the speedy trial/right to counsel discussion since delay stemming from the unavailability of a public defender to take on an indigent's case, coupled with severe financial stress, may very well constitute the type of breakdown to which Justice Ginsburg referred.

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<sup>100</sup> *Id.* at 437.

<sup>101</sup> *Id.* at 440 (quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972)).

<sup>102</sup> *Id.* at 438–39.

<sup>103</sup> *Id.* at 439.

<sup>104</sup> *See id.* at 438–39.

<sup>105</sup> *Id.* at 439.

<sup>106</sup> 129 S. Ct. 1283, 1287 (2009).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1287–89.

<sup>109</sup> *Id.* at 1289.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 1287.

<sup>113</sup> *Id.* at 1287, 1292.

<sup>114</sup> *Id.* at 1287.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

#### D. MERGING RIGHT TO COUNSEL AND SPEEDY TRIAL ISSUES

While speedy trial and right to counsel cases are relatively common, less frequent are cases that deal with both issues. However, an appellate court in Maryland did just that in *Howell v. State*, a case in which an indigent defendant attempted to invoke both his right to counsel and his right to a speedy trial.<sup>117</sup> Indicted for conspiracy to commit murder and second-degree murder, the defendant initially retained private counsel, but then stated that he wanted to be represented by a public defender.<sup>118</sup> The local public defender's office found the defendant to be eligible for its services, but refused to represent him unless he agreed to a continuance, which he refused.<sup>119</sup> After the court informed the defendant that the appointment of another public defender would require him to agree to a postponement, the defendant "expressly asserted that he wanted counsel to represent him, that he did not waive his right to counsel . . . and that he did not waive [his speedy trial right]." <sup>120</sup> The trial court then told the defendant that he could not exercise his right to counsel and his speedy trial right and "adamantly insisted that the accused make a choice between those two rights."<sup>121</sup> Indignant, the defendant refused, eventually winning an appeal on his right to counsel claim.<sup>122</sup>

The defendant in *Howell* succeeded in his appeal based on a right to counsel violation, and his case was remanded for a new trial.<sup>123</sup> The appellate court focused on the right to counsel claim, without really mentioning the defendant's concurrent insistence upon a speedy trial.<sup>124</sup> This is likely because the trial judge took the defendant's unwillingness to make a choice between the two rights as a waiver of the right to a speedy trial,<sup>125</sup> precluding the defendant from asserting a violation of that right on appeal. Had the defendant been able to preserve the speedy trial right for appeal, the appellate court, based on *Klopper v. North Carolina*, would have had no choice but to dismiss the charges. The defendant instead proceeded to trial *pro se*, preserving his right to counsel violation while forsaking his speedy trial right.<sup>126</sup> The question remains, of course, what will happen when both rights are appealable? Most likely, a court will focus on the right to counsel violation and remand for a new trial instead of making the unpopular decision to dismiss the case on speedy trial violation grounds.

#### E. THE PUBLIC DEFENDER SYSTEM IN MISSOURI

Following the United States Supreme Court's decision in *Gideon v. Wainwright*, indigent defendants in Missouri were represented by private attorneys who were appointed by the court and were unpaid.<sup>127</sup> In 1972, the Missouri legislature established a public defender commission, whereby a mixture of local public defenders and private, unpaid attorneys represented indigent defendants.<sup>128</sup> The Missouri General Assembly created the Office of State Public Defender in

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<sup>117</sup> 443 A.2d 103, 103, 104 (Md. 1982).

<sup>118</sup> *Id.* at 104-05.

<sup>119</sup> *Id.* at 105.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 107-08.

<sup>123</sup> *Id.* at 108.

<sup>124</sup> *Id.* at 104-08.

<sup>125</sup> *Id.* at 106.

<sup>126</sup> *Id.*

<sup>127</sup> *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. 2009).

<sup>128</sup> *Id.*

1982 in order to contract with local private attorneys in the defense of indigent defendants for a set fee.<sup>129</sup> In 1989, the current system was set in place when the public defender system was reorganized due to the rising cost of contracting counsel in indigent cases, thereby allowing the director of the public defender commission the authority to hire assistant public defenders and contract with private attorneys as needed.<sup>130</sup>

In January 2006, a Missouri Senate committee found that, although the public defender's office's caseload had risen by more than 12,000, it had not hired any more staff in the previous six years.<sup>131</sup> The number of felony convictions in Missouri has almost tripled during the last two decades,<sup>132</sup> and nearly eighty percent of those charged with felonies are represented by a public defender.<sup>133</sup> Missouri's population grew by 9.3 percent in the 1990s, while its prison population increased by 184 percent.<sup>134</sup>

On July 28, 2009, officials from the Missouri public defender system notified St. Louis County's Chief Judge and prosecutor that it had begun to take steps to refuse new criminal cases.<sup>135</sup> Counsel for the Missouri public defender's office stated that in June of the same year, their office was at 160 percent of its capacity.<sup>136</sup> A week before that notification, the public defender's office in Troy, Missouri, closed its doors to new cases through the end of the month.<sup>137</sup> The same happened at the public defender's office in Springfield, Missouri.<sup>138</sup> In Christian County, Missouri, the public defender's office attempted to refuse new cases, but the local judge did not allow it.<sup>139</sup> The office in Lincoln County, Missouri, threatened to turn away indigent defendants as well.<sup>140</sup>

The general reason cited for the overworked public defender system in Missouri is lack of funding.<sup>141</sup> In fact, according to the National Legal Aid and Defender Association,<sup>142</sup> Missouri's per capita spending on indigent defense ranks forty-ninth in the nation.<sup>143</sup> The Missouri public defender's office employs 570 people and was expected to receive around \$34 million in 2010.<sup>144</sup> An estimate from that office says that an additional 125 lawyers, 90 secretaries, 109 investigators, and 130 legal assistants are needed, as well as more space – plus an additional \$21 million per year to pay these individuals – to remedy the current situation.<sup>145</sup>

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<sup>129</sup> *Id.* at 876.

<sup>130</sup> *Id.*; Mo. Rev. Stat. § 600.021 (2006).

<sup>131</sup> *Pratte*, 298 S.W.3d at 877.

<sup>132</sup> *Id.* at 876-77.

<sup>133</sup> *Id.* at 877.

<sup>134</sup> *Id.*

<sup>135</sup> Heather Ratcliffe, *Public defenders threaten to refuse St. Louis County cases*, St. Louis Post-Dispatch (July 29, 2010), [http://www.stltoday.com/news/local/crime-and-courts/article\\_d97196ba-9930-58e4-91da-52c4d95bd46e.html](http://www.stltoday.com/news/local/crime-and-courts/article_d97196ba-9930-58e4-91da-52c4d95bd46e.html).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> The National Legal Aid Defender Association is a non-profit association devoted to ensuring the delivery of legal access to the poor. For more information, see [http://www.nlada.org/About/About\\_Home](http://www.nlada.org/About/About_Home) (last visited Oct. 4, 2011).

<sup>143</sup> Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. TIMES (Sept. 9, 2010), <http://www.nytimes.com/2010/09/10/us/10defenders.html>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

### III. PROCEDURAL ASPECTS RELATED TO THE DISCUSSION

#### A. WHEN DO THESE RIGHTS ATTACH?

Given the impending collapse of Missouri's public defender system, how are the rights to counsel and speedy trial implicated? The speedy trial right attaches at the time the defendant is either indicted or arrested.<sup>146</sup> Pre-arrest investigation does not trigger Sixth Amendment protections, although it may prejudice the defendant.<sup>147</sup> Similarly, the right to counsel attaches "at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" <sup>148</sup>

#### B. PROCEDURE OF CLOSING LOCAL PUBLIC DEFENDER OFFICES IN MISSOURI

Missouri's Public Defender system is divided into thirty-three district offices.<sup>149</sup> In December 2007, the Missouri Public Defender Commission enacted a rule setting forth protocol to follow when a particular office exceeded its caseload.<sup>150</sup> This rule provided that when a local public defender office was overburdened by its caseload, it could turn away certain types of indigent cases.<sup>151</sup> The Missouri Supreme Court, in a December 2009 decision, held that a public defender's office could not turn away certain types of cases.<sup>152</sup> Rather, the court held that "the rule authorizes the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard."<sup>153</sup> Every single office was over its capacity as of July 2009.<sup>154</sup>

#### C. THE CONTINUANCE PROBLEM

One of the main problems facing indigent defendants is that their appointed attorneys frequently ask for a continuance in order to have the trial at a later date.<sup>155</sup> A "continuance" is a pre-trial motion to "postpone or delay the start of a trial (or hearing) to a later time."<sup>156</sup> While their motives may be pure, a motion for continuance from the defense essentially results in the waiver of the defendant's speedy trial rights in that any delay caused by the defense will weigh against them, based on the *Barker* test.<sup>157</sup>

<sup>146</sup> United States v. Marion, 404 U.S. 307, 313 (1971).

<sup>147</sup> *Id.* at 321.

<sup>148</sup> Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). FED. R. CRIM. P. 44(a) provides: "A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right."

<sup>149</sup> Map of Missouri Public Defender's Office's Districts, [http://www.publicdefender.mo.gov/about/map\\_of\\_districts.htm](http://www.publicdefender.mo.gov/about/map_of_districts.htm) (last accessed Oct. 4, 2011).

<sup>150</sup> MO. CODE REGS. ANN. tit. 18, § 10-4.010 (2007), *repealed by State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 970 (Mo. 2009) (en banc).

<sup>151</sup> *Id.* § 10-4.010(2)(A).

<sup>152</sup> *Pratte*, 298 S.W.3d at 883.

<sup>153</sup> *Id.* at 887.

<sup>154</sup> *Id.* at 880.

<sup>155</sup> See JAMES A. ADAMS & DANIEL D. BLINKA, PRETRIAL MOTIONS IN CRIMINAL PROSECUTIONS 1085 (4th ed. 2008) (listing some of the various reasons why a defense attorney may move for a continuance).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1086.

Of course, as Justice Powell notes in *Barker*, a continuance is often used as a legal tactic to benefit the accused: "Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade."<sup>158</sup> Thus, there is a tension between the defense attorney requesting a continuance for purposes of establishing an adequate case and keeping the fundamental constitutional rights of the defendant available.

#### IV. POTENTIAL FOR SIXTH AMENDMENT VIOLATIONS IN LIGHT OF THE CURRENT INDIGENT "CRISIS"

Since the right to a speedy trial attaches upon arrest, all of the pre-trial procedure that occurs should weigh against the state, according the *Barker* test. Additionally, the right to counsel attaches when the accused is formally charged with a crime. Yet, if a defendant qualifies for the appointment of a public defender, and the public defender's office is closed due to overwork, theoretically there could be a substantial amount of time between the moment when the speedy trial clock starts ticking and the time that a public defender is appointed. This is where the potential conflict between the speedy trial and right to counsel provisions of the Sixth Amendment threatens to occur, posing the question, "What happens when two fundamental rights are seemingly at odds with each other?" Does one take precedence over the other, or should both rights carry equal weight, demanding that both are ensured?

#### V. POTENTIAL SOLUTIONS

Most would agree that the best solution to this matter is to put the criminal justice system in a position where the speedy trial right and the right to counsel would never conflict. The most elementary way to accomplish this would be to increase the funding of public defender offices that are overworked in order for them to hire more attorneys. Unfortunately, this plea will probably fall on deaf ears. Public defenders are funded by the state (at least in Missouri), and taxpayers fund the state. In recent years, taxpayers have not been willing to increase funding for indigent defense – which has led to the current crisis – and, especially in such grim economic times, it seems unlikely that taxpayers will suddenly have a change of heart.

Part of the problem lies in the strain between ensuring that constitutional rights are preserved but not wanting to help defendants who are likely guilty of crimes to have a competent defense. I would wager that most people would agree that constitutional rights should be vigorously enforced, yet at the same time would be reluctant to help potentially guilty (poor!) defendants. So, it is fair to say that increasing indigent defense funding will not happen without some form of intervention.

Since this is likely the case – that taxpayers will probably not increase indigent defense funding, thereby making a Sixth Amendment conflict all the more likely – perhaps a more drastic action would serve as the impetus to solve the public defender crisis. Rather than wait for rights-indifferent voters to come around, courts should hold fast to the holdings set forth in *Barker* and *Klopfert* – using the remedy of dismissal to free defendants whose rights are being trampled.

Considering that the speedy trial right attaches at arrest or indictment and that the right to counsel attaches shortly thereafter, courts should be more liberal in dismissing cases based on speedy trial violations. If indigent defendants who are likely guilty go free because there were not enough public defenders available to represent them, the tax-paying community might have a change of heart on the issue. Funding would be increased for indigent defender programs, and the potential Sixth Amendment conflict would be allayed.

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<sup>158</sup> See *Barker v. Wingo*, 407 U.S. 517, 521 (1972).



This solution is not, admittedly, without its flaws. First, defense attorneys must exercise much more discretion when moving for continuances because, in doing so, they seriously put at risk their client's fundamental right to a speedy trial. Admittedly, a continuance will be necessary under certain circumstances, but the current practice of routinely asking for a continuance must be eradicated.

The second flaw is that for courts to dismiss a case based on a speedy trial violation, the defendant must first assert that the right has been violated. Typically, the indigent defendant does not have the wherewithal to do so. Normally, their attorney would assert the right, but if the defendant had an attorney, their right to counsel would not be violated (and typically the attorney would ask for a continuance rather than try the case without at least a semblance of preparation, forfeiting the speedy trial right along with it). Thus, for this plan to be effective there must be a process by which the indigent defendant is made aware of how to assert the speedy trial right concurrently with the right to counsel, while proceeding *pro se*, without waiving the right to an attorney. It would require a non-counsel entity informing the indigent defendant of precisely what steps to take and when to take them.

Two potential solutions come to mind. First, law enforcement could give arrested or indicted individuals a pamphlet listing their fundamental rights under the criminal justice system. While it looks good on paper, considerations such as literacy and language barriers, not to mention financial limitations, would limit the pamphlet method. The other option would be simply to include mention of the speedy trial right in the *Miranda* warning. Of course, the purpose of the *Miranda* warning is to inform "a criminal suspect in police custody . . . of certain constitutional rights before [he is] interrogated."<sup>159</sup> Strictly speaking, therefore, information about the speedy trial clause is not an appropriate addition to the *Miranda* warning. However, because it would be as simple as including the phrase "you have the right to a speedy trial" before or after informing the arrestee that he has the right to an attorney (and because the *Miranda* warning is court-made law), then the rationale for opposing such an addition seems insubstantial. Furthermore, the speedy trial clock starts ticking at the moment of arrest or indictment, so a defendant should be made aware of all of his fundamental rights at the moment those rights become assertable.<sup>160</sup>

## VI. CONCLUSION

The cause of the indigent defendant is not a popular one. To the average citizen, the poor defendant is guilty upon arrest and deserves to go to jail. But, by depriving indigent defendants of their Sixth Amendment rights, taxpayers are inadvertently creating a criminal justice system that only serves the wealthy. Of course no one wants to help potential criminals roam free, but releasing defendants remains the only recourse for ensuring that constitutional rights remain intact, save hiring more defense attorneys. The American public cannot have it both ways. If the people are unwilling to move, the judiciary must step in. If not, what's to stop other fundamental rights from being disregarded as well?

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<sup>159</sup> BLACK'S LAW DICTIONARY 1087 (9th ed. 2009).

<sup>160</sup> If courts and/or lawmakers are unwilling to add a speedy trial clause to the *Miranda* requirements, then perhaps one could turn to Hollywood to effect change. It is likely that the average citizen is familiar with the *Miranda* warning not because of any formal learning or personal experience, but rather due to the fact that they saw it on television.

## CONFRONTING THE BACKDOOR ADMISSION OF TESTIMONIAL STATEMENTS AGAINST AN ACCUSED: THE DANGER OF EXPERT RELIANCE ON INADMISSIBLE INFORMATION

Sarah E. Stout\*

### I. INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>1</sup> In order to conform to the requirements of the Confrontation Clause prior to 2004, a prosecutor intending to offer a hearsay statement from an unavailable witness had to show that the statement either fell under a "firmly rooted hearsay exception" or that the statement bore "particularized guarantees of trustworthiness."<sup>2</sup> This changed, however, when, in *Crawford v. Washington*, the Supreme Court adopted an interpretation of a defendant's confrontation right based on its understanding and application of the Framers' intent at the adoption of the Sixth Amendment.<sup>3</sup> Under *Crawford*, the admission of a "testimonial" hearsay statement violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>4</sup> Although this seems relatively straightforward, the *Crawford* Court declined to provide an explicit definition of "testimonial" in its opinion.<sup>5</sup>

In the years following the *Crawford* decision, the Court has provided some illumination on the types of statements it considers "testimonial." However, the Court has continually declined to adopt an all-encompassing definition and, instead, it has determined whether a statement is testimonial hearsay on a case-by-case basis.<sup>6</sup> Because of this, the application of the Confrontation Clause doctrine by the lower federal courts has been unsystematic. In many cases, this has resulted in the use of judicial creativity to circumvent the confrontation requirement, in favor of greater judicial economy. Unfortunately for defendants, this has also resulted in a lack of judicial enforcement of proper confrontation protections.

The admission of expert testimony is one area where the lower courts have consistently struggled to apply the *Crawford* requirement. Specifically, under Federal Rule of Evidence 703, an expert may rely on inadmissible data in forming his or her opinion, if it is "of a type reasonably relied upon by experts in the particular field."<sup>7</sup> Prior to *Crawford*, the admission of this type of evidence was justified because the judicial system viewed these statements as sufficiently trustworthy, because other experts in the same field generally rely on the information.<sup>8</sup> Further, where an expert had been properly qualified under Rule 702, courts were comfortable assuming the expert would effectively evaluate the probative value of the hearsay statement in reaching

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>4</sup> *Id.* at 53-54.

<sup>5</sup> *Id.* at 68.

<sup>6</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813, 829 (2006).

<sup>7</sup> FED. R. EVID. 703.

<sup>8</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* 738 (3d. ed. 2009).

his or her opinion.<sup>9</sup> This type of evidence met the pro-admissibility, reliability confrontation standard set out in *Ohio v. Roberts*<sup>10</sup> but, as this paper will explore, is not a sufficient basis to justify admission without confrontation under the *Crawford* requirement.<sup>11</sup> The Court has been dealing with the issue of expert testimony since first deciding *Crawford*, through the decisions of *Melendez-Diaz v. Massachusetts*<sup>12</sup> and *Bullcoming v. New Mexico*,<sup>13</sup> and will continue to wrestle with the topic in the pending case *Williams v. Illinois*,<sup>14</sup> which was argued before the Court on December 6, 2011.

This paper will examine the interplay between the Confrontation Clause and Rule 703, and ultimately advocate for how the Court should rule in the pending *Williams* case to best preserve the confrontation right for defendants as established in *Crawford* and its progeny. Part II of this paper will provide a brief explanation of the problem that currently exists in reconciling the Confrontation Clause and Rule 703. Part III will provide the necessary background of the Confrontation Clause doctrine, beginning with *Crawford*. Part IV will discuss the history of Rule 703. Part V will detail the disconnect between the Confrontation Clause and Rule 703 by analyzing the current treatment of this issue in the lower federal courts. Part VI will explore and analyze the pending *Williams* case. Finally, Part VII will conclude the paper by looking at the stakes involved for defendants when courts fail to hold the government to the *Crawford* requirement, by exploring the importance of the judicial system properly protecting an accused's confrontation right at trial, and by opining on the appropriate route that the Court should follow in *Williams*.

## II. DESCRIPTION OF THE PROBLEM

Rule 703 allows experts to rely on inadmissible evidence if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."<sup>15</sup> If the prosecution offers this type of expert testimony against a defendant, the Confrontation Clause may be implicated if the defendant does not have the opportunity to cross-examine the declarant on the statements the expert uses as a basis for his or her opinion.<sup>16</sup> In general, courts have treated the possible confrontation issues implicated when an expert relies on or discloses testimonial hearsay statements at trial as inconsequential.<sup>17</sup> This leads many courts to largely ignore true analysis of the confrontation issue, even if the opinion acknowledges the underlying importance of the defendant's confrontation right.<sup>18</sup>

Professors Christopher Mueller and Laird Kirkpatrick suggest that one possible reason for the dismissive treatment of this issue in court opinions is quite simple, namely that many times the basis of the expert's testimony is not "testimonial" and therefore the Confrontation Clause is not implicated.<sup>19</sup> For example, imagine there is an expert on gang structure, whose testimony at trial relies on information gathered from interviews with former gang members over time. If the statements from the former gang members that form the basis of the expert's opinion were not

<sup>9</sup> DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* 190 (2d ed. 2011).

<sup>10</sup> *Roberts*, 448 U.S. at 66.

<sup>11</sup> *Crawford*, 541 U.S. at 60-63.

<sup>12</sup> 557 U.S. 305.

<sup>13</sup> 131 S. Ct. 2705 (2011).

<sup>14</sup> No. 10-8505 (U.S. argued Dec. 6, 2011).

<sup>15</sup> FED. R. EVID. 703.

<sup>16</sup> MUELLER & KIRKPATRICK, *supra* note 8, § 738.

<sup>17</sup> KAYE ET AL., *supra* note 9, § 190.

<sup>18</sup> MUELLER & KIRKPATRICK, *supra* note 8, § 739.

<sup>19</sup> *Id.*

specifically related to the current case on which the expert is opining, those statements would not be considered "testimonial" as they apply to the current defendant.<sup>20</sup> In contrast, if the gang expert relied on statements from a co-conspirator during police interrogation relating to the present case in forming his or her opinion, the statements would be testimonial, triggering confrontation protections for the defendant.<sup>21</sup>

As the previous example illustrates, in the arena of expert testimony, what statements the courts classify as testimonial becomes very important. Although experts are generally permitted to rely on inadmissible facts and data in reaching their expert opinions under Rule 703, experts should not be permitted to transmit or rely on testimonial statements that the defendant has not had the prior opportunity to cross-examine. It is important to note that this paper limits its evaluation of expert reliance on inadmissible data under Rule 703 to focus only on *testimonial* statements on which the expert relies. This paper does not attempt to argue that courts should no longer permit an expert witness to rely on other types of information or data that might nonetheless be inadmissible under other evidentiary rules, so long as that information and data are *nontestimonial*.

### III. THE CONFRONTATION REQUIREMENT

The Supreme Court shaped the modern interpretation of the Confrontation Clause in the 2004 decision *Crawford v. Washington*.<sup>22</sup> A jury convicted Michael Crawford of stabbing a man, who allegedly attempted to rape his wife, Sylvia Crawford.<sup>23</sup> At trial, the government introduced a recorded police statement from Mrs. Crawford regarding the incident, which was made during an interview at the police station.<sup>24</sup> She did not testify at trial, based on a marital privilege statute in the state of Washington.<sup>25</sup> On appeal, Crawford maintained that the admission of the recorded statement violated his rights under the Confrontation Clause, because he did not have the opportunity to cross-examine his wife's statements.<sup>26</sup>

Justice Scalia penned the majority opinion, and he openly admitted that "the Constitution's text does not alone resolve this case."<sup>27</sup> The opinion began with a lengthy historical discussion, which highlighted the fact that, under the common law, the admissibility of an unavailable witness's statement largely depended on whether the defendant in the case had the opportunity to cross-examine the witness.<sup>28</sup> This historical backdrop supported "two inferences about the meaning of the Sixth Amendment."<sup>29</sup> First, the Framers designed the Confrontation Clause to "eliminate the use of *ex parte* examinations against the accused."<sup>30</sup> Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."<sup>31</sup> This second inference became the analytical framework that currently shapes all Confrontation Clause cases.

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<sup>20</sup> KAYE ET AL., *supra* note 9, § 192.

<sup>21</sup> *Id.*

<sup>22</sup> 541 U.S. 36 (2004).

<sup>23</sup> *Id.* at 38.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 40.

<sup>26</sup> *Id.* at 38.

<sup>27</sup> *Id.* at 42.

<sup>28</sup> *Id.* at 45.

<sup>29</sup> *Id.* at 50.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 53-54.

Justice Scalia expanded on the second inference by stating that, according to the text of the Sixth Amendment, the Confrontation Clause applies to "'witnesses' against the accused – in other words, those who 'bear testimony.'"<sup>32</sup> "Testimony" was further defined as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>33</sup> The Court then explicitly included several types of statements as always being testimonial, such as "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."<sup>34</sup> The Court concluded that in the present case, the statement played for the jury was testimonial because police officers recorded Mrs. Crawford's statement in the course of an interrogation.<sup>35</sup>

Justice Scalia stressed that although the goal of the Confrontation Clause "is to ensure the reliability of evidence . . . it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing it in the crucible of cross-examination."<sup>36</sup> On one hand, if the statement at issue is nontestimonial hearsay, "it is wholly consistent with the Framers' design to afford the States flexibility" in determining the admissibility of the statement pursuant to regular hearsay rules.<sup>37</sup> However, there is no such flexibility when the out-of-court statement is testimonial because quite simply, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."<sup>38</sup>

The Court expanded the new interpretation of the Confrontation Clause in the combined 2006 cases of *Davis v. Washington* and *Hammon v. Indiana*, both of which involved domestic violence situations.<sup>39</sup> In *Davis*, the issue was whether the statements made in the course of a 911 call were testimonial.<sup>40</sup> Justice Scalia, writing for the majority, began by stating that there are differing types of police interrogations, distinguishable based on whether the declarant was telling the police "events as they were actually happening, [or] describing past events."<sup>41</sup> The Court concluded that it would not consider a 911 caller a witness providing testimony because the primary purpose of a 911 interrogation is to resolve a presently occurring emergency.<sup>42</sup>

In *Davis*'s companion case, *Hammon v. Indiana*, the issue was whether a victim's statements from a battery affidavit were admissible when the victim did not testify at trial.<sup>43</sup> The Court found this type of interrogation to be testimonial based largely on the status of the questioning as a part of an investigation into a possible crime.<sup>44</sup> Essentially, the Court held that police interrogations or questioning are "testimonial when the circumstances objectively indicate that there is no . . . emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>45</sup> Thus, the

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<sup>32</sup> *Id.* at 51 (citing WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 52.

<sup>36</sup> *Id.* at 61.

<sup>37</sup> *Id.* at 68.

<sup>38</sup> *Id.*

<sup>39</sup> *Davis v. Washington*, 547 U.S. 813, 818-19 (2006).

<sup>40</sup> *Id.* at 826.

<sup>41</sup> *Id.* at 827.

<sup>42</sup> *Id.* at 828.

<sup>43</sup> *Id.* at 820.

<sup>44</sup> *Id.* at 829.

<sup>45</sup> *Id.* at 822.

"primary-purpose" test was born as a primary means of determining what out-of-court statements are testimonial.

The Court once again examined whether to classify out-of-court statements as testimonial or nontestimonial for Confrontation Clause purposes in 2011, in *Michigan v. Bryant*.<sup>46</sup> In *Bryant*, the Court offered further insight into what types of out-of-court statements it deems to be testimonial.<sup>47</sup> Unfortunately, the majority opinion in many ways provides a less clear-cut analysis than was already in place under *Davis*. Justice Sotomayor authored the majority opinion, and for the first time in a confrontation case since *Crawford*, Justice Scalia filed a dissenting opinion.<sup>48</sup> In this case, the Court expanded on the principles set forth in *Davis*, holding that statements made to police officers by a mortally wounded shooting victim were admissible.<sup>49</sup> According to the majority, the statements, which identified the defendant as the shooter and described the location of the shooting, were not testimonial because the "primary purpose . . . [was] to enable police assistance to meet an ongoing emergency."<sup>50</sup>

In fact, the Court determined that "whether an emergency exists and is ongoing is a highly context-dependent inquiry" and includes consideration of the type of weapon used and the severity of the victim's injuries.<sup>51</sup> According to the Court, one of the primary rationales for admitting statements made to police officers in the course of an emergency is that the declarant is not likely to fabricate statements under such circumstances.<sup>52</sup> In fact, Justice Sotomayor writes that because "the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."<sup>53</sup> However, the Court is also careful to point out that whether there is an ongoing emergency is simply one factor to consider when determining the "primary purpose" of the interrogation.<sup>54</sup>

In a scathing dissent, Justice Scalia claimed the decision "distorts [the Court's] Confrontation Clause jurisprudence and leaves it in shambles."<sup>55</sup> Justice Scalia reinforced his previous understanding of the circumstances rendering an out-of-court statement testimonial and maintained, "the declarant must intend the statement to be a solemn declaration . . . and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused."<sup>56</sup> Justice Scalia argued that the Framers adopted the Confrontation Clause in order to prevent the admission of weaker, substitute evidence at trial in place of live testimony, and that the Court in this decision allowed exactly that.<sup>57</sup> Finally, Justice Scalia expressed his fears that the Court's decision would lead to a return to the pre-*Crawford* reliability standard for determining whether a statement is testimonial.<sup>58</sup> He strongly declared, "reliability tells [the Court] *nothing* about whether a statement is testimonial [because] testimonial and nontestimonial statements alike come in varying degrees of reliability."<sup>59</sup>

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<sup>46</sup> *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1168 (Scalia, J., dissenting).

<sup>49</sup> *Id.* at 1165, 1167.

<sup>50</sup> *Id.* at 1150 (citing *Davis*, 547 U.S. at 822).

<sup>51</sup> *Id.* at 1158-59.

<sup>52</sup> *Id.* at 1157 (citing *Davis*, 547 U.S. at 828-30; *Crawford*, 541 U.S. at 65).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1160.

<sup>55</sup> *Id.* at 1168 (Scalia, J. dissenting).

<sup>56</sup> *Id.* at 1168-69.

<sup>57</sup> *Id.* at 1171.

<sup>58</sup> *Id.* at 1175.

<sup>59</sup> *Id.*

The previous cases explain the steps that the Court has taken to define the contours of testimonial statements for confrontation purposes; the following cases delve into the issue that principally concerns this paper, namely the admission of testimonial statements through the use of an expert witness. In *Melendez-Diaz v. Massachusetts*, police arrested Luis Melendez-Diaz after discovering "a plastic bag containing 19 smaller plastic bags" on his person.<sup>60</sup> At trial, the government submitted into evidence "certificates of analysis" from the chemical testing of the substance, which stated that "the substance was found to contain: Cocaine," without in-court testimony from the analyst who conducted the tests.<sup>61</sup> Subsequently, a jury convicted Melendez-Diaz of distributing and trafficking cocaine.<sup>62</sup> On appeal, Melendez-Diaz maintained that his right to confrontation was violated when the certificates were admitted into evidence, as he had had no opportunity to confront and cross-examine the analyst who prepared them.<sup>63</sup>

The Court held that the "certificates" were plainly "affidavits" and therefore fell under the protection of the Confrontation Clause because affidavits are testimonial.<sup>64</sup> Not only did the analyst swear to the certificates before an "officer authorized to administer oaths,"<sup>65</sup> but the analyst created the certificates under conditions which would "lead an objective witness to reasonably believe that the statement would be available for later use at trial."<sup>66</sup> Justice Scalia's majority opinion explained that this was a straightforward application of the main principles laid out in *Crawford*.<sup>67</sup> In order for the testimonial hearsay statements from the certificates to be admitted, the analyst must be unavailable to testify at trial, and Melendez-Diaz must have the opportunity for prior cross-examination.<sup>68</sup>

Importantly, the majority opinion then disposes of the various legal arguments presented by the respondent and the dissenting opinion, three of which are particularly relevant to this paper. First, the dissent suggested there is no need for the defendant to confront a neutral "laboratory professional" whose scientific work is inherently reliable.<sup>69</sup> The majority scoffs at this statement because it suggests a return to pre-*Crawford* analysis where reliability alone was sufficient to protect the defendant's constitutional right to confrontation.<sup>70</sup> The Court thus reaffirms a major holding of *Crawford*, stating that the Confrontation Clause does not require any specific level of reliability for evidence, but rather "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>71</sup> Second, the dissent suggests the certificates should be admissible, without confrontation, under the business records exception to hearsay.<sup>72</sup> Justice Scalia again scolds the dissent, stating that the affidavits do not even qualify as business records.<sup>73</sup> However, even if they did, the certificates would still be subject to confrontation because the "regularly conducted business activity is the production of evidence for use at trial."<sup>74</sup> The declarant-analyst understood the prosecutorial intent behind the creation

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<sup>60</sup> 129 S. Ct. 2527, 2530 (2009).

<sup>61</sup> *Id.* at 2531.

<sup>62</sup> *Id.* at 2530-31.

<sup>63</sup> *Id.* at 2531.

<sup>64</sup> *Id.* at 2532.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (citing *Crawford*, 541 U.S. at 52).

<sup>67</sup> *Id.* at 2533.

<sup>68</sup> *Id.* at 2531.

<sup>69</sup> *Id.* at 2536.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting *Crawford*, 541 U.S. at 61).

<sup>72</sup> *Id.* at 2538.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

of the affidavits.<sup>75</sup> Finally, in addressing the respondent's concern that the criminal justice system could not accommodate the result of requiring confrontation for these types of affidavits, Justice Scalia asserted that "the Confrontation Clause may make the prosecution of criminals more burdensome, but . . . [it] is binding, and we may not disregard it at our convenience."<sup>76</sup>

Two years later, in June of 2011, the Court decided *Bullcoming v. New Mexico*, with Justice Ginsberg authoring the majority opinion.<sup>77</sup> Donald Bullcoming was arrested on charges of driving while intoxicated.<sup>78</sup> The main evidence against him was a "certificate of analyst" which stated that his blood alcohol content was above the legal limit at the time he was in an accident.<sup>79</sup> The certificate was completed and signed by Curtis Caylor, and the certificate required Caylor to affirm that "[t]he seal of th[e] sample was received intact . . . 'the statements in [the analyst's block of the report] are correct,' and that he 'followed the procedures set out on the reverse of th[e] report.'"<sup>80</sup> At Bullcoming's trial, the state did not call Caylor to testify because he had recently been placed on unpaid leave and was no longer working for the lab.<sup>81</sup> In his place, the state called another analyst, who had not observed Caylor's analysis, to admit the report as a business record.<sup>82</sup>

While Bullcoming's case was pending before the New Mexico Supreme Court, the United States Supreme Court decided *Melendez-Diaz*.<sup>83</sup> In light of that decision, the New Mexico Supreme Court held that the reports were in fact testimonial statements, but still refused to uphold Bullcoming's confrontation right.<sup>84</sup> The court explained several rationales for holding that the admission of the certificate did not violate the confrontation clause. First, the court held that Caylor was "a mere scrivener, who simply transcribed the results generated by the gas chromatograph machine."<sup>85</sup> Second, the court held that because Razatos, the testifying analyst, was a qualified expert witness, he "was available for cross-examination regarding . . . the operation of the machine, the results of [Bullcoming's] BAC test, and . . . established laboratory procedures."<sup>86</sup> Essentially, the court determined that Razatos was acceptable as a "surrogate witness" for Caylor, and because he was a qualified expert, Bullcoming's cross-examination would be meaningful and sufficient to protect his right to confront the witness against him.<sup>87</sup>

The majority opinion from the United States Supreme Court correctly treats *Bullcoming* as a straightforward extension of the *Melendez-Diaz* holding. First, the Court made clear that Caylor was certifying more than just the number from a machine and that the report he generated was clearly testimonial.<sup>88</sup> Further, the Court held that the reports at issue in this case resemble closely the ones from *Melendez-Diaz*, and that the formalities surrounding the creation of the blood analysis report were more than adequate to qualify the report as testimonial.<sup>89</sup> Therefore, based

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<sup>75</sup> *Id.* at 2539.

<sup>76</sup> *Id.* at 2540.

<sup>77</sup> *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

<sup>78</sup> *Id.* at 2709.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2710.

<sup>81</sup> *Id.* at 2711.

<sup>82</sup> *Id.* at 2712.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2713.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2715.

<sup>89</sup> *Id.* at 2717.



on *Crawford*, the actual analyst who completes the reports must appear at trial, regardless of any apparent underlying reliability of the report.<sup>90</sup>

Next, the Court rejected the notion that Razatos was permitted to testify as a "surrogate analyst."<sup>91</sup> Justice Ginsburg points out that it is clear that Razatos was not able to testify to "what Caylor knew or observed about his certification," and the surrogate testimony would not be effective at revealing any lies or lapses in Caylor's reporting.<sup>92</sup> The Court stresses that Razatos did not even know why Caylor had been placed on unpaid leave.<sup>93</sup> Justice Ginsburg then mentions that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by courts."<sup>94</sup> Importantly, she emphasizes that this is a more fundamental issue than if the state had asserted that Razatos had an "independent opinion regarding Bullcoming's BAC."<sup>95</sup>

Justice Sotomayor filed a separate opinion concurring in part with the majority. She wrote separately to explain that she would have held that the report was testimonial because its "primary purpose" was evidentiary, following in line with her *Bryant* opinion.<sup>96</sup> Interestingly, she also covered in her concurrence a set of circumstances in which the Court's opinion in *Bullcoming* would *not* apply.<sup>97</sup> Most importantly for this paper, she explained that this is not "a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."<sup>98</sup> This scenario is precisely the one raised in the most recent Confrontation Clause case to be heard by the Court, *Williams v. Illinois*, which will be discussed in detail in Part VI of this paper.<sup>99</sup>

Although this line of cases provides some insight into how the Court defines the contours of what are included as "testimonial" statements that require confrontation, the issue remains largely open for interpretation by the lower federal courts.

#### IV. THE HISTORY OF EXPERT OPINION TESTIMONY IN LIGHT OF FEDERAL RULE OF EVIDENCE 703

Under the common law, courts did not permit experts to rely on inadmissible evidence in reaching their conclusions and opinions.<sup>100</sup> However, Rule 703 has greatly expanded the types of information on which the courts permit an expert to rely in forming their expert opinion. Specifically, an expert may currently rely on inadmissible evidence in developing their expert opinion.<sup>101</sup> Scholars have defended Rule 703 on the basis that courts should be able to rely on "the reasonable judgment of the expert that the information source is sufficiently reliable to form the basis for an opinion."<sup>102</sup> Note that the main thrust of this argument is that the information is *reliable*.

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<sup>90</sup> *Id.* at 2715.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2716 (citing *Crawford*, 541 U.S. at 54).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2719-20 (Sotomayor, J., concurring in part).

<sup>97</sup> *Id.* at 2722.

<sup>98</sup> *Id.*

<sup>99</sup> *People v. Williams*, 238 Ill. 2d 125 (2010), *cert. granted*, *Williams v. Illinois*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

<sup>100</sup> KAYE ET AL., *supra* note 9, § 4.5.

<sup>101</sup> FED. R. EVID. 703.

<sup>102</sup> KAYE ET AL., *supra* note 9, § 4.6.

The passage of Rule 703 in 1975 presented a large expansion of what had been the current practices in many states to limit expert testimony. As the committee note to Rule 703 explained, part of the rationale for the rule was to bring "judicial practice into line with the practice of the experts themselves when not in court."<sup>103</sup> For example, a medical doctor would typically base his or her diagnosis of a patient on information from many different sources, including descriptions from the patient, statements from nurses, technicians and other doctors, and the patient's past medical records, to name a few.<sup>104</sup> The committee note explained that the large majority of these sources would be admissible into evidence, but "only with the expenditure of substantial time in producing and examining various authenticating witnesses."<sup>105</sup> Essentially, because the physician makes life-and-death decisions in reliance upon these types of statements, "[h]is validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."<sup>106</sup>

In 2000, Rule 703 was amended by the addition of a slight restriction in regards to the inadmissible data that an expert can rely on:

Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the expert's opinion substantially outweighs their prejudicial effect.<sup>107</sup>

The advisory committee note on the 2000 amendment explained this language was added to "emphasize that . . . the underlying information is not admissible simply because the opinion or inference is admitted."<sup>108</sup> In other words, inadmissible facts or data are to be considered by the jury only as a means to test the opinion of the expert, and not as substantive evidence.<sup>109</sup> The comment stressed that the amendment was not intended to prevent the expert from relying on inadmissible evidence in the first place and that the Rule is not intended to restrict an adverse party from presenting the underlying facts or data.<sup>110</sup> Further, the amendment was intended to "provide a presumption against disclosure to the jury of information used as the basis of an expert's opinion . . . when that information is offered by the proponent of the expert."<sup>111</sup> Under the current Rule 703, whenever the proponent of the expert testimony can establish that the "reasonably relied upon" test is satisfied, expert opinion testimony may be based on facts or data that "would be excluded under certain other provisions of the Evidence Rules."<sup>112</sup>

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<sup>103</sup> FED. R. EVID. 703 advisory committee's note.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Daniel W. Edwards, *The Man Behind the Curtain: Confronting Expert Testimony*, 1 U. DENV. CRIM. L. REV. 1, 9 (2011), available at <http://www.law.du.edu/documents/criminal-law-review/issues/v01-1/Edwards-Denv-U-Crim-L-Rev-Spring-2011.pdf>.

<sup>110</sup> FED. R. EVID. 703 advisory committee's note.

<sup>111</sup> *Id.*

<sup>112</sup> CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6273 (1st ed. 2011).

**V. THE CURRENT TREATMENT OF RULE 703 IN THE CIRCUIT COURTS FAILS TO MEET THE CONSTITUTIONAL REQUIREMENT OF CONFRONTATION**

As we have seen, *Crawford* and its progeny have significantly altered the analysis a trial court must complete in regards to the admission of statements that are testimonial hearsay. In the past seven years since the Supreme Court decided *Crawford*, the circuit courts have struggled in applying this new version of Confrontation Clause analysis to expert testimony, particularly to an expert's reliance on inadmissible testimonial hearsay statements under Rule 703. In fact, nearly all of the lower court opinions on point have included varying degrees of judicial gymnastics to avoid classifying the underlying information relied on by an expert as testimonial statements subject to the defendant's confrontation right.

The analytical frameworks employed by the circuit courts can be narrowed into three main types: (1) holding that Rule 703 allows an expert to side-step the confrontation issue based on policy concerns; (2) distinguishing the facts of the instant case from *Melendez-Diaz* by not admitting the underlying information on which the expert relied; and (3) finding that cross-examination of the expert suffices to safeguard the defendant's confrontation right because the expert has exercised his or her independent judgment on the information. In the following sections, each of these analytical frameworks will be explained through the use of an illustrating case, and then the circuit court method will be compared to what post-*Crawford* Confrontation Clause doctrine actually requires, in order to demonstrate the shortcomings of these approaches.

**A. RULE 703 ALLOWS AN EXPERT TO SIDE-STEP THE CONFRONTATION CLAUSE BASED ON POLICY CONCERNS**

In *United States v. Williams*, the defendant was charged with murder.<sup>113</sup> Williams objected to the government's introduction of the alleged victim's autopsy report, as well as the testimony regarding the autopsy report from a Dr. Tops at trial.<sup>114</sup> Although Dr. Tops did not complete the autopsy or the report, the government used his testimony to introduce the report into evidence.<sup>115</sup> Further, the government questioned Dr. Tops extensively on the details of the injuries listed on the report.<sup>116</sup> Dr. Tops ultimately opined as to how the injuries would have combined to lead to the death of the victim.<sup>117</sup> The doctor who actually conducted the autopsy, Dr. Ingwersen, was unavailable to testify at trial because she had retired.<sup>118</sup> The court stated in its opinion that the autopsy report "fit squarely within the definition of testimonial hearsay,"<sup>119</sup> as expressed in *Melendez-Diaz*, based primarily on the fact that the doctor who completed the autopsy, Dr. Ingwersen, was aware that the report would be available for later use at trial.<sup>120</sup> Further bolstering the conclusion that the autopsy report was testimonial, the court stated that the report was marked with the formal characteristics of a document that would be submitted at court in a criminal prosecution.<sup>121</sup> The court then explicitly commented that the report "contain[s] testimonial statements that may not be admitted into evidence unless the

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<sup>113</sup> 740 F. Supp. 2d 4 (D.D.C. 2010).

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 7.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

defendant has the opportunity to cross-examine Dr. Ingerwersen at trial, or has had that opportunity in the past."<sup>122</sup>

However, the *Williams* court went on to make a dramatic claim, asserting that "while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to the Federal Rule of Evidence 703."<sup>123</sup> The court concluded that so long as Dr. Tops had a sound basis for his conclusions, regardless of the fact that the basis included testimonial statements, his testimony would not violate the Confrontation Clause.<sup>124</sup> Although the *Williams* court provided very little explanation for its expansive holding, in *United States v. Johnson*, the Fourth Circuit provided some insight when it reached a similar conclusion.<sup>125</sup> There, the court justified this analytical framework based on policy concerns, stating that while "some of the information experts typically consider surely qualifies as testimonial under *Crawford* . . . . [W]ere we to push *Crawford* [too] far . . . we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases."<sup>126</sup>

This is in blatant contradiction to the stringent test applied in *Crawford* in regards to what the Confrontation Clause requires when a statement is testimonial. As Justice Scalia wrote in the *Melendez-Diaz* majority, "the Confrontation Clause is binding, and we may not disregard it at our convenience."<sup>127</sup> The only acceptable way for testimonial hearsay statements to be admitted is when the declarant is unavailable and the defendant had the prior opportunity to cross-examine him or her.<sup>128</sup> The Court explained in *Crawford* that the reasoning behind this requirement is to ensure the reliability of the statement in the *only* way that the Constitution deems sufficient: through confrontation.<sup>129</sup> Even in *Bryant*, the Court made efforts to define the declarant's statements regarding the shooter as nontestimonial in order to justify admission without meeting the requirements of the Confrontation Clause.<sup>130</sup> Therefore, even in a case that arguably stretches the outer boundaries of *Crawford*, the Court has been unwilling to admit un-confronted evidence that it has classified as testimonial. The policy concerns of a jury's access to expert testimony are not sufficient to overpower a right offered to protect an accused's liberty interest as guaranteed in the Constitution.

## B. NOT ALLOWING THE UNDERLYING INFORMATION ON WHICH THE EXPERT RELIED INTO EVIDENCE

In *United States v. Pablo*,<sup>131</sup> the Tenth Circuit considered an appeal arising out of the rape conviction of the defendant, who appealed the admission of both a DNA report and a serology report, each of which was prepared by a different lab analyst.<sup>132</sup> At trial, neither of the preparing lab analysts were called to testify, but the government nonetheless introduced the reports through a third lab analyst, who was qualified as an expert to testify as to their contents.<sup>133</sup> Pablo based his appeal on the then recent *Melendez-Diaz* holding that a forensic analyst's statements contained in an affidavit were testimonial statements, requiring

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<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 9 (quoting *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007)).

<sup>124</sup> *Id.* at 9-10.

<sup>125</sup> *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 2128 (2010).

<sup>126</sup> *Id.* at 635.

<sup>127</sup> 129 S. Ct. at 2540.

<sup>128</sup> *Id.* at 2531.

<sup>129</sup> *Crawford*, 541 U.S. at 68-69.

<sup>130</sup> *Bryant*, 131 S. Ct. at 1167.

<sup>131</sup> 625 F.3d 1285 (10th Cir. 2010), *petition for cert. filed* (U.S. Mar 31, 2011) (No. 09-2091).

<sup>132</sup> *Id.* at 1290.

<sup>133</sup> *Id.*

confrontation.<sup>134</sup> The government argued that Rule 703 permitted the expert to testify as to the content of the reports despite the holding of *Melendez-Diaz*.<sup>135</sup>

The *Pablo* court concluded that *Melendez-Diaz* was not necessarily dispositive in the instant case.<sup>136</sup> The court distinguished the facts because here, the government never attempted to move the actual reports into evidence, unlike in *Melendez-Diaz* where the affidavits were admitted.<sup>137</sup> The court goes on to state that "the degree to which an expert may merely rely upon . . . the out-of-court testimonial conclusions of another person not called as a witness is a nuanced legal issue without clearly established bright line parameters."<sup>138</sup> Importantly, the court did admit that the reports themselves contained testimonial statements.<sup>139</sup> Ultimately, the court held that because the reports themselves were never entered into evidence, the integrity of the Confrontation Clause was upheld.<sup>140</sup> In justifying this holding, the court explained that under Rule 703, an expert is permitted to rest his or her opinion on inadmissible facts or data, "which may at times include out-of-court testimonial statements."<sup>141</sup> In the court's estimation, the protections built into Rule 703 regarding the disclosure of the underlying inadmissible facts or data, including testimonial statements, ensure that such facts would never be admitted for substantive purposes, but rather only as a means for the jury to evaluate the expert's opinion.<sup>142</sup> Because of this limited purpose, the court concluded that "the admission of those testimonial statements under Rule 703 will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth."<sup>143</sup>

Again, this pattern of analysis is plainly at odds with post-*Crawford* Confrontation Clause doctrine, particularly in light of the policy concerns expressed by the Court in *Melendez-Diaz* and *Bullcoming*.<sup>144</sup> The reports, which the court readily admits were full of out-of-court testimonial statements, were the sole basis for the expert's ultimate opinion in the case.<sup>145</sup> Although the court attempted to distinguish *Pablo* from *Melendez-Diaz* because the government did not introduce the full report into evidence, the underlying reasoning of the Supreme Court in *Melendez-Diaz* is still applicable. In *Melendez-Diaz*, the Court stated, "confrontation is designed to weed out . . . the incompetent analyst."<sup>146</sup> However, in *Pablo* there was no way for the defendant to test the accuracy of the underlying reports, which constituted the sole basis for the expert's conclusions. There could have been countless errors in the completion of both the DNA and serology report, and there could have been additional errors in the recording of the results by the original analyst. None of these errors would be adequately exposed to the jury through the cross-examination of the testifying expert alone. In fact, *Bullcoming* would seem to be dispositive on the *Pablo* facts and prevent the introduction of any type of forensic laboratory report through the testimony of an analyst or expert witness who did not have at least some hand in completing the testing.<sup>147</sup> However, because the *Pablo* court rested the reasoning for

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<sup>134</sup> *Id.* at 1290-91.

<sup>135</sup> *Id.* at 1291.

<sup>136</sup> *Id.* at 1294-95.

<sup>137</sup> *Id.* at 1294.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1291.

<sup>140</sup> *Id.* at 1292.

<sup>141</sup> *Id.* (citing FED. R. EVID. 703).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Bullcoming*, 131 S. Ct. 2705; *Melendez-Diaz*, 129 S. Ct. at 2537.

<sup>145</sup> *Pablo*, 625 F.3d at 1291.

<sup>146</sup> *Melendez-Diaz*, 129 S. Ct. at 2537.

<sup>147</sup> *Bullcoming*, 131 S. Ct. at 2710.

the admission of the testimony squarely on Rule 703's shoulders, it could still fall into the gray area that Justice Sotomayor discusses in her concurrence to *Bulcoming*.<sup>148</sup> This is precisely the issue that the Court will resolve in *Williams v. Illinois*.

Whenever an expert relies on testimonial sources in forming his or her opinion, it is logical to conclude that the expert accepts the truth of the out-of-court statements.<sup>149</sup> In fact, the jury may even view the testimony as a "validation, expertly performed," of the out-of-court, testimonial statements.<sup>150</sup> It is unlikely that in forming his or her opinion, the expert is relying on the falsity of the testimonial statements or on the mere fact that they exist.<sup>151</sup> Therefore, the jury will likely also accept the underlying data or facts as true, even if they do not consciously realize that they are doing so.<sup>152</sup> This is especially true since the testimonial statements, although undisclosed, have been "validated" by an expert in the field, who is presumably knowledgeable about what source materials are reliable.<sup>153</sup> This demonstrates that the protections of Rule 703, while perhaps acceptable in regards to nontestimonial information, are not sufficient to safeguard a defendant's confrontation right when testimonial statements are at issue.

### C. CROSS-EXAMINATION OF THE EXPERT IS SUFFICIENT BECAUSE THE EXPERT HAS EXERCISED HIS OR HER INDEPENDENT JUDGMENT ON THE INFORMATION

The most common analytical framework employed by the circuit courts is demonstrated in the case of *United States v. Ayala*.<sup>154</sup> A jury convicted the defendant, a member of the violent street gang La Mara Salvatrucha ("MS-13"), of conspiracy to commit murder, conspiracy to participate in racketeering activities, and carrying a firearm in relation to a crime of violence.<sup>155</sup> A combined federal and state task force arrested the defendant at the close of an investigation that was "aided substantially by an informant . . . Noe Cruz."<sup>156</sup> Cruz was a member of the MS-13 clique led by Ayala, the defendant.<sup>157</sup> At the trial, the government called three experts who testified on the history and structure of the MS-13 gang.<sup>158</sup> Each of these experts based their opinions on interviews with former gang members, gang member families, and victims of the gang, as well as the information gained in the current investigation.<sup>159</sup>

The *Ayala* court created a test to use when applying *Crawford* to expert testimony, namely "whether the expert is, in essence, giving an independent judgment, or merely acting as a transmitter of testimonial hearsay."<sup>160</sup> Several circuit courts have adopted this standard since this decision.<sup>161</sup> The court opined that so long as the expert reached an independent conclusion in the case, it is immaterial whether the expert relied on inadmissible, testimonial statements.<sup>162</sup>

<sup>148</sup> *Id.* at 2721-23; *Pablo*, 625 F.3d at 1292.

<sup>149</sup> John C. O'Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501, 528 (2010).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 262 (2010).

<sup>155</sup> *Id.* at 261, 264.

<sup>156</sup> *Id.* at 261.

<sup>157</sup> *Id.* at 261-62.

<sup>158</sup> *Id.* at 274.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 275.

<sup>161</sup> See, e.g., *United States v. Turcios-Lazo*, 378 Fed. Appx. 341, 342 (4th Cir. 2010); *United States v. Turner*, 591 F.3d 928, 932-33 (7th Cir. 2010); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009).

<sup>162</sup> *Ayala*, 601 F.3d at 275.

The rationale behind this analytical structure is that the defendant's cross-examination of the expert on the stand regarding the expert's independent conclusion is sufficient to safeguard the defendant's confrontation right.<sup>163</sup> If the expert's opinion is the result of the reliance on several pieces of information and the expert had to exercise a degree of interpretation and independent decision-making, the expert reliance is permissible, even if some of the underlying basis of the opinion might be uncontroverted testimonial statements.<sup>164</sup>

However, once again, this strategy from the circuit courts fails to meet the high standards required under current Confrontation Clause doctrine. The primary purpose of the Confrontation Clause is to allow the defendant the opportunity to actually *be confronted* with each witness against him and to test the witness's testimony through the "crucible of cross-examination."<sup>165</sup> Testing the expert's ultimate conclusion in cross-examination can do nothing to satisfy the defendant as to the reliability of the underlying information on which the expert bases his or her opinion. Cross-examination of the expert on whether the information is reliable will not be effective as the expert is already required, under Rule 703, to find the information reliable, or at least to be of the type "reasonably relied upon" in his or her field.<sup>166</sup>

The shortcomings of this approach are further illuminated when considering that "even if the underlying report is rich in detail, there are ways in which the testifying expert must assume its accuracy in reaching his own decisions."<sup>167</sup> If the report transmits anything other than raw data, such as interpretations of that data, and the testifying expert accepts these interpretations as true, he is accepting and partially transmitting testimonial statements and information from the report.<sup>168</sup> However, there is an inherent difficulty in this approach which is not present in the other analytical structures. Namely, it is possible that some of the underlying information on which the expert relies in these types of cases is appropriate. For example, in *Ayala*, the experts relied both on information and data acceptable under the Confrontation Clause and on information that would be barred by the Confrontation Clause.<sup>169</sup> The information the experts gained in previous interviews, not specifically related to Ayala's activities in the gang, likely are permissible sources for the expert to rely on. However, it is equally likely that the information gained from Cruz was testimonial and directly implicated Ayala. Although it would be difficult for a court to ferret out what types of information are acceptable for the expert to rely on, and therefore the extent of the conclusions the expert can make, courts must engage in this type of analysis. This is what the Constitution requires, and courts may not dispose of it in the interest of judicial efficiency.

## VI. WILLIAMS V. ILLINOIS

On December 6, 2011, the United States Supreme Court heard oral arguments in *Williams v. Illinois*, which may prove to be the culmination of the Confrontation Clause's battle with expert testimony.<sup>170</sup> After a bench trial, Sandy Williams was convicted of two counts of aggravated sexual assault, aggravated kidnapping, and aggravated robbery.<sup>171</sup> Dr. Nancy Schubert took vaginal swabs from the victim immediately after the assault, which were sent to the Illinois State Police ("ISP") Crime Lab for testing.<sup>172</sup> ISP tested the swabs, which tested positive for semen.<sup>173</sup>

<sup>163</sup> KAYE ET AL., *supra* note 9, § 201.

<sup>164</sup> *Id.*

<sup>165</sup> *Crawford*, 541 U.S. at 61.

<sup>166</sup> FED. R. EVID. 703.

<sup>167</sup> KAYE ET AL., *supra* note 9, § 203.

<sup>168</sup> *Id.*

<sup>169</sup> *Ayala*, 601 F.3d at 274-75.

<sup>170</sup> 131 S. Ct. 3090 (2011).

<sup>171</sup> *People v. Williams*, 238 Ill. 2d 125, 128 (2010).

<sup>172</sup> *Id.* at 129.

The defendant was given a blood test several months later when he was picked up on an unrelated incident.<sup>174</sup> The DNA analysis of his blood sample was completed by a forensic scientist, Karen Kooi, who made a DNA profile at the ISP Crime Lab.<sup>175</sup> Meanwhile, the vaginal swab from the victim in the sexual assault case was sent to an out-of-state lab, Cellmark, for DNA analysis on the semen.<sup>176</sup> The two profiles were determined to be a match, and Williams was arrested.<sup>177</sup>

At trial, Sandra Lambatos was qualified as an expert in "forensic biology and forensic DNA analysis."<sup>178</sup> Among other things, she testified that the two DNA profiles were a match and that Cellmark, as an accredited laboratory, was required "to meet certain guidelines to perform DNA analysis."<sup>179</sup> She further testified that those guidelines and controls would have been in place for the defendant's particular sample.<sup>180</sup> The trial court judge stated "the DNA expert that testified, was in my view the best DNA witness I have ever heard . . . she was an outstanding witness in every respect."<sup>181</sup> The Illinois Supreme Court held that the issues surrounding her reliance on the Cellmark report went to the weight of her testimony and not its admissibility.<sup>182</sup> This was both because Lambatos used her own expertise to evaluate the two DNA profiles and because the court determined that the burden is on the adverse party to elicit the facts underlying the expert opinion on cross-examination.<sup>183</sup>

The court then addressed whether the Confrontation Clause was implicated in the case. The court asserted that the Confrontation Clause is only implicated if the testimonial statements are offered for the truth of the matter asserted.<sup>184</sup> The state maintained that the only statements offered for the truth of the matter asserted were the opinions of the expert witness.<sup>185</sup> The testimony about the Cellmark tests was offered for the sole purpose of explaining how she developed her own independent opinion, not for its truth.<sup>186</sup> The court then explained that it has "long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence . . ."<sup>187</sup> The evidence offered against Williams was the testimony of the expert and not the report.<sup>188</sup> Finally, the court explained how *Melendez-Diaz* did not alter its determination of the issue.<sup>189</sup> In *Melendez-Diaz*, the evidence at issue was a "bare-bones statement" that the substance was cocaine.<sup>190</sup> The court went on to explain that Lambatos used her own expertise to interpret the raw DNA data,

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<sup>173</sup> *Id.* at 130.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 271.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 271-72.

<sup>181</sup> *Id.* at 276.

<sup>182</sup> *Id.* at 277.

<sup>183</sup> *Id.* at 276.

<sup>184</sup> *Id.* at 277.

<sup>185</sup> *Id.* at 278.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 279.

<sup>189</sup> *Id.* at 281.

<sup>190</sup> *Id.*



and that the evidence at issue here was merely used to inform her opinion.<sup>191</sup> Therefore, there was no Confrontation Clause violation.<sup>192</sup>

The *Williams* case falls squarely within the second approach from the lower federal courts. It is nonsensical to believe that Lambatos did not accept the truth of the DNA reports as she was examining them. Saying that the reports are not offered for their truth would make them entirely irrelevant because if they were not a "true" representation, she would not be making a true match of the DNA. As mentioned earlier, there is a distinct risk that the judge or jury may even view the testimony as a "validation, expertly performed," of the out-of-court, testimonial statements.<sup>193</sup> In this case in particular, the trial court judge, who was serving as the trier of fact, commented that Lambatos was the best witness he had ever seen discussing DNA.<sup>194</sup> It is naïve to think that this would not affect his decision at least to some degree. It is very likely that an untrained jury, faced with such a prepared and practiced witness, would accept her underlying data for the truth of the matter asserted. Moreover, if they did not, her entire testimony would be unfounded.

## VII. CONCLUSION

The spirit of the Confrontation Clause as interpreted in *Crawford*, *Melendez-Diaz*, and *Bullcoming* would be "better protected through the testimony of the expert who wrote the report rather than a surrogate . . . ."<sup>195</sup> This applies equally to an expert who relies on the testimonial statements of others. The Federal Rules' departure from the common law in allowing an expert to rely on inadmissible facts, data, and statements is contrary to the Framers' intent at the adoption of the Confrontation Clause.<sup>196</sup>

In *Derr v. State*, the Maryland Court of Appeals was faced with an issue very similar to that presented in *Williams*.<sup>197</sup> In *Derr*, the defendant was convicted of several sexual offenses.<sup>198</sup> Physical evidence from the victim was taken to an FBI crime lab for serological testing by a lab technician, who created a serology report.<sup>199</sup> The case was not solved, and seventeen years later the physical evidence was submitted to the FBI lab again and an FBI analyst created a DNA report, which was entered into the Combined DNA Identification System ("CODIS") and led to *Derr*.<sup>200</sup> Dr. Jennifer Luttman was involved in supervising a group of biologists who re-tested a sample of *Derr*'s blood, but she was not involved in the serological testing or the actual DNA testing that led to the match.<sup>201</sup> Predictably, the state attempted to admit all of the forensic data through the "surrogate testimony" of Dr. Luttman.<sup>202</sup> At trial, she was permitted to testify to procedures used to create a serology report, a DNA profile, the testing procedures of both the

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<sup>191</sup> *Id.* at 281-82.

<sup>192</sup> *Id.* at 282.

<sup>193</sup> O'Brien, *supra* note 149, at 528.

<sup>194</sup> *Williams*, 939 N.E.2d at 276.

<sup>195</sup> KAYE ET AL., *supra* note 9, § 203.

<sup>196</sup> Ross Andrew Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1540 (2004).

<sup>197</sup> *Derr v. State*, 29 A.3d 533, 537 (Md. 2011); *Williams*, 939 N.E.2d at 270.

<sup>198</sup> *Derr*, 29 A.3d at 536.

<sup>199</sup> *Id.* at 537.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 538.

<sup>202</sup> *Id.*

serology report and the first DNA test, and her ultimate opinion that Derr's DNA profile matched the suspect.<sup>203</sup>

On review, the Court of Appeals held that DNA profiling is essentially a statement that the DNA being tested is the DNA of a particular person, and if that profile is used to match a person to a crime in CODIS, then the analyst who created it must appear to be cross-examined.<sup>204</sup> Further, the court directly addressed the interplay of Maryland Rule of Evidence 703, stating that "to the extent that Md. Rule 703 offends the Confrontation Clause, such testimony will not be admissible."<sup>205</sup> The court continued, asserting that "if the inadmissible evidence sought to be introduced is comprised of the conclusions of other analysts, then the Confrontation Clause prohibits the admission of such testimonial statements through the testimony of an expert who did not observe or participate in the testing."<sup>206</sup> This case is demonstrative of how the Court in *Williams* should rule, in order to protect defendant's confrontation right and stay true to the line of cases following *Crawford*.

The cost to defendants when courts allow experts to rely on testimonial statements is great. Under current circuit court approaches to Rule 703, the defendant is free to test the basis of the expert's opinion through cross-examination, but if he does, he will be unable to object to the disclosure of the statements to the jury.<sup>207</sup> The alternative is to leave the basis of the expert's opinion entirely unexamined.<sup>208</sup> Defendants are therefore left in a precarious position, and an undue burden is being placed on the exercise of an accused's constitutional guarantee. Defendants are forced into the position of deciding if it is a better tactical decision to risk disclosure of the expert's underlying information to uncover any possible Confrontation violation or, on the other hand, if it is better to keep that information from the jury for fear that the jury will misapply the information as substantive proof. Thus, the criminal defendant is placed in a no-win position, forced to choose between Constitutional guarantees and trial strategy.

In order to safeguard a defendant's Constitutional right to confront *all* witnesses against him or her at trial, the Supreme Court should follow the lead of the Maryland Court of Appeals in *Derr*. The Supreme Court must uphold Constitutional guarantees for criminal defendants, regardless of the difficulties they may entail. The reason for this is simple, and no one has said it better than Justice Scalia: "the Confrontation Clause . . . is binding, and we may not disregard it at our convenience."<sup>209</sup>

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<sup>203</sup> *Id.* at 539.

<sup>204</sup> *Id.* at 549.

<sup>205</sup> *Id.* at 553.

<sup>206</sup> *Id.*

<sup>207</sup> Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 829 (2008).

<sup>208</sup> *Id.*

<sup>209</sup> *Melendez-Diaz*, 129 S. Ct. at 2540.