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GANG POLICING: THE POST STOP-AND-FRISK JUSTIFICATION FOR PROFILE-BASED POLICING

*K. Babe Howell**

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INTRODUCTION

The New York City Police Department (NYPD) is about to follow a number of other urban police departments down the well-worn path of gang policing. It does not take this path because New York City has a significant gang problem. Gangs ranked last and second-to-last among the causes of murder in the two years since the NYPD added the category of “gangs” as a cause of murder to its annual reports.¹ Nor do gang-motivated crimes account for even one percent of the crimes that take place in New York City each year.² Indeed, having recently transferred 300 new officers to the Gang Division,³ the NYPD has more new police officers in the Gang Division than the 264 gang-motivated crimes⁴ the NYPD identified in the 2013 fiscal year.⁵ With over six hundred police officers dedicated to “Operation Crew Cut,” announced in October 2012, the NYPD has quadrupled its gang division at a time when shootings and homicides are lower than at any time in the four decades since crime statistics have been maintained.⁶

Why would the NYPD commit more officers to gang policing than there are gang-motivated crimes in New York City? Why would it quadruple its gang division in two years during which violent crimes have reached the lowest level in recorded history?

The answer to these questions is that the class action challenging the NYPD’s use of stop-and-frisk⁷ threatened to foreclose the NYPD’s ability to monitor youth of color in the absence of crime based on appearance and geography. After years of stopping suspicious people in high-crime areas, the NYPD is addicted to profile-based policing. Since 2001, the NYPD has adopted a surveillance-based policing model in which the millions of fruitless stops were a concern only because of the political and legal pressure they created, not because of the violation of rights guaranteed by the Fourth and Fourteenth Amendments. For the NYPD to relinquish the intensive policing of these suspect populations is unthinkable. The NYPD is driven by crime statistics and believes that aggressively policing a particular suspect class, which happens to be defined by race and class, is the reason for crime decline. It does not matter that the crime decline began before stop-and-frisk became the pervasive tactic it is today.⁸ Nor is this belief undermined by the fact that crime has declined in cities across the country and around the

¹ NYPD, *Murder in New York City*, NYC.GOV, 3 (2011) [hereinafter N.Y.C. Murders 2011], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_murder_in_nyc.pdf; NYPD, *Murder in New York City*, NYC.GOV, 3 (2012) [hereinafter N.Y.C. Murders 2012], http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf. The other categories are Dispute/Revenge, Drug, Domestic, Robbery/Burglary, Unknown and Other.

² NYPD, *GangStat Reports (2005–12)* [hereinafter *GangStat Reports*] (on file with the author). The *GangStat* reports were provided to the author in response to a Freedom of Information Law request by NYPD Legal after three years and a law suit.

³ Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to Focus on Youth Gangs*, N.Y. TIMES, Sept. 18, 2013, at A1.

⁴ See *infra* notes 38–39 and accompanying text for NYPD definitions of gang motivated and gang related incidents.

⁵ N.Y.C., MAYOR’S MANAGEMENT REPORT 4 (2013), available at http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/2013_mmr.pdf.

⁶ N.Y.C., *Mayor Bloomberg and Police Commissioner Kelly Announce 2013 Saw the Fewest Murders and Fewest Shootings in Recorded City History at NYPD Graduation Ceremony*, OFF. MAYOR: NEWS (Dec. 27, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/436-13/mayor-bloomberg-police-commissioner-kelly-2013-saw-fewest-murders-fewest/#/0>.

⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁸ FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 7-14 (2012)(showing New York City crime drops beginning in 1990); Eric P. Baumer & Kevin T. Wolff, *Evaluating Contemporary Crime Drop(s) in America, New York City and Many Other Places*, 2012 *Just. Quarterly* 1, 4-7 (2012)(demonstrating that for some crimes that the crime drop began prior to 1990).

world regardless of policing strategies.⁹

Like any organization that enjoys success utilizing a particular strategy, the NYPD has enjoyed success in the form of declining crime during the last two decades while policing minor crimes and makings millions of stops. To change strategies is unthinkable. Thus, the NYPD's challenge in the face of loss of legal and political support for stop-and-frisk policing is to create a new avenue for intensive surveillance of young men of color in a manner that avoids legal review or political opposition.

This explains the NYPD's "new" focus on gang policing despite the fact that gang crime in New York is low. As it became clear that the NYPD was losing the battle to defend stop-and-frisk in the courtroom, the media, and the political arena, the NYPD issued dire warnings about the dangers of gangs and began trumpeting the success of "Operation Crew Cut."

Who is not afraid of gangs? Or of gang violence? Who could object to policing focused on gang members? To date, no one has objected and the most important critics of the misuse of stop-and-frisk policing – Mayor de Blasio, Police Commissioner Bratton, and key city politicians such as Councilmember Jumaane Williams, have praised the shift from overuse of stop-and-frisk to gang policing.¹⁰

The gang narrative, however, is essentially the same as the narrative used to justify both the overuse of stop-and-frisk itself and the racial disparities that flowed from stop-and-frisk. Rather than requiring actual criminality, each narrative turns on two core concepts – place and person. Stop-and-frisk, according to the NYPD, was not directed at youth of color but at high-crime places and suspicious people.¹¹ Indeed, according to the NYPD it protected the innocent people in these high-crime areas from the criminal suspect. However, during the *Floyd* trial (a class action challenging the use of stop-and-frisk on Fourth Amendment and Equal Protection grounds), the empirical analysis of crime-rates by census track showed that the NYPD carried out more stops in black and Latino neighborhoods, whether crime levels were high or low.¹² Within these "high-crime" areas the NYPD focused on persons engaged in what they deemed to be suspicious conduct even though 94% of these suspicious people were not arrested after being stopped.¹³ The interplay of cognitive biases about place and appearance provided profiles that, to the police at least, obscured the lack of individualized suspicion and the racial disparities.¹⁴

⁹ ZIMRING *supra* note 8 at 15-18 (comparing New York City to other major U.S. cities); Baumer & Wolff *supra* note 8 at 19-25 (placing New York City crime drop in national and global context).

¹⁰ Stephon Johnson, *Stop-and-Frisk Makes Way for Operation Crew Cut*, N.Y. AMSTERDAM NEWS (Sept. 26, 2013, 11:32 AM), <http://amsterdamnews.com/news/2013/sep/26/stop-and-frisk-makes-way-operation-crew-cut/>.

¹¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 603-05 (S.D.N.Y. 2013).

¹² *Id.* at 560.

¹³ *Id.* at 660. Moreover, the New York State Attorney General's review of arrests resulting from stop-and-frisk revealed that nearly half of these arrests did not result in conviction. ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 3 (2013), *available at* http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SF_-_PRACTICES_NOV_2013.pdf. Further, about one in six of these arrests were never even arraigned after being either voided by the NYPD itself or declined by the prosecution. *Id.*

¹⁴ See, e.g., L. Song Richardson, *Cognitive Bias, Policing Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); James B. Comey, Dir., FBI, *Hard Truths: Law Enforcement and Race*, FBI.GOV (Feb. 12, 2015), <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> (noting that unconscious bias and mental shortcuts drive different behavior and relationships between law enforcement and communities).

The gang narrative, like the stop-and-frisk narrative, turns on the same core concepts – place and person. Instead of characterizing neighborhoods as “high-crime,” the NYPD now indicate that an area has a “gang problem.” Instead of stating that an individual is suspicious, the NYPD now state that he or she is a suspected gang or crew member. The gang narrative will be used, and has already been used, to justify an even more aggressive regime of stops, summonses, arrests, and surveillance than the pre-*Floyd* regime.¹⁵ The central concepts, however, like those underpinning the stop-and-frisk narrative, are defined so broadly that they can capture any neighborhood or individual the police deem suspicious. No criminal conduct whatsoever is required to be identified as a gang member. The gang allegation provides a facially race-neutral means for policing the usual suspects in the usual way. However, because gang databases and intelligence are secret, this policing avoids both public and judicial scrutiny.

This article takes on the task of challenging the NYPD’s new gang narrative before it takes root as a fully accepted justification for profile-based policing. The project is imperative because studies of gang formation suggest that gang policing encourages gang formation, hardens gang identity, and increases gang delinquency.¹⁶ It is not harmless to mistakenly identify and police individuals as gang members. Like the narrative that justifies stop-and-frisk, the gang narrative can obscure reality. Labeling individuals as gang members, trumpeting gang policing in the media, attributing crime decline to gang policing, and highlighting the relatively rare gang-motivated offenses to gain support for intensive policing exacerbates the adversarial, suspicion, and fear-based relationship between the police and youth of color. Further, gang policing affects communities as well as suspected gang members.

Part I of this article examines the NYPD’s crime statistics for New York City, demonstrating that claims of increasing gang crime are inconsistent with police-maintained data. Part II examines the relation of *Floyd* to Operation Crew Cut, and links the Operation Crew Cut narrative to the creation of “moral panics” based on alleged gang crime in other jurisdictions in the United States. Part III provides background relating to the challenge of defining gangs and identifying gang members, as well as the definitions used by the NYPD to certify gang membership for inclusion in their databases. Part IV explores the harms that flow from using the gang category to justify police intrusions. Among these harms are violations of the Fourth and Fourteenth Amendment such as those found in the *Floyd* case. Additionally, the gang narrative is even more damaging to fabric of vulnerable communities because the narrative creates fear and condemnation that can encourage and reinforce gang ties and potentially increase gang violence. Finally, in Part V, I will examine existing alternatives to address gangs and gang violence.

The *Floyd* decision and the acceptance of its findings by the Mayor and the Police Commissioner and the joint remedial process all provide an opportunity for the NYPD to break its addiction to profile-based policing. The addiction will only be overcome, however, if the NYPD does not adopt malleable “suspected gang member” or “crew member” profiles to continue race, place, and appearance based profiling. If the NYPD successfully advances an exaggerated narrative relating to gang and crew violence in New York City, suppression of informal youth groupings may give rise to a more

¹⁵ See *infra* Part IV.A below for description of gang policing.

¹⁶ FREDERIC M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* 10 (2000 ed., originally published in 1927) (noting that the transformation from informal peer group to gang is often precipitated by oppositional encounters, whether with other groups or with the police); Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification?*, *CRIME & DELINQ.*, July 12, 2013, at 1, available at <http://cad.sagepub.com/content/early/2013/05/23/0011128713492496>.

pervasive and persistent gang problem and will certainly perpetuate profile-based rather than offense-based policing.

Although this article addresses the particular example of the NYPD's reliance on the gang narrative, the issue is one of national significance. Police departments across the United States have developed gang units and committed their forces to gang policing. Law enforcement and prosecutors have pushed for civil injunctions and enhanced criminal penalties, even as researchers demonstrate that youth typically mature out of gangs and delinquent groups and that negative police contact increases rather than decreases delinquency and gang ties. In an era of declining crime, the rise of intensive and secret surveillance of youth based on profiles, the intensive policing of these youth for minor offenses, and the imposition of extensive sentences based on theories of conspiracy and accomplice liability threaten to extend racial disparities in mass-incarceration into the indefinite future. At a moment when the overuse of stop-and-frisk and intensive Broken Windows policing of minor offenses have come to the fore as issues of racial justice, the expansion of gang policing initiatives extends the use of these very same techniques against the same suspect populations, while avoiding oversight and transparency. When police-community relations are strained by instances of excessive force against youth of color, the propagation of narratives about gang-involved youth of color as the source of most violent crime can only heighten the stressful and explosive nature of police contacts with youth of color. Thus, every jurisdiction can benefit from an objective examination of the data supporting the need for gang policing, and an evidence-based evaluation of the actual outcomes of broad police-led suppression efforts, narrowly tailored anti-violence efforts, and non-law-enforcement alternatives to addressing youth violence.

I. GANG CRIME AS PRETEXT

The dramatic nature of youth crime and the quasi-mythical construction of gang crime gives rise to a belief that gang crime is far more common than it actually is and that young vulnerable children are recruited into gangs where they engage in violent crime. More importantly, the conflation of gangs and gang membership with violent crime creates the misimpression that gang membership alone is a proxy for violent criminality. To assess the narrative that attributes large proportions of violent crime to gangs, it is necessary to attempt to disentangle myth from reality.

As a preliminary matter, it is important to make clear that I do not claim that there is no gang-related crime or problems with youth violence and conflicts in New York City. New York City has always had gangs and will likely always have gangs.¹⁷ Nonetheless, New York City has a far smaller gang problem than other large cities.¹⁸ Moreover, a convincing case has been made that New York City's lack of organized gangs and its minimal gang violence is *because* New York used non-law enforcement approaches to address gangs and gang violence in the past.¹⁹ In jurisdictions where gang violence has been used to justify additional resources for broad law enforcement-based

¹⁷ ERIC C. SCHNEIDER, *VAMPIRES, DRAGONS, AND EGYPTIANS KINGS: YOUTH GANGS IN POSTWAR NEW YORK* (1999).

¹⁸ See *infra* Part I.B for New York City data on gang offenses. See also NAT'L GANG INTEL. CTR., NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 47 (2011), available at <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends> (reporting that New York State is in the lowest category for gang violence in the range of zero to two gang crimes per 1,000 people).

¹⁹ Judith Greene & Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies*, JUST. POL'Y INST., July 2007, at 33-39, http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

suppression strategies, gang membership and gang violence have increased.²⁰ Therefore, before arming the NYPD to engage in aggressive surveillance of and crackdowns on loosely organized “crews” of young people, it is necessary to examine the evidence that such “crews” are a major source of violence in New York City.²¹

A. National Crime Trends Versus Reported Gang Threat

To put it mildly, law enforcement reports of a growing gang menace in the United States are in significant tension with the dramatic decline of violent crime across the United States. Between 1993 and 2010, the National Crime Victimization Survey (NCVS) has documented a decline in serious violent crime victimization of 77%.²² The Federal Bureau of Investigations’ Uniform Crime Reports provide law enforcement figures that similarly document a decline in the rate of violent crime of 51% between 1993 and 2012.²³ According to the NCVS, only 6% of victims of violent felonies between 1998 and 2003 perceived the perpetrator to be a gang member.²⁴ This perception is consistent with FBI homicide reports, which classify about 5-7% of homicides as gang-related between 1993-2003.²⁵ Despite claims that gangs are corrupting ever more and ever younger youth, the rates of violence crime among youth under 18 appears to have declined more dramatically than rates for adults during the last decade.²⁶ This is the case even in a state like California, which reports high numbers of gangs and gang members.²⁷ In California, juvenile violent offense rates are lower than at any time during the sixty years that statistics have been kept.²⁸ Indeed, the juvenile crime rates in the 1950s were 2.5 times higher than they were in 2011.²⁹

The perception that gang violence is an ever-growing problem is fed by official law enforcement pronouncements. For example, according to the 2011 National Gang Threat Assessment published by the FBI, gangs and gang violence are a growing problem. In fact, the FBI’s National Gang Intelligence Center (NGIC) estimates a 40% increase in

²⁰ *Id.*

²¹ As discussed below at note 53 a “crew” would certainly fit the NYPD’s definition of a gang. Furthermore, Operation Crew Cut officers are in the Gang Division. It is therefore assumed that crew violence should be captured in reports of gang violence in New York City.

²² JANET L. LAURISTEN & MARIBETH L. REZEY, BJS, NATIONAL CRIME VICTIMIZATION SURVEY 5 (2013), available at <http://www.bjs.gov/content/pub/pdf/mpncncvs.pdf> (“The rate of serious violent victimization—rape and sexual assault, robbery, and aggravated assault—declined 77%, from 29.1 per 1,000 in 1993 to 6.6 per 1,000 in 2010.”). All violent victimization fell by 76%. *Id.* at 1.

²³ FBI, UNIFORM CRIME REPORTS, tbl. 1 (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.->

2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume-

_and_rate_per_100000_inhabitants_1993-2012.xls (reporting NCVS statistics reflecting both reported and unreported crime while the UCR provides statistics based on reported crime only).

²⁴ ERIKA HARRELL, BJS, VIOLENCE BY GANG MEMBERS 1993–2003 (2005), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=695> (providing estimates of the number and rate of violent crimes committed by offenders that victims perceived to be members of gangs based on the National Crime Victimization Survey data from 1998–2003: 55% of victims reported that perpetrators were not gang members, 37% did not know).

²⁵ *Id.*

²⁶ *Id.* at tbl. 32, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/32tabledatadecoverviewpdf>.

²⁷ NAT’L GANG INTEL. CTR., *supra* note 18, at 47 (placing California among the five states with the highest prevalence of gang membership in the country).

²⁸ David Pimental, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 92 (2013); Mike Males, *California Youth Crime Plunges to All-Time Low*, CENTER ON JUV. & CRIM. JUST., Oct. 2012, at 1–4, available at http://www.cjcj.org/uploads/cjcj/documents/CA-Youth_Crime_2011.pdf (juvenile violent crime decreased consistently since 1954).

²⁹ Males, *supra* note 28, at 1.

active gang members—from one million to approximately 1.4 million—between 2009 and 2011.³⁰ According to the law enforcement sources that provide information to the NGIC, these gang members were responsible for an average of 48% of violent crime in most jurisdictions and as much as 98% of violent crimes in some jurisdictions.³¹

The notion that gangs are growing exponentially in number and membership and are responsible for the majority of violent crime is nearly impossible to reconcile with the fact that violent crime, and indeed all crime, is down throughout the country.³² Some aspect or aspects of the law enforcement gang and crime narrative is awry. Either the gang problem is exaggerated or crime declines reported to the UCR are illusory. While there are certainly some sources that suggest that, in the age of computerized crime statistics, there is some pressure to downgrade and underreport serious crimes,³³ the sharp decline in homicide numbers (which are not easily susceptible to manipulation) and the substantial decline in reports of victimization recorded by the NCVS confirm that crime has decreased by nearly 80% in the past two decades.³⁴

Before attempting to explain the impetus for exaggerating the extent and danger posed by gangs in the United States, we will turn to the specific case of New York City crime trends and gang offenses.

B. New York City Crime and Gang Trends

New York City, like the entire country, has experienced declining crime in the past two decades. New York has been at the forefront of this trend, boasting crime declines of nearly 80% for violent crime between 1990 and 2014.³⁵

Despite the overall drop in violent crime and drops in youth crime, the NYPD has recently taken to the media and attributed 40% of recent shootings to loosely organized “crews” of “dozens of 12- to 20-year-olds with names such as Very Crispy Gangsters, True Money Gang and Cash Bama Bullies.”³⁶

These attributions are at odds with the NYPD’s statistics for crime, shootings, and homicides in New York City.

First, according to the NYPD’s GangStat Reports which were obtained pursuant to a FOIL request, *less than 1%* of all crime in New York City is “gang-related” and only

³⁰ NAT’L GANG INTEL. CTR., *supra* note 18, at 11 (attributing the increase in gang membership to both improved reporting and “more aggressive recruitment efforts by gangs”).

³¹ *Id.* at 9.

³² FBI, *supra* note 23.

³³ JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION 170 (2012); Dean Scoville, *What’s Really Going on With Crime Rates*, POLICE: L. ENFORCEMENT MAG. (Oct. 09, 2013), <http://www.policemag.com/channel/patrol/articles/2013/10/what-s-really-going-on-with-crime-rates.aspx> (“[C]reat[ing] an illusion of vulnerability, or strength, depending on one’s agenda”) (discussing history of manipulating statistics to either undercount or overcount offenses).

³⁴ LAURISTEN & REZEY, *supra* note 22, at 1.

³⁵ See NYPD, *CompStat Report Covering the Week 1/19/2015 Through 1/25/2015*, NYC.GOV, http://www.nyc.gov/html/nypd/downloads/pdf/crime_statistics/cscity.pdf (last visited May 1, 2015) [hereinafter *CompStat Report*] (recording a 79.76% drop between 1990 and 2014 in crime categories used by the FBI Uniform Crime Reporting Program).

³⁶ Associated Press, *Teen Crews Linked to 40 Percent of NYC Shootings*, TOWNHALL (May 1, 2014), <http://townhall.com/news/us/2014/05/01/teen-crews-linked-to-40-percent-of-nyc-shootings-n1831975>. See also Goldstein & Goodman, *supra* note 3 (attributing 30% of all shootings in recent years to crews based on Commissioner Kelly’s announcement of Operation Crew Cut in 2012).

a small fraction of that crime is “gang motivated”.³⁷ A gang-related crime is a crime committed by any gang member or any *suspected* gang member whether or not the crime has anything to do with the gang.³⁸ A gang-motivated crime is one that is done to benefit a gang or because of gang rivalries within or among gangs.³⁹ Table 1 provides the number of gang-related and gang motivated crimes as reported in NYPD GangStats reports from 2005 – 2012. The statistics demonstrate that NYPD attributed less than 1% of major categories of felony crimes⁴⁰ in New York City to gang members through 2012.

Table 1: NYPD GangStats 2005-2012⁴¹

Year	Gang Related Crime Total (percentage of all crime)	Gang Motivated Crime Total (percentage of all crime)	All Crimes ⁴²
2005	907 (0.68%)	235 (0.17%)	133,774
2006	1111 (0.87%)	321 (0.25%)	127,478
2007	1009 (0.84%)	280 (0.23%)	119,841
2008	943 (0.82%)	189 (0.16%)	114,487
2009	1006 (0.99%)	134 (0.13%)	102,054
2010	1001 (0.99%)	157 (0.16%)	101,127
2011	990 (0.98%)	143 (0.14%)	101,220
2012	1014 (0.95%)	99 (0.09%)	106,866

The rarity of gang crime in New York City is confirmed by the NYPD’s contribution to the annual Mayor’s Management Report. For each of the past five years, the NYPD has provided statistics for “Gang Motivated Incidents” which have been published in the Mayor’s Management Report.⁴³ Table 2, below reproduces these numbers for fiscal years 2009 – 2013.

Table 2: NYPD’s “Gang Motivated Incidents”⁴⁴

FY09	FY10	FY11	FY12	FY13
335	228	303	310	264

Gang-related and gang-motivated crimes account for a greater percentage of shootings and homicides than of all felony crime, however, the contribution to these

³⁷ GangStat Reports, *supra* note 2. Given the NYPD’s broad definition of “gangs” a crew engaged in violent crime or shooting should be captured in these statistics. See *infra* text accompanying note 53.

³⁸ NYPD, PATROL GUIDE PROCEDURE 212-13: REPORTING GANG RELATED CRIMINAL ACTIVITY 1 (2000) (“Gang Related Incident[:] Any incident of unlawful conduct by a gang member or *suspected* gang member.” (emphasis added)).

³⁹ *Id.* (“Gang Motivated Incident[:] Any gang related incident that is done primarily:

- a. To benefit or further the interests of the gang, or
- b. As part of an initiation, membership rite, or act of allegiance to or support for a gang, or
- c. As a result of a conflict or fight between gang members of the same or different gangs.”)

⁴⁰ See *infra* note 42 for the major crimes included in “All Crimes” in the GangStat Reports.

⁴¹ GangStat Reports, *supra* note 2.

⁴² “All Crimes” include: homicides, non-fatal shootings, rape, robbery, felony assaults, burglary, grand larceny, grand larceny auto. GangStats are provided on a weekly basis, thus the numbers for each year are based on the last full reporting week of the year. *Id.*

⁴³ N.Y.C., *supra* note 5, at 4.

⁴⁴ *Id.*

categories of crimes is nowhere near the 40% that the NYPD has recently been attributing to “crews.” Regarding homicides, the NYPD published annual reports on Murder in New York City until 2012. Like the published statistics for “Gang Motivated Incidents,” the murder statistics contradict the assertion that gang-like groups are responsible for a significant portion of homicides. Gangs were not even included as a potential cause of homicides until 2011, and in that year only 5% of the 515 homicides in New York City were attributed to gangs.⁴⁵ (Except for the category “Other,” this was the lowest of all categories of homicides in that year). In 2012, 9% of a total of 419 homicides were attributed to gangs.⁴⁶

The NYPD’s GangStat figures attribute an even smaller percentage – between 2.6 to 5.8%– of shootings and homicides to “gang-motivated” incidents. Table 3 provides this data for the years from 2005 through 2012.

Table 3: “Gang Motivated” Shootings and Homicides ⁴⁷

Year	Gang Motivated Shootings (percentage of all shootings)	Gang Motivated Homicide (percentage of all homicides)	Shootings	Homicides
2005	36 (2.3%)	27 (5.0%)	1533	540
2006	49 (3.1%)	18 (3.1%)	1567	590
2007	31 (2.2%)	13 (2.6%)	1441	492
2008	43 (2.9%)	15 (2.9%)	1497	512
2009	41 (2.9%)	27 (5.8%)	1407	460
2010	57 (3.9%)	21 (4.0%)	1452	520
2011	62 (4.2%)	14 (2.8%)	1482	497
2012	38 (2.8%)	12 (2.9%)	1372	415

As would be expected, the NYPD categorizes a higher percentage of shootings and homicides as “gang related.” A gang-related shooting or homicide would capture all incidents involving actual or suspected gang members even if the shooting/homicide clearly is attributable to a non-gang motive such as domestic violence. Even using this broader category, 80 to 85% of shootings and homicides are *not* gang-related.

Table 4: “Gang Related” Shootings and Homicides ⁴⁸

Year	Gang Related Shootings (percentage of all shootings)	Gang Related Homicide (percentage of all homicides)	Shootings	Homicides
2005	186 (12.1%)	82 (15.2%)	1533	540
2006	198 (12.6%)	90 (15.3%)	1567	590
2007	201 (13.9%)	76 (15.4%)	1441	492

⁴⁵ N.Y.C. Murders 2011, *supra* note 1, at 3.

⁴⁶ N.Y.C. Murders 2012, *supra* note 1, at 3.

⁴⁷ GangStat Reports, *supra* note 2.

⁴⁸ *Id.*

2008	220 (14.7%)	81 (15.8%)	1497	512
2009	254 (18.1%)	80 (17.4%)	1407	460
2010	300 (18.8%)	98 (20.7%)	1452	520
2011	286 (19.3%)	96 (19.3%)	1482	497
2012	283 (17.6%)	73 (20.6%)	1372	415
2013			1100 ⁴⁹	335
2014				333 ⁵⁰

Like gang-related crime, the NYPD estimates of new gang members do not appear to suggest a new gang menace. Each year from 2000 through 2012, the NYPD added from 850 to 1600 new alleged gang members to its database.⁵¹ Indeed, in 2011, the year before Operation Crew Cut was announced, the NYPD certified nearly 30% fewer new gang members than it had earlier in the decade. 2012 had even fewer additions to the gang database, and if the last four months of 2013 were consistent with the first eight months, the number of gang members added in that year would have been only about 700, a 30% drop from the 2012 low.

Table 5: Individuals added to NYPD Gang Database 2005-2013⁵²

Year	Individuals added to Gang Database
2005	1419
2006	1542
2007	1419
2008	1381
2009	1555
2010	1614
2011	1144
2012	1104
2013 (through August 30, 2013)	470

The NYPD might assert that it has not historically categorized crime by crews as gang crimes or included “crew” members in gang statistics. However, under the NYPD definitions of gangs, there can be no doubt that loosely organized “crews” that commit 40 percent of violent crimes, would fall into the category of gangs. It would be immaterial that such a group had no defined hierarchy or leadership. Furthermore, individual criminal behavior is enough to qualify such a group as a gang; collective criminal action is not required. The NYPD Patrol Guide, 212-13, provides the following definition:

GANG – Any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities, the commission of one or more criminal acts, having a

⁴⁹ Edgar Sandoval & Tina Moore, *New York City Murders Drop 20% but Not All Denizens Feel Safe*, N.Y. DAILY NEWS (Dec. 30, 2013), <http://www.nydailynews.com/new-york/nyc-crime/nyc-murders-drop-20-2013-not-feels-safe-article-1.1561930> (noting that there were 333 homicides and only 1100 shootings, nearly a 20 percent drop in both categories between 2012 and 2013, and quoting the NYPD as attributing this decline in part to Operation Crew Cut).

⁵⁰ *CompStat Report*, *supra* note 30. J. David Goodman & Al Baker, *Murders in New York Drop to a Record Low But Officers Aren't Celebrating*, N.Y. Times, Dec. 31, 2014, at A1 (noting there were 328 homicides in 2014).

⁵¹ Gang Members Entered by Month, NYPD statistics January 2001 – August 2013, provided by NYPD Legal in response to FOIL request.

⁵² *Id.*

common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.⁵³

Any “crew” of youths committing violent crimes with a name like “Very Crispy Gangsters” would certainly be considered a gang within this definition.

Operation Crew Cut has resulted in the quadrupling of the Gang Division from 150 officers to 600 in just four years. The narrative attached to it is that of an emerging form of criminality – a “shifted paradigm,” as Deputy Harrington phrased it when addressing the City Council in hearings on Operation Crew Cut.⁵⁴ Shootings have remained remarkably consistent during the past decade and dropped precipitously in 2013 to 1093 shootings for the year.⁵⁵ If crews have emerged as a new threat committing 40% of shootings, all other offenders in New York City must have very abruptly reformed substantially. Alternatively, the NYPD has simply chosen to re-label or exaggerate the threat of violence by crews.⁵⁶

II. THE RELATIONSHIP BETWEEN OPERATION CREW CUT AND THE STOP AND FRISK LITIGATION

The narrative that “crews” of young people are responsible for a large percentage of shootings in New York City was first advanced by Police Commissioner Raymond Kelly in October of 2012, when he announced Operation Crew Cut.⁵⁷ This announcement came just months after an order in *Floyd v. City of New York* granting class certification to:

All persons who since January 31, 2005 have been, or in the future will be subjected to the New York Police Department’s policies and/or widespread customs or practices of stopping, or stopping and frisking persons . . . in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause. . . .⁵⁸

The decision accompanying the order was twenty pages long, included extensive references to the discovery materials, and laid out the basis for concluding that the class of individuals described by the plaintiffs in *Floyd* represented hundreds of thousands of New

⁵³ NYPD PATROL GUIDE PROCEDURE 212–13, *supra* note 38, at 1.

⁵⁴ N.Y.C. Council Comm. on Pub. Safety, *Oversight: The NYPD’s Operation Crew Cut and Crime Reduction Strategies for NYCHA*, N.Y.C. COUNCIL (Apr. 28, 2014, 1:00 PM), <http://legistar.council.nyc.gov/MeetingDetail.aspx?ID=304831&GUID=66D6AF49-65A7-4AA8-851E-DA8755D55FED&Options=info|&Search=>. Deputy Harrington’s comment occurs at 1:15:16 in the hearing video.

⁵⁵ Sandoval & Moore, *supra* note 49.

⁵⁶ See Mercer L. Sullivan, *Maybe We Shouldn’t Study “Gangs”: Does Reification Obscure Youth Violence?*, 21 J. CONTEMP. CRIM. JUST. 170 (2005) for a discussion of how labeling can increase the perception of gang problems in the absence of increased criminality. Mercer explains why the supposed proliferation of national gangs in New York in the 1990s did not increase serious youth crime but merely relabeled existing beefs. *Id.*

⁵⁷ Richard Esposito, *New York’s Kelly Plans “Crew Cut” for Gang Members*, WORLD NEWS (Oct. 2, 2012), <http://abcnews.go.com/Blotter/nypd-plans-crew-cut-gang-members/story?id=17370903&singlePage=true>; Daniel Beekman, *Bronx Community Leaders Praise New NYPD Anti-gang Initiative, Argue More Youth Programs Are Also Needed: NYPD Gang Division to Double in Size in Intensive Effort to Stem Shootings*, N.Y. DAILY NEWS (Oct. 3, 2012), <http://www.nydailynews.com/new-york/bronx/city-top-raymond-kelly-announces-operation-crew-cut-article-1.1173045>.

⁵⁸ *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (granting class certification, May 16, 2012).

Yorkers of color, who faced a heightened risk of being stopped, frisked, and subjected to use of force in violation of both the Fourth and Fourteenth Amendments.⁵⁹ A trial date was also set, but with the certification of the class, the NYPD's stop and frisk activity declined for the first time in decades. While the NYPD were on track in the first quarter of 2012 to exceed the 685,000 stops they made in 2011, by the end of the year only 533,000 stops were reported (a 22% drop).⁶⁰ In 2013, the number of reported stops plunged to about 190,000.⁶¹

Furthermore, in contrast to dire predictions that crime would increase if the NYPD were not permitted to continue the regime of stop and frisks, homicides dropped nearly 20% between 2011 and 2012 (from 515 to 419), and another 20% between 2012 and 2013 (from 419 to 335).⁶² As the weekly CompStat data came through in the fall of 2012, a thinking person might have concluded that the intensive policing of innocent young men of color really was not responsible for the drop in crime.

There can be no doubt that in October 2012, when Commissioner Kelly announced that "crews" were responsible for at least 30% of shootings in New York City and that the NYPD was doubling the number of officers in the Gang Division to police these youth,⁶³ he was aware that homicides would likely drop to a historic low in 2012. The NYPD also faced an upcoming trial based on assertions of racial profiling and unconstitutional stops.⁶⁴ The announcement of a new menace to society, however, together with frightening rhetoric about kids who would hurt you for invading their turf,⁶⁵ served both to give the NYPD a new justification for intensively policing young men of color and to overshadow any argument that stop and frisk was not a deterrent to crime.

In his announcement of Operation Crew Cut, Commissioner Kelly defined the problem as "not . . . large, established gangs such as the Bloods and Crips, but . . . the looser associations of younger men who identify themselves by the block they live on, or on which side of a housing development they reside."⁶⁶ Although, feuding crews did exist and do cause problems, the NYPD was already collaborating with the District Attorneys and federal prosecutors and its Gang Division was already collecting evidence on crews that were in active conflict. The new resources poured into the Gang Division via Operation Crew Cut allowed an expansion of intensive policing of individuals based on the block or housing development where they reside beyond the investigation of these existing conflicts.⁶⁷ No increase in crime accounted for the massive increase of resources into Operation Crew Cut.

The use of the gang menace to create a moral panic⁶⁸ and increase support for

⁵⁹ *Id.* at 158–78.

⁶⁰ *Racial Justice: Stop-and-Frisk Data*, NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited May 1, 2015).

⁶¹ *Id.*

⁶² *Historical New York City Crime Data: Citywide Seven Major Felony Offenses 2000 2014*, NYPD http://www.nyc.gov/html/nypd/downloads/excel/analysis_and_planning/seven_major_felony_offenses_2000_2014.xls (last visited May 1, 2015).

⁶³ Beekman, *supra* note 57.

⁶⁴ *Floyd*, 283 F.R.D. 153.

⁶⁵ Esposito, *supra* note 57 (quoting Commissioner Kelly as reporting that crews' "rivalries are based not on narcotics trafficking or some other entrepreneurial interest, but simply on local turf.")

⁶⁶ Rocco Parascandola, *NYPD to Double Gang Division to Combat Street Violence: Commissioner Kelly*, N.Y. DAILY NEWS (Oct. 1, 2012), <http://www.nydailynews.com/new-york/nypd-double-gang-division-article-1.1172347>.

⁶⁷ *Id.*

⁶⁸ See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2002) (updating the seminal 1972

intensive profile-based policing is a well-established policing tactic.⁶⁹ In studies across the country, law enforcement has been able to push through legislation and obtain resources and support by providing the media with stories recounting increased gang crime violence.⁷⁰ The media is not necessarily a victim in the creation of moral panic but may benefit commercially from sensational and disproportionate coverage of youth and gang violence, which in turn reshapes public opinion and criminal justice policy as well.⁷¹ While moral panics may involve any type of deviant behavior, they have been used extensively to highlight the risk of youth gang violence even in an era when youth gang is declining.⁷²

In a moral panic, the public, the media, and politicians reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals. . . . Although sometimes the targeted enemy poses an imaginary threat (the Salem “witches,” for example), more often a moral panic focuses on individuals who do real harm, such as sexual abusers or members of criminal street gangs. . . . But what distinguishes a moral panic from an effort to deal with a pressing social problem is the gap between the perception of the problem and the reality. In a moral panic, the seriousness of the threat and the number of offenders are greatly exaggerated.⁷³

While the predominant narrative throughout the Bloomberg/Kelly era was that the NYPD had made New York the safest city in the world, by the fall of 2012 the press started publishing more and more stories about local crews, suggesting that New York was, in fact, a city facing new dangers.⁷⁴ These stories had always existed, but the threat

book on the moral panic generated around conflicts between the Mods and Rockers in 1960s England); CHARLES KRINSKY ET AL., *THE ASHGATE RESEARCH COMPANION TO MORAL PANICS*, (Charles Krinsky ed., 2013) (providing an overview by various authors of types of moral panics, the role of media, and the impact on governance).

⁶⁹ See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 108–12 (2008) (discussing the passage of Proposition 21 in California based on a moral panic about juvenile crime); John M. Hagedorn, *Gang Violence in the Postindustrial Era*, 24 *CRIME & JUST.* 365, 376 (1998) (noting the tendency to construct male gangs as deviant during moral panics); Marjorie Zatz, *Chicano Youth Gangs and Crime: The Creation of a Moral Panic*, 11 *CONTEMP. CRISES* 129 (1987); Marjorie Zatz, *Los Cholos: Legal Processing of Chicano Gang Members*, 33 *SOC. PROBS.* 13 (1985).

⁷⁰ See Richard C. McCorkle & Terance D. Miethe, *The Political and Organizational Response to Gangs: An Examination of a “Moral Panic” in Nevada*, 15 *JUST. Q.* 41 (1998); Carol A. Archbold & Michael Meyer, *Anatomy of a Gang Suppression Unit: The Social Construction of an Organizational Response to Gang Problems*, 2 *POLICE Q.* 184, 189–98 (1999) (recounting a particularly dramatic response to a moral panic caused by a single homicide in a town 80 miles away in response to which police in a midsized Midwestern town redefined all crime committed by anyone under 18 as “gang related” and thereby “document” a gang problem that required resources to establish a gang suppression unit).

⁷¹ Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *WM. & MARY L. REV.* 397, 397–98 (2006).

⁷² David Pimental, *supra* note 28, at 92 (discussing how fear of juvenile violence has driven us to punish American youth as adults, even in the face of historic lows in juvenile crime); Jodi Lane, *Fear of Gang Crime: A Qualitative Examination of the Four Perspectives*, 39 *J. RES. CRIME & DELINQ.* 437 (2002) (presenting several theoretical models that might explain why fear of gang violence in parts of Southern California exceeds the actual danger of gang violence).

⁷³ SCOTT & STEINBERG, *supra* note 69, at 109–10 (linking moral panic over youth crime to the adoption of Proposition 21 which required many juveniles to be tried as adults, barred sealing of juvenile records, and extended prison terms for gang-related crimes. Concluding that “Proposition 21 was adopted by a “public who inaccurately thought that youths were responsible for most crime and that juvenile crime was on the rise.”).

⁷⁴ For a cluster of articles in mainstream liberal media focusing on the threat of a new type of youth violence and the NYPD’s response that came out within weeks of the gang raid in June 2014 see, for example, Mosi Secret, *On the Brink in Brownsville*, N.Y. *TIMES MAG.*, May 1, 2014,

and the number of offenses were exaggerated. In the fall of 2013, Commissioner Kelly expressly linked the shift from stop-and-frisk policing to policing of crews, when he announced a second doubling of the size of the NYPD's Gang Division.⁷⁵ By highlighting a new threat,⁷⁶ he was able to garner support for a form of policing that differs more in form than in substance from the prior regime of profile-based stop-and-frisk. Even the biggest critics of stop-and-frisk policing expressed approval for focusing police resources on "crews" who were responsible for forty percent of shootings, despite the fact that only isolated stories support this narrative.⁷⁷ Under the new police commissioner and the de Blasio administration the commitment to Operation Crew Cut has continued unabated.⁷⁸

The larger concern raised by this paper, however, is the fact that there is no definition for "crews," no transparency about who will be considered a possible crew or gang member. Examined closely, policing kids because of associations based on where they live, is not fundamentally different from the stop and frisk regime. Indeed, policing of gangs and crews is more worrisome. First, stop-and-frisk policing is subject to Fourth Amendment requirements and gives rise to occasional review in either criminal or civil cases. Second, gang policing relies on police-developed secret lists, secret surveillance, secret criteria, and is not governed by either constitutional or statutory requirements. Finally, the crew/gang label can be used to justify even harsher treatment than a stop-and-frisk, both for those who are labeled as crew members and for those who associate with alleged crew members either in public or in private.

In the following section the lack of meaningful definitions for gangs, the lack of process, and the vague criteria for certifying gang membership will be reviewed.

III. THE NYPD'S GANG DEFINITIONS AND DATABASE

In May of 2010, the NYCLU filed a lawsuit, *Lino v. City of New York*, challenging the NYPD's practice of maintaining an electronic database containing information relating to every individual that the NYPD stopped or stopped and frisked, even when the stop did not result in a summons or arrest.⁷⁹ The public outrage that the NYPD was keeping an electronic database with identifying information on innocent New Yorkers was widespread.⁸⁰ On July 16, 2010, less than two months after the database was challenged, the criminal procedure law was amended to prohibit the maintenance of an electronic database containing identifying information for individuals stopped and "released without further legal action."⁸¹ *Lino* was settled in August 2013, when the City agreed to remove information from the database relating to people whose cases were

<http://www.nytimes.com/2014/05/04/magazine/on-the-brink-in-brownsville.html>; Eric Konigsberg, *Woo Cho Bang Bang*, NYMAG.COM (June 19, 2014), <http://nymag.com/news/features/brownsville-2014-6/>; Matthew McKnight, *De Blasio's Violent-Crime Challenges*, NEW YORKER (July 9, 2014), <http://www.newyorker.com/news/news-desk/de-blasios-violent-crime-challenges> (interviewing Jeffrey Fagan about the alleged increase in violent crime to 2014).

⁷⁵ Goldstein & Goodman, *supra* note 3.

⁷⁶ See Esposito *supra* note 57.

⁷⁷ Johnson, *supra* note 10 (indicating that Operation Crew Cut had the backing of stop-and-frisk critics, Bill de Blasio and Jumaane Williams).

⁷⁸ J. David Goodman & Joseph Goldstein, *Bratton Takes Helm of Police Force He Pledged to Change*, N.Y. TIMES, Jan. 2, 2014, A14.

⁷⁹ *Lino v. City of New York*, 958 N.Y.S.2d 11, 13 (App. Div. 2012).

⁸⁰ Rocco Parascandola, *Gov. Paterson Signs Law Forcing NYPD to Delete Stop and Frisk Database*, N.Y. DAILY NEWS (July 16, 2010), <http://www.nydailynews.com/news/crime/gov-paterson-signs-law-forcing-nypd-delete-stop-frisk-database-article-1.467911>.

⁸¹ N.Y. CPL §140.50(4) (McKinney 2010).

subsequently dismissed or resolved with no criminal conviction.⁸²

Where the legislation closes a door, however, gang policing opens a window (albeit, a pre-existing window). Although it is not a crime to be in a gang,⁸³ law enforcement agencies across the country have started to maintain extensive databases of gang members or associates and suspected gang members and associates.⁸⁴ There is no right to notice or procedure for challenging inclusion in gang databases.⁸⁵ The challenge of defining gangs has been one that has long plagued researchers, law enforcement, courts, and scholars. Thus, there are no generally accepted definitions for gangs and no universally applicable method for determining gang membership.⁸⁶ Nonetheless, there are commonalities in the definitions used by law enforcement in the United States for defining gangs and, more importantly, for “certifying” gang membership or association for the purpose of collecting intelligence on suspected gang members.⁸⁷

The most important commonality is that there is no jurisdiction that requires proof (or even reasonable suspicion) of any criminality on the part of an individual in order to certify him as a gang member or associate.⁸⁸ Instead, individuals can be certified as gang members or associates, based on appearance, association, location, law enforcement “intelligence,” or informants. There is no notification of inclusion in gang databases and no right to challenge inclusion.⁸⁹

Thus, although the NYPD cannot maintain electronic data on those stopped-and-frisked but not arrested or given a summons, the NYPD gang database allows the NYPD to maintain identifying data, including name, address, and social security number on individuals without even a pretense of reasonable suspicion.⁹⁰ Indeed, the NYPD gang database does not require any information regarding criminality whatsoever. The criteria used by the NYPD to “qualify” an individual as an “Identified Gang Member” were provided to the author January 7, 2014, in response to a FOIL request filed on September 2, 2011.⁹¹ The criteria are listed on the Intelligence Division (I.D.S.) Gang Entry Sheet, and an individual can be certified in any of the following three ways:

⁸² *NYCLU Settlement Ends NYPD Practice of Keeping New Yorkers in Stop-and-Frisk Database*, NYCLU (Aug. 7, 2013), <http://www.nyclu.org/news/nyclu-settlement-ends-nypd-practice-of-keeping-new-yorkers-stop-and-frisk-database>.

⁸³ *Lanzetta v. New Jersey*, 306 U.S. 451, 457–58 (1939).

⁸⁴ For examples of typical criteria for inclusion in gang databases see NAT’L GANG CTR., BRIEF REVIEW OF FEDERAL AND STATE DEFINITIONS OF THE TERMS “GANG,” “GANG CRIME,” AND “GANG MEMBER” (2012), available at <https://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf>.

⁸⁵ Joshua D. White, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 118 (2005). One recent exception to this general rule is California which passed legislation granting notice and an opportunity to challenge gang designation to parents or guardians and minors under the age of 18. CAL. PENAL CODE § 186.34 (West 2014).

⁸⁶ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 643–47 (2011).

⁸⁷ NAT’L GANG CTR., *supra* note 84, at 2–3.

⁸⁸ *Id.* at 3–8. Of the seven states that have legislative criteria for identifying gang members and associates, none requires any criminal conviction or arrest. Instead, each requires that two or more criteria of a list be met. The list typically includes such items as, self-admission, dress, tattoos, correspondence with gang members, and the rather circular “identified as criminal street gang members by law enforcement.” *Id.* As discussed below, Minnesota has a database that requires a gross misdemeanor conviction but it also has second database that does not require criminality. See text *infra* at note 104–110.

⁸⁹ See sources cited *supra* note 85.

⁹⁰ The NYPD does not share its database with the federal government or others. E-mail Response from N.Y.C. Police Dep’t Legal Bureau to author, (March 24, 2014) (on file with author). Therefore it is not bound by 28 C.F.R. § 23.20 which requires reasonable suspicion of criminal conduct or activity and compliance reviews every five years for shared intelligence databases. 28 C.F.R. § 23.20 (2015).

⁹¹ NYPD, I.D.S. GANG ENTRY SHEET (obtained by FOIL from NYPD, on file with the author).

1. An individual will be entered if he/she admits to membership during debriefing OR
2. Through the course of an investigation an individual is reasonably believed to belong to a gang and is identified as such by two independent sources. (Ex. Pct. Personnel, Intell, School Safety, Dept. of Correction, or Outside Agency) ... OR
3. Meets any **Two** below mentioned criteria
 - o Known gang **Location**
 - o **Scars/Tattoos** Associated w/ Gangs
 - o **Gang Related Documents**
 - o **Colors** Associated w/ Gangs
 - o **Association** w/ Known Gang members
 - o **Hand Signs** Associated with Gangs⁹²

None of the three methods for certifying gang members and adding them to the NYPD's database requires any arrest or criminal conduct.⁹³ Nor is there any requirement or provision for notifying individuals that they are included in gang databases or for purging names from gang databases.⁹⁴ For the period covered by the FOIL request (January 2001 – August 2013), the NYPD Legal Bureau responded that they could locate no documents related to maintenance or guidelines regarding purging of the database.⁹⁵

As of August 30, 2013, the NYPD's Gang Database included over 20,000 individuals.⁹⁶ Of the 21,537 who were added between January 2001 and August 30, 2013, just one percent (212 individuals) of those entered into the gang database were categorized as Caucasian or white.⁹⁷ Approximately 48% of the individuals added to the database between 2003 and 2013 were identified by the NYPD as black, another 42% Hispanic, nearly 8% "unidentified" and less than 4% were female.⁹⁸ About 30% were under 18 years of age when they were added to database.⁹⁹ Because of widely accepted narratives regarding gang membership, these percentages may not strike the reader as under-representative of white or female gang membership or over-inclusive of black and Latinos. However, criminologist and youth gang researchers find that gang membership is rare among all races but substantially more common among white youth than law enforcement statistics estimates, with white gang members accounting for 25% or more of all gang members.¹⁰⁰

⁹² *Id.*

⁹³ This is typical of gang databases across the country. There are no generally accepted definitions for gangs and no universally applicable method for determining gang membership. *See, e.g.*, Howell, *supra* note 86, at 643–47. One commonality, however, is that criminal conduct is not necessary for inclusion in gang databases. *Id.*

⁹⁴ E-mail Response from NYPD Legal Bureau to author, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *See* NYPD Gang Members by Age, (obtained by FOIL from NYPD, on file with author); Joseph Goldstein, *Weekly Police Briefing Offers Snapshot of Department and Its Leader*, N.Y. TIMES, Feb. 10, 2013, at A15.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.* Judith Greene and Kevin Pranis, *supra* note 19, at 37 (noting that white youth accounted for 40% of adolescent gang members according to National Longitudinal Survey of Youth and GREAT surveys); David Pyrooz and Gary Sweeten, *Gang Membership Between Ages 5 and 17 Years in the United States*, J. of Adolescent Health 1, 3 (2015) (noting that the National Longitudinal Survey of Youth establish that while gang participation is more common among black and Latino, the majority of self-reported gang members were white); Finn-Aage Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multistate Survey*, 15 JUST. Q. 505, 510 (1998); Adrienne Freng & Finn-Aage Esbensen, *Race and Gang Affiliation: An Examination of Multiple Marginality*, 24 JUSTICE QUARTERLY 600, 609 (December 2007) (approximately 30% of gang youth in this study were white). *See also*, Jordan Blair Woods, *Systemic*

Because criteria for the database do not require any criminality and there is no notice or right to appeal, there is a potential for the database to be or to become both vastly over-inclusive and demographically skewed. The track record for gang databases in other cities and states demonstrate this risk.¹⁰¹ A particularly good example of the potential impact that lack of criteria has on the racial makeup of databases can be seen in Minnesota.¹⁰² Minnesota maintained two databases, one of which, the Gang Pointer File, requires at least one conviction for a gross misdemeanor or felony, a minimum age of 14 for inclusion, and three criteria from a 10-point list.¹⁰³ A second database, GangNet, like the NYPD database, did not require any conviction or a minimum age for inclusion.¹⁰⁴ In 2009, the more demanding Gang Pointer database included about 2500 individuals, 36% of whom were white.¹⁰⁵ The GangNet database was nearly seven times larger and included 17,000 individuals, of whom only 18% were white.¹⁰⁶ As this example illustrates, broad criteria for inclusion can lead to over-representation of youth of color and under-representation of whites.¹⁰⁷ Indeed, the community groups that held hearings on the Minnesota databases asked whether the criteria used to designate gang members were “synonymous with the urban youth culture.”¹⁰⁸

With the increased number of officers assigned to gang division intelligence gathering, we must consider what criteria should be in place before individuals can be added to the database. Further, we cannot be confident that the gang database represents the entirety of the intelligence gathered relating to suspected gang members. The database appears to be just one aspect of the intelligence-gathering machine. In fact, despite the doubling of the gang intelligence division under Operation Crew Cut in the fall of 2012, the number of gang members added to the database in first eight months 2013 was lower than in prior years. The intelligence collected by these officers may be going into other databases, may be broader than that kept in the gang databases, and may be disseminated and used in other ways. While the NYPD’s reply to a FOIL requesting what information is kept in the database was non-responsive, the databases maintained relating to the NYPD’s surveillance of Muslims since 9/11 may be instructive.¹⁰⁹ As part of an intelligence-gathering program, the NYPD debriefed Muslim individuals who were arrested for even minor offenses and maintained a detailed database. As the New York Times reports:

After each interview, the detectives filed detailed reports about the

Racial Bias and RICO’s Application to Criminal Street and Prison Gangs, 17 Mich. J. of Race & Law 303, 307-09 (2012)(for a discussion of how “racial stereotype can shape the way government constructs gangs.”).

¹⁰¹ See Howell, *supra* note 86, at 650–54 (gathering information on database demographics in which over 90% of individuals in gang databases were black or Latino but half had never been arrested).

¹⁰² CMTY. JUSTICE PROJECT, UNIV. OF ST. THOMAS, EVALUATION OF GANG DATABASES IN MINNESOTA & RECOMMENDATIONS FOR CHANGE 2–4 (2011), *available at* <https://dps.mn.gov/divisions/bca/Documents/Evaluation%20of%20Gang%20Databases%20in%20Minnesota%20and%20Recommendations%20for%20Change.pdf>.

¹⁰³ *Id.* at 4. The 10-point criteria are as follows: (1) Subject admits to being a gang member;(2) Is observed to associate on regular basis with known gang members; (3) Has tattoos indicating gang membership; (4) Wears gang symbols to identify with a specific gang; (5) Is in a photograph with known gang members and/or using gang-related hand signs; (6) Name is on gang document, hit list, or gang-related graffiti; (7) Is identified as a gang member by a reliable source; (8) Arrested in the company of identified gang members or associates; (9) Corresponds with known gang members or writes and/or receives correspondence about gang activity; (10) Writes about gang (graffiti) on walls, books and paper. *Id.* See also Howell, *supra* note 86, at 650–53.

¹⁰⁴ CMTY. JUSTICE PROJECT, *supra* note 102, at 2–4; Howell, *supra* note 86, at 652.

¹⁰⁵ CMTY. JUSTICE PROJECT, *supra* note 102, at 22.

¹⁰⁶ *Id.* at 10.

¹⁰⁷ *Id.* at 10, 22.

¹⁰⁸ *Id.* at 19.

¹⁰⁹ See generally Joseph Goldstein, *Police Recruit Muslims to be Informers*, N.Y. TIMES, May 10, 2014, at A1.

prisoner that were entered into a database. In many instances, they included the names of relatives, including children: “Subject daughter is ‘Myriam’, age 6 and youngest child is ‘Omar’ age 2 years,” stated part of a six-page report filed about a furniture salesman, who had been arrested for driving without a license and making an improper left turn.¹¹⁰

Whether similar detailed statements are being assembled for those in gang databases and for others targeted by Operation Crew Cut, we cannot be sure. However, the NYPD Patrol Guide suggests that this may well be the case. The Patrol Guide identifies Gang Division Intelligence Officers *who are available to debrief suspected gang members 24/7*.¹¹¹ It further designates local Field Intelligence Officers and charges them to disseminate lists of gang members on a monthly basis.¹¹² Other than the very broad non-criminal criteria that relate to certification for the gang database, there are no established criteria for the additional intelligence gathering that the NYPD engages in as part of Operation Crew Cut and its Gang Intelligence Division. There is nothing in the criteria for certifying gang members that would prevent collection of detailed information even for individuals who have never been arrested or charged with any crime based on where they live, what they look like and who they are seen with.

The existence of parallel databases stemming from collaboration with the NYPD is evident in recent statements by New York County District Attorney’s Office. After tapping the NYPD to designate the 25 worst offenders in each of the 22 precincts in Manhattan, the DA’s Office went on to develop a list of about 9000 individuals of high interest that its Crime Strategies Unit considers the worst of the worst.¹¹³ The fact that the District Attorney averages over 400 persons of interest per precinct, rather than 25, likely reflects the broad collection of data from the surveillance and petty arrests of individuals consistent with Operation Crew Cut. It is worth noting that the number of people on this list is twice as high as the number of all violent felony arrests for 2014.¹¹⁴ Like the surveillance of Muslim drivers and food vendors arrested for minor offenses who are then debriefed, alleged gang members are also detained and questioned for very minor offenses.¹¹⁵ Based on this list, the prosecutors

decide whom we should try to pull out for a debriefing. We don’t debrief people arrested for felonies because we don’t want to compromise a case. We pull people arrested on low-level misdemeanor charges, maybe two or three a week. We read them their Miranda rights. About 80 percent of them will talk. If you speak to a 16-year-old, they might tell you, ‘This kid is running things, this kid is a hanger-on.’ That’s how we find out information like whether a gang has changed their name. We took down the Flow Boyz gang at the Robert F. Wagner housing project in 2012. But a lot of those gang members have aged out, and now there’s a new group of 14- and 15-

¹¹⁰ *Id.*

¹¹¹ NYPD, *supra* note 33, at 1.

¹¹² NYPD, PATROL GUIDE PROCEDURE 212-103: CRIME INFORMATION CENTERS 3 (2010) (requiring field intelligence officers to post lists of “active gang members” who reside within the command by the 5th of each month).

¹¹³ Chip Brown, *Cyrus Vance Jr.’s “Moneyball” Approach to Crime*, N.Y. TIMES MAG. (Dec. 7, 2014), available at <http://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html>.

¹¹⁴ See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2005–2014 (2015), available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf>.

¹¹⁵ Brown, *supra* note 113.

year-olds who want their own set name. Through debriefings, we learned they call themselves Only the Wagner.¹¹⁶

When suspect individuals go through the system, even for a minor offense, they may be pulled aside and subjected to interrogation based on this secret list. If we could be assured that the list was developed to actually target repeat violent offenders, we might (or might not) applaud such an effort, but the debriefing of 16 year-olds to get names of 14 and 15 year-olds goes well beyond targeted enforcement, and is certainly not what a parent would expect prosecuting attorneys to do to an unrepresented teenager in a minor case.

IV. THE HARMFUL CONSEQUENCES OF GANG SUPPRESSION TACTICS

Although the narrative used to justify gang policing rests on the same two concepts – place and suspicion – as the justification for stop-and-frisk, the narrative can lead to even greater harms than the stop-and-frisk regime. First, the gang label permits and encourages even more aggressive and broader police intrusion than the stop-and-frisk narrative. The label affects police perception and behavior, prosecutorial behavior, suspected gang and crew members, and the broader community. Second, gang suppression policing may be counterproductive, leading to increased formation, cohesion, and longevity of gangs, and contributing to individual criminality and delinquency among youth.

A. *The Impact of the Gang Narrative on Police, Suspects, and the Community*

1. Police Perceptions of Gang Problems.

Although the narratives justifying the use of excessive stop-and-frisk and justifying gang policing are very similar, they differ in ways that make gang policing deeply troubling. Unlike a *Terry* stop, there are no legal pre-requisites for categorizing an individual as a gang member. Unlike a *Terry* stop, no criminal conduct must be suspected or established. Unlike *Terry*, there are no official rules or limits for whether a frisk is permissible or how a search might be conducted. And, unlike a *Terry* stop, there are no systems of review. Moreover, the central premise of the gang narrative—that gangs are responsible for most violent crime and engage in violence heedlessly and irrationally—creates circumstances in which an officer approaching a suspected gang member is likely to view him not just with suspicion but with some level of fear and antagonism.

The gang narrative has the power to distort police perception of the prevalence and violence of gangs and to trigger biases¹¹⁷ that affect policing. In a careful study of gang units in four western cities (Inglewood, CA, Albuquerque, NM, Las Vegas, NV, and Phoenix, AZ), Charles Katz and Vincent Webb outline some worrisome aspects of gang policing.¹¹⁸ After following and interviewing police officers from four gang units and their colleagues, these researchers observed a number of disturbing attitudes and trends.

[T]he majority of the officers perceived the magnitude of their local gang problem to be greater than indicated by the official gang crime

¹¹⁶ *Id.*

¹¹⁷ Jessica J. Sim, Joshua Correll, & Melody Sadler, *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 *Personality & Soc. Psych. Bull.* 291, 299 (2013)(finding that special unit officers in gang units demonstrate racial bias in the first-person-shooter task (FPST) similar to untrained novices and unlike trained patrol officers).

¹¹⁸ CHARLES M. KATZ & VINCENT J. WEBB, *POLICING GANGS IN AMERICA* (2006).

data recorded by their department. Except in Las Vegas, the vast majority of officers in each [gang] unit perceived that their city had a major gang problem, that gang members engaged in a wide variety of criminal behaviors, and that roughly 30 to 70% of all local crimes were probably attributable to gang members.¹¹⁹

Gang units across the country similarly attribute 48 to 98% of violent crime to gangs¹²⁰ even though victim reports attribute only about 6% of violent crimes to gangs.¹²¹

This misperception translated into action, as gang unit officers came to perceive their role as a duty to fight “evil perpetrators” and engaged in aggressive directed patrols and sweeps that focus on minor offenses in an attempt to deter gang membership.¹²² “All of the police departments reacted with zero-tolerance law enforcement for gang members, and by initiating gang sweeps and saturating gang neighborhoods.”¹²³ The sweeps contributed to community complaints of over-policing and excessive force, even while community members continued to seek law enforcement assistance to address gang problems.¹²⁴

The use of the gang narrative enhances the sense of danger and dehumanizes the targets of enforcement. The fight against “evil perpetrators” can lead the police to engage in unlawful conduct. Such attitudes were at the root of the Rampart Scandal, in Los Angeles in which gang unit officers engaged in widespread misconduct and corruption.¹²⁵ In Phoenix, thirteen police officers shot at a gang member 89 times, striking him 30 times.¹²⁶ In Las Vegas an FBI investigation led to the arrest of two gang unit officers for engaging in a drive-by shooting.¹²⁷ The attitudes that could lead to such an outcome were expressed by an officer in an anonymous statement to the press:

As for the poor, stupid, innocent gang member, that has spread hatred, vandalism, crime, and murderous-intent-through-profit-motive –legacy of his organization, all that I can say is what goes around comes around . . . and THE only good gang member is a dead gang member.¹²⁸

2. Gang Policing Justifies Intensive Policing and Surveillance

In west coast jurisdictions, where gang policing has long been practiced, the policing is often associated with very broad and intrusive practices. Suspected gang members may be included in civil injunctions that criminalize their presence in public places.¹²⁹ These injunctions can prevent named individuals from participating in sports

¹¹⁹ *Id.* at 122. In Las Vegas, officers stated that they did not know the proportion of crime that was committed by gang members. *Id.* at 122 n.6.

¹²⁰ NAT’L GANG INTEL. CTR., *supra* note 18, at 11, 15 (attributing the increase in gang membership to both improved reporting and “more aggressive recruiting efforts by gangs”).

¹²¹ See HARRELL, *supra* note 24 (reporting that 6 percent of victims of violent crime identify perpetrator as perceived gang member).

¹²² KATZ & WEBB, *supra* note 118, at 71.

¹²³ *Id.* at 88.

¹²⁴ *Id.*

¹²⁵ See *Floyd v. City of New York*, 302 F.R.D. 69, 106–07 (S.D.N.Y. 2014) (“LAPD [CRASH] officers had ‘subject[ed] individuals to uses of excessive force, false arrest, and improper searches.’” (quoting Complaint at 2, *United States v. City of Los Angeles*, No. 00 Civ. 11769 (C.D. Cal. Nov. 3, 2000))).

¹²⁶ KATZ & WEBB, *supra* note 118, at 83.

¹²⁷ *Id.* at 74–75. The shooter was convicted, but contrary to normal practice the driver was not charged as an accomplice. *Id.*

¹²⁸ *Id.* at 75.

¹²⁹ See, e.g., Matthew M. Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement*

teams, after school activities, taking public transportation, and going to job centers.¹³⁰ Some gang units engage in aggressive Broken-Windows style enforcement, ticketing suspected gang members for jaywalking and other minor traffic infractions.¹³¹ The NYPD has indicated that a similar strategy would be adopted as part of Operation Crew Cut, with officers focusing on picking kids up for truancy or ticketing them for bikes on sidewalks if they were suspected crew members.¹³² These minor arrests can lead to debriefing of minors who have never been arrested or accused of a violent offense, based on dress or association with other suspected gang or crew members.

The intensive surveillance extends to following twitter feeds, monitoring Facebook (often by creating fake profiles of attractive young women), and monitoring YouTube videos.¹³³ Whether the police should be engaged in this level of surveillance of youth for intelligence collection purposes, without any prior showing or justification, is an important question that merits serious consideration and is not one that should be answered in a kneejerk manner based on our fear of gangs. Police lists may be shared with immigration¹³⁴ or potential employers¹³⁵ and cause substantial collateral damages even in the absence of criminal convictions or arrests.

The potential impact of gang intelligence was demonstrated quite dramatically in a case decided by the New York State Court of Appeals in 2014.¹³⁶ In *People v. Johnson*, the defendant was standing on the sidewalk of 140th Street at 7th Avenue near three other men. At least two of them were allegedly members of the local gang, the 40 Wolves.¹³⁷ There was no information that the defendant was alleged to be a member of the 40 Wolves.¹³⁸ There was no testimony that any of the men had done anything other than stand on the block (where they lived) but the NYPD, nevertheless ordered them to disperse. When one of the men asked why they were being ordered to disperse, all four were arrested for disorderly conduct for failing to obey an order to disperse.¹³⁹ In a search-incident-to-arrest, drugs were found on the defendant.¹⁴⁰ At the suppression hearing the

Injunctions Against Urban Street Gangs, 51 STAN. L. REV. 409, 411 (1999).

¹³⁰ Youth Justice Coal., *Getting Off a Gang Injunction*, YOUTH FOR JUST. (Apr. 2011), <http://www.youth4justice.org/self-defense-legal-rights/getting-off-a-gang-injunction>.

¹³¹ KATZ & WEBB, *supra* note 118, at 274.

¹³² Goldstein & Goodman, *supra* note 3.

¹³³ *Id.*

¹³⁴ Jennifer Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, 2007 U. CHI. LEGAL F. 317, 348 (noting that a substantial portion of alleged gang members swept up by ICE had not been accused of any violent crime); SEC'Y JEH JOHNSON, DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS (2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (categorizing aliens "not younger than 16 years of age who intentionally participated in an organized gang" along with terrorists and convicted felons as Priority 1 for civil enforcement of immigration laws). Suspected gang membership is also being used to deny relief for DACA (Deferred Action for Childhood Arrival) eligible individuals. Defendants' Sur-Reply In Opposition to Plaintiffs' Motion of Preliminary Injunction at 32–33, Texas v. United States, No. 1:14-CV-254 (S. D. Tex. Jan. 30, 2015).

¹³⁵ CMTY. JUSTICE PROJECT, *supra* note 102, at 20–21 (discussing witnesses who reported being denied employment by law enforcement, probation, and the national guard); see also, N.Y.C. DEP'T OF INVESTIGATION, DOI REPORT REVEALS BROKEN RECRUITMENT SYSTEM AND APPLICATION PROCESS 10–11 (2015), www.nyc.gov/html/doi/downloads/pdf/2015/jan15/pr01rikers_aiu_011515.pdf (critiquing the Department of Corrections for failure to screen for prior gang association and indicating that DOC is now rejecting candidates based on tattoos that suggest gang membership).

¹³⁶ *People v. Johnson*, 22 N.Y.3d 1162 (2014).

¹³⁷ Brief Amicus Curiae for Defendant-Appellant on behalf of the New York Bar Ass'n at 3–4, *People v. Johnson*, 22 N.Y.3d 1162 (2014) (No. APL-2013-00034).

¹³⁸ *Johnson*, 22 N.Y.3d at 1164.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

officer testified that 40 Wolves members only associated with 40 Wolves members, and therefore, the defendant was a gang member.¹⁴¹ The prosecution elicited testimony that two of the men were 40 Wolves members based on “gang intelligence,” but objected to questioning by defense counsel to probe the basis for this intelligence.¹⁴²

The trial court denied suppression, and the intermediate appeals court issued a sweeping ruling that police who had information “about gang problems . . . at that location in the past and the gang background of several of the men” could order dispersal and arrest the men if they disobeyed.¹⁴³ The Appellate Division’s decision, if upheld, would have allowed police to order anyone that they claimed was a member of a local crew or gang off their own block and arrest them for disobeying.¹⁴⁴

In a *per curiam* decision, the New York Court of Appeals stepped in to protect the right to stand peaceably in a public place. As the Court wrote, “It is understandable that police officers become concerned when people they believe to be gang members and their associates gather in public. It is not disorderly conduct, however, for a small group of people, even people of bad reputation, to stand peaceably on a street corner.”¹⁴⁵ Although, this decision forecloses arrest based on the theory of disorderly conduct advanced in the *Johnson* case, there are many ways to achieve similar results by asserting gang allegations. In many jurisdictions, moral panics about the dangers of gang violence have led to civil gang injunctions and curfews that have left alleged gang members and other youth without the right to stand in their own neighborhoods and without a basis to challenge gang classifications.¹⁴⁶

Under a stop-and-frisk regime, the police are required to articulate reasonable suspicion that the individual had engaged or was about to engage in a crime.¹⁴⁷ If the Court of Appeals had upheld the Appellate Division’s decision, reputation alone, and not criminality, would be enough to compromise both an alleged gang member’s right to stand on the street and the right of anyone standing with him, whether that person was aware of the alleged gang affiliation or not. The surveillance and intelligence gathering of Operation Crew Cut create databases for those who have never been arrested or accused of any crime, where the Criminal Procedure Law would not permit the retention of such data after a stop.

3. The Gang Narrative Harms Community Relations

Gang or crew allegations affect not only those who voluntarily associate with gang members, but can render entire communities vulnerable to militaristic anti-gang tactics.

At six a.m. on June 3, 2014, hundreds of police officers in riot gear descended on the Grant and Manhattanville housing projects as helicopters roared overhead.¹⁴⁸ The

¹⁴¹ Brief Amicus Curiae for Defendant-Appellant on behalf of the New York Bar Ass’n, *supra* note 137, at 4.

¹⁴² Hearing Transcript at A53, *People v. Johnson*, 99 A.D.3d 472, 473 (N.Y. App. Div. 2012). (No. 8050 5822/10).

¹⁴³ *Johnson*, 99 A.D.3d at 473.

¹⁴⁴ *See id.* It is not clear how this decision could have been reconciled with *City of Chicago v. Morales*, 527 U.S. 41 (1999), which struck down a city ordinance that provided for dispersal orders and arrests of suspected gang members and those standing with them as void for vagueness.

¹⁴⁵ *Johnson*, 22 N.Y.3d at 1164.

¹⁴⁶ *See supra* notes 61–66 and accompanying text.

¹⁴⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁴⁸ J. David Goodman, *Dozens of Gang Suspects Held in Raids in Manhattan*, N.Y. TIMES, June 4, 2014, at A25;

police broke down doors and ordered residents, including children, to the floor at gunpoint.¹⁴⁹ This raid was New York City's "largest ever gang bust" according to Reuters.¹⁵⁰

The purported goal was to arrest 64 individuals who were charged with crimes related to feuds between crews in the two projects that have simmered for at least three years.¹⁵¹ But when the dust settled, one in three of the wanted individuals remained at large.¹⁵²

These 64 were among 103 individuals charged in two conspiracy indictments. The most serious of the substantive crimes charged in the conspiracy were 2 homicides and approximately 50 shootings (causing 19 injuries).¹⁵³ For at least one of the homicides, that of Tayshana Murphy in 2009, two individuals had already been convicted and imprisoned.¹⁵⁴ The 103 charged were charged based on theories of accessorial liability (primarily conspiracy).¹⁵⁵ A major form of evidence supporting these charges are the communications relating to the on-going rivalry between the Grant Houses-based 3 Staccs gang and the Manhattanville-based Make it Happen Boys and Money Avenue. During the years between the killing of Tayshana Murphy and the conspiracy arrests, the NYPD listened to telephone calls from Rikers, followed social media postings of the kids in the 3 Staccs, Make it Happen Boys, and Money Avenue gangs/crews, and collaborated with the Manhattan District Attorneys office to assemble evidence to charge these 103 individuals with conspiracy to commit homicide, to possess weapons, and to commit various assaults.¹⁵⁶

Although most of those indicted for conspiracy in the first degree and other charges that carry potential life sentences engaged in some form of non-communicative conduct, 9 of the 103 were not characterized as committing substantial criminal conduct.¹⁵⁷ Others were present for one or two street encounters over the course of years.¹⁵⁸ Yet others had pleaded guilty years earlier, had already served part or all of their sentences, and were indicted and faced prosecution based on the same predicate acts in the

Daryl Kahn, *Harlem Residents: We Asked the City for Help, We Got a Raid Instead*, JUV. JUST. INFO. EXCHANGE (June 5, 2014), <http://jjie.org/harlem-residents-we-asked-city-for-help-we-got-a-raid-instead/107031/>.

¹⁴⁹ *The Brian Lehrer Show: We Asked the City for Help and We Got a Raid*, (WNYC radio broadcast June 10, 2014), available at <http://www.wnyc.org/story/we-asked-city-help-and-we-got-raid/> (according to callers who were residents of Grant and Manhattanville Houses, homes were "trashed" furniture "broken" and children were traumatized by the unprofessional heavy handed raids); Abigail Kramer, *Busts, but Not a Solution, from NYPD Tracking of Housing Feuds*, CAPITAL (Mar. 2, 2015), <http://www.capitalnewyork.com/article/city-hall/2015/03/8563012/busts-not-solution-nypd-tracking-housing-feuds#>.

¹⁵⁰ Victoria Cavaliere, *More than 100 Arrested in Harlem in Largest-Ever NYC Gang Bust*, REUTERS (June 4, 2014), <http://www.reuters.com/article/2014/06/04/us-usa-crime-gangs-idUSKBN0E9IDQ20140604>. (Indicating that 40 of the 64 individuals were arrested.)

¹⁵¹ *Id.* 103 individuals were charged in two indictments but 39 of them were already incarcerated. Khan, *supra* note 138.

¹⁵² Cavaliere, *supra* note 15240; Khan, *supra* note 148. The show of force and the militaristic tactics are common to gang units and have led to serious abuses and scandals. See, e.g., *supra* Part IV(A)(1).

¹⁵³ See Press Release, N.Y. Cnty. Dist. Att'y's Office, District Attorney Vance and Police Commissioner Bratton Announce Largest Indicted Gang Case in NYC History (June 4, 2014), available at <http://manhattanda.org/press-release/district-attorney-vance-and-police-commissioner-bratton-announce-largest-indicted-gang>. See also Goodman, *supra* note 148.

¹⁵⁴ Goodman, *supra* note 148.

¹⁵⁵ Press Release, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Assistant Dist. Att'y Christopher Ryan, Comment at N.Y.C. Bar Ass'n Panel on Gang Intervention Panel (Jan. 14, 2015) (stating that 94 of the 103 indicted committed "substantive criminal conduct").

¹⁵⁸ See, for example, defendants Johnny Green and Andre Guzman described in paragraphs 102, 105, and 258 of the MA & MHB indictment. Press Release, *supra* note 153.

Manhattan District Attorney's new conspiracy charges.¹⁵⁹

Moreover, while the NYPD and the District Attorney amassed evidence in the form of gang member communications to charge these 103 individuals, the residents of Grant Houses and Manhattanville sought assistance at the precinct level to diffuse tensions and provide alternatives for the warring factions.¹⁶⁰ How much violence could have been prevented if the NYPD and District Attorney had worked with community members to intervene and mediate conflicts rather than secretly recording, watching and amassing information?

The raid on Grant and Manhattanville Houses is deeply troublesome in two respects. First, one may question the wisdom of watching, listening, spying, waiting and then using conspiracy charges to link dozens of young people to offenses committed by others instead of intervening to defuse the rivalry. Second, one may wonder how a military-style raid to accomplish regular law enforcement goals affects police-community relations. Having obtained the indictment and surveilled the individuals for years, why enter their homes wearing bulletproof vests, with firearms drawn, pointing weapons at family members, while helicopters whirl overhead? While some members of the community may applaud such tactics, at least one former gang member reported that for youth in those neighborhoods, the tactics elevated the arrested individuals to "rock star" status and glorified the reputation and standing of crews in the eyes of some vulnerable youth.¹⁶¹

B. Gang Suppression as a Catalyst to Gang Formation and Individual Criminality

Even if one accepts that an intelligence and suppression strategy such as Operation Crew Cut extends to non-gang members, former gang members, and gang members who are not actively involved in any collective crime or violent conduct, one may question whether anti-gang policing does any harm. If an individual is not engaged in gang activity, then surely he or she has nothing to worry about? Surely the overarching message that gangs and crews will be watched and dealt with harshly will be a balm to at-risk communities and a deterrence to those who would become gang members. Unfortunately, like the overbroad use of stop-and-frisk, the impact of gang-suppression tactics reaches far beyond the alleged gang or crew member. Gang suppression units often resort to stops and minor arrests to garner information about suspected gang members and to communicate that police, and not gangs, control neighborhoods. Moreover, even when gang suppression tactics are used against actual gang members, law enforcement opposition can serve to increase individual criminality, entrench gang affiliation, increase gang membership, and prolong gang ties.

¹⁵⁹ Jeff Mays, *District Attorney Cast Too Wide a Net in Harlem Gang Crackdown, Critics Say*, DNAINFO (Oct. 6, 2014, 7:31 AM), <http://www.dnainfo.com/new-york/20141006/west-harlem/vance-cast-too-wide-net-harlem-gang-crackdown-families-say> (recounting how Darrell Rhett, plead guilty to an assault and was serving a five-year sentence for shooting a 3 Staccs member and was rearrested in prison for conspiracy for the same shooting on June 4 in connection with Grant House and Manhattanville raids; similarly, Ralphie Garcia who was arrested at the age of 15 for gun possession was completing an intensive supervision program and completing his GED when the NYPD and the Manhattan DA's office had him rearrested); Ben Popper, *How the NYPD Is Using Social Media to Put Harlem Teens Behind Bars: The Untold Story of Jelani Henry, Who Says Facebook Likes Landed Him Behind Bars*, THE VERGE (Dec. 10, 2014, 01:15 PM), <http://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison> (recounting how Asheem pleaded guilty to possessing a firearm, served a probation sentence, completed high school and was starting college when he was indicted for possessing the same gun and appearing in photos on social media dating back to when he was 14 and 15).

¹⁶⁰ Kahn, *supra* note 148.

¹⁶¹ Kramer, *supra* note 149.

I. Gang Formation

From the earliest studies of street gangs, the transition from informal youth peer group to true gang status has been attributed to oppositional forces.¹⁶² The informal peer group tends to form in neighborhoods with limited resources and to be based on geographic proximity.¹⁶³ In many ways, the “crews” described by the NYPD fit this model. These groups form for protection and to ensure access to limited recreational space.¹⁶⁴ Often opposition comes in the form of other informal peer groups. The police, however, can contribute to the transition from informal group to gang status by treating groups as if they are gangs.

After an exhaustive study of informal youth groupings and gangs in the early twentieth century in Chicago, Frederic Thrasher identified the catalyst that turns typical youth groupings and delinquent groups into gangs. That catalyst is opposition. The opposition can come either from other gangs or from the police. As Thrasher outlines the move from informal groupings based on neighborhood and age group to gang:

[A] play-group may acquire a real organization. Natural leaders emerge, a relative standing is assigned to various members and traditions develop. It does not become a gang, however, until it begins to excite disapproval and opposition, and thus acquires a more definite group-consciousness. It discovers a rival or an enemy in the gang in the next block; its baseball or football team is pitted against some other team; parents or neighbors look upon it with suspicion or hostility; “the old man around the corner,” the storekeepers, or the “cops” begin to give it “shags” (chase it); or some representative of the community steps in and tries to break it up. This is the real beginning of the gang, for now it starts to draw itself more closely together. It becomes a conflict group.¹⁶⁵

Police recognition and suppression efforts confirm and consolidate gang structure, gang identity, and gang duration. Suppression of gangs, like trimming back certain shrubs, is one means of encouraging gang growth.

The contrast between New York City’s experience and that of cities which adopted aggressive gang suppression strategies in the past fifty years supports the conclusion that gang suppression may increase gang cohesion and membership.¹⁶⁶ The Justice Policy Institute study *Gang Wars* traces the divergent approaches to gang problems in New York, Los Angeles, and Chicago from World War II to present.¹⁶⁷ In New York the Youth Board was established in the mid-fifties and street gang workers were dispatched to troubled neighborhoods throughout the city. The street gang workers, who were not law enforcement officers, gave advice, took kids on trips, helped them find jobs, and intervened to attempt to negotiate truces or even alert law enforcement of fights and weapons.¹⁶⁸ In addition to street workers, the social work model based on the Chicago

¹⁶² THRASHER, *supra* note 16, at 10.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Greene & Pranis, *supra* note 19, at 68.

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.* at 15-16.

Area Project “used local residents as family counselors and organizers in their neighborhoods to engage . . . youth and adults in projects designed to improve and strengthen social control in the community.”¹⁶⁹ Truces were negotiated, and gang violence largely abated by the mid 1960s.¹⁷⁰ This is not to claim that there are no gangs in New York, but as discussed in part IB above, the number of offenses attributed to gang violence has been consistently low in New York. The “gangs” that do exist are little more than the informal peer groups as observed by Frederic Thrasher and are not organized criminal associations. Not even the NYPD claims that the “crews” they are now targeting are anything like organized crime groups or hierarchical established gangs.¹⁷¹

This is not the case in cities where gangs have been vigorously repressed and suppressed by law enforcement. In cities like Chicago and Los Angeles, gangs have become institutionalized, and persist across generations.

In Chicago, the police have engaged in round after round of gang suppression. The result of these efforts has not been elimination of gangs. The strength and level of organization of gangs has been linked to these suppression efforts. In a move that sounds much like the expansion of the NYPD’s gang unit, in the late sixties “the gang intelligence unit was increased from 38 to 200 officers” for political reasons rather than because of violent crime.¹⁷² In the years that followed, the Unit engaged in an intensive campaign of harassment that led to greater incarceration and greater resistance of those incarcerated to prison authority.¹⁷³ Prisons became gang-dominated institutions, and imprisonment served to cement gang bonds and gang power rather than deter gangs or undermine their power. Successive attempts at gang suppression, such as the city ordinance that was overturned in *Chicago v. Morales*,¹⁷⁴ have done little to improve matters. Prosecution and imprisonment of the leadership of the largest gang, the Gangster Disciples, has contributed to more gang factions and more violence.¹⁷⁵

Similarly, in Los Angeles, the police have attempted to suppress gangs through force, arrests, and injunctions. The STEP Act has provided prosecutors with tools to obtain lengthy sentence enhancements.¹⁷⁶ Yet,

[d]espite massive, militarized police actions, strict civil injunctions, draconian sentencing enhancements, and a gang database that appears to criminalize upwards of half of its young African American residents, gang violence is worsening, according to media reports. With a reported 729 active gangs and 39,488 gang members Los Angeles remains the dubious honor of being the gang capital of the world.¹⁷⁷

The observation that opposition spurs gang development along with the

¹⁶⁹ *Id.* at 16.

¹⁷⁰ *Id.* at 17.

¹⁷¹ N.Y.C. Council Comm. on Pub. Safety, *supra* note 48 (“[Despite] their lack of defined structure . . . [crews] remain at least as dangerous as their more structured counterparts.”). Deputy Chief Harrington begins speaking on the topic at 1:13:22 of the video.

¹⁷² Greene & Pranis, *supra* note 19, at 22.

¹⁷³ JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 141-63 (1977).

¹⁷⁴ 527 U.S. 41 (1999).

¹⁷⁵ Jeremy Gerner & Jason Meisner, *More than 2 Dozen Gang Members Arrested in Drug Investigation*, CHI. TRIB. (June 12, 2014), http://articles.chicagotribune.com/2014-06-12/news/chi-more-than-2-dozen-gang-members-arrested-in-drug-investigation-20140612_1_drug-investigation-dozen-gang-traveling-vice-lords.

¹⁷⁶ CAL. PENAL CODE § 186.22 (West 2014).

¹⁷⁷ Greene & Pranis, *supra* note 19, at 29.

dominance of gangs in cities that have adopted aggressive anti-gang suppression tactics suggests that pursuing anti-gang tactics in the absence of serious gang problems is unwise. Indeed, even where gang problems are serious, the periods of relative calm in Los Angeles and Chicago have coincided with negotiated truces and community engagement, not with law enforcement crackdowns.¹⁷⁸ It is not surprising that policing and prosecution of peripheral or non-gang members followed by incarceration of these individuals with core members will create or cement gang ties leading to more cohesion over time.

2. Individual Criminality

Aggressive policing does not simply encourage gang cohesion; it can also contribute to individual delinquency and criminality. Negative contact with law enforcement and contact that is perceived of as unfair can contribute to unwillingness to conform to the law in several ways. First, procedural justice research establishes that people are much more willing to conform to the law when they are treated fairly and with respect.¹⁷⁹ For those who experience police surveillance as harassment, are treated harshly during arrests, and are prejudged as alleged gang members if arrested for even a minor offense, the perceived unfairness of the treatment may reduce willingness to comply with the law and the perception that law enforcement is legitimate.¹⁸⁰ Additionally, labeling theory posits that when one is labeled as delinquent, one is more likely to associate with delinquent peers and behave in delinquent ways.¹⁸¹ The raids, high bail requests, double-jeopardy defying reindictments,¹⁸² and fake Facebook friend requests all undermine the legitimacy of law enforcement and respect for the criminal justice system. Labeling and segregation, particularly in jails and prisons, may encourage rather than deter delinquent conduct.

Whether or not these theories correctly explain the impact of negative contact with police and the criminal justice system, there can be no doubt that these factors are causally connected to increased delinquency, criminality and violence. There is strong proof that negative police contact in fact contributes to criminality. Ironically, one of the best sources of proof for this is the research done in connection with a gang intervention program that targets at risk youth at the middle school age.

The GREAT program is a gang intervention program that has been carefully evaluated by researchers. The program brings law enforcement representatives to schools to talk to young people about the dangers of gangs. The program covers 31 schools in 7

¹⁷⁸ *Id.* at 21, 26.

¹⁷⁹ TOM R. TYLER & E. ALLEN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Tom R. Tyler & Jason Sunshine, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC. REV.* 513 (2003).

¹⁸⁰ Raymond Patemoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *LAW & SOC'Y REV.* 163 (1997) (analyzing a randomized study of domestic violence arrests, showing defendants who were treated politely and given an opportunity to speak were less likely to re-offend than those that were treated less politely). See also, Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 *COLUM. HUM. RTS. L. REV.* 71, 97 (2005) (concluding that drug enforcement appears to have an adverse effect on crime rates); Robert White, *Curtailing Youth: A Critique of Coercive Crime Prevention*, 9 *CIV. REMEDIES & CRIME PREVENTION* 117, 124 (1998) (observing one consequence of street policing as crime prevention is the "creation of 'criminals'"); Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 *J. RES. CRIME & DELINQ.* 426 (1993) (noting that defiance to unfair sanctions may explain reoffending); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 *CRIME & JUST.* 1, 22–23 (1998) (noting that stigma-erosion may decrease deterrence effect of sanctions).

¹⁸¹ Wiley & Esbensen, *supra* note 16, at 17 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further).

¹⁸² See *supra* note 159.

cities¹⁸³ and the final sample includes 2614 youth.¹⁸⁴ The program has success in that the GREAT program substantially reduced gang membership by 39%.¹⁸⁵ However, the decrease in gang membership is not matched by a decrease in violent crime or general delinquency.¹⁸⁶ The first lesson of the GREAT program should be that deterring gang membership and deterring violent crime are two different things. Each may be valuable, but decreasing gang membership does not automatically reduce crime or violence.

A second and equally important lesson of the GREAT research and related social science research is that police and criminal justice intervention increase delinquency and violence independent of any other factor.¹⁸⁷ Controlling for initial rates of delinquency, the study follows youth over time, and thus can compare individuals with negative police contact to similar individuals without negative police contact (stops or arrests) and determine if the negative police contact independently predicts a reduction in delinquent acts (as deterrence theory would predict) or an increase in delinquency (as procedural justice and labeling theories would predict).¹⁸⁸

The lesson of the GREAT research is not only clear but it is quite dramatic. Controlling for initial levels of delinquency, those who are stopped by police engage in nearly 60% more delinquent acts than those who have no contact with police.¹⁸⁹ Those who are arrested engage in 230% more delinquent acts than those with no contact.¹⁹⁰ And those who are arrested engage in nearly twice as many delinquent acts as those who are merely stopped.¹⁹¹ In responding to questions about their attitudes toward delinquent behaviors and delinquent peers:

[Y]outh who have been stopped or arrested report significantly less anticipated guilt, greater agreement with neutralization techniques, greater commitment to delinquent peers, and higher levels of delinquency than youth with no police contact. In addition, our findings show that the negative consequences of police contact are compounded for arrested youth; subsequent to arrest they report less anticipated guilt and more delinquency compared with stopped youth.¹⁹²

The rich data from the GREAT research provides affirmative lessons about the

¹⁸³ Albuquerque, NM, Chicago, IL, Dallas-Fort Worth, TX, Greeley, CO, Nashville, TN, Philadelphia, PA, and Portland, OR. *Id.* at 7.

¹⁸⁴ *Id.* at 7–8. The original sample was 3820 students but the 2614 reflects those for whom all data was available at Wave 4 (about 3 years after the initial participation in GREAT). *Id.*

¹⁸⁵ Finn-Age Esbensen et al., *Results from Multi-Site Evaluation of the G.R.E.A.T. Program*, 29 JUST. Q. 125, 139–41 (2012).

¹⁸⁶ *Id.*

¹⁸⁷ Wiley & Esbensen, *supra* note 16, at 17 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further); Jon Gunnar Bernburg et al., *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory*, 43 J. RES. CRIME & DELINQ. 67, 80 (2006) (“[J]uvenile justice intervention increases the odds of involvement in serious delinquency . . . by a factor of 5.5, net of all controls.”) Although this effect is greater for non-gang members, it is also observed for gang members. Thus police intervention and gang membership reinforce each other creating more, rather than less risk of subsequent delinquency. *Id.*

¹⁸⁸ Wiley & Esbensen, *supra* note 16, at 9–10 (controlling for original levels of delinquency police stops increase future delinquency and arrests increase delinquency even further).

¹⁸⁹ *Id.* at 15. In the researchers’ words “The use of propensity score matching reduces the likelihood that our results are being driven by preexisting differences, a problem that may plague much existing labeling research.”

Id. at 17.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.* at 16.

¹⁹² *Id.* at 17.

relationship between policing, delinquency, and violent crime. The GREAT researchers had extensive data from the program participants about their backgrounds, risk factors, and delinquent behavior. The researchers also followed the GREAT participants over time. There can be little doubt that negative suppression tactics such as those proposed in connection with Operation Crew Cut are likely to increase individual delinquency and commitment to delinquent peers.

In similar research analyzing 1,000 youth from the Rochester Youth Development Study of seventh and eighth graders, the effect of juvenile justice intervention was to increase the odds of serious delinquency by a factor of 5.5 by Wave 4.¹⁹³ As in the GREAT experiments, the researchers control for initial levels of delinquency and substance abuse. Whether these results stem from the label “juvenile delinquent” or the fact that juvenile justice intervention increases contact with delinquent peers, it is evident that suppression efforts are far more likely to increase delinquency than to reduce it.

This research is not intended to suggest that stops, arrests, or juvenile justice interventions are never appropriate. Rather the lesson is that these should be avoided where delinquency is not severe. The broad net of anti-gang policing tends to catch the suspected, the marginal, the former, or the wannabe gang members together with the core members. Databases, surveillance and mass-prosecutions encourage these trends. These interventions are likely to significantly increase delinquent behavior for those who are targeted. If the goal is actually to reduce violence, then expanding policing to those who live on gang blocks and associate with any other gang member, which is virtually unavoidable in some circumstances, will undermine this goal in the long term.

V. ALTERNATIVES APPROACHES TO REDUCING GANG CRIME

As discussed above, intensive gang suppression policing is damaging to police, community, and at-risk youth. This is particularly so where the underlying gang problem is exaggerated and is a pretext for intensive surveillance. The research and history of gang suppression tactics by law enforcement instructs that suppression tactics are often ineffective and counterproductive. The oppositional nature of gang formation and the effect of labeling theory means that the greater the gang suppression effort, the larger the gang problem will likely become.

Fortunately, New York City has a history of successfully using non-law enforcement interventions to reduce gang violence. In the 1960s, New York relied on non-law enforcement street workers and community social work models to connect at-risk youth with services, to mediate conflicts, and to notify law enforcement when serious violent confrontation was anticipated. While these programs were disbanded in the 1970s, the collaboration with street workers and community groups who were not law enforcement provides a model for working with the crew or gang-involved youth today.

The Chicago Ceasefire/SNUG (guns spelled backward) model takes the non-law enforcement street worker model a step further by mobilizing former gang members and convicts as outreach workers and violence interrupters.¹⁹⁴ New York State has funded

¹⁹³ Bemburg et al., *supra* note 187, at 80.

¹⁹⁴ Nat'l Inst. of Justice, Office of Justice Programs, *Program Profile: Cure Violence (Chicago, Illinois)*, CRIME SOLUTIONS.GOV, <http://www.crimesolutions.gov/ProgramDetails.aspx?ID=205> (last visited May 13, 2015). The SNUG model is now called: Cure Violence.

SNUG initiatives with significant reductions of shootings in Albany and Rochester.¹⁹⁵

Building on New York's history with non-law enforcement outreach workers and the Chicago model, several community-based organizations have developed in New York and have been credited with substantial reductions in gang related violence. In East New York, Brooklyn, the neighborhood development organization Man Up! has used former gang members as mentors and mediators and violence interrupters.¹⁹⁶ Similarly, in Crown Heights, Save Our Streets replicated the Cure Violence Model, reducing shootings in the target area by 6% at a time when adjacent comparable neighborhoods experienced an increase in gun violence of 18 and 28%.¹⁹⁷ These are examples of community-based groups that engage directly to defuse violent conflicts and protect communities and gang members.

Successful programming need not be based on or targeted at gang or crew members to be effective. Recognizing that gang membership and violence are independent of each other (GREAT, for example, decreases gang membership but does not affect violence), it is important that the goal of preventing violence be the focus. Programs that reach all youth and keep them in school or get them jobs can prevent violence as effectively as those targeted at gang members. Tutoring in algebra and other subjects in Chicago has reduced drop-out rate and violence in at-risk youth.¹⁹⁸ Job and employment programs have long been associated with reduced gang membership, leaving gangs, and reduced violence.¹⁹⁹

The Boston Ceasefire Program does instruct that law enforcement and even law enforcement intelligence can play an important role in reducing gang violence when it is properly targeted.²⁰⁰ The Boston Ceasefire Program identified the most violent offenders and brought them in to meet with law enforcement and community leaders. Rather than collecting data secretly as the NYPD Operation Crew Cut does and bringing massive indictments seeking decades-long sentences based on conspiracy charges, the Boston Ceasefire surveillance data was used to accomplish specific deterrence. Individuals identified as most likely to commit violent crime were brought to public meetings, told they were being observed and offered assistance.²⁰¹

Another alternative to the current NYPD suppression strategy that is well supported by research relating to gang formation and violence would be to do nothing at all. Gang researchers concur that the vast majority of gang members age out of gangs and

¹⁹⁵ *Cure Violence New York*, CUREVIOLENCE.ORG, <http://cureviolence.org/partners/us-partners/snug/> (last visited May 13, 2015).

¹⁹⁶ Jim Dwyer, *No Shootings or Killings for 363 Days, but the Fight Is Far from Over*, N.Y. TIMES, July 19, 2013, at A17.

¹⁹⁷ SARAH PICARD-FRITSCHÉ & LENORE CERNIGLIA, CTR. FOR COURT INNOVATION, TESTING A PUBLIC HEALTH APPROACH TO GUN VIOLENCE: AN EVALUATION OF CROWN HEIGHTS SAVE OUR STREETS, A REPLICATION OF THE CURE VIOLENCE MODEL 18 (2012), available at http://www.courtinnovation.org/sites/default/files/documents/SOS_Evaluation.pdf.

¹⁹⁸ Jann Ingmire, *Crime Lab Makes Impact for Chicago Youth*, U. CHI. (Feb. 20, 2014), http://www.uchicago.edu/features/crime_lab_makes_impact_for_chicago_youth/.

¹⁹⁹ Justin Dickerson, *Nothing Stops a Bullet Like a Job: Homeboy Industries and Restorative Justice* (May 14, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1827983 (providing a history of Homeboy Industries, and the philosophy of its founder, Father Greg Boyle).

²⁰⁰ David M. Kennedy et al., U.S. Dep't of Justice, *Developing and Implementing Operation Ceasefire*, in REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE 1, 27-28, 30, 48 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188741.pdf>.

²⁰¹ *Id.* at 3, 35-41.

gang violence with no intervention.²⁰² While neglect is not preferable to employment, counseling, violence prevention, and educational improvements, these strategies should ideally be carried out by community-based groups, not law enforcement. Because police contact, stops, arrests, prosecution, imprisonment, and juvenile justice involvement are all factors that tend to increase delinquency, gang membership, and violence, it would be far better to do nothing than to engage in the intensive policing of vulnerable youth.²⁰³ New York has had little in the way of gang policing during the past three decades and has fared far better than localities that use aggressive gang suppression tactics. These different experiences provide some of the most compelling proof that gang suppression is a catalyst for, not a solution, to gang violence.

In addition to using a social work model of intervention for general crime deterrence, and a limited and targeted law enforcement model for working with violent criminals, narrow and enforceable criteria must be developed to maintain databases that are not overbroad. While the details of appropriate inclusion criteria, oversight, notice and appeal provisions, maintenance, and security measures for such database are beyond the scope of this paper, the databases must, at a minimum, be narrowly tailored with requirements of actual criminality, notice to those included and to parents of minors, and regular purging of non-gang and non-active gang members.

CONCLUSION

By all accounts, New York City has enjoyed a tremendous drop in all crime and particularly in violent crime during the past 25 years. This drop has been accomplished without intensive gang policing or prosecutions. During this time, the NYPD has always recorded a low number of gang crimes. Nonetheless, during the death-throws of the NYPD's stop-and-frisk regime in New York City the NYPD announced a new threat in the form of "crews," and, despite continuing crime declines, quadrupled the number of Gang Division officers dedicated to watching and policing these youth of color. This announcement manipulates and exaggerates an existing phenomenon to increase support for a new profile-based policing. The NYPD's gang division and databases permit extensive surveillance of suspect populations, and essentially recreate and expand the scope of the blanket stop-and-frisk regime without the potential for court supervision. Like the stop-and-frisk regime before it, the strategy will exacerbate tensions with communities of color and sweep up innocent and guilty alike. Unlike stop-and-frisk, there is currently no effective oversight to limit the extent of surveillance or information collected relating to vulnerable youth. Most importantly, these strategies are unsuited to actually reducing problems of gang and youth violence and have historically increased rather than decreased gang violence and the costs associated with it. Rather than following west-coast forerunners into a cycle of gang suppression, long sentences, and community disruption, New York should build on its history of non-law enforcement outreach to provide productive alternatives to gang involvement. This article should also prompt other jurisdictions to examine the empirical need for and efficacy of aggressive gang suppression strategies.

²⁰² See TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 38, 41 (2003) (discussing a study of 1000 Rochester youth from the age of 13 to 17.5, about 31% reported belonging to a gang at some point but only 1.6% of the sample remained in gangs at the age of 18 and this number did not increase through the rest of the study to age 22). See also, IRVING A. SPERGEL, THE YOUTH GANG PROBLEM 104 (1995) ("Most studies suggest that gang members simply 'mature-out'").

²⁰³ See text at notes 189-93 for research demonstrating the adverse impact of negative police contact on youth.

THE NOT SO GREAT WRIT: CONSTITUTION *LITE* FOR STATE PRISONERS

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I. INTRODUCTION

Following up on a previous piece describing the limiting effect of confining federal habeas relief to violations of “clearly established Federal law, as determined by the Supreme Court,”¹ this brief essay focuses on a particular set of cases to examine further the constraints the Court has placed on the grant of relief to state prisoners. Over the past seven terms (October, 2009 to June, 2015), the Court has issued summary, per curiam reversal of grants of federal habeas corpus relief by circuit courts of appeals at the behest of wardens, without briefing or oral argument, in eighteen cases, including seven involving death sentences.² By contrast, in only five cases did the Court reverse *denials* of habeas relief per curiam, and those cases presented highly unusual circumstances.³ Shining a bright light on cases in which the Court saw fit to undo a determination by a federal court of appeals that a state prisoner had been deprived of his constitutional rights reveals the extent to which the Great Writ has been diminished by the Court’s restrictive reading of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). State prisoners are entitled to relief from federal courts, it appears, only for the most blatant violations of their rights – they must be content with Constitution *lite*.⁴

The summary reversals of cases in which a panel of one of the circuit courts of appeal, the courts directly below the Supreme Court, found merit in petitioners’ claims continue the trend of interpreting AEDPA in a way that makes it virtually impossible to overcome the deference now due to state court rejections of constitutional claims. To understand the dramatic changes wrought by the Supreme Court’s interpretation of AEDPA, it is useful to recall the position of state prisoners seeking redress of their constitutional rights before that statute was enacted. Petitioners who had followed the proper procedures (giving state courts opportunity to rule on their federal claims, not procedurally defaulting them, and overcoming any harmless error argument) had the right to have a federal court decide, viewing the question *de novo*, whether their constitutional rights were violated in the state court proceedings.⁵ Now, state prisoners have only two ways of securing *de novo* federal court review of federal constitutional claims alleged to have been wrongly decided by the state court: through a grant of certiorari on direct review (with the Court hearing about 75 cases per year of more than 7,000 petitions filed) or by overcoming a finding of procedural default.⁶

¹ See Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 743-44 (2010).

² See *infra* Appendix A (listing cases reversing grants of habeas relief).

³ See *infra* Appendix B (listing cases reversing denials of relief); see also *infra* notes 159-64.

⁴ While this essay does not directly engage with the ongoing debate about the role of federal habeas review prompted by Nancy King and Joseph Hoffmann’s book *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011), the reader will correctly infer that the author’s sympathies lie with those who, unlike King and Hoffmann, still see a significant role for federal courts in ensuring the protection of constitutional rights in state courts. See, e.g., Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 198-99 (2012).

⁵ See, e.g., *Brown v. Allen*, 344 U.S. 443, 462-64 (1953).

⁶ When a state court relies on an independent and adequate state ground, such as failure to raise appropriate objections, to deny relief on a constitutional claim, rather than addressing the merits, federal courts that find either “cause and prejudice” for the default or a showing of actual innocence may address the issue of whether the petitioner’s rights were violated *de novo*. See *House v. Bell*, 547 U.S. 518, 536 (2006); see also *Murray v. Carrier*, 477 U.S. 478, 485, 495-96 (1986). One scholar views that potential avenue for relief as showing that the Court has a logical approach to the habeas remedy consistent with notions of fault comparable to those applied to constitutional torts. See Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 523, 585 (2014). On the other hand, it could be seen as perverse to provide a benefit to petitioners who failed to adhere to state procedural rules.

In all other cases, federal courts, rather than granting relief to defendants who suffered a constitutional violation that prejudiced them, instead are limited to deciding whether the state courts' refusal to acknowledge the constitutional violation represented such an unreasonable application of clearly established Supreme Court law that no rational jurist would agree with the state court.⁷ The extent to which Congress actually intended, when it enacted AEDPA, to cause such a dramatic shift in habeas jurisprudence is subject to debate.⁸ Even assuming the legitimacy of the new regime, the way the Supreme Court has handled cases in which circuit courts granted relief to state prisoners should raise concerns about the diminished protection of constitutional rights.

The cases examined for this essay demonstrate the Court's continuing substantive restrictions on the federal habeas remedy for state prisoners, as well as displaying its low regard for that remedy by the use of summary procedure and a highly dismissive tone. First, the Court's definition of what law it has "clearly established" is disconcertingly narrow, requiring that the Supreme Court confronted on a prior occasion, in which it had granted its notoriously parsimonious certiorari review on direct appeal, essentially the same set of facts presented by the habeas petitioner. Second, building on its increasing deference to any determinations by state courts on the merits of the constitutional claims, the Court appears to require such a determination to be basically irrational to warrant federal relief – if *any* "fairminded jurist"⁹ could arrive at the same conclusion, habeas is precluded.

In terms of process, the Court issues these reversals without so much as hearing the respondent – the habeas petitioner who prevailed in the Court of Appeals – on the merits of why the grant of relief should be affirmed. On petitions by wardens, to which prisoners respond only to urge the Court not to grant review, the Court is summarily reversing decisions on the basis that those decisions were so clearly in error as to occasion no debate, even when dissenting justices disagree. In addition, the *per curiam* opinions are written in a tone more appropriate to scold a naughty child than to address an institution one step below the Supreme Court. The language in the opinions in some of these cases reflects a disdain not only of the petitioners, but of the courts of appeals that granted their petitions, hardly in keeping with the significant constitutional rights at stake. Finally, the few cases in which the Court uses summary reversal when habeas relief was denied display a quite different pattern.

II. CLEARLY ESTABLISHED LAW

The Supreme Court has continued its pattern, first announced in *Carey v. Musladin*, of narrowly defining what law has been so "clearly established" as to warrant

⁷ See, e.g., *Harrington v. Richter*, 562 U.S. 86, 100-02 (2011).

⁸ See Judith L. Ritter, *The Voice of Reason: Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U. L. REV. 55, 55-56 (2013); see also Elizabeth J. Barnett, Comment, *A Great Writ Reduced: Why the Tenth Circuit's Interpretation of Congressional Intent and Supreme Court Precedent Portends Defeat for State Prisoners Seeking Federal Habeas Corpus Relief*, 58 OKLA. L. REV. 469, 475-78 (2005); see also Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court through October Term 2010*, 87 NOTRE DAME L. REV. 2165, 2175 (2012); see also Daniel J. O'Brien, *Antiterrorism and Effective Death Penalty Act: Heeding Congress's Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT'G REP. 320 (2012). The authors of the latter two articles, a judge and assistant attorney general respectively, assume, without explanation, that it was Congress, rather than the Court, that intended the new meaning of "unreasonable."

⁹ See *Harrington*, 562 U.S. at 101-02.

habeas relief after a state court has denied the federal constitutional claim on the merits.¹⁰ Two consequences, both harmful to the protection of constitutional rights, flow from this approach. First, interpretation of the provisions of the Constitution designed to ensure the fairness of criminal convictions and sentences is placed entirely in the hands of the Supreme Court, with the lower federal courts playing virtually no role. Given the Court's limited review of cases on certiorari review of direct appeals, the opportunity to clarify or expand constitutional protections is vanishingly small. Second, failure to apply the constitutional principles developed in the context of appellate review to defendants, who may well have raised those challenges on direct appeal, but whose petitions for writ of certiorari were (as most are) denied, results in a stark differentiation, sometimes literally involving life or death, between prisoners whose cases are identical except for the timing of the Supreme Court's recognition of the constitutional violation. True, that difference has long been accepted as the price to pay in postconviction proceedings out of concern for finality and comity,¹¹ but when the petitioner unsuccessfully raised the claim on direct review, the result seems particularly unfair. Moreover, using the mechanism of summary reversal, without briefing or oral argument, for making that critical decision suggests that the cost is disproportionate to any possible benefit achieved.

One of the Court's most recent cases emphasizing the requirement that habeas relief is precluded in the absence of its own clearly established law illustrates the problem. In *White v. Woodall*,¹² over three dissents, the Court reversed the Sixth Circuit's grant of habeas relief to a Kentucky petitioner who had pled guilty to capital murder, kidnapping, and rape and been sentenced to death.¹³ The court of appeals had concluded that the trial judge's failure, upon request, to give the jury a no-adverse-inference instruction from the defendant's failure to testify at the penalty phase (here, the only phase) of his trial violated law that had been clearly established in a series of Supreme Court precedents.¹⁴ When the defendant had raised this federal constitutional issue on direct appeal, the Kentucky Supreme Court rejected it,¹⁵ and the Supreme Court denied the petition for certiorari.¹⁶ That denial, one of almost 2,000 issued that day,¹⁷ turned out to have sealed the defendant's fate under the Court's current regime governing habeas review. Had the Court granted certiorari, it might well have determined that the trial court did indeed violate the defendant's rights under the Fifth Amendment by refusing to issue a no-adverse-inference instruction. Indeed, Justice Scalia's opinion for the Court denying relief to Mr. Woodall acknowledged as much: "Perhaps the logical next step from [the Supreme Court precedents] would be to hold that the Fifth Amendment requires a penalty-phase no-adverse-inference instruction in a case like this one; perhaps not. . . . The appropriate time

¹⁰ See *Carey v. Musladin*, 549 U.S. 70, 72, 74, 76-77 (2006).

¹¹ See *Teague v. Lane*, 489 U.S. 288, 308-09 (1989).

¹² 134 S. Ct. 1697 (2014).

¹³ *Id.* at 1701, 1707 (containing a dissent written by Justice Breyer, and joined by Justices Ginsburg and Sotomayor).

¹⁴ *Woodall v. Simpson*, 685 F.3d 574, 579 (6th Cir. 2012), *rev'd sub nom.* *White v. Woodall*, 134 S. Ct. 1697. The Sixth Circuit concluded that the Kentucky Supreme Court had unreasonably rejected the defendant's Fifth Amendment claim based on clearly established law set forth in three Supreme Court cases. *Id.* In *Carter v. Kentucky*, 450 U.S. 288, 305 (1981), the Court held that a defendant is entitled to a "no adverse inference" instruction during the guilt phase of a trial. This Fifth Amendment protection against self-incrimination was extended from the guilt phase to the penalty phase of a capital trial in *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981). Finally, the Court determined that the "rule against negative inferences at a criminal trial appl[ies] with equal force at sentencing[.]" even where a defendant pled guilty. *Mitchell v. United States*, 526 U.S. 314, 317, 329 (1999).

¹⁵ *Woodall v. Commonwealth*, 63 S.W.3d 104, 115 (Ky. 2001) (distinguishing each of the Supreme Court cases on its facts).

¹⁶ *Woodall v. Kentucky*, 537 U.S. 835 (2002).

¹⁷ See 537 U.S. 812-945 (2002) (listing the cert. petitions denied on October 7, 2002).

to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by Sec. 2254(d)(1)."¹⁸

The Court in no way acknowledged that at the "appropriate time," the Court had denied review,¹⁹ as it does in all but a minuscule number of cases in which certiorari is sought on direct appeal. The Court thereby summarily relegated the defendant to "Constitution *lite*," the watered-down version of constitutional protections available to state prisoners on federal habeas review. As long as the specific facts of a petitioner's case are, in the eyes of a majority of the Supreme Court, sufficiently different from the precedent cases so that the "clearly established law" does not encompass them, no habeas relief is permitted. Even if some of the justices on the Court (three, in Woodall's case) agree with the circuit court that Supreme Court precedents had clearly established the constitutional principle on which the petitioner relies, the state prisoner is without a remedy for its violation, and his execution can be carried out.²⁰

In addition to characterizing the holdings of Supreme Court cases quite narrowly, the Court in *Woodall* foreclosed a basis for federal habeas relief that had been assumed to be available since Section 2254 was first interpreted in *Williams v. Taylor*.²¹ Justice O'Connor had included among possible "unreasonable application" scenarios one in which "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."²² The Court now rejected that possibility, asserting that the "unreasonable-refusal-to-extend rule" had never been endorsed by a majority of the Court.²³ The Court acknowledged that it is not always clear whether one is applying a rule or extending it, and that § 2254 does not require an identical fact pattern for a rule to be applied, rather than extended. Yet for relief to be available under the unreasonable application clause, a clearly established rule must so obviously apply to the given set of facts "that there could be no fairminded disagreement on the question."²⁴

Finally, the Court noted in this case, as it has in several of the recent per curiam reversals, that habeas relief can never be justified by reference to a circuit court's own precedents. Use of lower court cases as part of what law has been "clearly established" is, of course, expressly prohibited by the language of § 2254(d)(1) ("clearly established Federal law, as determined by the Supreme Court of the United States"). Yet even if circuit courts may not extend the reach of Supreme Court precedents in the habeas context, are they precluded from looking to their own opinions, or the decisions of sister circuits, in determining what law the Supreme Court has clearly established? The Sixth

¹⁸ *White v. Woodall*, 134 S. Ct. at 1707.

¹⁹ See *Woodall*, 537 U.S. at 835.

²⁰ Three dissenting justices in another recent case, in which the Sixth Circuit had granted habeas on the ground that the defendant prisoner was "in custody" when he was taken to a prison conference room, noted the stark difference between direct review and review of a decision on federal habeas:

Given this Court's controlling decisions on what counts as "custody" for *Miranda* purposes, I agree that the law is not "clearly established" in respondent Fields's favor. See, e.g., *Maryland v. Shatzer*, 559 U.S. 105, 106 (2010); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). But I disagree with the Court's further determination that Fields was not in custody under *Miranda*. Were the case here on direct review, I would vote to hold that *Miranda* precludes the State's introduction of Fields's confession as evidence against him.

Howes v. Fields, 132 S. Ct. 1181, 1185-87, 1194 (2012) (Ginsburg, Breyer, Sotomayor, JJ., concurring in part and dissenting in part).

²¹ 529 U.S. 362 (2000).

²² *Id.* at 407.

²³ *White v. Woodall*, 134 S. Ct. at 1705-06.

²⁴ *Id.* at 1706-07 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Circuit in *Woodall* referred to a prior case in which the court had analyzed the Supreme Court's cases involving an adverse inference from a defendant's failure to testify, noting that although the high court had not "directly" addressed the specific circumstance at issue, the principles set forth in its opinions suggested that the instruction requested was constitutionally required.²⁵ In fact, in the circuit court's view, the question the Supreme Court had not "directly" addressed was application of the principle to non-capital cases;²⁶ given *Woodall*'s death sentence, that concern was irrelevant. Nonetheless, the Supreme Court chastised the circuit for basing its conclusion on one of its own cases, broadly proclaiming that a lower court may not "consult" its own precedents in assessing a habeas claim governed by § 2254.²⁷

A number of the per curiam opinions that are the subject of this essay, in which the Court has reversed circuit courts' grant of habeas relief summarily, without briefing or oral argument, assert that habeas was not warranted because the applicable law had not been "clearly established" – there simply was no explicit prior holding by the Supreme Court on the facts presented. Of course, as any law student knows after a few weeks in school, the "holding" of a case can be stated in rather general or very specific terms. In the extreme case, so many facts are incorporated in the holding that virtually any deviation from those particular facts prevents the case from being binding precedent.²⁸ That appears to be the route taken by the Supreme Court in the habeas context when determining that the law based on which relief was granted was not in fact "clearly established." Reliance on general principles of constitutional law drawn from Supreme Court precedents, or, even worse, on interpretation of those precedents by the circuits themselves, is condemned as departing from the highly deferential standard of review required by AEDPA.

In eight of the summary reversals in recent terms, three involving death sentences and three sentences of life imprisonment, the per curiam opinions focused primarily on the lack of clearly established law to support the grant of habeas relief. In its brief opinion

²⁵ *Id.* at 1703. In the prior case, *Finney v. Rothgerber*, the court had analyzed the issue as follows:

In *Carter v. Kentucky*, 450 U.S. 288, 67 L. Ed. 2d 241, 101 S. Ct. 1112 (1981), the Supreme Court held that a defendant in a state criminal trial has the right, upon request, to a jury instruction that his failure to testify may not be the basis of an inference of guilt and should not prejudice him in any way. The Court had earlier held that a federal statute required that a no adverse inference instruction be given upon request of a criminal defendant. *Bruno v. United States*, 308 U.S. 287, 84 L. Ed. 257, 60 S. Ct. 198 (1939). Following *Carter*, in *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981), the Court held a defendant is entitled to the Fifth Amendment protection against self-incrimination in the punishment phase of a bifurcated trial of a capital case, declaring, "We can discern no basis to distinguish between the guilt and penalty phase of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." *Id.* at 462-63 (footnoted omitted).

The Supreme Court has not held directly that a no adverse inference instruction is required in the enhancement phase of a bifurcated persistent felony offender proceeding. It can be argued that *Estelle v. Smith* should be applied only to the punishment phase of capital cases, in view of the emphasis the Court placed on that feature of the case: "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." 451 U.S. at 463 (citations omitted). We do not believe this emphasis is significant.

751 F.2d 858, 863 (6th Cir. 1985).

²⁶ *Finney*, 751 F.2d at 863.

²⁷ *White v. Woodall*, 134 S. Ct. at 1702 n.2.

²⁸ Judges working within the common law tradition of *stare decisis* are well versed in how to characterize prior cases from which they want to deviate. A common formulation is to describe the pesky precedent as "best understood in the context of its facts." See Ursula Bentele, *Chief Justice Rehnquist, The Eighth Amendment, and The Role of Precedent*, 28 AM. CRIM. L. REV. 267, 290 (1991). Rehnquist was referring to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which had announced a strict rule about when jurors could be excluded from capital trials based on their death penalty views. *Wainwright v. Witt*, 469 U.S. 412, 418 (1985).

reversing the grant of relief to a petitioner serving life imprisonment for rape, the Court reiterated three separate times that “no prior decision of this Court” clearly established the principle on which the Ninth Circuit had relied.²⁹ At issue was the Nevada trial court’s refusal to allow the defense to introduce evidence that the victim, defendant’s former girlfriend, had made several previous reports claiming that defendant raped or assaulted her, claims the police were unable to corroborate, thereby depriving him of his federal constitutional right to present a complete defense.³⁰ According to the Supreme Court, the circuit court had made the mistake of describing its precedents establishing the right to present a defense too generally: “By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into ‘clearly established Federal law, as determined by the Supreme Court.’ 28 U.S.C. §2254(d)(1).”³¹

The Nevada courts had asserted that the defendant could not rely on a Nevada statute that explicitly granted defendants in sexual abuse cases the right to present extrinsic evidence of false allegations because he had not filed the written notice required by the statute. The Supreme Court declared: “No decision of this Court clearly establishes that this notice requirement is unconstitutional.”³² In response to the Ninth Circuit’s conclusion that such a notice requirement is subject to examination as to whether it serves legitimate state interests, the Court proclaimed: “Nor ... do our cases clearly establish that the Constitution requires a case-by-case balancing of interests before such a rule can be enforced.”³³ The Court concluded: “No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution.”³⁴ Of course, if that kind of specificity regarding the holding of precedents is required, habeas petitioners will virtually never be entitled to relief.

Similarly confining habeas relief to cases in which the Supreme Court had faced essentially identical facts, the Court reversed the Sixth Circuit’s holding that the prosecutor’s closing argument in a capital case deprived the defendant of due process.³⁵ Conceding that part of the summation did appear improperly to allege collusion between the defendant and counsel, the Court was not persuaded that his suggestion that the defendant tailored his testimony justified the grant of relief: “The Sixth Circuit cited no precedent of this Court in support of its conclusion that due process prohibits a prosecutor from emphasizing a criminal defendant’s motive to exaggerate exculpatory facts.”³⁶ Again, habeas relief seems to be authorized only when the Supreme Court has decided a case on all fours with the petitioner’s.

In addition to granting relief without the requisite Supreme Court precedent, the Sixth Circuit also committed error in consulting its own precedents, rather than those of the Supreme Court.³⁷ Rejecting the argument that the circuit court was simply considering those cases to shed light on what law had been clearly established by the Supreme Court, the Court noted that the general standard regarding prosecutorial misconduct set forth in

²⁹ *Nevada v. Jackson*, 133 S. Ct. 1990, 1991, 1993-94 (2013) (per curiam).

³⁰ *Id.* at 1990-91.

³¹ *Id.* at 1994.

³² *Id.* at 1993.

³³ *Id.* The Court described the decision on which the Ninth Circuit relied, *Michigan v. Lucas*, 500 U.S. 145 (1991), as “very far afield.” *Jackson*, 133 S. Ct. at 1993. Again, any intelligent second-semester law student could make a cogent argument to the contrary.

³⁴ *Jackson*, 133 S. Ct. at 1994.

³⁵ *Parker v. Matthews*, 132 S. Ct. 2148, 2154-55 (2012).

³⁶ *Id.* at 2154.

³⁷ *Id.* at 2155-56.

its key precedent, *Darden v. Wainwright*,³⁸ did not support the more specific tests suggested by the circuit court cases cited.³⁹ Accordingly, the Court granted the warden's petition for writ of certiorari and reversed the circuit court's decision granting habeas relief.⁴⁰

A third summary reversal illustrates the same pattern. At the first trial of Irving Cross, the complaining witness had described a forcible assault, while the defendant claimed a consensual sexual encounter in exchange for money and drugs.⁴¹ The jury found the defendant not guilty of kidnapping, but when it was unable to reach a verdict on the sexual assault count, the court declared a mistrial.⁴² At the retrial, the complainant could not be located and, over defense objection, her prior testimony was read by a legal intern from the State's attorney's office upon a finding that the prosecution had made sufficient efforts to secure her presence.⁴³ The jury acquitted Cross of aggravated sexual assault, but found him guilty of criminal sexual assault, and the Illinois appellate courts affirmed.⁴⁴ The Seventh Circuit granted habeas relief (reversing the district court), on the basis that the Illinois courts were unreasonable in finding the State's efforts to secure the complainant's testimony to be sufficient.⁴⁵ In finding that the efforts did not meet constitutional standards, given the importance of the witness's testimony, the court relied in part on the fact that the trial judge had described the witness's testimony at the first trial as halting, while the intern read the testimony without the pauses.⁴⁶ Regarding her unavailability, in addition to suggesting various avenues the State might have pursued to find the witness, the court noted that the prosecution failed to serve her with a subpoena after she had expressed concern about testifying at the retrial. The Supreme Court responded to that assertion as follows: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes"⁴⁷ If that kind of specificity is required in the prior holdings of Supreme Court cases, habeas relief will indeed be limited to cases that duplicate the facts in those precedents.

Two other summary reversals in which circuit courts had granted relief to death row inmates also relied on the absence of "clearly established Federal law, as determined by the Supreme Court." The Sixth Circuit had found a Fifth Amendment violation when the police persuaded the defendant to cut a deal before his accomplice did so. The Supreme Court responded: "Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground."⁴⁸ Articulating a similarly narrow description of what previous high court precedents must hold, the Court reversed the Fifth Circuit's grant of relief on a *Batson* claim:

³⁸ 477 U.S. 168, 189-90 (1986).

³⁹ *Parker v. Matthews*, 132 S. Ct. at 2155.

⁴⁰ *Id.* at 2156. The case was remanded for further proceedings, but as of this writing, no additional decision has been forthcoming.

⁴¹ *Hardy v. Cross*, 132 S. Ct. 490, 491 (2011) (per curiam).

⁴² *Id.*

⁴³ *Id.* at 492-93.

⁴⁴ *Id.* at 493.

⁴⁵ *Id.*

⁴⁶ *Id.* at 491, 493. See *Cross v. Hardy*, 632 F.3d 356, 362 (7th Cir. 2011) ("A.S.'s testimony at the first trial was pause-filled and evasive, which may have adversely affected the jury's impression of her, as is perhaps demonstrated by the verdict of not guilty on the kidnapping count and the lack of a verdict on the sexual assault counts.").

⁴⁷ *Hardy v. Cross*, 132 S. Ct. at 494.

⁴⁸ *Bobby v. Dixon*, 132 S. Ct. 26, 30 (2011).

In holding that respondent is entitled to a new trial, the Court of Appeals cited two decisions of this Court, *Batson* and *Snyder*, but neither of these cases held that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor.⁴⁹

Again, requiring such a fact-specific holding in a Supreme Court case before habeas relief is warranted limits state prisoners to swiss-cheese-like constitutional protections with major holes wherever the Court has not yet confronted the fact pattern presented by the petitioner.

Finally, the pattern continues in the current term. On the first day, the Court summarily reversed, in a per curiam opinion, the grant of habeas to a defendant convicted of murdering his wife when the prosecution asserted throughout the trial that he had committed the killing himself, but after all the evidence was in, requested an aiding and abetting charge.⁵⁰ The jury, instructed on both theories, found the defendant guilty without specifying which theory it found to have been proven. The Court justified its reversal both on the ground that the California courts' affirmance of the conviction did not contravene clearly established Supreme Court law and that the circuit court had committed error in relying on its own precedents.⁵¹

On the issue of how "clearly" the law must be established, the Court defined the principle at issue in the narrowest possible terms:

[T]he Ninth Circuit's grant of habeas relief may be affirmed only if this Court's cases clearly establish that a defendant, once adequately apprised of such a possibility, can nevertheless be deprived of adequate notice by a prosecutorial decision to focus on another theory of liability at trial. The Ninth Circuit pointed to no case of ours holding as much. Instead, the Court of Appeals cited three older cases that stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him. This proposition is far too abstract to establish clearly the specific rule respondent needs. We have before cautioned the lower courts – and the Ninth Circuit in particular – against "framing our precedents at such a high level of generality." *Nevada v. Jackson*, 569 U. S. ___, ___ (2013) (per curiam) (slip op., at 7). None of our decisions that the Ninth Circuit cited addresses, even remotely, the specific question presented by this case.⁵²

As in the cases discussed above, the Court seems to require a precedent with a fact pattern virtually on all fours to warrant federal habeas relief.

Similarly, the Court found fault with the circuit's citation to its own precedent, refusing to accept the lower court's assertion that the previous case had simply applied principles that had been established by the Supreme Court:

⁴⁹ *Thaler v. Haynes*, 559 U.S. 43, 47 (2010).

⁵⁰ *Lopez v. Smith*, 135 S. Ct. 1, 5-6 (2014), *rev'g per curiam* 731 F.3d 859 (9th Cir. 2013).

⁵¹ *Id.* at 1-2.

⁵² *Id.* at 3-4 (citation omitted).

The Ninth Circuit did not purport to identify any case in which we have found notice constitutionally inadequate because, although the defendant was initially adequately apprised of the offense against him, the prosecutor focused at trial on one potential theory of liability at the expense of another. Rather, it found the instant case to be “indistinguishable from” the Ninth Circuit’s own decision in *Sheppard v. Rees*, 909 F.2d 1234 (1989), which the court thought “faithfully applied the principles enunciated by the Supreme Court.”⁵³

Apparently disagreeing with the circuit court’s assessment that it was in fact applying clearly established Supreme Court law, the Court summarily reversed the decision granting habeas relief.

Another recent case, again from the Ninth Circuit, continued in the same vein. Habeas relief had been denied by the district court and a panel of the circuit, but the en banc court reversed in a decision that was, in turn, reversed summarily by the Supreme Court.⁵⁴ At trial, the defendant, charged with participating in robberies with two associates, had relied on a defense of duress. Before summation, his attorney asked to be able to argue both that the state had not proven that his client was an accomplice and, in the alternative, that he had acted under duress. The trial court ruled that, under state law, a defendant was prohibited from simultaneously contesting an element of the crime and raising an affirmative defense.⁵⁵ The state appellate court agreed that the trial court’s decision was in error, but ruled the error harmless. On federal habeas, the en banc court deemed the mistake to constitute structural error, the kind of error that is not subject to harmless error analysis. The Supreme Court declared this ruling not to have been clearly established, noting that most constitutional errors call for reversal only if the government fails to show harmlessness, with only a rare type of error requiring automatic reversal: “None of our cases clearly requires placing improper restriction of closing argument in this narrow category.”⁵⁶

In addition to interpreting the relevant Supreme Court precedent too broadly, the circuit had also cited to precedents from its own circuit. Again declining to accept that the court referred to these decisions simply to shed light on what law had been clearly established by the Supreme Court,⁵⁷ the Court reminded the circuit that, as “we have repeatedly emphasized,” circuit court precedent does not satisfy AEDPA’s clearly established law requirement.⁵⁸

Most recently, the Sixth Circuit was the subject of the Court’s tongue-lashing for its grant of habeas relief to a Michigan defendant serving a life sentence.⁵⁹ During the trial, the defendant’s attorney was absent from the courtroom when testimony was given by a prosecution witness concerning telephone calls among the codefendants.⁶⁰ Chiding the lower court for finding counsel’s absence during a critical stage to amount to a Sixth Amendment violation under *United States v. Cronie*, the Supreme Court noted that “We have never addressed whether the rule announced in *Cronie* applies to testimony regarding

⁵³ *Id.* at 3.

⁵⁴ See *Glebe v. Frost*, 135 S. Ct. 429, 430-31 (2014), *rev’g* *Frost v. Van Boening*, 757 F.3d 910 (9th Cir. 2014).

⁵⁵ *Id.* at 430.

⁵⁶ *Id.* at 430-31.

⁵⁷ *Id.* at 431. The Court seemed to find it determinative that the precedents did not arise under AEDPA; it did not explain why that fact should be conclusive on the issue of what law the Supreme Court had “clearly established”.

⁵⁸ *Id.* at 431-32.

⁵⁹ *Woods v. Donald*, 135 S. Ct. 1372 (2015).

⁶⁰ *Id.* at 1375.

codefendants' actions."⁶¹ Reprising its theme that to be "contrary to" Supreme Court law, one of its own precedents must have confronted the specific question presented, the Court saw no case in which testimony relevant to a codefendant was deemed to amount to a critical stage of the proceeding.⁶²

These per curiam, summary decisions by the Supreme Court send a strong message to lower federal courts considering granting habeas relief to a state prisoner.⁶³ That message is obviously most explicit when the Court directly orders habeas relief to be denied.⁶⁴ In most cases, however, the Court remands to the circuit court for further proceedings consistent with the per curiam opinion.⁶⁵ Such remands generally, but not always, result in denial of habeas relief.⁶⁶ In addition, the Court with some frequency issues orders granting certiorari, vacating, and remanding (gvr) for reconsideration in light of decisions that have some bearing on the opinion below.⁶⁷ In those cases, too, the lower courts most often "get the hint" and issue an opinion in keeping with the Court's restrictive view of the availability of habeas relief under AEDPA.⁶⁸ Finally, even without an order from the Court, some circuits, presumably gleaning an implicit threat of summary reversal, have sua sponte changed outcomes in cases previously granting relief, citing to recent Supreme Court opinions.⁶⁹ The pronounced ripple effect of the Court's admonition that circuit courts are prohibited from playing any role in developing principles of constitutional law in the context of assessing state court decisions under AEDPA means that state prisoners throughout the country must be satisfied with Constitution *lite*.

⁶¹ *Id.* at 1377.

⁶² *Id.*

⁶³ To further complicate matters, the message may be strong, but not entirely clear. As one scholar has pointed out, use of the summary reversal has the potential of muddying up "clearly established law." See Richard M. Re, *Did the Martinez Sum Rev Apply or Change the Law?*, RE'S JUDICATA (June 6, 2014), <https://richardresjudicata.wordpress.com/2014/06/06/did-the-martinez-sum-rev-apply-or-change-the-law/>.

⁶⁴ Indeed, in one recent case, the Court at first stated that habeas relief should be denied despite an open issue on which the circuit had not yet ruled. See *Johnson v. Williams*, 133 S. Ct. 1088, 1092 (2013). Then, alerted by two circuit judges pointing out the error, the Court issued a per curiam decision remanding for consideration of that claim under the proper standard. See *Johnson v. Williams*, 134 S. Ct. 2659 (2014), *vacating* 720 F.3d 1212 (9th Cir. 2013). Judges Reinhardt and Kozinski concurred in denial of the habeas petition but expressed concern about the Court's previous opinion. See 720 F.3d at 1212, 1214.

⁶⁵ See, e.g., *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) ("The petition for a writ of certiorari and respondent's motion to proceed in forma pauperis are granted. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.").

⁶⁶ See discussion *infra* notes 81-96.

⁶⁷ See, for example, two cases remanded for reconsideration in light of *White v. Woodall*: *Washington v. See'y Pa. Dep't of Corr.*, 726 F.3d 471 (3d Cir. 2013), *vacated sub nom. Wetzel v. Washington*, 134 S. Ct. 1935 (2014) (granting habeas for confrontation clause violation when codefendant's confession implicated the defendant); *Drummond v. Houk*, 728 F.3d 520 (6th Cir. 2013) *cert. granted, judgment vacated sub nom. Robinson v. Drummond*, 134 S. Ct. 1934 (2014) (granting habeas for violation of right to a public trial by closure of the courtroom without demonstration of an overriding interest). According to one observer, some remands are not easily explained. See James J. Duane, *Sherlock Holmes and the Mystery of the Pointless Remand*, 18 BERKELEY J. CRIM. L. 154, 169-70 (2013).

⁶⁸ See, e.g., *infra* note 114.

⁶⁹ See, e.g., *Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014). The original opinion granting habeas was withdrawn (Warden had petitioned for rehearing) in light of the intervening decision in *White v. Woodall*, which made clear that relief may not be based on a state court's unreasonable refusal to extend a rule set forth by Supreme Court precedent. *Id.* at 1015. The court explained that when petitioner's conviction became final, fairminded jurists could conclude that the Supreme Court had not yet clearly established that an ameliorative change in state law must be applied retroactively to cases pending on appeal. *Id.* at 1020. See also *Rivera v. Cuomo*, 664 F.3d 20 (2d Cir. 2011) (panel decision granting habeas on ground of insufficiency of the evidence reversed on rehearing based on summary reversal in *Cavazos v. Smith*, which reasserted the "double deference" due to state court decisions raising such a claim).

III. NO FAIRMINDED JURIST

The Supreme Court's insistence that, before any federal court, including the Court itself, is authorized to grant habeas relief to a state prisoner, the law governing the claim must have been clearly established by the high court in the factual context in which the petitioner presents it poses a significant constraint. That limitation has been magnified exponentially by the Court's recent redefinition of the meaning of the term "unreasonable application." In cases where the state court adjudicated the federal constitutional claim on the merits, comprising the vast majority of federal habeas petitions,⁷⁰ the federal court is precluded from granting the writ unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"⁷¹ Particularly given that even so-called postcard denials of relief, that is those in which the state court provides no reasons whatever, are deemed to be on the merits,⁷² it is not surprising that state decisions will rarely be challengeable as "contrary to" clearly established law. Most cases, therefore, will fall under the "unreasonable application" clause.

That clause was first interpreted in *Williams v. Taylor*,⁷³ where, with Justice O'Connor writing the controlling opinion, the Court emphasized that the petitioner must show something more than that the state court's decision was erroneous; rather, the decision must have been "objectively unreasonable."⁷⁴ The Court firmly rejected, however, the position taken by some circuits that, to be unreasonable, the challenged state court decision had to be one that no reasonable jurist could make.⁷⁵ Yet eleven years later, in *Harrington v. Richter*,⁷⁶ without so much as acknowledging its about-face, the Court adopted just that interpretation.⁷⁷ State prisoners whose claims were adjudicated on the merits by state courts are now barred from federal relief unless there is "no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."⁷⁸ A number of the summary per curiam opinions have explicitly relied on this standard in reversing the circuit courts' grants of habeas relief, at times placing an additional gloss on the meaning of "unreasonable application." Quoting the *Richter* standard in the first paragraph of its opinion reinstating a death sentence, for example, the Court asserted: "Because it is not clear that the Ohio Supreme Court erred at all, much less

⁷⁰ The most common scenario where a state court does not reach the merits involves reliance on the defendant's failure to follow a state procedural rule, thereby defaulting the claim. Under such circumstances, the habeas petitioner is not entitled to federal review at all without demonstrating either "cause and prejudice" or actual innocence. Fortunate petitioners who can overcome that high bar may then be granted de novo review. See cases cited *supra* note 6 and accompanying text.

⁷¹ 28 U.S.C.A. § 2254(d)(1) (West 1996).

⁷² See *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011).

⁷³ 529 U.S. 362 (2000).

⁷⁴ *Id.* at 409.

⁷⁵ *Id.*

⁷⁶ 562 U.S. 86.

⁷⁷ Justice Kennedy's opinion cites to *Williams* only generally as distinguishing between an unreasonable application and an incorrect application. *Harrington v. Richter*, 562 U.S. at 100-01. Without explanation, the opinion goes on to assert that federal habeas relief is precluded so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Id.* at 88 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In that 5 to 4 decision, again without any reference to the discussion in *Williams*, the majority introduced the idea of the fairminded jurist as the appropriate standard for determining whether a state court decision was unreasonable. *Yarborough*, 541 U.S. 663-64. Scholarship supporting the Court's restrictive interpretation of AEDPA similarly ignores the initial interpretation of the AEDPA language in *Williams v. Taylor*. See, e.g., O'Scannlain, *supra* note 8; see also O'Brien, *supra* note 8. Neither article so much as mentions the opinion in *Williams v. Taylor*.

⁷⁸ *Harrington v. Richter*, 562 U.S. at 102.

erred so transparently that no fairminded jurist could agree with that court's decision, the Sixth Circuit's judgment must be reversed."⁷⁹ The notion that an error must be "transparent" appears to be a new, and exacting, requirement.

Application of the "no fairminded jurist" standard has led to some puzzling results. In two cases in which the Supreme Court had summarily reversed the grant of habeas but sent the case back to the circuit for further consideration, habeas relief was again affirmed, each time over the dissent of a member of the panel. Despite what appeared to be the opinion of a presumptively fairminded judge, the Supreme Court this time denied certiorari review to the wardens. Examination of these opinions reveals the extent to which the writ has been both marginalized and made dependent on the subjective views of the particular judges who happen to sit on the panel reviewing the case. These results are particularly ironic given that the standard was originally touted as suggesting that relief would be based on "objective" unreasonableness.

In one of the cases in which the Supreme Court summarily reversed the grant of habeas to a death row inmate by the Third Circuit, the Court remanded for exploration of an issue on which the state court might have relied.⁸⁰ According to the Court, the Pennsylvania Supreme Court may have concluded, when denying petitioner's *Brady* claim, that a report that had been withheld was "ambiguous." Having been chided for failing to acknowledge and address the state courts' possible reliance on the ambiguous nature of the withheld report, the Third Circuit on remand explicitly addressed that purported conclusion.⁸¹ Even granting AEDPA deference, the majority found the state court's characterization of the police report as ambiguous to be an unreasonable determination of the facts, as well as an unreasonable application of clearly established law.⁸² Accordingly, this Pennsylvania death row inmate's life was spared.

Dissenting Judge Hardiman, on the other hand, conceding that finding ambiguity was not the most natural reading of the report, asserted that the state court's decision had enough support to preclude federal habeas relief: "If we exercised *de novo* review of the state court decision, it would seem that the best reading of the activity sheet is that it relates to the . . . robbery [with which petitioner was charged]. But under AEDPA's highly deferential standard of review, 'even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.'"⁸³ The dissenting judge further cited to the earlier Supreme Court case of *Yarborough v. Alvarado*⁸⁴ for the proposition that habeas relief is precluded as long as the state court decision was "within the matrix" of the custody test for *Miranda* purposes as articulated by the Court.⁸⁵ Finally, the judge stressed the reach of the standard set forth in *Harrington v. Richter*, supplying emphasis to the word "possibility": "The Court has repeatedly reminded the lower federal courts that AEDPA precludes relief unless the state court's ruling was error 'beyond any *possibility* of fairminded disagreement.'"⁸⁶ In a footnote to this interpretation of the standard, Judge

⁷⁹ *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011).

⁸⁰ *Wetzel v. Lambert*, 132 S. Ct. 1195, 1198 (2012) ("[The] Third Circuit overlooked the determination of the state courts that the notations were . . . 'entirely ambiguous.'").

⁸¹ See *Lambert v. Beard*, 537 F. App'x. 78, 84-86 (3d Cir. 2013).

⁸² *Id.* at 84.

⁸³ *Id.* at 89 (Hardiman, J., dissenting) (quoting *Harrington v. Richter*, 562 U.S. at 88).

⁸⁴ *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004)).

⁸⁵ *Id.* (quoting *Yarborough*, 541 U.S. at 103).

⁸⁶ *Id.* (quoting *Harrington v. Richter*, 562 U.S. at 103) (emphasis added).

Hardiman cited to a previous dissent in which he had collected all the cases in which the Supreme Court had reversed lower courts for failure to heed this admonition.⁸⁷

Another case illustrates the same point. Habeas relief that had been granted by the Sixth Circuit was vacated and remanded⁸⁸ in light of *Parker v. Matthews*,⁸⁹ one of the summary reversals being considered here. Unlike in most cases, when such a remand results in the court toeing the line articulated by the Supreme Court, the lower court again found relief warranted, with one judge dissenting.⁹⁰ The circuit court acknowledged that its first decision had relied, improperly as the Supreme Court made clear in *Parker v. Matthews*, on its own precedent in evaluating the prejudice suffered by the defendant by his attorney's deficient performance.⁹¹ On remand, the court reexamined the case using only the *Strickland* standard itself and concluded that the Michigan court both failed to apply the correct rule and, even if it stated the rule correctly, the result was an unreasonable application of federal law.⁹² By contrast, the dissenting judge did not find the Michigan court's decision to be "objectively unreasonable; fairminded jurists could (and did) disagree on this point."⁹³

The same pattern is reflected in another recent case, in which the Supreme Court has recently allowed the Eleventh Circuit's grant of habeas relief to vacate an Alabama death sentence to stand.⁹⁴ Here, too, a dissenting judge, praised by one of the judges ruling in the petitioner's favor as a "nationally known and admired judge,"⁹⁵ criticizes his colleagues as failing to heed the requirement that the state court's application of *Strickland* be "objectively unreasonable."⁹⁶ It is difficult to square the disagreement of a jurist acknowledged to be fairminded with the grant of habeas relief applying the "fairminded jurist" standard.

The new fairminded jurist standard poses a particular analytical challenge in the context of claims that the evidence was insufficient to support a conviction. Such claims require a defendant to demonstrate that "no rational trier of fact" could have agreed with the jury's finding of guilt beyond a reasonable doubt.⁹⁷ To secure habeas relief on that basis, in addition to making that showing, a petitioner must now show that a state court's decision rejecting the sufficiency of the evidence claim was such that "no fairminded jurist" could agree with it. As the Supreme Court noted in one of its per curiam summary reversals, over the objection of three dissenting justices, "[b]ecause rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must

⁸⁷ *Id.* at n.2 (citing *Garrus v. Sec'y of Pa. Dep't of Corrs.*, 694 F.3d 394, 412-15 nn.1-3 (3d Cir. 2012)). Judge Raggi of the Second Circuit provided a similar list in an opinion dissenting from a grant of habeas relief. *Young v. Conway*, 715 F.3d 79, 87 n.1 (2d Cir. 2013) (Raggi, J., dissenting).

⁸⁸ *Howes v. Walker*, 132 S. Ct. 2741, 2741 (2012), *vacating Walker v. McQuiggan*, 656 F.3d 311 (6th Cir. 2011).

⁸⁹ *Id.*

⁹⁰ *Walker v. Hoffner*, 534 F. App'x 406, 416-18 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1025 (2014).

⁹¹ *Id.* at 411 ("[A] defendant suffers prejudice when he is deprived of a 'substantial defense' by the deficient performance of his counsel.") (citing *Walker v. McQuiggan*, 656 F.3d at 321); *see Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012).

⁹² *Walker v. Hoffner*, 534 F. App'x at 412-13.

⁹³ *Id.* at 418 (Cook, J., dissenting).

⁹⁴ *See DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014), *cert. denied sub nom Dunn v. DeBruce*, 2015 U.S. LEXIS 4015 (June. 15, 2015).

⁹⁵ *Id.* at 1279-80 (Martin, J., concurring).

⁹⁶ *Id.* at 1280 (Tjoflat, J., concurring in part and dissenting in part).

⁹⁷ *Jackson v. Virginia*, 443 U.S. 307, 317, 319 (1979).

nonetheless uphold.”⁹⁸ Yet in this context, several presumably fairminded jurists (including three justices of the Supreme Court) found the evidence so lacking that no rational factfinder could arrive at a verdict of guilty beyond a reasonable doubt.

The case that prompted the Court’s admonition that mistaken convictions must sometimes be upheld involved Shirley Rhee Smith, a grandmother convicted of killing her seven-week-old grandchild based on questionable evidence that he had died of “shaken baby syndrome.”⁹⁹ The case had a long and complicated history in the state and federal courts, including three trips to the United States Supreme Court. When the Ninth Circuit first granted habeas relief,¹⁰⁰ the Supreme Court vacated and remanded in light of the recently decided *Carey v. Musladin*, which, as described above, had narrowed the meaning of “clearly established law” in § 2254(d)(1).¹⁰¹ The Court of Appeals reinstated its grant of relief on the grounds that, unlike the situation in *Musladin*, here, the federal law had been clearly established by the Supreme Court in *Jackson v. Virginia*.¹⁰² The court acknowledged that the high court had not confronted the same factual scenario presented by the petitioner, but refused to accept that AEDPA could be interpreted to limit habeas relief to cases in which the Court had decided an identical case.¹⁰³ When the Warden sought rehearing en banc in light of another Supreme Court case applying the *Musladin* principle,¹⁰⁴ the Ninth Circuit denied the petition, again finding that the intervening opinion did not affect the grant of relief.¹⁰⁵ The Supreme Court vacated and remanded,¹⁰⁶

⁹⁸ *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (per curiam).

⁹⁹ *Id.* at 4-5.

¹⁰⁰ *Smith v. Mitchell*, 437 F.3d 884, 885 (9th Cir. 2006) (“We agree with Smith that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child’s death. We further conclude that the state court’s affirmation of Smith’s conviction constituted an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), which established the standard for constitutional sufficiency of the evidence. See 28 U.S.C. § 2254(d)(1). We accordingly reverse and remand with instructions to grant the writ.”).

¹⁰¹ *Patrick v. Smith*, 550 U.S. 915 (2007); *Carey v. Musladin*, 549 U.S. 70, 74, 76 (2006). See 28 U.S.C. § 2254(d)(1) (2014); see also *supra* note 10 and accompanying text.

¹⁰² *Smith v. Patrick*, 508 F.3d 1256, 1258-59 (9th Cir. 2007).

¹⁰³ The circuit court’s decision stated as follows:

It is true, of course, that the Supreme Court has never had a case where the issue was whether the evidence, expert and otherwise, was constitutionally sufficient to establish beyond a reasonable doubt that a defendant had shaken an infant to death. But there are an infinite number of potential factual scenarios in which the evidence may be insufficient to meet constitutional standards. Each scenario theoretically could be construed artfully to constitute a class of one. If there is to be any federal habeas review of constitutional sufficiency of the evidence as required by *Jackson*, however, section 2254(d)(1) cannot be interpreted to require a Supreme Court decision to be factually identical to the case in issue before habeas can be granted on the ground of unreasonable application of Supreme Court precedent.

Id. at 1259.

¹⁰⁴ *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

¹⁰⁵ The court’s decision stated:

For the same reason that we determined that *Musladin* did not affect our decision in *Smith*, we conclude that *Van Patten* does not, either. *Van Patten* addresses an entire class of cases under the Supreme Court’s jurisprudence applying the standards set by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984), for ineffective assistance of counsel. Whether appearance of counsel by telephone is structural error is an issue “for another day” that the Supreme Court may address to establish a rule for innumerable cases in the future. See 128 S. Ct. at 747.

Smith v. Patrick, 519 F.3d 900, 901 (9th Cir. 2008).

¹⁰⁶ *Patrick v. Smith*, 558 U.S. 1143 (2010).

citing yet another intervening opinion, *McDaniel v. Brown*,¹⁰⁷ in which it had granted certiorari to consider the insufficiency standard in the habeas context. And yet again, the Ninth Circuit reinstated its prior opinion.¹⁰⁸ Finally, the Supreme Court summarily reversed the grant of habeas relief, per curiam, over the dissents of three justices.¹⁰⁹

The per curiam opinion begins by stressing that, under *Jackson v. Virginia*, it is the responsibility of the jury, not the court, to decide what conclusions should be drawn from evidence.¹¹⁰ A reviewing court may set aside the jury verdict only if no rational trier of fact could have agreed with the jury's assessment that the evidence demonstrated the defendant's guilt beyond a reasonable doubt. Added to this significant hurdle, on habeas review, the federal court may not grant relief simply because it disagrees with the state court's rejection of the sufficiency claim; rather, the state court decision must be "objectively unreasonable" such that "no fairminded jurist" would agree with it.¹¹¹ It is almost impossible even to imagine that no fairminded jurist could agree with a conclusion of twelve jurors that the state court, by hypothesis, refused to reverse as one that "no rational factfinder" would have reached.¹¹²

In another per curiam opinion, the Supreme Court also summarily reversed a habeas grant on the ground of insufficiency of the evidence, chiding the Third Circuit for failing to afford the respect that the jury and Pennsylvania state courts were due.¹¹³ The federal court had found insufficient evidence that the defendant was an accomplice of the shooter to a deliberate murder; according to the Supreme Court, under the doubly deferential standard, that conclusion could not stand. Accordingly, on remand habeas relief was denied.¹¹⁴

Analysis of claims under these multiple layers of abstract standards, most involving some notion of what is "reasonable," not only requires mind-numbing logical gymnastics, but fails to achieve results that can in any meaningful way be termed "objective." First, the *Jackson* standard itself suggests that presumably reasonable jurors may arrive, unanimously, at a verdict that "no rational factfinder" could support. To further complicate matters, that conclusion necessarily incorporates the constitutionally mandated burden that guilt must be proven "beyond a reasonable doubt."¹¹⁵ Second, trial courts routinely deny defense counsel's motion before the case is submitted to the jury asking for dismissal on the basis of insufficiency of the evidence. Overturning a jury's verdict pursuant to the *Jackson* standard therefore inherently involves disagreement among fairminded jurists. Accordingly, applying the "fairminded jurist" standard would appear always to preclude the grant of federal habeas relief.

¹⁰⁷ *Id.* (citing *McDaniel v. Brown*, 558 U.S. 120 (2010)).

¹⁰⁸ *Smith v. Mitchell*, 624 F.3d 1235, 1237 (9th Cir. 2010) ("We have now examined *Brown* along with supplemental briefs from the parties addressing its potential effect on *Smith's* case. We conclude that nothing in *Brown* is inconsistent with our prior decision or our method of reaching it. We accordingly reinstate our former decision . . .").

¹⁰⁹ *Cavazos v. Smith*, 132 S. Ct. 2, 8 (2011).

¹¹⁰ *Id.* at 3-4.

¹¹¹ *Id.* at 4; *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (per curiam).

¹¹² Although she did not secure relief through the courts, Shirley Rhee Smith was ultimately granted a commutation by Governor Jerry Brown. A.C. Thompson, *California Governor Commutes Sentence in Shaken Baby Case*, PROPUBLICA (Apr. 6, 2012), <http://www.propublica.org/article/california-governor-commutes-sentence-in-shaken-baby-case>.

¹¹³ *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012).

¹¹⁴ *Id.* at 2064; *Johnson v. Mechling*, 518 F. App'x 106, 106-07 (3d Cir. 2013).

¹¹⁵ *See In re Winship*, 397 U.S. 358, 361 (1970).

The fairminded jurist standard raises a further issue for courts of appeals considering whether to grant a certificate of appealability to a petitioner who has been denied habeas relief by a district court. Long before *Harrington v. Richter*, the Supreme Court had set the bar for issuance of such a certificate at a relatively low level.¹¹⁶ Courts were admonished that they should make only a threshold inquiry into the claim, assessing whether the petitioner has made “a substantial showing of the denial of a constitutional right.”¹¹⁷ Such a showing is made when “jurists of reason could disagree with the district court’s resolution” or conclude the issues presented are worthy of further exploration.¹¹⁸ In establishing this standard for appellate review, the Court noted specifically that “a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”¹¹⁹ Once the fairminded jurist test is in place, however, if the issue is debatable among such jurists, no habeas relief will ever be warranted for claims adjudicated on the merits in state courts.

IV. SUMMARY TREATMENT

The Supreme Court’s practice of issuing summary per curiam opinions resolving cases on petitions for certiorari review has long come under strong criticism both within the Court and from academics and practitioners. While the earlier practice of reversing summarily without providing reasons¹²⁰ has largely been abandoned, questions have been raised about the lack of transparency and procedural regularity governing summary dispositions.¹²¹ In addition, skeptics wonder whether such reversals are being limited to cases of clear error, and whether there is a substantive bias in the selection of cases to subject to this treatment.¹²² Moreover, concern that respondents may be unfairly prejudiced when the merits of claims are adjudicated on petitions for writ of certiorari continues to be voiced.

Several of the opinions being considered here illustrate the problems of such summary reversals. In her dissent from the summary reversal in *Cavazos v. Smith*, joined by two other members of the Court, Justice Ginsburg specifically chastised the Court for its failure to allow for full briefing and argument.¹²³ “The fact-intensive character of the case calls for attentive review of the record, including a trial transcript that runs over 1,500 pages. Careful inspection of the record would be aided by the adversarial presentation that full briefing and argument afford.”¹²⁴

¹¹⁶ Indeed, in *Cavazos v. Smith*, the Magistrate Judge noted that this was not the typical shaken baby case, raising many questions, but found that the evidence was sufficient to a support conviction. 132 S. Ct. at 6, 8. The district court adopted this recommendation, but granted a COA on ground that question was debatable. *Id.*

¹¹⁷ *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing 28 U.S.C. § 2253(c) (2014)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 338.

¹²⁰ Failure to give any rationale for summary reversal prompted the initial protests against the practice. See, e.g., Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77, 82, 90 (1958).

¹²¹ See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015). Professor Baude looked at all the Roberts Court’s summary reversals so far, and studied in depth those issued in the 2013-14 term. He describes the reversals as falling into two general categories: those designed to enforce the Supreme Court’s supremacy over recalcitrant circuit courts and those essentially serving an ad hoc function. *Id.* at 1-2.

¹²² See Jonathan Kirshbaum, *Accelerating Pace of Supreme Court’s Summary Reversals of Habeas Relief Suggests Impatience with Circuit Courts’ Failure to Defer to State Tribunals*, CRIM. L. REP., June 27, 2012, at 1-3; see also Baude, *supra* note 121, at 4.

¹²³ 132 S. Ct. 2, 12 (2011) (Ginsburg, J., dissenting).

¹²⁴ *Id.*

Justice Ginsburg cited to two highly respected treatises in support of her objection to the summary treatment of the case. The classic treatise on Supreme Court practice¹²⁵ characterizes per curiam opinions such as those discussed in this article, in which the Court grants certiorari and, at the same time, disposes of the merits, addressing both facts and issues in detail, as the “most controversial form of summary disposition.”¹²⁶ The authors note that the justices themselves characterized summary reversals as “rare and exceptional,” appropriate only when “law is well settled and stable, facts are not in dispute, and the decision below is clearly wrong.”¹²⁷ According to Justice Brennan, summary dispositions should be limited to situations where the decision below flatly rejected the Court’s controlling authority. If even one justice disagreed, the case should be set for briefing and argument.¹²⁸ In addition, the authors describe the problems posed for counsel, particularly for respondents, by the use of summary reversals, in light of the fact that lawyers are told not to focus on briefing the merits of the issue when seeking or opposing certiorari review.¹²⁹

Summary reversal seems particularly questionable when, as in Shirley Rhee Smith’s case and the capital case involving James Lambert described above,¹³⁰ several justices of the Supreme Court dissent from the disposition. If indeed the practice is meant for cases in which the law and facts are undisputed and the decision below is clearly wrong, even one dissenting opinion, much less three, would suggest that, at the very least, full briefing and argument is in order. Moreover, the lack of any written dissent does not, in and of itself, demonstrate that summary treatment is proper. Several of the unanimous summary reversals presented both factual and legal issues that seemed worthy of full consideration by the Court. In *Felkner v. Jackson*, for example, the Ninth Circuit had granted relief on a *Batson* claim, finding that the prosecutor’s proffered race-neutral bases were not sufficient to counter evidence of purposeful discrimination, given that two of three black jurors were stricken and the record reflected different treatment of comparably situated white jurors.¹³¹ Such claims are by their nature fact-sensitive, and adherence to the prohibition against use of peremptory challenges on the basis of race has by no means been universally accepted.¹³² Yet the Supreme Court summarily reversed the circuit court’s determination: “That decision is as inexplicable as it is unexplained. It is reversed.”¹³³ Noting the deference due to the trial judge’s assessment of a prosecutor’s credibility, to which AEDPA adds another level of deference, the Court announced: “The state appellate court’s decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.”¹³⁴

¹²⁵ *Id.*; GRESSMAN, ET. AL., SUPREME COURT PRACTICE (10th ed. 2013) is “regarded as a sufficiently authoritative resource on all things related to the Court that it is cited not only by lawyers who argue there but also by the Justices themselves.” Tom Goldstein and Amy Howe, *Book review: New edition for a classic treatise*, SCOTUSBLOG (Jan. 28, 2014, 7:00 PM), <http://www.scotusblog.com/2014/01/book-review-new-edition-for-a-classic-treatise/>.

¹²⁶ GRESSMAN, ET. AL., SUPREME COURT PRACTICE 349 (9th ed. 2007).

¹²⁷ *Id.* at 350-51 (quoting Justice Marshall). The other treatise cited by Justice Ginsburg, FALLON, ET. AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009), also cites to justices in its critique of summary reversals, adding that some justices complained that they were more likely to be granted in favor of the government than an individual claiming violation of constitutional rights. *Id.* at 1479-80.

¹²⁸ Justice Brennan, *Some Thoughts on the Supreme Court’s Workload*, 66 JUDICATURE 230, 232 (1983).

¹²⁹ GRESSMAN, AT AL., *supra* note 126, at 417 n.46.

¹³⁰ See *supra* text accompanying notes 80-87.

¹³¹ 562 U.S. 594, 597 (2011).

¹³² See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003).

¹³³ *Felkner*, 562 U.S. at 598.

¹³⁴ *Id.*

The panel of the Ninth Circuit that did reach this conclusion surely will consider the Supreme Court's summary reversal of its decision to have been reached in a similarly "dismissive manner." As will the Sixth Circuit, whose decision that a defendant facing a death sentence did not receive effective assistance at sentencing phase was summarily reversed, with the conclusory statement: "Because we think it clear that Van Hook's attorneys met the constitutional minimum of competence under the correct standard, we grant the petition and reverse."¹³⁵ The circuit court was deemed particularly at fault for relying on the 2003 ABA guidelines for the defense of capital cases, a point that prompted Justice Alito to write a separate concurrence to make clear that the opinion in no way suggests that those guidelines have special relevance.¹³⁶ Admonishing the circuit court for relying on the well-established guidelines for the representation of defendants in capital cases seems particularly unseemly without allowing full briefing or oral argument on the issue.

V. TONE

As the previous sections have shown, these per curiam summary reversals reveal a pattern of limiting the federal habeas petitioner's opportunity to secure relief based on constitutional violations in state court. The petitioner must be able to point to "clearly established Federal law, as determined by the Supreme Court of the United States," which has been limited to narrowly defined holdings of the Court; no reference should be made to any circuit court rulings; then it must be demonstrated that "no fairminded jurist" would agree with the state court's determination that his constitutional rights were not violated. Moreover, all this must be accomplished in the context of responding to a petition for certiorari by the warden, without the opportunity for full briefing and argument. One additional characteristic of these opinions is noteworthy: their tone. The Court strikes an attitude of lecturing and dismissiveness, suggesting that the circuit courts need to be taught a lesson, that they should know better. Indeed, as one commentator has noted, the Court's summary reversals can be seen as a non-too-subtle threat to any federal court considering granting habeas relief.¹³⁷ Even if not designed to send such warnings, the language used by the Court in describing opinions granting relief certainly conveys a message any objective reader would find insulting.

The Supreme Court's attitude is well illustrated by the first paragraph of one of the summary reversals in a case in which the defendant had been sentenced to death:

In this habeas case, the United States Court of Appeals for the Sixth Circuit set aside two 29-year-old murder convictions *based on the flimsiest of rationales*. The court's decision is a *textbook example of what the . . . AEDPA proscribes*: "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. ___ (2010) (slip op., at 12). We therefore grant the petition for certiorari and reverse.¹³⁸

The Supreme Court's derogatory assessment of the Sixth Circuit's opinion is particularly striking in light of the Court's own curious evaluation of the evidence regarding extreme emotional disturbance, the issue on which the circuit had found the Kentucky courts to

¹³⁵ *Bobby v. Van Hook*, 558 U.S. 4, 5 (2009).

¹³⁶ *Id.* at 13-14 (Alito, J., concurring).

¹³⁷ See Kirshbaum, *supra* note 122, at 4.

¹³⁸ *Parker v. Matthews*, 132 S. Ct. 2148, 2149 (2012) (emphasis added).

have improperly shifted the burden to the defense. Noting that the defense expert admitted that many people suffer from adjustment disorders, the Court commented: “But of course very few people commit murders.”¹³⁹ The Court thereby suggested that it is the murder for which there must be a reasonable explanation or excuse, while any competent first year criminal law student would understand that the requirement of a reasonable explanation applies to the emotional disturbance, not to the killing.

In the same opinion, the Court chastised the circuit court for relying on its own precedents, rather than limiting consideration to Supreme Court case law. Beginning with a phrase that appears regularly in these summary reversals:

To make matters worse, the Sixth Circuit decided [the prior case] under pre-AEDPA law, . . . so that case did not even *purport* to reflect clearly established law as set out in this Court’s holdings. It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief.¹⁴⁰

Why reliance on a pre-AEDPA case would “make matters worse” is by no means clear; surely a circuit court could render an opinion stating well-established principles of constitutional law rooted in Supreme Court precedents at any time.¹⁴¹

The Court’s reversal of habeas relief granted to a death row inmate by the Sixth Circuit contained similarly querulous language: “Because it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court’s decision, the Sixth Circuit’s judgment must be reversed.”¹⁴² Regarding the circuit court’s rationale for concluding that the state courts had failed to acknowledge a *Miranda* violation, the Court announced dismissively: “That is plainly wrong.”¹⁴³

The Court used the same phraseology in rejecting the Ninth Circuit’s evaluation of the evidence in Shirley Rhee Smith’s case as insufficient to demonstrate the cause of the child’s death beyond a reasonable doubt: “That conclusion was plainly wrong.”¹⁴⁴ Reminding the circuit that a state appellate court can reverse for insufficiency only if no rational trier of fact could have found the essential elements of the crime; that the reviewing court must presume that jury resolved conflicts in favor of prosecution, and must defer to that resolution; and that AEDPA adds another layer of deference to state court decisions, the Court announced: “[T]here can be no doubt of the Ninth Circuit’s error below.”¹⁴⁵ The Court continued with its tone of absolute certainty, despite the disagreement of three dissenting justices: “In light of the evidence presented at trial, the Ninth Circuit plainly erred in concluding that the jury’s verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise.”¹⁴⁶ The final substantive paragraph of the Court’s opinion went beyond finding the circuit to have

¹³⁹ *Id.* at 2153.

¹⁴⁰ *Id.* at 2155-56.

¹⁴¹ See *supra* note 57 (describing another case in which the Court made the same point in reversing the Ninth Circuit).

¹⁴² *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011), *habeas denied*, 737 F.3d 1003 (6th Cir. 2013), *reh’g denied*, 2014 U.S. App. LEXIS 1890 (6th Cir. Jan. 29, 2014), *cert. denied*, 135 S. Ct. 63 (2014).

¹⁴³ *Id.* at 29.

¹⁴⁴ *Cavazos v. Smith*, 132 S. Ct. 2, 6 (2011).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 7.

been mistaken and accused the court of essentially ignoring the Supreme Court's directives:

The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in §2254(d) habeas cases. Each time the panel *persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention*. Its refusal to do so necessitates this Court's action today.¹⁴⁷

Justice Ginsburg, dissenting with two other justices, viewed the case as intensely fact-bound and not worthy of certiorari review, and characterized the per curiam opinion as follows: “[T]he Court is bent on rebuking the Ninth Circuit for what it conceives to be defiance of our prior remands. I would not ignore Smith’s plight and choose her case as a fit opportunity to teach the Ninth Circuit a lesson.”¹⁴⁸

Criticizing the Ninth Circuit in another case, the Supreme Court, as noted above,¹⁴⁹ focused on the conclusory and dismissive manner in which the circuit treated the state court’s rejection of the petitioner’s *Batson* claim: “The state appellate court’s decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.”¹⁵⁰ Yet some of the per curiam opinions in which the high court rejected the determinations of circuit court panels appear equally “dismissive,” or at least might be taken that way by the judges who had found violations of state prisoners’ constitutional rights.

In summarily reversing the Sixth Circuit’s grant of habeas to a death row inmate even in the absence of AEDPA deference, when the petitioner had filed for relief before that statute was enacted, the Court, without the benefit of full briefing and argument, was able to reject an ineffective assistance of counsel claim: “Because we think it clear that Van Hook’s attorneys met the constitutional minimum of competence under the correct standard, we grant the petition and reverse.”¹⁵¹ After describing the gruesome crime in considerable detail, the Court noted that a panel of the circuit had been reversed by the en banc court twice, and then went on to criticize the most recent panel opinion for its reliance on the 2003 ABA guidelines for defense of capital cases, according to the Court, “without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial.”¹⁵² The Court continued: “To make matters worse,” the circuit treated the guidelines as inexorable commands, rather than as guides for what is reasonable, as required by *Strickland*.¹⁵³ To the petitioner’s assertion that his counsel was ineffective even under professional standards of the time, the Court responded curtly. “He is wrong.”¹⁵⁴

Justice Alito took the opportunity in his concurrence to stress that the Court’s opinion in no way suggests that ABA guidelines have special relevance.

¹⁴⁷ *Id.* at 7-8 (citations omitted) (emphasis added).

¹⁴⁸ *Id.* at 12 (Ginsburg, J., dissenting) (citation omitted).

¹⁴⁹ See *supra* notes 131-34 and accompanying text.

¹⁵⁰ *Felkner v. Jackson*, 562 U.S. at 598.

¹⁵¹ *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009).

¹⁵² *Id.* at 8.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 9.

It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.¹⁵⁵

Particularly when a defendant's life is at stake, one might question whether it is appropriate for the Supreme Court to reach out to scold a court of appeals for relying on well-respected guidelines for the defense of capital cases without even permitting counsel to brief and argue their possible relevance.

One of the Court's summary reversals of the current term contains the same kind of sharp rebuke. Asserting that the "second rationale for the Court of Appeals' decision is no more sound than the first," the Court summarizes the key points in the circuit court's opinion leading it to the determination that the trial court's error was structural.¹⁵⁶ The next paragraph begins with a single word: "No."¹⁵⁷ The Court then goes on to find fault with each aspect of the circuit's analysis, stressing that "reasonable minds could disagree" with all of the lower court's conclusions.¹⁵⁸

VI. SUMMARY REVERSALS WHEN RELIEF WAS DENIED

The five per curiam summary reversals of decisions in which the circuit court had *denied* federal habeas corpus relief during this period¹⁵⁹ convey strikingly different characteristics, both in terms of substance and tone. Four of these cases are essentially reversals based on procedural irregularities, in which the courts had in some way misinterpreted their task in assessing the petitioner's right to relief.¹⁶⁰ The fifth case, *Porter v. McCollum*,¹⁶¹ was unanimous in reversing a death sentence imposed on a Korean War veteran on the basis that his attorney had provided ineffective assistance at the penalty phase of trial by not informing the jury about the defendant's post-traumatic stress disorder.¹⁶² As Linda Greenhouse pointed out at the time, the case formed a stark contrast with that of Bobby Van Hook, whose lawyer similarly failed to present extensive

¹⁵⁵ *Id.* at 14 (Alito, J., concurring).

¹⁵⁶ *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014).

¹⁵⁷ *Id.* at 431.

¹⁵⁸ *Id.*

¹⁵⁹ See cases listed in Appendix B.

¹⁶⁰ In the most recent such case, *Williams v. Johnson*, 134 S. Ct. 2659 (2014), the Court corrected an error in its previous opinion when it declared that the petitioner was not entitled to relief despite the fact that it had not ruled on the merits of one of the issues. See *supra* note 64.

In *Jefferson v. Upton*, the Court remanded to the circuit for consideration of all the applicable exceptions to the requirement that a federal court must accept state factual findings when the circuit had considered only one of those exceptions. Justices Scalia and Thomas dissented. 560 U.S. 284, 294-95 (2010). In *Wellons v. Hall*, the Court reversed the Eleventh Circuit's denial of habeas relief to a petitioner under sentence of death because the circuit had erroneously relied on a procedural bar that may have affected its decision to deny an evidentiary hearing. 558 U.S. 220, 226 (2010). Four justices dissented on the ground that the circuit had also denied relief on the merits, making remand inappropriate. *Id.* at 226-28 (Scalia and Thomas, JJ., dissenting); *id.* at 228-32 (Alito, J., and Roberts, C.J., dissenting). And in *Corcoran v. Levenhagen*, the Court remanded to the circuit which had reversed the district court's grant of habeas relief on one bases without addressing other claims challenging the petitioner's death sentence. 558 U.S. 1, 2-3 (2009). When the circuit later granted habeas relief, the Court again reversed summarily, on the ground that the circuit had relied on a violation of state law, rather than denial of a federal constitutional right. *Wilson v. Corcoran*, 562 U.S. 1, 7 (2010). On remand, the district court denied the writ. *Corcoran v. Buss*, No. 3:05-CV-389, 2013 WL 140378, at *17 (N.D. Ind. Jan. 10, 2013).

¹⁶¹ 558 U.S. 30 (2009).

¹⁶² *Id.* at 30-31, 40.

mitigating evidence on behalf of that veteran.¹⁶³ Because the state court had not decided whether counsel's performance was deficient, Porter's claim could be reviewed *de novo* by the federal court, without the deference due under AEDPA. Bobby Van Hook was not so fortunate: habeas relief granted to that petitioner was summarily reversed.¹⁶⁴

VII. CONCLUSION

The picture that emerges from examination of these summary reversals is one of a Supreme Court arrogating to itself, through its tiny direct review docket, guardianship of the Constitution as it applies to defendants in state courts, leaving no role for the lower federal courts. From this vantage point, the Court interprets constitutional protections in the narrowest possible terms, using the mechanism of summary reversals to send unmistakable messages to the circuit courts that granting relief based on generous reading of Supreme Court precedents, much less on lower court characterizations of what those precedents might have held, will be set aside without so much as a call for briefing or oral argument. Moreover, to be deemed "generous," an opinion in a petitioner's favor simply needs to be one with which any fairminded jurist could disagree. And the Supreme Court's per curiam opinions are written in a way that signals utter lack of respect for both the petitioners and the courts that found their constitutional claims to be valid. The Great Writ's protections extend only to Constitution *lite*.

¹⁶³ See Linda Greenhouse, *Selective Empathy*, N.Y. TIMES (Dec. 3, 2009, 9:11 PM), <http://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy>.

¹⁶⁴ Bobby v. Van Hook, 558 U.S. 4, 13 (2009).

APPENDIX A

Summary reversals of grants of habeas corpus relief, October, 2009 to June, 2015

Nov. 9, 2009	Bobby v. Van Hook, No. 09-144 558 U.S. 4 (2009)	6 th Cir. (death sentence)
Nov. 16, 2009	Wong v. Belmontes, No. 08-1263 558 U.S. 15 (2009)	9 th Cir. (death sentence)
Jan. 11, 2010	McDaniel v. Brown, No. 08-559 558 U.S. 120 (2010)	9 th Cir.
Feb. 22, 2010	Thaler v. Haynes, No. 09-273 559 U.S. 43 (2010)	5 th Cir. (death sentence)
Nov. 8, 2010	Wilson v. Corcoran, No. 10-91 562 U.S. 1 (2010)	7 th Cir. (death sentence)
Mar. 21, 2011	Felkner v. Jackson, No. 10-797 562 U.S. 594 (2011)	9 th Cir.
May 2, 2011	Bobby v. Mitts, No. 10-1000 131 S. Ct. 1762 (2011)	6 th Cir. (death sentence)
Oct. 31, 2011	Cavazos v. Smith, No. 10-1115 132 S. Ct. 2 (2011)	9 th Cir.
Nov. 7, 2011	Bobby v. Dixon, No. 10-1540 132 S. Ct. 26 (2011)	6 th Cir.
Dec. 12, 2011	Hardy v. Cross, No. 11-74 132 S. Ct. 490 (2011)	7 th Cir.
Feb. 21, 2012	Wetzel v. Lambert, No. 11-38 132 S. Ct. 1195 (2012)	3 rd Cir. (death sentence)
May 29, 2012	Coleman v. Johnson, No. 11-1053 132 S. Ct. 2060 (2012)	3 rd Cir.
June 11, 2012	Parker v. Matthews, No. 11-845 132 S. Ct. 2148 (2012)	6 th Cir. (death sentence)
April 1, 2013	Marshall v. Rodgers, No. 12-382 133 S. Ct. 1446 (2013)	9 th Cir.
June 3, 2013	Nevada v. Jackson, No. 12-694 133 S. Ct. 1990 (2013)	9 th Cir.

¹ This case was briefed and scheduled for oral argument, but shortly before the argument date, it was removed from the calendar without explanation.

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THE NOT SO GREAT WRIT

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Oct. 6, 2014	Lopez v. Smith	No. 13-946	9 th Cir. 135 S. Ct. 1 (2014)
Nov. 17, 2014	Glebe v. Frost	No. 14-95	9 th Cir. 135 S. Ct. 429 (2014)
Mar. 30, 2015	Woods v. Donald	No. 14-618	6 th Cir. 135 S. Ct. 1372 (2015)

APPENDIX B*Summary reversals of denials of habeas corpus relief, October, 2009 to June, 2015*

Oct. 20, 2009	Corcoran v. Levenhagen, No. 08-10495 558 U.S. 1 (2009)	7 th Cir. (death sentence)
Nov. 30, 2009	Porter v. McCollum, No. 08-10537 558 U.S. 30 (2009)	11 th Cir. (death sentence)
Jan. 19, 2010	Wellons v. Hall, No. 09-5731 558 U.S. 220 (2010)	11 th Cir. (death sentence)
May 24, 2010	Jefferson v. Upton, No. 09-8852 560 U.S. 284 (2010)	11 th Cir. (death sentence)
July 1, 2014	Johnson v. Williams, No. 13-9085 134 S. Ct. 2659 (2014)	9 th Cir.

**TIPPING THE SCALES IN FAVOR OF CIVILIAN
TAPING OF ENCOUNTERS WITH POLICE
OFFICERS**

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INTRODUCTION

The original purposes of eavesdropping statutes were to protect the citizen against government intrusion into the citizen's privacy and to authorize law enforcement interception to fight organized crime.¹ Yet, in certain instances, the statutes have been used offensively by the government to avoid citizen oversight of policing and even to intimidate citizens. These uses are far different from the original legislative intent behind the statutes, doing nothing to thwart organized crime activities and significantly interfering in the lives of otherwise law-abiding citizens. The prohibition against taping police activity ultimately hurts society more than it benefits society, given over-enforcement of eavesdropping statutes and under-enforcement of discipline or penalties for officers lying or falsifying evidence. The over-enforcement of eavesdropping statutes must be viewed against the backdrop of officer falsification of evidence and the police code of silence.

Citizens who audio record or videotape conversations run the risk of being arrested for violating eavesdropping statutes, especially in the eleven states that require all-party consent prior to taping. Even in a one-party consent state, there may be grounds to arrest the citizen if the citizen is a bystander rather than a party to the conversation. The risk is greater where the person being recorded is a police officer because the police officer may feel challenged by a civilian recording the police officer's actions; this is so although several federal circuit courts have found that the First Amendment protects gathering such information. The civilian fear of arrest for taping an encounter involving a police officer has a chilling effect on the civilian's gathering of information concerning law enforcement, as the eavesdropping statutes in most jurisdictions carry a hefty prison term, or fine, or both for their violation.

Two federal courts of appeals have found that the First Amendment protects civilian taping of encounters with police officers.² Those decisions and the Department of Justice's statement of interest in *Garcia v. Montgomery County, Maryland*³ may signal a trend in the law. In effect, the scales may be tipping in favor of sanctioning civilian recording of encounters with police officers.

The facts of *Garcia* are discussed in Section I. Section II provides information on eavesdropping statutes of various jurisdictions, as does Appendix A, and Section III reviews federal court decisions considering whether there is First Amendment protection for civilian taping. Section IV discusses officer falsification of evidence and the police code of silence. Section V analyzes the role civilian taping plays in society and Section VI proposes an exemption to eavesdropping statutes that would safeguard a civilian's right to tape an encounter with a police officer.

¹ See S. REP. NO. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2153, 2157, for the Senate report that accompanied the passage of the federal eavesdropping statutes in 1968. See also CAL. PENAL CODE § 630 (West 2010); FLA. STAT. ANN. § 934.01(3), (4) (West 2001); and MASS. GEN. LAWS ANN. Ch. 272, § 99(A) (West 2014) for the state statutes of three all-party consent states.

² *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012), on remand, No. 10 C 5235, 2012 WL 6680341, at *3 (N.D. Ill. Dec. 18, 2012) (granting the plaintiff's motion for summary judgment and a permanent injunction); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

³ See *infra* notes 11-15 and accompanying text.

I. THE CASE OF MANNIE GARCIA

The following case is illustrative of what can happen when police officers take offense at a civilian recording a police encounter.

Mannie Garcia is a well-known freelance photojournalist whose photos have appeared in national publications, such as *The New York Times* and *Newsweek*, and international publications such as *Der Spiegel*.⁴ He was leaving a restaurant with his wife and a friend on June 16, 2011 when he spotted several Montgomery County, Maryland police officers arresting two male Hispanics at a nearby intersection. Believing that the officers were using excessive force in making the arrest, Garcia began to photograph the incident from a distance of some thirty feet. When Officer Baxter shone a spotlight on him, Garcia retreated to a distance of almost 100 feet. As Officer Malouf approached Garcia, Garcia identified himself as a member of the press. Officer Malouf announced that Garcia was under arrest, restrained Garcia in a choke hold, dragged him to the patrol car, placed handcuffs on Garcia, and confiscated Garcia's camera.⁵ While Garcia was in handcuffs, Officer Malouf kicked one of Garcia's feet out from under him, resulting in Garcia's head hitting the patrol car. When Garcia's wife asked Officer Baxter what was happening, Officer Baxter threatened to arrest her also. Officer Malouf placed Garcia in the patrol car and drove Garcia to the police station. Outside the police station, Garcia observed Officer Malouf remove the video card and battery from Garcia's camera.⁶

Garcia was charged with disorderly conduct under Maryland Criminal Code § 10-201.⁷ On December 16, 2011 following trial, the judge declared Garcia not guilty.⁸ A police department investigation reached the finding on April 12, 2012 that there had been no administrative violation.⁹ Garcia filed a title 42 U.S.C. § 1983 action on December 7, 2012 against Montgomery County, Maryland and several officers, including Officer Malouf and Officer Baxter, claiming, among other things, that they had deprived him of his First and Fourth Amendment rights.¹⁰

On March 4, 2013, the United States Department of Justice (DOJ) took the rare step of filing a Statement of Interest in Garcia's § 1983 action asking the court to find that "both the First and Fourth Amendments protect an individual who peacefully photographs police activity on a public street, if officers arrest the individual and seize the camera of that individual for that activity."¹¹ The DOJ then proceeded to make two other points, the first of which was to recognize that a police department often uses certain "discretionary" charges of general applicability such as "disorderly conduct, loitering, disturbing the peace, and resisting arrest" to dissuade citizens from exercising their First Amendment right and to urge a court encountering these types of charges to examine them critically as

⁴ Complaint at 2-3, *Garcia v. Montgomery Cnty., Md.*, No. JFM-12-cv-03592, 2013 WL 4539394 (D. Md. Aug. 23, 2013).

⁵ *Id.* at 5.

⁶ *Id.* at 6.

⁷ *Id.* at 7.

⁸ *Id.* at 8.

⁹ *Id.* at 9.

¹⁰ *Id.* at 12-14.

¹¹ Statement of Interest of the United States at 1, *Garcia v. Montgomery Cnty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013). The United States filed a similar Statement of Interest in a second Maryland case. Statement of Interest of the United States, *Sharp v. Baltimore City Police Dep't.*, No. 1:11-cv-02888 (D. Md. Jan. 10, 2012), 2012 WL 9512053.

a subterfuge for curtailing constitutionally protected conduct.¹² “Core First Amendment conduct, such as recording a police officer performing duties on a public street, cannot be the sole basis for such charges.”¹³ The second point was that it is not just the media, but individuals also, who enjoy the First Amendment right to tape police activities.¹⁴ “The derogation of these rights erodes public confidence in our police departments, decreases the accountability of our governmental officers, and conflicts with the liberties that the Constitution was designed to uphold.”¹⁵

In addition to eavesdropping charges, discretionary charges are often used against a civilian recording an encounter with a police officer. However, use of these charges against a civilian recording this type of encounter flies in the face of the First Amendment. In 1987, the United States Supreme Court struck down a Houston ordinance as overbroad because it criminalized civilian speech that “in any manner . . . interrupt[s]” a police officer.¹⁶ Similar to other discretionary charges used in civilian taping cases, the Houston ordinance “accord[ed] the police unconstitutional discretion in enforcement.”¹⁷ “The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”¹⁸

According to Garcia’s version of the facts, he was well out of the way of the police officers effecting the arrest of the two Hispanic males and did nothing to interfere with the arrest.¹⁹ Garcia was at a location open to the public, as he was on a public thoroughfare. To him, the encounter was newsworthy, as the police officers seemed to be using excessive force.²⁰ Perhaps the officers’ perception that they might have been photographed engaging in police misconduct was what caused them to arrest Garcia. In a number of respects, the public nature of the location, the photographer’s concern for the person being arrested, the subsequent arrest of the photographer on a discretionary charge, the failure to convict on the discretionary charge, and the ensuing civil rights lawsuit against the police officer, Garcia’s case is factually similar to *Glik v. Cunniffe*,²¹ one of the First Amendment cases reviewed in Section III.

The circumstances of bystander Garcia photographing police officers arresting individuals and Garcia’s subsequent arrest happened in Maryland, an all-party consent jurisdiction.²² Had Garcia been videotaping the encounter rather than photographing it, he might have been charged with eavesdropping under the Maryland eavesdropping statutes, in addition to being arrested for disorderly conduct. The eavesdropping statutes of the various jurisdictions are discussed in the following section.

II. EAVESDROPPING STATUTES

Federal statutes prohibit eavesdropping and all states but one protect certain types of conversation from being taped; the highest court of the single state without a statutory

¹² Statement of Interest of the United States at 1-2, *Garcia*, No. 8:12-cv-03592-JFM.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *City of Hous., Tex. v. Hill*, 482 U.S. 451, 462 (1987).

¹⁷ *Id.* at 466.

¹⁸ *Id.* at 462-63.

¹⁹ Complaint, *supra* note 4, at 5.

²⁰ *Id.*

²¹ 655 F.3d 78, 79-80 (1st Cir. 2011). See *infra* notes 223-36 and accompanying text.

²² MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(1), (c)(3) (West 2011 & Supp. 2014).

prohibition against taping interpreted the state constitution to provide some protection against eavesdropping.²³

Although all states but one protect certain types of conversation against being recorded, three states, Indiana, New Mexico, and Mississippi, appear not to make surreptitious taping of a face-to-face conversation a crime. The statutes of Indiana and New Mexico appear to prohibit taping of telephone conversations but not face-to-face conversations.²⁴ Although the Mississippi statutes contain procedures for obtaining a court order to intercept an oral communication,²⁵ research has failed to locate any statute or case law interpretation of any statute affirmatively prohibiting such taping.

Eavesdropping statutes of the various jurisdictions vary widely in the manner in which they protect face-to-face conversations from being recorded; however, two factors to consider are the consent required to tape a conversation and the type of conversation protected. Eavesdropping statutes generally require a police officer not a party to the conversation to obtain a court order prior to secretly taping a face-to-face conversation.²⁶ Other than obtaining a court order, a conversation may be taped with the consent of at least one party to the conversation.²⁷ A major distinction among the jurisdictions is the consent required to permit legal recording without a court order; until very recently, eleven states required all-party consent²⁸ and the federal statutes and the eavesdropping statutes from the balance of the states required only one-party consent.²⁹

The other factor is the type of conversation that receives statutory protection. *Katz v. United States* was the landmark 1967 case that found Fourth Amendment protection for a telephone conversation.³⁰ The case is remembered for Justice Harlan's concurring opinion in which he announced a two-pronged test to determine whether a conversation would receive constitutional protection against secretly being taped.³¹ The focus of the test is on the speaker's privacy rather than the substance of the conversation or the possibility that the conversation may be divulged later. The first prong is that there must be an expectation of privacy and the second prong is that the expectation of privacy must be reasonable.³²

²³ See *infra* app. A (Vermont).

²⁴ See *infra* app. A (Indiana & New Mexico).

²⁵ See *infra* app. A (Mississippi).

²⁶ See, e.g., 18 U.S.C.A. §§ 2516-2519 (West 2000 & Supp. 2014). The federal eavesdropping statute includes an exemption allowing a police officer who is a party to the conversation to secretly tape the conversation. *Id.* § 2511(2)(c). The statute provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a[n] . . . oral . . . communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.*

²⁷ See, e.g., *Id.* § 2511(2)(d). The statute provides:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Id. The eavesdropping statutes of a number of states contain a similar exemption. See *infra* app. A.

²⁸ See *infra* notes 34-187 and accompanying text.

²⁹ See *infra* notes 188-210 and accompanying text.

³⁰ 389 U.S. 347, 353 (1967).

³¹ *Id.* at 361 (Harlan, J., concurring).

³² *Id.*

The federal statutes protect face-to-face conversations against recording under this two-pronged test. Thus, a face-to-face conversation qualifies for protection as an oral communication against being taped where the speaker had an expectation of privacy that society would consider reasonable.³³ Many of the state statutes incorporate the term “oral communication” and define that term similar to the definition contained in the federal statutes. The next portion of this paper contains a discussion of all-party consent states, followed by a discussion of one-party consent jurisdictions.

A. All-Party Consent States

A starting point is to examine the nature of the face-to-face conversation protected under the eavesdropping statutes of the eleven all-party consent states. The statutes from the eleven all-party consent states are discussed in this section, as they are the most problematic for a civilian who desires to tape an encounter with a police officer. The pertinent provisions of the federal statutes and the statutes of the other states are reviewed in Appendix A.

Florida,³⁴ New Hampshire,³⁵ and Pennsylvania³⁶ are all-party consent states that protect a face-to-face conversation as long as there is an expectation of privacy that is reasonable; thus, other than requiring all-party consent to taping, the way in which they define the term “oral communication” is similar to the way in which it is defined in the federal statutes. However, as more fully discussed below, what constitutes a reasonable expectation of privacy has been interpreted differently by Florida and Pennsylvania.

The Massachusetts eavesdropping statute protects “oral communication” but does not tie this to whether the speaker has a reasonable expectation of privacy.³⁷ What is important in determining whether the face-to-face conversation is protected is whether the conversation was secretly taped and whether the taping was done with all-party consent.

Until two recent decisions of the Illinois Supreme Court, the Illinois eavesdropping statutes were the most rigid and unforgiving of any of the all-party consent statutes. Although the statutes protected “oral communication” they did so in such a way as to specifically negate any exemption for a conversation made with a reasonable expectation of privacy.³⁸

The eavesdropping statutes of Maryland,³⁹ Michigan,⁴⁰ and Washington⁴¹ protect “private conversation,” California eavesdropping statutes⁴² protect “confidential communication,” and the eavesdropping statutes of Montana⁴³ and Oregon⁴⁴ protect “conversation” against being recorded without all party consent. In those states and as more fully explained below, case law provides some guidance in determining the nature of the face-to-face conversation protected against eavesdropping.

³³ 18 U.S.C.A. § 2510(2) (West 2000 & Supp. 2014). *See infra* app. A (United States).

³⁴ *See infra* notes 45-75 and accompanying text.

³⁵ *See infra* notes 76-83 and accompanying text.

³⁶ *See infra* notes 84-101 and accompanying text.

³⁷ *See infra* notes 102-12 and accompanying text.

³⁸ *See infra* notes 113-26 and accompanying text.

³⁹ *See infra* notes 127-31 and accompanying text.

⁴⁰ *See infra* notes 132-46 and accompanying text.

⁴¹ *See infra* notes 147-59 and accompanying text.

⁴² *See infra* notes 160-63 and accompanying text.

⁴³ *See infra* notes 164-76 and accompanying text.

⁴⁴ *See infra* notes 177-87 and accompanying text.

1. A Conversation Made with a Reasonable Expectation of Privacy

a. Florida

Florida defines “oral communication” as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”⁴⁵ Under Florida law, it is illegal to deliberately tape a private conversation without all-party consent.⁴⁶ One who illegally tapes a conversation is subject to up to five years imprisonment,⁴⁷ or a fine of up to five thousand dollars, or both.⁴⁸

The Florida Supreme Court had occasion to determine whether there was a reasonable expectation of privacy in a private home, *State v. Walls*,⁴⁹ in a business office open to the public, *State v. Inciarrano*,⁵⁰ and in a police car, *State v. Smith*.⁵¹ While the *Walls* and *Smith* decisions presented little difficulty, *Inciarrano* highlighted the difficulty faced by the courts in other states of interpreting the terms “oral communication” and “intercept.”

In *Walls*, two individuals were allegedly extorting Antel in his home when Antel secretly taped the conversation.⁵² The Florida Supreme Court found that the conversation was an oral communication and no statutory exception would allow the taped conversation to be used as evidence.⁵³

In *Inciarrano*, the victim was in his business office secretly taping the conversation between the victim and Inciarrano when Inciarrano shot and killed the victim. Because the taped information was the only evidence against Inciarrano, the Florida courts faced a tough situation.⁵⁴ The trial court did not suppress the taped information, considering “the quasi-public nature of the premises within which the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and the location and visibility to the unaided eye of the microphone used to record the conversations.”⁵⁵ Inciarrano pled nolo contendere but reserved the right to appeal the denial of his motion to suppress. The intermediate appellate court reversed, feeling duty-bound to follow *Walls*. However, even in reversing, the intermediate court expressed its uneasiness with the decision it felt it needed to make.⁵⁶ The court suggested that the Florida Supreme Court could take one of three avenues of interpretation that would allow the information secretly taped by the victim to be used against Inciarrano.

⁴⁵ FLA. STAT. ANN. § 934.02(2) (West, Westlaw through Ch. 255 (End) of the 2014 Sp. "A" Sess. of the Twenty-Third Legislature).

⁴⁶ *Id.* § 934.03(1), (2)(d).

⁴⁷ *Id.* § 775.082(3)(e).

⁴⁸ *Id.* § 775.083(1).

⁴⁹ *State v. Walls*, 356 So. 2d 294, 295 (Fla. 1978).

⁵⁰ *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985).

⁵¹ *State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994).

⁵² 356 So. 2d at 295.

⁵³ *Id.* at 296. Although the court did not state its reasoning, presumably the parties had an expectation of privacy because there were only three people talking in a confined space and the expectation of privacy was reasonable because they were in a private home. The court explained that Antel, had he wished, could have obtained authorization to secretly tape the conversation. Even though Antel had not received the required authorization, the prosecution could use Antel’s testimony as evidence. *Id.* at 297.

⁵⁴ *Inciarrano v. State*, 447 So. 2d 386, 387-88 (Fla. Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272, 1276 (Fla. 1985).

⁵⁵ *State v. Inciarrano*, 473 So. 2d at 1274.

⁵⁶ *Inciarrano v. State*, 447 So. 2d at 387, 390.

One route would have been to interpret the term “intercept” to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from taping.⁵⁷ Another route would have been to read the legislative history to protect the privacy of an “innocent” individual.⁵⁸ The final route would be to limit application of the exclusionary rule to secret government taping of a conversation.⁵⁹

When *Inciarrano* reached the Florida Supreme Court, the four-member court majority stated that Inciarrano’s expectation of privacy was not reasonable and quashed the lower court’s decision.⁶⁰ Without offering more of an explanation why Inciarrano’s expectation of privacy was not reasonable, the court quoted from the intermediate appellate court decision:

One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises.⁶¹

Perhaps in indication of the difficulty in reaching a decision in *Inciarrano*, there were two concurring opinions, the first authored by one justice and the second, concurring in result only, joined in by two justices.⁶² The reasoning of the first concurring opinion is that Inciarrano did not have an expectation of privacy, as he went into the victim’s business. “[W]hen an individual enters someone else’s home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply.”⁶³

The second concurring opinion characterized the majority opinion as a “tortuous misconstruction of the plain language of the statute.”⁶⁴ The concurring opinion criticized the reasoning that the majority borrowed from the intermediate appellate court. “To hold, as the majority does, that the commission of a criminal act waives a privacy right requires an entirely new legal definition of privacy rights which would, in turn, shake the foundation of fourth amendment analysis.”⁶⁵ The concurring opinion added, “If criminal

⁵⁷ *Id.* at 388-89.

⁵⁸ *Id.* at 390.

⁵⁹ *Id.*

⁶⁰ *State v. Inciarrano*, 473 So. 2d at 1276. In 2000, the intermediate appellate court relied on *Inciarrano* in deciding a case in which a part business owner of Balgres Distributing Company, Inc., Lamaletto, secretly taped a conversation in his office with Jatar who was allegedly attempting to extort Lamaletto. *Jatar v. Lamaletto*, 758 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 2000). Jatar sued Lamaletto and Balgres civilly, asking for damages for the taping. The trial court granted Lamaletto and Balgres’ motion for summary judgment, and the appellate court affirmed. *Id.* at 1168-69. The intermediate appellate court certified the following question to the Florida Supreme Court as one of great public importance:

DOES *STATE v. WALLS*, 356 So.2d 294 (Fla.1978), HAVE CONTINUED VALIDITY AND BAR SUMMARY JUDGMENT IN THE VICTIM’S FAVOR, WHERE AN EXTORTION THREAT WAS DELIVERED IN THE VICTIM’S OFFICE AND ELECTRONICALLY RECORDED BY THE VICTIM BECAUSE HE FEARED THAT SUCH AN EXTORTION THREAT WAS IMMINENT, IN VIEW OF THE HOLDING IN *STATE v. INCIARRANO*, 473 So.2d 1272 (Fla. 1985)?

Id. at 1169-70. The Florida Supreme Court declined to hear the case. *Jatar v. Lamaletto*, 786 So. 2d 1186 (Fla. 2001) (mem.).

⁶¹ *State v. Inciarrano*, 473 So. 2d at 1275-76.

⁶² *Id.* at 1276.

⁶³ *Id.* (Overton, J., concurring). Justice Overton also recommended that the Florida legislature consider amending chapter 934. *Id.*

⁶⁴ *Id.* at 1277 (Ehrlich, J., concurring).

⁶⁵ *Id.*

acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has ‘gone up in smoke.’⁶⁶ The author of the concurring opinion would have adopted one of the suggestions of the intermediate appellate court and would have interpreted the term “intercept” to allow a conversant to secretly tape a conversation but preclude a third party not a party to the conversation from secretly taping a conversation.⁶⁷ In addition, the opinion recognized the special status of being in one’s own home, which gave Inciarrano’s victim a “higher degree of privacy.”⁶⁸ In contrast, any expectation of privacy that Inciarrano claimed was not reasonable.⁶⁹

*State v. Smith*⁷⁰ was a typical traffic stop case in which the driver consented to the officer’s request to search the car in which Smith was a passenger. At the officer’s suggestion, the driver and Smith sat in the back seat of the patrol car while their car was being searched. Unbeknownst to them, the officer secretly taped their conversation, which contained incriminating information. The suspects were not under arrest while their conversation was taped but were arrested after the officer found illegal drugs in the car.⁷¹ The suspects did seem to have a subjective expectation of privacy while in the patrol car, as evidenced by their disclosure of incriminating information.⁷² Even though this was a case of first impression for the Florida Supreme Court, the court had several cases of persuasive authority to rely on and, thus, the decision was a fairly easy one.⁷³ “We agree with the Eleventh Circuit Court’s reasoning and hold that a person does not have a reasonable expectation of privacy in a police car and that any statements intercepted therein may be admissible as evidence.”⁷⁴ That means that the suspects’ conversation did not fall within the definition of an oral communication and, therefore, the conversation was not protected against being secretly recorded.⁷⁵

b. New Hampshire

The New Hampshire statutory prohibition against eavesdropping is similar to that of Florida in a number of respects. New Hampshire defines “oral communication” as “any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation.”⁷⁶ Under New Hampshire law, it is a class B felony if “without the consent of all parties to the communication, the person . . . [w]ilfully intercepts . . . any . . . oral communication”;⁷⁷ however, it is “a misdemeanor if, . . . without consent of all parties to the communication, the person knowingly intercepts a[n] . . . oral communication when the person is a party to the communication or with the prior consent of one of the parties to the communication.”⁷⁸

⁶⁶ *Id.*

⁶⁷ *Id.* at 1276.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1276-77.

⁷⁰ 641 So. 2d 849, 850 (Fla. 1994).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 852.

⁷⁴ *Id.*

⁷⁵ *Id.* The court reasoned: “Because we find that there is no reasonable expectation of privacy in a police car, section 934.03 does not apply to conversations that take place in those vehicles. Consequently, the section 934.06 prohibition against the use of intercepted oral communications as evidence is inapplicable as well.” *Id.*

⁷⁶ N.H. REV. STAT. ANN. § 570-A:1.II (2012).

⁷⁷ *Id.* § 570-A:2.I.

⁷⁸ *Id.* § 570-A:2.1-a.

The New Hampshire statute provides two exceptions allowing a police officer to record a conversation when performing the officer's duties. The first exception makes the eavesdropping prohibition inapplicable to a police officer recording a traffic stop, in other words allowing:

A uniformed law enforcement officer to make an audio recording in conjunction with a video recording of a routine stop performed in the ordinary course of patrol duties on any way as defined by RSA 259:125 [street or other thoroughfare], provided that the officer shall first give notification of such recording to the party to the communication.⁷⁹

The second exception allows an officer to record an incident involving the use of a taser, in other words making the eavesdropping prohibition inapplicable to:

A law enforcement officer in the ordinary course of the officer's duties using any device capable of making an audio or video recording, or both, and which is attached to and used in conjunction with a TASER or other similar electroshock device. Any person who is the subject of such recording shall be informed of the existence of the audio or video recording, or both, and shall be provided with a copy of such recording at his or her request.⁸⁰

One who illegally tapes a conversation without the consent of at least one party to the conversation has committed a class B felony, making the individual subject to more than one year and a maximum of seven years imprisonment, or a maximum fine of \$4,000, or both.⁸¹ One who illegally tapes a conversation with the consent of only one party to the conversation has committed a misdemeanor, punishable as a class B misdemeanor, making the individual subject to "conditional or unconditional discharge, a [maximum] fine [of \$1,200], or other sanctions"; "[a] fine may be imposed in addition to any sentence . . . conditional discharge."⁸²

In contrast to Florida and Pennsylvania, research showed no case law interpreting the New Hampshire statutory term "oral communication."⁸³

c. Pennsylvania

The Pennsylvania statutory prohibition against eavesdropping is similar to that of Florida in a number of respects. Pennsylvania defines "oral communication" as "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."⁸⁴ Similar to the New Hampshire eavesdropping statute, an exception to the Pennsylvania statute makes the eavesdropping prohibition inapplicable to a police officer recording a traffic stop.⁸⁵

⁷⁹ *Id.* § 570-A:2.II.(j).

⁸⁰ *Id.* § 570-A:2.II.(l).

⁸¹ *Id.* §§ 625:9.III.(a)(2), 651:2.II, IV.

⁸² *Id.* §§ 625:9.IV.(c), 651:2.III, IV.

⁸³ A New Hampshire statute provides an exemption making it lawful for a "law enforcement officer . . . to intercept a telecommunication or oral communication, when . . . one of the parties to the communication has given prior consent to such interception." *Id.* § 570-A:2.II.(d). The Supreme Court of New Hampshire has interpreted the consent requirement under that statute in the context of a face-to-face conversation, *State v. Locke*, 761 A.2d 376, 381 (N.H. 1999), and instant messaging, *State v. Moscone*, 13 A.3d 137, 145 (N.H. 2011); *State v. Lott*, 879 A.2d 1167, 1172 (N.H. 2005).

⁸⁴ 18 PA. CONS. STAT. ANN. § 5702 (West 2013).

⁸⁵ *Id.* § 5704(16). The statute provides:

Under Pennsylvania law, it is a third degree felony if one “intentionally intercepts . . . any . . . oral communication;”⁸⁶ however, it is not illegal for “[a] person, to intercept a[n] . . . oral communication, where all parties to the communication have given prior consent to such interception.”⁸⁷ One convicted of a third degree felony is subject to a maximum of seven years imprisonment and a maximum fine of \$15,000.⁸⁸

The Pennsylvania Supreme Court’s case law interpretation of the term oral communication tracks the statutory definition in part, but with a layered approach. The statutory language directs the court to determine if the conversant had a reasonable expectation that the conversation would not be intercepted, which interception, in most instances, means that the conversation would not be recorded; however, according to the Pennsylvania Supreme Court in *Agnew v. Dupler*, the non-interception determination is dependent on a determination that the conversant had a reasonable expectation of privacy.⁸⁹ This approach asks a court to first consider whether there was a reasonable

A law enforcement officer, whether or not certified under section 5724 (relating to training), acting in the performance of his official duties to intercept and record an oral communication between individuals in accordance with the following:

(i) At the time of the interception, the oral communication does not occur inside the residence of any of the individuals.

(ii) At the time of the interception, the law enforcement officer:

(A) is in uniform or otherwise clearly identifiable as a law enforcement officer;

(B) is in close proximity to the individuals' oral communication;

(C) is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the oral communication; and

(D) informs, as soon as reasonably practicable, the individuals identifiably present that he has intercepted and recorded the oral communication.

Id.

⁸⁶ *Id.* § 5703.

⁸⁷ *Id.* § 5704(4).

⁸⁸ *Id.* §§ 106(b)(4), 1101, 1103.

⁸⁹ *Agnew v. Dupler*, 717 A.2d 519, 523 (Pa. 1998). As the court explained:

[I]n determining what constitutes an “oral communication” under the Wiretap Act, the proper inquiries are whether the speaker had a specific expectation that the contents of the discussion would not be intercepted, and whether that expectation was justifiable under the existing circumstances. In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy. To determine the existence of an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable.

Id.

A 1996 case involved a police officer who secretly taped traffic stops. *Commonwealth v. McIvor*, 670 A.2d 697, 698 (Pa. Super. Ct. 1996). In contrast to the analysis of *Agnew*, the *McIvor* court found no linkage between a reasonable expectation of non-interception and a reasonable expectation of privacy. “Under the circumstances of this case, while the stopped motorists had no expectation of privacy, they had a very real expectation of non-

expectation of privacy prior to considering whether the expectation that the conversation would not be recorded was reasonable. This two-step approach, unique to the state, may well be because the Pennsylvania Supreme Court has recognized an implicit right to privacy under Article I, Section 8 of the Pennsylvania Constitution, the state's version of the Fourth Amendment to the United States Constitution.⁹⁰

This interpretation asks a court to make two determinations, one about privacy and the other about non-interception, both of which have a subjective and an objective component. Case law focus is often on the reasonableness of the speaker's expectation of privacy because the reasonable expectation of non-interception finding is necessarily dependent on a reasonable expectation of privacy finding.⁹¹ As for the subjective component, the conversant naturally claims an expectation of privacy and an expectation that the conversation was not being recorded. Thus, the key to the court's decision is the objective component of whether society would view the speaker's expectation of privacy as reasonable.⁹²

The reasonableness objective component is often based on the location of the conversation and the identities or positions of the parties to the conversation. In 1998 in *Agnew v. Dupler*, the Pennsylvania Supreme Court found that a police officer did not have a reasonable expectation of privacy in a squadroom in the police department where the police officer was talking to two other police officers and the chief of police was eavesdropping on the conversation via intercom.⁹³ The squadroom was large and the door was open, allowing others outside the room to overhear conversations in the room without amplification, and the intercom on the room's four telephones, which could be activated at any time, permitted conversations in the room to be heard in other locations within the building.⁹⁴

In the 1994 Pennsylvania Supreme Court case *Commonwealth v. Brion*, a confidential informant with a body wire entered Brion's home to make an illegal drug

interception. They legitimately could expect that their words would not be electronically seized and carried away by the officer." *Id.* at 704. The court then found that the secretly taped conversations were oral communication. *Id.* The Pennsylvania Supreme Court denied review of the case on appeal. *Commonwealth v. McIvor*, 692 A.2d 564 (Pa. 1997) (mem.).

The continued viability of *McIvor* seems doubtful, given *Agnew*. In addition, a police officer can easily tape a traffic stop in compliance with § 5704(16) quoted above, which was adopted in 2002.

⁹⁰ *Commonwealth v. Blystone*, 549 A.2d 81, 87 (Pa. 1988), *aff'd on other grounds*, 494 U.S. 299 (1990) ("Article I, § 8 creates an implicit right to privacy in this Commonwealth. . . . To determine whether one's activities fall within the right of privacy, we must examine: first, whether appellant has exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable"). Another reason for making the non-interception dependent on a determination of a reasonable expectation of privacy may be to refute the reasoning of *McIvor*. The concurring opinion of *Agnew* would have separated the finding of interception from the finding of privacy. "Contrary to the Majority's position, I believe that the expectation of non-interception and the expectation of privacy involve two distinct inquiries. Thus, a speaker, under certain circumstances, may possess a reasonable expectation of non-interception even in the absence of a reasonable expectation of privacy." *Agnew*, 717 A.2d at 525 (Nigro, J., concurring).

⁹¹ In determining whether the speaker has a reasonable expectation of privacy, the subjective component is whether the speaker expects privacy, and the objective component is whether society would consider this expectation reasonable. In determining whether there is a reasonable expectation of non-interception, the subjective component is whether the speaker expects that the conversation will not be recorded, and the objective component is whether society would consider this expectation reasonable. *Agnew*, 717 A.2d at 523.

⁹² *Id.* "Since the standard for such expectation of privacy is one that society is prepared to recognize as reasonable, the standard is necessarily an objective standard and not a subjective standard. . . ." *Id.* The determination of the reasonableness of the conversant's expectation of privacy is like a house of cards; with this objective component of reasonableness missing, the house of cards collapses.

⁹³ *Id.* at 521, 524.

⁹⁴ *Id.* at 524.

purchase and the informant taped the conversation.⁹⁵ The court found that the recording violated Brion's right to privacy under the Pennsylvania Constitution and held that "an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance."⁹⁶

In a 1989 case, *Commonwealth v. Henlen*, a Pennsylvania state trooper was questioning a prison guard regarding the theft of an inmate's personal property.⁹⁷ Unbeknownst to the trooper, the guard was secretly taping the conversation, which conversation was being conducted at the county jail.⁹⁸ The Pennsylvania Supreme Court found that "the circumstances do not establish that Trooper Dibler possessed a justifiable expectation that his words would not be subject to interception."⁹⁹ Questioning of suspects is usually recorded, the trooper took notes of the questioning, which were to be made part of a report, and there was a third person present during part of the questioning.¹⁰⁰

Thus, although the definition of "oral communication" in the statutes of the three states, Florida, New Hampshire, and Pennsylvania, is almost identical in wording, the interpretation of that term by two states is differs significantly. New Hampshire has not had occasion to interpret the meaning of oral communication. Florida and Pennsylvania have each decided a number of cases interpreting the meaning of the term.

Under Florida case law, a court would first consider the threshold issue of whether the subject conversation qualifies as an oral communication. Florida has interpreted the two prongs of the definition as being given equal weight. Thus, if either the speaker did not have an expectation of privacy or if the expectation of privacy was not reasonable, then Florida would find no protected oral communication. In *Walls*, the Florida Supreme Court easily found that the conversation qualified as an oral communication because the conversation took place in a private home. In both *Inciarrano* and *Smith*, the Florida Supreme Court found that the objective prong of the two-prong test lacking and, therefore, tape recording did not violate the Florida eavesdropping statute. Once it has been determined that the taped conversation qualifies as an oral communication, the court would move on to consider whether there was an eavesdropping violation because all parties to the conversation failed to consent.

In examining whether the taped conversation was private, Pennsylvania case law emphasizes the objective prong of the two-pronged test and assumes that the subjective prong of the test was met. Thus, it was reasonable for Brion to have an expectation of privacy in his home but it was not reasonable for there to be an expectation of privacy in a squadroom, as in *Agnew*, or during an interview that took place in a county jail, as in *Henlen*.

2. A Conversation that is Secretly Taped - Massachusetts

After reviewing the eavesdropping statutes of Florida, New Hampshire, and Pennsylvania, one should not necessarily expect the same two-pronged approach to apply to a state statute that protects a face-to-face conversation under the term "oral

⁹⁵ 652 A.2d 287, 287 (Pa. 1994).

⁹⁶ *Id.* at 289.

⁹⁷ 564 A.2d 905, 905 (Pa. 1989).

⁹⁸ *Id.*

⁹⁹ *Id.* at 907.

¹⁰⁰ *Id.* at 906.

communication.” As more fully explained below, the key to the Massachusetts eavesdropping statute is whether the person who recorded the conversation did so secretly.

In Massachusetts,

...any person who--willfully commits an interception . . . of any . . . oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.¹⁰¹

Pursuant to the statute, “‘interception’ means to . . . secretly record . . . the contents of any . . . oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.”¹⁰² The statute further defines “oral communication” as “speech, except such speech as is transmitted over the public air waves by radio or other similar device.”¹⁰³

In a 2001 case, *Commonwealth v. Hyde*, the Supreme Judicial Court of Massachusetts held that the Massachusetts eavesdropping statute “strictly prohibits the secret electronic recording by a private individual of any oral communication, and makes no exception for a motorist who, having been stopped by police officers, surreptitiously tape records the encounter.”¹⁰⁴ The four police officers involved did not discover that Hyde, the driver, had secretly taped the fifteen to twenty minute stop, which was “confrontational” until Hyde went to the police department to file a complaint.¹⁰⁵ The police department requested that Hyde be charged with four counts of eavesdropping and Hyde was convicted of the charges.¹⁰⁶

On appeal, Hyde argued that he could not be convicted because the officers did not have an expectation of privacy, reasoning that the term “oral communication” should be interpreted to require an expectation of privacy.¹⁰⁷ The four-member majority of the court declined to so interpret the Massachusetts eavesdropping statute in light of the statute’s “plain language and legislative history,” explaining that Hyde could have recorded the encounter had he “simply informed the police of his intention to tape record the encounter, or even held the tape recorder in plain sight.”¹⁰⁸

The two justices joining in the vigorous dissent would have read the Massachusetts statute to prohibit recording only of a conversation made with “a legitimate expectation of privacy.”¹⁰⁹ The dissent emphasized the vital role that the public has in monitoring police activity. “To hold that the Legislature intended to allow police officers to conceal possible misconduct behind a cloak of privacy requires a more affirmative showing than this statute allows.”¹¹⁰ Finally, the dissent noted the flawed nature of the

¹⁰¹ MASS. GEN. LAWS ANN. ch. 272, § 99 C.1. (West 2014)

¹⁰² *Id.* § 99 B.4.

¹⁰³ *Id.* § 99 B.2.

¹⁰⁴ 750 N.E.2d 963, 964 (Mass. 2001).

¹⁰⁵ *Id.* at 964-65.

¹⁰⁶ *Id.* at 965.

¹⁰⁷ *Id.* at 965-66.

¹⁰⁸ *Id.* at 971.

¹⁰⁹ *Id.* at 975 (Marshall, C.J., dissenting).

¹¹⁰ *Id.* at 976. “It is the recognition of the potential for abuse of power that has caused our society, and law enforcement leadership, to insist that citizens have the right to demand the most of those who hold such awesome powers.” *Id.* at 977.

statute because it does not distinguish between a private individual and a reporter exercising the reporter's right under the First Amendment to Freedom of the Press and would subject both individuals to criminal liability.¹¹¹

The dissenting opinion in *Hyde* makes it clear that not only face-to-face conversations made with a reasonable expectation of privacy are protected against being recorded. The Massachusetts interpretation of the state's eavesdropping statute focused on the autonomy of the individual in consenting or not consenting to being recorded. Still, a determination whether the taping was done secretly may be fact specific to a particular case and may be dependent on whether the speaker recognizes that a device in plain view has the capability of taping.

3. Taping a Conversation Where There is no Claim of a Reasonable Expectation of Privacy - Illinois

Until two 2014 Illinois Supreme Court decisions, Illinois law protected "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."¹¹² An individual eavesdropped when the individual "[k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so . . . with the consent of all of the parties to such conversation or electronic communication."¹¹³ The statutory language specifically negated limiting conversations protected against recording to those made with a reasonable expectation of privacy; thus, it would have been an offense to tape a conversation even in a public place or in the midst of a crowd of people.¹¹⁴ Among a lengthy string of exemptions, were two that allowed an officer to tape a conversation relating to a traffic stop while suspects were in a patrol car.¹¹⁵

Eavesdropping was a class 4 felony¹¹⁶ unless the person recorded was a law enforcement officer or other official, in which event eavesdropping was a class 1 felony.¹¹⁷ One convicted of a class 4 felony was subject to imprisonment of not less than one to not more than three years and a fine of a maximum of \$25,000.¹¹⁸ One convicted of a class 1 felony was subject to imprisonment of not less than four to not more than fifteen years and a fine of a maximum of \$25,000.¹¹⁹

In 2014 in *People v. Clark*¹²⁰ and *People v. Melongo*,¹²¹ two cases decided on the same day, the Illinois Supreme Court recognized the unforgiving nature of the Illinois statute that protected face-to-face conversations even if there was no reasonable

¹¹¹ *Id.*

¹¹² 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West 2003).

¹¹³ *Id.* 5/14-2(a)(1).

¹¹⁴ *Id.*

¹¹⁵ *Id.* 5/14-3(h), (h-5).

¹¹⁶ *Id.* 5/14-4(a). "Eavesdropping, for a first offense, is a Class 4 felony and, for a second or subsequent offense, is a Class 3 felony." *Id.*

¹¹⁷ *Id.* 5/14-4(b).

¹¹⁸ 730 ILL. COMP. STAT. ANN. 5/5-4.5-45(a), 5/5-4.5-50(b) (West, Westlaw through P.A. 98-756 of the 2014 Reg. Sess.).

¹¹⁹ *Id.* 5/5-4.5-30(a), 5/5-4.5-50(b).

¹²⁰ *People v. Clark*, 6 N.E.3d 154 (Ill. 2014). Clark was charged with secretly taping a conversation with an attorney and secretly taping a conversation with a judge and an attorney. *Id.* at 156.

¹²¹ *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014). Melongo was charged with secretly taping three telephone conversations with the Assistant Administrator of the Cook County Court Reporter's Office, Criminal Division, and illegally posting the recordings and a transcript of the recordings on her website. *Id.* at 122-23.

expectation of privacy and held the recording statute to be unconstitutional on its face.¹²²

The court found the statute problematic for several reasons. First of all, the statute “criminalize[d] a wide range of innocent conduct.”¹²³ The court explained, “[t]he statute criminalizes the recording of conversations that cannot be deemed private: a loud argument on the street, a political debate on a college quad, yelling fans at an athletic event, or any conversation loud enough that the speakers should expect to be heard by others.”¹²⁴ A second reason for concern is that one who openly tapes a conversation with the recording device in plain view might have been charged under the statute unless the person taping had the express consent of all parties to the conversation. “[T]he individual must risk being charged with a violation of the statute and hope that the trier of fact will find implied consent.”¹²⁵ In addition, the court recognized the value of an eavesdropping statute in protecting conversations that are truly private from being surreptitiously taped; otherwise, the possibility of an intimate conversation being taped might have a chilling effect.¹²⁶

Thus, with two Illinois Supreme Court decisions, Illinois has moved from rigidly protecting conversations against being taped to presently providing no protection. The Illinois legislature will have the task of fashioning a new eavesdropping statute.

4. Taping a Private Conversation

Maryland, Michigan, and Washington prohibit taping a “private conversation” without all-party consent.

a. Maryland

Maryland makes it illegal to tape “any person in private conversation” unless “the person is a party to the communication and where all of the parties to the communication have given prior consent.”¹²⁷ One who illegally tapes a conversation is subject to up to five years imprisonment, or up to ten thousand dollars in fine, or both.¹²⁸ An exception to a Maryland statute allows a police officer to record a traffic stop subject to certain conditions.¹²⁹

¹²² *Clark*, 6 N.E.3d at 162 (“[S]ection [5/14-2](a)(1)(A) of the eavesdropping statute is unconstitutional as violative of the overbreadth doctrine under the first amendment to the United States Constitution.”); *Melongo*, 6 N.E.3d at 127 (“[T]he recording provision is unconstitutional on its face because a substantial number of its applications violate the first amendment.”).

¹²³ *Melongo*, 6 N.E.3d at 126.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Clark*, 6 N.E.3d at 160-61.

¹²⁷ MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401(13)(i), (3), 10-402(a)(1), (c)(3) (West 2011 & Supp. 2014).

¹²⁸ *Id.* § 10-402(b).

¹²⁹ *Id.* § 10-402(c)(4). The statute provides:

(i) It is lawful under this subtitle for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication if:

1. The law enforcement officer initially lawfully detained a vehicle during a criminal investigation or for a traffic violation;
2. The law enforcement officer is a party to the oral communication;
3. The law enforcement officer has been identified as a law enforcement officer to the other parties to the oral communication prior to any interception;
4. The law enforcement officer informs all other parties to the communication of the interception at the beginning of the communication; and
5. The oral interception is being made as part of a video tape recording.

The Maryland term “private conversation” is not defined by statute. In 1997, a Maryland court analyzed whether a conversation qualified as an oral communication by determining whether the conversation was made with a reasonable expectation of privacy.¹³⁰ In so doing, the court employed the two-pronged *Katz* test of “whether Craigie exhibited an actual, subjective expectation of privacy with regard to his statements. If we answer that question in the affirmative, we then ask whether that expectation is ‘one that society is prepared to recognize as ‘reasonable.’”¹³¹

b. Michigan

Michigan statutes define “eavesdropping” as “to overhear, record, amplify or transmit” the “private discourse of others without the permission of all persons engaged in the discourse.”¹³² It is illegal for “[a]ny person who is present or who is not present” to eavesdrop on a “private conversation,” with one who illegally eavesdrops subject to up to two years imprisonment, or a fine of up to two thousand dollars, or both.¹³³ In contrast to the eavesdropping and wiretapping statutes in most other states, the Michigan statutes do not distinguish between eavesdropping on a face-to-face conversation and wiretapping a telephone conversation, with the terms “private discourse of others” and “private conversation” applying to both types of conversations.

In 2001 in *People v. Stone*, the Michigan Supreme Court interpreted a private conversation to be “a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance.”¹³⁴ Although *Stone* involved a cordless telephone conversation, the court’s interpretation in *Stone* coincides with its decision in *Dickerson v. Raphael*,¹³⁵ which involved the recording of a face-to-face conversation.¹³⁶

In *Dickerson*, the Michigan Court of Appeals had held that, where one of the participants in the conversation was wearing a concealed microphone, a non-participant who was taping the conversation could be liable for eavesdropping.¹³⁷ In reversing in part, the Michigan Supreme Court found that the intermediate appellate court had improperly granted a directed verdict in favor of the participant whose conversation had been secretly broadcast because the lower court had not first determined whether the conversation was private.¹³⁸ The Michigan Supreme Court stated, “the question whether plaintiff’s conversation was private depends on whether she intended and reasonably expected it to

(ii) If all of the requirements of subparagraph (i) of this paragraph are met, an interception is lawful even if a person becomes a party to the communication following:

1. The identification required under subparagraph (i)3 of this paragraph; or
2. The informing of the parties required under subparagraph (i)4 of this paragraph.

Id.

¹³⁰ *Malpas v. State*, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997).

¹³¹ *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The court found that Craigie did not have an expectation of privacy because, on his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. *Id.* at 591, 595.

¹³² MICH. COMP. LAWS ANN. § 750.539a(2) (West, Westlaw through P.A.2014, No. 280, of the 2014 Reg. Sess., 97th Legislature).

¹³³ *Id.* § 750.539c.

¹³⁴ *People v. Stone*, 621 N.W.2d 702, 705 (Mich. 2001).

¹³⁵ *Dickerson v. Raphael*, 601 N.W.2d 108 (Mich. 1999).

¹³⁶ *Dickerson v. Raphael*, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev’d in part*, 601 N.W.2d 108 (Mich. 1999).

¹³⁷ *Id.* at 88.

¹³⁸ 601 N.W.2d at 108.

be private at the time and under the circumstances involved.”¹³⁹ The trial court had mistakenly focused on the substance of the conversation rather than the speaker’s reasonable expectation of privacy. “The proper question is whether plaintiff intended and reasonably expected that the *conversation* was private, not whether the subject matter was intended to be private.”¹⁴⁰

In 2011 in *Bowens v. Ary, Inc.*,¹⁴¹ the Michigan Supreme Court applied language from *Stone* when finding that the plaintiffs did not have a reasonable expectation of privacy based on the following facts:

(1) the general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were not receptive to the public-official plaintiffs’ requests and, by all accounts, the parties’ relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants’ operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establishing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a “private conversation.”¹⁴²

An interesting question in Michigan is whether a participant can tape a conversation without running afoul of the prohibition against eavesdropping even though the all-party consent requirement would be applicable if a bystander were to tape the conversation. In 1982 in *Sullivan v. Gray*, the Michigan Court of Appeals interpreted that statute to allow taping by one of the parties to a telephone conversation.¹⁴³ “The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on.”¹⁴⁴ The Michigan Supreme Court did not weigh in on this interpretation, denying review in *Sullivan*,¹⁴⁵ nor in *Dickerson* did the Michigan Supreme Court comment on whether there was an exception for a participant recording the conversation.¹⁴⁶

c. Washington

Washington makes it illegal to tape “any . . . [p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation.”¹⁴⁷ One who

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 794 N.W.2d 842 (Mich. 2011).

¹⁴² *Id.* at 843-44.

¹⁴³ 324 N.W.2d 58, 60 (Mich. Ct. App. 1982).

¹⁴⁴ *Id.*

¹⁴⁵ *Sullivan v. Gray*, 335 N.W.2d 473 (Mich. 1983) (mem.).

¹⁴⁶ *Dickerson v. Raphael*, 601 N.W.2d 108, 108 (Mich. 1999).

¹⁴⁷ WASH. REV. CODE ANN. § 9.73.030(1) (West, Westlaw through 2014 legislation). The statute specifies how all party consent may be demonstrated:

illegally tapes a private conversation has committed a gross misdemeanor¹⁴⁸ and is subject to up to three hundred sixty four days imprisonment, or up to five thousand dollars in fine, or both.¹⁴⁹ Under the state eavesdropping statutes, a police officer who uses the patrol car video to tape a conversation must specifically inform civilians that the conversation is being recorded.¹⁵⁰

The term “private conversation” has no statutory definition; however, the term has been subject to case law interpretation. The Washington Supreme Court found that a traffic stop conversation is not private.¹⁵¹ The court also found that “conversations with police officers are not private.”¹⁵²

In other circumstances, the court has interpreted the term to first require that the parties to the conversation have a subjective expectation of privacy and that the court consider three other factors in determining whether the taped conversation is a private conversation within the meaning of the statute.¹⁵³ In a 2006 case, *Lewis v. State, Dept. of Licensing*, the Washington Supreme Court stated that the three factors are: “(1) duration and subject matter of the conversation, (2) location of conversation and presence or

Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

Id. § 9.73.030(3).

¹⁴⁸ *Id.* § 9.73.080(1).

¹⁴⁹ *Id.* § 9.92.020.

¹⁵⁰ *Id.* § 9.73.090(1)(c). The statute exempts “[s]ound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles” from the reach of the eavesdropping prohibition. *Id.* However, there are several conditions that a police officer must abide by when making the recording. The statute provides:

All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into “pre-event” mode.

....

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

Id.

¹⁵¹ *Lewis v. State, Dep’t of Licensing*, 139 P.3d 1078, 1086 (Wash. 2006). In *Lewis*, the Washington Supreme Court held that “traffic stop conversations are not private.” *Id.* the court further held that “the language of RCW 9.73.090(1)(c) directs officers to inform all traffic stop detainees that they are being recorded, not just those having private conversations. Therefore, we conclude that police officers must strictly comply with RCW 9.73.090(1)(c), even though recording those traffic stop conversations does not also violate RCW 9.73.030.” *Id.*

¹⁵² *Id.* at 1084.

¹⁵³ *Id.* at 1083.

potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party.”¹⁵⁴

In *Lewis*, the court considered four consolidated cases in which police officers had stopped drivers for alleged DUI offenses and the officers had taped the conversations.¹⁵⁵ In considering the three factors, the court easily concluded that the conversations were not private;¹⁵⁶ however, the court excluded the use of the taped conversation in each of the three cases in which the police officer failed to inform the driver that the conversation was being taped.¹⁵⁷

In the 2014 case *State v. Kipp*, the Washington Supreme Court considered the three factors in deciding that the conversation was private.¹⁵⁸ Kipp engaged in a ten-minute conversation with his brother-in-law about a sensitive subject when they were alone in a private home.¹⁵⁹

Thus, although Maryland, Michigan, and Washington all protect face-to-face conversations under the term “private conversation,” the case law interpretation of the term differs from state to state. In addition, Michigan may allow participant taping as an exception to all-party consent.

5. Taping a Confidential Communication - California

In California, it is illegal to tape a “confidential communication . . . without the consent of all parties.”¹⁶⁰ A “confidential communication” is defined as:

[A]ny communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.¹⁶¹

¹⁵⁴ *Id.* The court first identified the three factors in 1996. *State v. Clark*, 916 P.2d 384, 392-93 (Wash. 1996). In that case, the court provides analysis, perhaps instructive, of whether the three factors apply in a number of situations. *Id.*

¹⁵⁵ 139 P.3d at 1079.

¹⁵⁶ *Id.* at 1084.

Under the first factor, the recorded conversations in these cases were essentially brief business conversations with uniformed police officers. Under the second factor, the conversations between the police officers and the detainees occurred in public, in several cases along busy roads. Additionally, in the case of *Lewis and Kelly*, third parties were present for part or all of the conversations because the police officers called back-up, and in the case of *Kelly*, a passenger was in his car. Finally, under the third factor, it is not persuasive that the nonconsenting parties to these conversations, the drivers, would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents.

Id. at 1083.

¹⁵⁷ *Id.* at 1090.

¹⁵⁸ 317 P.3d 1029, 1035-36 (Wash. 2014).

¹⁵⁹ *Id.* at 1034-35.

¹⁶⁰ CAL. PENAL CODE § 632(a) (West, Westlaw through urgency legislation through Ch. 187 of 2014 Reg. Sess., Res. Ch. 1 of 2013-2014 2nd Ex. Sess., and all propositions on the 6/3/2014 ballot).

¹⁶¹ *Id.* § 632(c).

The California Supreme Court found that “a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.”¹⁶² One who illegally tapes a conversation is subject to up to one year imprisonment, or a fine of up to two thousand five hundred dollars, or both.¹⁶³

Thus, California employs the *Katz* two-pronged test to determine if a face-to-face conversation qualifies for protection as a “confidential communication.”

6. Protection Against Taping a Conversation

a. Montana

Montana makes it illegal to secretly record a conversation without all party consent.¹⁶⁴ Under the Montana statute, one “commits the offense of violating privacy in communications if the person knowingly or purposely . . . records . . . a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation.”¹⁶⁵ The statute exempts from criminal sanction “elected or appointed public officials or . . . public employees when the . . . recording is done in the performance of official duty.”¹⁶⁶ This exception would allow a uniformed police officer to secretly record a conversation with a suspect.¹⁶⁷ One who illegally tapes a conversation is subject to up to six months imprisonment, or up to five hundred dollars in fine, or both.¹⁶⁸

¹⁶² *Flanagan v. Flanagan*, 41 P.3d 575, 582 (Cal. 2002). *Flanagan* involved the secret taping of telephone conversations; however, pursuant to statutory language the term “confidential communication” is not limited to face-to-face conversation. Section 632(a) provides:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

§ 632(a). As evidence of the inclusive nature of the term, in *Flanagan* the California Supreme Court cited with approval to a case involving a face-to-face conversation. 41 P.3d at 581 (citing *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 492 (Cal. 1998) (finding that the recording is illegal if one has “an objectively reasonable expectation of privacy” in the conversation)).

¹⁶³ § 632(a).

¹⁶⁴ MONT. CODE ANN. § 45-8-213(1) (West 2009), *invalidated on other grounds by State v. Dugan*, 303 P.3d 755 (Mont. 2013).

¹⁶⁵ *Id.* Secret recording is not illegal in circumstances in which either “persons [are] speaking at public meetings” or “persons [are] given warning of the . . . recording, and if one person provides the warning, either party may record.” *Id.* § 45-8-213(1)(c).

¹⁶⁶ *Id.*

¹⁶⁷ However, the Montana Constitution may prohibit secret taping by a police informant. The Montana Constitution contains a right to privacy and a right against unreasonable search and seizure. *See* MONT. CONST. art. II, §§ 10, 11. In a 2008 decision, the Montana Supreme Court held that “recording of the Defendants’ conversations with the confidential informants, notwithstanding the consent of the confidential informants, constituted searches subject to the warrant requirement of Article II, Section 11 of the Montana Constitution.” *State v. Goetz*, 191 P.3d 489, 504 (Mont. 2008). The court further found that “recording of those conversations without a warrant or the existence of an established exception to the warrant requirement violated the Defendants’ rights under Article II, Sections 10 and 11.” *Id.*

¹⁶⁸ § 45-8-213(3)(a).

In addition to the eavesdropping statute, Article 2, § 10 of the Montana Constitution guarantees Montana citizens a right to privacy: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”¹⁶⁹

The eavesdropping statute does not define the term “conversation” and research fails to show that the term has been interpreted by the Montana state courts. However, two Supreme Court of Montana cases have interpreted the Montana Constitution privacy provision to protect certain conversations against being secretly taped.

In 2008 in *State v. Goetz*, the court considered two consolidated cases in which police confidential informants had been fitted with body wires and secretly taped conversations with the two suspects, with two of the conversations taking place in the suspects’ residences and one conversation taking place in the informant’s vehicle located in a parking lot.¹⁷⁰ In determining if the suspect had a right to privacy, the court considered “1) whether the person challenging the state’s action has an actual subjective expectation of privacy; [and] 2) whether society is willing to recognize that subjective expectation as objectively reasonable.”¹⁷¹ The court found that the suspects did have “actual subjective expectations of privacy” because of the “private settings”¹⁷² and that “society is willing to recognize as reasonable the expectation that conversations held in a private setting are not surreptitiously being electronically monitored and recorded by government agents.”¹⁷³

In 2010 in *State v. Meredith*, police officers secretly taped Meredith’s allegedly incriminating statements while he sat alone in a police station interrogation room.¹⁷⁴ The Supreme Court of Montana used the two-pronged test from *Goetz* and concluded that “while Meredith *may* have an expectation of privacy in his statements, it is not one that society would recognize as objectively reasonable.”¹⁷⁵ The court reasoned that “[h]ad [Meredith] wanted to preserve his privacy, he would not have voiced his thoughts.”¹⁷⁶

b. Oregon

The Oregon statute provides that one “may not . . . [o]btain . . . the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are

¹⁶⁹ MONT. CONST. art. II, § 10.

¹⁷⁰ *Goetz*, 191 P.3d at 492-93.

¹⁷¹ *Id.* at 497.

¹⁷² *Id.* at 499. “The [suspects] did not conduct their conversations where other individuals were present or physically within range to overhear the conversations.” *Id.* at 498.

¹⁷³ *Id.* at 500. An open question is whether the court would have reached the same two conclusions if the person secretly taping had been a private individual. The court stated:

[W]hile we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.

Id.

¹⁷⁴ 226 P.3d 571, 575, 580 (Mont. 2010).

¹⁷⁵ *Id.* at 580.

¹⁷⁶ *Id.* “Police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion whether it be by two-way glass, video taping or audio recording. In addition, there was no reason for Meredith to make the incriminating statements out loud unless he wanted to be overheard.” *Id.*

specifically informed that their conversation is being obtained.”¹⁷⁷ The term “conversation” is defined as “the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication.”¹⁷⁸ The Oregon eavesdropping statutes are in some respects similar to those of Illinois in that Oregon requires all party consent and does not limit protected conversations to those made with an expectation of privacy considered to be reasonable.¹⁷⁹ Research of Oregon case law reveals no case that read a reasonable expectation of privacy requirement into a protected conversation. Illegal eavesdropping is a class A misdemeanor,¹⁸⁰ carrying a maximum one year prison term¹⁸¹ and a maximum fine of six thousand two hundred fifty dollars.¹⁸²

Surprisingly enough, the words “specifically informed” were the focus of two Oregon Court of Appeals cases, one from 1990 and the second from 2011, decided en banc.¹⁸³ In the 1990 case, Bichsel’s conviction for recording her in-person conversation with at least two officers and her companion was affirmed because she failed to tell the officers that she was recording the conversation.¹⁸⁴ In the 2011 case, a police officer pulled over Neff for a traffic stop and told Neff that the officer was recording the conversation; the officer did not know that Neff was also recording the conversation from his driver’s position with a recorder not in view of the officer.¹⁸⁵ The court held that officer “Ou’s own act of informing defendant that their conversation was being recorded was sufficient to satisfy the requirement of ORS 165.540(1)(c) that all participants to the conversation be ‘specifically informed’ that the conversation was being obtained.”¹⁸⁶

¹⁷⁷ OR. REV. STAT. ANN. § 165.540(1) (West, Westlaw through 2014 Reg. Sess. legislation effective through July 1, 2014).

¹⁷⁸ *Id.* § 165.535(1).

¹⁷⁹ The statute does except from the reach of the prohibition against recording, face-to-face conversations made in certain specified settings so long as the tape recorder is not hidden. *Id.* § 165.540(6). The statute provides:

The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept or attempt to intercept with an unconcealed recording device the oral communications that are part of any of the following proceedings:

(a) Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;

(b) Regularly scheduled classes or similar educational activities in public or private institutions; or

(c) Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

Id.

¹⁸⁰ *Id.* § 165.540(8).

¹⁸¹ *Id.* § 161.615.

¹⁸² *Id.* § 161.635(1).

¹⁸³ See *State v. Bichsel*, 790 P.2d 1142 (Or. Ct. App. 1990) (en banc); *State v. Neff*, 265 P.3d 62 (Or. Ct. App. 2011) (en banc).

¹⁸⁴ *Bichsel*, 790 P.2d at 1143. Bichsel had been counseling young people at a local mall and was carrying a tape recorder that continued to record when she and a companion met up with at least two police officers in an alley of downtown Eugene. One of the officers arrested Bichsel when the officer discovered that their conversation had been recorded. *Id.* The court opined that, even if the recorder was in plain sight, as Bichsel claimed, the statute required her to tell the officers that she was taping the conversation. *Id.* at 1144-45.

¹⁸⁵ *Neff*, 265 P.3d at 63.

¹⁸⁶ *Id.* at 68. The court found that “the primary concern underlying ORS 165.540(1)(c) was the protection of participants in conversations from being recorded without their knowledge.” *Id.* at 66. The court reasoned that “[w]here, as here, all participants in a conversation know that the conversation is being recorded, the legislature’s primary concern has been satisfied.” *Id.*

Similar to the New Hampshire eavesdropping statute, the Oregon statute provides two exceptions allowing a police officer to record a conversation when performing the officer's duties.¹⁸⁷

Although the eavesdropping statutes of Montana and Oregon protect face-to-face conversations, the focus of the two states is quite different. Montana uses the *Katz* two-pronged test to gauge the speaker's privacy. Oregon is more akin to Massachusetts in Oregon's focus on the autonomy of the speaker in consenting or not consenting to being taped.

7. One-Party Consent States

The federal eavesdropping statutes prohibit taping a conversation that qualifies as an oral communication.¹⁸⁸ In defining the term oral communication, the federal statutes incorporate the *Katz* two-pronged reasonable expectation of privacy test. Thus, an oral communication is a conversation in which the speaker has an expectation of privacy that society would consider to be reasonable. The first prong is the subjective component of the test and the second prong is the objective component of the test.¹⁸⁹ One of the exemptions from liability under the federal statutes allows a private individual to tape a conversation if the person is a party to the conversation or one of the parties to the conversation consents to the taping unless the taping is for a criminal or tortious purpose.¹⁹⁰ This exemption makes the federal eavesdropping statutes one-party consent statutes.

Although the federal statutes allow a conversation to be taped upon one-party consent, it would be illegal for someone who is not a party to the conversation to tape the conversation so long as the participants expect privacy in the conversation and society would consider that expectation of privacy to be reasonable.¹⁹¹ Typically, people discussing confidential, sensitive, or intimate information expect privacy; therefore, the subjective component of the test is usually satisfied. The second prong of the test, the objective component, is usually fact specific and is often tied to location and the possibility that the conversation might be overheard. A reasonable expectation of privacy is often recognized in a private home, but not in a public park or on a public street. However, there may not be a reasonable expectation of privacy in a private home if the doors or windows were open or the parties to the conversation were speaking loud enough to be heard outside the home¹⁹² and there might be a reasonable expectation of privacy in a

¹⁸⁷ The first exception allows a police officer to record a traffic stop, in other words making the eavesdropping prohibition inapplicable to:

A law enforcement officer who is in uniform and displaying a badge and who is operating a vehicle-mounted video camera that records the scene in front of, within or surrounding a police vehicle, unless the officer has reasonable opportunity to inform participants in the conversation that the conversation is being obtained.

§ 165.540(5)(c). The second exception allows an officer to record an incident involving the use of a taser, in other words making the eavesdropping prohibition inapplicable to: "A law enforcement officer who, acting in the officer's official capacity, deploys an Electro-Muscular Disruption Technology device that contains a built-in monitoring system capable of recording audio or video, for the duration of that deployment." *Id.* § 165.540(5)(d).

¹⁸⁸ 18 U.S.C.A. § 2511 (West 2000 & Supp. 2014).

¹⁸⁹ See *supra* notes 30-32 and accompanying text.

¹⁹⁰ See *supra* note 27 and accompanying text.

¹⁹¹ See *supra* notes 30-32 and accompanying text.

¹⁹² See, e.g. *Malpas v. State*, 695 A.2d 588, 595 (Md. Ct. Spec. App. 1997); *People v. Kirsh*, 575 N.Y.S.2d 306, 307 (App. Div. 1991). The *Malpas* court found that Craigie did not have an expectation of privacy because, on

park if the conversation is being conducted in a low tone of voice and the parties to the conversation are far removed from others in the park.¹⁹³

The federal eavesdropping statutes have been quite influential and serve as a model for many states adopting their own eavesdropping statutes. The eavesdropping statutes of a number of states track the above provisions of the federal eavesdropping statutes. The states that track the federal eavesdropping statutes fairly closely are: Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island,¹⁹⁴ Utah, West Virginia, and Wisconsin.¹⁹⁵ Other states that are one-party consent states and use a two-pronged definition of oral communication but do not track the federal statutes include: Arizona, Colorado, Idaho, Missouri,¹⁹⁶ North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming.¹⁹⁷

Other states protect a face-to-face conversation using a term other than “oral communication” but define the term using subjective and objective components. The Alaska eavesdropping statutes protect “private communication” and define the term using the two-pronged *Katz* test.¹⁹⁸ The eavesdropping statutes of Georgia¹⁹⁹ and Kansas²⁰⁰ protect “private conversation” made in a “private place” and define private place as a location where one can be “reasonably safe” from “surveillance.” The Maine eavesdropping statutes protect the privacy of sounds made in a “private place” and define private place as a location where one can be “reasonably safe” from “surveillance.”²⁰¹ The New York eavesdropping statutes protect “conversation” but the statutes do not define conversation;²⁰² New York case law indicates that a conversation made with a reasonable expectation of privacy is protected against recording.²⁰³

Other states protect a face-to-face conversation against being secretly taped but do not provide a definition for the type of conversation protected.²⁰⁴ These states are: Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada. The Alabama eavesdropping statutes²⁰⁵ protect “private communication”; the eavesdropping statutes of

his side of the telephone conversation, he was yelling loud enough to be heard in the next apartment. 695 A.2d at 591, 595. The *Kirsh* court found that “absent a reasonable expectation of privacy, the recording of conversations, *per se*, is not illegal” and the defendant had no reasonable expectation of privacy in “conversations . . . heard through a hole in the floor, and tape recorded.” 575 N.Y.S.2d at 307.

¹⁹³ See, e.g., *Dickerson v. Raphael*, 564 N.W.2d 85, 87-88 (Mich. Ct. App. 1997), *rev'd in part*, 601 N.W.2d 108 (Mich. 1999). The conversation took place in a public park with one of the parties wearing a microphone that simultaneously broadcast the conversation to a TV van. On appeal the Michigan Supreme Court stated “the question whether plaintiff’s conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved.” *Dickerson v. Raphael*, 601 N.W.2d 108, 108 (Mich. 1999).

¹⁹⁴ In Rhode Island, the term “oral communication” is defined in a criminal procedure statute, rather than in the eavesdropping statute. R.I. GEN. LAWS ANN. § 12-5.1-1(10) (West 2006).

¹⁹⁵ See *infra* app. A (Delaware, Hawaii, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Oklahoma, Rhode Island, Utah, West Virginia, and Wisconsin).

¹⁹⁶ Missouri eavesdropping statutes protect “oral communication” where the conversation is intercepted using a microphone transmitting the conversation elsewhere and define the term using the two-pronged *Katz* test. See app. A (Missouri).

¹⁹⁷ See *infra* app. A (Arizona, Colorado, Idaho, Missouri, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Virginia, and Wyoming).

¹⁹⁸ See *infra* app. A (Alaska).

¹⁹⁹ See *infra* app. A (Georgia).

²⁰⁰ See *infra* app. A (Kansas).

²⁰¹ See *infra* app. A (Maine).

²⁰² See *infra* app. A (New York).

²⁰³ *People v. Kirsh*, 575 N.Y.S.2d 306, 307-08 (App. Div. 1991).

²⁰⁴ See *infra* app. A (Alabama, Arkansas, Kentucky, Tennessee, Connecticut, and Nevada).

²⁰⁵ See *infra* app. A (Alabama).

Arkansas,²⁰⁶ Kentucky,²⁰⁷ and Tennessee²⁰⁸ protect “oral communication”; the Connecticut eavesdropping statutes²⁰⁹ protect “conversation”; and the Nevada eavesdropping statutes²¹⁰ protect “private conversation.” In these states, lack of a definition for the type of conversation being protected is problematic for a bystander taping an encounter with a police officer. The police officer could claim that the taping was illegal even if the taping were done in a location traditionally open to the public, such as a street or a park.

As one might imagine, arresting someone who is videotaping an encounter with a police officer has been challenged under the theory that the First Amendment protects the videotaping. The following section discusses First Amendment protection for videotaping a police officer.

III. FIRST AMENDMENT RIGHT TO GATHER INFORMATION

There is a circuit split as to whether there is a First Amendment right to record a police officer and the United States Supreme Court has yet to clarify whether such a First Amendment right exists. However, two federal courts of appeals, the first and the seventh circuits, found that the First Amendment protects civilian taping of encounters with police officers.²¹¹ These cases are discussed in subsections A and B below.

As one might expect, a much higher percentage of cases advocating a First Amendment right to gather information are from all-party consent states than from one-party consent states because it is easier for a police officer in an all-party consent state to allege that the civilian taping an encounter with a police officer has violated the state eavesdropping statute. Although just over one-fifth of the states have all-party consent eavesdropping statutes, just over sixty percent of the cases discussed in this section are from all-party consent states.

A. The Seventh Circuit

The impetus behind the seventh circuit’s 2012 decision in *American Civil Liberties Union of Illinois v. Alvarez*²¹² was the ACLU’s planned “police accountability program” pursuant to which individuals would videotape and audiotape public police officer activity where the police officer’s conversation could be heard by a bystander. Fearful that the individuals taping would be charged under the Illinois eavesdropping statutes, the ACLU filed the lawsuit against the Cook County State Attorney requesting that the judge enter an injunction preventing enforcement of the eavesdropping statutes against individuals participating in the planned program.²¹³ The Illinois eavesdropping statutes make recording a conversation illegal except with the consent of all parties to the

²⁰⁶ See *infra* app. A (Arkansas).

²⁰⁷ See *infra* app. A (Kentucky).

²⁰⁸ See *infra* app. A (Tennessee).

²⁰⁹ See *infra* app. A (Connecticut).

²¹⁰ See *infra* app. A (Nevada).

²¹¹ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012), on remand, No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. Dec. 18, 2012) (granting the plaintiff’s motion for summary judgment and a permanent injunction); *Gericke v. Begin*, 753 F.3d 1, 3 (1st Cir. 2014); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011).

²¹² *Alvarez*, 679 F.3d at 586.

²¹³ *Id.*

conversation and do not limit protection to those conversations made with an expectation of privacy.²¹⁴

In considering “whether the First Amendment prevents Illinois prosecutors from enforcing the eavesdropping statute against people who openly record police officers performing their official duties in public,”²¹⁵ the court emphasized the all-inclusive nature of the Illinois statutes.²¹⁶ The court found that “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”²¹⁷ The court reasoned that the Illinois statute “restricts . . . an integral step in the speech process” as it “interferes with the gathering and dissemination of information about government officials performing their duties in public.”²¹⁸ The court noted that recorders are devices generally available and used by the public, with the characteristics of being “uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public” and “self-authenticating” making “it highly unlikely that other methods could be considered reasonably adequate substitutes.”²¹⁹

The court remanded the case to the federal district court to enjoin the “State’s Attorney from applying the Illinois eavesdropping statute against the ACLU and its employees or agents who openly audio record the audible communications of law-enforcement officers (or others whose communications are incidentally captured) when the officers are engaged in their official duties in public places.”²²⁰ After the United States Supreme Court denied certiorari,²²¹ the federal district court granted the ACLU’s motion for summary judgment and entered a permanent injunction barring the State’s Attorney from enforcing the Illinois statute against those participating in the ACLU accountability program.²²²

B. The First Circuit

Glik v. Cunniffe was a 2011 case from the first circuit in which Glik was walking past the Boston Common when he began using his cell phone to videotape three officers ten feet away, allegedly using excessive force, arresting a young male.²²³ Following the

²¹⁴ *Id.* at 587. The *Alvarez* court described the history of the eavesdropping statutes, including an interesting interplay between the judicial and legislative branches. *Id.* A 1986 Illinois Supreme Court case involved an arrestee with a tape recorder seated in the back seat of a patrol car who taped a conversation between two officers in the front seat. *People v. Beardsley*, 503 N.E.2d 346, 347-48 (Ill. 1986). The *Beardsley* court read into the eavesdropping statute a requirement that there be a reasonable expectation of privacy for the conversation to be protected. “Because there was no surreptitious interception of a communication intended by the declarants to be private, secret, or confidential, under circumstances justifying such expectation, there was no violation of the eavesdropping statute.” *Id.* at 350. Eight years later, the Illinois Supreme Court followed the same path in deciding that “the Illinois eavesdropping statute . . . allows the recording of a conversation by a party to that conversation.” *People v. Herrington*, 645 N.E.2d 957, 959 (Ill. 1994).

In response to *Beardsley* and *Herrington*, the Illinois legislature amended the Illinois statute to include participant recording without the consent of all parties as eavesdropping and to expand protected conversations beyond those made with an expectation of privacy. *Alvarez*, 679 F.3d at 587.

²¹⁵ *Id.* at 586.

²¹⁶ *Id.* at 595. “Unlike the federal wiretapping statute and the eavesdropping laws of most other states, . . . the [Illinois] statute sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private.” *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 600.

²¹⁹ *Id.* at 596, 607.

²²⁰ *Id.* at 608.

²²¹ *Alvarez v. ACLU of Ill.*, 133 S. Ct. 651 (2012).

²²² *ACLU of Ill. v. Alvarez*, No. 10 C 5235, 2012 WL 6680341, at *3 (N.D. Ill. Dec. 18, 2012).

²²³ *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

completion of the arrest, one of the officers asked Glik whether Glik was taping the audio portion of the encounter. The officer arrested Glik under the Massachusetts eavesdropping statute after Glik admitted that he was taping sound.²²⁴ After the eavesdropping charge was dismissed, Glik filed a 42 U.S.C. § 1983 claim against the police officers and the City of Boston.²²⁵

The court found that “the First Amendment protects the filming of government officials in public spaces [and] accords with the decisions of numerous circuit and district courts.”²²⁶ The court stated that there was no reason to distinguish this case from a prior case in which the court had noted that a journalist was exercising his First Amendment right to film officials.²²⁷ “[C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw.”²²⁸ However, “the right to film . . . may be subject to reasonable time, place, and manner restrictions.”²²⁹ Glik did not run afoul of any of these limitations as he was in a public park at a safe distance from the arrest and did not interfere with the arrest in any way.²³⁰ The court held that, “though not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”²³¹ The court concluded that “the district court did not err in denying qualified immunity to the appellants on Glik’s First Amendment claim.”²³²

Glik’s Fourth Amendment claim was that the officer lacked probable cause to arrest Glik because his taping was not done secretly and taping secretly was a prerequisite to violating the Massachusetts eavesdropping statute.²³³ After reviewing Massachusetts cases interpreting the statute, the court determined that the cases “indicate that the use of a recording device in ‘plain sight,’ as here, constitutes adequate objective evidence of actual knowledge of the recording” and, on top of that, “here the police officers made clear through their conduct that they knew Glik was recording them.”²³⁴ The court concluded that “Glik’s recording was not ‘secret’ within the meaning of Massachusetts’s wiretap statute, and therefore the officers lacked probable cause to arrest him.”²³⁵ Therefore, the court affirmed the district court’s denial of qualified immunity for the police officers.²³⁶

Almost three years after *Glik*, the United States Court of Appeals for the First Circuit had occasion to determine in *Gericke v. Begin* whether *Glik* applied to a bystander

²²⁴ *Id.* at 79-80.

²²⁵ *Id.* at 80.

²²⁶ *Id.* at 83.

²²⁷ *Id.* “[T]he news-gathering protections of the First Amendment cannot turn on professional credentials or status.” *Id.* at 84.

²²⁸ *Id.* The court explained:

The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.

Id.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 85.

²³² *Id.*

²³³ *Id.* at 86.

²³⁴ *Id.* at 87.

²³⁵ *Id.* at 88.

²³⁶ *Id.* at 89.

appearing to videotape a traffic stop “where there was no police order [for Gericke] to stop filming or leave the area.”²³⁷

Late in the evening of March 24, 2010 in Weare, New Hampshire, Carla Gericke, part of a two-car caravan, was following Tyler Hanslin’s car when a police car behind them activated its emergency lights. Both Gericke and Hanslin pulled over and the police car parked between them. When the police officer told Gericke that Hanslin’s car was the one being pulled over and asked Gericke to move her car, Gericke told the officer that she would pull into an adjacent school parking lot at least thirty feet away. After moving her car to the parking lot, Gericke exited her car, announced that she would videotape the stop, and attempted to do so.²³⁸ Although Gericke’s camera malfunctioned and failed to record, Gericke continued to act as if she were taping the incident even after the officer ordered her to return to her car.²³⁹ According to Gericke, the officer did not order her to stop taping nor did the officer order her to move her car.²⁴⁰

After other officers arrived, Gericke was arrested for failing to produce her license and registration. At the police station, Gericke was charged with disobeying a police officer, obstructing a government official, and illegally taping a conversation under New Hampshire law.²⁴¹ After neither the town prosecutor nor the county attorney pressed the charges, Gericke filed a civil rights 42 U.S.C. § 1983 lawsuit against the police officers, the Weare police department, and the town of Weare for violating her First Amendment right by charging her with illegally taping a conversation.²⁴² The officers filed a motion for summary judgment asking the court to find that they had qualified immunity, as there was no clearly established right to videotape a traffic stop.²⁴³

At the trial level, the United States District Court for the District of New Hampshire denied the motion for summary judgment, largely because the facts were unclear as to whether Gericke was disruptive. The officers filed an interlocutory appeal of their motion for summary judgment, accepting Gericke’s version of the facts solely for purposes of the appeal. The issue before the First Circuit was “whether it was clearly established that Gericke was exercising a First Amendment right when she attempted to film Sergeant Kelley during the traffic stop.”²⁴⁴

According to the court, *Glik* and *Gericke* were similar in that someone was attempting to gather information on a police officer performing a duty in public.²⁴⁵ Although an officer may place reasonable restrictions on taping a traffic stop, “a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.”²⁴⁶ Because in *Glik* the court found that a First Amendment right to tape a police officer performing a duty in public was clearly established and the *Glik* incident occurred more than two years prior to the *Gericke* incident, Gericke’s First Amendment right to

²³⁷ *Gericke v. Begin*, 753 F.3d 1, 3, 10 (1st Cir. 2014).

²³⁸ *Id.* at 3.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 4.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 5.

²⁴⁵ *Id.* at 7.

²⁴⁶ *Id.* at 8.

videotape was clearly established.²⁴⁷

Thus, the court found *Glik* controlling as to Gericke's First Amendment right to videotape. "It was clearly established at the time of the stop that the First Amendment right to film police carrying out their duties in public, including a traffic stop, remains unfettered if no reasonable restriction is imposed or in place."²⁴⁸ The court held "that the district court properly denied qualified immunity to the officers on Gericke's § 1983 claim that the wiretapping charge constituted retaliatory prosecution in violation of the First Amendment."²⁴⁹

Although the court affirmed the denial of the officers' motion for summary judgment on Gericke's version of the facts, it left open the possibility that the fact-finder could reach a different conclusion at trial. "Of course, a trial might leave a fact-finder with a different view of whether Sergeant Kelley ordered Gericke to leave the area or stop filming. That view, in turn, might affect the court's analysis of the availability of qualified immunity to the officers."²⁵⁰

C. The Third, Fourth, and Tenth Circuits

Three federal courts found that a First Amendment right to tape a government official was not clearly established under the circumstances, entitling the official to qualified immunity on the First Amendment claim.²⁵¹ However, the courts did not state that a First Amendment right to gather information does not exist.

In *Kelly v. Borough of Carlisle*, a third circuit case from Pennsylvania, Brian Kelly was riding with his friend in his friend's truck when a police officer stopped the truck for alleged traffic violations.²⁵² Kelly was accustomed to carrying his video camera with him, which he used to tape various encounters. During the traffic stop, Kelly held the camera in his lap and proceeded to tape the incident. It is unclear whether the camera was in plain view of the officer. Later in the traffic stop, the officer told Kelly and the driver that the officer was taping the stop and, according to the officer, it was then that the officer realized that Kelly was taping. After confiscating Kelly's camera, the officer telephoned Assistant District Attorney Birbeck to inquire whether the officer could arrest Kelly for violating the Pennsylvania eavesdropping statute because Kelly had failed to inform the officer that Kelly was taping the traffic stop.²⁵³ The officer arrested Kelly based on Birbeck telling the officer it was appropriate to do so, but the charge was later dropped. Believing that the officer and the Borough of Carlisle had violated his First and Fourth Amendment rights, Kelly filed a 42 U.S.C. § 1983 claim against them.²⁵⁴

The court first considered Kelly's Fourth Amendment claim in light of the officer's conversation with Birbeck. The court held "that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on

²⁴⁷ *Id.* at 9.

²⁴⁸ *Id.* at 10.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 10 n.13.

²⁵¹ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010); *Szymecki v. Houck*, 353 F. App'x 852, 852 (4th Cir. 2009); *Moccek v. City of Albuquerque*, No. CIV 11-1009 JB/KBM, 2013 WL 312881, at *57 (D. N.M. Jan. 14, 2013) (deciding a case within 10th circuit jurisdiction).

²⁵² *Kelly*, 622 F.3d at 251.

²⁵³ *Id.*

²⁵⁴ *Id.* at 252.

a lack of probable cause.”²⁵⁵ The court ordered that, on remand, the district court investigate the facts to make findings as to whether the officer knew he was being recorded at the beginning of the traffic stop and whether the officer asked Birbeck for legal advice or for an arrest number.²⁵⁶ The appellate court found that the lower court had erred in reviewing case law interpreting the Pennsylvania eavesdropping statute, as the Pennsylvania Supreme Court had twice held that recording a police officer did not violate the statute where the police officer did not have a reasonable expectation of privacy²⁵⁷ and “it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects.”²⁵⁸

In considering Kelly’s First Amendment claim, the court held “that the right to videotape police officers during traffic stops was not clearly established and Officer Rogers was entitled to qualified immunity on Kelly’s First Amendment claim.”²⁵⁹ The court characterized traffic stops as “inherently dangerous situations” and pointed out that courts within the third circuit that had recognized a First Amendment right to tape a police officer had not dealt with the traffic stop environment.²⁶⁰

Szymecki v. Houck, a case from Virginia, was a brief, unpublished decision of the United States Court of Appeals for the Fourth Circuit.²⁶¹ In the decision, the court agreed with the lower court’s conclusion “that Szymecki’s asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.”²⁶²

In *Mocek v. City of Albuquerque*, a case from New Mexico, Mocek had a practice of refusing to show identification when passing through a Transportation Security Administration airport checkpoint.²⁶³ In 2009, Mocek was passing through the checkpoint at the Albuquerque airport when he refused to show identification and began videotaping the incident. One of the Transportation Security Administration officers (TSOs) ordered Mocek to stop filming and called in officers from the Albuquerque Aviation Police

²⁵⁵ *Id.* at 255-56. The court noted that “a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor’s advice.” *Id.* at 256.

²⁵⁶ *Id.* at 256.

²⁵⁷ *Id.* at 257. The two cases are *Agnew v. Dupler*, 717 A.2d 519, 523 (Pa. 1998) and *Commonwealth v. Henlen*, 564 A.2d 905, 906 (Pa. 1989).

²⁵⁸ *Kelly*, 622 F.3d at 258.

²⁵⁹ *Id.* at 263.

²⁶⁰ *Id.* at 262. “Moreover, even insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions . . .” *Id.* *Robinson v. Fetterman*, 378 F. Supp. 2d 534 (E.D. Pa. 2005) was one of the cases discussed in *Kelly*. Robinson was worried about safety concerns regarding Pennsylvania state troopers conducting truck inspections on Route 41. After obtaining permission from an adjoining landowner, Robinson began videotaping the inspections while positioned twenty to thirty feet from the highway. In 2000, officers arrested him for harassment and he was convicted but did not appeal the conviction. A similar incident and arrest occurred late in 2002; Robinson was found guilty, but on appeal the judge dismissed the charge. Believing that the three officers had violated his First and Fourth Amendment rights, Robinson filed a 42 U.S.C. § 1983 claim against them. *Id.* at 538. The court concluded that “there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants on October 23, 2002.” *Id.* at 541. The court reasoned that “[v]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case.” *Id.* The court found each of the three officers liable to Robinson, awarding Robinson \$35,000 in compensatory damages against the three officers, jointly and severally, and \$2,000 in punitive damages against each of the three officers. *Id.* at 545-46.

²⁶¹ *Szymecki v. Houck*, 353 F. App’x 852, 852-53 (4th Cir. 2009).

²⁶² *Id.* at 853.

²⁶³ *Mocek v. City of Albuquerque*, No. CIV 11–1009 JB/KBM, 2013 WL 312881, at *1 (D. N.M. Jan. 14, 2013).

Department (AAPD) when Mocek did not stop.²⁶⁴ The AAPD officers escorted Mocek away from the checkpoint and placed him in a holding cell. Mocek had four criminal charges filed against him but a jury acquitted him.²⁶⁵ Believing that the TSOs and the AAPD officers had violated his First and Fourth Amendment rights, Mocek filed a 42 U.S.C. § 1983 claim against them.²⁶⁶

The location of the filming incident, the checkpoint of an airport terminal, weighed heavily in the court's decision to grant the TSOs qualified immunity. "[R]ecording TSA employees at a screening checkpoint raises safety concerns, because, if Mocek had ill intentions and was able to record information regarding the TSA's screening procedures which would allow someone to evade the procedures, the safety of passengers at commercial airports would be jeopardized."²⁶⁷ The court found that Mocek's right to videotape under the circumstances was not clearly established. "Just as the Court finds that the TSOs did not violate Mocek's right to gather news, which entails some First Amendment protection, neither the Tenth Circuit nor the Supreme Court has found that Mocek's right to gather news in this context is clearly established."²⁶⁸ The court noted that the United States Supreme Court had approved reasonable limitations on the exercise of Constitutional rights in airports. "[T]he Supreme Court has upheld reasonable limitations on First Amendment conduct in airport terminals, and thus a reasonable TSA agent in the TSOs' shoes would not likely understand that telling Mocek to stop recording and subsequently summoning the police when he refused to comply violated his rights."²⁶⁹

D. The Eleventh and Ninth Circuits

In 2000, one federal court of appeals found that civilians had a First Amendment right to tape police officers²⁷⁰ and, in 1995, another federal court of appeals recognized in passing a First Amendment right to videotape police officers.²⁷¹

The Court of Appeals for the Eleventh Circuit decided *Smith v. City of Cumming*, a case out of Georgia, in 2000.²⁷² Aside from the allegation that police officers had prevented Mr. Smith from videotaping police activities and that police officers had harassed the Smiths, the facts in the Smiths' 42 U.S.C. § 1983 lawsuit are non-existent in the decision.²⁷³ The court held that, "[a]s to the First Amendment claim under § 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."²⁷⁴ The court reasoned that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."²⁷⁵ The court affirmed the summary judgment in favor of the defendants because, "[a]lthough the Smiths have a right to videotape police activities, they have not shown that the Defendants' actions violated that right."²⁷⁶

²⁶⁴ *Id.* at *3.

²⁶⁵ *Id.* at *4.

²⁶⁶ *Id.* at *5.

²⁶⁷ *Id.* at *57.

²⁶⁸ *Id.* at *56.

²⁶⁹ *Id.*

²⁷⁰ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

²⁷¹ *Fordyce v. City of Seattle*, 55 F.3d 436, 439, 442 (9th Cir. 1995).

²⁷² *Smith*, 212 F.3d at 1332.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1333.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

The Court of Appeals for the Ninth Circuit decided *Fordyce v. City of Seattle* in 1995.²⁷⁷ Fordyce was videotaping a protest march, including police officers on duty, and later tried to videotape some bystanders.²⁷⁸ Fordyce alleged that in the earlier incident an officer smashed the camera into Fordyce's face.²⁷⁹ In the later incident, a different officer arrested Fordyce under the Washington eavesdropping statute when the bystanders indicated that they did not want to be videoed.²⁸⁰ Several months later, a court dismissed the charges.²⁸¹ Believing that the city and eight officers had violated his First and Fourth Amendment rights, Fordyce filed a 42 U.S.C. § 1983 claim against them. The court granted the defendants' motions for summary judgment on the § 1983 claims.²⁸² Of its own accord and without a request from Fordyce, the lower court granted him declaratory relief, "declaring that [the Washington eavesdropping statute] 'does not prohibit the videotaping or sound-recording of conversations held in a public street, within the hearing of persons not participating in the conversation, by means of a readily apparent recording device.'"²⁸³

On appeal, the court reversed the grant of summary judgment to the officer who allegedly attempted to stop Fordyce from videotaping the march. "[A] genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."²⁸⁴ Thus, the court assumed in passing that Fordyce did have a First Amendment right to videotape the march and the court repeated the existence of that right in the conclusion paragraph. "[A] genuine issue of material fact exists concerning whether he interfered with Fordyce's First Amendment right to gather news."²⁸⁵

Other information necessary to understand the tension behind a civilian taping an encounter with a police officer are two common characteristics of police culture. These characteristics are explained in the following section.

IV. "TESTILYING" AND THE CODE OF SILENCE

The job of the police officer is not an easy one, to say the least, with the officer forced to make difficult decisions in the face of looming violence. "Patrol officers and detectives deal with the public without direct oversight by administrative superiors, and so they must be trusted to behave in an ethical way on their own."²⁸⁶ Often there is an outcry from television viewers that suspects be apprehended almost immediately following a newsworthy and violent televised incident. "When a terrible crime has occurred, the

²⁷⁷ 55 F.3d 436 (9th Cir. 1995).

²⁷⁸ *Id.* at 438.

²⁷⁹ *Id.* at 439.

²⁸⁰ *Id.* at 438.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 439 (quoting *Fordyce v. City of Seattle*, 840 F. Supp. 784, 794 (W.D. Wash. 1993), *aff'd in part, vacated in part, rev'd in part*, 55 F.3d 436 (9th Cir. 1995)). On appeal, the court vacated the declaratory judgment because the lower court had not provided Washington State a chance to be heard on the issue of the constitutionality of the eavesdropping statute. *Id.* at 442.

²⁸⁴ *Id.* at 439.

²⁸⁵ *Id.* at 442.

²⁸⁶ James Q. Wilson, *Police Ethics*, EJOURNAL USA, Apr. 2011, at 7, available at http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf.

public may demand that the police solve it ‘no matter what they have to do,’ and so there is pressure to use unnecessary force.”²⁸⁷

The police officer wields immense power and this immense power should justify allowing law enforcement activity to be scrutinized. Generally, a uniformed police officer does not have a reasonable expectation of privacy while conducting official business because the officer is performing a service to the public.²⁸⁸ One Maryland judge opined, “Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation.”²⁸⁹ In addition, it is routine for an officer to videotape a traffic stop, with certain statutes specifically sanctioning this activity,²⁹⁰ and an officer may tape other interactions with the public via a body-mounted video camera.²⁹¹ It would be anomalous for one who is deliberately taping a conversation to claim that the conversation is private.

Society’s general trust of police activity combined with police bravado means that, without a citizen recording, the officer’s testimony would be believable even if the officer is falsifying information. In fact, officer falsification is so commonplace that the Mollen Commission, charged with investigating the New York City Police Department, referred to officer falsification of evidence as “testilying.”²⁹² If falsification of evidence were to occur, a huge gulf may exist between the sights and sounds captured on videotape and a witness recounting what transpired.

A police studies professor explained, “Many police departments attempt to impose ethical standards and effective policing through policy, proscription, and punishment.”²⁹³ However, many incidents of police and minority encounters remain uninvestigated, perhaps because there is no visual recordation of what happened. “A major shortcoming of this approach is that most police actions will never be reviewed and, as a practical matter, are unreviewable.”²⁹⁴

²⁸⁷ *Id.*

²⁸⁸ See, e.g., *State v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *19 (Md. Cir. Ct. Sept. 27, 2010) (“[O]n a public highway in full view of the public[,] . . . the Troopers had [no] reasonable expectation of privacy in their conversation with the Defendant which society would be prepared to recognize as reasonable.”); *Lewis v. State, Dep’t of Licensing*, 139 P.3d 1078, 1084, 1086 (Wash. 2006) (“[C]onversations with police officers are not private. . . . [T]raffic stop conversations are not private[.]”); *Burton v. York County Sheriff’s Dep’t*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (“[T]he manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye.”); *Hornberger v. Am. Broad. Cos.*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (“[P]laintiffs, as police officers on duty, searching a vehicle on a public street, cannot expect the same level of privacy as a private citizen in a private place.”). See also *supra* notes 232-33 and accompanying text.

²⁸⁹ *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *35.

²⁹⁰ See *supra* notes 79, 85, 115, 129, 150, 187 and accompanying text.

²⁹¹ Andrea Noble, *Police Now Armed with Video: Recording Can Protect Officer, Citizen Through Visual Proof*, WASH. TIMES, Feb. 25, 2013, <http://www.washingtontimes.com/news/2013/feb/25/police-now-armed-with-video/?page=all>.

²⁹² THE CITY OF N.Y. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 36 (1994) [hereinafter MOLLEN COMMISSION REPORT] (“[P]olice falsifications . . . [are] probably the most common form of police corruption . . . so common in some precincts that it has spawned its own word: ‘testilying.’”), available at http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf.

²⁹³ Eugene O’Donnell, *Fostering Ethical and Humane Policing*, EJOURNAL USA, Apr. 2011, at 9, available at http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf.

²⁹⁴ *Id.*

Citizen taping can balance the deference, sometimes undue, given the police officer by the court and jury and provide an accurate portrayal of the incident. There may be a significant discrepancy between citizen recording and a police officer's recount of an incident. The Christopher Commission, which was charged with investigating the Rodney King incident, found the arrest report to be inconsistent with the videotape.²⁹⁵ Jurors are likely to believe police officer testimony and are not likely to have experienced police corruption first-hand. Taping allows weighing the power of the police against the corrective power of the citizenry. Courts and oversight boards are inadequate to prevent police-inflicted harm, either intended or unintended.

The Mollen Commission description of officer falsification of evidence, testifying, is frightening because it weakens the foundations of the criminal justice system. The Mollen Commission found:

Police perjury and falsification of official records is a serious problem facing the Department and the criminal justice system – largely because it is often a “tangled web” that officers weave to cover for other underlying acts of corruption or wrongdoing. One form of corruption thus breeds another that taints arrests on the streets and undermines the credibility of police in the courtroom.²⁹⁶

The Mollen Commission found that falsification was widespread, “widely tolerated by corrupt and honest officers alike, as well as their supervisors.”²⁹⁷ The justification for the falsification is that it is “‘doing God’s work’ – doing whatever it takes to get a suspected criminal off the streets.”²⁹⁸

One of the root causes of police corruption is what is sometimes referred to as the code of silence. This is “the silence of honest officers who fear the consequences of ‘rattling’ on another cop no matter how grave the crime.”²⁹⁹ The Christopher Commission found that “the greatest single barrier to the effective investigation and adjudication of complaints is the officers’ unwritten ‘code of silence:’ . . . an officer does not provide adverse information against a fellow officer.”³⁰⁰ The Mollen Commission found the New York City Police Department code of silence had not weakened since the Knapp Commission, the prior police investigative commission of more than twenty years earlier. “[T]he dishonest officers in the New York City Police Department still do not fear their honest colleagues. . . . The vast majority of honest officers still protect the minority of corrupt officers through a code of silence few dare to break.”³⁰¹ The honest officer may be secretly relieved when a civilian taping exposes lying by a corrupt officer. “[A]lthough patrol officers openly expressed disgust over corruption and hoped corrupt officers would

²⁹⁵ INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 9 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT], available at http://www.parc.info/client_files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf. The arrest “report of the incident is inconsistent with the scenes captured on the Holliday videotape in terms of the number and location of baton blows, as well as the description of King’s ‘resistance.’” *Id.*

²⁹⁶ MOLLEN COMMISSION REPORT, *supra* note 292, at 36. Falsification “typically occurs as a means to conceal other underlying acts of corruption or to conceal illegal steps taken for what officers often perceive as ‘legitimate’ law enforcement ends.” *Id.* at 37.

²⁹⁷ *Id.* at 40.

²⁹⁸ *Id.* at 41.

²⁹⁹ *Id.* at 1.

³⁰⁰ CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 168.

³⁰¹ MOLLEN COMMISSION REPORT, *supra* note 292, at 51. “[I]t often appears to be strongest where corruption is most frequent.” *Id.* at 53. The Mollen Commission explained: “this is because the loyalty ethic is particularly powerful in crime-ridden precincts where officers most depend upon each other for their safety each day – and where fear and alienation from the community are the most rampant.” *Id.*

be fired, they nonetheless are highly reluctant to report corruption³⁰² The code of silence is part of the culture of a police department and is enforced by retaliation against an officer who does provide negative information about a fellow officer. An officer who fails to abide by the code is subject to being “ostracized and harassed” and may “become the target of [police] complaints.”³⁰³

The police culture is very much a product of the manner in which most police departments are managed. “Changing police attitudes can be especially challenging given that police departments are run on a military model that demands obedience to authority, the surrender of officers’ individuality, and the willingness to wield coercive power against others.”³⁰⁴

One must consider the pernicious intersection of testifying and the code of silence as the backdrop against which increased civilian taping of encounters with police officers occurs. For the officer, “[l]earning about the cultures of the communities police serve is not enough. Police departments also have cultures that need to be examined—and sometimes changed.”³⁰⁵ Without the civilian tape, an officer might be tempted to falsify information concerning the encounter to make sure that what the officer perceives to be the right result is reached. Thus, a police officer charged with upholding the law would feel free to act outside the constraints of the law. The code of silence would make sure that the falsification remains undisclosed by fellow officers. However, audio recording is a powerful counterbalance to testifying and the code of silence. But for the prevalence of civilian recording, the police culture would dictate that the ends justify the means.

The following section analyzes civilian taping of encounters with police officers in light of eavesdropping statutes, First Amendment protection for taping, and police culture.

V. ANALYSIS

A more recent version of the Rodney King incident is that involving Oscar Grant at the Fruitvale Bay Area Rapid Transit (BART) station in Oakland, California.³⁰⁶ Early on January 1, 2009, transit police officers were reacting to reports of a fight aboard a train arriving at the Fruitvale station when they pulled a number of passengers, including Grant, from the train. As the incident unfolded, a number of passengers videotaped the encounter and captured an officer, Johannes Mehserle, fatally shooting Grant in the back.³⁰⁷ At least one of those videos was posted online and Mehserle served less than a year after being convicted of involuntary manslaughter.³⁰⁸ The online video spurred an aspiring filmmaker,

³⁰² *Id.* at 56. “It is not surprising that the honest cop wants corrupt cops off the job. The consequences of corruption for honest cops are grave: it taints their reputation, destroys their morale, and, most important, jeopardizes their very safety.” *Id.* at 57.

³⁰³ CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 170. “When an officer finally gets fed up and comes forward to speak the truth, that will mark the end of his or her police career.” *Id.*

³⁰⁴ O’Donnell, *supra* note 293, at 10.

³⁰⁵ Joseph D. McNamara, *Policing Diverse Communities*, EJOURNAL USA, Apr. 2011, at 5, available at http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf.

³⁰⁶ “Fruitvale Station”: *Recreating a Tragic Loss of a Life*, CBSNEWS.COM (July 21, 2013, 10:51 AM), http://www.cbsnews.com/8301-3445_162-57594533/fruitvale-station-recreating-a-tragic-loss-of-a-life/.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

Ryan Coogler, to make the movie, *Fruitvale Station*, which was released to the public in July 2013 after winning awards at the Cannes and Sundance film festivals.³⁰⁹

Surprisingly enough, the new BART police chief, Kenton Rainey, gave his full cooperation to Coogler's filming, allowing the murder scene to be filmed on the Fruitvale station platform where Grant was shot. Rainey commented, "When Ryan came to us, we really wanted to help in the making of this film, to help with the healing process" and added, "The story's going to be told."³¹⁰ After the movie was complete, Rainey viewed it with individuals from his command staff as a preventative measure. "It's important for us to understand what we're doing, so that another incident like this never happens again."³¹¹

The movie has resonated with black males near the age of Grant, shot at twenty-two years old.³¹² At twenty-four, Hamza Farrah identifies with Grant: "it's frightening to think that the people who are sworn to protect and serve can also cause such great harm. Growing up he said he was taught by his elders to just listen and obey police officers and to not act 'black' around them."³¹³ Farrah sees *Fruitvale Station* as "very important to show."³¹⁴ He reasons, "It gives you a conscience of what's happening across the nation; from Trayvon Martin to the Oscar Grant story. It shows you that race still matters and that people are treated differently because of the color of their skin."³¹⁵

The typical police officer's focus is to protect society, sometimes by arresting those accused of criminal activity. The police officer's interests while participating in the encounter are to gather evidence, promote the safety of all persons involved, conduct an efficient investigation, and gather evidence. The typical reader of this paper is from a fairly affluent community, relying on the police force to enforce the law against undesirable elements; however, someone not from an affluent community may hold a radically different view of police activity. Insight may be gained by viewing police activity from the extremes of a prosperous community, in which the police officer is trusted, and a high-crime community, where police are not trusted. Typical jurors may view a convicted criminal, or a person lacking formal education, or one from a low socio-economic background as less credible than a police officer and are used to the official framing of a civilian encounter with a police officer as recounted by the officer.

Citizen oversight is generally helpful, rarely harmful, and community policing has been implemented within the last few decades. The benefits of recording interactions with police officers are to encourage police accountability, promote use of justifiable police tactics, serve as the basis of deserved discipline against an officer engaging in misconduct, reduce harm to the individual, promote the free flow of discussion concerning police activities, educate the public, and prevent and deter police misconduct. Some 400 persons annually die as the result of police officer shootings,³¹⁶ yet many in non-minority

³⁰⁹ *Id.* The movie received the Prize of the Future award during the Cannes Film Festival and the Grand Jury Prize and the Audience Award at the Sundance Film Festival. Ja'Nel Johnson, *Fruitvale Station Shines Light on Race, Police Accountability*, KVNONEWS.COM (Aug. 22, 2013), <http://www.kvnonews.com/2013/08/fruitvale-station/>. The Oscar Grant incident took place in California, an all-party consent state; however, the passengers who videotaped the incident did not run afoul of the California eavesdropping statutes because they were on a BART platform open to the public where an expectation of privacy, especially considering the many train passengers, would not have been objectively reasonable. See *supra* notes 160-63 and accompanying text.

³¹⁰ "Fruitvale Station": *Recreating a Tragic Loss of a Life*, *supra* note 306.

³¹¹ *Id.*

³¹² Johnson, *supra* note 309.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

communities remain unaware of incidents involving minorities and police officers, such as the Oscar Grant incident, without a videotape of such an incident. “[T]he cell phone footage of Oscar Grant’s killing, much like the video footage captured of Rodney King’s beating in 1991, has transformed police accountability.”³¹⁷ A criminal justice professor noted, “The important thing is that there are tens of millions of people, white Americans, who just don’t believe these things happen. To see it happen made it real for them. It transformed the public reaction to it.”³¹⁸

Most citizens have video capability on their phones, which they carry with them, and many phones allow recorded videos to be posted online. It would be natural for a citizen to record an event in progress, such as one that involves a confrontation between another citizen and someone in authority, followed by the common practice of posting the video online. The video reinforces one’s memory of the event and provides evidence of events as they transpired. The video can furnish proof of the even where two individuals’ versions of the event differ. The video can exculpate a defendant. A video can provide graphic images and audio of police brutality, misconduct, and corruption.

The cell phone is not a new technology but its use as a recording device with access to the internet is fairly new. Technology, including the recording capabilities of cell phones, has blurred the distinction between an official member of the press and a public-minded citizen. Citizen-taping can capture newsworthy events when no professional journalist is present and the press often requests use of citizen-taped material to supplement news stories. Incidents videotaped by citizens, such as the Rodney King and Oscar Grant incidents, may be picked up by the press and covered in great detail. Without the videotapes of the Rodney King and Oscar Grant incidents, most would not have believed the violence of the confrontations and the incidents would not have made news.³¹⁹

Taping is unique in that it memorializes the tension of the moment, capturing what was said, with the tone of voice and context intact. The self-authenticating character of taped information can corroborate one person’s version of events or perhaps shed light on an aspect of the incident not recalled by any participant or bystander. Without taping, it would be the civilian’s word against the officer’s, neither of which might be entirely accurate. Inaccuracy in recounting the event as it transpired may be due to the bias of the viewer, faulty memory, or deliberate falsification. In fact, in some instances a recording may show that there was no misconduct on the part of the police officer, who was innocently performing a law enforcement duty, and the officer can use the recording to show that there was no misconduct.³²⁰ An attorney who hears a recording of the encounter

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ CHRISTOPHER COMMISSION REPORT, *supra* note 295, at 12.

³²⁰ A videotape was the key in a United States Supreme Court case. *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, Scott was the police officer pursuing Harris in a vehicle chase. The chase ended when Scott rear-ended Harris’ vehicle to stop it. Harris was seriously injured and sued under 42 U.S.C. § 1983 alleging violation of his constitutional rights. *Id.* at 375. The federal district court denied Scott’s motion for summary judgment and the federal court of appeals affirmed. *Id.* at 376. The Court reversed based on a videotape of the chase that corroborated Scott’s version of the facts. *Id.* at 376, 378. Harris’ version of the facts was quite different in that “rather than fleeing from police, [Harris] was attempting to pass his driving test.” *Id.* at 378-79. In stark contrast, the videotape showed:

[Harris’] vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of

between the police officer and the potential client may be dissuaded from filing what the attorney gauges to be a frivolous lawsuit. A recording may serve other police officers by being the subject of officer training.

What would police activity be like without accountability overseen by citizens? One expert on police accountability opined, “It’s people of color who are the victims, for the most part, of police misconduct.”³²¹ The expert continued, “Race is at the center of policing. My view is that if we can fix police problems we can go a long way toward fixing our race problem in this country.”³²² Mistrust between a minority citizen and a police officer stifles effective policing. “Mistrust is created between citizens and the police when officers are not held accountable for wrongdoings.”³²³ The effect of this mistrust is significant. “[P]olice depend on the public for their cooperation in dealing with crime and disorder, but when people don’t trust the police they don’t report crime and that hampers effective crime fighting.”³²⁴

For example, the Christopher Commission report recommended that an independent group monitor the Los Angeles Sheriff’s Department, resulting in the Special Counsel’s office.³²⁵ The office “consists of a team of experts that has full authority to audit and monitor any aspect of the sheriff’s department operations.”³²⁶ The Special Counsel follows the “auditor model” of citizen oversight, with a permanent, full-time staff, rather than the other model, with “a part-time, volunteer citizen review board focusing on specific complaints.”³²⁷ The Special Counsel’s office has had a positive effect on the Los Angeles Sheriff’s Department: “The Special Counsel’s regular monitoring and reporting on civil suits against the sheriff’s office has reduced the number of lawsuits against the department and amounts of monetary settlements paid to complainants.”³²⁸

Taping would allow a check on the discretionary and often arbitrary power of a police officer, an example of which is the almost unbridled power of a police officer to pull over a vehicle for any traffic violation under *Whren v. United States*.³²⁹ *Whren* allows a police officer to stop based on immutable and otherwise protected categories such as race.³³⁰ Taping can limit the objectionable activities of an officer who used the alleged traffic violation as a pretext and made the stop for an improper motive.

time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379-80 (footnote omitted).

³²¹ Johnson, *supra* note 309.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Samuel Walker & Andrea Lorenz, *Policing the Police: Citizens Encourage Ethical Policing*, EJOURNAL USA, Apr. 2011, at 23, available at http://photos.state.gov/libraries/korea/397355/April_2011/Ethical-Policing-041311.pdf.

³²⁶ *Id.* “The Special Counsel, which continues today, has issued 29 semi-annual public reports that address the most critical issues related to police accountability: use of force, lawsuits against the department, personnel issues, the management of district stations and innumerable other issues.” *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that “probable cause to believe that petitioners had violated the traffic code . . . rendered the stop reasonable under the Fourth Amendment”).

³³⁰ *Id.* at 813. “[T]he constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved.” *Id.* The Court added “that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally

The advances in technology have brought with them ready availability of videotaping to civilians who have used this technology, among other uses, to record police officer activity. This videotaping is often followed by the video being posted online. News programs clamor for viewers to upload videos they have taken. This has spurred a tension between technological capability to make a record and a police officer's perception that the taping wrongfully interferes with law enforcement or challenges the officer's authority. Technology has far outpaced the law, in effect tempting a civilian to tape activity occurring in a location open to the public, with the civilian least suspecting that taping could be illegal, and subjecting the civilian to imprisonment and fine. The civilian may further increase the chance of having criminal charges filed for the allegedly illegal taping by posting the video online and thus providing the prosecutor with evidence. With further advances in technology and without amendment to the eavesdropping statutes, the potential liability for a civilian taping a police officer engaged in official duties will only increase.

Citizens who audio record or videotape conversations run the risk of being arrested for violating eavesdropping statutes, even more so in the eleven states that require all party consent prior to taping. The risk is greater where the person being recorded is a police officer. This is so although several courts have found that the First Amendment protects gathering such information. The civilian fear of arrest for taping an encounter involving a police officer has a chilling effect on the civilian's gathering of information concerning law enforcement. The eavesdropping statutes in most jurisdictions carry a hefty prison term, or fine or both for their violation.

The person taping may be a participant in the conversation or a bystander. If the person is a participant, the legality of the taping typically turns on whether the taping is performed in a one-party or all-party consent jurisdiction. The action of taping provides the requisite consent in a one-party consent jurisdiction but not in an all-party consent jurisdiction. In an all-party consent jurisdiction, the participant taping may be able to escape liability if the eavesdropping statute only protects private or confidential conversations or those made with a reasonable expectation of privacy, especially where the conversation takes place in a location open to the public. If the person taping is a bystander, the requisite consent, from one party to the conversation in a one-party consent jurisdiction or all-party consent in an all-party consent jurisdiction, may be lacking. If the requisite consent is lacking, the bystander taping may be able to escape liability if the eavesdropping statute only protects private or confidential conversations or those made with a reasonable expectation of privacy, especially where the conversation takes place in a location open to the public.

Illinois, Massachusetts, and Oregon eavesdropping statutes afford the most expansive protection against a conversation being taped as they do not require a reasonable expectation of privacy as a threshold for the conversation being protected and require all-party consent. The Illinois statute necessarily views citizen recording at odds with effective policing and carries an enhanced prison term of more than double the prison term in other states for taping a police officer. Many other jurisdictions limit protection to those having a reasonable expectation of privacy.

discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.*

A citizen may be limited in taping a conversation with a police officer in all-party consent states; however, the police officer does not usually have to abide by the same constraints. In addition, the police have ready access to being able to record their encounters with citizens and several states have an explicit statutory exemption from eavesdropping liability for a police officer taping such an encounter. The limitation of citizen taping obscures transparency in law enforcement and civilian oversight. This disparity in the legal right to tape an encounter between a citizen and a police officer creates a double standard, with the balance tipped in favor of the police officer.

Police officers may not be educated as to whether a citizen is permitted to tape a conversation involving a police officer and sometimes limits on police conduct are unclear. By the same token, a civilian may not understand whether the state eavesdropping statute applies to an encounter with a police officer, allowing the police officer to intimidate the civilian into stopping taping. Eavesdropping statutes differ from state to state and differ from the federal eavesdropping statutes, possibly leading to more confusion. Also, as discussed earlier in this paper, eavesdropping statutes of several states lack clarity and some have rarely been subject to court interpretation.

Given this inherent tension, it might be well to consider the players involved, the civilian, the police officer, and society, as viewed against a backdrop of fairness and justice. One could view the civilian as law-abiding, generally cooperative with police involvement, and willing to assist in apprehending someone who is breaking the law. The civilian's interests in taping an encounter with a police officer are to gather evidence, deter police misconduct, and participate in community policing efforts. This civilian views the lawbreaker as someone other than the civilian himself and might be shocked by the reach of criminal statutes on the books, especially where a criminal statute, such as an eavesdropping statute, is enforced against the civilian. Society has an interest in seeing criminal statutes enforced by police officers and is understandably dismayed when police misconduct is uncovered.³³¹ The associate producer of the movie *Fruitvale Station* explained that "people living in homogeneous environments may not interact with people of different backgrounds, which can instigate fear when all they see are negative stories in the news about people unlike them."³³²

VI. AN EXEMPTION AUTHORIZING TAPING AN ENCOUNTER WITH A POLICE OFFICER

As discussed above, the United States Courts of Appeals for the First and Seventh Circuits recently found that the First Amendment protects civilian taping of encounters with police officers.³³³ This may signal a trend of recognizing that the First Amendment protects civilian taping of their encounters with police officers. However, this movement in constitutional law may amount to little real protection for a civilian, such as Mannie Garcia, faced with a discretionary criminal charge of general applicability.

³³¹ See generally MOLLEN COMMISSION REPORT, *supra* note 292; and CHRISTOPHER COMMISSION REPORT, *supra* note 295.

³³² Johnson, *supra* note 309. "[The movie *Fruitvale Station*] gives [Grant] back his sense of humanity. That's the whole point— to see it as a real three dimensional person instead of a statistic." *Id.*

³³³ Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012), *on remand*, No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. 2012) (granting the plaintiff's motion for summary judgment and a permanent injunction).

There should be an exemption in the eavesdropping statutes that guarantees the right of a civilian to audiotape a police officer. The following is suggested statutory language.³³⁴

It is lawful for a person not acting under color of law to record the conversation of a law enforcement officer who is performing a public duty in a public place and any other person who is having a conversation with that law enforcement officer if the conversation is at a volume audible to the unassisted ear of the person who is making the recording. For purposes of this subsection, "public place" means any place to which the public has access and includes, but is not limited to, streets, sidewalks, parks, and highways (including inside motor vehicles), and the common areas of public and private facilities and buildings.

Any person whose right to record under this section has been violated shall have a civil cause of action against the law enforcement officer who stopped, prevented, or resulted in the destruction of such recording and shall have the right to collect no less than \$1,000 nor more than \$2,500, together with a reasonable attorney's fee and other litigation costs reasonably incurred, personally from the law enforcement officer. In addition, the police officer shall be suspended from official duties for not less than seven nor more than twenty-one days without pay. An affirmative defense is that the law enforcement officer exhibited an expectation of privacy in the conversation that was reasonable under the circumstances or that the officer's actions prevented immediate and serious injury to the officer or bystanders.

Such an exemption clearly places a police officer on notice that a civilian does have the right to tape an encounter with a police officer. The exemption allows a civilian, whether a bystander or a party to the conversation, to tape the conversation of a uniformed police officer performing official duties in a location open to the public. In addition, the proposed legislation gives the civilian a private right of action against a police officer who fails to abide by the exemption. This penalty reinforces the civilian's right to tape and should be sufficiently onerous to dissuade a police officer from interfering with civilian taping. The right of action makes the police officer personally liable to pay the civilian a stipulated damages award and results in the officer's suspension from official duties without pay for a reasonable amount of time. Police officer liability automatically attaches should the police officer's actions result in destruction of the audiotape. Police officer liability under the private right of action is a presumption that can be rebutted by the police officer upon a showing that the officer did have a reasonable expectation of privacy, perhaps when discussing confidential information or dealing with a confidential informant or an undercover police officer, or the officer's actions prevented substantial injury to the police officer or bystanders.

CONCLUSION

Given the reality of police culture and the civilian's easy access to recording, civilian recording is needed now more than ever. Title 42 U.S.C. § 1983 actions have been ineffective in checking police intimidation of civilian taping of encounters with police officers. Perhaps this is because the videos of such encounters have not been as dramatic as the Rodney King or the Oscar Grant incidents. Except for the individuals personally

³³⁴ The proposed statutory language borrows from the text of Illinois Senate Bill 1575 (SB 1575) introduced in 2013. S.B. 1575, 98th Gen. Assemb. 1st Reg. Sess. (Ill. 2013).

intimidated by police while taping, this police harassment has not struck a chord with the public. The difficulty of being successful in a § 1983 action may mean that protection for gathering newsworthy information should come from legislation designed specifically to protect newsgathering.

The prior section of this paper included a proposed exemption from civilian liability under the eavesdropping statutes; in addition, the proposed legislation would provide the civilian who is wrongly arrested a private right of action against the arresting police officer.

APPENDIX A**United States**

One who “intentionally intercepts . . . any . . . oral . . . communication” is subject to five years imprisonment. 18 U.S.C.A. § 2511(1), (4) (West 2000 & Supp. 2014).

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Id. § 2511(2)(d). Oral communication is defined as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 2510(2).

Alabama

The state defines eavesdrop as “[t]o overhear, record, amplify or transmit any part of the private communication of others without the consent of at least one of the persons engaged in the communication, except as otherwise provided by law.” ALA. CODE § 13A-11-30(1) (2006). Eavesdropping is a class A misdemeanor. *Id.* § 13A-11-31. It may be punished by not more than a year imprisonment or a fine of not more than \$6,000, or both. *Id.* §§ 13A-5-2(c), 13A-5-7(a)(1), 13A-5-12(a)(1). A defense is that “[h]e was a peace officer engaged in the lawful performance of his duties.” *Id.* § 13A-11-36. Research failed to locate case law interpreting “private communication.”

Alaska

The state eavesdropping statute states that “[a] person may not . . . use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation.” ALASKA STAT. ANN. § 42.20.310(a) (West, Westlaw through legislation effective April 24, 2014, passed during the 2014 2nd Reg. Sess. of the 28th Legislature). There are several definitions that help understand what is prohibited. “[O]ral communication’ means human speech used to communicate information from one party to another.” “[I]ntercept’ means the aural or other acquisition of the contents of an oral . . . communication through the use of any electronic, mechanical, or other device, including the acquisition of the contents by simultaneous transmission or by recording.” “[C]ontents’ includes information obtained from a private communication concerning the existence, substance, purport, or meaning of the communication, or the identity of a party of the communication.” “[P]rivate communication’ means an oral . . . communication uttered or transmitted by a person who has a reasonable expectation that the communication is not subject to interception.” *Id.* § 42.20.390(2), (7), (9), (11). Eavesdropping is a class A misdemeanor punishable by up to one year imprisonment, or up to a \$10,000 fine, or both. *Id.* §§ 12.55.015(a), 12.55.035(b), 12.55.135(a), 42.20.330.

Article 1, Section 22 of the Alaska Constitution provides: “The right of the people to privacy is recognized and shall not be infringed.” ALASKA CONST. art. 1, § 22.

In *State v. Glass*, 583 P.2d 872, 879 (Alaska 1978), the Alaska Supreme Court held “that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant” where the informant was sent into the suspect’s home wearing a body bug, which allowed officers located outside to record the conversation. *Id.* at 874. However, in later opinions, the Alaska Supreme Court found that a drunk driving suspect’s expectation of privacy was not reasonable and, thus, the suspect’s conversation was not protected under the Alaska Constitution from being secretly taped. *City and Borough of Juneau v. Quinto*, 684 P.2d 127, 129 (Alaska 1984) (finding that drunk driving suspect’s expectation of privacy was not reasonable where uniformed officer was performing official duties and, therefore, taped information was not inadmissible); *Palmer v. State*, 604 P.2d 1106, 1108 (Alaska 1979) (finding that drunk driving suspect’s expectation of privacy was not reasonable where the suspect was under arrest and in police headquarters undergoing breathalyzer and sobriety tests when he was secretly taped and, therefore, his right to privacy under the Alaska Constitution was not violated).

Arizona

The state statute provides: “a person is guilty of a class 5 felony who . . . [i]ntentionally intercepts a conversation or discussion at which he is not present, or aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion.” ARIZ. REV. STAT. ANN. § 13-3005 (2010). “‘Oral communication’ means a spoken communication that is uttered by a person who exhibits an expectation that the communication is not subject to interception under circumstances justifying the expectation.” *Id.* § 13-3001.8. The statutes exempt “[t]he interception of any . . . oral communication by any person, if the interception is effected with the consent of a party to the communication or a person who is present during the communication.” *Id.* § 13-3012.9. The penalty for a class 5 felony is from six months to two and one half years imprisonment, “an amount fixed by the court not more than one hundred fifty thousand dollars,” or both. *Id.* §§ 13-702.D., 13-801.

Arkansas

The state statute provides: “It is unlawful for a person to intercept a[n] . . . oral . . . communication, and to record or possess a recording of the communication unless the person is a party to the communication or one (1) of the parties to the communication has given prior consent to the interception and recording.” ARK. CODE ANN. § 5-60-120(a) (West, Westlaw through end of 2014 Second Extraordinary Session). The same statute classifies a violation as a Class A misdemeanor. *Id.* § 5-60-120(b). One guilty of a Class A misdemeanor may be fined a maximum of \$2,500, or sentenced to a maximum of one year imprisonment, or both. *Id.* §§ 5-4-201(b), 5-4-104(d), 5-4-401(b). Research failed to locate case law interpreting “oral communication.”

Colorado

The state statute provides: “Any person not visibly present during a conversation or discussion commits eavesdropping if he . . . [k]nowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto.” COLO. REV. STAT. ANN. § 18-9-304(1) (West, Westlaw current through the Second Regular Session of the Sixty-Ninth General Assembly (2014)). *See People v. Lesslie*, 24 P.3d 22, 28 (Colo. App. 2000) (“recognize[ing] that this criminal statute requires a case-by-case analysis as to whether the participants in the intercepted

conversations have a justifiable expectation of privacy and, in turn, whether they believe that their conversation is subject to interception”). The same statute classifies eavesdropping as a Class 1 misdemeanor. *Id.* § 18-9-304(2). “‘Oral communication’ means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief” *Id.* § 18-9-301(8). *See* *People v. Lesslie*, 939 P.2d 443, 446 (Colo. App. 1996) (finding “conversation” or “discussion” synonymous with “oral communication”). One guilty of a Class 1 misdemeanor may be sentenced to a minimum of six months and a maximum of eighteen months, or a minimum fine of \$500 and a maximum fine of \$5,000, or both. § 18-1.3-501(1)(a).

Connecticut

In Connecticut, eavesdropping, the “mechanical overhearing of a conversation,” is a class D felony. CONN. GEN. STAT. ANN. § 53a-189 (West, Westlaw through enactments of Public Acts of the 2014 February Regular Session of the Connecticut General Assembly effective on or before July 1, 2014). The Connecticut statutes define “[m]echanical overhearing of a conversation” as “the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” *Id.* § 53a-187(a)(2). The prison term for a class D felony is not more than five years (effective October 1, 2013) and the fine is not more than \$5,000; the court may impose imprisonment, or a fine, or both. *Id.* §§ 53a-28, 53a-35a(8), 53a-41(4). Research failed to locate case law interpreting “conversation.”

Delaware

The state statute provides that “no person shall . . . [i]ntentionally intercept . . . any . . . oral . . . communication” and specifies that someone who eavesdrops has committed a class E felony and is subject to a fine of not more than \$10,000. DEL. CODE ANN. tit. 11, § 2402(a), (b) (West, Westlaw through 79 Laws 2014, ch. 388). Pursuant to that statute:

It is lawful . . . [f]or a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutions or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

Id. § 2402(c)(4). “‘Oral communication’ means any oral communication uttered by a person made while exhibiting an expectation that such communication is not subject to interception and under circumstances justifying such expectation” *Id.* § 2401(13).

Georgia

The state statute provides: “It shall be unlawful for . . . [a]ny person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place.” GA. CODE ANN. § 16-11-62 (West, Westlaw through Acts 343 to 346, 348 to 631, and 633 to 669 of the 2014 Regular Session). “‘Private place’ means a place where one is

entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance.” *Id.* § 16-11-60(3). The eavesdropping statute “does not prohibit one party to a conversation from secretly recording or transmitting it without the knowledge or consent of the other party.” *State v. Birge*, 241 S.E.2d 213, 213 (Ga. 1978). “[A]ny person violating any of the provisions of this part shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years or a fine not to exceed \$10,000.00, or both.” § 16-11-69.

Hawaii

The state statute provides that “any person who . . . [i]ntentionally intercepts . . . any . . . oral . . . communication . . . shall be guilty of a class C felony.” HAW. REV. STAT. § 803-42(a) (West, Westlaw through Act 235 [End] of the 2014 Regular Session of the Hawaii Legislature). Pursuant to that statute:

It shall not be unlawful under this part for a person not acting under color of law to intercept a[n] . . . oral . . . communication when the person is a party to the communication or when one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

Id. § 803-42(b)(3)(A). “‘Oral communication’ means any utterance by a person exhibiting an expectation that the utterance is not subject to interception under circumstances justifying that expectation . . .” *Id.* § 803-41. The prison term for a class C felony is not less than one year and not more than five years and the fine is not more than \$10,000; the court may impose imprisonment, or a fine, or both. *Id.* §§ 706-605, 706-640, 706-660.

Idaho

The state statute provides:

any person shall be guilty of a felony and is punishable by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars (\$5,000), or by both fine and imprisonment if that person . . . [w]illfully intercepts . . . any . . . oral communication.

IDAHO CODE ANN. § 18-6702(1) (West, Westlaw through the 2014 Second Regular Session of the 62nd Idaho Legislature). Pursuant to that statute, “[i]t is lawful under this chapter for a person to intercept a[n] . . . oral communication when one (1) of the parties to the communication has given prior consent to such interception.” *Id.* § 18-6702(2)(d). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 18-6701(2).

Indiana

The state statute provides:

(a) This section does not apply to a person who makes an interception authorized under federal law.

(b) A person who knowingly or intentionally intercepts, a communication in violation of this article commits unlawful interception, a Level 5 felony.

IND. CODE ANN. § 35-33.5-5-5 (West 2012 & Supp. 2014). *See* State v. Lombardo, 738 N.E.2d 653, 660 (Ind. 2000) (“[O]ur legislature did not intend to directly incorporate the Federal Wiretap Act statutory or case law into Indiana's Act but instead meant to exempt from its provisions federal law enforcement surveillance activities within Indiana's borders.”). Research failed to locate case law interpreting “communication.” Arguably, communication refers only to communication via the telephone or telegraph and not to face-to-face conversation. The title of article 33.5 is “Interception of Telephonic or Telegraphic Communications” and an Indiana statute, § 35-33.5-1-5 repealed effective July 1, 2012, contained the following definition:

“Interception” means the intentional:

- (1) recording of; or
- (2) acquisition of the contents of; a telephonic or telegraphic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.

Id. § § 35-33.5-1-5 (repealed 2012).

Iowa

The state statute provides:

Any person, having no right or authority to do so, . . . who by any electronic or mechanical means listens to, records, or otherwise intercepts a conversation or communication of any kind, commits a serious misdemeanor; provided, . . . one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication

IOWA CODE ANN. § 727.8 (West 2014). Another state statute provides: “a person who does any of the following commits a class ‘D’ felony: . . . [w]illfully intercepts . . . a[n] . . . oral . . . communication.” *Id.* § 808B.2.1. Pursuant to the statute:

It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 808B.2.2.c. “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to

interception, under circumstances justifying that expectation.” *Id.* § 808B.1.8. “A class ‘D’ felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.” *Id.* § 902.9.1.

Kansas

The state statute provides:

Breach of privacy is knowingly and without lawful authority:

.....

(3) entering with intent to listen surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein; [or]

(4) installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein.

KAN. STAT. ANN. § 21-6101(a) (West, Westlaw through laws effective July 1, 2014, including Chapters 1 through 152 (End) of the 2014 Regular Session of the Kansas Legislature). That statute provides that breach of privacy is a class A nonperson misdemeanor. *Id.* § 21-6101(b). In addition, it defines “private place” as “a place where one may reasonably expect to be safe from uninvited intrusion or surveillance.” *Id.* § 21-6101. The statute has been interpreted to allow taping upon consent of one party to the conversation. In a 1984 case, the Kansas Supreme Court found that “any party to a private conversation may waive the right of privacy and the non-consenting party has no Fourth Amendment or statutory right to challenge that waiver.” *State v. Roudybush*, 686 P.2d 100, 108 (Kan. 1984). Further, the court held “that a face-to-face ‘private conversation’ between a police informer and a suspect is not an ‘oral communication’ as defined by K.S.A. 22-2514 and, thus, it is not necessary to obtain an ex parte court order to intercept such conversation if the informer knowingly consents to the interception.” *Id.* A class A nonperson misdemeanor is punishable by imprisonment for not more than one year, or a fine of \$2,500, or both. §§ 21-6602(a),(b), 21-6611(b).

For the purpose of obtaining a court order to intercept a conversation, “‘oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” § 22-2514(2).

Kentucky

Pursuant to the state statute, “[a] person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.” KY. REV. STAT. ANN. § 526.020(1) (West, Westlaw through the end of the 2014 legislation). That statute makes eavesdropping a Class D felony. *Id.* § 526.020(2). “[E]avesdrop’ means to overhear, record, amplify or transmit any part of a[n] . . . oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device.” *Id.* § 526.010. Research failed to locate case law interpreting “oral communication.”

Louisiana

The state statute provides that “it shall be unlawful for any person to . . . [w]illfully intercept . . . any . . . oral communication.” LA. REV. STAT. ANN. § 15:1303.A (Westlaw through the 2014 Regular Session with Acts effective on or before December 31, 2014). That statute provides: “Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor.” *Id.* § 15:1303.B. That statute further provides:

It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

Id. § 15:1303.C.(4). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 15:1302.(14).

Maine

The state statute provides:

A person is guilty of violation of privacy if, except in the execution of a public duty or as authorized by law, that person intentionally:

. . . .

B. Installs or uses in a private place without the consent of the person or persons entitled to privacy in that place, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place; [or]

C. Installs or uses outside a private place without the consent of the person or persons entitled to privacy therein, any device for hearing, recording, amplifying or broadcasting sounds originating in that place that would not ordinarily be audible or comprehensible outside that place.

ME. REV. STAT. ANN. tit. 17-A, § 511.1 (Westlaw through legislation through the 2013 Second Regular Session of the 126th Legislature). That statute provides: “‘private place’ means a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places.” *Id.* § 511.2. The statute further provides: “Violation of privacy is a Class D crime.” *Id.* § 511.3. A class D crime is punishable by of imprisonment of less than one year, a fine of not more than \$2,000, or both. *Id.* §§ 1152.2, 1252.2, 1301.1-A.

The Supreme Judicial Court of Maine interpreted “private place” to require that “a person’s desire to keep private what transpires within that place must be a *justifiable expectation*, and, therefore, objectively reasonable.” *State v. Strong*, 60 A.3d 1286, 1291

(Me. 2013). The court found that “it is objectively unreasonable for a person who knowingly enters a place of prostitution for the purpose of engaging a prostitute to expect that society recognizes a right to be safe from surveillance while inside.” *Id.* Research failed to locate case law determining whether the statute has been interpreted to allow taping upon consent of one party to the conversation.

Minnesota

The state statute provides that “any person who . . . intentionally intercepts . . . any . . . oral communication . . . shall be fined not more than \$20,000 or imprisoned not more than five years, or both.” MINN. STAT. ANN. §§ 626A.02.1 to 626A.02.4 (West, Westlaw through legislation of the 2014 Regular Session effective through July 31, 2014). That statute provides:

It is not unlawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state.

Id. § 626A.02.2.(d). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 626A.01.4.

Mississippi

Mississippi statute sections 41-29-501 to 41-29-535 appear to prohibit taping of a private conversation. MISS. CODE ANN. §§ 41-29-501 to 41-29-535 (West, Westlaw through 2014 Regular (End) and First and Second Extraordinary (End) Sessions). Although the statutes provide exceptions from liability, research has not found any statute or case law interpretation of any statute affirmatively prohibiting such taping. In addition, it is unclear the activity to which the penalty provisions apply. The state statute provides:

(1) Any person who knowingly and intentionally possesses, installs, operates or monitors an electronic, mechanical or other device in violation of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to not more than one (1) year in the county jail or fined not more than Ten Thousand Dollars (\$10,000.00), or both.

(2) Any person who violates the provisions of Section 41-29-511 shall be guilty of a felony and, upon conviction thereof, shall be sentenced to not more than five (5) years in the State Penitentiary and fined not more than Ten Thousand Dollars (\$10,000.00).

Id. § 41-29-533. The state statute allows a private individual to disclose an intercepted oral communication if the interception was authorized:

A person who receives, by any means authorized by this article, information concerning a[n] . . . oral . . . communication . . . intercepted

in accordance with the provisions of this article may disclose the contents of such communication . . . while giving testimony under oath in any proceeding held under the authority of the United States, of this state, or of a political subdivision of this state.

Id. § 41-29-511(3).

The state statute excepts from liability:

A person not acting under color of law who intercepts a[n] . . . oral . . . communication if the person is a party to the communication, or if one (1) of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this state, or for the purpose of committing any other injurious act.

Id. § 41-29-531(e). “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation. *Id.* § 41-29-501(j).

Missouri

The focus of sections 542.400-542.422 appears to be the prohibition against taping a telephone conversation, except as authorized pursuant to those statutes, or taping a face-to-face conversation using a microphone transmitting the conversation elsewhere. MO. ANN. STAT. §§ 542.400-.422 (West, Westlaw through emergency legislation approved through July 14, 2014, of the 2014 Second Regular Session of the 97th General Assembly). Thus, the statutes do not appear to prohibit a participant from taping a face-to-face conversation using a handheld tape recorder. The statutes contain a definition of “oral communication” and a few tangential references to oral communication; otherwise, most of the references are to “wire communication.” Oral communication means “any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 542.400(8). A state statute provides that:

1. Except as otherwise specifically provided in sections 542.400 to 542.422, a person is guilty of a class D felony and upon conviction shall be punished as provided by law, if such person:

(1) Knowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire communication; [or]

(2) Knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when such device transmits communications by radio or interferes with the transmission of such communication; provided, however, that nothing in sections 542.400 to 542.422 shall be construed to prohibit the use by law enforcement officers of body microphones and transmitters in undercover investigations for the acquisition of evidence and the protection of law

enforcement officers and others working under their direction in such investigations.

....

2. It is not unlawful under the provisions of sections 542.400 to 542.422:

....

(2) For a person acting under law to intercept a wire or oral communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.

(3) For a person not acting under law to intercept a wire communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act.

Id. § 542.402.

Any investigative officer or law enforcement officer who, by any means authorized by sections 542.400 to 542.422, has lawfully obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents to the extent such use is necessary to the proper performance of his official duties.

Id. § 542.406(2). Another statute contains a reference to oral communication in the context of the requirement of taping an authorized interception. *Id.* § 542.410(1).

Arguably, with the few slight references to oral communication discussed above, the criminal sanctions for taping in these statutes refer only to communication via the telephone and to one not a party to the conversation taping a face-to-face conversation. Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation.

Nebraska

The state statute provides that “it is unlawful to . . . [i]ntentionally intercept . . . any . . . oral communication.” NEB. REV. STAT. ANN. § 86-290(1) (Westlaw through End of 2013 Regular Session). That statute provides that “any person who violates this subsection is guilty of a Class IV felony.” *Id.* That statute further provides:

It is not unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.

Id. § 86-290(2)(c). The penalty for a Class IV felony is not more than “five years imprisonment, or ten thousand dollars fine, or both.” *Id.* § 28-105(1). “Oral communication means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 86-283.

Nevada

The state statute provides:

[A] person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording . . . by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

NEV. REV. STAT. ANN. § 200.650 (West, Westlaw through the 2013 77th Regular Session and the 27th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2013)). One who “willfully and knowingly” violates the statute commits a category D felony. *Id.* § 200.690(1).

A category D felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 4 years. In addition to any other penalty, the court may impose a fine of not more than \$5,000, unless a greater fine is authorized or required by statute.

Id. § 193.130(2)(d). Research failed to locate case law interpreting “private conversation.”

Certain Nevada state statutes govern the procedure for obtaining a court order to tape an oral communication. *Id.* §§ 179.410-.515. Pursuant to those statutes, “[o]ral communication” means any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such expectation.” *Id.* § 179.440.

New Jersey

The state statute provides: “[A]ny person who . . . [p]urposely intercepts . . . any . . . oral communication . . . shall be guilty of a crime of the third degree.” N.J. STAT. ANN. § 2A:156A-3 (West, Westlaw through laws effective through L.2014, c. 22 and J.R. No. 3). “Oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 2A:156A-2(b). Another state statute provides an exception for:

A person not acting under color of law to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted or used for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

Id. § 2A:156A-4. A crime of the third degree is punishable by imprisonment of between three and five years, a fine of not more than \$15,000, or both. *Id.* §§ 2C:43-2, -3, -6.

New Mexico

Section 30-12-1 makes interference with communications a misdemeanor. N.M. STAT. ANN. § 30-12-1 (West, Westlaw through laws of the 2nd Regular Session of the 51st Legislature (2014), effective May 21, 2014). That statute does not contain the term “oral communication” and has been interpreted to be inapplicable to a face-to-face conversation. *State v. Hogervorst*, 566 P.2d 828, 834 (N.M. Ct. App. 1977) (“[The statute] pertains to telephone conversations or telegraph messages[] . . . [not] a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation.”). Sections 30-12-2 to 30-12-10 contain the term “oral communication” and set the basis for obtaining a court order allowing interception of an oral communication. Section 30-12-11 provides a civil cause of action to someone whose oral communication has been wrongly intercepted. None of these statutes define oral communication.

Research failed to discover other statutory or case law prohibitions against taping a face-to-face conversation. Arguably, the criminal sanction for interfering with communications in section 30-12-1 refers only to communication via the telephone or telegraph and not to face-to-face conversation.

New York

“A person is guilty of eavesdropping when he unlawfully engages in . . . mechanical overhearing of a conversation . . .” N.Y. PENAL LAW § 250.05 (Westlaw through L.2014, chapters 1 to 208, 210, 213, 214, 217 to 221, 227 to 231, 233, 235 to 247, 261, 267, 290, 294, 297, 302, 304, 306, 309, 316, 322, 324). The statute makes eavesdropping a class E felony. *Id.* A class E felony is punishable by a minimum of one year and a maximum of four years imprisonment, or not more than the greater of five thousand dollars or “double the amount of the defendant's gain from the commission of the crime,” or both. *Id.* §§ 60.01(3), 70.00(2, 3), 80.00(1). “‘Mechanical overhearing of a conversation’ means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.” *Id.* § 250.00(2). One court found that “absent a reasonable expectation of privacy, the recording of conversations, *per se*, is not illegal” and the defendant had no reasonable expectation of privacy in “conversations . . . heard through a hole in the floor, and tape recorded.” *People v. Kirsh*, 575 N.Y.S.2d 306, 307 (App. Div. 1991). Other than *Kirsh*, research failed to discover statutory or case law interpretation of “conversation” or “discussion.”

North Carolina

The state statute provides that “a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person . . . [w]illfully intercepts . . . any . . . oral . . . communication.” N.C. GEN. STAT. ANN. § 15A-287(a) (West 2014). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 15A-286(17). A Class H felony is punishable by imprisonment, or fine or both. *Id.* §§ 15A-1340.17, -1361, -1362.

North Dakota

The state statute provides that “[a] person is guilty of a class C felony if he . . . [i]ntentionally intercepts any . . . oral communication by use of any electronic, mechanical, or other device.” N.D. CENT. CODE ANN. § 12.1-15-02(1) (West, Westlaw through the 2013 Regular Session of the 63rd Legislative Assembly). That statute makes it a defense to criminal liability that “(1) The actor was a party to the communication or one of the parties to the communication had given prior consent to such interception, and (2) such communication was not intercepted for the purpose of committing a crime or other unlawful harm.” *Id.* § 12.1-15-02(3). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 12.1-15-04(5). A class C felony carries “a maximum penalty of five years’ imprisonment, a fine of ten thousand dollars, or both.” *Id.* § 12.1-32-01(4).

Ohio

The state statute provides: “No person purposely shall . . . [i]ntercept . . . a[n] . . . oral . . . communication.” OHIO REV. CODE ANN. § 2933.52(A) (West, Westlaw through Files 1 to 140 and Statewide Issue 1 of the 130th GA (2013-2014)). That statute makes its violation a felony of the fourth degree. *Id.* § 2933.52(C). That statute excepts from its application:

A person who is not a law enforcement officer and who intercepts a[n] . . . oral . . . communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act.

Id. § 2933.52(B). “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.” *Id.* § 2933.51(B). A felony of the fourth degree is punishable by imprisonment for six through eighteen months, or a maximum fine of \$5,000, or both. *Id.* §§ 2929.13(A), 2929.14(A)(4), 2929.18(A).

Oklahoma

The state statute provides that:

any person is guilty of a felony and upon conviction shall be punished by a fine of not less than Five Thousand Dollars (\$5,000.00), or by imprisonment of not more than five (5) years, or by both who:

1. Willfully intercepts . . . any . . . oral . . . communication.

OKLA. STAT. ANN. tit. 13, § 176.3 (West, Westlaw through chapters of the Second Regular Session of the 54th Legislature (2014) effective July 1, 2014).

It is not unlawful pursuant to the Security of Communications Act for:

....

5. a person not acting under color of law to intercept a[n] . . . oral . . . communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless the communication is intercepted for the purpose of committing any criminal act.

Id. § 176.4. “‘Oral communication’ means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstance justifying such expectation.” *Id.* § 176.2(12).

Rhode Island

The state statute provides: “[a]ny person . . . who willfully intercepts . . . any . . . oral communication . . . shall be imprisoned for not more than five (5) years.” R.I. GEN. LAWS ANN. § 11-35-21(a) (West, Westlaw through Chapter 104 of the January 2014 session). That statute provides:

It shall not be unlawful under this chapter for:

....

(3) A person not acting under color of law to intercept a[n] . . . oral communication, where the person is a party to the communication, or one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in the violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 11-35-21(c). Although “oral communication” is not defined in that statute, a criminal procedure statute defines “[o]ral communications” as “any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation . . .” *Id.* § 12-5.1-1(10).

South Carolina

Under the state statute, one who “intentionally intercepts . . . any . . . oral . . . communication” commits a felony. S.C. CODE ANN. REGS. § 17-30-20 (2014). “It is lawful under this chapter for a person not acting under color of law to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.” *Id.* § 17-30-30(C). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation . . .” *Id.* § 17-30-15(2).

South Dakota

The state statute provides that it is a class 5 felony if one “[n]ot present during a conversation or discussion, intentionally and by means of an eavesdropping device overhears or records such conversation or discussion . . . without the consent of a party to such conversation or discussion.” S.D. CODIFIED LAWS § 23A-35A-20 (Westlaw through the 2014 Regular Session and Supreme Court Rule 14-10). “Eavesdropping device” means

“any electronic, mechanical, or other apparatus which is intentionally used to intercept a wire or oral communication” *Id.* § 23A-35A-1(6). “Oral communication” means “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” *Id.* § 23A-35A-1(10). A class 5 felony is punishable by imprisonment for a maximum of five years; in addition, a maximum fine of \$10,000 may be imposed. *Id.* § 22-6-1.

Tennessee

The state statute provides that “a person commits an offense who . . . [i]ntentionally intercepts . . . any . . . oral . . . communication.” TENN. CODE ANN. § 39-13-601(a)(1) (West, Westlaw from laws from the 2014 Second Reg. Sess., eff. through June 30, 2014). That statute provides:

It is lawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication, where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

Id. § 39-13-601(b)(5). One who violates § 39-13-601(a)(1) commits a Class D felony. *Id.* § 39-13-602. Research failed to discover statutory or case law interpretation of “oral communication.”

Texas

The state statute provides that “[a] person commits an offense if the person . . . intentionally intercepts . . . a[n] . . . oral . . . communication.” TEX. PENAL CODE ANN. § 16.02(b) (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature). That statute excepts from criminal liability:

[A] person not acting under color of law [who] intercepts a[n] . . . oral . . . communication, if:
 (A) the person is a party to the communication; or
 (B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

Id. § 16.02(c). That statute further makes violation of the statute a felony of the second degree. *Id.* § 16.02(f). A violation is punishable as follows:

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the Texas Department of Criminal Justice for any term of not more than 20 years or less than 2 years.
 (b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed \$10,000.

Id. § 12.33. “‘Oral communication’ means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.” TEX. CODE CRIM. PROC. ANN. art. 18.20(2) (West, Westlaw through the end of the 2013 Third Called Session of the 83rd Legislature).

Utah

The state statute provides that “[a] person commits a violation of this subsection who . . . intentionally or knowingly intercepts . . . any . . . oral communication.” UTAH CODE ANN. § 77-23a-4(1)(b) (West, Westlaw through 2014 General Session). That statute provides that:

A person not acting under color of law may intercept a[n] . . . oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

Id. § 77-23a-4(7)(b). A violation of the statute is a third degree felony. *Id.* § 77-23a-4(10)(a). A third degree felony is punishable by not more than five years imprisonment, or a fine of not more than \$5,000, or both. *Id.* §§ 76-3-201(2), 76-3-203(3), 76-3-301(1). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception, under circumstances justifying that expectation . . .” *Id.* § 77-23a-3(13).

Vermont

This state has no statute prohibiting eavesdropping. However, the Vermont Supreme Court has interpreted the search and seizure provision of Chapter I, Article 11 of the Vermont Constitution to prohibit a police officer from secretly taping a suspect’s conversation where the suspect has a reasonable expectation of privacy. *State v. Geraw*, 795 A.2d 1219, 1221-22 (Vt. 2002) (stating that a suspect had a reasonable expectation of privacy in the home but not in a parking lot).

Virginia

The state statute provides that “any person who . . . [i]ntentionally intercepts . . . any . . . oral communication . . . shall be guilty of a Class 6 felony.” VA. CODE ANN. § 19.2-62(A) (West, Westlaw through the End of the 2014 Reg. Sess. and the End of the 2014 Sp. Sess. I). That statute provides: “It shall not be a criminal offense under this chapter for a person to intercept a[n] . . . oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.” *Id.* § 19.2-62(B)(2). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations . . .” *Id.* § 19.2-61. A class 6 felony is punishable by:

[A] term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

Id. § 18.2-10(f).

West Virginia

The state statute provides that “it is unlawful for any person to . . . [i]ntentionally intercept . . . any . . . oral . . . communication.” W. VA. CODE ANN. § 62-1D-3(a) (West, Westlaw through laws of the 2014 Second Extraordinary Session). That statute provides: “Any person who violates subsection (a) of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary for not more than five years or fined not more than ten thousand dollars or both fined and imprisoned.” *Id.* § 62-1D-3(b). That statute further provides:

It is lawful under this article for a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state.

Id. § 62-1D-3(e). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . .” *Id.* § 62-1D-2(h).

Wisconsin

One who “[i]ntentionally intercepts . . . any . . . oral communication” commits a Class H felony. WIS. STAT. ANN. § 968.31(1) (West, Westlaw through 2013 Act 380, published 4/25/2014). That statute provides that:

It is not unlawful . . . [f]or a person not acting under color of law to intercept a[n] . . . oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

Id. § 968.31(2). “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation.” *Id.* § 968.27(12). The punishment for a Class H felony is “a fine not to exceed \$10,000 or imprisonment not to exceed 6 years, or both.” *Id.* § 939.50(3).

Wyoming

The state statute provides that “no person shall intentionally . . . [i]ntercept . . . any . . . oral . . . communication.” WYO. STAT. ANN. § 7-3-702(a) (West, Westlaw through the 2014 Budget Sess.). That statute does not prohibit “[a]ny person from intercepting an oral . . . communication where the person is a party to the communication or where one (1) of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious

act.” *Id.* § 7-3-702(b). “[A]ny person who violates this section is guilty of a felony punishable by a fine of not more than one thousand dollars (\$1,000.00), imprisonment for not more than five (5) years, or both. *Id.* § 7-3-702(f). “‘Oral communication’ means any oral communication uttered by a person who reasonably expects and circumstances justify the expectation that the communication is not subject to interception” *Id.* § 7-3-701(a)(xi).

MANDAMUS MUDDLE: THE MANDAMUS REVIEW STANDARD FOR THE FEDERAL CRIME VICTIMS' RIGHTS ACT

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I. INTRODUCTION

Over forty years ago, a renewed focus on crime victim rights began to emerge in this country. During the following years, every state enacted legislative provisions addressing crime victim rights and a majority of states adopted constitutional provisions concerning victim rights. Congress enacted several laws addressing aspects of crime victim rights, but efforts to initiate a federal constitutional amendment regarding crime victim rights proved unsuccessful.¹ In 2004, following another unsuccessful constitutional amendment effort, Congress enacted the Crime Victims' Rights Act ("CVRA") to strengthen and expand crime victim rights in the federal criminal justice system and to serve as a model for state criminal justice systems. Unlike past federal crime victim-related statutory enactments, the CVRA was designed to bring together the "critical components [of] rights, remedies, and resources."²

Included in the CVRA enforcement mechanisms is the authority for a crime victim, or the prosecutor on the victim's behalf, to petition the applicable court of appeals for a writ of mandamus if a trial judge denies relief to the victim pursuant to the CVRA.³ In the ten years since the enactment of the CVRA, petitioners have filed over 70 mandamus petitions pursuant to the statute. The appellate courts have denied or dismissed the majority of these petitions.⁴ In resolving the mandamus petitions, the federal appellate circuits have adopted a variety of review standards, resulting in a clear conflict among the circuits in the interpretation of this aspect of the CVRA.⁵

This Article examines the legislative history of the CVRA mandamus provision, and the varied review standards that the federal appellate courts have adopted to resolve CVRA mandamus petitions.⁶ It also analyzes the issues raised and outcomes in the CVRA mandamus petitions reviewed thus far.⁷ Finally, the Article discusses the impact—or lack thereof—that the differing review standards have had on the outcomes of the mandamus petitions filed pursuant to the CVRA.⁸

¹ See generally PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 5–13 (2d ed. 2010).

² See *id.* at 12; see also 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); 150 CONG. REC. S4,266 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl). The CVRA, formally designated as the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, was included as Title I in the Justice for All Act of 2004. Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261–63 (codified as amended at 18 U.S.C.A. § 3771 (West Pamp. 2014)).

³ See 18 U.S.C.A. § 3771 (d)(1), (d)(3).

⁴ See *infra* CVRA Mandamus Outcomes Table; *infra* notes 193–428 and accompanying text (discussing CVRA petitions and outcomes).

⁵ See *infra* notes 46–192 and accompanying text (discussing the review standards).

⁶ See *infra* notes 9–32, 46–192 and accompanying text.

⁷ See *infra* notes 193–428 and accompanying text.

⁸ See *infra* notes 429–64 and accompanying text. It is not the purpose of this Article to assess which of the appellate circuits has "correctly" interpreted the CVRA mandamus review provisions. *Cf. Crime Victims Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 46–47, 49–50 (2009) (testimony and statement of Douglas E. Beloff, Professor of Law, Lewis and Clark Law School); 157 CONG. REC. S7,359–60 (daily ed. Nov. 10, 2011) (letter of Assistant Attorney General Ronald Weich discussing, in part, the CVRA mandamus review standard); 157 CONG. REC. S3,607–09 (daily ed. June 8, 2011) (letter of Sen. Jon Kyl discussing, in part, the CVRA mandamus review standard); David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 664–65, 668–72 (2008); Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. U. L. REV. 599 (2010); Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims Rights' Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011); Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims Rights' Act*, 9 LEWIS & CLARK L. REV. 581, 618–20 (2005); Steven Joffee, Note, *Validating Victims: Enforcing Victims' Rights through Mandatory Mandamus*, 2009 UTAH L. REV. 241; Julie Kaster, Note,

II. CONGRESS ADOPTS THE CVRA MANDAMUS ENFORCEMENT MECHANISM

More than twenty years before the enactment of the CVRA, Congress began enacting significant crime victim-related legislation, including provisions addressing victim restitution and compensation and aspects of victim participation in criminal justice proceedings (e.g., inclusion of victim impact statements in presentencing information).⁹ Included in this legislation is the Victims' Rights and Restitution Act of 1990 in which Congress codified a statutory list of rights for federal crime victims.¹⁰ Pursuant to this legislation, officers and employees of federal agencies and departments involved in the "detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded" the seven rights identified in the statute: 1) to notice of court proceedings; 2) to confer with the prosecutor; 3) to be present at public court proceedings regarding the crime (subject to potential limitations); 4) to reasonable protection from the accused; 5) to be treated with fairness and respect for the victim's dignity and privacy; 6) to restitution; and 7) to information about the offender's conviction, sentencing, imprisonment, and release.¹¹ This statute required only "best efforts" to provide the enumerated rights and contained no enforcement mechanism.¹²

When Congress repealed this victim rights provision and replaced it with the CVRA provisions in 2004, it not only expanded the statutory list of federal crime victim rights, but also added enforcement provisions designed to ensure the rights.¹³ The federal crime victim rights provided by the CVRA are:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

The Voices of Victims: Debating the Appropriate Role of Fraud Victim Allocution Under the Crime Victims' Rights Act, 94 MINN. L. REV. 1682, 1690–1702 (2010); Danielle Levine, Note and Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335 (2010) (discussing the CVRA mandamus review standard). Ultimately, either Congress or the United States Supreme Court must resolve the conflict in interpretation that has developed. The focus of this Article is to identify the nature of the conflict in the circuits that has developed, analyze the outcomes in CVRA mandamus cases reviewed thus far, and discuss any impact that the interpretation conflict may have had on the outcomes of these CVRA mandamus petitions.

⁹ See TOBOLOWSKY ET AL., *supra* note 1, at 11–12. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 14–17, 113–16 (2008) (describing federal victim-related legislation).

¹⁰ See Pub. L. No. 101-647, § 502, 104 Stat. 4789, 4820 (1990) (codified at 42 U.S.C. § 10606, *repealed* by Pub. L. No. 108-405, § 102(c), 118 Stat. 2260, 2264 (2004)). This legislation also contained a provision identifying required services to federal crime victims, including notification of specified prosecution proceedings and post-conviction events and information regarding available assistance. See Pub. L. No. 101-647, § 503, 104 Stat. 4789, 4820–22 (1990) (codified as amended at 42 U.S.C.A. § 10607 (West 2013)).

¹¹ 42 U.S.C. § 10606 (repealed 2004).

¹² *Id.*

¹³ Compare 18 U.S.C.A. § 3771 (West Pamp. 2014), with 42 U.S.C. § 10606 (repealed 2004).

- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.¹⁴

Unlike the predecessor victim rights statute, Congress also included a definition of the "crime victim" eligible to assert the CVRA victim rights, i.e., a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."¹⁵ Designated representatives can assert CVRA rights on behalf of crime victims who are minors, incompetent, incapacitated, or deceased.¹⁶

When the CVRA was introduced in Congress, Senator Dianne Feinstein, one of its primary co-sponsors, articulated the importance of the CVRA's enforcement provisions:

We have written a bill that we believe is broad. We have written a bill that provides an enforcement remedy: namely, the writ of mandamus.

This part of the bill is what makes this legislation so important, and different from earlier legislation: It provides mechanisms to enforce the set of rights provided to victims of crime.

These mechanisms fall into four categories:

A direction to our courts that they "shall ensure that the crime victim is afforded the rights described in the law."

A direction to the Attorney General of the United States to take steps to ensure that our Federal prosecutors "make their best efforts" to see that crime victims are aware of, and can exercise these rights.

¹⁴ 18 U.S.C.A. § 3771(a); *cf.* S. 2329, 108th Cong. (2004); H.R. 5107, 108th Cong. (2004) (reflecting articulation of these rights in the underlying bills, as initially introduced in each chamber of Congress). By comparison, the victim rights constitutional amendment that was under consideration at the time of the CVRA's enactment provided the following rights:

the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender.

S.J. Res. 1, 108th Cong. (2003); H.R.J. Res. 48, 108th Cong. (2003); *see* S. REP. NO. 108-191, at 33-41 (2003).

¹⁵ *Compare* 18 U.S.C.A. § 3771(e), *with* 42 U.S.C. § 10606 (repealed 2004). Although there was no crime victim definition in the previous victim rights statute, the accompanying victim services provision defined "victim" for purposes of that section as a "person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." 42 U.S.C.A. § 10607(e). By comparison, the victim rights constitutional amendment that was under consideration at the time of the CVRA's enactment was limited to victims of "violent crime." *See* S.J. Res. 1, 108th Cong. (2003); H.R.J. Res. 48, 108th Cong. (2003); S. REP. NO. 108-191, at 30-32 (2003).

¹⁶ 18 U.S.C.A. § 3771(e); *cf.* 42 U.S.C.A. § 10607.

A specific statement that the victim of a crime, or their representative, may assert these rights; the result is that, for the first time victims will have clear standing to ask our courts to enforce their rights.

And a new use of a very old procedure, the writ of mandamus. This provision will establish a procedure where a crime victim can, in essence, immediately appeal a denial of their rights by a trial court to the court of appeals, which must rule “forthwith.” Simply put, the mandamus procedure allows an appellate court to take timely action to ensure that the trial court follows the rule of law set out in this statute.

These procedures, taken together, will ensure that the rights defined in the first section are not simply words on paper, but are meaningful and functional.¹⁷

Senator Feinstein subsequently engaged in a colloquy on the Senate floor regarding the mandamus provision with Senator Jon Kyl, the other primary co-sponsor of the legislation:

Mrs. FEINSTEIN. ... I now want to turn to another critical aspect of enforcement of victims’ rights, section 2, subsection (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim’s right. This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims’ rights is just as important as the initial assertion of a victim’s right. This provision ensures review and encourages courts to broadly defend the victims’ rights.

Mr. President, does Senator KYL agree?

Mr. KYL. Absolutely. Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country’s appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim’s rights. For a victim’s right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims’ rights will have meaning.¹⁸

¹⁷ 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); *see* S. 2329, 108th Cong. (2004); 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

¹⁸ 150 CONG. REC. S4,270 (daily ed. Apr. 22, 2004) (statements of Sens. Dianne Feinstein and Jon Kyl); *see also* 150 CONG. REC. S4,271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); 150 CONG. REC. S4,230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy) (referencing the inclusion of the mandamus enforcement mechanism in the proposed legislation).

The mandamus provision, as introduced in the Senate and as passed there with almost no opposition, stated:

If a Federal court denies any right of a crime victim under this chapter or under the Federal Rules of Criminal Procedure, the Government or the crime victim may apply for a writ of mandamus to the appropriate court of appeals. The court of appeals shall take up and decide such application forthwith and shall order such relief as may be necessary to protect the crime victim's ability to exercise the rights.¹⁹

The proposed Senate legislation also authorized the Government, in any appeal in a case, to assert as error the trial court's denial of any crime victim's right in the underlying criminal proceeding.²⁰

After passage in the Senate, the House of Representatives included the crime victim rights provisions in a broader piece of legislation.²¹ Without specifically articulating their rationale, the chamber's sponsors made some slight revisions to the mandamus provisions in their introduced version of the proposed legislation:²²

The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide such motion forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five day [sic], or affect the defendant's right to a speedy trial, for purposes of enforcing this chapter.²³

In addition to the mandamus procedure, the House of Representatives retained the additional option in the Senate bill for the Government to assert a trial court's denial of a victim's right as error in a criminal appeal in the underlying case.²⁴ On the other hand, the House of Representatives version of the bill preserved or expanded some Senate limitations on remedies regarding victim rights violations, including prohibition of a cause

¹⁹ S. 2329, 108th Cong. (2004); *see* 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (reflecting text of the bill and 96 favorable votes, 1 unfavorable vote, and 3 members not voting).

²⁰ S. 2329, 108th Cong. (2004); 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

²¹ *See* Justice for All Act of 2004, Pub. L. No. 108-405, § 102(a), 118 Stat. 2260, 2261-63 (codified as amended at 18 U.S.C.A. § 3771).

²² *See* H.R. 5107, 108th Cong. (2004); H.R. REP. NO. 108-711, at 10 (2004); *id.* at 122-24 (statements of Rep. James Sensenbrenner).

²³ H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004); *see* 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill); *see also* 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner).

²⁴ *See* H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004); *see* 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill).

of action for damages or grounds for a new trial.²⁵ The House of Representatives bill also stated that none of its provisions should be construed to impair prosecutorial discretion.²⁶

Prior to passage in the House of Representatives, Representative James Sensenbrenner, the bill's manager, offered some amendments to the mandamus provision:

The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.²⁷

In his remarks on the floor of the House of Representatives, and consistent with the legislation's provision that both the crime victim and the prosecutor may assert the specified victim rights, Representative Sensenbrenner stated that the crime victim or the Government can pursue the writ of mandamus remedy to "ensure that the crime victim's rights are protected."²⁸ In addition to the mandamus amendment, Representative Sensenbrenner proposed an amendment that would permit a crime victim to move to reopen a plea or sentence if 1) the victim had asserted a right to be heard before or during the plea or sentencing proceeding and this right was denied; 2) the victim petitioned the appellate court for a writ of mandamus within ten days; and 3) the accused had not entered a plea to the highest offense charged.²⁹

The CVRA, as amended in the House of Representatives, was overwhelmingly passed in the House of Representatives³⁰ and subsequently passed in the Senate by unanimous consent.³¹ President George Bush signed the CVRA into law on October 30, 2004.³²

²⁵ Compare H.R. 5107, 108th Cong. (2004) (as introduced on September 21, 2004), and 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill), with S. 2329, 108th Cong. (2004), and 150 CONG. REC. S4,279 (daily ed. Apr. 22, 2004) (text of bill).

²⁶ See 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill).

²⁷ Compare 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill as introduced), with 150 CONG. REC. H8,195 (daily ed. Oct. 6, 2004) (amendments offered by Rep. James Sensenbrenner).

²⁸ 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner); see 150 CONG. REC. H8,180 (daily ed. Oct. 6, 2004) (text of bill as introduced).

²⁹ See 150 CONG. REC. H8,195 (daily ed. Oct. 6, 2004) (amendments offered by Rep. James Sensenbrenner). After enactment of the CVRA, the time period in which the crime victim must seek mandamus relief was amended and extended to 14 days. See 18 U.S.C.A. § 3771(d)(5) (West Pamp. 2014).

³⁰ See 150 CONG. REC. H8,204, H8,208–09 (daily ed. Oct. 6, 2004) (reflecting 393 favorable votes, 14 unfavorable votes, and 25 members not voting). See generally *All Actions: H.R. 5107 108th Congress (2003-2004)*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/house-bill/5107/all-actions-with-amendments> (last visited Sept. 23, 2014).

³¹ See 150 CONG. REC. S10,910–17 (daily ed. Oct. 9, 2004). Senator Jon Kyl, one of the CVRA's primary Senate co-sponsors, offered additional remarks about the CVRA provisions similar to those he and Senator Dianne Feinstein made when the CVRA was introduced, including statements regarding the importance of the mandamus and direct appeal by the Government provisions. See 150 CONG. REC. S10,910–13 (daily ed. Oct. 9,

III. THE FEDERAL APPELLATE COURTS ADOPT CVRA MANDAMUS REVIEW STANDARDS

A. *Writ of Mandamus General Principles*

The writ of mandamus is part of the common law heritage that shaped American jurisprudence.³³ In its landmark decision addressing the issuance of a writ of mandamus in *Marbury v. Madison*,³⁴ the United States Supreme Court (the “Court”) quoted Blackstone’s mandamus definition:

a command issued in the King’s name from the court of King’s Bench, and directed to any person, corporation, or inferior court of judicature within the King’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King’s Bench has previously determined, or at least supposed, to be consonant to right and justice.³⁵

In considering its authority to issue the requested writ of mandamus, the *Marbury* Court also noted that “to render the mandamus a proper remedy,” the person to whom the writ is directed must be a legally appropriate subject of the writ and the person seeking the writ must be “without any other specific and legal remedy.”³⁶ Further, the propriety of the issuance of the writ is determined by the “nature of the thing to be done.”³⁷ For example, the Court noted that mandamus would not be an appropriate remedy regarding acts pursuant to executive discretion.³⁸

Over one hundred years after *Marbury*, the Court reviewed its mandamus jurisprudence in *Roche v. Evaporated Milk Association*.³⁹ In determining that the federal appellate court had improperly issued a writ of mandamus, the *Roche* Court noted that the “traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”⁴⁰ The Court further noted that the function of mandamus is to correct “an abuse of judicial power, or refusal to exercise it.”⁴¹ Finally, because “common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court,” the Court’s review of the lower court’s issuance of the writ focused not on its “power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power.”⁴²

2004) (statement of Sen. Jon Kyl, including described remarks); cf. 150 CONG. REC. S4,261–70 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein).

³² See *All Actions: H.R. 5107*, supra note 30.

³³ See Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 351–61 (2012).

³⁴ 5 U.S. 137 (1803).

³⁵ *Id.* at 168 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *110).

³⁶ *Id.* at 169.

³⁷ *Id.* at 170.

³⁸ *Id.* at 170–71.

³⁹ 319 U.S. 21, 22 (1943).

⁴⁰ *Id.* at 26.

⁴¹ *Id.* at 31.

⁴² *Id.* at 25–26.

Over fifty years later, and during Congress's consideration of the CVRA, the Court again reviewed its mandamus jurisprudence in *Cheney v. United States District Court*.⁴³ The *Cheney* Court quoted prior Court statements that the "extraordinary remedy" of the mandamus writ is justified only in "exceptional circumstances amounting to a judicial 'usurpation of power'" or a "clear abuse of discretion."⁴⁴ The *Cheney* Court then summarized the requirements, previously articulated by the Court, for the issuance of a writ of mandamus:

As the writ is one of "the most potent weapons in the judicial arsenal," three conditions must be satisfied before it may issue. First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," – a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy "the burden of showing that [his] right to issuance of the writ is "clear and indisputable.""⁴⁵ Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.⁴⁵

B. Federal Courts of Appeals Diverge in Their Adoption of CVRA Mandamus Review Standards

It is in the context of the above-described long-standing Court mandamus jurisprudence and the previously described articulation by its two primary Senate sponsors of the goals of the CVRA mandamus remedy that the federal appellate courts have announced their CVRA mandamus review standards.⁴⁶ The initial appellate circuits that adopted CVRA mandamus review standards departed, to varying degrees, from the traditional mandamus review standards described above. However, the majority of appellate circuits that have adopted CVRA mandamus review standards have adopted some variation of the traditional mandamus standards in reviewing CVRA mandamus

⁴³ 542 U.S. 367 (2004).

⁴⁴ *Id.* at 380 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)). The Court noted that the common law mandamus writ "against a lower court" was codified, as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* (quoting 28 U.S.C.A. § 1651(a) (West 2006)).

⁴⁵ *Id.* at 380–81 (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976); *Will*, 389 U.S. at 107; *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *Ex parte Fahey*, 332 U.S. 258, 260 (1947)).

⁴⁶ See *supra* notes 17–18, 33–45 and accompanying text. The legislative history concerning the goals and purposes of the CVRA mandamus remedy primarily consists of the statements offered by Senators Feinstein and Kyl on the Senate floor. In their remarks, Senator Leahy and Representative Sensenbrenner simply referenced the mandamus remedy as a mechanism to assert or protect the statutory victim rights. See H.R. REP. NO. 108-711, at 122–24 (2004) (statements of Rep. James Sensenbrenner); 150 CONG. REC. H8,188 (daily ed. Oct. 6, 2004) (statement of Rep. James Sensenbrenner); 150 CONG. REC. S4,271 (daily ed. Apr. 22, 2004) (statement of Sen. Patrick Leahy); 150 CONG. REC. S4,230 (daily ed. Apr. 21, 2004) (statement of Sen. Patrick Leahy). There had been previous hearings and reports regarding the proposed crime victim rights constitutional amendments, but these did not address the mandamus remedy. See, e.g., S. REP. NO. 108-191 (2003). There were no hearings on the CVRA in either the Senate or the House of Representatives and no Senate committee report. The House of Representatives committee report simply stated that the crime victim or the Government could apply to the appellate court for a writ of mandamus to enforce the statutory victim rights if a trial court had denied a request for "appropriate relief." See H.R. REP. NO. 108-711, at 5, 10 (2004); 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); 150 CONG. REC. S4,266 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl); *All Actions: S. 2329 108th Congress (2003-2004)*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/senate-bill/2329/all-actions-with-amendments> (last visited Sept. 23, 2014).

petitions. A few appellate circuits have not yet articulated their CVRA mandamus review standards.⁴⁷

1. Initial Circuit Courts Depart, to Varying Degrees, From the Traditional Mandamus Review Standard

Less than a year after the CVRA was enacted, the Second Circuit was the first appellate circuit to articulate its CVRA mandamus review standard in *In re W.R. Huff Asset Management Co.*⁴⁸ The *Huff* petitioners asserted that their CVRA rights to notice, confer with the prosecutor, fair treatment, and restitution had been violated in connection with a fraud proceeding.⁴⁹ In establishing its CVRA mandamus review standard, the *Huff* court first reviewed circuit precedent that required mandamus petitioners to demonstrate a “novel and significant” legal question, the inadequacy of alternative available remedies, and a legal issue the resolution of which would “aid in the administration of justice.”⁵⁰ The Second Circuit court concluded, however, that under the “plain language” of the CVRA regarding the mandamus remedy and re-opening of a plea or sentence procedure, Congress had “chosen” the mandamus remedy “as a mechanism by which a crime victim may appeal” a trial court’s denial of relief under the CVRA.⁵¹ Thus, a CVRA mandamus petitioner “need not overcome the hurdles” of a traditional mandamus proceeding.⁵²

The Second Circuit court stated that because CVRA crime victims, as mandamus petitioners, “have a right to appellate review,” it must determine the appropriate review standard for these CVRA appellate proceedings.⁵³ In this connection, the appellate court reviewed the three traditional appellate review standards: de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the lower court’s discretion.⁵⁴ The *Huff* court found instructive the Court’s selection of the abuse of discretion appellate review standard in a decision concerning a trial court’s award of attorneys’ fees pursuant to the Equal Access to Justice Act.⁵⁵ Applying the rationale of the Court’s attorneys’ fees decision, the Second Circuit court found that the CVRA entrusts the trial court with ensuring that crime victims are afforded their CVRA rights.⁵⁶ In addition, the trial court is in a better position than an appellate court to determine whether CVRA relief is warranted in an individual case and to make the determinations of “reasonableness” required regarding most of the CVRA rights.⁵⁷ Finally, the *Huff* court stated that, just as regarding the attorneys’ fees case, there is not a “clear statutory prescription” or a “historical tradition” to determine the appropriate review standard.⁵⁸ Finding that the factors utilized by the Court in adopting the abuse of discretion review standard in the attorneys’ fees decision applied “with equal force” to the

⁴⁷ See *infra* notes 48–192 and accompanying text (discussing the CVRA review standards).

⁴⁸ 409 F.3d 555 (2d Cir. 2005). Most of the appellate courts’ CVRA mandamus decisions have been rendered through published and unpublished per curiam opinions or orders. Because all of these decisions are presented in this Article for illustrative purposes, the per curiam and “unpublished” designations will not be used in the citations of these opinions.

⁴⁹ See *id.* at 560–61.

⁵⁰ See *id.* at 562.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *id.* (referencing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

⁵⁵ See *id.* at 562–63.

⁵⁶ *Id.* at 562.

⁵⁷ *Id.* at 562–63.

⁵⁸ *Id.* at 563.

CVRA, the Second Circuit held that a trial court's CVRA determinations should be reviewed for abuse of discretion and found no abuse of discretion in the instant case.⁵⁹

In *In re Galvis*,⁶⁰ the Second Circuit subsequently expanded its CVRA mandamus review standards in reviewing a trial court's determination that the petitioner was not an eligible "crime victim" under the CVRA.⁶¹ The *Galvis* court retained the *Huff* standard that a trial court's CVRA determinations are reviewed for abuse of discretion in the mandamus process.⁶² However, the Second Circuit court also determined that the appellate court reviews for "clear error any factual findings made by the district court in determining a putative victim's motion to enforce her [CVRA] rights."⁶³ In adding this CVRA mandamus review standard, the *Galvis* court quoted a previous Court decision regarding the interrelationship of the abuse of discretion and clear error review standards: "When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable. A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous."⁶⁴ The *Galvis* court denied the mandamus petition, concluding that there was no clear error in the trial court's determination of the facts concerning the petitioner's CVRA victim status and therefore the trial court did not abuse its discretion in denying her motion to assert CVRA rights.⁶⁵

The Ninth Circuit announced its CVRA mandamus review standard regarding a petition alleging a denial of the crime victim's right to be orally heard at sentencing in *Kenna v. United States District Court*,⁶⁶ issued a few months after the Second Circuit's *Huff* decision. The *Kenna* court noted the usual circuit application of "strict standards" in mandamus review, granting the writ only in "truly extraordinary" cases, such as those involving clear or frequently repeated legal error, absence of alternative review mechanisms, or issues of first impression.⁶⁷ The appellate court further stated that the instant case may warrant review under the circuit's traditional mandamus standards.⁶⁸

However, the Ninth Circuit court stated that the application of the circuit's traditional mandamus factors was not required because the "CVRA contemplates active review of orders denying victims' rights claims even in routine cases. ... The CVRA [mandamus provisions create] a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute."⁶⁹ In agreement with the Second Circuit's decision in *Huff* and in the absence of any contrary appellate decisions, the Ninth Circuit court stated that "we must issue the writ [in CVRA mandamus proceedings] whenever we find that the district court's order reflects an abuse of discretion or legal error."⁷⁰ Finding that the trial court clearly erred in declining to permit the petitioner to be orally heard at sentencing, the *Kenna* court granted the writ of

⁵⁹ See *id.* at 562–64 (discussing *Pierce*, 487 U.S. at 558–62); *infra* notes 254–60, 344–51 and accompanying text (discussing this petition); see also *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 85–88 (2d Cir. 2009) (utilizing the abuse of discretion standard to deny a CVRA mandamus petition).

⁶⁰ 564 F.3d 170 (2d Cir. 2009).

⁶¹ *Id.* at 174–76.

⁶² *Id.* at 174 (citing *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 563).

⁶³ *Id.*

⁶⁴ *Id.* at 174–75 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990)).

⁶⁵ *Id.* at 175–76; see *infra* notes 209–12 and accompanying text (discussing this petition).

⁶⁶ 435 F.3d 1011 (9th Cir. 2006).

⁶⁷ *Id.* at 1017.

⁶⁸ See *id.* (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)).

⁶⁹ *Id.*

⁷⁰ *Id.*

mandamus to permit the petitioner to pursue a CVRA motion in the trial court to re-open the sentencing proceeding.⁷¹

The Ninth Circuit has maintained the *Kenna* CVRA mandamus review standard in subsequent decisions, i.e., utilizing its abuse of discretion or legal error standard regarding CVRA mandamus petitions rather than the circuit's traditional mandamus balancing test.⁷² However, in applying this review standard in *In re Andrich*,⁷³ in which the petitioners sought mandamus both pursuant to the CVRA and traditional mandamus, the Ninth Circuit described the interrelationship between the *Kenna* CVRA mandamus review standard and the circuit's traditional mandamus review standard.⁷⁴ In establishing its CVRA review standard, the *Andrich* court stated that the *Kenna* court (and subsequent circuit decisions following *Kenna*) had focused on one of the several factors identified in the circuit's traditional mandamus review standard, i.e., that a trial court's order is "clearly erroneous as a matter of law," and that prior circuit precedent had determined that this traditional factor is "dispositive" in the mandamus analysis.⁷⁵ Moreover, this circuit precedent is consistent with the Court's mandamus jurisprudence that a petitioner's entitlement to mandamus must be "clear and indisputable."⁷⁶ In the instant case, the Ninth Circuit court found that the trial judge did not "clearly err as a matter of law, nor did he abuse his discretion" in determining the petitioner's CVRA victim status.⁷⁷ The *Andrich* court therefore denied the mandamus petition under "either the CVRA or our traditional mandamus authority."⁷⁸

Slightly over a year after the Ninth Circuit announced its CVRA mandamus review standard in *Kenna*, the Third Circuit, in *In re Walsh*,⁷⁹ denied a mandamus petition presented generally and pursuant to the CVRA.⁸⁰ In denying the mandamus petition pursuant to the CVRA, the *Walsh* court, citing the Ninth Circuit's *Kenna* decision and the Second Circuit's *Huff* decision, stated that "mandamus relief is available under a different, and less demanding, standard under [the CVRA] in the appropriate circumstances."⁸¹ The *Walsh* court did not explicitly state what this "different" CVRA mandamus standard was.⁸² Moreover, in reviewing a CVRA mandamus petition in *In re Zackey*,⁸³ the Third Circuit stated, "[W]e assume that Congress understood the implications of using a term of art such as 'mandamus' when drafting the statute."⁸⁴ However, the *Zackey* court found it unnecessary to decide whether to apply the traditional mandamus review standard or the "more expansive abuse of discretion standard" to the petitioner's claim regarding the right to be heard through his attorney.⁸⁵ The appellate court found that, even under the abuse of

⁷¹ *Id.* at 1017–18; *see infra* notes 364–75 and accompanying text (discussing this petition); *see also* 18 U.S.C.A. § 3771(d)(5) (West Pamp. 2014) (describing the motion to re-open sentencing procedure).

⁷² *See, e.g., In re K.K.*, 756 F.3d 1169 (9th Cir. 2014); *In re Morning Star Packing Co.*, 711 F.3d 1142, 1143 (9th Cir. 2013).

⁷³ 668 F.3d 1050 (9th Cir. 2011).

⁷⁴ *Id.* at 1051.

⁷⁵ *Id.*

⁷⁶ *See id.* (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)).

⁷⁷ *Id.*

⁷⁸ *Id.*; *see infra* notes 213–15 and accompanying text (discussing this petition).

⁷⁹ 229 F. App'x 58 (3d Cir. 2007).

⁸⁰ *Id.* at 60.

⁸¹ *Id.*

⁸² *See id.*; *accord In re Mujaddid*, 563 F. App'x 874, 875 (3d Cir. 2014); *In re El*, 553 F. App'x 113, 115 (3d Cir. 2014).

⁸³ No. 10-3772, 2010 U.S. App. LEXIS 19914 (3d Cir. Sept. 22, 2010).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

discretion standard, the petitioner was not entitled to CVRA mandamus relief.⁸⁶ Thus, there appears to be some ambiguity in the Third Circuit's articulation of its CVRA mandamus review standard and the degree to which it has departed from the traditional mandamus review standard.

2. Subsequent Circuit Courts Adopt a Traditional Mandamus Review Standard

As described above, the initial appellate circuits that addressed the CVRA mandamus review standard, i.e., the Second, Third, and Ninth Circuits, interpreted the CVRA mandamus provisions—to varying degrees—to support a mandamus review standard less stringent than their circuits' traditional mandamus review standard.⁸⁷ However, all of the appellate circuits that have subsequently adopted a CVRA mandamus review standard, i.e., the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits, have adopted a traditional mandamus review standard for their review of CVRA mandamus petitions.⁸⁸ The First, Fourth, and Seventh Circuits have not yet adopted a CVRA mandamus review standard.⁸⁹

The Tenth Circuit was the first appellate circuit to adopt a traditional mandamus review standard in connection with its review of a trial court's determination of CVRA crime victim status in *In re Antrobus*.⁹⁰ The *Antrobus* petitioners had asserted that, "even though the CVRA provides for mandamus review, this court should apply those standards that would apply on normal appellate review," citing the *Huff* and *Kenna* decisions.⁹¹ However, the *Antrobus* court "respectfully disagree[d]" with the decisions of the Second and Ninth Circuits.⁹² Applying the "plain language" of the CVRA, the Tenth Circuit court stated that Congress "authorized and made use of the term 'mandamus'" in the CVRA rather than terms such as "immediate appellate review" or "interlocutory appellate review" that Congress had previously used in statutes.⁹³ The *Antrobus* court cited Court interpretive precedent regarding statutory use of terms of art:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.⁹⁴

Finding that "[m]andamus is the subject of longstanding judicial precedent," the Tenth Circuit court applied the above-described Court interpretive precedent to the "plain language" of the CVRA and reviewed the petition under "traditional" mandamus standards.⁹⁵ The *Antrobus* court cited Court mandamus precedent that reflected that mandamus is a "drastic" remedy reserved for "extraordinary situations," such as to compel

⁸⁶ *Id.*; see *infra* notes 393–99 and accompanying text (discussing this petition).

⁸⁷ See *supra* notes 48–86 and accompanying text.

⁸⁸ See *infra* notes 90–167 and accompanying text.

⁸⁹ See *infra* notes 168–82 and accompanying text.

⁹⁰ 519 F.3d 1123, 1125 (10th Cir. 2008).

⁹¹ *Id.* at 1124.

⁹² *Id.*

⁹³ *Id.* at 1124–25.

⁹⁴ *Id.* at 1124 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

⁹⁵ *Id.* at 1125; see *id.* at 1126 (Tymkovich, J., concurring) (noting the "relaxed" CVRA mandamus review standards adopted by the Second and Ninth Circuits and stating that the *Antrobus* court had "part[ed] company" with these circuits and applied the traditional mandamus review standard).

a lower court to “exercise its authority when it is its duty to do so,” and requiring a petitioner to demonstrate a “clear and indisputable” right to the writ.⁹⁶ Although characterizing the instant petition as a “difficult case,” the *Antrobus* court denied the writ because it was unable to conclude that the trial court was “clearly wrong” in its victim status determination or that the petitioners’ right to mandamus was “clear and indisputable,” as required under the traditional mandamus review standard.⁹⁷

In a subsequent CVRA mandamus proceeding involving the *Antrobus* petitioners, the Tenth Circuit maintained its use of traditional mandamus review standards.⁹⁸ In articulating these standards, the appellate court cited additional Court precedent requiring that a mandamus petitioner have “no other adequate means” to attain the requested relief.⁹⁹ The Tenth Circuit also cited its own mandamus precedent that a petitioner’s “clear and indisputable” right to mandamus can be demonstrated by a “judicial usurpation of power or a clear abuse of discretion.”¹⁰⁰ The Tenth Circuit declined the *Antrobus* petitioners’ request to apply “ordinary appellate standards of review” to the instant petition regarding the trial court’s denial of their discovery request concerning their attempt to establish their CVRA victim status.¹⁰¹ However, the appellate court stated that the review standard would make no difference in the instant matter because the trial court’s action would be reviewed under an abuse of discretion standard under either review standard.¹⁰² Finding no “clear abuse of discretion” by the trial court, the Tenth Circuit denied the *Antrobus* mandamus petition.¹⁰³

In their subsequent petition for rehearing regarding their initial mandamus petition, the *Antrobus* petitioners re-asserted their position that “normal appellate” rather than traditional mandamus review standards should apply to their CVRA mandamus petition.¹⁰⁴ Once again, in rejecting the petitioners’ position, the Tenth Circuit cited the “plain language” of the CVRA that incorporated the mandamus remedy, a “well worn term of art in our common law tradition,” and Court interpretive precedent regarding statutory use of terms of art.¹⁰⁵ The Tenth Circuit also found nothing in the *Huff* and *Kenna* decisions—departing from the traditional mandamus review standard—that explained Congress’s use of “mandamus” rather than “appeal” in the CVRA and it found the *Huff* court’s reliance on the Court’s attorneys’ fees review standard decision misplaced.¹⁰⁶

In addition to the general interpretive concept that Congress, having authorized interlocutory appeals in other legislation, should be presumed to have intentionally selected the mandamus remedy for use in the CVRA, the Tenth Circuit concluded that the CVRA’s “structure and language” supported the incorporation of traditional mandamus in the CVRA. In this connection, the Tenth Circuit referenced the CVRA’s alternative option for the Government to assert CVRA error in an ordinary appeal from the underlying conviction and the 72 hour time frame for CVRA mandamus decision-making that was

⁹⁶ *Antrobus*, 519 F.3d at 1124 (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)).

⁹⁷ *Id.* at 1125–26.

⁹⁸ *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *2–3 (10th Cir. Feb. 1, 2008).

⁹⁹ *Id.* (quoting *Allied Chem. Corp.*, 449 U.S. at 35).

¹⁰⁰ *Id.* at *3 (quoting *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1184 (10th Cir. 2006)).

¹⁰¹ *Id.* at *3 n.1.

¹⁰² *Id.*

¹⁰³ *Id.* at *12; see *infra* note 226 (discussing this petition).

¹⁰⁴ *In re Antrobus*, 519 F.3d 1123, 1127 (10th Cir. 2008).

¹⁰⁵ *Id.* at 1127–28 (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Marbury v. Madison*, 5 U.S. 137, 170–71 (1803)).

¹⁰⁶ *Id.* at 1128 & n.3.

inconsistent with typical appellate review of often complex legal issues.¹⁰⁷ Contrary to the petitioners' alternative assertions, the Tenth Circuit explained that the "clear and indisputable right" requirement that it imposed regarding CVRA mandamus petitions was consistent with traditional mandamus circuit precedent.¹⁰⁸ Finally, the Tenth Circuit found that the *Antrobus* petitioners had failed to "even suggest" how adopting their proposed review standard would affect their petition's outcome.¹⁰⁹ The Tenth Circuit denied the *Antrobus* petition for rehearing,¹¹⁰ and has subsequently maintained the traditional mandamus review standard regarding CVRA mandamus petitions.¹¹¹

The Fifth Circuit was the next circuit to adopt traditional mandamus review standards regarding the CVRA. In resolving the mandamus petition in *In re Dean*,¹¹² the appellate court stated that the parties disputed the applicable review standard.¹¹³ The appellate court stated that despite the use of the term "mandamus" in the CVRA, the petitioners asserted that "ordinary appeal standards" apply to CVRA mandamus petitions.¹¹⁴ The *Dean* court noted that two circuits agreed with the petitioners, citing the *Kenna* and *Huff* decisions. However, citing the *Antrobus* rehearing petition decision described above, the *Dean* court stated that the Tenth Circuit had recently held that mandamus standards apply to CVRA petitions. The Fifth Circuit announced, "We are in accord with the Tenth Circuit for the reasons stated in its opinion."¹¹⁵

The *Dean* court then described the three-part Court mandamus standard that the Fifth Circuit had adopted, requiring a mandamus petitioner 1) to have "no other adequate means" to attain the requested relief and 2) to demonstrate a "clear and indisputable right" to the writ, and 3) further requiring that the court, in exercising its discretion, concludes the writ is "appropriate under the circumstances."¹¹⁶ The *Dean* court found that the trial court, "with the best of intentions, misapplied the law and failed to accord the victims the rights conferred by the CVRA," i.e., the rights to notice and to confer with the prosecutor.¹¹⁷ However, in determining whether to issue the mandamus writ, the *Dean* court found that it did not need to decide whether the first two mandamus requirements were met because "for prudential reasons, a writ of mandamus is not 'appropriate under the circumstances'" presented by the case.¹¹⁸

The Fifth Circuit has continued to apply to CVRA mandamus petitions the traditional three-part mandamus review standard announced in *Dean*.¹¹⁹ In an en banc

¹⁰⁷ See *id.* at 1128–30. The *Antrobus* court stated that the petitioners' additional arguments regarding why they should have greater appellate rights pursuant to the CVRA were "best directed to Congress. Our job is to apply the CVRA as written, not to rewrite it as one might wish the law to be." *Id.* at 1129.

¹⁰⁸ *Id.* at 1130 (stating that a multi-factor analysis sometimes used in the circuit is simply "one, non-exclusive means of applying" the "clear and indisputable right" standard).

¹⁰⁹ *Id.* at 1130–31.

¹¹⁰ *Id.* at 1131; see *infra* notes 223–26 and accompanying text (discussing this petition); cf. *United States v. Hunter*, 548 F.3d 1308, 1312–16 (10th Cir. 2008) (finding the CVRA did not authorize a non-party right to appeal the underlying sentence and dismissing the *Antrobus* attempt to directly appeal from the defendant's sentence).

¹¹¹ See *In re Olesen*, 447 F. App'x 868, 869–70 (10th Cir. 2011); *In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009).

¹¹² 527 F.3d 391 (5th Cir. 2008).

¹¹³ *Id.* at 393.

¹¹⁴ *Id.* at 393–94.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 394 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see *infra* notes 352–63 and accompanying text (discussing this petition).

¹¹⁹ See, e.g., *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012); *In re Fisher*, 640 F.3d 645, 647–48 (5th Cir. 2011).

opinion in *In re Amy Unknown*,¹²⁰ however, the Fifth Circuit not only rejected the petitioner's contention that the review standard governing direct criminal appeals applies to CVRA mandamus petitions, but also more fully articulated its rationale for adopting the traditional mandamus review standard for CVRA mandamus petitions.¹²¹ After reviewing the nature of the traditional mandamus writ as an "extraordinary remedy" and not a substitute for an appeal or a mechanism to control trial court decision making in discretionary matters,¹²² the Fifth Circuit found that aspects of the CVRA supported its conclusion that Congress intended to incorporate traditional mandamus when it adopted the statutory "mandamus" remedy for crime victims.¹²³

For example, the en banc court found that the CVRA's identification of an exclusive list of crime victim rights and authorization of mandamus only when a trial court denies a motion regarding one of these identified rights "suggests that in granting relief, the district court retains discretion to select the appropriate means to ensure victims' rights, and that victims may only properly seek appellate intervention where the district court clearly fails to 'exercise its authority when it is its duty to do so.'"¹²⁴ Moreover, the CVRA's express limitation to the Government, in the exercise of its prosecutorial discretion, of the alternative right to appeal based on a claim of CVRA-related error further supports Congress's intentional adoption of a traditional mandamus remedy for crime victims. The CVRA's requirement that its mandamus petitions must be resolved by the appellate court within 72 hours and its authorization for resolution by a single appellate judge further support Congress's adoption of a traditional mandamus remedy, i.e., reflecting that appellate courts must "grant relief quickly, but rarely" as consistent with a remedy reserved for "extraordinary" cases.¹²⁵ Acknowledging the petitioner's contention that "it may be more difficult for a crime victim to enforce rights through mandamus than appeal, [the Fifth Circuit en banc court concluded] this limitation reflects the express language of the statute and honors the common law tradition in place when the CVRA was drafted."¹²⁶

The Sixth Circuit, in *In re Simons*,¹²⁷ its initial CVRA mandamus petition, noted the conflict in the appellate circuits regarding the CVRA mandamus review standard.¹²⁸ The *Simons* court, however, found it unnecessary to resolve the issue of the "proper" CVRA review standard in the case because it found the petitioner had established his "clear and indisputable" right to relief, i.e., a prompt ruling on his motion to unseal case

¹²⁰ 701 F.3d 749 (5th Cir. 2012) (en banc), *vacated and remanded on other grounds sub nom.* Paroline v. United States, 134 S. Ct. 1710 (2014) (determining restitution).

¹²¹ See *id.* at 756–58. In its en banc decision, the Fifth Circuit also held that the CVRA does not grant crime victims an independent right to appeal from the underlying criminal proceedings. See *id.* at 754–56; *cf. id.* at 758–59 (finding it unnecessary to resolve whether the appellate court's supervisory mandamus power of review applied to the petition).

¹²² *Id.* at 757.

¹²³ *Id.* at 757–58.

¹²⁴ *Id.* at 757 (quoting *Kerr v. U. S. Dist. Court*, 426 U.S. 394, 402 (1976)).

¹²⁵ *Id.* at 757–58; see 18 U.S.C.A. § 3771(d)(3), (4) (West Pamp. 2014).

¹²⁶ *Amy Unknown*, 701 F.3d at 757–58. Contrary to the petitioner's assertion, the en banc court found that the CVRA requirements that the appellate court "take up and decide" a CVRA mandamus petition and "ensure" crime victims are afforded their rights did not support an appellate rather than a mandamus review standard. *Id.* The en banc court also did not find persuasive the reasoning of the Second and Ninth Circuits in *Huff* and *Kenna*, respectively, regarding a non-traditional review standard, and questioned other cited circuits' support for a non-traditional mandamus standard. See *id.* at 758 n.6; *cf. infra* notes 284–96 and accompanying text (discussing this petition).

¹²⁷ 567 F.3d 800 (6th Cir. 2009).

¹²⁸ *Id.* at 801.

records.¹²⁹ He was therefore entitled to relief under the “stricter” traditional mandamus review standard.¹³⁰

The Sixth Circuit subsequently adopted the traditional mandamus standard in *In re Acker*.¹³¹ The Sixth Circuit found “persuasive” the Tenth Circuit’s *Antrobus* decision that concluded the CVRA’s “plain language” compelled application of the “normal mandamus standards.”¹³² Specifically, the *Acker* court cited the CVRA’s use of the term “mandamus” that is governed by “well-established standards” and the “truncated” review period required for CVRA mandamus petitions as factors that “convince[d]” it that the “usual” mandamus standards apply to CVRA petitions.¹³³ The *Acker* court cited Court and Sixth Circuit precedent regarding the requirements for the “extraordinary” remedy of mandamus, including “exceptional circumstances amounting to a ... clear abuse of discretion.”¹³⁴ Finding no such abuse of discretion in the trial court’s acceptance of a plea agreement in the case, the appellate court denied the mandamus petition.¹³⁵ In the related mandamus petition of *In re McNulty*,¹³⁶ the Sixth Circuit added that, as a discretionary remedy, mandamus can be denied if it is not “appropriate under the circumstances” even if a petitioner has shown a “clear and indisputable” right to the writ. The *McNulty* court found that the petitioner, who challenged the denial of his CVRA victim status and restitution, had not established his “clear and indisputable” right to the writ and thus the trial court did not abuse its discretion in making its determinations.¹³⁷

As was the case in the Sixth Circuit, the District of Columbia Circuit found it unnecessary to determine the appropriate review standard in resolving its initial CVRA mandamus petition in *In re Jacobsen*.¹³⁸ The *Jacobsen* court found that the petitioner had not satisfied either a “clear and indisputable right” or an “abuse of discretion” review standard regarding an alleged denial of the right to be heard and denied the petition as moot.¹³⁹ Subsequently, in *In re Amy*,¹⁴⁰ the District of Columbia Circuit adopted the traditional mandamus review standard for CVRA petitions.¹⁴¹ After noting the conflict in the circuits regarding the issue, the District of Columbia Circuit court concluded that the “best reading” of the CVRA supports the application of the traditional mandamus standard.¹⁴²

In support of its conclusion, the District of Columbia Circuit court cited the Court interpretive precedent regarding statutory use of a term of art, such as “mandamus”; the CVRA inclusion of the alternative direct appeal remedy solely for the Government to assert CVRA-related errors; and the “abbreviated” deadline for resolution of CVRA

¹²⁹ *Id.*

¹³⁰ *See id.*; *infra* note 343 (discussing this petition); *cf. In re Siler*, 571 F.3d 604, 608–10 (6th Cir. 2009) (addressing an appeal and mandamus action regarding the trial court’s refusal to disclose the presentence report to crime victims for use in a civil suit following the conclusion of the criminal proceeding, and finding the victims’ request was outside the scope of the CVRA and that the trial court had not abused its discretion regarding the appellate action).

¹³¹ 596 F.3d 370, 372 (6th Cir. 2010).

¹³² *Id.* (citing *In re Antrobus*, 519 F.3d 1123, 1124–25 (10th Cir. 2008)).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 373; *see infra* notes 274–76, 363 and accompanying text (discussing this petition).

¹³⁶ 597 F.3d 344 (6th Cir. 2010).

¹³⁷ *Id.* at 349, 352–53; *see infra* note 220 and accompanying text (discussing this petition).

¹³⁸ No. 05-7086, 2005 U.S. App. LEXIS 13990 (D.C. Cir. July 8, 2005).

¹³⁹ *Id.* at *2–4; *see infra* note 406 (discussing this petition).

¹⁴⁰ 641 F.3d 528 (D.C. Cir. 2011).

¹⁴¹ *Id.* at 534.

¹⁴² *Id.* at 532–33.

mandamus petitions that is more consistent with a review for only “clear and indisputable” errors.¹⁴³ The *Amy* court found unpersuasive the petitioner’s assertions that CVRA statutory language that appellate courts “take up and decide” mandamus petitions and “ensure” a victim’s rights, or the statements offered on the Senate floor by Senators Feinstein and Kyl, supported an appellate-type rather than a traditional CVRA mandamus review standard.¹⁴⁴ Instead, the appellate court applied the District of Columbia Circuit’s three-part traditional mandamus review standard to the petitioner’s restitution-related claim, requiring her to demonstrate that 1) she has a “clear and indisputable right” to relief; 2) the trial court has a “clear duty to act”; and 3) no other “adequate remedy” is available.¹⁴⁵ Applying this traditional standard, the *Amy* court granted her mandamus relief, in part, regarding her restitution claim.¹⁴⁶

In reviewing its only CVRA mandamus petition thus far, in *In re Vicky*,¹⁴⁷ the Eighth Circuit was the next circuit to adopt the traditional mandamus review standard. In rejecting the petitioner’s request that the direct appeal review standard be applied to her CVRA mandamus petition, the Eighth Circuit court cited aspects of the rationale utilized by the Fifth, Sixth, Tenth, and District of Columbia Circuits in adopting the traditional mandamus review standard for CVRA petitions.¹⁴⁸ The *Vicky* court noted the Court interpretive precedent regarding statutory use of a term of art, such as mandamus; the express provision of the alternative opportunity for direct appeal for the Government regarding CVRA-related errors; and the short statutory time frame for the resolution of CVRA mandamus petitions. The appellate court found that the *Huff* and *Kenna* decisions cited by the petitioner regarding alternative review standards lacked “detailed analysis” and were “unpersuasive” and the cited decisions of the Third and Eleventh Circuits did not clearly adopt an alternative review standard.¹⁴⁹ The Eighth Circuit therefore adopted the Court and circuit “traditional standard” for mandamus, requiring a petitioner to demonstrate 1) the absence of an “adequate alternative means” to attain relief, 2) a “clear and indisputable” right to the writ, and 3) that the writ is “appropriate under the circumstances.”¹⁵⁰ Finding that the trial court did not “clearly and indisputably” err in its determination of restitution, the *Vicky* court denied the mandamus petition.¹⁵¹

The Eleventh Circuit’s articulation of its CVRA mandamus review standard has evolved over time. In *In re Stewart*,¹⁵² the appellate court characterized the CVRA mandamus proceeding as a “free standing cause of action” and “not an appeal” or an “interlocutory appeal of an intermediate order.”¹⁵³ In granting the petitioners’ writ regarding their CVRA victim status, the *Stewart* court described the question for resolution as a “mixed question of law and fact,” but did not explicitly state the review standard that it was applying.¹⁵⁴ However, the basis for the dissenting opinion was that the petitioners had failed to demonstrate the “clear and indisputable” right to the writ or the

¹⁴³ *Id.* at 533.

¹⁴⁴ *Id.* at 533–34.

¹⁴⁵ *Id.* at 532, 534.

¹⁴⁶ *Id.* at 534–44; see *infra* notes 302–08 and accompanying text (discussing this petition).

¹⁴⁷ 709 F.3d 712 (8th Cir. 2013), *vacated and remanded on other grounds sub nom.* *Vicky v. Fast*, 134 S. Ct. 1934 (2014) (requiring further proceedings regarding restitution).

¹⁴⁸ *Id.* at 718–719.

¹⁴⁹ *Id.* at 719.

¹⁵⁰ *Id.* at 718–20.

¹⁵¹ *Id.* at 719–23; see *infra* notes 309–13 and accompanying text (discussing this petition).

¹⁵² 552 F.3d 1285 (11th Cir. 2008).

¹⁵³ *Id.* at 1288.

¹⁵⁴ *Id.* at 1288–89; see *infra* notes 234–39, 400 and accompanying text (discussing this petition).

“clear abuse of discretion” required for the “drastic and extraordinary remedy” of mandamus.¹⁵⁵

When the *Stewart* petitioners filed a subsequent CVRA mandamus petition, in *In re Stewart*,¹⁵⁶ regarding the trial court’s denial of restitution to them, the appellate court noted that it “did not explicitly indicate the standard” used in resolving the initial mandamus writ.¹⁵⁷ Regarding the restitution-related petition, the *Stewart* court stated that it made “no difference” whether it treated the matter as an appeal of a trial court judgment or an original mandamus proceeding because the questions for resolution were identical, i.e., whether the trial court’s findings of fact were “clearly erroneous” or whether it had misapplied the law to the factual findings.¹⁵⁸ Finding the legal principle in the case undisputed and the trial court’s factual findings not clearly erroneous, the *Stewart* court denied the mandamus petition.¹⁵⁹

Almost ten years after the enactment of the CVRA, the Eleventh Circuit explicitly adopted a CVRA mandamus review standard in *In re Wellcare Health Plans, Inc.*¹⁶⁰ The Eleventh Circuit repeated its previous statements that the CVRA mandamus proceeding is a “free-standing cause of action” and not an “appeal of a district court judgment” or an “interlocutory appeal of an intermediate order.”¹⁶¹ The *Wellcare* court noted that, in the *Stewart* decision, it had previously “left open” whether “traditional” mandamus or “normal appellate” review standards apply to CVRA mandamus petitions.¹⁶² In *Wellcare*, the Eleventh Circuit concluded that, in accord with the Fifth, Sixth, Tenth, and District of Columbia Circuits, the traditional mandamus review standard applied to CVRA petitions.¹⁶³ The appellate court stated that the “plain text” and other “compelling textual clues” of the CVRA supported its conclusion: the Court interpretive precedent regarding statutory use of a term of art, such as mandamus; the express provision of the alternative opportunity for direct appeal for the Government regarding CVRA-related errors; and the “compressed” statutory time frame for the resolution of CVRA mandamus petitions that is consistent with a “highly deferential” review standard.¹⁶⁴

Having adopted the traditional mandamus review standard for CVRA petitions, the appellate court noted that it is an “extraordinary remedy” to be utilized in circumstances constituting a “judicial usurpation of power” or a “clear abuse of

¹⁵⁵ See *Stewart*, 552 F.3d at 1290 (Wilson, J., dissenting) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)).

¹⁵⁶ 641 F.3d 1271 (11th Cir. 2011).

¹⁵⁷ *Id.* at 1274.

¹⁵⁸ *Id.* at 1274–75.

¹⁵⁹ *Id.*; see *infra* notes 277–79 and accompanying text (discussing this petition); see also *In re Aquino*, No. 12-13238-B (11th Cir. June 22, 2012) (citing *Stewart* and reviewing the trial court’s determination of CVRA crime victim status for “clear error”); *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G, 11-12708-G (11th Cir. June 17, 2011) (quoting *Stewart* and stating that in reviewing a CVRA mandamus petition, the appellate court must determine whether the trial court based its decision on clearly erroneous factual findings or a misapplication of the law to the findings). In *In re Aquino*, the appellate court found that the petitioners had not demonstrated that the trial court made “clearly erroneous” factual findings or misapplied the law to the facts. No. 12-11757-B, slip op. at 1 (11th Cir. Apr. 06, 2012). However, it cited *Stewart* for the proposition that the Eleventh Circuit had not decided whether CVRA mandamus petitions are reviewed under the “clear-abuse-of-discretion standard generally applicable to mandamus petitions or the less-demanding standard of review applied to ordinary appeals” and concluded that the petitioners had not demonstrated entitlement to relief under “any potentially applicable standard of review.” *Id.*, slip op. at 2 & n.1.

¹⁶⁰ 754 F.3d 1234, 1238 (11th Cir. 2014).

¹⁶¹ *Id.* at 1236–37.

¹⁶² *Id.* at 1237 n.3.

¹⁶³ *Id.* at 1238.

¹⁶⁴ See *id.* at 1237–38.

discretion.”¹⁶⁵ The Eleventh Circuit also stated the Court’s three-part standard a petitioner must satisfy for the issuance of a writ, i.e., the demonstration of 1) the absence of an adequate alternative means to attain relief, 2) a “clear and indisputable” right to the writ, and 3) that the writ is “appropriate under the circumstances.”¹⁶⁶ In the instant case, the *Wellcare* court found that the petitioner had not met its burden to demonstrate a “clear and indisputable” right to the writ and that the trial court had not “clearly abuse[d] its discretion” in denying the petitioner CVRA victim status or restitution.¹⁶⁷

3. Remaining Circuits Have Not Yet Adopted a CVRA Mandamus Review Standard

Over ten years after the enactment of the CVRA, three appellate circuits, i.e., the First, Fourth, and Seventh Circuits, have not yet adopted a review standard regarding CVRA mandamus petitions. Although the Seventh Circuit has denied several CVRA mandamus petitions, it has not identified a standard of review for its actions.¹⁶⁸ In the sole CVRA mandamus petition it has considered, the First Circuit simply found that the trial court “did not er” in determining the petitioner was not a CVRA crime victim and denied the petition in *In re Haas*.¹⁶⁹ In another case in which crime victims had attempted to file an appeal rather than a mandamus petition concerning the denial of restitution, the First Circuit noted the conflict in the circuits regarding the applicable CVRA mandamus review standard.¹⁷⁰ The appellate court further found that the victims would not be entitled to CVRA mandamus relief under either the “exacting standard” of traditional mandamus review or the “more lenient” abuse of discretion standard.¹⁷¹ As a result, conversion of their attempted appeal into a mandamus petition would be “futile” and the First Circuit therefore found it unnecessary to decide the applicable CVRA mandamus review standard.¹⁷²

The Fourth Circuit has also addressed, but not resolved, the standard of review issue in some of its CVRA mandamus rulings. For example in *In re Doe*,¹⁷³ the first of these decisions, the appellate court described the traditional mandamus review standard; observed that CVRA mandamus petitions are “not necessarily subject to this stringent” review standard; and noted that the Second and Ninth Circuits had adopted a “normal abuse of discretion” standard for CVRA mandamus petitions rather than the higher abuse of discretion standard associated with mandamus petitions.¹⁷⁴ However, the *Doe* court concluded that it did not need to decide the review standard issue because the petitioner was not entitled to mandamus relief regarding her CVRA victim status and restitution claims “even under the lower standard.”¹⁷⁵

¹⁶⁵ *Id.* at 1238 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)).

¹⁶⁶ *Id.* (quoting *Cheney*, 542 U.S. at 380–81).

¹⁶⁷ *Id.* at 1238–40; see *infra* note 219 and accompanying text (discussing this petition).

¹⁶⁸ See, e.g., *In re Hamilton*, No. 12-1059 (7th Cir. Jan. 12, 2012); *In re Bustos*, No. 10-2752 (7th Cir. July 26, 2010); *In re Sabbia*, No. 10-3316, 2010 U.S. App. LEXIS 27411 (7th Cir. Oct. 7, 2010); cf. *In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006) (citing *Kenna* and *Huff* in connection with general statements regarding the CVRA).

¹⁶⁹ No. 08-2378 (1st Cir. Oct. 30, 2008).

¹⁷⁰ *United States v. Aguirre-Gonzales*, 597 F.3d 46, 55–56 (1st Cir. 2010).

¹⁷¹ *Id.* at 56.

¹⁷² *Id.*; see *id.* at 52–55 (holding that crime victims do not have a right of direct appeal pursuant to the CVRA and that their sole appellate remedy for asserted CVRA rights violations is through the CVRA mandamus remedy).

¹⁷³ 264 F. App’x 260 (4th Cir. 2007).

¹⁷⁴ *Id.* at 261–62.

¹⁷⁵ See *id.* at 262; *id.* at 264 (finding no abuse of discretion); *infra* notes 242–43 and accompanying text (discussing this petition).

In *In re Brock*,¹⁷⁶ the Fourth Circuit similarly noted the traditional mandamus standard and the “ordinary abuse of discretion” standard adopted by the Second and Ninth Circuits for review of CVRA mandamus petitions.¹⁷⁷ As in *Doe*, the *Brock* court concluded that it did not need to decide the review standard issue because “even applying the more relaxed abuse of discretion standard,” the petitioner was not entitled to relief regarding his claimed violations of his CVRA rights to be heard and treated fairly.¹⁷⁸

In ruling on a CVRA mandamus petition almost ten years after the enactment of the CVRA, in *In re Bankruptcy Estate of AGS, Inc.*,¹⁷⁹ the Fourth Circuit once again declined to adopt a standard of review for use regarding CVRA mandamus petitions.¹⁸⁰ The *AGS* court noted the traditional mandamus review standard, as well as the conflict that had developed among the appellate circuits regarding whether the traditional mandamus or “traditional appeal” standard applies to the CVRA petitions. Once again, the Fourth Circuit found it unnecessary to decide the applicable review standard, stating, “It is sufficient simply to note that to issue a writ of mandamus to a district court is not something to be undertaken lightly.”¹⁸¹ The *AGS* court found that the petitioner was not a CVRA victim and that the trial court “did not err” in denying restitution to the petitioner, and denied the petition.¹⁸²

C. Conclusion Regarding Appellate Adoption of CVRA Mandamus Review Standards

In the ten years since the enactment of the CVRA, at least eight of the twelve federal appellate circuits have adopted review standards for the CVRA mandamus remedy. The initial two appellate circuits to announce CVRA mandamus review standards interpreted the CVRA to support their selection of a review standard more similar to that used in direct appellate review than that utilized in traditional mandamus review. The Second Circuit selected the abuse of discretion standard in *Huff*¹⁸³ and the Ninth Circuit selected an abuse of discretion or legal error standard in *Kenna*.¹⁸⁴ The Third Circuit has cited *Huff* and *Kenna* as authority for a “different, and less demanding”—but not explicitly articulated—CVRA mandamus review standard.¹⁸⁵ However, it has also referenced the implications of Congress’s use of a term of art, such as “mandamus,” in the CVRA, in finding it unnecessary to decide the applicable review standard regarding a CVRA mandamus petition.¹⁸⁶ The First, Fourth, and Seventh Circuits have not yet adopted CVRA mandamus review standards.¹⁸⁷

¹⁷⁶ 262 F. App’x 510 (4th Cir. 2008).

¹⁷⁷ *Id.* at 512.

¹⁷⁸ *Id.* (finding no abuse of discretion); see *infra* notes 415–22 and accompanying text (discussing this petition).

¹⁷⁹ 565 F. App’x 172 (4th Cir. 2014).

¹⁸⁰ *Id.* at 174.

¹⁸¹ *Id.*

¹⁸² *Id.* at 175; see *infra* note 241 and accompanying text (discussing this petition).

¹⁸³ See *supra* notes 48–59 and accompanying text; cf. *supra* notes 60–65 and accompanying text (describing subsequent Second Circuit discussion of the interrelationship between an abuse of discretion and a clear error review in CVRA mandamus review).

¹⁸⁴ See *supra* notes 66–71 and accompanying text; cf. *supra* notes 72–78 and accompanying text (describing subsequent Ninth Circuit discussion of the interrelationship of the *Kenna* review standard and traditional mandamus review).

¹⁸⁵ See *supra* notes 79–86 and accompanying text.

¹⁸⁶ See *id.*

¹⁸⁷ See *supra* notes 168–82 and accompanying text.

Six appellate circuits have interpreted the CVRA to require a traditional mandamus review standard regarding CVRA petitions, i.e. the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits.¹⁸⁸ In this connection, the Fifth, Eighth, and Eleventh Circuits have adopted the three-part Court standard requiring the unavailability of an alternative adequate means to attain relief, a clear and indisputable right to the writ, and the appropriateness of the grant of the writ under the circumstances.¹⁸⁹ The Sixth, Tenth, and District of Columbia Circuits also require a petitioner's showing of a clear and indisputable right to the writ. The Tenth and District of Columbia Circuits additionally reference the unavailability of other adequate means to relief. The Sixth and the Tenth Circuits state that a clear and indisputable right to the writ can be demonstrated by a showing of a "clear" abuse of discretion. The Sixth Circuit also includes a showing of the appropriateness of the requested relief under the circumstances. The District of Columbia Circuit additionally requires a showing that the trial court has a clear duty to act.¹⁹⁰ Thus, all of these circuits require a CVRA mandamus petitioner to demonstrate a clear and indisputable right to relief, plus additional specified factors associated with the traditional mandamus remedy, in order to obtain CVRA mandamus relief.

A conflict in the circuits has clearly developed between the majority of appellate circuits (i.e., six circuits) that have adopted some variation of the traditional mandamus review standard regarding CVRA petitions and the minority of circuits (i.e., two or three circuits) that have adopted a review standard more like an ordinary appellate review standard. Additionally, a significant minority of circuits (i.e., three or four circuits) have not yet adopted a CVRA mandamus review standard.¹⁹¹ This conflict must await resolution either by congressional action amending the CVRA to specify the desired review standard for CVRA mandamus petitions or by Court action interpreting the CVRA and resolving the existing conflict in the circuits.¹⁹²

In the meantime, however, the federal appellate courts continue to review CVRA mandamus petitions. The next section of this Article examines the outcomes regarding the CVRA mandamus petitions reviewed thus far and the actual impact the appellate courts' differing review standards (or lack of review standards) have had on the outcomes of these petitions.

IV. THE OUTCOMES OF CVRA MANDAMUS PETITIONS AND THE IMPACT OF THE REVIEW STANDARD UTILIZED

A. The Overall Outcomes of CVRA Mandamus Petitions

As described in the CVRA Mandamus Outcomes Table below, in the ten years since the enactment of the CVRA, the federal appellate courts have resolved 73 mandamus petitions filed pursuant to the CVRA. These mandamus petitions have involved 62 separate petitioners (or petitioner groups). Seven of these 62 petitioners have been the same (regarding the "Amy" and/or "Vicky" petitions), but they have filed their petitions regarding separate underlying prosecutions.¹⁹³

¹⁸⁸ See *supra* notes 90–167 and accompanying text.

¹⁸⁹ See *supra* notes 112–26, 147–67 and accompanying text.

¹⁹⁰ See *supra* notes 90–111, 128–46 and accompanying text.

¹⁹¹ See *supra* notes 183–90 and accompanying text.

¹⁹² See *infra* notes 468–69 and accompanying text.

¹⁹³ See *infra* CVRA Mandamus Outcomes Table. The mandamus petitions included in the table were identified through two sources, i.e., the annual reports prepared for Congress by the Administrative Office of the United States Courts pursuant to the CVRA and a search of the LexisNexis data base. The Administrative Office of the

Overall, the federal appellate courts have denied or dismissed 62 (85%) of the 73 CVRA mandamus petitions.¹⁹⁴ The appellate courts have denied or dismissed 23 of these petitions (indicated with an “*” in the table), with limited discussion, on the ground that the petitioners’ claims were not properly raised pursuant to the CVRA, e.g., petitioners attempting to raise claims in connection with civil proceedings, petitioners attempting to intervene in criminal proceedings unrelated to them, and petitioners attempting to utilize the CVRA mandamus remedy to pursue relief on other grounds.¹⁹⁵ In the remaining 39 CVRA mandamus petition denials, the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA before ultimately determining to deny the requested relief.¹⁹⁶ Of the 73 CVRA mandamus petitions reviewed, the federal appellate courts have granted 11 petitions (15%) to some degree.¹⁹⁷

CVRA MANDAMUS OUTCOMES TABLE

FIRST CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Haas</i> , No. 08-2378	Victim definition/CVRA eligibility/	Denied

United States Courts has thus far filed nine annual reports with Congress describing the CVRA mandamus actions brought and their outcomes, with the most recent report filed on April 30, 2014. *See* Justice for All Act of 2004, Pub. L. No. 108-405, § 104(a), 118 Stat. 2260, 2265. A search of the LexisNexis United States Courts of Appeals data base was also conducted for CVRA mandamus petitions resolved as of October 30, 2014, ten years after the enactment of the CVRA, using the search terms “Crime Victims’ Rights Act” or “Crime Victims Rights Act” or 3771. Thus, the materials described in this Article are current, as of October 30, 2014.

In addition to these mandamus petitions filed pursuant to the CVRA, in *United States v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010), the Government raised a crime victim-related issue in its appeal of an offender’s sentence, as authorized by the CVRA. *See* 18 U.S.C.A. § 3771 (d)(4) (West Pamp. 2014). The federal appellate courts that have addressed the issue have generally concluded that the CVRA does not authorize non-parties, including crime victims, to appeal an offender’s sentence. *See, e.g., United States v. Fast*, 709 F.3d 712, 715–18 (8th Cir. 2013), *vacated and remanded on other grounds sub nom. Vicky v. Fast*, 134 S. Ct. 1934 (2014); *In re Amy Unknown*, 701 F.3d 749, 755–56 & n.5 (5th Cir. 2012) (en banc), *vacated and remanded on other grounds sub nom. Paroline v. United States*, 134 S. Ct. 1710 (2014); *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301, 1304–07 (11th Cir. 2012); *United States v. Monzel*, 641 F.3d 528, 540–44 (D.C. Cir. 2011); *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52–55 (1st Cir. 2010); *In re Brock*, 262 F. App’x 510, 513 (4th Cir. 2008); *United States v. Hunter*, 548 F.3d 1308 (10th Cir. 2008); *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017–18 (9th Cir. 2006); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562–63 (2d Cir. 2005); *compare In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010), *with In re Siler*, 571 F.3d 604, 608–09 (6th Cir. 2009).

¹⁹⁴ *See infra* CVRA Mandamus Outcomes Table.

¹⁹⁵ *See id.*; *see also, e.g., In re Mujaddid*, 563 F. App’x 874 (3d Cir. 2014) (attempting to utilize the CVRA mandamus remedy to obtain other forms of relief); *In re Bond*, No. 13-2462 (4th Cir. Dec. 6, 2013) (attempting to intervene in criminal proceedings unrelated to him); *In re Nabaya*, 481 F. App’x 64 (4th Cir. 2012) (attempting to assert CVRA claims in connection with a civil proceeding); *In re Hamilton*, No. 10-3294 (7th Cir. Oct. 6, 2010) (attempting to intervene in criminal proceedings unrelated to her); *In re Ross*, 380 F. App’x 356 (4th Cir. 2010) (attempting to use the CVRA mandamus remedy to attack the legality of his confinement); *Williamson v. U.S. Dist. Court*, No. 06-74584 (9th Cir. Sept. 29, 2006) (attempting to utilize the CVRA mandamus remedy to pursue claims against government officials and to seek a wide range of relief, including an injunction prohibiting the use of “microwaves” on him).

¹⁹⁶ *See, e.g., In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014); *In re Acker*, 596 F.3d 370 (6th Cir. 2010); *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 555.

¹⁹⁷ *See, e.g., In re Morning Star Packing Co.*, 711 F.3d 1142 (9th Cir. 2013); *In re Allen*, 701 F.3d 734 (5th Cir. 2012); *In re Amy*, 641 F.3d 528 (D.C. Cir. 2011). Although the Fifth Circuit initially granted mandamus, in part, to stay trial court action pending further order of the appellate court, it ultimately denied the petitioners’ mandamus petition in *In re Dean*, 527 F.3d 391, 393, 396 (5th Cir. 2008). *See infra* notes 352–63 and accompanying text (discussing this petition). Therefore, this petition is included with the mandamus petition denials rather than those petitions that have been granted.

(Oct. 30, 2008).*	Hearing	
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SECOND CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Galvis</i> , 564 F.3d 170 (2009).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re W.R. Huff Asset Mgmt. Co.</i> , 409 F.3d 555 (2005).	Confer/Notice/ Fairness/Restitution	Denied
<i>In re Local #46 Metallic Lathers Union</i> , 568 F.3d 81 (2009).	Victim definition/CVRA eligibility/Restitution	Denied

THIRD CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Dawalibi</i> , 338 F. App'x 112 (2009).*	Victim definition/CVRA eligibility/ Fairness/Privacy	Denied
<i>In re El</i> , 553 F. App'x 113 (2014).*	Victim definition/CVRA eligibility	Denied
<i>In re Mujaddid</i> , 563 F. App'x 874, <i>cert. denied sub nom. Mujaddid v. U.S. Dist. Court</i> , 135 S. Ct. 133 (2014).*	Victim definition/CVRA eligibility	Denied
<i>In re Walsh</i> , 229 F. App'x 58 (2007).*	Victim definition/CVRA eligibility	Denied
<i>In re Zackey</i> , No. 10-3772, 2010 U.S. App. LEXIS 19914 (Sept. 22, 2010).	Hearing	Denied

FOURTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Bankr. Estate of AGS, Inc.</i> , 565 F. App'x 172 (2014).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re Bond</i> , 547 F. App'x 348 (2013).*	Victim definition/CVRA eligibility	Dismissed
<i>In re Brock</i> , 262 F. App'x 510 (2008).	Hearing/Fairness/Disclosure of presentence report	Denied

<i>In re</i> Doc, 264 F. App'x 260 (2007).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> Gyamfi, 362 F. App'x 385 (2010).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Nabaya, 481 F. App'x 64 (2012).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Rochester, 292 F. App'x 226 (2008).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Rodriguez, 275 F. App'x 192 (2008).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Ross, 380 F. App'x 356 (2010).*	Victim definition/CVRA eligibility	Dismissed
<i>In re</i> Searcy, 202 F. App'x 625 (2006).*	Victim definition/CVRA eligibility	Denied

FIFTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Allen, 701 F.3d 734 (2012).	Victim definition/CVRA eligibility	Granted (for trial court to consider new arguments raised re victim status)
<i>In re</i> Allen, 568 F. App'x 314 (2014).	Restitution	Denied
<i>In re</i> Amy Unknown, 701 F.3d 749 (2012), vacated and remanded sub nom. Paroline v. United States, 134 S. Ct. 1710 (2014).	Restitution	Granted (re restitution determination), but vacated by the Court and remanded
<i>In re</i> Amy Unknown, No. 13-20485 (Aug. 30, 2013).	Restitution	Granted (re restitution determination)
<i>In re</i> Butler, No. 06-20848 (Nov. 1, 2006).	Restitution/Abatement	Denied
<i>In re</i> Community Housing Fund, No. 11-11155 (Dec. 9, 2011).	Restitution	Denied
<i>In re</i> Dean, 527 F.3d 391 (2008).	Notice/Confer	Granted in part (to temporarily stay further trial court action); Denied
<i>In re</i> Fisher, 640 F.3d 645 (2011).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> Fisher, No. 11-10006, 2011 U.S. App. LEXIS 26500 (Oct. 1, 2011).	Victim definition/CVRA eligibility/ Restitution	Denied
<i>In re</i> May, No. 13-30773 (July 24, 2013).*	Victim definition/CVRA eligibility	Denied

<i>In re</i> Thaler, No. 13-40171 (Feb. 15, 2013).	Delay	Dismissed as moot
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SIXTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Acker, 596 F.3d 370 (2010).	Victim definition/CVRA eligibility/Notice/Restitution	Denied
<i>In re</i> McNulty, 597 F.3d 344 (2010).	Victim definition/CVRA eligibility/Restitution	Denied
<i>In re</i> Siler, 571 F.3d 604 (2009).	Disclosure of presentence report	Denied
<i>In re</i> Simons, 567 F.3d 800 (2009).	Fairness/Dignity	Granted (to require trial court action on pending motion)

SEVENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Bustos, No. 10-2752 (July 26, 2010).	Intervention in proceedings/Hearing	Denied
<i>In re</i> Hamilton No. 10-3294 (Oct. 6, 2010).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Hamilton, No. 12-1059 (Jan. 12, 2012).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Oak Brook Bank, No. 06-2331 (May 12, 2006).	Victim definition/CVRA eligibility/Hearing/Restitution	Denied
<i>In re</i> Sabbia, No. 07-1368 (Feb. 21, 2007).*	Victim definition/CVRA eligibility	Denied
<i>In re</i> Sabbia, No. 10-3316, 2010 U.S. App. LEXIS 27411 (Oct. 7, 2010).*	Victim definition/CVRA eligibility	Denied

EIGHTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re</i> Vicky, 709 F.3d 712 (2013), <i>vacated and remanded sub nom.</i> Vicky v. Fast, 134 S. Ct. 1934 (2014).	Restitution	Denied, but vacated by the Court and remanded

NINTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Amy & Vicky</i> , 710 F.3d 985 (2013).	Restitution	Granted in part (to determine an amount of restitution), Denied in part
<i>In re Amy & Vicky</i> , 714 F.3d 1165 (2013).	Restitution	Denied
<i>In re Amy & Vicky</i> , 698 F.3d 1151 (2012), <i>vacated and remanded sub nom. Amy and Vicky v. U.S. Dist. Court</i> , 134 S. Ct. 1959 (2014).	Restitution	Denied, but vacated by the Court and remanded
<i>In re Andrich</i> , 668 F.3d 1050 (2011).	Victim definition/CVRA eligibility	Denied
<i>Kenna v. U.S. Dist. Court</i> , 435 F.3d 1011 (2006).	Hearing	Granted (re right to be heard and to permit motion for re-opening of sentencing proceeding)
<i>In re Kenna</i> , 453 F.3d 1136 (2006).	Disclosure of presentence report	Denied
<i>In re K.K.</i> , 756 F.3d 1169 (2014).	Privacy	Denied (but ordered preliminary in camera review of documents)
<i>In re Mikhel</i> , 453 F.3d 1137 (2006).	Exclusion	Granted in part (for trial court to conduct CVRA exclusion analysis)
<i>In re Morning Star Packing Co.</i> , 711 F.3d 1142 (2013).	Restitution	Granted (to make restitution determination using correct standards)
<i>In re Parker</i> , Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (Feb. 27, 2009).	Victim definition/CVRA eligibility/ Exclusion	Granted (re victim status and to make particularized finding re exclusion of each petitioner)

<i>In re Stake Ctr. Locating, Inc.</i> , 717 F.3d 1089 (2013).	Restitution	Denied (as premature)
<i>In re Stake Ctr. Locating, Inc.</i> , 731 F.3d 949 (2013).	Forfeiture	Denied
<i>Williamson v. U.S. Dist. Court</i> , No. 06-74584 (Sept. 29, 2006).*	CVRA eligibility	Denied
<i>In re Zito</i> , No. 09-70554 (Feb. 26, 2009).	Privacy	Denied without prejudice

TENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Antrobus</i> , 519 F.3d 1123 (2008).	Victim definition/CVRA eligibility	Denied
<i>In re Antrobus</i> , No. 08-4013, 2008 U.S. App. LEXIS 27527 (Feb. 1, 2008).	Victim definition/CVRA eligibility discovery	Denied
<i>In re Antrobus</i> , 563 F.3d 1092 (2009).	Victim definition/CVRA eligibility issue re-opening	Denied
<i>In re Olesen</i> , 447 F. App'x 868 (2011).	Delay/Fairness	Denied
<i>In re Pinson</i> , No. 11-1425 (Oct. 14, 2011).*	CVRA filing fee provisions	Dismissed as moot

ELEVENTH CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Aquino</i> , No. 12-11757-B (Apr. 6, 2012).	Victim definition/CVRA eligibility/Hearing	Denied
<i>In re Aquino</i> , No. 12-13238-B (June 22, 2012)	Victim definition/CVRA eligibility	Denied
<i>In re Instituto Costarricense de Electricidad</i> , Nos. 11-12707-G, 11-12708-G (June 17, 2011).	Victim definition/CVRA eligibility	Denied
<i>In re Miller</i> , No. 06-15182 (Sept. 28, 2006).*	Victim definition/CVRA eligibility	Denied
<i>In re Searcy</i> , No. 06-14951 (Sept. 15, 2006).*	Victim definition/CVRA eligibility	Denied
<i>In re Stewart</i> , 552 F.3d 1285 (2008).	Victim definition/CVRA eligibility/Hearing	Granted (re victim status)
<i>In re Stewart</i> , 641 F.3d 1271 (2011).	Restitution	Denied

<i>In re Wellcare Health Plans, Inc.</i> , 754 F.3d 1234 (2014).	Victim definition/CVRA eligibility/ Restitution	Denied
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DISTRICT OF COLUMBIA CIRCUIT

Petitioner	CVRA Primary Issue(s)	Outcome
<i>In re Amy</i> , 641 F.3d 528 (2011).	Restitution	Granted in part (to determine amount of restitution)
<i>In re Chacin de Henriquez</i> , No. 10-3051, 2010 U.S. App. LEXIS 12129 (June 11, 2010).	Victim definition/CVRA eligibility	Denied without prejudice to renewal
<i>In re Jacobsen</i> , No. 05-7086, 2005 U.S. App. LEXIS 13990 (July 8, 2005).	Hearing	Denied as moot
<i>Rodriguez v. Editor in Chief, Legal Times</i> , No. 07-5234, 2008 U.S. App. LEXIS 28154 (Apr. 23, 2008).*	Victim definition/CVRA eligibility	Denied
<i>Sieverding v. American Bar Ass'n</i> , No. 07-5126, 2007 U.S. App. LEXIS 13756 (June 8, 2007).*		Dismissed for lack of prosecution

B. The Issues Addressed in CVRA Mandamus Petitions

As reflected in the CVRA Mandamus Outcomes Table, the issues most frequently addressed in the mandamus petitions filed in the ten years since the CVRA's enactment have concerned 1) the CVRA crime victim definition and petitioners' eligibility for CVRA crime victim status; 2) the CVRA right to restitution; and 3) the CVRA participatory rights to confer with the prosecutor, to notice of proceedings, not to be excluded from the proceedings, and to be heard in the proceedings.¹⁹⁸ In all, 68 of the 73 CVRA mandamus petitions (93%) involve some aspect of these issues. Of the 50 petitions in which the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA, 45 (90%) address these issues. To illustrate the extent to which the specific mandamus review standards have had an impact on the outcomes of CVRA petitions addressing these issues, the following discussion of the outcomes of these 45 petitions is grouped by appellate circuit review standard. These three groups are, as follows: the traditional mandamus review standard adopted by the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits; the more expansive review standards adopted by the Second and Ninth Circuits, and arguably the Third Circuit; and the "standardless" First, Fourth, and Seventh Circuits.¹⁹⁹

¹⁹⁸ See *supra* CVRA Mandamus Outcomes Table.

¹⁹⁹ See *id.*; *supra* notes 46-192 and accompanying text (discussing the CVRA mandamus review standards); *cf. infra* note 343 (describing the outcomes regarding the five petitions that have raised other CVRA issues).

I. CVRA Crime Victim Status

The issue most frequently addressed in the CVRA mandamus petitions resolved thus far concerns petitioners' attempts to be deemed eligible "crime victims" for purposes of asserting CVRA rights.²⁰⁰ In their mandamus review, the federal appellate courts have thus considered federal trial courts' application of the CVRA "crime victim" definition, i.e., whether a petitioner is a "person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia,"²⁰¹ a definition incorporating well-known concepts of causation and foreseeability of harm.²⁰²

a. More Expansive Review Standard Circuits

Utilizing their more expansive review standards, the Second and Ninth Circuits have each reviewed two mandamus petitions dealing with a petitioner's eligibility for CVRA crime victim status.²⁰³ Applying its abuse of discretion review standard, the Second Circuit has denied mandamus in both of the cases it has considered.²⁰⁴ In *In re Local #46 Metallic Lathers Union*,²⁰⁵ in which the defendant was convicted of a money laundering conspiracy, the trial court determined that the defendant's subsequent use of the laundered cash to make employee payments that deprived the petitioner union of related union benefit funds did not make the union a CVRA victim of the defendant's money laundering crime entitled to restitution.²⁰⁶ The trial court found that the defendant's

²⁰⁰ See *supra* CVRA Mandamus Outcomes Table.

²⁰¹ 18 U.S.C.A. § 3771(e) (West Pamp. 2014); see *id.* (identifying eligible representatives for minor, incompetent, incapacitated, and deceased crime victims). During the discussion of the CVRA on the Senate floor, Senator Jon Kyl, one of the CVRA's primary sponsors, stated that the legislation defined a "crime victim" as a "person directly and proximately harmed as a result of any offense, felony or misdemeanor. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." 150 CONG. REC. S4,270 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl); *accord id.* (statement of Sen. Dianne Feinstein); see 150 CONG. REC. S10,912 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (indicating the inclusion of victims "whether or not they are the victim of the count charged"). But see *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 564 (stating that the CVRA does not confer rights against "individuals who have not been convicted of a crime").

²⁰² See, e.g., *In re Fisher*, 640 F.3d 645, 648 (5th Cir. 2011); *In re McNulty*, 597 F.3d 344, 349–53 (6th Cir. 2010); cf. Aaronson, *supra* note 8, at 637–42 (discussing the CVRA victim definition); Kyl et al., *supra* note 8, at 594–95 (stating that the CVRA crime victim definition "invokes" the concept of foreseeability and is not limited to the crime of conviction). The CVRA requirement of direct and proximate harm is similar to the crime victim definition used in the primary federal restitution statutes:

[T]he term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C.A. §§ 3663(a)(2), 3663A(a)(2) (West 2000 & Pamp. 2014) (defining victim status in the primary federal discretionary and mandatory restitution provisions); see Kyl et al., *supra* note 8, at 594 & n.65 (stating that the CVRA crime victim definition is "based on" these restitution statutes); cf. 18 U.S.C.A. §§ 1593(c), 2248(c), 2259(c) (West 2000 & Supp. 2014) (defining a "victim" as "the individual harmed as a result of a commission of" the applicable crime in the mandatory restitution provisions regarding human trafficking, sexual abuse, and sexual exploitation and abuse of children).

²⁰³ The Third Circuit has not reviewed any mandamus petitions regarding this issue. See *supra* CVRA Mandamus Outcomes Table.

²⁰⁴ See *infra* notes 205–12 and accompanying text (describing these petitions).

²⁰⁵ 568 F.3d 81 (2d Cir. 2009).

²⁰⁶ *Id.* at 85–88.

crime of conviction was complete at the moment the defendant received the cash.²⁰⁷ The Second Circuit found that the trial court did not abuse its discretion in finding the union was not directly and proximately harmed by the defendant's offense.²⁰⁸

In *In re Galvis*,²⁰⁹ the Second Circuit also found that the trial court did not abuse its discretion in denying CVRA victim status to the mother of a decedent who was murdered in Columbia by members of an organization that the offender led and regarding which he was convicted in Columbia.²¹⁰ The offender, however, was extradited to the United States and convicted for drug conspiracy charges.²¹¹ The appellate court found no clear error in the trial court's factual finding that there was an insufficient causal connection between the Columbian murder and the drug conspiracy conviction charge to establish the direct and proximate harm required for CVRA victim status.²¹²

Without a discussion of the specific facts in *In re Andrich*,²¹³ the Ninth Circuit found the trial court did not clearly err as a matter of law or abuse its discretion in concluding that the CVRA rights did not apply to the petitioners.²¹⁴ The appellate court concluded that the mandamus petition should be denied under either the CVRA or its traditional mandamus authority.²¹⁵ On the other hand, again without a discussion of the specific facts in *In re Parker*,²¹⁶ the Ninth Circuit granted a CVRA mandamus petition addressing crime victim status.²¹⁷ The appellate court found that the trial court had erred in its conclusion that the petitioners in the underlying air pollution prosecution did not satisfy the CVRA crime victim definition and thus were not eligible for the CVRA-prescribed determination concerning their exclusion from court proceedings.²¹⁸

b. Traditional Review Standard Circuits

The appellate circuits utilizing the traditional mandamus review standard have also denied most, but not all, of the petitions regarding CVRA victim status. The Eleventh Circuit has denied petitions in which the petitioner has actually played a role in the

²⁰⁷ *Id.* at 86.

²⁰⁸ *Id.* at 85 & n.2 (applying similar "victim" definition of applicable restitution statute (18 U.S.C.A. § 3663A(a)(2) (West 2000 & Pamp. 2014)) because the petitioner had presented its case under this provision). Although the defendant planned to use the laundered money to pay employees in cash and thereby avoid taxes and union obligations, he was only charged with and convicted of the money laundering crime. The appellate court found the fact that the Government agreed not to charge the defendant for acts related to defrauding union benefit funds further supported the trial court's determination that this conduct was separate from the money laundering conviction offense. *See id.* at 86–87.

²⁰⁹ 564 F.3d 170 (2d Cir. 2009).

²¹⁰ *Id.* at 174–76.

²¹¹ *Id.* at 172.

²¹² *See id.* at 175–76; *cf. supra* notes 60–65 and accompanying text (discussing the review standard).

²¹³ 668 F.3d 1050 (9th Cir. 2011).

²¹⁴ *Id.* at 1051.

²¹⁵ *See id.*; *supra* notes 73–78 and accompanying text (discussing the review standard). The petitioners had asserted that they were victims of additional unrelated and uncharged federal offenses committed after the defendant entered a plea to mail fraud. The trial court denied their motion to intervene in the criminal case and to be heard at the defendant's sentencing. *See United States v. McMahan*, No. 8:07-cr-00249-CJC (C.D. Cal. Nov. 11, 2011).

²¹⁶ Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (9th Cir. Feb. 27, 2009).

²¹⁷ *Id.* at *1.

²¹⁸ *See id.*; *infra* notes 381–84 and accompanying text (discussing this petition); *see also* 18 U.S.C.A. § 3771(a)(3) (West Pamp. 2014); *cf. United States v. W.R. Grace*, 597 F. Supp. 2d 1157, 1159–66 (D. Mont. 2009) (describing the basis of the trial court's findings regarding the petitioners' crime victim status), *vacated*, CR 05-07-M-DWM, 2009 U.S. Dist. LEXIS 124996 (D. Mont. Feb. 27, 2009).

underlying crime regarding which CVRA crime victim status has been sought.²¹⁹ The Sixth Circuit concluded that the trial court did not abuse its discretion in finding that an employee, who refused to participate in his defendant company's antitrust conspiracy and was subsequently fired and "blackballed" in the related industry, was not a CVRA victim of the conspiracy and that the petitioner had not demonstrated a clear and indisputable right to the writ.²²⁰ In two related mandamus proceedings, the Fifth Circuit considered a trial court's denial of CVRA victim status to the petitioners who invested funds to gain city approval and financing of housing projects that were granted to co-defendants who engaged in a public corruption-related bribery conspiracy.²²¹ The appellate court found that the trial court's factual findings—that the petitioners' claims that they were directly and proximately harmed by the defendants' bribery conspiracy were too speculative—were not clearly erroneous, and the petitioners had not clearly and indisputably established their CVRA victim status.²²²

In *In re Antrobus*,²²³ the Tenth Circuit considered a trial court's denial of CVRA victim status to the parents of a decedent subsequently murdered (with others) with a gun the defendant illegally sold to the murderer when he was a juvenile.²²⁴ The appellate court found that the trial court was not clearly wrong in concluding the defendant's crime of the gun sale was "too factually and temporally attenuated" from the murder over seven months later when the murderer was an adult, and that the murderer's acts were an "independent, intervening cause" of the petitioners' daughter's death.²²⁵ Although characterizing it as a "difficult case," the Tenth Circuit concluded that the petitioners had not established a clear and indisputable right to the writ.²²⁶

²¹⁹ See *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014) (finding no clear abuse of discretion in trial court denial of CVRA victim status to un-indicted co-conspirator and no showing of clear and indisputable right to the writ); *In re Aquino*, No. 12-13238-B (11th Cir. June 22, 2012) (finding no clear error in trial court denial of CVRA victim status to persons who sought fraudulent foreign worker visas from the offender and her co-conspirators); *In re Aquino*, No. 12-11757-B (11th Cir. Apr. 6, 2012) (finding no clearly erroneous factual findings or misapplication of law regarding the above-described victim status determination, actual trial court affording of right to be heard regarding victim status, and no entitlement to relief under any potential CVRA review standard); *In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G, 11-12708-G (11th Cir. June 17, 2011) (finding that the trial court did not clearly err in denying CVRA victim status to the entity that functioned as the offenders' co-conspirator); cf. 18 U.S.C.A. § 3771(d)(1) (prohibiting a person "accused of the crime" from obtaining relief pursuant to the CVRA).

²²⁰ See *In re McNulty*, 597 F.3d 344, 349–53 (6th Cir. 2010); *supra* notes 136–37 and accompanying text (discussing the review standard).

²²¹ *In re Fisher*, 640 F.3d 645 (5th Cir.), *reconsideration denied*, 649 F.3d 401 (5th Cir. 2011); *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500 (5th Cir. Oct. 1, 2011).

²²² *Fisher*, 640 F.3d at 647–50 (addressing trial court findings regarding speculation as to the role that the bribery played in the award of city support to the co-defendants rather than the petitioners and the petitioners' decision to invest funds in their projects); *Fisher*, 2011 U.S. App. LEXIS 26500, at *1–4 (finding no clear and indisputable error in the trial court's determination regarding the petitioners' victim status).

²²³ 519 F.3d 1123 (10th Cir. 2008).

²²⁴ *Id.* at 1123–24.

²²⁵ *Id.* at 1125–26 (quoting *United States v. Hunter*, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 413, at *4–5 (D. Utah Jan. 3, 2008)).

²²⁶ See *id.* at 1125–26, 1130–31; *supra* notes 90–97, 104–10 and accompanying text (discussing the review standard). A contested fact regarding the causation issue was whether the defendant had heard the murderer say, at the time of the gun sale, that he intended to commit a bank robbery (i.e., a crime different than the one in which the petitioners' daughter and others were murdered). The trial judge had stated that his determination of CVRA victim status would not change even assuming the existence of this fact. See *Antrobus*, 519 F.3d at 1124, 1125 & n.1; *United States v. Hunter*, No. 2:07CR307DAK, 2008 U.S. Dist. LEXIS 1323, at *4 (D. Utah Jan. 8, 2008); see also *In re Antrobus*, 563 F.3d 1092, 1094 (10th Cir. 2009) (denying mandamus based on petitioners' claim of newly discovered evidence establishing that the defendant heard the murderer say that he planned to rob a bank with the gun purchased from the defendant); cf. *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *7 (10th Cir. Feb. 1, 2008) (finding no clear abuse of discretion in trial court's denial of discovery of

The federal appellate circuits utilizing the traditional mandamus review standard have granted two CVRA mandamus petitions concerning CVRA crime victim status.²²⁷ In *In re Allen*,²²⁸ the Fifth Circuit reviewed a petition in which the trial court, finding insufficient evidence of harm, had initially denied the Government's motion to grant victim status to identified community members who resided in the area of the defendants' Clean Air Act violations.²²⁹ Four years later, and two months before sentencing, the petitioners, now through their own pro bono counsel, again attempted to be declared CVRA crime victims. The trial judge denied their request as untimely without addressing the merits of their claim.²³⁰ In its mandamus review of the trial court's action, the Fifth Circuit found that the CVRA does not have a time limit for obtaining trial court relief that would preclude the potential granting of relief under the facts of this case.²³¹ The appellate court found that the circuit's three-part mandamus standard was satisfied, including the fact that it was clear and indisputable that no time bar prevented the trial court from considering the new arguments made by the petitioners' counsel in support of their victim status and the consequent appropriateness of the issuance of the writ.²³² The Fifth Circuit granted the petitioners' writ to require the trial court to consider the new arguments presented by their counsel in support of the petitioners' victim status.²³³

In *In re Stewart*,²³⁴ the Eleventh Circuit considered a mandamus petition brought by home purchasers seeking CVRA victim status regarding a defendant bank official who conspired to deprive the bank of honest services by charging the petitioners an additional mortgage brokerage fee which he and his co-conspirator split.²³⁵ The trial court found that the petitioners were not victims of the defendant's conspiracy to deprive the bank of honest services and denied their request to be heard.²³⁶ The appellate court rejected the respondents' claim that the petitioners were not harmed by the conspiracy because their

Government investigative files and grand jury transcripts in petitioners' attempt to establish CVRA victim status); *supra* notes 98–103 and accompanying text (describing this petition).

In denying mandamus in another case, the Sixth Circuit found it unnecessary to resolve the petitioners' claim that the trial court had refused to recognize them as CVRA crime victims. Regardless whether the petitioners met the CVRA crime victim definition, the appellate court found that the trial court had allowed the petitioners a full opportunity for participation in the proceedings, as petitioners themselves acknowledged, and had actually afforded them the status of CVRA crime victims. See *In re Acker*, 596 F.3d 370, 372–73 (6th Cir. 2010); *supra* notes 131–35 and accompanying text (discussing the review standard).

The District of Columbia Circuit denied without prejudice to renewal a mandamus petition seeking a writ directing the trial court to decide the petitioners' CVRA victim status. Because this matter was already proceeding toward resolution in the trial court, the appellate court determined that mandamus relief was not currently warranted. See *In re Chacin de Henriquez*, No. 10-3051, 2010 U.S. App. LEXIS 12129, at *1–2 (D.C. Cir. June 11, 2010).

²²⁷ See *supra* CVRA Mandamus Outcomes Table.

²²⁸ 701 F.3d 734 (5th Cir. 2012).

²²⁹ *Id.* at 735.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*; compare *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 848, 852–54 (S.D. Tex. 2012) (finding that it had previously applied an incorrect legal standard to determine the community members' victim status, reversing its prior ruling, and deeming the community members CVRA victims), with *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2011 U.S. Dist. LEXIS 37371 (S.D. Tex. Apr. 5, 2011), *reconsideration denied*, 2011 U.S. Dist. LEXIS 82818 (S.D. Tex. July 27, 2011) (describing the basis of the trial court's initial ruling regarding the community members' CVRA victim status). See generally Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623 (2010); Ashley Ferguson, Comment, *We're Victims, Too!: The Need for Greater Protection of Environmental Crime Victims Under the Crime Victims' Rights Act*, 19 PENN ST. ENVTL. L. REV. 287 (2011).

²³⁴ 552 F.3d 1285 (11th Cir. 2008).

²³⁵ *Id.* at 1286–87.

²³⁶ *Id.* at 1287.

real estate developers had agreed to pay their closing costs, including the inflated mortgage brokerage fee.²³⁷ The Eleventh Circuit found that the petitioners remained liable to the bank for the closing costs, regardless of the developers' agreement to pay the costs.²³⁸ As a result, the petitioners, as well as the bank, were directly and proximately harmed by the conspiracy and were CVRA victims. The appellate court granted the writ and ordered the trial court to recognize the petitioners as CVRA victims and afford them the CVRA rights associated with this status.²³⁹

c. "Standardless" Review Circuits

The Fourth Circuit, which has not adopted a CVRA mandamus review standard, has denied two mandamus petitions regarding a petitioner's crime victim status.²⁴⁰ One petition involved the bankruptcy estate of an entity that the defendant had utilized to carry out his health care fraud scheme. The appellate court found that neither the entity nor its creditors were directly and proximately harmed by the defendant's fraud offenses.²⁴¹ The other petition involved a petitioner who had become addicted to a prescription drug she used to treat chronic pain, and who sought CVRA victim status in the criminal prosecution of an entity accused of misbranding the drug with the intent to defraud or mislead.²⁴² Because the appellate court concluded that the petitioner's addiction-related harm was not directly and proximately caused by the defendant's misbranding of the drug, she did not qualify as a victim of the crime charged.²⁴³

2. Restitution

The CVRA provides crime victims the right to "full and timely restitution as provided in law."²⁴⁴ Thus, the CVRA does not provide an *additional* right to restitution for CVRA crime victims, but ensures the provision of restitution to the degree afforded by

²³⁷ *Id.* at 1288–89.

²³⁸ *Id.* at 1289.

²³⁹ *Id.*; see *supra* note 152–55, *infra* note 400 and accompanying text (discussing this petition). *But see Stewart*, 552 F.3d at 1290 (Wilson, J., dissenting) (finding no clear abuse of discretion or clear and indisputable right to the writ, as required under the traditional review standard). In finding that the petitioners had established their CVRA victim status, the appellate court stated that, as long as the requisite harm was established, a CVRA victim did not have to be named in the charging document or have an identity that constituted an element of the crime. *Id.* at 1289.

²⁴⁰ See *supra* CVRA Mandamus Outcomes Table.

²⁴¹ See *In re Bankruptcy Estate of AGS, Inc.*, 565 F. App'x 172, 174–75 (4th Cir. 2014) (describing the petitioner's ineligibility for restitution due to its lack of victim status); *supra* notes 179–82 and accompanying text (discussing the review standard).

²⁴² *In re Doe*, 264 F. App'x 260, 261 (4th Cir. Aug. 9, 2007).

²⁴³ See *id.* at 263–64 (describing the petitioner's ineligibility for restitution due to her lack of victim status). The appellate court found that the petitioner did not allege that she directly relied on or was even aware of the drug misbranding. Even assuming that she became aware of "common misperceptions" regarding the drug resulting from the misbranding, the appellate court found the causation chain between the misbranding and the petitioner's addiction was "too attenuated" to establish the requisite causation. See *id.*; *cf. id.* at 264–65 (King, J., concurring) (finding it unnecessary to resolve the causation issue in order to deny mandamus). The appellate court found it unnecessary to determine the applicable review standard because it concluded that the petitioner would not be entitled to relief even under the "lower standard" and concluded that the trial court did not abuse its discretion. See *id.* at 262, 264; *supra* note 173–75 and accompanying text (discussing the review standard).

The Seventh Circuit denied a petition that the appellate court found was prematurely filed in that the trial court had not expressly denied the petitioner CVRA victim status and was actually permitting the petitioner to participate in the determination of victim status. See *In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006).

²⁴⁴ 18 U.S.C.A. § 3771(a)(6) (West Pamp. 2014).

other statutes.²⁴⁵ The federal statutes include both mandatory and discretionary restitution provisions,²⁴⁶ with victim eligibility definitions in the primary restitution statutes similar to the definition adopted in the CVRA.²⁴⁷ Restitution is mandatory for all federal violent and property crimes in which an “identifiable” victim has suffered a physical injury or pecuniary loss.²⁴⁸ Restitution is discretionary regarding other crimes.²⁴⁹ Regarding property crimes, however, restitution is not mandatory if the court determines that the large number of victims makes restitution “impracticable” or the determination of complex factual issues regarding a victim’s loss would “complicate or prolong” the sentencing process such that the burden on the sentencing process outweighs the need to provide restitution.²⁵⁰ The court may also decline discretionary restitution if the complication and prolongation of sentencing proceedings required to fashion a restitution order outweigh the need for restitution.²⁵¹

The CVRA restitution-related mandamus claims thus far include those described in the previous section in which the petitioner was not deemed to be an eligible crime victim either under the CVRA or restitution statutory definition or both, and thus was not eligible for restitution.²⁵² They also include petitions, described in this section, by eligible crime victims who have contested the denial or grant of restitution in their individual cases. Almost half of these petitions involve the pursuit of restitution by two child pornography victims in multiple appellate circuits.²⁵³

a. Restitution Petitions Generally

i. *More Expansive Review Standard Circuits*

Applying its abuse of discretion review standard in *In re W.R. Huff Asset Management Co.*,²⁵⁴ the Second Circuit denied mandamus petitions brought by two groups of claimants that had purchased securities from an entity associated with defendants convicted of securities fraud.²⁵⁵ The interrelated criminal, civil, and bankruptcy proceedings involved potentially tens of thousands of victims. The petitioners sought to vacate a settlement agreement incorporating forfeiture of defendant assets in lieu of

²⁴⁵ See *Doe*, 264 F. App’x at 262 n.2; *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005); 150 CONG. REC. S4,268 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl) (stating that the CVRA restitution right, in combination with the rights to be heard and confer with the prosecutor, “means that existing restitution laws will be more effective”); *accord id.* (statement of Sen. Dianne Feinstein); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl) (repeating this statement and adding an endorsement of the “expansive definition” of restitution given in cited decisions); Kyl et al., *supra* note 8, at 610–11 (repeating this statement and describing the interplay between the CVRA restitution right and the restitution statutes).

²⁴⁶ See *infra* notes 247–51 and accompanying text.

²⁴⁷ See *supra* notes 201–02 and accompanying text (discussing victim definitions).

²⁴⁸ 18 U.S.C.A. § 3663A(c) (West 2000 & Pamp. 2014); see also 18 U.S.C.A. §§ 1593, 2248, 2259 (West 2000 & Supp. 2014) (describing the mandatory restitution provisions regarding human trafficking, sexual abuse, and sexual exploitation and abuse of children).

²⁴⁹ 18 U.S.C.A. § 3663 (West 2000 & Pamp. 2014); see also 18 U.S.C.A. § 3664 (West 2000 & Pamp. 2014) (describing restitution procedures including an initial award of restitution in the full amount of the victim’s loss).

²⁵⁰ 18 U.S.C.A. § 3663A(c)(3).

²⁵¹ See 18 U.S.C.A. § 3663(a)(1)(B)(ii).

²⁵² See, e.g., *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1240 (11th Cir. 2014); *In re Bankr. Estate of AGS, Inc.*, 565 F. App’x 172, 175 (4th Cir. 2014); *In re Fisher*, 640 F.3d 645, 650 (5th Cir.), *reconsideration denied*, 649 F.3d 401, 405 (5th Cir. 2011); *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500 (5th Cir. Oct. 1, 2011); *In re McNulty*, 597 F.3d 344, 353 (6th Cir. 2010); *In re Local #46 Metallic Lathers Union*, 568 F.3d 81, 88 (2d Cir. 2009); *In re Galvis*, 564 F.3d 170, 176 (2d Cir. 2009); *In re Doe*, 264 F. App’x 260, 264 (4th Cir. Aug. 9, 2007).

²⁵³ See *infra* notes 254–327 and accompanying text.

²⁵⁴ 409 F.3d 555 (2d Cir. 2005).

²⁵⁵ *Id.* at 564.

restitution or a fine at sentencing and adopted in connection with a related non-prosecution agreement that established a \$715 million fund to compensate victims of the securities fraud.²⁵⁶ The petitioners contended that the fund provided less than the required full restitution for the fraud victims and further limited their opportunities for additional recoveries by including releases and indemnifications for various defendants.²⁵⁷

The Second Circuit found that the trial court had not abused its discretion both in finding that the number of crime victims and the complexity of determining victim losses satisfied the above-described exceptions to the mandatory restitution provision and by accepting the settlement agreement as “reasonable substitute restitution.”²⁵⁸ The appellate court further noted that the trial court’s acceptance of the settlement in lieu of a complex restitution determination with an uncertain recovery was consistent with the CVRA’s provision regarding prosecutions with multiple crime victims.²⁵⁹ “In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights [identified in the CVRA], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.”²⁶⁰

In *In re Morning Star Packing Co.*,²⁶¹ the Ninth Circuit, however, found that the trial court had committed legal error in denying restitution to petitioners who claimed they were entitled to mandatory restitution for the full amount of their losses caused by the defendant’s crime.²⁶² The trial court had based its denial on determinations that it “would be an unduly complex and time-consuming exercise” to determine restitution, the defendant could not financially satisfy a restitution award, and the victims could pursue relief in civil proceedings.²⁶³ The appellate court concluded that the trial court committed legal error by basing its denial on these factors because the defendant’s financial capacity and the availability of a civil remedy are not proper statutory factors to consider regarding the imposition of mandatory restitution.²⁶⁴ In addition, the record was unclear whether the trial court had conducted the required statutory balancing test that the burden on the sentencing process outweighed the need for restitution in the case.²⁶⁵ The Ninth Circuit granted the mandamus petition and required the trial court to vacate its judgment denying restitution and conduct further proceedings using appropriate factors to determine whether to award restitution in the case.²⁶⁶

²⁵⁶ *Id.* at 557–59.

²⁵⁷ *See id.* at 560–61.

²⁵⁸ *Id.* at 563–64.

²⁵⁹ *See id.* at 564; *supra* notes 48–59; *infra* notes 344–51 and accompanying text (discussing this petition).

²⁶⁰ 18 U.S.C.A. § 3771(d)(2) (West Pamp. 2014).

²⁶¹ 711 F.3d 1142 (9th Cir. 2013).

²⁶² *Id.* at 1143–44.

²⁶³ *Id.*

²⁶⁴ *See id.*

²⁶⁵ *Id.* at 1144.

²⁶⁶ *See id.* (applying provisions in 18 U.S.C.A. §§ 3663A, 3664 (West 2000 & Pamp. 2014)). The Ninth Circuit denied, as “unripe,” a restitution-related petition filed prior to the defendant’s sentencing. *In re Stake Center Locating, Inc.*, 717 F.3d 1089, 1090 (9th Cir. 2013); *cf. In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006) (denying the petitioner’s restitution claim as premature without reference to a review standard). The Ninth Circuit subsequently found that the trial court did not abuse its discretion or commit legal error by denying the petitioner’s motion to compel the Government to initiate forfeiture proceedings to obtain property “traceable” to the defendant’s crimes, in addition to the restitution already awarded to the petitioner. The appellate court found that the CVRA did not provide a victim right to criminal forfeiture or impair the Government’s “broad discretion” regarding seeking such forfeiture. *See In re Stake Center Locating, Inc.*, 731 F.3d 949, 950–51 (9th Cir. 2013).

ii. *Traditional Review Standard Circuits*

Applying traditional mandamus review standards in *In re Allen*,²⁶⁷ the Fifth Circuit denied a CVRA petition regarding which the trial court had denied restitution, in part, based on a conclusion that the difficulties of determining restitution and resultant burden on the sentencing process outweighed any need for restitution.²⁶⁸ The petition concerned a Clean Air Act prosecution in which the trial court had determined that all persons who lived near the refinery that caused the violation during a specified period, demonstrated specified symptoms, and submitted victim impact statements by a specified date would be deemed CVRA crime victims.²⁶⁹ Over 800 individuals submitted victim impact statements and experts and over 90 victims had offered oral testimony in connection with the restitution claims.²⁷⁰ The trial court found that the crime victims had not established the factual basis for their restitution claims based on the presented evidence and that the difficulties of determining restitution and resultant burden on the sentencing process outweighed any need for restitution under the discretionary restitution provisions.²⁷¹ The Fifth Circuit found that the petitioners had not demonstrated that the trial court clearly and indisputably erred in invoking this exception to the discretionary grant of restitution.²⁷²

In *In re Acker*,²⁷³ the Sixth Circuit denied a restitution-related petition after adopting the traditional mandamus standard that included a required showing of a “clear abuse of discretion.”²⁷⁴ The petitioners sought 1) to vacate the plea agreement in this antitrust prosecution that did not include restitution “in deference to” the related pending civil litigation, and 2) to participate as parties to its renegotiation to include restitution.²⁷⁵ The appellate court found that the trial court had considered all appropriate factors and had reasonably applied the exception to the grant of restitution for cases in which the burden on the sentencing process due to a determination of restitution outweighed any need for restitution. The Sixth Circuit found that the CVRA did not compel restitution in this case and that the trial court had not abused its discretion in accepting the plea agreement.²⁷⁶

In *In re Stewart*,²⁷⁷ the Eleventh Circuit denied a restitution-related petition prior to its formal adoption of the traditional mandamus review standard, but based on its conclusion that a petitioner showing of a clearly erroneous factual finding by the trial court in denying restitution was required in the instant case regardless of what review standard was applied.²⁷⁸ The appellate court agreed with the trial court that the petitioners’

²⁶⁷ 568 F. App’x 314 (5th Cir. 2014).

²⁶⁸ *Id.* at 315–16.

²⁶⁹ *See id.*; *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2014 U.S. Dist. LEXIS 60172 (S.D. Tex. Apr. 30, 2014); *see also* 18 U.S.C.A. § 3663 (West 2000 & Pamp. 2014); *cf. supra* note 228–33 and accompanying text (describing previous grant of mandamus for the trial court to consider additional arguments regarding the petitioners’ CVRA victim status and the trial court’s subsequent redetermination of its previous denial of victim status).

²⁷⁰ *Allen*, 568 F. App’x at 315.

²⁷¹ *See id.* at 315–16.

²⁷² *See id.* The Fifth Circuit denied two other restitution-related CVRA mandamus petitions. *See In re Community Housing Fund*, No. 11-11155 (5th Cir. Dec. 9, 2011) (petition regarding restitution denied to the petitioner fund controlled by the defendants); *In re Butler*, No. 06-20848 (5th Cir. Nov. 1, 2006) (petition denied concerning an abated prosecution regarding which the petitioner claimed restitution).

²⁷³ 596 F.3d 370 (6th Cir. 2010).

²⁷⁴ *Id.* at 372–73.

²⁷⁵ *Id.* at 373.

²⁷⁶ *See id.*; *supra* notes 131–35, *infra* note 363 and accompanying text (discussing this petition).

²⁷⁷ 641 F.3d 1271 (11th Cir. 2011).

²⁷⁸ *Id.* at 1274–75.

claimed loss resulted from their builders' failure to complete their construction projects and the resulting default on their construction loans rather than the defendant's fraudulent collection of an additional mortgage brokerage fee. As a result, the petitioners were not entitled to restitution from the defendant and the appellate court denied their mandamus petition.²⁷⁹

b. "Amy" and "Vicky" Petitions

Seven CVRA mandamus petitions thus far have involved trial courts' application of the specific mandatory restitution provision concerning sexual exploitation and abuse of children.²⁸⁰ This provision requires mandatory restitution to an individual "harm[ed] as a result of" an applicable crime in the "full amount" of the victim's loss in specifically identified areas, such as medical services, therapy, attorney's fees, and lost income, as well as any other losses suffered as a "proximate result" of the crime.²⁸¹ The CVRA petitions have concerned one or both petitioners, designated by the pseudonyms "Amy" and "Vicky," who were sexually abused as children and whose abusers filmed and distributed images of the abuse. The petitions have addressed prosecutions in which Amy or Vicky, or both, have sought restitution in the full amount of their losses—as much as approximately \$3.4 million for Amy and \$1.3 million for Vicky—from defendants subsequently convicted of possessing, transporting, or distributing child pornography that included images of Amy and/or Vicky.²⁸² In addressing these petitions, the appellate courts reached different conclusions regarding whether all of a victim's claimed losses must be proximately caused by a defendant's conduct or only the "catchall" non-specific category of losses in the restitution statute. The Court ultimately resolved the conflict among the circuits regarding the proximate causation requirement in *Paroline v. United States*.²⁸³

i. *Traditional Review Standard Circuits*

Appellate circuits that had adopted traditional mandamus review standards initially addressed CVRA petitions regarding this issue. The Fifth Circuit was the first to address a CVRA mandamus petition filed by Amy regarding a child pornography possession prosecution in which two images of Amy were found among a large number of images of children on the defendant's computer.²⁸⁴ The trial court concluded that the

²⁷⁹ See *id.* at 1275 (finding that the petitioners approved the construction draws and were therefore on notice that the bank would deduct the mortgage-related fee from them); *supra* notes 156–59 and accompanying text (discussing the review standard); *cf. supra* notes 234–39 and accompanying text (granting mandamus regarding the petitioners' victim status).

²⁸⁰ See *infra* notes 281–327 and accompanying text.

²⁸¹ See 18 U.S.C.A. § 2259 (West 2000).

²⁸² In the years since the sexual abuse images were filmed, they have been widely circulated by and among third parties. At least 35,000 images of Amy's abuse have been found among the evidence in over 3,200 child pornography cases since 1998. Amy's restitution claim of approximately \$3.4 million is based on the total amount of her losses from the production, distribution, and possession of the images and primarily consists of losses for future psychological care and lost income. Restitution has been ordered to Amy in amounts ranging from \$100 to over \$3.5 million in at least 174 child pornography cases. See *In re Amy Unknown*, 701 F.3d 749, 752–53 & n.3 (5th Cir. 2012) (en banc), *vacated and remanded sub nom. Paroline v. United States*, 134 S. Ct. 1710 (2014). Vicky's losses of over \$1.3 million primarily include lost income, counseling expenses, and attorney's fees. She has received restitution to some extent in at least 309 prosecutions. See *United States v. Cantrelle*, No. 2:11-cr-00542-GEB, 2013 U.S. Dist. LEXIS 53767, at *18–23 (E.D. Cal. Apr. 15, 2013).

²⁸³ 134 S. Ct. at 1718, 1722–30; see *infra* notes 328–36 and accompanying text (discussing the Court's decision).

²⁸⁴ See *In re Amy*, 591 F.3d 792, 794 (5th Cir. 2009), *reh'g granted sub nom. In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011), *reh'g en banc granted*, 701 F.3d at 749, *vacated and remanded sub nom. Paroline*, 134 S. Ct. at 1710.

Government had failed to establish that the defendant's conduct proximately caused any of Amy's approximately \$3.4 million loss and denied her any restitution.²⁸⁵ In its mandamus review of the restitution determination, the initial appellate panel noted that existing precedent in other circuits required a proximate causation showing for restitution under this statute and that the Fifth Circuit had not yet construed this aspect of the statute.²⁸⁶ This panel denied mandamus, finding that Amy had neither clearly nor indisputably established the correctness of her contention that the statute did not require a showing of proximate causation between the categories of her claimed losses and the defendant's conduct.²⁸⁷

On rehearing, a different appellate panel concluded that the trial court had clearly and indisputably erred by requiring proximate causation as to all of Amy's losses as opposed to only the catchall non-specific category of victim loss. The rehearing panel granted the mandamus writ and remanded the matter for the determination of restitution owed to Amy.²⁸⁸ The Fifth Circuit reheard Amy's petition en banc.²⁸⁹ The en banc court recognized that the other circuits that had addressed the issue had concluded that the sexual exploitation of children restitution statute requires a showing of proximate causation between a defendant's criminal conduct and all categories of a victim's losses. However, the en banc court concluded that the language and rationale of the statute supported a limitation of the proximate causation requirement solely to the catchall category of restitution losses.²⁹⁰

Pursuant to the Fifth Circuit en banc court's statutory interpretation, in order to obtain restitution under the statute, a person must first establish victim status by demonstrating that images possessed, received, or distributed by a defendant include an image(s) of the individual.²⁹¹ Once victim status is established, the individual is entitled to full restitution for all categories of losses specifically identified in the statute, e.g., medical services and therapy, and any additional catchall categories of loss that the victim can establish were proximately caused by the defendant's criminal conduct.²⁹² In awarding restitution in cases with multiple offenders, such as this, a trial court can use available

²⁸⁵ *Id.* at 794–95.

²⁸⁶ *Id.* at 794.

²⁸⁷ *Id.* at 795. *But see id.* at 795–98 (Dennis, J., dissenting) (finding that Amy was entitled to some amount of restitution and supporting a remand for a determination of an appropriate amount).

²⁸⁸ *Amy Unknown*, 636 F.3d at 192–202. In addition to her mandamus petition, Amy attempted to file a direct appeal from the trial court's restitution ruling that was assigned to this panel. Her request for rehearing of the mandamus panel ruling was consolidated with her attempted appeal before this second appellate panel. *See id.* at 193–94; *cf. id.* at 192–93 (determining there was no need to resolve the issue of a CVRA victim right to appeal because of the grant of mandamus).

²⁸⁹ *See Amy Unknown*, 701 F.3d at 752. In addition to the conflict between the initial and rehearing panel opinions, another Fifth Circuit panel had addressed the same proximate causation issue in a direct appeal by an offender in a child pornography possession case that included some images of Amy and in which the trial court had awarded over \$500,000 in restitution to Amy. *See United States v. Wright*, 639 F.3d 679, 681 (5th Cir. 2011), *reh'g en banc granted*, 701 F.3d 749 (5th Cir. 2012). Although the *Wright* panel applied the *Amy* rehearing panel's interpretation that proximate causation is only required regarding the catchall loss category, it concluded that the trial court had not adequately articulated a rationale for its restitution award, vacated the restitution order, and remanded the case for the trial court to better explain the basis for its restitution award. *See id.* at 684–86. Moreover, although they applied the *Amy* rehearing panel interpretation of the restitution statute concerning proximate causation, all of the judges on the panel specially concurred to express their disagreement with this interpretation and to urge the court to rehear both cases en banc. *See id.* at 686–92 (Davis, J., joined by King and Southwick, JJ., specially concurring).

²⁹⁰ *See Amy Unknown*, 701 F.3d at 759–72.

²⁹¹ *Id.* at 773.

²⁹² *Id.*

statutory procedures, such as joint and several liability.²⁹³ The en banc court applied its statutory interpretation to Amy's restitution-based mandamus petition. It concluded that, as a victim of the defendant's child pornography possession offense, Amy was entitled to the full amount of her losses and that the trial court had clearly and indisputably erred in awarding her no restitution.²⁹⁴ Thus, the appellate court granted her mandamus petition, vacated the underlying trial court judgment, and directed the trial court to enter a restitution order for the full amount of Amy's losses pursuant to the restitution statute.²⁹⁵ The Court subsequently vacated and remanded this judgment in *Paroline*, as described later in this section.²⁹⁶

The Fifth Circuit also applied the traditional mandamus standards to grant mandamus to Amy and Vicky in a child pornography possession prosecution that included images of both of them.²⁹⁷ In this case, the trial court had awarded \$125,000 restitution to each petitioner (of the over \$3 million sought) based on their counseling expenses for ten years and attorneys' fees, but had not explicitly stated whether the defendant had joint and several liability for this restitution.²⁹⁸ Following the affirmance of the restitution award on the offender's appeal,²⁹⁹ the trial court granted the offender's motion for a hearing regarding the restitution award. The trial court stated at the hearing that the previously imposed restitution obligation was to be joint and several. It then entered an order that the offender had no obligation to pay any of the awarded amounts of restitution because Amy and Vicky had each already received more than \$125,000 in restitution from defendants in other cases.³⁰⁰

²⁹³ See *id.* at 772–73 (including a description of the interplay between 18 U.S.C.A. §§ 2259, 3664 (West 2000 & Pamp. 2014)).

²⁹⁴ *Id.* at 773–74.

²⁹⁵ See *id.* The appellate court also found that Amy satisfied the two other criteria for mandamus, i.e., she had no other available remedy because mandamus was her only CVRA remedy and the grant of mandamus was appropriate in light of the court's statutory interpretation. See *id.* at 773; see also *id.* at 754–56 & n.5 (finding no CVRA victim right to appeal); *id.* at 774 (affirming the award of over \$500,000 restitution to Amy in the *Wright* case despite the fact that it erroneously did not reflect the full amount of Amy's loss because the Government did not appeal the sentence and Amy did not seek mandamus regarding it); *id.* at 774–75 (Dennis, J., concurring in part in the judgment) (suggesting trial courts can take steps to craft restitution orders in cases with multiple defendants pursuant to the applicable restitution statutes); *cf. id.* at 775–80 (Davis, J., joined by King, Smith, and Graves, JJ., concurring in part and dissenting in part) (finding proximate causation is required, but satisfied here; agreeing with the remand for a determination of restitution; and disagreeing with the majority's analysis regarding its award in cases with multiple offenders). But see *id.* at 780–82 (Southwick, J., dissenting) (finding that proximate causation is required and can be shown through aggregate causation; that additional restitution proceedings are necessary in the case; and disagreeing with the majority's analysis regarding its award in cases with multiple offenders).

²⁹⁶ *Paroline v. United States*, 134 S. Ct. 1710, 1730 (2014) (vacating and remanding the judgment); *infra* notes 328–36 and accompanying text (discussing the *Paroline* decision).

²⁹⁷ See *In re Amy Unknown*, No. 13-20485, slip op. at 1 (5th Cir. Aug. 30, 2013).

²⁹⁸ See *id.*; *United States v. Gammon*, No. 11-20902, slip op. at 2–3 & n. 1 (5th Cir. Apr. 29, 2013).

²⁹⁹ On appeal, the offender challenged the restitution order because there was no showing that the victims' losses were proximately caused by his conduct. The appellate court rejected this challenge on the basis of its en banc opinion in *In re Amy Unknown*, described *supra* notes 289–95 and accompanying text, and found that the categories of the victims' losses did not require a showing of proximate causation. See *Gammon*, No. 11-20902, slip op. at 3–5. The offender also claimed that the trial court abused its discretion by failing to explain the reasons for the restitution amount and by not stating whether he was jointly and severally liable for the victims' losses. The appellate court found that the trial court adequately explained the basis for its restitution award (in the absence of a Government appeal or victim mandamus petition seeking an award of the full amount of claimed victim loss). The appellate court also found 1) no abuse of discretion based on the trial court's failure to indicate whether the offender's liability was joint and several; 2) that the offender's liability was limited to the amounts of restitution awarded; and 3) that, pursuant to the restitution procedural statute, the offender could seek to suspend restitution payments in the future if the victims were fully compensated for the full amount of their losses by other offenders. See *id.*, slip op. at 5–8.

³⁰⁰ See *Amy Unknown*, No. 13-20485, slip op. at 2.

In its mandamus review, the Fifth Circuit found that its previous affirmance of the restitution award included a determination that the offender's obligation to pay \$125,000 each to Amy and Vicky was *not* joint and several and that the trial court intended a restitution award separate from the victims' recovery in other cases. As a result, the appellate court found that the traditional mandamus criteria were satisfied, including the petitioners' clear and indisputable right to the writ. It granted the writ and ordered the reinstatement of the original restitution award of \$125,000 to each victim without regard to any other recovery they might receive.³⁰¹

Contrary to the Fifth Circuit, the District of Columbia Circuit concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct and all of a victim's losses.³⁰² However, applying traditional mandamus standards, the appellate court granted Amy's mandamus petition in part.³⁰³ In this case, the offender was convicted of possessing child pornography that included one image of Amy. The trial court awarded Amy \$5,000 that it characterized as "nominal" restitution regarding the over \$3.2 million she sought as her total losses from the creation and distribution of the pornographic images of her.³⁰⁴ The trial court indicated that the restitution amount was less than the actual harm the offender caused Amy, but that the Government and Amy had failed to establish the specific amount of loss that was caused by the offender's possession of the image of Amy.³⁰⁵ The trial court also declined to hold the offender jointly and severally liable for all of Amy's losses based on the conduct of others.³⁰⁶

On mandamus review, the District of Columbia Circuit found that because the record did not establish that the offender's conduct proximately caused all of Amy's losses, the trial court did not clearly and indisputably err in declining to impose joint and several liability on the offender for the full amount of Amy's losses. However, she was entitled to the loss that the offender did proximately cause and which the trial court acknowledged was in excess of the \$5,000 restitution awarded. By awarding restitution in an amount less than that the offender proximately caused, the trial court did clearly and indisputably err, entitling Amy to the grant of mandamus.³⁰⁷ On remand, the District of Columbia Circuit directed the trial court to reconsider the existing evidence presented by the Government to establish the losses the offender's conduct proximately caused Amy or to permit the submission of additional evidence or a formula or some "principled method" for determining the amount of restitution owed to Amy.³⁰⁸

The Eighth Circuit also concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct

³⁰¹ See *id.*, slip op. at 2–3. The appellate court noted that the petitioners had already recovered more than \$125,000 each at sentencing which would have rendered the restitution award a nullity if based on joint and several liability and that the trial court did not indicate a joint and several restitution obligation at sentencing. See *id.*

³⁰² See *In re Amy*, 641 F.3d 528, 534–37 (D.C. Cir. 2011).

³⁰³ See *id.* at 530.

³⁰⁴ *Id.*

³⁰⁵ See *id.*

³⁰⁶ *Id.* at 530–31; cf. *United States v. Monzel*, 641 F.3d 528, 540–44 (D.C. Cir. 2011) (dismissing Amy's companion attempted direct appeal after finding no CVRA victim right or other right to appeal the restitution award).

³⁰⁷ *Amy*, 641 F.3d at 539–40.

³⁰⁸ *Id.* at 540; *id.* at 540–44 (finding that mandamus was Amy's only adequate remedy); see *supra* notes 140–46 and accompanying text (discussing the review standard).

and all of a victim's losses.³⁰⁹ The appellate court reached this conclusion in a mandamus review of a trial court's award of \$3,333 in restitution to Vicky as part of the offender's receipt and distribution of child pornography sentence rather than the full amount of her losses that included the conduct of other offenders. The amount was calculated based on Vicky's medical care, therapy, lost income, and attorney's fees expenses after the date of the offender's crime.³¹⁰ Applying traditional standards of mandamus review, the appellate court concluded that the full amount of losses that Vicky sought included losses prior to the commission of the offender's crime and which he could not have proximately caused.³¹¹ Thus, the trial court did not clearly and indisputably err in declining to award Vicky the full amount of her losses that included these pre-crime losses. In addition, the trial court articulated the basis for the restitution award for Vicky's post-crime losses which the trial court found represented the full amount of her losses proximately caused by the conduct of this offender. The Eighth Circuit found that the trial court did not clearly and indisputably err in its restitution determination and denied the mandamus petition.³¹² The Court subsequently vacated and remanded this judgment for further consideration "in light of" *Paroline*, as described later in this section.³¹³

ii. More Expansive Review Standard Circuits

Prior to the CVRA, the Ninth Circuit had concluded that the child sexual exploitation restitution statute requires a showing of proximate causation between an offender's criminal conduct and all of a victim's losses.³¹⁴ In their mandamus petition, Amy and Vicky challenged the trial court's denial of any restitution to Amy and the award of \$4,545 to Vicky for the offender's transportation of child pornography including their images.³¹⁵ Utilizing its more expansive abuse of discretion or legal error review standard and applying circuit precedent regarding the requirement of proximate causation regarding

³⁰⁹ See *In re Vicky*, 709 F.3d 712, 720–22 (8th Cir. 2013), *vacated and remanded sub nom. Vicky v. Fast*, 134 S. Ct. 1934 (2014). *But see id.* at 723–28 (Shepherd, J., concurring in part, dissenting in part) (finding that proximate causation is only required for the catchall category of restitution loss).

³¹⁰ See *id.* at 715. Vicky sought from the offender her full losses of over \$1.2 million minus the almost \$300,000 she had already recovered from other defendants. The trial court awarded restitution of almost \$20,000 and found that proximate causation was only required for the catchall restitution category. On the offender's appeal, the Government agreed that proximate causation was required regarding all losses. The appellate court remanded the matter for the reconsideration of restitution. On remand, the trial court calculated an amount of restitution based on Vicky's medical care, therapy, lost income, and attorney's fees expenses after the date of the offender's crime. See *id.*

³¹¹ See *id.* at 718–20; *supra* notes 147–51 and accompanying text (discussing the review standard); cf. *United States v. Fast*, 709 F.3d 712, 715–18 (8th Cir. 2013), *vacated and remanded on other grounds sub nom. Vicky*, 134 S. Ct. at 1934 (dismissing Vicky's companion attempted direct appeal after finding no CVRA victim right or other right to appeal the restitution award).

³¹² See *Vicky*, 709 F.3d at 722–23. *But see id.* at 723–28 (Shepherd, J., concurring in part, dissenting in part) (finding that proximate causation is only required for the catchall category of restitution loss and supporting the grant of the petition and remand for entry of restitution in the full amount of Vicky's loss).

³¹³ *Vicky*, 134 S. Ct. at 1934; see *infra* note 337 and accompanying text.

³¹⁴ See *United States v. Lancy*, 189 F.3d 954, 965 (9th Cir. 1999).

³¹⁵ See *In re Amy & Vicky*, 698 F.3d 1151, 1152 (9th Cir. 2012), *vacated and remanded sub nom. Amy and Vicky v. U.S. Dist. Court*, 134 S. Ct. 1959 (2014). In the trial court, Amy sought restitution for losses of \$3 million and Vicky sought restitution for over \$225,000. The trial court had initially awarded restitution to Amy and Vicky based on \$1,000 per image of them that the offender had on his computer, resulting in \$17,000 for Amy and \$48,000 for Vicky. On the offender's direct appeal, the Ninth Circuit expanded the discussion of its prior precedent regarding the required proximate causation for restitution under the statute. It concluded that the Government had not proven that the offender's crime proximately caused the victims' losses, such proof needed to support an award of any restitution. The appellate court also questioned whether the formula the trial court used to determine the amount of restitution was an adequate measure of victim loss. The appellate court vacated the restitution award and remanded the matter for a redetermination regarding restitution. See *United States v. Kennedy*, 643 F.3d 1251, 1254–56, 1259–66 (9th Cir. 2011).

victim loss, the Ninth Circuit denied the mandamus petition.³¹⁶ The Court subsequently vacated and remanded this judgment for further consideration “in light of” *Paroline*, as described later in this section.³¹⁷

In a separate Ninth Circuit-based prosecution, Amy sought over \$3.3 million and Vicky sought over \$1.3 million for losses associated with the offender’s child pornography distribution conviction that included Amy and Vicky in at least one of the images he distributed.³¹⁸ The presentence report did not recommend restitution based on the lack of information establishing a causal connection between the offender’s conduct and the victims’ losses. In the absence of any additional evidence by the Government or the victims establishing such a causal connection, the trial court did not order restitution to Amy and Vicky.³¹⁹

In its mandamus review of the restitution denial, the Ninth Circuit found that the trial court did not err in requiring a showing of proximate causation in determining restitution, pursuant to circuit precedent, and denied the petition in this regard.³²⁰ However, the appellate court found that the trial court had abused its discretion in denying any restitution to Amy and Vicky.³²¹ Contrary to the presentence report recommendation adopted by the trial court, the appellate court found that the petitioners had offered sufficient record evidence to establish the required causal connection between their losses and the offender’s crime.³²² Therefore, the Ninth Circuit granted the mandamus petition, in part, and remanded the matter for the vacation of the restitution aspect of the judgment and a determination of the amount of restitution owed to Amy and Vicky.³²³

On remand, the trial court reviewed the victims’ claimed losses, made some adjustments, and then deducted from the pool of each victim’s remaining total losses any losses that were specifically traceable to another defendant’s conduct and any losses that predated the defendant’s conduct. To determine the offender’s share of the victims’ losses, the court then divided the resulting sums by the number of restitution orders in other prosecutions associated with the victims’ images. This formula resulted in a restitution award of \$2,881 for Vicky and \$17,307 for Amy.³²⁴

In their mandamus proceeding regarding these restitution awards, Amy and Vicky contended that the trial court had used an “improper methodology” to determine the restitution amounts and the court should have imposed joint and several liability on the defendant for all of their losses.³²⁵ The Ninth Circuit found that 1) the imposition of joint and several liability was not expressly authorized in the applicable restitution statutes; 2) the Ninth Circuit had not yet determined the appropriate method for calculating restitution pursuant to the child sexual exploitation statute; and 3) a conflict in the circuits existed on

³¹⁶ See *Amy & Vicky*, 698 F.3d at 1152–53 (declining the petitioners’ request to overrule its proximate causation precedent and adopt the Fifth Circuit interpretation that proximate causation is only required regarding the catchall category of statutory losses).

³¹⁷ See *Amy and Vicky*, 134 S. Ct. at 1959; *infra* note 338 and accompanying text.

³¹⁸ See *United States v. Cantrelle*, No. 2:11-cr-00542-GEB, 2013 U.S. Dist. LEXIS 53767, at *2–3 (E.D. Cal. Apr. 15, 2013).

³¹⁹ *Id.* at *3–5.

³²⁰ See *In re Amy & Vicky*, 710 F.3d 985, 986–87 (9th Cir. 2013) (declining the petitioners’ request to overrule its proximate causation precedent and adopt the Fifth Circuit interpretation that proximate causation is only required regarding the catchall category of statutory losses).

³²¹ *Id.* at 987.

³²² See *id.*

³²³ See *id.*

³²⁴ See *Cantrelle*, 2013 U.S. Dist. LEXIS 53767, at *10–27.

³²⁵ *In re Amy & Vicky*, 714 F.3d 1165, 1167 (9th Cir. 2013).

this issue with the weight of the authority declining to impose joint and several liability.³²⁶ As a result, the trial court did not commit legal error or abuse its discretion by declining to impose joint and several liability on the defendant for all of the victims' losses. The Ninth Circuit therefore denied the mandamus petition.³²⁷

iii. Court Resolution of the Causation Issue

Almost ten years after the enactment of the CVRA and twenty years after the enactment of the child sexual exploitation restitution statute, the Court granted certiorari, in *Paroline v. United States*,³²⁸ the Fifth Circuit en banc case involving Amy's images, to resolve the conflict that had developed between the circuits regarding the proximate causation requirement.³²⁹ The *Paroline* Court concluded that the proximate causation requirement applies to all categories of loss described in the statute and that restitution under the statute is thus "proper" only to the degree that an offender's crime proximately caused a victim's loss.³³⁰ The Court, however, recognized the challenges of applying this proximate causation requirement, and the accompanying actual causation requirement, in cases like Amy's in which hundreds or thousands of individuals might have participated in creating her losses and in which attributing specific losses to an individual offender through traditional causal analysis might not be possible.³³¹

In this "special context," the *Paroline* Court concluded that courts applying the statute should award restitution in an amount that reflects a defendant's "relative role in the causal process that underlies the victim's general losses."³³² Although the Court entrusted the application of these interpretive principles and the resulting determination of restitution in these circumstances to the discretion of the trial courts, it suggested possible factors a trial court might consider in determining a specific offender's relative role in the overall causal process resulting in a victim's losses. For example, after first determining a victim's overall losses from the continuing distribution of pornographic images of the victim, the Court stated that a trial court could consider the estimated number of prosecuted and not yet prosecuted offenders engaged in related conduct generating the losses as well as factors concerning the defendant's individual conduct (e.g., possession vs. distribution of images, the number of images of the victim involved, and any connection to the images' production).³³³ The *Paroline* Court stated that a restitution amount based on a consideration of such types of factors would be deemed the amount of a victim's overall losses that were the "proximate result" of an offender's crime and the "full amount" of the losses owed to the victim under the statute.³³⁴

³²⁶ *Id.* at 1167–68; *cf. id.* (declining the petitioners' request to overrule its proximate causation precedent)

³²⁷ *See id.*

³²⁸ 134 S. Ct. 1710, 1718 (2014).

³²⁹ The Court identified the conflict as one "over the proper causation inquiry for purposes of determining the entitlement to and amount of restitution" under the child sexual exploitation restitution statute. *Id.* The Fifth Circuit's position applying a proximate causation requirement only to the catchall category of loss conflicted with decisions of the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits that applied a proximate causation requirement to all losses under the statute. *See id.* at 1719 (citing cases).

³³⁰ *See id.* at 1718–22.

³³¹ *See id.* at 1722–27.

³³² *Id.* at 1727.

³³³ *Id.* at 1727–28.

³³⁴ *Id.* at 1728 (applying 18 U.S.C.A. § 2259 (West 2000)). *But see id.* at 1730–35 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting) (finding that the statute requires actual and proximate causation between a defendant's conduct and a victim's loss and that no actual causation was shown here that would support a restitution award); *id.* at 1735–44 (Sotomayor, J., dissenting) (supporting an aggregate causation interpretation that would permit restitution in the full amount of a victim's losses from each defendant).

The *Paroline* Court concluded that the Fifth Circuit's interpretation of the restitution statute's requirements was "incorrect" and that the trial court in the matter had erred in requiring a "strict showing of but-for causation."³³⁵ The Court vacated the Fifth Circuit judgment granting mandamus and remanded the matter for further proceedings consistent with its opinion.³³⁶ The Court subsequently vacated—and remanded for further consideration "in light of" *Paroline*—the judgments related to the Eighth Circuit's denial of mandamus to Vicky³³⁷ and the Ninth Circuit's denial of mandamus to Amy and Vicky in their initial mandamus action there.³³⁸

3. Participation Rights

The CVRA includes four crime victim participatory rights regarding notice, an opportunity to confer with the prosecutor and to be heard, and an exemption from exclusion from court proceedings for testifying victims. The notice right provides crime victims the right to "reasonable, accurate, and timely notice" of public court proceedings and parole proceedings concerning the crime or the defendant's release or escape.³³⁹ The CVRA provides crime victims the "reasonable right to confer" with the prosecutor in the case.³⁴⁰ The right of testifying victims not to be excluded from public court proceedings is granted unless the court finds, by clear and convincing evidence, that a victim's testimony would be "materially altered" if the crime victim heard other testimony at the applicable proceeding.³⁴¹ The CVRA right to be "reasonably heard" relates to public proceedings in the trial court regarding release, plea, and sentencing and parole proceedings.³⁴² The federal appellate circuits have reviewed mandamus petitions regarding each of these participatory rights, with the most petitions concerning the right to be reasonably heard.³⁴³

³³⁵ *Id.* at 1730.

³³⁶ *Id.*; see *supra* notes 284–96 and accompanying text (discussing this petition).

³³⁷ See *Vicky v. Fast*, 134 S. Ct. 1934 (2014); *supra* notes 309–13 and accompanying text (discussing this petition).

³³⁸ See *Amy and Vicky v. U.S. Dist. Court*, 134 S. Ct. 1959 (2014); *supra* notes 314–17 and accompanying text (discussing this petition).

³³⁹ 18 U.S.C.A. § 3771(a)(2) (West Pamp. 2014); see 18 U.S.C.A. § 3771(a)(3)–(5).

³⁴⁰ 18 U.S.C.A. § 3771(a)(5).

³⁴¹ 18 U.S.C.A. § 3771(a)(3), (b)(1); see Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

³⁴² 18 U.S.C.A. § 3771(a)(4); see 150 CONG. REC. S4,267–68 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein) (describing the participatory rights); see also 150 CONG. REC. S10,910–12 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); cf. Aaronson, *supra* note 8, at 646–62; Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44 (2006); Russell P. Butler, *What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings*, 19 FED. SENT'G REP. 21 (2006); Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 432 (2008); Kyl et al., *supra* note 8, at 597–610; Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008) (describing the participatory rights).

³⁴³ See *infra* notes 344–428 and accompanying text. In addition to the mandamus petitions regarding these participatory rights, the appellate courts have addressed three petitions relying exclusively on "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy." See 18 U.S.C.A. § 3771(a)(8); *In re K.K.*, 756 F.3d 1169 (9th Cir. 2014) (finding no abuse of discretion or legal error by trial court's denial of motions to quash, but requiring an initial in camera review of documents); *In re Zito*, No. 09-70554 (9th Cir. Feb. 26, 2009) (finding the in camera review of subpoenaed documents was not a "cognizable harm" to the petitioner); *In re Simons*, 567 F.3d 800 (6th Cir. 2009) (finding a clear and indisputable right to a writ due to the trial court's three-month delay in ruling on the petitioner's motion to unseal and directing the trial court to make a ruling within two weeks); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,269 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein); Kyl et al., *supra* note 8, at 613–14 (describing this right). Petitioners have also asserted this right in connection with other rights raised. See *In re Olesen*, 447 F. App'x 868 (10th Cir. 2011); *In re Brock*, 262 F. App'x 510 (4th Cir. 2008); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555 (2d Cir. 2005).

a. The Rights to Notice and to Confer with the Prosecutor

i. *More Expansive Review Standard Circuits*

The Second Circuit considered two petitioner groups' claims that their rights to notice and to confer with the prosecutor had been violated regarding a securities fraud prosecution in *In re W.R. Huff Asset Management Co.*³⁴⁴ The Government had asserted that it was impossible to identify and personally notify each of the tens of thousands of affected victims of the proposed settlement in the case.³⁴⁵ It sought authorization to use alternative notification procedures pursuant to the CVRA provision concerning prosecutions with multiple victims, including notification through the related bankruptcy and civil proceedings, a nationally televised press conference and a press release through media outlets, and postings on the prosecutor's office web site. The Government engaged in all of these notifications regarding the proposed settlement. The trial court also ordered written submissions by persons or entities desiring to be heard regarding the proposed settlement.³⁴⁶ After the due date for these submissions, at the hearing scheduled to rule on the Government's motion to utilize the alternative notifications, the Government informed the trial court of the notification actions it had taken. At this proceeding, the petitioners objected to the proposed settlement agreement, but the trial court accepted the settlement agreement subject to approval by the judges in the related proceedings.³⁴⁷

On mandamus review, the Second Circuit found that the trial court did not abuse its discretion in determining that, in light of the time delays and challenges of identifying victims and calculating related losses, the Government had given "reasonable notice" to victims of the proposed settlement through the alternative notification methods.³⁴⁸ The appellate court found that no petitioner had requested and been denied an opportunity to confer with the prosecutor in the case.³⁴⁹ The Second Circuit stated that "[n]othing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement."³⁵⁰ Instead, the CVRA gave the petitioners an opportunity to be heard regarding the proposed settlement agreement, which they received. In denying the mandamus petition, the *Huff* court found that the trial court

The appellate courts have also addressed two petitions raising claims regarding "unreasonable delay" in the proceedings. See 18 U.S.C.A. § 3771(a)(7); *In re Thaler*, No. 13-40171 (5th Cir. Feb. 15, 2013) (dismissing as moot a mandamus petition challenging the nine-year delay in the resolution of a habeas corpus petition because the trial court took action and denied the underlying petition); *Olesen*, 447 F. App'x at 868 (finding no clear and indisputable right to a writ based on delay in resolution of habeas corpus proceeding); see also 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,268-69 (daily ed. Apr. 22, 2004) (statements of Sens. Jon Kyl and Dianne Feinstein); Kyl et al., *supra* note 8, at 611-13 (describing this right).

The appellate courts have not yet addressed any petitions asserting the right to be "reasonably protected" from the defendant. See 18 U.S.C.A. § 3771(a)(1); see also 150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Jon Kyl); 150 CONG. REC. S4,267 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein); Kyl et al., *supra* note 8, at 595-97 (describing this right).

³⁴⁴ 409 F.3d at 555.

³⁴⁵ *Id.* at 559.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 559-60; see 18 U.S.C.A. § 3771 (d)(2); *supra* note 260 and accompanying text (describing options in cases involving multiple crime victims).

³⁴⁸ *W.R. Huff Asset Mgmt. Co.*, 409 F.3d at 564.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

had engaged in “extensive successful efforts to provide notice of the proposed settlement and to solicit and hear objections to it.”³⁵¹

ii. *Traditional Review Standard Circuits*

In *In re Dean*,³⁵² the Fifth Circuit also considered an alternative notification procedure concerning a plea agreement and its impact on victims’ rights to notice and to confer with the prosecutor.³⁵³ The Government filed an ex parte motion in the trial court seeking to establish alternative CVRA procedures in light of the large number of crime victims in the underlying industrial explosion-related prosecution and the potential accompanying media coverage that could harm the plea negotiation process.³⁵⁴ The trial court entered an ex parte order that permitted the Government to enter into a plea agreement with the defendant without prior notice to the crime victims. Pursuant to this order, the crime victims were notified of the agreement before the plea’s entry in court.³⁵⁵ The crime victims had and exercised opportunities to express their opposition to the plea agreement. The trial court denied their request that it reject the plea agreement based on asserted violations of their CVRA rights to notice, confer with the prosecutor, and fairness.³⁵⁶ The petitioners filed a mandamus petition seeking that the trial court’s decision be reversed and the matter be remanded with instructions that the plea agreement not be accepted at that time. The Fifth Circuit initially granted the mandamus petition, in part, to stay further trial court actions to “effect the plea agreement” pending further order of the appellate court.³⁵⁷

The Fifth Circuit found that “Congress made the policy decision [in the CVRA]—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.”³⁵⁸ In this prosecution involving less than 200 victims, the *Dean* court concluded that it was not “impracticable” for the Government to notify the victims of the plea discussions and to permit the crime victims to “communicate meaningfully” with the prosecutor before the plea agreement was reached.³⁵⁹ The trial court therefore misapplied the CVRA and the alternative procedure it approved violated the victims’ CVRA rights to notice and to confer with the prosecutor.³⁶⁰

³⁵¹ *Id.*; cf. *supra* notes 48–59, 254–60 and accompanying text (discussing this petition).

³⁵² 527 F.3d 391 (5th Cir. 2008).

³⁵³ *Id.* at 392–93.

³⁵⁴ *Id.* at 392.

³⁵⁵ *Id.* at 392–93.

³⁵⁶ *Id.* at 393; see *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893 (S.D. Tex. Feb. 21, 2008) (describing the trial court proceedings).

³⁵⁷ *Dean*, 527 F.3d at 392–93.

³⁵⁸ *Id.* at 395.

³⁵⁹ *Id.*

³⁶⁰ *Id.*; see 18 U.S.C.A. § 3771 (d)(2) (West Pamp. 2014); *supra* note 260 and accompanying text (describing options in cases involving multiple crime victims). The appellate court stated that the Government should have found a “reasonable way” to inform the victims of the likely criminal charges and find out their views regarding the potential plea bargain. *Dean*, 527 F.3d at 394. The appellate court found that the stated reasons for the ex parte order’s alternative notification procedure, i.e., the number of victims and the possible impairment of the plea negotiations, did not “pass muster.” The Government had not claimed that identification and notification of the victims would be too difficult or expensive and, in fact, suggested a notification procedure to be implemented

However, the *Dean* court also found that the victims were allowed “substantial and meaningful participation” at the plea proceeding and thereafter to convey their opposition to the plea agreement to the trial court.³⁶¹ In ultimately denying the writ under the traditional mandamus standards, the Fifth Circuit concluded that its issuance would not be “appropriate under the circumstances” of the case.³⁶² Finding that the decision to grant mandamus is “largely prudential[,] [w]e conclude that the better course is to deny relief, confident that the district court will take heed that the victims have not been accorded their full rights under the CVRA and will carefully consider their objections and briefs as this matter proceeds” in the court’s determination whether to accept the plea agreement.³⁶³

b. The Rights to be Heard and not to be Excluded from Proceedings

i. *More Expansive Review Standard Circuits*

In *Kenna v. United States District Court*,³⁶⁴ the matter in which the Ninth Circuit established its abuse of discretion or legal error review standard for CVRA mandamus petitions, the appellate court reviewed a petitioner’s challenge to the trial court’s denial of his asserted CVRA right to be orally heard at sentencing.³⁶⁵ This prosecution involved father and son co-defendants whose investment fraud resulted in victim losses of almost

after the plea agreement was signed. *Id.* at 394–95. The appellate court also rejected the stated concern about impairment of the plea negotiation process as a basis for the alternative notification procedure:

In making that observation [about the impairment of plea negotiations], the court missed the purpose of the CVRA’s right to confer. In passing the Act, Congress made the policy decision—which we are bound to enforce—that victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government’s independent prosecutorial discretion; instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising that broad discretion.

Id. at 395 (citation omitted). The Fifth Circuit stated that it did not matter whether the victims’ exercise of their conferral right “impair[ed]” or facilitated the plea negotiation process— “[t]he Act gives the right to confer.” *Id.*

³⁶¹ *Dean*, 527 F.3d at 395–96.

³⁶² *Id.* at 395.

³⁶³ *Id.* at 396; see *supra* notes 112–18 and accompanying text (discussing the review standard); cf. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 730 (S.D. Tex. 2009) (accepting the plea agreement).

The Sixth Circuit applied traditional mandamus standards to deny a petition asserting a right to notice prior to the filing of charges in the case and “direct involvement” in the negotiation of the plea agreement. The appellate court found the asserted right to notice “uncertain” and not a ground for relief in this case in which the petitioners were given a “full opportunity” for participation, beginning at the arraignment and continuing throughout the proceedings. *In re Acker*, 596 F.3d 370, 372–73 (6th Cir. 2010); see *supra* notes 131–35, 273–76 and accompanying text (discussing this petition); cf. *Dean*, 527 F.3d at 394; *Crime Victims Rights Act of 2004: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 53, 56–57 (2009) (testimony and statement of Susan Howley, Director of Public Policy, National Center for Victims of Crime); 157 CONG. REC. S7,359–60 (daily ed. Nov. 10, 2011) (letter of Assistant Attorney General Ronald Weich); 157 CONG. REC. S7,060–61 (daily ed. Nov. 2, 2011) (letter of Sen. Jon Kyl); 157 CONG. REC. S3,607–09 (daily ed. June 8, 2011) (letter of Sen. Jon Kyl); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 8, 41–42 (rev. 2012); Paul G. Cassell et al., *Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59 (2014); Elliot Smith, Comment, *Is There a Pre-Charge Conferral Right in the CVRA?*, 2010 U. CHI. LEGAL F. 407 (discussing applicability of the CVRA prior to the initiation of formal charges).

³⁶⁴ 435 F.3d 1011 (9th Cir. 2006).

³⁶⁵ *Id.* at 1013.

\$100 million.³⁶⁶ More than 60 victims submitted written victim impact statements and the petitioner and several other victims orally addressed the trial court at the father's sentencing.³⁶⁷ However, the judge did not permit the petitioner or other victims to make oral presentations at the son's sentencing three months later. In declining their requests to speak, the judge stated that he had listened to the victims at the first sentencing, re-reviewed the impact statements, did not think there was any additional information that would impact the son's sentencing, and would receive any new victim-related information through the prosecutor.³⁶⁸

In this first mandamus review concerning the CVRA right to be heard, the Ninth Circuit found that the CVRA statutory text was not dispositive and hence was ambiguous regarding whether a crime victim's right to be heard included a right to be orally heard or only a right to make the victim's "position known by whatever means the court reasonably determines."³⁶⁹ To resolve this ambiguity, the *Kenna* court reviewed the legislative history of the CVRA and the proposed victim's rights constitutional amendment that used the same language, and found that it revealed a "clear congressional intent to give crime victims the right to speak" at the proceedings designated in the CVRA.³⁷⁰ The Ninth Circuit also concluded that this interpretation, i.e., that victims have an "indefeasible right to speak" at sentencing (like the prosecutor and the defendant), advanced the CVRA's purpose to make crime victims "full participants" in the criminal justice process.³⁷¹

Thus, the *Kenna* court found that the petitioner's CVRA right to orally address the court at the co-defendant son's sentencing was not satisfied by the petitioner's oral address at the father's sentencing.³⁷² The appellate court observed that the trial court's denial of the petitioner's CVRA right to be heard might satisfy its circuit's traditional mandamus review standard. However, the Ninth Circuit stated that it was not required to make that determination because the trial court clearly erred and thereby satisfied the review standard it had adopted for CVRA mandamus review.³⁷³ The *Kenna* court thus granted the petitioner's writ and authorized the petitioner and other victims to pursue a CVRA motion in the trial court to re-open the sentencing proceeding.³⁷⁴ If granted, the

³⁶⁶ See *id.* at 1012.

³⁶⁷ *Id.* at 1013.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 1013–15. The Ninth Circuit not only addressed the differing interpretations of the CVRA right to be heard presented by the petitioner and the trial court, but also addressed the differing interpretations of the two other trial courts that had previously addressed the issue. *Id.*; compare *United States v. Degenhardt*, 405 F. Supp. 2d 1341 (D. Utah 2005), with *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005).

³⁷⁰ *Kenna*, 435 F.3d at 1015–16.

³⁷¹ *Id.* at 1016. The appellate court noted the petitioner's concession that the CVRA permits a trial court to "place reasonable constraints on the duration and content of victims' speech, such as avoiding undue delay, repetition or the use of profanity" and further noted the potential application of the CVRA's provision regarding alternative procedures in prosecutions with multiple victims. *Id.* at 1014 & n.1 (referencing 18 U.S.C.A. § 3771(d)(2) (West Pamp. 2014)); cf. *id.* at 1018–19 (Friedman, J., *dubitante*) (agreeing with the application of the CVRA right to speak in the instant case, but expressing concern about the "broad sweep" of the opinion's language regarding an "absolute" CVRA right to speak regardless of the circumstances and its application to victims in the instant case beyond the petitioner).

³⁷² *Id.* at 1016–17 (finding a CVRA victim right to "confront every defendant who has wronged them" at potentially multiple sentencings and have the victim's then current impact information considered at the time of the imposition of punishment).

³⁷³ *Id.* at 1017.

³⁷⁴ *Id.* at 1017–18 (referencing 18 U.S.C.A. § 3771(d)(5) regarding re-opening sentencing proceedings).

trial court was required to conduct a new sentencing hearing at which the petitioner and other victims would be permitted to speak, as described in the appellate court's opinion.³⁷⁵

This petitioner subsequently filed a CVRA mandamus petition with the Ninth Circuit seeking release of the defendant son's entire presentence report, after the trial court rejected the petitioner's assertion that the CVRA provides crime victims a "general right" to obtain disclosure of the report.³⁷⁶ The Ninth Circuit agreed with the trial court's position after finding that neither the CVRA statute's text nor its legislative history supported the petitioner's position.³⁷⁷ The appellate court additionally noted that the trial court found that the petitioner had not demonstrated that his reasons for requesting the report outweighed its confidentiality and had refused to consider the trial court's offer to consider disclosing specific parts of the report.³⁷⁸ The Ninth Circuit concluded that the trial court did not abuse its discretion or commit legal error and denied the writ.³⁷⁹

The Ninth Circuit granted aspects of two writs regarding the CVRA right not to be excluded from specified public proceedings by requiring trial court determinations, by clear and convincing evidence, as to whether individual victims could be excluded because their testimony would be "materially altered" by their presence in court.³⁸⁰ In *In re Parker*,³⁸¹ the trial court had determined that 34 witnesses did not satisfy the CVRA's crime victim definition and thus could be excluded from court proceedings based on traditional practices involving witnesses.³⁸² The Ninth Circuit found that the trial court had erred in its determination of victim status and granted the mandamus petition.³⁸³ The appellate court further instructed the trial court to vacate its order excluding the victim-witnesses and to conduct proceedings to make individualized findings regarding the presence or exclusion of each of the 34 victim-witnesses pursuant to the CVRA.³⁸⁴

The other Ninth Circuit petition, *In re Mikhel*,³⁸⁵ was filed by the Government regarding a kidnapping and murder prosecution in which the prosecutor had filed an unopposed motion in limine to permit the murder victims' families to be present during the entire trial despite the fact that some of them would be testifying.³⁸⁶ Citing concerns about "collusive" witness testimony and "proper" courtroom decorum, the trial court

³⁷⁵ *Id.*; see *supra* notes 66–71 and accompanying text (discussing the review standard); cf. Amy Baron-Evans, *Traps for the Unwary Under the Crime Victims' Rights Act: Lessons the Kenna Case*, 19 FED. SENT'G REP. 49 (2006); Douglas E. Beloof, *Judicial Leadership at Sentencing Under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt*, 19 FED. SENT'G REP. 36 (2006).

³⁷⁶ *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006).

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*; see Matthew B. Riley, Note, *Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports*, 2007 UTAH L. REV. 235 (2007).

³⁸⁰ See *infra* notes 381–92 and accompanying text (discussing these petitions); see also 18 U.S.C.A. § 3771(a)(3), (b)(1) (West Pamp. 2014).

³⁸¹ Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 10270 (9th Cir. Feb. 27, 2009).

³⁸² *Id.* at *1.

³⁸³ *Id.*

³⁸⁴ See *id.*; *supra* notes 216–18 and accompanying text (discussing this petition); see also *In re Parker*, Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 7158, at *3 (9th Cir. Mar. 2, 2009); *United States v. W.R. Grace*, CR 05-07-M-DWM, 2009 U.S. Dist. LEXIS 124996, at *1–2 (D. Mont. Feb. 27, 2009) (describing the trial court's compliance responses).

³⁸⁵ 453 F.3d 1137 (9th Cir. 2006).

³⁸⁶ *Id.* at 1138.

denied the motion and prohibited testifying family members to be present in court prior to their testimony.³⁸⁷

In response to the Government's mandamus petition seeking that the testifying family members be permitted to observe the entire trial, the Ninth Circuit noted the traditional rule regarding courtroom exclusion of witnesses incorporated in Rule 615 of the Federal Rules of Evidence.³⁸⁸ However, the appellate court stated that Rule 615's exception regarding persons "authorized by statute to be present" was satisfied by the CVRA's crime victim right not to be excluded from designated proceedings unless there was clear and convincing evidence establishing a risk that the victim's testimony would be "materially altered" and unless "reasonable alternatives" to exclusion were considered.³⁸⁹ Moreover, the appellate court stated that there must be a "highly likely" risk of altered testimony to warrant CVRA victim-witness exclusion.³⁹⁰ The Ninth Circuit therefore concluded that the CVRA "abrogated" Rule 615 with regard to crime victims and effectively replaced it with the exclusion procedure prescribed by the CVRA—which the trial court had not performed before summarily excluding the victim-witnesses from the proceedings.³⁹¹ Rather than ordering the trial court to permit the victim-witnesses to be present, the Ninth Circuit granted the Government's petition, in part, and remanded the matter for the trial court to conduct the exclusion analysis required by the CVRA and described in its opinion.³⁹²

In addressing a CVRA petition asserting a crime victim's right to be heard in *In re Zackey*,³⁹³ the Third Circuit stated that it did not need to determine the applicable review standard because the petitioner was not entitled to relief even under the "more expansive" abuse of discretion standard.³⁹⁴ In this fraud prosecution, the trial court denied the petitioner's motion to permit his lawyer to enter an appearance and represent him at sentencing. The trial court recognized the petitioner's right to be heard regarding the defendant's sentence (which he was free to exercise). However, the trial court found that the CVRA did not require a victim's legal representation when exercising his right to be heard or require a victim's lawyer to be permitted to speak during sentencing or other proceedings.³⁹⁵ The trial court concluded that the prosecutor's assistance would be "sufficient" to determine an appropriate sentence.³⁹⁶

On mandamus review, the Third Circuit observed that the prosecutor had already requested restitution and attorney's fees on the victim's behalf, had represented he would seek the upward sentencing guideline departure requested by the victim, and had not entered into any agreements that would prevent full advocacy at sentencing on behalf of the defendant's victims.³⁹⁷ The *Zackey* court concluded that the petitioner's CVRA rights

³⁸⁷ *Id.*; see also *id.* at 1138 n.1 (stating that it was proper for the Government to file the mandamus petition because the CVRA authorized the prosecutor, as well as the victim, to assert the CVRA rights, and referencing 18 U.S.C.A. § 3771 (d)(1) (West Pamp. 2014)).

³⁸⁸ *Id.* at 1139.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See *id.* at 1140; *id.* at 1139 n.4 (expressing no opinion regarding the merits of the exclusion claims in the absence of record evidence regarding the proposed testimony of the victim-witnesses); FED. R. EVID. 615; *cf.* *United States v. Johnson*, 362 F. Supp. 2d 1043, 1056 (N.D. Iowa 2006) (permitting presence of victim-witnesses).

³⁹³ No. 10-3772, 2010 U.S. App. LEXIS 19914 (3d Cir. Sept. 22, 2010).

³⁹⁴ *Id.* at *3.

³⁹⁵ *Id.* at *2–3.

³⁹⁶ *Id.* at *2.

³⁹⁷ *Id.* at *2–3.

were ensured by these measures and would not be “diluted in the absence of individual counsel.”³⁹⁸ The Third Circuit found that the trial court had properly recognized the petitioner’s sentencing interests; that the prosecutor had “assumed responsibility” for securing the petitioner’s CVRA rights; and that the trial court had properly exercised its “discretionary powers” in denying the appearance motion of the petitioner’s lawyer. It therefore denied the petition.³⁹⁹

ii. *Traditional Review Standard Circuits*

Prior to expressly adopting the traditional mandamus review standard, the Eleventh Circuit granted a CVRA mandamus petition and ordered the trial court to recognize the petitioner home buyers as CVRA victims of the defendant’s mortgage brokerage fee-related fraud. The appellate court’s grant of mandamus also included an order to the trial court to afford the petitioners their CVRA rights, including the right to be heard that the petitioners had sought to exercise in *In re Stewart*.⁴⁰⁰

In *In re Aquino*,⁴⁰¹ the Eleventh Circuit denied another petition concerning CVRA victim status and the right to be heard.⁴⁰² The appellate court found that the petitioners had not demonstrated that the trial court had made clearly erroneous factual findings or misapplied the law to the findings regarding the defendant’s sentencing hearing.⁴⁰³ Assuming arguendo that the petitioners were eligible CVRA crime victims, the trial court had afforded them the right to be “reasonably heard” by postponing the sentencing to give them additional time to establish their CVRA victim status and by permitting them to provide written statements to be considered at sentencing.⁴⁰⁴ The petitioners failed to provide support to establish their victim status or to submit the permitted statements as of the defendant’s sentencing.⁴⁰⁵ The Eleventh Circuit concluded that the petitioners had not established their entitlement to relief under “any potentially applicable standard of review” and denied their petition.⁴⁰⁶

In a consolidated appeal and CVRA mandamus petition in *In re Siler*,⁴⁰⁷ the Sixth Circuit found that the trial court did not abuse its discretion in denying the petitioners access to the presentence reports from a previous prosecution in which they were CVRA victims.⁴⁰⁸ The petitioners had sought the presentence reports in connection with a civil suit filed eighteen months after the conclusion of the criminal proceedings.⁴⁰⁹ The trial

³⁹⁸ *Id.* at *3.

³⁹⁹ *Id.* at *2–4; see *supra* notes 83–86 and accompanying text (discussing the review standard).

⁴⁰⁰ 552 F.3d 1285, 1286–89 (11th Cir. 2008); see *supra* notes 152–55, 234–39 and accompanying text (discussing this petition).

⁴⁰¹ No. 12-11757-B (11th Cir. Apr. 6, 2012).

⁴⁰² *Id.*, slip op. at 1–2.

⁴⁰³ *Id.*, slip op. at 1.

⁴⁰⁴ *Id.*, slip op. at 1–2.

⁴⁰⁵ *Id.*, slip op. at 2.

⁴⁰⁶ *Id.*, slip op. at 2 n.1 (stating that the circuit had not yet adopted a CVRA mandamus review standard); see *supra* notes 159, 219 and accompanying text (discussing this petition).

In their CVRA petition in the District of Columbia Circuit, the petitioners sought to be heard prior to the acceptance of the plea and proposed plea agreement in the prosecution. Finding that the trial judge had not yet accepted the plea or plea agreement and had stated that he would not do so without hearing from the victims, the appellate court denied the CVRA petition as moot under either the traditional or more expansive review standard. See *In re Jacobsen*, No. 05-7086, 2005 U.S. App. LEXIS 13990 (D.C. Cir. July 8, 2005); *supra* notes 138–39 and accompanying text (finding the petition should be denied under either review standard).

⁴⁰⁷ 571 F.3d 604 (6th Cir. 2009).

⁴⁰⁸ *Id.* at 611.

⁴⁰⁹ *Id.* at 607.

court rejected their claim that the CVRA supported the reports' release to them and concluded that the CVRA did not provide crime victims a "general right" to obtain presentence reports.⁴¹⁰ In addition, the trial court found that these reports are generally not available to non-parties in the prosecution and the petitioners had not demonstrated any special need for access to the reports in this matter.⁴¹¹

At the outset, the Sixth Circuit concluded that the petitioners' requests for access to presentence reports in a completed criminal prosecution fell outside the CVRA's "scope of protection" and the trial court's authority pursuant to the CVRA.⁴¹² Even if the trial court retained authority to release the reports, the appellate court found that the CVRA provides no independent victim right to obtain presentence reports and thus did not require disclosure in this matter. Even if the CVRA were interpreted to include a right of access to presentence reports, the petitioners' request of the reports for use in a civil suit subsequent to the completed criminal proceedings would be outside of the CVRA's scope. The petitioners presented no evidence of their "special need" or other adequate basis for obtaining the nonpublic, confidential reports.⁴¹³ The Sixth Circuit found that the trial court had appropriately weighed the petitioners' need for the presentence reports against the need to maintain the reports' confidentiality and had not abused its discretion in denying the petitioners' request. Concluding that the trial court had "properly" denied the request for the presentence reports, the *Siler* court affirmed the trial court's denial order and it denied the mandamus petition.⁴¹⁴

iii. "Standardless" Review Circuits

In *In re Brock*,⁴¹⁵ the Fourth Circuit reviewed a mandamus petition asserting violations of an assault victim's rights to be heard and treated with fairness in connection with the defendants' sentencing.⁴¹⁶ Although he had materials that summarized the presentence reports, the petitioner requested disclosure of parts of the presentence reports themselves regarding restitution, sentencing guideline calculations, and upward departures, two days before the defendants' sentencing.⁴¹⁷ The reports are confidential, with access limited to the court and parties to the prosecution. The trial court denied this request at the sentencing hearing, concluding that the petitioner had sufficient information to make his victim impact statement without the presentence reports.⁴¹⁸ The trial court permitted the petitioner to add his oral impact presentation to submitted written impact and restitution materials, but declined to hear his testimony or arguments regarding the guidelines calculations.⁴¹⁹

On mandamus review, the Fourth Circuit concluded that it did not need to determine the applicable CVRA review standard because the petitioner was not entitled to relief even under the "more relaxed" abuse of discretion standard.⁴²⁰ The *Brock* court

⁴¹⁰ *Id.* at 608.

⁴¹¹ *See id.* at 607–08 (reflecting additionally that the petitioners had not conducted discovery in their civil suit and sought to use the presentence reports as evidence in the civil suit).

⁴¹² *Id.* at 609.

⁴¹³ *Id.* at 609–11.

⁴¹⁴ *Id.* at 611; *cf. id.* at 608–09 (discussing the petitioners' ability to appeal the trial court order under the facts of this case).

⁴¹⁵ 262 F. App'x 510 (4th Cir. 2008).

⁴¹⁶ *Id.* at 510–11.

⁴¹⁷ *Id.* at 511.

⁴¹⁸ *Id.* (citing 18 U.S.C.A § 3552(d) (West 2000), FED. R. CRIM. P. 32(e)(2), and a local court rule regarding access to the presentence reports).

⁴¹⁹ *See id.*

⁴²⁰ *Id.* at 512; *see supra* notes 176–78 and accompanying text (discussing the review standard).

rejected the petitioner's assertion that, without access to the reports, he had insufficient information to meaningfully exercise his CVRA right to be heard. The appellate court found that he had "ample" sentencing-related information and found no abuse of discretion in the trial court's denial of his access to portions of the presentence reports.⁴²¹ In light of the petitioner's ability to offer written and oral impact and related information to the court and the judge's statement that the guideline calculations did not affect the sentence imposed, the *Brock* court found that the trial court's refusal to consider the petitioner's guideline-related arguments did not prevent him from being reasonably heard or fairly treated. Finally, the appellate court characterized the petitioner's attempt to challenge the trial court's guideline calculations as a crime victim attempt to appeal the defendant's sentence, which is not authorized by the CVRA. Concluding that the petitioner was both reasonably heard and fairly treated, the Fourth Circuit denied the mandamus petition.⁴²²

In *In re Bustos*,⁴²³ the Seventh Circuit addressed the trial court's denial of a motion to intervene in the underlying securities fraud prosecution by the petitioner and other investors who disagreed with aspects of the court-appointed receiver's proposed agreements.⁴²⁴ The appellate court found that the CVRA does not provide a crime victim right to intervene in the prosecution, but instead ensures that victims are "heard out": "Giving victims a voice in the criminal process differs from giving them a veto power, which often is both the goal and the effect of intervention."⁴²⁵ The appellate court found that the trial court had not "refused to listen" to the victims, and that the petitioner's and others' requests had in fact resulted in some modifications of the receiver's proposals.⁴²⁶ The appellate court found no "concrete" violations of the CVRA identified in the petition, but noted that mandamus remained available if the trial court refused to accept victim comments during future court proceedings.⁴²⁷ However, the petitioner's anticipated opposition to the receiver's final proposal did not constitute a CVRA violation or a basis for intervention.⁴²⁸

C. *The Impact of the Mandamus Review Standard on the CVRA Petition Outcomes*

Of the 73 mandamus petitions resolved in the ten years since the enactment of the CVRA, the federal appellate courts have denied or dismissed 62 petitions (85%) and granted 11 petitions (15%) to some degree. The appellate courts denied or dismissed 23 of the petitions (indicated with an "*" in the CVRA Mandamus Outcomes Table) with limited discussion on the ground that the petitioners' claims were not properly raised pursuant to the CVRA, e.g., petitioners attempting to raise claims in connection with civil proceedings. The appellate circuit's CVRA mandamus review standard consequently did not affect the outcome of these petitions. Focusing on the remaining 50 petitions in which the federal appellate courts have more fully addressed specific claims raised pursuant to the CVRA, the federal appellate courts have denied 39 petitions (78%) and granted 11

⁴²¹ *Brock*, 262 F. App'x at 512.

⁴²² *See id.* at 512-13.

⁴²³ No. 10-2752 (7th Cir. July 26, 2010).

⁴²⁴ *Id.*, slip op. at 1.

⁴²⁵ *Id.*, slip op. at 1-2; *see also id.*, slip op. at 2 (finding it unnecessary to decide if victim intervention in a prosecution is ever appropriate and questioning dicta in *In re Siler*, 571 F.3d 604, 609 (6th Cir. 2009), regarding this).

⁴²⁶ *Id.*, slip op. at 2.

⁴²⁷ *Id.*

⁴²⁸ *See id.* In another petition, the Seventh Circuit found a petitioner had been allowed to participate in the proceedings and there had been no violation of the petitioner's right to be heard as of yet in a petition filed "to preserve [the petitioner's] objections." *See In re Oak Brook Bank*, No. 06-2331 (7th Cir. May 12, 2006).

petitions (22%) to some degree.⁴²⁹ As discussed in this section and assessed in multiple ways, the appellate circuit's CVRA mandamus review standard has had a limited impact on the outcomes of these 50 petitions.

Reviewing the denial rate alone, an appellate circuit's adoption of a more expansive mandamus review standard does not automatically guarantee a lower mandamus denial rate. The Second Circuit's application of its abuse of discretion standard in the 3 mandamus petitions it has reviewed has resulted in a denial rate of 100%. Using its abuse of discretion or legal error review standard, the Ninth Circuit has granted 5 of the 13 mandamus petitions it has reviewed, resulting in a denial rate of 62%. If one includes the Third Circuit in the category of more expansive mandamus review standards, its denial rate is 100% based on the sole petition it has reviewed. Collectively, the denial rate for the appellate circuits that have adopted more expansive CVRA mandamus review standards is 71%.⁴³⁰

The mandamus denial rate in the appellate circuits that have adopted traditional mandamus review standards is somewhat higher. The Fifth Circuit has denied 7 of the 10 reviewed petitions (70%). The Sixth Circuit has denied 3 of the 4 reviewed petitions (75%). The Eighth Circuit has denied the sole petition it has reviewed (100%). The Tenth Circuit has denied all 4 petitions it has reviewed (100%). The Eleventh Circuit has denied 5 of the 6 petitions it has reviewed (83%). The District of Columbia Circuit has denied 2 of the 3 petitions it has reviewed (67%). Collectively, the denial rate for the circuits that have adopted traditional mandamus review standards is 79%.⁴³¹

The mandamus denial rate in the appellate circuits that have not yet adopted a CVRA mandamus review standard is the highest of the review standard categories. The Fourth Circuit has denied all 3 reviewed petitions (100%). The Seventh Circuit has denied both of its reviewed petitions (100%). The First Circuit has not yet reviewed any petitions included in this analysis. Collectively, the denial rate for the appellate circuits that have not yet adopted a CVRA mandamus review standard is 100%.⁴³²

Looking at the mandamus grant and denial outcomes from another perspective, the traditional mandamus review standard circuits have actually granted more CVRA mandamus petitions than the appellate circuits with more expansive review standards, i.e., 6 vs. 5 granted petitions. It is also important to note the disproportionate impact on the overall petition success ratios that two circuits—the Fifth and Ninth Circuits—have had. The Ninth Circuit, a more expansive review standard circuit, has both reviewed and granted the largest number of CVRA mandamus petitions: granting 5 of the 13 reviewed petitions. The Fifth Circuit, a traditional review standard circuit, has reviewed and granted the second largest number of CVRA mandamus petitions: granting 3 of 10 reviewed petitions. Collectively, these two circuits account for 46% of the reviewed petitions and 73% of the petitions that have been granted.⁴³³ The comparison of these two circuits and the successful outcomes overall indicates that a traditional CVRA mandamus review standard does not foreclose the possibility of the grant of a CVRA petition.

⁴²⁹ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 193–428 and accompanying text (discussing CVRA petitions and outcomes).

⁴³⁰ See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 48–86 and accompanying text (discussing the adoption of more expansive mandamus review standards).

⁴³¹ See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 90–167 and accompanying text (discussing the adoption of traditional mandamus review standards).

⁴³² See *supra* CVRA Mandamus Outcomes Table; *cf. supra* notes 168–82 and accompanying text (discussing the circuits that have not yet adopted mandamus review standards).

⁴³³ See *supra* CVRA Mandamus Outcomes Table.

The above-described data thus reflect that the CVRA mandamus review standard does not guarantee, or even necessarily predict, a petition's outcome. Circuits that have adopted more expansive CVRA review standards nevertheless have petition denial rates ranging between 62-100%. Denial rates for circuits with traditional CVRA mandamus review standards range from 67-100%. The denial rate for circuits that have not yet adopted a CVRA mandamus review standard is 100%.⁴³⁴ These denial rates indicate that the CVRA mandamus review standard is generally not outcome-determinative.

Another way to assess the impact of the review standard is to examine petitions that have raised similar issues in circuits with different review standards. For example, the Fourth, Sixth, and Ninth Circuits, representing all three review standard categories, have each denied petitions seeking disclosure of some or all of confidential presentence reports.⁴³⁵ In addition, four circuits have addressed seven petitions brought by one or both of two petitioners regarding the sexual exploitation of children restitution statute. The traditional review standard circuits granted 3 of the 4 petitions they reviewed (75%); the Fifth Circuit granting both of its petitions, the District of Columbia Circuit granting its petition, and the Eighth Circuit denying its petition. Applying its more expansive review standard, the Ninth Circuit granted 1 of the 3 petitions it reviewed (33%).⁴³⁶ Although there were obviously factual variations in the individual petitions, this review of outcomes in petitions raising similar issues reflects that the likelihood of CVRA mandamus success was not enhanced by the availability of a more expansive review standard.

Another measure of the limited impact of the CVRA mandamus review standard is the fact that, in resolving 10 of the 50 CVRA petitions (20%), appellate courts explicitly stated that they would have reached the same result regardless whether they applied a traditional or more expansive mandamus review standard.⁴³⁷ In reviewing petitions prior to adopting their traditional CVRA mandamus review standards, appellate courts in three circuits took action on four CVRA mandamus petitions based on their determination that the review standard was not outcome-determinative. The Eleventh Circuit found it unnecessary to adopt a review standard in denying one petition because it found the issue for resolution under either review standard was whether the trial court made clearly erroneous factual findings.⁴³⁸ The Eleventh Circuit found it unnecessary to adopt a review standard to deny another petition because it concluded that the petitioners had not established their entitlement to relief under "any potentially applicable standard of review."⁴³⁹ Before denying the petition as moot, the District of Columbia Circuit similarly found that the petitioner had failed to satisfy either an abuse of discretion or a clear and indisputable right review standard.⁴⁴⁰ On the other hand, the Sixth Circuit found it

⁴³⁴ See *supra* notes 430–33 and accompanying text.

⁴³⁵ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 376–79, 407–22 and accompanying text (discussing these petitions).

⁴³⁶ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 280–327 and accompanying text (discussing these petitions).

⁴³⁷ See *infra* notes 438–45 and accompanying text; see also *United States v. Aguirre-Gonzalez*, 597 F.3d 46, 52–56 (1st Cir. 2010) (finding no crime victim right to appeal and finding conversion of attempted appeal into a mandamus petition would be "futile" because the victim was not entitled to CVRA relief under the traditional or "more lenient" abuse of discretion standard).

⁴³⁸ See *In re Stewart*, 641 F.3d 1271, 1274–75 (11th Cir. 2011); *supra* notes 156–59, 277–79 and accompanying text (discussing this petition).

⁴³⁹ See *In re Aquino*, No. 12-11757, slip op. at 2 & n.1 (11th Cir. Apr. 6, 2012); *supra* notes 159, 219, 401–06 and accompanying text (describing this petition).

⁴⁴⁰ See *In re Jacobsen*, No. 05-7086, 2005 U.S. App. LEXIS 13990, at *2 (D.C. Cir. July 8, 2005); *supra* notes 138–39, 406 and accompanying text (discussing this petition).

unnecessary to adopt a review standard in granting a petition because it found the petitioners had established a right to the writ even under the “stricter” traditional review standard.⁴⁴¹ In addition to these circuits, the Fourth Circuit found it unnecessary to adopt a review standard in denying two petitions because it concluded that the petitioners had not established a right to the writ even under an abuse of discretion standard.⁴⁴²

Three additional circuits denied CVRA mandamus petitions in circumstances in which they explicitly determined that the review standard was not outcome-determinative. The Ninth Circuit, a more expansive CVRA review standard circuit, denied a petition in which the petitioner sought mandamus both pursuant to the CVRA and traditional mandamus authority. The appellate court denied the petition pursuant to “either the CVRA or our traditional mandamus authority.”⁴⁴³ The Third Circuit, arguably a more expansive CVRA review standard circuit, found it unnecessary to determine the applicable review standard in denying a CVRA writ because it found the petitioner was not entitled to relief even under the abuse of discretion standard.⁴⁴⁴ In denying two petitions, the Tenth Circuit, a traditional CVRA review standard circuit, found that the review standard was not outcome-determinative. In denying one of these petitions, the Tenth Circuit observed that the review standard did not impact the petition’s outcome because it found that the disputed trial court ruling would be reviewed for an abuse of discretion under either review standard.⁴⁴⁵ In denying the other petition and rejecting the petitioner’s request for a “more relaxed” review standard, the Tenth Circuit noted that the review standard did not affect the outcome of the petition because relief “must be denied under any standard of review.”⁴⁴⁶

Of course, among the 50 CVRA petitions, there are some instances in which the review standard appears to be outcome-impactful, if not outcome-determinative. For example, in one matter, the Tenth Circuit characterized the petitioners’ claim regarding the trial court’s denial of their victim status as a “difficult case.” It, however, denied mandamus because it did not find that the trial court was clearly wrong in its victim status determination or that the petitioners had established a clear and indisputable right to the writ, as required under the traditional mandamus review standard.⁴⁴⁷ In another matter, the Fifth Circuit actually determined that the trial court had erred in its application of the CVRA and had violated the petitioners’ rights to notice and to confer with the prosecutor. However, the appellate court also considered the petitioners’ “substantial and meaningful participation” at the contested plea proceeding and their opportunity to express their opposition to the plea agreement before concluding that the grant of mandamus would not be “appropriate,” a dispositive factor included in the traditional mandamus review standard.⁴⁴⁸

⁴⁴¹ *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009); *supra* notes 127–30, 343 and accompanying text (discussing this petition).

⁴⁴² *See In re Brock*, 262 F. App’x 510, 512 (4th Cir. 2008); *In re Doe*, 264 F. App’x 260, 261–62 (4th Cir. 2007); *supra* notes 173–78, 243, 415–22 and accompanying text (discussing these petitions).

⁴⁴³ *See In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011); *supra* notes 73–78, 213–15 and accompanying text (discussing this petition).

⁴⁴⁴ *See In re Zackey*, No. 10-3772, 2010 U.S. App. LEXIS 19914, at *3–4 (3d Cir. Sept. 22, 2010); *supra* notes 83–86, 393–99 and accompanying text (discussing this petition).

⁴⁴⁵ *See In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *3 n.1 (10th Cir. Feb. 1, 2008); *supra* notes 98–103, 226 and accompanying text (discussing this petition).

⁴⁴⁶ *See In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009); *supra* note 226 (discussing this petition).

⁴⁴⁷ *See In re Antrobus*, 519 F.3d 1123, 1125–26 (10th Cir. 2008); *supra* notes 90–97, 104–10, 223–26 and accompanying text (discussing this petition); *cf. Antrobus*, 519 F.3d at 1126–27 (Tymkovich, J., concurring).

⁴⁴⁸ *See In re Dean*, 527 F.3d 391, 394–96 (5th Cir. 2008); *supra* notes 112–18, 352–63 and accompanying text (discussing this petition).

Although the traditional review standard circuits have applied the clear and indisputable right requirement to both deny and grant mandamus petitions,⁴⁴⁹ its impact on outcomes has also been diminished by the fact that some appellate courts have intermingled and blurred the distinctions between adopted CVRA traditional mandamus review standards and the more expansive abuse of discretion (or legal error) standard adopted by some circuits. This intermingling of standards is perhaps facilitated by Court mandamus precedent that recognizes a “clear abuse of discretion” as one of the “exceptional circumstances” that would justify the “extraordinary remedy” of mandamus.⁴⁵⁰ For example, the Eleventh Circuit concluded that, if established, a trial court’s clearly erroneous factual finding regarding CVRA crime victim status would satisfy the abuse of discretion required under traditional mandamus analysis as well as a direct appellate review standard.⁴⁵¹ The Second Circuit concluded that such a clearly erroneous factual finding concerning CVRA victim status would satisfy its adopted CVRA abuse of discretion review standard.⁴⁵² The Tenth Circuit stated that it would be reviewing the trial court’s action regarding a discovery request related to CVRA victim status for abuse of discretion under its traditional mandamus review standard and would have also done so under the rejected “ordinary appellate” review standard.⁴⁵³ Perhaps best reflecting the intermingling of the adopted CVRA review standards, the Sixth Circuit, a traditional review standard circuit, found that the petitioner had not established a clear and indisputable right to the writ and thus concluded that the trial court had not abused its discretion in finding that the petitioner was not a CVRA crime victim.⁴⁵⁴

As a practical matter, this intermingling or blurring of review standards also results from the nature of the trial court actions that appellate courts review in many CVRA petitions. In this connection, most CVRA rights have a “reasonableness” limitation e.g., the right to “reasonable, accurate, and timely notice,” the “reasonable right” to confer with the prosecutor, and the right to be “reasonably heard.” The right of victim-witnesses not to be excluded from the courtroom is conditioned on a trial court determination that the testimony of the victim-witnesses would not be materially altered by their presence. The right to restitution is governed by other statutes that permit, in some instances, a trial court balancing of the burdens of determining restitution in a complex prosecution against the victim’s need for restitution. The CVRA authorizes “reasonable” alternative procedures in prosecutions in which the large number of victims makes it “impracticable”

⁴⁴⁹ Compare *In re Fisher*, No. 11-10006, 2011 U.S. App. LEXIS 26500, at *1-4 (5th Cir. Oct. 1, 2011) (finding no clear and indisputable error in the trial court’s determination regarding the petitioners’ victim status), with *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (finding clear and indisputable error in trial court’s determination that a time bar prevented its consideration of new arguments regarding the petitioners’ CVRA victim status).

⁴⁵⁰ See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); see also *supra* notes 34-45 and accompanying text (describing Court mandamus precedent).

⁴⁵¹ See *In re Stewart*, 641 F.3d 1271, 1274-75 (11th Cir. 2011); *supra* notes 156-59, 278-79 and accompanying text (discussing this petition).

⁴⁵² See *In re Galvis*, 564 F.3d 170, 174-76 (2d Cir. 2009) (citing precedent finding that clearly erroneous and abuse of discretion standards are “indistinguishable” in this context); *supra* notes 60-65, 209-12 and accompanying text (discussing this petition).

⁴⁵³ See *In re Antrobus*, No. 08-4013, 2008 U.S. App. LEXIS 27527, at *3 n.1 (10th Cir. Feb. 1, 2008); *supra* notes 98-103, 226 and accompanying text (discussing this petition).

⁴⁵⁴ See *In re McNulty*, 597 F.3d 344, 348-53 (6th Cir. 2010); *supra* notes 136-37, 220 and accompanying text (discussing this petition); accord *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1236-40 (11th Cir. 2014); *supra* notes 160-67, 219 and accompanying text (discussing this petition).

There is a similar intermingling of review standards regarding the legal error component of the Ninth Circuit’s more expansive CVRA review standard. The Ninth Circuit subsequently stated that its analysis in previous CVRA petitions had focused on whether the trial court’s action was “clearly erroneous as a matter of law,” a “dispositive” factor in its traditional mandamus review. See *In re Andrich*, 668 F.3d 1050, 1051 (9th Cir. 2011); *supra* notes 73-78, 213-15 and accompanying text (discussing this petition).

to accord the enumerated rights to all of the victims.⁴⁵⁵ These provisions consequently entrust the trial court with a significant degree of discretion in implementing the CVRA.⁴⁵⁶

In fact, in *In re W.R. Huff Asset Management Co.*,⁴⁵⁷ the Second Circuit identified the nature of the CVRA rights and their implementation as support for its selection of a CVRA abuse of discretion mandamus review standard.⁴⁵⁸

[T]he CVRA provides that the determination to “ensure” that the crime victim is afforded the rights enumerated in the CVRA is entrusted to the district court to make. Further, the district court is in a better position than this Court to decide whether or not relief is warranted under the CVRA ... as it has far more insight into the complexities of a pending litigation than does a court of appeals. Most of the rights provided to crime victims under the CVRA require an assessment of “reasonableness.” The district court is far better positioned to make these assessments and to determine what constitutes “a reasonable procedure” for effecting these rights than a court of appeals.⁴⁵⁹

These factors that led the Second Circuit to select a CVRA abuse of discretion review standard—that it has used to deny all of the CVRA petitions it has reviewed—have also limited the likelihood that a trial court action regarding the CVRA would be deemed a clear and indisputable error upon mandamus review under the traditional review standard.

They are also the same factors that have likely limited the scope of mandamus relief when CVRA petitions have been granted under either the traditional or a more expansive review standard. For example, when the Ninth and Eleventh Circuits concluded that the trial courts had erred in their victim status determinations, the appellate courts nevertheless entrusted the trial courts with the responsibility to subsequently provide the requested rights by performing the CVRA-required determination regarding victim-witness exclusion from proceedings and by hearing from the victims, respectively.⁴⁶⁰ When the Ninth Circuit determined that the trial court had violated the petitioner’s right to be orally heard at sentencing, it nevertheless required the petitioner to follow the CVRA-prescribed procedure of filing a motion to re-open the sentencing in the trial court.⁴⁶¹ Almost half of the petitions granted involved trial court errors concerning restitution. Regarding two of these petitions, the Fifth Circuit, a traditional review standard circuit, dictated what the “correct” restitution award should be.⁴⁶² Regarding the other three

⁴⁵⁵ 18 U.S.C.A. § 3771(a), (d)(2) (West Pamp. 2014); see also 18 U.S.C.A. §§ 3663, 3663A (West 2000 & Pamp. 2014) (describing restitution provisions).

⁴⁵⁶ See, e.g., *In re Zackey*, No. 10-3772, 2010 U.S. App. LEXIS 19914, at *1-4 (3d Cir. Sept. 22, 2010) (finding that the trial court’s action denying the petitioner a right to be heard through his attorney “fell within the proper exercise of its discretionary powers”).

⁴⁵⁷ 409 F.3d 555 (2d Cir. 2005).

⁴⁵⁸ *Id.* at 562-63.

⁴⁵⁹ *Id.* (citations omitted).

⁴⁶⁰ See *In re Parker*, Nos. 09-70529, 09-70533, 2009 U.S. App. LEXIS 7158, at *3-7 (9th Cir. Mar. 2, 2009); *In re Stewart*, 552 F.3d 1285, 1287, 1289 (11th Cir. 2008); *supra* notes 152-55, 216-18, 234-39, 382-84, 400 and accompanying text (discussing these petitions); cf. *supra* notes 156-59, 278-79 and accompanying text (discussing denial of *Stewart* petitioners’ subsequent petition regarding denial of restitution).

⁴⁶¹ See *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1017-18 (9th Cir. 2006); *supra* notes 66-71, 364-75 and accompanying text (discussing this petition); cf. *supra* notes 376-79 and accompanying text (discussing denial of *Kenna* petitioner’s subsequent petition regarding access to the presentence report).

⁴⁶² See *In re Amy Unknown*, No. 13-20485, slip op. at 2-3 (5th Cir. Aug. 30, 2013); *In re Amy Unknown*, 701 F.3d 749, 773-74 (5th Cir. 2012) (en banc), *vacated and remanded sub nom.* *Paroline v. United States*, 134 S. Ct. 1710 (2014); *supra* notes 120-26, 284-301 and accompanying text (discussing these petitions).

petitions, the Ninth and District of Columbia Circuits, representing both traditional and more expansive review standard circuits, authorized the trial courts to attempt to properly re-determine the restitution award.⁴⁶³

As assessed across multiple measures, the CVRA mandamus review standard, i.e., a traditional or more expansive mandamus review standard, has had a limited impact on the outcomes of CVRA mandamus petitions in the ten years since the statute's enactment. The appellate circuits have denied the majority (from 62-100%) of the mandamus petitions, regardless of the review standard. Appellate circuits with traditional mandamus review standards have actually granted more CVRA petitions than those with more expansive review standards. The review standard has not differentially impacted the outcomes in petitions resolving similar issues. In a significant minority of the petition opinions, the appellate courts explicitly stated that the same outcome would have been reached regardless which review standard was utilized. Several other appellate courts have intermingled or blurred the distinctions between the review standards in resolving their petitions. Finally, both in granting and denying the presented CVRA petitions, regardless of the review standard used, appellate courts have shown significant deference to trial courts' implementation of the CVRA and its required "reasonableness" and other determinations.⁴⁶⁴

V. CONCLUSION

When Congress considered the enactment of the CVRA in 2004, one of its primary sponsors identified its mandamus enforcement remedy as a feature that made the legislation "so important, and different from earlier legislation" and a remedy that would allow an "appellate court to take timely action to ensure that the trial court follows the rule of laws set out in this statute."⁴⁶⁵ In the ten years since the CVRA's enactment, federal appellate courts have considered 73 mandamus petitions asserting violations of the CVRA. In the course of their review of these petitions, the appellate circuits have addressed most of the crime victim rights prescribed in the CVRA and other aspects of the statute, including the definition of crime victim status for purposes of CVRA eligibility.

⁴⁶³ See *In re Morning Star Packing Co.*, 711 F.3d 1142, 1144 (9th Cir. 2013); *In re Amy & Vicky*, 710 F.3d 985, 987 (9th Cir. 2013); *In re Amy*, 641 F.3d 528, 540 (D.C. Cir. 2011); *supra* notes 140–46, 261–66, 302–08, 318–23 and accompanying text (discussing these petitions); *cf. supra* notes 324–27 and accompanying text (discussing denial of Amy and Vicky's subsequent petition regarding the award of restitution).

The scope of relief ordered upon granting the remaining CVRA mandamus petitions was also limited, regardless of the review standard utilized. See *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (requiring the trial court to hear new arguments regarding the petitioners' victim status); *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009) (requiring the trial court to rule on the petitioner's motion within two weeks); *In re Mikhel*, 453 F.3d 1137, 1139–40 (9th Cir. 2006) (requiring the trial court to make the CVRA-prescribed determination regarding victim-witness exclusion from proceedings); *supra* notes 127–30, 228–33, 343, 385–92 and accompanying text (discussing these petitions); *cf. supra* notes 267–72 and accompanying text (discussing denial of *Allen* petitioners' subsequent petition regarding restitution).

The breadth of the appellate circuit's mandamus review standard also has not predicted which circuits are most likely to broadly interpret the scope of the CVRA itself. For example, the Ninth Circuit, a more expansive review standard circuit, more broadly interpreted the CVRA rights to be heard and not to be excluded from court proceedings. See *Mikhel*, 453 F.3d at 1139; *Kema*, 435 F.3d at 1016. However, the Fifth Circuit, a traditional review standard circuit, more broadly interpreted the CVRA right to confer with the prosecutor and the sexual exploitation of children restitution statute. See *Amy Unknown*, 701 F.3d at 773; *In re Dean*, 527 F.3d 391, 394–95 (5th Cir. 2008).

⁴⁶⁴ See *supra* notes 429–64 and accompanying text (discussing the impact of the CVRA review standard).

⁴⁶⁵ See 150 CONG. REC. S4,261–62 (daily ed. Apr. 22, 2004) (statement of Sen. Dianne Feinstein).

The appellate courts have granted 11 of these mandamus petitions and denied 62 petitions.⁴⁶⁶

In their CVRA mandamus review, a conflict has developed among the circuits regarding the appropriate review standard to be utilized. The initial appellate circuits to identify a CVRA mandamus review standard adopted standards that were more expansive than traditional mandamus review standards: an abuse of discretion standard in the Second Circuit and an abuse of discretion or legal error standard in the Ninth Circuit. The circuits that have subsequently adopted a CVRA mandamus review standard have adopted some version of a traditional mandamus review standard, with all incorporating a requirement of a petitioner showing of a clear and indisputable right to the writ. These circuits include the Fifth, Sixth, Eighth, Tenth, Eleventh, and District of Columbia Circuits. The Third Circuit's review standard is ambiguous in that it has referred both to the more expansive standards adopted by the Second and Ninth Circuits and the traditional standard. The First, Fourth, and Seventh Circuits have not yet adopted a CVRA mandamus review standard.⁴⁶⁷

This conflict in the circuits regarding the review standard can be resolved by either congressional or Court action. In this connection, legislation was recently introduced, but not enacted, in both the Senate and House of Representatives to amend the CVRA to reflect that appellate courts "shall apply ordinary standards of appellate review" in deciding CVRA mandamus petitions.⁴⁶⁸ Alternatively, the Court could grant certiorari review to resolve the conflict among the circuits, as it did regarding the child sexual exploitation restitution statute in the *Paroline* decision,⁴⁶⁹ and determine whether the CVRA requires a traditional or more expansive mandamus review standard.

The mandamus remedy is an important component of the CVRA. To achieve the most effective implementation of the CVRA, the circuit conflict regarding the mandamus review standard should be resolved—regardless of the review standard selected. As a practical matter, however, this Article has demonstrated that the difference in review standards has had a limited impact on the outcomes of the CVRA mandamus petitions reviewed thus far. It is therefore unlikely that a resolution of the circuit conflict regarding

⁴⁶⁶ See *supra* CVRA Mandamus Outcomes Table; *supra* notes 193–428 and accompanying text (identifying and discussing these petitions).

⁴⁶⁷ See *supra* notes 46–192 and accompanying text (discussing the circuit conflict regarding the CVRA mandamus review standard).

⁴⁶⁸ S. 2646, 113th Cong. § 302 (2014); H.R. 4165, 113th Cong. § 2 (2014); S. 822, 113th Cong. § 2 (2013). This provision was added, during Judiciary Committee consideration, to proposed Senate legislation reauthorizing the Justice for All Act and including some amendments to the CVRA. The bill was reported out of the Judiciary Committee and placed on the Senate legislative calendar. No further action was taken on the CVRA amendments prior to the expiration of the congressional session. *All Actions: S. 822 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/822/all-actions> (last visited Jan. 7, 2015). This provision was also added, during Judiciary Committee review, to proposed Senate legislation addressing runaway and homeless youth and trafficking prevention. The bill was reported out of the Judiciary Committee and placed on the Senate legislative calendar. No further action was taken prior to the expiration of the congressional session. *All Actions: S. 2646 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2646/all-actions> (last visited Jan. 7, 2015). The provision was in legislation introduced in the House of Representatives containing proposed amendments to the CVRA and other crime victim-related legislation. It was referred for subcommittee consideration, but no action was taken prior to the expiration of the congressional session. *All Actions: H.R. 4165 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4165/all-actions> (last visited Jan. 7, 2015).

⁴⁶⁹ See *supra* notes 328–36 and accompanying text (discussing the *Paroline* decision).

the review standard will significantly change the outcomes of CVRA mandamus petitions in the future.⁴⁷⁰

⁴⁷⁰ See *supra* notes 429–64 and accompanying text (discussing the limited impact of the CVRA mandamus review standard on petition outcomes).

POSTSCRIPT: OUT OF THE MANDAMUS MUDDLE

After completion of this Article, both the Senate and House of Representatives approved an amendment to the CVRA to resolve the circuit conflict regarding the CVRA mandamus review standard.⁴⁷¹ In separate legislation approved regarding other matters, both chambers included a provision that explicitly states that the appellate courts “shall apply ordinary standards of appellate review” in deciding CVRA mandamus petitions.⁴⁷² Prior to the publication of this Article, the House of Representatives adopted the Senate version of the broader legislation containing the CVRA mandamus review standard amendment previously approved in both chambers.⁴⁷³ President Barack Obama signed the legislation into law on May 29, 2015.⁴⁷⁴ This CVRA amendment resolves the circuit conflict regarding the mandamus review standard that has existed throughout the first ten years of the CVRA implementation and it will provide appellate courts greater guidance in considering CVRA mandamus petitions in the future.⁴⁷⁵ However, as this Article has demonstrated, the resolution of the circuit conflict regarding the mandamus review

⁴⁷¹ See S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015); 161 CONG. REC. S2,338 (daily ed. Apr. 22, 2015) (reflecting passage of the legislation); 161 CONG. REC. H607 (daily ed. Jan. 27, 2015) (reflecting passage of the legislation); see also *All Actions: S. 178 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/178/all-actions> (last visited June 6, 2015); *All Actions: H.R. 181 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/181/all-actions> (last visited May 21, 2015); cf. *supra* note 468 and accompanying text (describing previous legislative proposals to resolve the mandamus review standard issue).

⁴⁷² S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015). Both the Senate and House of Representatives included this CVRA amendment in legislation addressing victims of trafficking. In this legislation, both chambers also approved additional CVRA amendments, such as 1) the addition of CVRA rights to timely information about plea bargains and deferred prosecution agreements and to information about the CVRA rights themselves and 2) a provision to permit the mandamus litigants and the appellate court to agree to a different time period for mandamus resolution than the 72 hour time period established in the CVRA. S. 178, 114th Cong. § 113 (2015); H.R. 181, 114th Cong. § 10 (2015); *All Actions: S. 178, supra* note 471; *All Actions: H.R. 181, supra* note 471.

⁴⁷³ See 161 CONG. REC. H3,329–30 (daily ed. May 19, 2015) (reflecting passage of the legislation); *All Actions: S. 178, supra* note 471.

⁴⁷⁴ See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113; *All Actions: S. 178, supra* note 471.

⁴⁷⁵ Although intended to resolve the circuit conflict regarding the CVRA mandamus review standard, the review standard Congress has selected may not be entirely clear. The amendment provides for the use of “ordinary standards of appellate review” in CVRA mandamus proceedings. S. 178, 114th Cong. § 113 (2015). Traditional appellate review standards include de novo review of questions of law, clear error review of questions of fact, and abuse of discretion review of matters entrusted to the trial court’s discretion. See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 562 (2d Cir. 2005). The only discussion of the proposed legislative clarification of the CVRA mandamus review standard appears in the House of Representatives Committee on the Judiciary report:

This section adopts the approach followed by the Ninth Circuit in *Kenna v. U.S. District Court for the Central District of California*, 435 F.3d 1011 (9th Cir. 2006), and the Second Circuit in *In re W.R. Huff Asset Management Company*, 409 F.3d 555 (2d Cir. 2005), namely that, despite the use of a writ of mandamus as a mechanism for victims’ rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.

H.R. REP. NO. 114-7, at 8 (2015). As described in this Article, the Second Circuit adopted an abuse of discretion mandamus review standard for CVRA petitions in *W.R. Huff Asset Management Co.*, 409 F.3d at 562–63, and the Ninth Circuit adopted an abuse of discretion or legal error mandamus review standard in *Kenna*, 435 F.3d at 1017. See *supra* notes 48–59, 66–71 and accompanying text (discussing the CVRA mandamus review standards established in these decisions). Although similar, these two review standards are not identical and they do not include all of the traditional appellate review standards. Thus, even after the enactment of this CVRA amendment, there may be some continuing questions about the applicable CVRA mandamus review standard.

standard is not likely to significantly change the outcomes of CVRA mandamus petitions.⁴⁷⁶

⁴⁷⁶ See *supra* notes 429–64 and accompanying text (discussing the limited impact of the CVRA mandamus review standard on the petition outcomes).

**GIVING AN ACQUITTAL ITS DUE: WHY A
QUARTET OF SIXTH AMENDMENT CASES
MEANS THE END OF UNITED STATES V. WATTS
AND ACQUITTED CONDUCT SENTENCING**

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In 2007, Mr. Joseph Jones, Mr. Desmond Thurston, and Mr. Antwuan Ball exercised their Sixth Amendment right to require the government prove to a Washington, D.C. jury that they were guilty beyond all reasonable doubt of multiple offenses arising from their alleged involvement with a crack-dealing gang.¹ The three defendants were charged with conspiracy to distribute crack, distribution of crack (multiple counts), and various violent crime and racketeering offenses.² At trial, the government's proof included recordings of the defendants selling crack, testimony from former defendants turned cooperators, and testimony from witnesses who had purchased crack from the three defendants.³ On November 28, 2007, the jury convicted the three men of the distribution charges, but acquitted them of the conspiracy, racketeering, and violent crime charges.⁴

Despite the acquittal on the conspiracy charge, the sentencing judge leveraged the distribution convictions to find by a preponderance of the evidence that the defendants' "crimes were part of a common scheme to distribute crack."⁵ The judge then determined, again using the preponderance standard, that the scheme involved sales of over 500 grams of crack for Mr. Jones, and 1.5 kilograms of crack for the other two defendants.⁶ Based on these findings, the judge increased the three defendants' sentencing exposure under the Federal Sentencing Guidelines from between 27 and 71 months imprisonment, to 324 to 405 months for Mr. Jones, 262 to 327 months for Mr. Thurston, and 292 to 365 months for Mr. Ball.⁷ The judge varied below the enhanced ranges to impose prison sentences of 180 months for Mr. Jones, 194 months for Mr. Thurston, and 225 months for Mr. Ball.⁸

The three defendants appealed their sentences on the basis that "their sentences violated their Sixth Amendment right to trial by jury because they were based, in part, on [their] supposed involvement in the very conspiracy that the jury acquitted them of participating in."⁹ While the D.C. Circuit "underst[oo]d why appellants find sentencing on acquitted conduct unfair," the law allowed it, so the appellate court found no fault with sentences the three defendants received.¹⁰

This outcome shocks the conscience of the average layperson whose knowledge of the criminal justice system likely begins and ends with "innocent until proven guilty." That is because what allowed this outcome is a dirty secret of the criminal justice system: *United States v. Watts*. *Watts* allows judges to sentence multi-count defendants for conduct underlying acquitted counts.¹¹ It is an allocation of judicial power that (for most) provokes visceral protestation. Yet, it is a practice that has continued largely unabated before and after the Supreme Court blessed it in *Watts* over 17 years ago.

Many commentators and scholars have written how acquitted conduct sentencing violates the intent and spirit of the Fifth and Sixth Amendments. This article takes this

¹ *United States v. Jones*, 744 F.3d 1362, 1365, 1368 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 8 (2014). Only Mr. Jones and Mr. Ball were charged with the violent crimes. *See id.* at 1365 n1.

² *Id.* at 1365 & n.1.

³ *Id.* at 1365.

⁴ *Id.* at 1365 & n.1.

⁵ *Id.* at 1365.

⁶ *Id.* at 1365-66.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1368.

¹⁰ *Id.* at 1369; The Supreme Court denied the defendants' petition for writ of certiorari. *Jones v. United States*, 135 S. Ct. 8 (2014). The denial, and Justice Scalia's dissent, is discussed later in this article.

¹¹ 519 U.S. 148, 149 (1997).

common analysis one step further, by arguing that a quartet of Supreme Court Sixth Amendment cases are a Constitutional bar to acquitted conduct sentencing. With *Apprendi v. New Jersey*¹², *Blakely v. Washington*¹³, *United States v. Booker*¹⁴, and more recently, *Alleyne v. United States*¹⁵, the Supreme Court reinforced, clarified, and extended the line in the sand that separates the power and reach of the bench from the province of the jury. Taken together, this “max-min quartet” firmly establishes that a judge’s sentencing power begins and ends with the jury and the reasonable doubt standard.¹⁶ More importantly, they provide the means to force the Sixth Amendment confrontation that the Supreme Court deftly avoided in *Watts* -- a confrontation that *Watts* cannot survive.

SENTENCING REFORM ACT OF 1984 AND THE BIRTH OF THE GUIDELINES

Before examining *Watts* and the max-min quartet, it is important to understand the judicial context and environment that allowed *Watts* and acquitted conduct sentencing to emerge and survive, despite contradicting bedrock principles of the American criminal justice system.

For nearly a century prior to 1984, the federal system employed an indeterminate sentencing model that approached crime as a moral disease to be cured through rehabilitation.¹⁷ Indeed, the model “was premised on a faith in rehabilitation.”¹⁸ Judges, supported by parole officers, were viewed as experts of the disease, and were therefore vested with broad discretion to fashion sentences that provided sufficient time to cure defendants through rehabilitation.¹⁹

During this time, judicial sentencing authority and practice were largely unregulated and unchecked. The majority of federal criminal statutes had open-ended punishment ranges or merely set the maximum numbers of years a defendant could be sentenced to prison.²⁰ Judges had unquestioned discretion to sentence a defendant anywhere within the statutory limits.²¹ Appellate courts took a hands-off approach and interjected themselves only when a sentence exceeded the statutory limits or reflected a gross abuse of discretion.²² This unfettered respect for judicial discretion extended even to

¹² 530 U.S. 466 (2000).

¹³ 542 U.S. 296 (2004), *reh’g denied*, 542 U.S. 961 (2004).

¹⁴ 543 U.S. 220 (2005).

¹⁵ 133 S. Ct. 2152 (2013).

¹⁶ See cases cited *supra* notes 12-15.

¹⁷ See *Mistretta v. United States*, 488 U.S. 361, 363-66 (1989) (“For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.”); see also *Tapia v. United States*, 131 S. Ct. 2382, 2383, 2386 (2011) (citing and quoting *Mistretta*, 488 U.S. at 363); see also Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993).

¹⁸ *Tapia*, 131 S. Ct. at 2386; see also *Mistretta*, 488 U.S. at 363 (“Both indeterminate sentencing and parole were based on concepts of the offender’s possible, indeed probable rehabilitation . . .”).

¹⁹ See *Mistretta*, 488 U.S. at 363-64. *Tapia*, 131 U.S. at 2386 (“If the judge decided to impose a prison term, discretionary authority shifted to parole officials: Once the defendant had a spent a third of his term behind bars, they could order his release.”).

²⁰ See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

²¹ *Jones v. United States*, 327 F.2d 867, 869-70 (D.C. Cir. 1963) (“It is clear beyond peradventure that this court had and has no control over a sentence which comports with the applicable statute, ‘even though it be a death sentence.’ Nor may we reduce or modify a sentence nor require a trial judge to do so.”) (quoting *Rosenberg v. United States*, 344 U.S. 889, 890 (1952)); *United States v. Lowery*, 335 F. Supp. 519, 521 (D.D.C. 1971) (“It is clear that absent a manifest abuse of discretion, and provided the trial judge complies with the applicable statute, his discretion in sentencing cannot be infringed upon.”); Stith & Koh, *supra* note 20, at 225.

²² Stith & Koh, *supra* note 20, at 226, 245; see also *Mistretta*, 488 U.S. at 364.

death sentences.²³ A judge's sentence, for the most part, was final and absolute.²⁴ It was only with the introduction of federal parole in 1910, did Congress reduce (somewhat) judicial sentencing power.²⁵

By the 1970s, "this model of indeterminate sentencing eventually fell into disfavor."²⁶ The model, and unchecked judicial sentencing discretion, came under increasing criticism from academics and legislators from both the political left and right.²⁷ To the conservative right, judges were using their unchecked discretion to impose lenient, disparate, and inconsistent sentences that allowed dangerous, repeat offenders to escape sufficient terms of imprisonment.²⁸ For the liberal left, the problem was a growing disparity in the sentences handed to minorities compared to the lighter sentences white defendants received for comparable crimes.²⁹

After a decade of many fits and starts (and failures) to revamp sentencing policy, the contrasting concerns of the political left and right converged with the passage of the Sentencing Reform Act of 1984 (hereinafter the "SRA").³⁰ The SRA was a near complete overhaul of federal sentencing policy and practice.³¹ Most notably, the SRA was the abandonment of the indeterminate model in favor of a determinate model that Congress believed would yield consistent and proportionate sentences, and ease the public's confusion and concern about sentencing lengths.³² To be the engine of this new model, the SRA created the United States Sentencing Commission (hereinafter the "Commission"),

²³ See, e.g., *Rosenberg*, 344 U.S. at 889-90 (1952) ("A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of the Court to revise.") (discussing congressional action in 1911 abolishing the right to an appeal).

²⁴ *Lowery*, 335 F. Supp. at 521 ("Initially, it cannot be gainsaid that in matters relating to sentencing the trial court has virtually absolute, if not unfettered discretion.").

²⁵ Stith & Koh, *supra* note 20, at 226-27 ("[P]arole authorities were assigned the task of determining the actual release date for most federal prisoners . . . With the advent of federal parole, federal prison sentences became partially indeterminate.") (explaining that parole reduced judicial sentencing power).

²⁶ *Tapia v. United States*, 131 S. Ct. 2382, 2387 (2011); see also Gerald Leonard & Christine Dieter, *Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing*, 17 BERKELEY J. CRIM. L. 260, 271 (2012).

²⁷ See Leonard & Dieter, *supra* note 26, at 271; see also S. Rep. No. 98-225, at 41 (1983) (Conf. Rep.) ("The absence of a comprehensive federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants."); See also Stith & Koh, *supra* note 20, at 228. Perhaps the most influential critic was Marvin Frankel, a well-respected former federal judge and former Columbia law school professor. *Id.* In 1972, while serving on the bench, Judge Frankel published *Criminal Sentences: Law Without Order*, which zealously criticized judicial "wholly unchecked and sweeping" sentencing authority and called for the creation of a "Commission on Sentencing" responsible for establishing "binding" sentencing guides. *Id.* Judge Frankel's views and his book would serve as the model and inspiration for the Sentencing Reform Act of 1984. *Id.*

²⁸ See S. Rep. No. 98-225, at 44-45; see Leonard & Dieter, *supra* note 26, at 271; see Frank O. Bowman, III, *Debauch: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 374 (2010).

²⁹ See S. Rep. No. 98-225, at 65; see also *Tapia*, 131 S. Ct. at 2387; see Leonard & Dieter, *supra* note 26, at 271.

³⁰ See S. Rep. No. 98-225, at 65 ("The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."); see also *Tapia*, 131 S.Ct. at 2387. See Stith & Koh, *supra* note 20, for a discussion of the comprehensive legislative history of the SRA.

³¹ *Burns v. United States*, 501 U.S. 129, 132-33 (1991) ("The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes."); see also S. Rep. No. 98-225, at 65, ("[The SRA] meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain.").

³² See *Setser v. United States*, 132 S. Ct. 1463, 1474-75 (2012); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1190 (1993); see also U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2013) [hereinafter "U.S.S.G."]. In passing the SRA, Congress sought "honesty in sentencing", "to avoid the confusion and implicit deception" of indeterminate sentencing, and "reasonable uniformity." *Id.* [Note: The sentencing guidelines are referred throughout this Article as the "Guidelines"].

and charged it with crafting the federal sentencing guidelines (hereinafter the “Guidelines”).³³

The SRA also shifted the focus of sentencing from rehabilitation to punishment and deterrence.³⁴ More bluntly, the SRA was the legislative rejection of the premise that prison was for rehabilitation.³⁵ Indeed, Congress made its rejection clear by limiting judicial discretion to the sentencing factors specified by Congress, of which rehabilitation is one of many, and one that is not highly valued.³⁶

MODIFIED REAL OFFENSE SENTENCING UNDER THE GUIDELINES

It took the Commission nearly three years to draft the Guidelines and for Congress to approve them. At the start, the Commission’s critical decision was whether to base the Guidelines on the charged offense or the “real” offense.³⁷ In a “charge offense” system, a defendant is sentenced solely on the offense of conviction (and his criminal record) without considering the particulars of the defendant’s criminal conduct.³⁸ Charge offense sentencing restrains judicial discretion and promotes sentencing consistency, but at the expense of particularized sentencing, which recognizes that criminal offenses are committed with varying degrees of culpability and that not all defendants are the same.

In contrast, under a “real offense” system, a defendant’s sentence is based on the particulars and specifics of his criminal conduct, the context of the conduct, and who was involved with or injured by the conduct.³⁹ The advantage of real offense sentencing is that it allows a judge to tailor a sentence specifically to the circumstances that aggravate or mitigate a particular criminal act. The downside is that real offense sentencing fosters sentencing disparity -- a defendant’s sentence is largely determined by which judge the defendant draws and how the judge subjectively views the defendant and the defendant’s conduct.

The Commission initially pursued a real offense system.⁴⁰ However, this effort “proved unproductive” as the Commission failed to find a “practical way to combine and account for the large number of diverse harms arising in different circumstances.”⁴¹ The

³³ *Mistretta*, 488 U.S. at 367-68 (1989); *Tapia*, 131 S. Ct. at 2387; see also S. Rep. No. 98-225 at 63 (“[The SRA] creates a United States Sentencing Commission whose duty is to promulgate sentencing guidelines and policy statements.”); *Lear*, *supra* note 32, at 1190.

³⁴ *Mistretta*, 488 U.S. at 367 (“[The SRA] rejects imprisonment as a means of promoting rehabilitation . . . and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals.”) (citation omitted); see also *Lear*, *supra* note 32, at 1190-91.

³⁵ See *United States v. Irey*, 612 F.3d 1160, 1228-29 (11th Cir. 2010); see also S. Rep. No. 98-225, at 40 (“The sentencing provisions of current law were originally based on a rehabilitation model Recent studies suggest that this approach has failed, and most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate bases for sentencing.”).

³⁶ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1998 (1984) (codified as 18 U.S.C. § 3582) (“[I]mprisonment is not an appropriate means of promoting correction and rehabilitation.”); see generally *Tapia*, 131 S. Ct. 2382 (holding that the SRA precluded a sentencing court from lengthening a defendant’s prison term to promote rehabilitation); but see 18 U.S.C.A. § 3553(a)(2)(D) (West 2010) (“[T]o provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”).

³⁷ See U.S.S.G., *supra* note 32, §1A1.4(a) (“One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct . . . or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Commission was also unable to devise a simple and efficient system that would not result in the sentencing disparities the SRA was enacted to prevent.⁴²

The Commission eventually settled on a modified real offense system that incorporates elements of charge offense sentencing.⁴³ This hybrid system is employed today. It consists of base offense levels for every federal offense and pre-set offense level increases (and a few decreases) based on contextual factors. The base offense level with the adjustments produce a final offense level that ranges from one to forty-three.⁴⁴ Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction.⁴⁵ A defendant's total number of criminal history points determines into which of the six criminal history categories he falls.⁴⁶ Using the Guidelines' sentencing table, the intersection point of a defendant's final offense level and his criminal history category yield his presumptive sentencing range.⁴⁷

RELEVANT CONDUCT

A central tenet of real offense sentencing is that sentencing judges are free to set a term of imprisonment, within the statutory maximum, based on the specific conduct of the defendant and all that resulted from the conduct. In real offense sentencing a judge is not limited by the elements of the offense of conviction. The "modified" approach of the Guidelines incorporates this tenet by allowing judges to sentence a defendant based on "relevant conduct."⁴⁸ Relevant conduct extends outside and beyond the elements of the offense of conviction, as well as the offense itself.⁴⁹ Relevant conduct can consist of facts related to the criminal conduct underlying the conviction, uncharged conduct, dismissed charges, the conduct of others done "in furtherance of the jointly undertaken criminal activity," or (the focus of this Article) acquitted conduct.⁵⁰

To encapsulate "relevant conduct" the Guidelines enumerate a number of "specific offense characteristics" and "applicable general adjustments" consisting of particular mitigating or aggravating circumstances that increase (or at times decrease) a defendant's offense level by a prescribed number of levels.⁵¹ The number of adjustments

⁴² *Id.*

⁴³ Lear, *supra* note 32, at 1194; Leonard and Dieter, *supra* note 26, at 273; The Commission characterization of the system as a charge offense system that "contains a significant number of real offense elements," U.S.S.G., *supra* note 37, §1A1.4(a), is belied by the real offense adjustments and considerations that are built into or accompany nearly every factor for determining a defendant's sentencing range, from his base offense level, *see, e.g.*, U.S.S.G., *supra* note 37, §4A1.1(d) (requiring the addition of two criminal history points if the defendant committed the instant offense while under any criminal justice sentence such as probation or parole). On its face and in practice, the Guidelines are a real offense system that has elements of a charge offense system.

⁴⁴ *See generally* U.S.S.G., *supra* note 37, §1B1.1(a); *see also id.* §2A1.1(a).

⁴⁵ *Id.* § 1B1.1(a).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* § 1B1.3.

⁴⁹ *Id.*; *see also id.* § 5K2.21 (allowing a court to "depart upward" for dismissed or uncharged conduct).

⁵⁰ *Id.* § 1B1.3(a)(1). However, the Guidelines do not explicitly provide that acquitted conduct is "relevant conduct." Indeed, the Guidelines provide only a bland and passive endorsement of acquitted conduct sentencing. *See id.* § 6A1.3 cmt. background ("In determining relevant facts, sentencing judges are not restricted to information that would be admissible at trial.") (citing *Watts* in support of the Guidelines' sentencing policy).

⁵¹ *Id.* § 1B1.3. The number of enumerated offense adjustments is fixed, and in some ways limited. For the Commission to account for the nearly unlimited variations and variables of conduct and harm would have rendered the Guidelines too complex, dense, and unworkable. *See id.* § 1A1.4(a) ("[N]o practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did [the Commission] find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a

is fixed, and in some ways limited, because to account for “every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect.”⁵² However, for egregious conduct that falls through the cracks, the Guidelines encourage judges to increase a defendant’s offense level or sentence a defendant above his presumed guideline range.⁵³

Relevant conduct sentencing under the Guidelines mirrors the statutory directive from Congress that “[n]o limitation shall be placed on the information concerning the background, character, and *conduct* of a person convicted of an offense which a [court] may receive and consider for the purpose of imposing an appropriate sentence.”⁵⁴ Relevant conduct sentencing, therefore, is essentially without boundaries or limits. One such absent border is the reasonable doubt standard. The preponderance of evidence standard reigns for sentencing.⁵⁵ It is a standard that is free from the purposefully burdensome constraints and obligations of the reasonable doubt standard, in favor of a standard where a splinter over 50% exposes a defendant to an enhanced sentence.⁵⁶ Once the door of conviction is opened, a defendant is left to answer for his entire life up to that moment, regardless of how tenuous the link to the offense of conviction, and regardless that the proof would fail to convince a jury.

UNITED STATES V. WATT

In two cases decided together in 1997 as *United States v. Watts*,⁵⁷ the Supreme Court established that a sentencing court may consider acquitted conduct otherwise proven under the preponderance standard at sentencing to determine a defendant’s sentence.⁵⁸

In *Watts*, police found cocaine base and two loaded firearms in separate parts of Watts’s home.⁵⁹ At trial, Watts was convicted of possessing with the intent to distribute cocaine base, but acquitted of the using a firearm in relation to the drug offense.⁶⁰ In the companion case, Putra was captured on videotape selling cocaine to a government informant on two separate occasions (May 8, 1992 and May 9, 1992). The jury convicted

speedy sentencing process given the potential existence of hosts of adjudicated ‘real harm’ facts in many typical cases.”).

⁵² *Id.* §1A1.3.

⁵³ See, e.g., *id.* §§ 5K2.0-5K2.17.

⁵⁴ 18 U.S.C.A. § 3661 (West 2014) (emphasis added); see also U.S.S.G., *supra* note 37, § 1B1.4 (adopting § 3661). It is important to note that § 3661’s broad unrestricted scope is not fully embraced by the Guidelines. In contrast to § 3661, the Guidelines discourage or limit a judge from considering a defendant’s education, vocational skills, drug or alcohol dependence, gambling addiction, employment record, family ties, race, sex, national origin, creed, religion, socio-economic status, disadvantaged upbringing in determining a sentence or decreasing a defendant’s offense level. See *Id.* § 1B1.4 cmt. background; *Id.* §§ 5H1.2-5H1.6, 5H1.10, 5H1.12.

⁵⁵ See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process); see also U.S.S.G., *supra* note 37, § 6A1.3 cmt. background (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding the application of the guidelines to the facts of a case.”).

⁵⁶ See, *United States v. Watts*, 519 U.S. 148, 156-57 & n.2 (1997).

⁵⁷ *Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra*. *Watts* consisted of two cases from the Ninth Circuit: *United States v. Watts* and *United States v. Putra*. *Id.* at 149.

⁵⁸ In *Williams v. New York*, the Supreme Court opened the door to acquitted conduct sentencing by affirming a trial judge’s imposition of the death sentence after the jury recommended a life sentence for the defendant’s first degree murder charge. 337 U.S. 241, 252 (1949). The Supreme Court held that it is consistent with due process and proper under New York law, for the trial judge to rely on additional information obtained by the probation department, but not presented to the jury, to impose a harsher punishment than had been recommended by the jury. *Id.* at 242-43.

⁵⁹ *Watts*, 529 U.S. at 149.

⁶⁰ *Id.* at 149-50.

her of the distribution count for the May 8th transaction, but acquitted her for the May 9th transaction.⁶¹ During the sentencing phase in both cases, the district court found that Watts and Putra had engaged in the conduct underlying the acquitted offenses, and used this “relevant conduct” to increase their respective final offense levels under the Guidelines.⁶² For Watts, the adjustment consisted of a two-level bump for possession of a gun in connection with a drug offense.⁶³ For Putra, the court aggregated the amount of drugs from the May 8th and May 9th transactions to determine her offense level.⁶⁴ In both cases, the Ninth Circuit vacated the sentences and remanded for resentencing, on the ground that it was improper to punish the defendants for facts and offenses that the jury rejected with their acquittals.⁶⁵

The Ninth Circuit’s decisions created a circuit split.⁶⁶ In response, the Supreme Court took up *Watts* and *Putra*. The Court resolved the split by reversing and remanding both Ninth Circuit decisions by way of a short *per curiam* opinion that was issued without full briefing or oral argument.⁶⁷

The Supreme Court’s starting point was the “longstanding principle” codified by § 3661 and pre-dating the Guidelines, that “sentencing courts have broad discretion to consider various kinds of information,” including conduct that may not have resulted in a conviction.⁶⁸ The Court noted that the Guidelines expressly adopted and incorporated this principle.⁶⁹ In the Court’s view, this “longstanding principle” plus the Guidelines’ broad embrace of “relevant conduct,” created an expansive pool of sentencing conduct that includes acquitted conduct.⁷⁰

Next, with a quick stroke of the pen, the Court dismissed any thought that acquitted conduct sentencing runs afoul of double jeopardy protections. The Court explained that it is “erroneous” to confuse punishing a defendant for a crime for which he was acquitted, with sentencing enhancements that increase a term of imprisonment because of the manner in which defendant committed the crime.⁷¹ According to the Court, sentencing based on acquitted conduct is the latter, and therefore does not implicate double jeopardy.⁷²

The Court ended its short opinion by clarifying what an acquittal means. Contrary to the Ninth Circuit’s view in *Watts* and *Putra*, the Court explained that a “not guilty” verdict is not a rejection of any facts or a finding that the defendant is actually

⁶¹ *Id.*

⁶² *Id.* at 150-51.

⁶³ *Id.* at 150 (citing U.S.S.G. § 2D1.1(b)(1) for triggering the bump).

⁶⁴ *Id.* at 150-51.

⁶⁵ *Id.*

⁶⁶ *Id.* at 149 (“Every other Court of Appeals has held that a sentencing court may [consider acquitted conduct], if the Government establishes that conduct by a preponderance of the evidence.”).

⁶⁷ *Id.* at 170-71 (Kennedy, J., dissenting) (“For these reasons the case should have been set for full briefing and consideration on the oral argument calendar. From the Court’s failure to do so, I dissent.”).

⁶⁸ *Id.* at 151 (majority opinion).

⁶⁹ *Id.* at 152-53 (citing and discussing U.S.S.G. §1B1.3 and 1B1.4).

⁷⁰ *Id.* at 151-53.

⁷¹ *Id.* at 154. In making the point, the Court relied solely on *Witte v. United States*, 515 U.S. 389 (1995). In *Witte*, the defendant pled guilty to a marijuana distribution charge, but was sentenced based on a guideline range that was calculated by including uncharged conduct involving cocaine importation. *Id.* at 389. The defendant was later indicted for the cocaine importation conduct. The Supreme Court held that the later indictment was not barred by double jeopardy because the sentencing court’s use of the uncharged cocaine conduct in increased sentence for the marijuana charge did not constitute “punishment” for the cocaine conduct. *Id.*

⁷² *Watts*, 519 U.S. at 154.

innocent.⁷³ To the Court, a “not guilty” verdict is narrow, specific, and “merely proves the existence of a reasonable doubt as to [a defendant’s] guilt” because the government failed to prove at least one essential element of the offense beyond a reasonable doubt.⁷⁴ Therefore, to the Court, an acquittal provides no barriers to the government “relitigating an issue when presented in a subsequent action governed by a lower standard of proof.”⁷⁵

Justices Stevens and Kennedy issued separate dissents. Justice Kennedy took issue with the Court’s decision to render an opinion without full briefing and oral argument.⁷⁶ Justice Stevens’ criticism was more substantive and critical.⁷⁷ Justice Stevens methodically dismantled the majority’s legal reasoning to show why neither the Court’s “prior cases nor the text of [§ 3661] warrants this perverse result.”⁷⁸ And he ended his dissent with a strong rebuke of what he saw as the majority’s betrayal of the principles of constitutional criminal jurisprudence.⁷⁹

THE COSTS OF ACQUITTED CONDUCT SENTENCING

Any discussion about the costs of acquitted conduct sentencing must start with the depreciation of the jury’s primacy in our criminal justice system. The right to a jury trial is “fundamental to our system of justice”⁸⁰ whose importance is “hard to overemphasize.”⁸¹ Indeed, it is a civil right that the Founding Fathers agreed was absolutely necessary even though they disagreed about the size and role of the federal government.⁸² Acquitted conduct sentencing undermines and devalues the role of the jury, and mocks the jury’s historical roots and prominence by “trivializ[ing] ‘legal guilt’ or ‘legal innocence’ – which is what a jury decides.”⁸³ Indeed, the practice “severs the connection between verdict and sentence,” “thwarts the express will of the jury,” and jeopardizes the jury’s power to serve as the bulwark between the accused and the government.⁸⁴

The next conspicuous cost is that acquitted conduct provides prosecutors with a second-bite at the apple of punishment under circumstances that substantially disfavor the defendant.⁸⁵ The forum of sentencing advantages the government – one fact-finder (judge)

⁷³ *Id.* at 155.

⁷⁴ *Id.* (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984)).

⁷⁵ *Id.* at 156 (quoting *Dowling v. United States*, 493 U.S. 342, 343 (1990)).

⁷⁶ *Id.* at 170 (Kennedy, J., dissenting).

⁷⁷ *Id.* at 159-70 (Stevens, J., dissenting).

⁷⁸ *Id.* at 164.

⁷⁹ *Id.* at 169-70 (“The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to that jurisprudence.”).

⁸⁰ *Duncan v. Louisiana* 391 U.S. 145, 153 (1968).

⁸¹ *United States v. White*, 551 F.3d 381, 392 (6th Cir. 2008) (Merritt, J., dissenting).

⁸² *See, e.g.*, THE FEDERALIST NO. 83 (Alexander Hamilton) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”); *See also Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (“[T]he jury-trial guarantee was one of the least controversial provisions of the Bill of Rights.”).

⁸³ *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005).

⁸⁴ *United States v. Mercado*, 474 F.3d 654, 662-64 (9th Cir. 2007) (Fletcher, J., dissenting); *see also United States v. Coleman*, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) (“Stated differently, the jury is essentially ignored when it disagrees with the prosecution.”), *overruled in part by United States v. Kaminski*, 501 F.3d 655, 657 (6th Cir. 2007). This outcome is not only “nonsensical” but violates the letter and spirit of our country’s criminal jurisprudence. *Id.*

⁸⁵ *See Barry L. Johnson, If at First You Don’t Succeed: Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153, 182-83 (1996); *see also Coleman*, 370 F. Supp. 2d at 672; *see also United*

as opposed to multiple fact-finders who must be unanimous to convict (jury), a lower standard of proof, looser evidentiary rules, and a finding that the defendant is already guilty of something.⁸⁶ It is against this backdrop that acquitted conduct sentencing allows prosecutors to present the same evidence rejected by the jury (or even was deemed inadmissible at trial) to establish that a defendant deserves an enhanced prison sentence for conduct the jury did not find supported a guilty verdict. In effect, after failing before a jury, the prosecution is allowed a “mini-trial” to re-ligate the issue under more favorable circumstances.⁸⁷ And “[w]ith this second chance at success, the Government almost always wins.”⁸⁸

A related cost is that acquitted conduct sentencing empowers and emboldens prosecutors to charge additional offenses with the intent of establishing “guilt” at sentencing (under more favorable conditions) rather than at trial. In other words: charge inflation. Take for instance a prosecutor who believes (or rather desires) that five charges could apply to a defendant’s conduct, but recognizes that only two charges can be proven beyond a reasonable doubt. In this scenario, acquitted conduct sentencing encourages the prosecutor to pursue all five charges because only one conviction is needed to open the door at sentencing to any of the charges rejected by the jury.⁸⁹ In addition to the costs in prison years, charge inflation contributes to pleas through cost-benefit coercion. A defendant facing multiple charges not only has to weigh whether she can emerge successful at trial, but also the added penalty exposure posed by charges she can beat under the reasonable doubt standard, but may lose under the preponderance standard at sentencing. More often than not, the result of this calculation is that the potential years of imprisonment after trial, even if the defendant is able beat some of the charges, far outweighs the plea offer provided by the government.

Finally, another cost are the potential sentencing disparities that the Guidelines are designed to prevent. Not all judges engage in acquitted conduct sentencing, and the judges that do engage in the practice, do not do so in a uniform manner. Disparities are an inescapable consequence of defendants who appear before judges who reject acquitted conduct sentencing and those who embrace it in varying degrees.

MAX-MIN QUARTET

As the central thesis of this Article is based on the “max-min quartet” of *Apprendi*, *Blakely*, *Booker*, and *Alleyne*, a brief overview of the four cases is warranted.

*Apprendi v. New Jersey*⁹⁰

Apprendi was arrested for firing several shots into the home of a black family who recently moved into an all-white neighborhood. During post-arrest questioning, Apprendi stated that he fired into the house because the occupants were “black in color”

States v. Canania, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) (“Government gets the proverbial ‘second bite at the apple’ during sentencing to essentially retry those counts on which it lost.”).

⁸⁶ *Coleman*, 370 F. Supp. 2d at 672 (“[C]onsideration of acquitted conduct skews the criminal justice system’s power differential much in the prosecution’s favor.”).

⁸⁷ *Id.* at 672-73.

⁸⁸ *Canania*, 532 F.3d at 776.

⁸⁹ *United States v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990) (“[Relevant conduct sentencing] obviously invite[s] the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.”) (quoting *United States v. Miller*, 910 F.2d 1321, 1332 (6th Cir. 1990)) (Merritt, J., dissenting).

⁹⁰ 530 U.S. 466 (2000).

and he did not “want them in the neighborhood.”⁹¹ He was subsequently charged by a New Jersey grand jury with 23 counts for the shootings and unlawful weapon possession.⁹² None of the charged counts referred to New Jersey’s hate crime statute.

Pursuant to a plea agreement, Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of possession of an antipersonnel bomb. New Jersey law set a penalty range of five to ten years for the firearm possession counts, and three to five years for the antipersonnel bomb count.⁹³ Under the plea agreement, the state reserved the right to seek an enhanced sentence under New Jersey’s hate crime statute, while Apprendi reserved the right to claim that a hate crime enhancement violated the Constitution.⁹⁴

The trial court held an evidentiary hearing on the state’s motion in support of the hate crime enhancement. The judge found by a preponderance of the evidence that the enhancement was warranted.⁹⁵ Apprendi was sentenced to 12 years for one of the firearm possession counts (or two years over the ten-year maximum), and to shorter concurrent sentences for the remaining two counts.⁹⁶

Apprendi appealed arguing that for the hate crime enhancement to apply, the Constitution’s due process clause required the government to prove the bias motive to a jury guided by the reasonable doubt standard. The state appellate court and the New Jersey Supreme Court rejected Apprendi’s argument. Both courts of review relied heavily on *McMillan v. Pennsylvania* to find that the hate crime enhancement was a sentencing factor, rather than an element or separate offense requiring the reasonable doubt standard.⁹⁷

The Supreme Court, however, sided with Apprendi. The Court held that New Jersey’s hate crime statute violated due process because it allowed a judge to increase a sentence beyond the statutory maximum based on the preponderance of the evidence.⁹⁸ In reaching this decision, the Court started with the premise that “taken together” the Sixth Amendment’s trial rights and the Fourteenth Amendment’s due process rights “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”⁹⁹

The Court then explored the “historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties.”¹⁰⁰ For years since the nation’s founding, according to the Court, “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court”¹⁰¹ The Court acknowledged that trial practices can “change in the course of centuries

⁹¹ *Id.* at 469 (noting that Apprendi later retracted the statement).

⁹² *Id.*

⁹³ *Id.* at 469-470.

⁹⁴ See *id.* at 468-69. New Jersey’s hate crime statute provided for an “extended term” of imprisonment if the trial judge found under the preponderance standard that a defendant committed the crime to intimidate a person or group because of the person’s or group’s race, color, gender, or other protected classes. *Id.*

⁹⁵ *Id.* at 470-71.

⁹⁶ *Id.* at 471.

⁹⁷ 477 U.S. 79, 91 (1986) (holding that using the preponderance standard to find sentencing factors that enhance a sentence within the statutory maximum is consistent with due process).

⁹⁸ *Apprendi*, 530 U.S. at 491-92, 497.

⁹⁹ *Id.* at 476-77 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

¹⁰⁰ *Id.* at 482.

¹⁰¹ *Id.* at 478.

and still remain true to the principles” of the Founding Fathers.¹⁰² But, the Court stressed, this “practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt.”¹⁰³

With these principles in mind, the Court proceeded to reject all three arguments put forward by New Jersey in support of its statute. The state’s first argument was that the hate crime statute’s biased purpose penalty was a “traditional sentencing factor” and not an “element” of a separate hate crime offense.¹⁰⁴ To the Court, characterizing “biased purpose” as just a sentencing factor regarding motive, greatly undervalued its legal significance. “By its very terms, this statute mandates an examination of the defendant’s state of mind – a concept known well to the criminal law as the defendant’s *mens rea*.”¹⁰⁵ And a defendant’s intent, or *mens rea*, “is perhaps as close as one might hope to come to a core criminal offense ‘element.’”¹⁰⁶

The state’s second argument – *McMillan* allows a legislature to authorize a judge to find a traditional sentencing factor on the basis of a preponderance of the evidence – was equally unavailing. The Court read *McMillan* to frown on a legislature allowing a judge to significantly increase a defendant’s maximum penalty using the preponderance of the evidence standard.¹⁰⁷ Moreover, it was of no Constitutional consequence to the Court, that the New Jersey legislature placed the hate crime enhancer within the sentencing provisions of the state’s criminal code. The placement did “not define its character,” which the Court found resembled an element rather than a sentencing factor.¹⁰⁸

The Court used few words to dispatch the state’s final argument - that *Almendarez-Torres v. United States* extended *McMillan*’s holding to the New Jersey statute.¹⁰⁹ To the Court, the two situations were far too different. *Almendarez-Torres* concerned recidivism, which does not relate to the commission of the offense itself. New Jersey hate crime statute, conversely, “goes precisely to what happened in the ‘commission of the offense.’”¹¹⁰

In sum, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹¹¹

¹⁰² *Id.* at 483.

¹⁰³ *Id.* at 483-84.

¹⁰⁴ *Id.* at 492.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 493.

¹⁰⁷ *Id.* at 494-95. The Court noted that New Jersey’s hate crime statute turned a second-degree offense into a first-degree offense under the state’s criminal code, and therefore subjected defendants to significantly heightened penalties. *Id.* at 494. In *Apprendi*’s case, the statute potentially doubled *Apprendi*’s maximum sentence from 10 years to 20 years – a “differential . . . unquestionably of constitutional significance.” *Id.* at 495.

¹⁰⁸ *Id.* at 495-96.

¹⁰⁹ *Id.* at 496; see also *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that it was constitutional for Congress to define recidivism, particularly illegal re-entry into the United States after being deported following an aggravated felony conviction, as a sentencing factor, and not an element of the offense).

¹¹⁰ *Apprendi*, 530 U.S. at 496 (“There is a vast difference between accepting the validity of a prior judgment of conviction [provided beyond a reasonable doubt] and allowing the judge to find the required fact under a lesser standard of proof.”).

¹¹¹ *Id.* at 490.

*Blakely v. Washington*¹¹²

Four years later, the Supreme Court used *Apprendi* to invalidate another state's use of sentencing factors to enhance a defendant's sentence beyond the statutory maximum.¹¹³ In *Blakely*, the defendant pled guilty to second-degree kidnapping involving domestic violence and use of a firearm stemming from a violent episode involving his estranged wife. Under Washington state law at the time, second degree kidnapping was a class B felony with a 10-year imprisonment limit.¹¹⁴ Another state law limited the punishment for second degree kidnapping with a firearm to a range of 49 to 53 months imprisonment, unless a judge found compelling and exceptional reasons to impose a sentence exceeding the range.¹¹⁵

During the sentencing hearing, Blakely's wife recounted the graphic details of the kidnapping.¹¹⁶ Having found that Blakely acted with "deliberate cruelty", the judge rejected the state's recommendation for a sentence within the 49 to 53 month range, and instead imposed a sentence of 90 months (or 37 months beyond the standard maximum).¹¹⁷

When the case reached the Supreme Court, Washington state argued that there was no *Apprendi* violation because the relevant statutory maximum was not 53 months, but rather the 10-year maximum for class B felonies under state law.¹¹⁸ The Supreme Court rejected the argument head-on, and set a bright-line rule for what constitutes the "statutory maximum" under *Apprendi*:

Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.¹¹⁹

The Court then used this bright line rule to find Blakely's 90-month sentence constitutionally infirm. It was particularly important to the Court that the judge could not have imposed the 90-month sentence based on the admitted facts in Blakely's guilty plea.¹²⁰ Because the judge needed to find additional facts, beyond those admitted by

¹¹² 542 U.S. 296 (2004).

¹¹³ *Id.* at 301 ("This case requires us to apply the rule we expressed in *Apprendi* . . .").

¹¹⁴ *Id.* at 298–300; WASH. REV. CODE § 9A.40.030 (1975), *amended* by Leg. Serv. 57-6151, 2d Spec. Sess., at 356 (Wash. 2001).

¹¹⁵ The 49 to 53-month range consisted of, under Washington state law, a "standard range" of 13 to 17 months for second-degree kidnapping and a 36-month firearm enhancement. *Blakely*, 542 U.S. at 299.

¹¹⁶ Blakely had abducted his wife from their home, bound her with duct tape, forced her at knifepoint into a box in the bed of his pickup truck, and ordered their 13-year old son to follow the truck in another car under threat of shooting his wife with a shotgun. *Id.* at 298. The judge held a three-day bench hearing following Blakely's objection to the sentence to obtain further testimony about the circumstances of the kidnapping. *Id.* at 300. The judge affirmed his finding of deliberate cruelty and the 90-month sentence at the end of the hearing. *Id.* at 301.

¹¹⁷ *Id.* at 300.

¹¹⁸ *Id.* at 303.

¹¹⁹ *Id.* at 303–04 (citations omitted).

¹²⁰ *Id.* at 304.

Blakely (or found by a jury), to impose the enhanced sentence, the Court held that the 90-month sentence ran afoul of the Constitution and *Apprendi*.¹²¹

After finding the 90-month sentence was invalid, the Court addressed *Apprendi*'s critics. The Court explained that for "[t]hose who would reject *Apprendi*," there were two unsound alternatives.¹²² The first alternative "is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase punishment – may be found by the judge."¹²³ The Court quickly deemed it "absurd" to follow this path, because the jury would cease to "function as [the] circuitbreaker in the State's machinery of justice," and judges and the State would have unlimited punishment power.¹²⁴

The second alternative "is that legislatures may establish legally essential sentencing factors *within limits* – limits crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.'"¹²⁵ The Court's problem with this alternative was the subjectivity of determining whether a sentencing factor exceeds constitutional limits and improperly expands the role of the judge.¹²⁶ This subjectivity, in the Court's mind, is inconsistent with the Sixth Amendment's empowerment of the jury (which reflects the founders' fear of the power of government and judges).¹²⁷

The Court then made clear that its decision was not about the constitutionality of determinate sentencing, but rather "about how it can be implemented in a way that respects the Sixth Amendment."¹²⁸ In response to critics (such as Justice O'Connor), the majority felt it was of no consequence that determinate sentencing schemes involve less judicial fact-finding than indeterminate sentencing schemes.¹²⁹ What was important to the majority was whether determinate sentencing schemes involve more *judicial power* than jury fact-finding, and therefore requiring more diligent protection of Sixth Amendment trial and jury rights.¹³⁰

*United States v. Booker*¹³¹

Booker is well known for transforming the Guidelines into a provider of advisory sentences rather than mandatory ones. What is often lost is that the decision rested on the Supreme Court extending *Apprendi* to the Guidelines to find that *Booker*'s enhanced sentence violated his Sixth Amendment right to a jury trial.

Booker was convicted at trial of possessing with the intent to distribute 50 grams of crack, which triggered a 10-year mandatory minimum sentence.¹³² *Booker*'s guideline range was 210 to 262 months imprisonment based on his criminal history and the evidence

¹²¹ *Id.* at 304-05.

¹²² *Id.* at 306.

¹²³ *Id.*

¹²⁴ *Id.* at 306-07; *see id.* at 307 ("This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene.").

¹²⁵ *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)).

¹²⁶ *Id.* at 307-08 ("With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.").

¹²⁷ *Id.* at 308.

¹²⁸ *Id.*

¹²⁹ *Id.* at 308-09.

¹³⁰ *Id.*

¹³¹ 543 U.S. 220 (2005).

¹³² *Id.* at 227.

at trial that his conduct involved 92.5 grams of crack.¹³³ At sentencing the trial judge concluded by a preponderance of the evidence that Booker's conduct involved an additional 556 grams of crack.¹³⁴ Based on this finding, the Guidelines required Booker to receive a sentence between 360 months and life imprisonment.¹³⁵ The trial judge sentenced Booker to the low-end of the range -- 360 months in prison.¹³⁶

Booker's appeal presented two questions to the Supreme Court. The first was "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the [Guidelines] based on the sentencing judge's determination of fact (other than a prior conviction) that was not found by the jury or admitted by the defendant[?]"¹³⁷ If the answer was "yes," the second question concerned the proper remedy – whether the Guidelines as whole had to be scrapped as unconstitutional or could parts of the Guidelines be excised to save the rest.¹³⁸

The Court answered "yes" to the first question. In delivering the majority opinion, Justice Stevens relied heavily on *Apprendi* and *Blakely* to hold that "[a]ny fact (other than a prior conviction) that leads to a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond all reasonable doubt."¹³⁹ According to Justice Stevens, those cases (and other similar cases) made clear that a defendant has a "right to have a jury find the existence of 'any particular fact' that the law makes essential to his punishment."¹⁴⁰

Nonetheless, the Court resisted rendering the entire Guidelines unconstitutional, primarily because of all the efforts behind the passage of the SRA. In speaking for the Court on the second question, Justice Breyer announced the Court's remedy for saving the Guidelines from constitutional purgatory was to surgically remove the provisions that rendered the Guidelines mandatory.¹⁴¹ Justice Breyer explained that this approach, above all other alternatives, would allow the Sixth Amendment rights of defendants to live in concert with the determinate sentencing scheme Congress desperately wanted.¹⁴²

*Alleyne v. United States*¹⁴³

While *Apprendi* and *Blakely* firmly established the limits of judicial fact-finding to impose a sentence beyond a statutory maximum, questions remained about the constitutional limits of judicial fact-finding to increase a defendant's minimum sentence. Two years after *Apprendi*, the Supreme Court temporarily settled the questions with its *Harris v. United States* decision, which held that judges remained free to find facts to set or increase a mandatory minimum faced by a defendant.¹⁴⁴ *Harris*'s lifespan came to a

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 245.

¹³⁸ *Id.*

¹³⁹ *Id.* at 244.

¹⁴⁰ *Id.* at 32 (quoting *Blakely*, 542 U.S. at 301)

¹⁴¹ *Id.* at 245-58.

¹⁴² *Id.* at 258.

¹⁴³ 133 S. Ct. 2151 (2013).

¹⁴⁴ 536 U.S. 545, 568-69 (2002), *overruled by Alleyne*, 133 S. Ct. 2151. The Court blessed the trial court's finding by preponderance of the evidence that a firearm was brandished during criminal offense for purposes of imposing enhanced sentence under 18 § 924(c)(1)(A). *Id.* at 567-68. The Court held that judicial finding of facts

screaming halt in 2013 with the *Alleyne* decision.

Alleyne and an accomplice robbed a store manager on his way to deliver the store's daily deposits at a local bank. During the robbery, Alleyne's accomplice approached the manager with a gun.¹⁴⁵ A jury convicted Alleyne of multiple offenses related to the robbery, including using or carrying a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)), which carries various mandatory minimum penalties based on how the firearm was used during the crime.¹⁴⁶

The jury's verdict form did not indicate that Alleyne or his accomplice "brandished" the firearm during the robbery.¹⁴⁷ Yet based on the presentence report that recommended the seven-year "brandishing" penalty for Alleyne, and evidence presented at trial, the trial court imposed the seven-year mandatory minimum sentence for brandishing on the § 924(c) count.¹⁴⁸ The court dismissed Alleyne's objection to the sentence on the ground that under *Harris*, brandishing was a sentencing factor that the court could find by a preponderance of the evidence without violating the Constitution.¹⁴⁹

The Supreme Court used *Alleyne* to re-examine whether *Harris* was consistent and compatible with *Apprendi*. The Court concluded that it was not.¹⁵⁰ In reaching this conclusion, the Court started with the principle that the "touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."¹⁵¹ To the Court, the failure of *Harris* to extend this principle to facts increasing a mandatory minimum sentence was inconsistent with *Apprendi*'s definition of "elements," which "necessarily includes not only facts that increase the ceiling, but also those that increase the floor."¹⁵² As the Court recognized, a fact that sets or increases a mandatory minimum "aggravates the punishment" just as it does when it increases a statutory maximum.¹⁵³ And therefore, to pass constitutional muster "[f]acts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt."¹⁵⁴

After establishing the bright line rule, the Court further explained why *Harris* had to give way to *Apprendi*. To the Court, *Harris* violated the principle established by "common-law and early American practice," and embodied in *Apprendi*, that facts that increase the prescribed penalties a defendant faces are elements of the offense.¹⁵⁵ It does not matter whether the facts increase the floor of the prescribed penalties, as opposed to the ceiling, because it "is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed."¹⁵⁶ What is key for Sixth Amendment purposes, according to the Court, is that facts that increase or

increase a defendant's mandatory minimum sentence within the statutory range does not violate the Constitution. *Id.* at 568-69.

¹⁴⁵ *Alleyne*, 133 S. Ct. at 2155.

¹⁴⁶ *Id.* at 2155-56. The statute sets a base minimum sentence of 5 years imprisonment; a minimum of 7 years imprisonment if the firearm was "brandished"; and a minimum of 10 years imprisonment if the firearm was "discharged." 18 U.S.C.A. § 924(c)(1)(A) (West 2006).

¹⁴⁷ *Alleyne*, 133 S. Ct. at 2156.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2158 ("*Harris* was wrongly decided and that it cannot be reconciled with our reasoning in *Apprendi*.").

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2160.

¹⁵⁶ *Id.*

trigger a mandatory minimum “aggravate” a defendant’s punishment because there is a “heighten[ed] loss of liberty associated with the crime.”¹⁵⁷ Therefore the *Harris* decision’s attempt to limit *Apprendi* only to facts increasing a statutory maximum was without sound legal footing, and the “principle applied in *Apprendi* applies in equal force to facts increasing the mandatory minimum.”¹⁵⁸

The Court then disparaged the reasoning in *Harris* that a judge is constitutionally permitted to impose a enhanced mandatory minimum if the enhanced sentence is within the statutory range of the offense of conviction found by a jury (or agreed to pursuant to a plea agreement).¹⁵⁹ To the *Alleyne* Court, “[i]t is no answer to say that a defendant could have received the same sentence with or without the fact.”¹⁶⁰ The key inquiry, the Court explained, is always whether a fact “alters the legally prescribed punishment so as to aggravate it” and is therefore an element of the offense that must be submitted to the jury.¹⁶¹

WHY THE MAX-MIN QUARTET SPELLS THE END FOR *WATTS*

Inexplicably, what has been largely lost over the years is that in *Watts* the Supreme Court did not address whether the Sixth Amendment posed a barrier to acquitted conduct sentencing.¹⁶² Since *Watts*, many circuits have addressed the issue, and unfortunately have concluded that acquitted conduct sentencing is consistent with the Sixth Amendment.¹⁶³ However, a number of these decisions rest on a misunderstanding that *Watts* addressed the Sixth Amendment issue in favor of acquitted conduct sentencing,¹⁶⁴ and others were decided before the max-min quartet was complete.¹⁶⁵ Whatever the circumstances or reasoning, these decisions must be re-examined in the full light of the max-min quartet.¹⁶⁶

To understand how and why the max-min quartet should put an end to acquitted conduct sentencing, it is best to start with the circumstances where there can be no

¹⁵⁷ *Id.* at 2161; *see id.* at 2160 (“It is impossible to dissociate the floor of a sentencing range from the penalty affixed to a crime.”).

¹⁵⁸ *Id.* at 2160.

¹⁵⁹ *Id.* at 2160-63.

¹⁶⁰ *Id.* at 2162.

¹⁶¹ *Id.* The court noted that its decision did not mean that “any fact that influences judicial discretion must be found by a jury,” nor did it upset the “the broad discretion of judges to select a sentence within the range authorized by law.” *Id.* at 2163.

¹⁶² *See, e.g.,* *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) (“*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause . . .”).

¹⁶³ *See, e.g.,* *United States v. Milton*, 27 F.3d 203, 211 (6th Cir. 1994); *United States v. Dorcelly*, 454 F.3d 366, 369 (D.C. Cir. 2006); *United States v. Ashworth*, 139 Fed. App’x 525, 527 (4th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005).

¹⁶⁴ *See, e.g.,* *United States v. Mercer*, 242 Fed. App’x 932 (4th Cir. 2007) (relying on *Watts* to reject the defendant-appellants’ Fifth and Sixth Amendment challenge to trial court having used acquitted conduct to enhance his sentence); *United States v. Mercado*, 474 F.3d 654, 661 (9th Cir. 2007) (Fletcher, J. dissenting) (“The majority’s reliance on *Watts* as dispositive of Sixth Amendment issues is misplaced. *Watts* neither considered nor decided the [Sixth Amendment] issue currently before us.”); *see also* *People v. Rose*, 776 N.W.2d 888, 888 n.3 (Mich. 2010) (“Although other courts have recognized that *Watts* is not controlling on the Sixth Amendment question, they have nevertheless been influenced by the other courts that erroneously presumed the contrary.”).

¹⁶⁵ *See infra* note 161.

¹⁶⁶ *United States v. Coleman*, 370 F. Supp. 2d 661, 670 (S.D. Ohio 2005) (“The underlying premises of *Booker* and its predecessors – *Jones*, *Apprendi* . . . and *Blakely* – detract from *Watts*’ continued validity.”).

dispute.¹⁶⁷ First, the max-min quartet, specifically *Apprendi*, is a complete bar to using acquitted conduct to extend a sentence beyond the statutory maximum of conviction. Second, the quartet (specifically *Blakely*) bars a sentencing judge from using acquitted conduct to extend a statutory maximum. Finally, the quartet, (specifically *Alleyne*) bars the use of acquitted conduct to establish or increase a mandatory minimum sentence.

What is unresolved is the grey middle: judges using acquitted conduct to extend a prison sentence within the statutory maximum of the offense of conviction, without regard to an applicable mandatory minimum. So why does the max-min quartet put an end to judges using acquitted conduct in this area? The short answer is that the max-min quartet firmly reinforces bedrock and interdependent principles underneath the Sixth Amendment's trial rights, and these principles are irreconcilable with allowing a sentencing judge to transform offense elements rejected (or not found beyond reasonable doubt) by a jury into sentencing factors that extend a defendant's term of imprisonment – even if the sentence is within statutory limits. These principles are:

- 1) *The Constitution demands that a jury find a defendant guilty of all the elements of the crime with which he/she is charged.*
- 2) *The character of a sentencing enhancer defines whether it is an offense element or a sentencing factor.*
- 3) *If a sentencing enhancer is an element then it must be submitted to the jury and found beyond a reasonable doubt, or admitted by the defendant.*
- 4) *A judge's sentencing authority is derived from, and limited by a jury's verdict.*
- 5) *The sentencing range faced by a defendant is defined by, and limited to the facts found by the jury beyond a reasonable doubt, or admitted by a defendant.*

Together, the principles reflect the Supreme Court's intent through the max-min quartet to protect and embolden the jury's power to not only resolve the question of guilt or innocence, *but also to find the facts essential to punishment.* The max-min quartet puts to rest the belief and practice that a conviction, without specific findings by a jury, automatically exposes a defendant to enhanced and extended penalties, mandatory penalties, and extended statutory maximums.

But these principles reflect a more subtle intent that is important for the argument presented here. The max-min quartet is part of an ongoing process to dismantle the practice of prosecutors and judges doing an end-run around the Sixth Amendment's promise that a conviction on jury-found facts must always precede punishment.¹⁶⁸ Without a conviction, a judge has *no* power to impose punishment. The max-min quartet reinforces not only the premise that a judge's sentencing power is dependent on a conviction, but also that a conviction does not grant a judge cart-blanc sentencing power. In short, the

¹⁶⁷ *Id.* (“*Apprendi* and its progeny, including *Booker*, have elevated the role of the jury verdict by circumscribing a defendant's sentence to the relevant statutory maximum *authorized* by a jury; yet the jury's verdict is not heeded when it specifically withholds authorization.”).

¹⁶⁸ Leonard & Dieter, *supra* note 26 at 280-281 (“[J]udges can find facts that contextualize an offense and enhance punishment but *the jury must first convict the defendant.*”) (emphasis added).

clear implication of the max-min quartet is that a “judge violates a defendant’s Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance a defendant’s sentence.”¹⁶⁹

To look at it another way, it makes no logical or constitutional sense, that the max-min quartet prohibits a judge from using a fact rejected by a jury to impose a mandatory minimum sentence, but permits a judge to use a jury rejected fact to impose a sentence that is *multiple times* what the defendant would otherwise receive under the Guidelines if not for that fact. Take for instance the *Jones* case discussed in the opening of this article. Certainly the trial judge could not have sentenced the defendants to a crack mandatory minimum sentence of 5 or 10 years for the acquitted conspiracy count. Yet, the judge found no barrier to using “facts” underlying the acquitted conspiracy count to bump the defendants’ sentences from between 27 and 71 months imprisonment to between 180 and 225 months imprisonment – sentences well-above the crack mandatory minimums. It is a paradox that strains all credulity, and more importantly, renders jury acquittals meaningless.

This illogical paradox is amply reflected in a decision soon after *Booker: United States v. Magallanez*. In that case, the defendant was convicted by a jury of conspiring to distribute methamphetamine.¹⁷⁰ On a special verdict interrogatory, the jury attributed between 50 and 500 grams of methamphetamine to the defendant.¹⁷¹ At sentencing, however, the trial judge attributed 1200 grams to the defendant and increased his sentence accordingly under the Guidelines.¹⁷²

Relying on *Booker* (decided after *Magallanez* had been sentenced), the Tenth Circuit held it was error for the trial court “to increase Mr. Magallanez’s sentence beyond the maximum authorized by the jury verdict through mandatory application of the Guidelines to judge-found facts” using the preponderance standard.¹⁷³ Yet, the circuit court rejected the defendant’s argument that “under *Blakely* and *Booker*, the district court was required to accept the jury’s special verdict of drug quantity for purposes of sentencing, rather than calculating the amount for itself.”¹⁷⁴ According to the appellate court, because of *Watts*, a sentencing court “maintained the power to consider the broad context of a defendant’s conduct, even when a court’s view of the conduct conflicted with the jury’s verdict.”¹⁷⁵ Therefore, “[a]pplying the logic of *Watts* to the Guidelines system as modified by *Booker*, we conclude that when a district court makes a determination of sentencing facts by a preponderance test under the now-advisory Guidelines, it is not bound by jury determinations reached through application of the more onerous reasonable doubt standard.”¹⁷⁶

Although it does not involve acquitted conduct, *Magallanez* reflects the Kafkaesque world that is criminal sentencing jurisprudence under *Watts*. On one hand the Tenth Circuit chided the sentencing court for increasing a sentence beyond facts found by a jury

¹⁶⁹ *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008).

¹⁷⁰ 408 F.3d 672 (10th Cir. 2005).

¹⁷¹ *Id.* at 676.

¹⁷² *Id.* at 682-83. The court’s finding bumped the defendant’s offense level from 26 or 30, to level 32. *Id.* at 682. This resulted in a sentencing range of 121-151 months, as opposed to 63-78 months under the offense level that corresponded with the jury’s verdict. The court imposed a 121-month sentence. *Id.*

¹⁷³ *Id.* at 685

¹⁷⁴ *Id.* at 683.

¹⁷⁵ *Id.* at 684.

¹⁷⁶ *Id.* at 685.

under the then-mandatory-Guideline scheme, but in the same breath said the trial court was permitted to do the exact same thing under the “advisory” Guidelines. We are now in a tail-wags-the-dog situation where the force of a jury verdict under the Sixth Amendment is dictated and limited by the force of the Guidelines, and not the other way around.

This leads to common rebuttal to Sixth Amendment challenges to acquitted conduct sentencing: that because *Booker* rendered the Guidelines advisory, the Sixth Amendment is not implicated when a trial judge relies on facts rejected by a jury to select a sentence within the statutory maximum for the offense of conviction.¹⁷⁷ The simple response to this argument is that the max-min quartet does not disturb this premise unless the judicially discovered “fact” is an element of an offense that was not found (or rejected) by the jury. An element is not stripped of its character, weight, and significance, once a jury is released following the verdict.¹⁷⁸ In today’s advisory-Guidelines era, “all facts are not equal . . . especially not facts that amount to separate crimes.”¹⁷⁹ What differentiates acquitted conduct facts, and thereby implicates the Sixth Amendment, is that they “are not facts enhancing the crime of conviction, like the presence of a gun or the vulnerability of a victim. Rather, they are facts comprising different crimes.”¹⁸⁰

A more probing response is that acquitted conduct sentencing turns *Booker* onto itself and strips away the Sixth Amendment protections it was supposed to reinforce.¹⁸¹ The common understanding is that *Booker* gave judges back some of the sentencing discretion that had been taken away by the SRA and the Guidelines. What is often lost is that *Booker* also provided increased constitutional protections to federal criminal defendants facing sentencing.¹⁸² Through *Booker*, the Supreme Court erected a Sixth Amendment wall between defendants and judicial fact-finding at sentencing. This wall limits a judge’s sentencing authority to the “maximum authorized by the facts established by a plea of guilty . . . or proved to a jury beyond a reasonable doubt.”¹⁸³ The purpose of this wall is to protect defendants from *fait accompli* sentences based on fact-finding at sentencing under a less demanding standard of proof. In other words, “Just because the jury has authorized a punishment [with a guilty verdict] does not mean that the jury has authorized any punishment.”¹⁸⁴ *Booker*, therefore, restricts the sentencing power of judges relative to the defendant, as much as it expands judicial power in relation to the Guidelines.

Acquitted conduct sentencing betrays the former purpose. It is directly counter to *Booker*’s intent for judges to use acquitted conduct to extend the sentence range

¹⁷⁷ *Booker*, 543 U.S. at 233 (“For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); see also *United States v. White*, 551 F.3d 381, 384-85 (6th Cir. 2008) (explaining that Post-*Booker* there is no Sixth Amendment violation when a judge looks at other facts, including acquitted conduct, to select a sentence within the statutory range).

¹⁷⁸ *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (“The dispositive question, we said [in *Apprendi*] ‘is one not of form, but of effect.’ If a State makes an increase in an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”) (quoting *Apprendi*, 530 U.S. at 494).

¹⁷⁹ *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 150–51 (“In a nutshell, this position, that one can consider acquitted conduct because the Guidelines are now advisory, seems to hark back to the period pre-mandatory Guidelines when there was a clear line between the trial sphere and the sentencing sphere”).

¹⁸² *Id.* at 153 (“The *Booker* remedy decision made the Guidelines advisory But the principal decision in that case and those that had foreshadowed it reflected the Court’s new concern with the formal procedures for determining facts essential to sentencing.”).

¹⁸³ *Booker*, 543 U.S. at 244..

¹⁸⁴ *Mercado*, 474 F.3d at 663.

authorized by the Guidelines. It is of no constitutional importance *to a defendant* that the Guidelines are “advisory” as opposed to “mandatory” if the trial judge enhances the defendant’s guideline range based on jury rejected “facts” that constitute elements of an acquitted offense, *and then impose a sentence within that enhanced range*. The outcome – a sentence longer than sanctioned by the jury – is the same. Under the max-min quartet, this backdoor sentencing not only implicates the Sixth Amendment, it runs afoul of it.

As one court explained, it is nonsensical for *Booker*, when it comes to acquitted conduct, to afford defendants *less* Sixth Amendment protections under an advisory Guidelines scheme:

If the Guidelines are mandatory, “what the jury verdict authorized” means a sentence framed by the facts tried – *excluding* aggravating enhancements to that offense and surely excluding aggravating relevant conduct if those facts did not form part of the jury’s verdict. With advisory Guidelines, when the trial judge is not required to accept a sentence driven by enhancements or relevant conduct, “what the jury verdict authorized” means a sentence just within the statutory maximum.

However, when a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize, it considers facts of which the jury expressly disapproved. Nor is it enough to hark back to the idea that they jury “only decides guilty beyond a reasonable doubt, while the judge decides facts by a fair preponderance of the evidence.” The argument is circular: The fair preponderance standard made sense in the context of fully indeterminate sentencing. It does not make sense in this hybrid regime where rules still matter, and certain facts have important, if not dispositive, consequences.¹⁸⁵

Moreover, to claim that there is no Sixth Amendment violation because *Booker* rendered the Guidelines advisory is to ignore the “controlling influence” of the Guidelines.¹⁸⁶ The Guidelines remain the “Federal Government’s authoritative view of appropriate sentences for specific crimes,”¹⁸⁷ and through a series of post-*Booker* rulings, the Supreme Court has ensured that the Guidelines remain so. Accordingly, the Guidelines are the “starting point and the initial benchmark” for all sentence determinations,¹⁸⁸ and failure to properly calculate a defendant’s guideline range constitutes procedural error.¹⁸⁹ And once a defendant’s guidelines are calculated, a within-guideline sentence may be presumed reasonable, and any departure or variance must be explained.¹⁹⁰ Indeed, a judge

¹⁸⁵ *Pimental*, 367 F. Supp. 2d at 152-53 (footnote omitted).

¹⁸⁶ *Peugh v. United States*, 133 S. Ct. 2072, 2084-85 (2013).

¹⁸⁷ *Id.* at 2085.

¹⁸⁸ *Gall v. United States*, 552 U.S. 38, 49 (2007); *See also Rita v. United States*, 551 U.S. 338, 347-49 (2007).

¹⁸⁹ *Peugh*, 133 S. Ct. at 2080.

¹⁹⁰ *Rita*, 551 U.S. at 347, 356-59.

“varies from a Guidelines sentence at his or her own peril.”¹⁹¹ “And so, in effect, the Guidelines, with respect to ‘acquitted conduct,’ remain very much mandatory.”¹⁹²

By slapping an “advisory” sticker on them, *Booker* did not “deprive the Guidelines of force as the framework for sentencing.”¹⁹³ Since the Guidelines remain the dominant sentencing force post-*Booker*, when a judge uses facts rejected (or not found) by a jury to “alter the prescribed range of sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment,” the Sixth Amendment is certainly implicated.¹⁹⁴ In short, when it comes to the Guidelines, as one court noted, “[w]e cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important.”¹⁹⁵

A related common justification for acquitted conduct sentencing, is that the practice is consistent with the Sixth Amendment so long as the resulting sentence is within the statutory maximum of the offense of conviction. In other words, the offense of conviction is the jury’s authorization of a sentence up to or equal to the statutory maximum based on facts found by the sentencing judge. However, the “jury authorization” argument rests on the premise that a *jury’s verdict authorizes punishment*. A not guilty verdict is the most conspicuous expression of a jury’s grant (rather withholding) of sentencing authority. “The fact that a jury has not authorized a particular punishment is never more clear than when the jury is asked for, and yet specifically withholds, that authorization.”¹⁹⁶ Certainly no one would argue that the Sixth Amendment and other constitutional protections are not barriers to a judge sentencing a defendant who was acquitted of *all* charges, just because the judge found the government proved its case by a preponderance of the evidence. So it is absurd that an acquittal loses the effect of withholding sentencing authority just because it is in the company of a guilty verdict.¹⁹⁷

* * * *

The max-min quartet reaffirms the principle that a criminal offense is a collection of individual elements, and elements are a collection of facts that must be proven beyond a reasonable doubt. Under the quartet, once an element, always an element.¹⁹⁸ A not guilty

¹⁹¹ *United States v. Ibanga*, 454 F. Supp. 2d 532, 538 (E.D. Va. 2006), *vacated and remanded*, 271 Fed. App’x. 298 (4th Cir. 2008); *See also United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) (“[F]ederal district court judges are often acting as automatons—mechanically enhancing sentences with ‘acquitted conduct’ pursuant to the now ‘advisory’ Sentencing Guidelines.”).

¹⁹² *Canania*, 532 F.3d at 777 (Bright, J., concurring); *Rita*, 551 U.S. at 366 (Stevens, J., concurring) (“I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*.”)

¹⁹³ *Peugh*, 133 S. Ct. at 2083.

¹⁹⁴ *Alleyne v. United States*, 133 S. Ct. 2151, 2156–58 (2013). The protection of a defendant’s jury right must “not [be] motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.” *United States v. Booker*, 543 U.S. 220, 237 (2005).

¹⁹⁵ Amended Sentencing Memo at 22, *United States v. Pimental*, 236 F. Supp. 2d 99 (E.D. Va. 2002) (No. 99-10310-NG), *aff’d in part and rev’d in part*, 380 F.3d 575 (1st Cir. 2004).

¹⁹⁶ *Mercado*, 474 F.3d at 664. *See also Id.* (“In the case of acquitted conduct, the jury has been given the opportunity to authorize punishment and specifically withheld it.”)

¹⁹⁷ *See id.* at 663 (Fletcher, J., dissenting) (“It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, and also conclude that the fruits of the jury’s efforts can be ignored with impunity by the judge in sentencing.”) (quoting *United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005)).

¹⁹⁸ *Cf. Oregon v. Ice*, 555 U.S. 160, 173 (2009) (Scalia, J., dissenting) (arguing that when a judge’s fact-finding is essential to the imposed punishment, “[t]hat ‘should be the end of the matter.’”) (quoting *Blakely v. Washington*, 542 U.S. 296, 313 (2004)).

verdict does not, and cannot, recast an offense element into something less substantial, which can be found by a sentencing judge, using a lesser standard of proof, to extend a prison sentence.¹⁹⁹ Such re-labeling, as the Supreme Court forcefully asserted in *Booker*, is “irrelevant for constitutional purposes.”²⁰⁰ And under the quartet, it is of no import whether the sentence imposed using acquitted conduct facts falls within the range allowed by statute. All that matters is the jury has not provided authority for such a sentence, and the acquitted conduct facts expose a defendant to an aggravated prison sentence that he would otherwise not face.²⁰¹

TURNING THE TIDE – JUSTICE SCALIA THE KEY?

The key to ending acquitted conduct may lie with an unlikely source – Justice Antonin Scalia. Through his dissent in *Jones*, Justice Scalia forcefully called on the Supreme Court to reach a definitive decision on judicial fact-finding during sentencings, and chided the Court for passing on the opportunity *Jones* permitted to do so:

We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

For years, however, we have refrained from saying so. . . . the Courts of Appeal have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. This has gone on long enough.²⁰²

While the tone is suggestive, Justice Scalia’s dissent does not explicitly say which way he would vote if the issue were properly before the Court. One must remember that Justice Scalia concurred with the majority decision in *Watts*.²⁰³ However, a Scalia dissent a few years prior to the *Jones* case suggests that the Justice’s comfort with acquitted conduct sentencing has dissipated over time.

In *Oregon v. Ice*, the Supreme Court held that the Sixth Amendment allowed states, such as Oregon in this instance, to assign to judges, rather than juries, the role of finding facts needed to impose consecutive, rather than concurrent, sentences for multiple offenses.²⁰⁴ In dissenting, Justice Scalia argued that *Apprendi* was an uncompromising barrier to a sentencing scheme where judge-found facts were “‘essential to’ the punishment . . . imposed.”²⁰⁵

¹⁹⁹ No one would ever dispute that a judge’s power to punish a defendant facing a one count indictment rests on the jury returning a guilty verdict. If the jury returns a not guilty verdict, the trial judge would have no authority to punish the defendant using judge-found facts under a preponderance of evidence standard. It simply defies logic to believe this power vacuum is filled just because a defendant faces multiple counts.

²⁰⁰ *Booker*, 543 U.S. at 231. See also *Ring v. Arizona*, 536 U.S. 584, 605 (2002) (“[T]he characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative of the question ‘who decides,’ judge or jury.”).

²⁰¹ See *Alleyne*, 133 S. Ct. at 2158.

²⁰² *Jones*, 135 S. Ct. at 8-9 (2014) (Scalia, J., dissenting) (citations omitted).

²⁰³ See 519 U.S. 148, 158 (1997).

²⁰⁴ 555 U.S. 160 163-64 (2009).

²⁰⁵ *Id.* at 173 (Scalia, J., dissenting) (quoting *Booker*, 543 U.S. at 223).

Justice Scalia took aim at the majority's effort to limit *Apprendi* to "only to the length of a sentence for an individual crime and not to the total sentence for a defendant."²⁰⁶ The majority's faulty logic, according to Justice Scalia, was a betrayal to the "pains" the Supreme Court had taken "to reject artificial limitations upon the facts subject to the jury-trial guarantee."²⁰⁷ These efforts "made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime."²⁰⁸

Together, Justice Scalia's dissents in *Oregon* and *Jones* provide cautious optimism that the Justice is ready to embrace an unambiguous and unyielding rule that the jury (and only the jury) is permitted to find facts necessary to extend a prison sentence regardless of the statutory limit. Or, he at least wants the Supreme Court to resolve the issue once and for all.

If the acquitted conduct sentencing does come before the Supreme Court again, who would side with Justice Scalia (assuming he is ready to end acquitted conduct sentencing)? Among the current ranks, Justices Ginsburg and Thomas joined Scalia's *Jones* dissent, and Chief Justice Roberts and Justice Thomas joined his *Oregon* dissent.²⁰⁹ Assuming they all continued to follow Justice Scalia's lead, there would be at least four votes for ending acquitted conduct sentencing.

One could speculate about which justice could provide the crucial fifth vote. However, that speculation must be tempered by the reality of the vote to deny review of the *Jones* case. Although the denial order did not reveal how the justices voted, since it takes just four justices to grant review, it seems clear that the six justices that did not join Scalia's dissent voted for denial. This is not a good sign for those, including this author, eager to see the Supreme Court put an end to acquitted conduct sentencing.

CONCLUSION

"The Founders were keenly aware, though, that 'the jury right could be lost not only by gross denial, but by erosion.'"²¹⁰ *Watts* was a monumental breach of the Sixth Amendment, and its erosive effect on defendants' jury rights continues unabated. Acquitted conduct sentencing devalues to worthlessness the jury's role in measuring whether the government has met its burden at trial, and empowers and encourages prosecutors to over-charge knowing that one guilty verdict will supersede any not guilty verdicts a jury renders. It is practice that indeed is a "jagged scar on our constitutional complexion."²¹¹

For too long, courts have rested on *Watts* to justify this invidious practice. In *Watts*, however, the Supreme Court side-stepped the Sixth Amendment and the barrier it poses to acquitted conduct sentencing. It is a maneuver that is no longer available now that the max-min quartet has fortified the line between judge and jury, and re-invigorated the

²⁰⁶ *Id.* ("I cannot understand why we would make such a strange exception to the treasured right of trial by jury.")

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See *Jones*, 135 S. Ct. at 8; *Ice*, 555 U.S. at 173.

²¹⁰ *United States v. White*, 551 F.3d 381, 393-94 (6th Cir. 2008) (Merritt, J., dissenting) (quoting *Jones*, 526 U.S. at 248 (1999)).

²¹¹ *United States v. Baylor*, 97 F.3d 542, 550 (D.C. Cir. 1996) (Wald, J., concurring).

role of the Sixth Amendment in sentencing. Armed with the max-min quartet, now is the time for a direct Sixth Amendment assault on acquitted conduct sentencing “in order to again ensure that the ‘right of jury trial [will] be preserved, in a meaningful way guaranteeing that the jury [will] still stand between the individual and the power of the government.’”²¹²

²¹² Brief of Law Professor as Amicus Curiae in Support of Petitioners at 15, *Jones*, 135 S. Ct. 8 (No. 13-10026) (quoting *United States v. Booker*, 543 U.S. 220, 237 (2005)).

**THE PEREMPTORY PARADOX: A LOOK AT
PEREMPTORY CHALLENGES AND THE
ADVANTAGEOUS POSSIBILITIES THEY PROVIDE**

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INTRODUCTION

Peremptory challenges to potential jury members are supported by an overwhelming majority of practicing lawyers. Criminal litigators of both stripes – prosecutors and defense attorneys – are nearly unanimous in their view that peremptory challenges should be retained, despite criticism of such challenges from judges and academics. Interestingly, both prosecutors and defense attorneys believe that one of the main advantages of peremptory strikes is that they provide an advantage over the trial opponent.

But as a matter of elementary logic, preemptory strikes cannot simultaneously provide both the prosecution and defense an advantage over the other. Rather, only three scenarios for systemic advantage exist: the prosecution is advantaged over the defense, the defense is advantaged over the prosecution, or neither party is systematically advantaged over another.¹

In Part I, I will discuss voir dire as a whole and give an explanation of peremptory strikes. In Part II, I will discuss the positives and negatives of peremptory strikes and the effects of eliminating peremptory strikes. In Part III, I will discuss which party to a criminal case benefits from preemptory strikes, the paradox that preemptory strikes cannot simultaneously provide an advantage over the other side to both the prosecution and the defense, and factors that could influence which side peremptory strikes benefit.

PART I

A. Right to a Jury

Throughout history, the right to a trial by jury has held strong as a principle rooted in constitutional values. Thomas Jefferson stated, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of [its] constitution."² Trial by jury represents the ideals that framers brought to the constitution in forming this great nation. The Sixth Amendment right to a jury trial prevents oppression by the government. Trial by jury embodies the concept of a restrained government, in that disinterested and uninvolved persons must make objective decisions regarding fact before the government can convict an individual and as a result restrict the rights of that individual.

Article III of the United States constitution provides that unless otherwise waived, criminal prosecutions should be tried by a jury.³ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.⁴ The Honorable Judge Herbert J. Hutton characterized the right to a trial by jury of one's peers as "one of the cornerstones of the American judicial system" and "a birthright cherished

¹ The third option – neither party is systematically advantaged over the other – is consistent with peremptory strikes advantaging one party over the other in a particular case. A particular, rather than systemic, advantage might result from a particularly skilled attorney, the particular crime or defendant, or the members of the particular venire.

² Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to A Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1009 (1992) (citing 15 The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958) (letter to Thomas Paine dated Paris, July 11, 1789)).

³ U.S. CONST. art. III, § 2, cl. 2.

⁴ U.S. CONST. amend. VI.

by generations of American citizens.”⁵ The Jury Selection and Service Act of 1968 outlined guidelines for juries, requiring that they be “selected at random from a fair cross section of the community in the district or division wherein the court convenes.”⁶

B. Voir Dire

In order to ensure the constitutional guarantees surrounding trial by jury, litigants are permitted to voir dire the venire, which allows for exclusion from the venire those members that present a potential cause for disqualification so that the remaining members are capable of analyzing the facts without influence from extraneous considerations.⁷ In *Hill v. State*, the court stated “Undergirding the voir dire procedure and, hence, informing the trial court’s exercise of discretion regarding the conduct of the voir dire, is a single, primary, and overriding principle or purpose: ‘to ascertain the existence of cause for disqualification.’”⁸

Voir dire is a French term meaning “to speak the truth.”⁹ Put simply, voir dire is the examination of a potential juror to see if he or she is fit to serve.¹⁰ Colorado Rule of Criminal Procedure 24(a) provides: “An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.”¹¹ Trial courts are vested with discretion in conducting voir dire, which is not disturbed unless there is a clear showing of abuse.¹² Generally, both the prosecution and defense are permitted a certain amount of time to voir dire the venire; however, there is no constitutional right to voir dire, “so long as the court’s examination allowed counsel to determine whether any potential jurors possessed any beliefs that would bias them such as to prevent [the defendant] from receiving a fair trial.”¹³ Jurors may be examined for multiple purposes, including to elicit grounds of challenge for cause and to ascertain the jurors’ state of mind with reference to the matter at hand in order to keep parties fully advised in the exercise of their right to peremptory challenges.¹⁴

C. Types of Challenges

During the voir dire, litigants are permitted to strike jurors from the venire, or challenge them. There are two main types of challenges: challenges for cause and peremptory challenges.

i. Challenge for Cause

A challenge for cause is “a request that a prospective juror be dismissed because there is a specific and forceful reason to believe the person cannot be fair, unbiased or

⁵ *In re Green*, No. 96-0002, 1996 WL 660949, at*1 (E.D. Pa. Nov. 15, 1996).

⁶ Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 (2014).

⁷ *Williams v. State*, 904 A.2d 534, 539 (Md. 2006).

⁸ 661 A.2d 1164, 1166 (Md. 1995) (quoting *McGee v. State*, 146 A.2d 194, 196 (Md. 1959)).

⁹ BLACK’S LAW DICTIONARY 1710 (9th ed. 2009).

¹⁰ *Id.*

¹¹ COLO. R. CRIM. P. 24(a).

¹² *Speak v. United States*, 161 F.2d 562, 563-64 (10th Cir. 1947).

¹³ *People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996) (quoting *People v. O’Neill*, 803 P.2d 164, 169 (Colo. 1990)).

¹⁴ *Union Pac. Ry. Co. v. Jones*, 40 P. 891, 892 (Colo. 1895).

capable of serving as a juror.”¹⁵ The judge makes the determination regarding whether the juror should be struck or dismissed. Colorado Rule of Criminal Procedure 24(b) provides that the court shall sustain challenges for cause for reasons including, but not limited to: incompetence in the absence of qualification prescribed by statute; relationship within the third degree to participants in the case, including attorneys; criminal complaint against the accused; service on grand jury, coroner’s jury, or investigatory body in relation to the case; previous jury service for trial arising out of same factual situation or involving same defendant; involvement in civil action against defendant arising out of the act charged as a crime; witness to any matter related to crime or its prosecution; fiduciary relationship to the defendant, person alleged to be injured by crime, or person whose complaint instituted the prosecution; bias for or against the defendant or prosecution.¹⁶

While courts are required to dismiss a juror for cause if the juror has a state of mind “manifesting bias for or against the defendant, or for or against the prosecution,” the test applied for a challenge for cause is not whether a potential juror merely expressed concern about some aspect of the case or jury service, but whether the juror “would render a fair and impartial verdict based on the evidence presented at trial and the instructions given by the court.”¹⁷ This is because jurors’ concerns are often an effort to express “feelings and convictions about such matters of importance in an emotionally charged setting,” and the court “may give ‘considerable weight’ to a potential juror’s assertion that he or she can perform jury service fairly and impartially in the case.”¹⁸ In contrast, a peremptory challenge allows litigants to challenge or dismiss a juror without stating a reason.¹⁹

ii. Peremptory Challenge

Peremptory challenges have existed for nearly as long as juries have existed.²⁰ In Roman criminal cases, the accuser and accused each proposed one hundred judges, each rejected fifty from the other’s list, and the remaining one hundred would try to alleged crime.²¹ Peremptory challenges date back to the early days of the jury trial in England,²² and are rooted in tradition of the jury trial in America.²³

¹⁵ Gerald Hill & Kathleen Hill, *challenge for cause*, PEOPLE’S LAW DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=169> (last visited Nov. 11, 2014).

¹⁶ COLO. R. CRIM. P. 24(b).

¹⁷ *People v. Vigil*, 718 P.2d 496, 500-01 (Colo. 1986) (citing *People v. Abbott*, 690 P.2d 1263, 1267 (Colo. 1984); *People v. Wright*, 672 P.2d 518 (Colo. 1982)); *People v. Garrison*, 303 P.3d 117, 127 (Colo. App. 2012).

¹⁸ *Garrison*, 303 P.3d at 127-28 (quoting *People v. Sandoval*, 733 P.2d 319, 321 (Colo. 1987)).

¹⁹ Gerald Hill & Kathleen Hill, *peremptory challenge*, PEOPLE’S LAW DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=1501> (last visited Nov. 11, 2014).

²⁰ *Batson v. Kentucky*, 476 U.S. 79, 119 (1986).

²¹ *Id.*

²² See *Swain v. Alabama*, 380 U.S. 202, 212-13 (1965) (White, J.) (“Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if ‘they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.’ So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to ‘stand aside’ until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies.” (footnotes omitted)) (tracing the development of preemptory challenges), *overruled by Batson*, 476 U.S. at 79.

²³ See *id.* at 214-16 (“In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . . The course in the States apparently paralleled that in the federal system. The defendant’s right of challenge was early conferred by statute, the number often corresponding to the

The right to peremptory challenges has been described as one of the most important rights of the accused,²⁴ despite the United States Constitution containing no language giving the right to peremptory challenges.²⁵ In a criminal proceeding, the function of a peremptory challenge is “to secure a more fair and impartial jury by enabling” litigants “to remove jurors whom they perceive as biased, even if the jurors are not subject to a challenge for cause.”²⁶ As Justice Byron White stated in *Swain v. Alabama*, “The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”²⁷

Traditionally, litigants could exercise peremptory challenges “for any reason at all, as long as that reason is related to his view concerning the outcome of that case,”²⁸ and the decision to exercise a peremptory challenge was “left wholly within the discretion of the litigant.”²⁹ However, the Supreme Court has limited this discretion throughout time.

Constitutional limits are imposed on peremptory challenges through the equal protection clause. These limits have formed over time.

In 1879, the Supreme Court held excluding jurors “because of their color . . . amounts to a denial of the equal protection of the laws.”³⁰ The Court then went on to hold that “[a]lthough a Negro defendant is not entitled to a jury containing members of his race, a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”³¹ The prosecutor’s “use of peremptory challenges against Negroes over a period of time” was described as “systematic discrimination on the part of the State.”³² The Court outlined what a defendant must show in order to establish a prima facie case of purposeful discrimination in the prosecutor’s exercise of peremptory challenges: (1) the defendant “is a member of a cognizable racial group;” (2) “the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race;” and (3) a showing that “these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”³³

In 1986, the Court held that once the defendant establishes a prima facie showing of purposeful discrimination in the prosecutor’s exercise of peremptory challenges, “the burden shifts to the State to come forward with a neutral explanation for challenging black

English practice, the prosecution was thought to have retained the Crown’s common-law right to stand aside, and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.” (footnotes omitted) (tracing the development of peremptory challenges).

²⁴ See *Pointer v. United States*, 151 U.S. 396, 408 (1894) (“The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.”).

²⁵ See *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”).

²⁶ *People v. Lefebvre*, 5 P.3d 295, 303 (Colo. 2000), *overruled by* *People v. Novotny*, 320 P.3d 1194 (Colo. 2014).

²⁷ 380 U.S. at 219.

²⁸ *United States v. Robinson*, 421 F. Supp. 467, 473 (D. Conn. 1976).

²⁹ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 633 (1991).

³⁰ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522, (1975).

³¹ *Swain*, 380 U.S. at 203-04.

³² *Id.* at 227.

³³ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), *holding modified by* *Powers v. Ohio*, 499 U.S. 400 (1991).

jurors.”³⁴ In 1991 the Court extended the *Batson* protection to defendants of all races,³⁵ and in 1994 the Court extended the *Batson* protection to gender discrimination.³⁶ In *Edmonson v. Leesville Concrete Co., Inc.*, the Court extended *Batson* to civil juries because “the race-based exclusion violates the equal protection rights of the challenged jurors.”³⁷ In *Georgia v. McCollum*, the Court extended *Batson* even further and held “that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”³⁸

Colorado Rule of Criminal Procedure 24, which governs peremptory challenges in criminal cases in Colorado, provides:

In capital cases the state and the defendant, when there is one defendant, shall each be entitled to ten peremptory challenges. In all other cases where there is one defendant and the punishment may be by imprisonment in a correctional facility, the state and the defendant shall each be entitled to five peremptory challenges, and in all other cases, to three peremptory challenges. If there is more than one defendant, each side shall be entitled to an additional three peremptory challenges for every defendant after the first in capital cases, but not exceeding twenty peremptory challenges to each side; in all other cases, where the punishment may be by imprisonment in a correctional facility, to two additional peremptory challenges for every defendant after the first, not exceeding fifteen peremptory challenges to each side; and in all other cases to one additional peremptory challenge for every defendant after the first, not exceeding ten peremptory challenges to each side. In any case where there are multiple defendants, every peremptory challenge shall be made and considered as the joint peremptory challenge of all defendants. In case of the consolidation of any indictments, informations, complaints, or summons and complaints for trial, such consolidated cases shall be considered, for all purposes concerning peremptory challenges, as though the defendants had been joined in the same indictment, information, complaint, or summons and complaint. When trial is held on a plea of not guilty by reason of insanity, the number of peremptory challenges shall be the same as if trial were on the issue of substantive guilt.³⁹

D. Methods of Voir Dire

There are two main methods of jury selection: the “strike and replace” method and the “struck” method.⁴⁰ In both of these methods, parties are permitted to voir dire the venire before being required to exercise challenges. This practice is rooted in history and supports the due administration of justice.⁴¹

³⁴ *Id.* at 97.

³⁵ *Powers v. Ohio*, 499 U.S. 400, 415 (1991).

³⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994).

³⁷ 500 U.S. 614, 616 (1991).

³⁸ 505 U.S. 42, 59 (1992).

³⁹ Colo. R. Crim. P. 24(d)(2).

⁴⁰ *Jury Selection*, ARIZ. JUD. BRANCH, http://www.supreme.state.az.us/jury/jury/jury1j.htm#N_3_ (last visited May 16, 2014).

⁴¹ *See Pointer v. United States*, 151 U.S. 396, 408-09 (1894) (“Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the

i. “Strike and Replace” Method

In the “strike and replace” method, otherwise known as the “jury box” system, the jury box is filled with randomly selected venire members.⁴² After examining the venire, counsel for each side may exercise their challenges.⁴³ Litigants “exercise challenges for cause and their allotted number of peremptory challenges in some prescribed pattern of alternation.”⁴⁴ As members of the venire are struck from the box, other venire persons are drawn to replace the empty seats.⁴⁵ When all challenges have been used or waived, the remaining individuals in the jury box become the jury.⁴⁶

ii. “Struck” Method

In the “struck” method, venire members are examined, and then challenged and excused for cause.⁴⁷ A panel is then created with the number of jurors who will hear the case, the number of alternates, and the combined number of peremptory challenges allotted to each side.⁴⁸ Litigants exercise their peremptory challenges on an alternating basis against the panel until they have used their allotted challenges and only the number of jurors and alternates needed remain.⁴⁹

PART II

Research indicates that many scholars and academic commentators favor the abolishment of peremptory challenges.⁵⁰ Moreover, a growing number of judges have

presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.”)

⁴³ *United States v. Blouin*, 666 F.2d 796, 796 (2d Cir. 1981).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁸ *Id.* at 796-97.

⁴⁹ *Id.* at 797.

⁵⁰ See generally 4 William Blackstone, Commentaries *346 (stating that the peremptory challenge is “an arbitrary and capricious species of challenge”) available at http://press-pubs.uchicago.edu/founders/documents/amendV-VI_criminal_process14.html; Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 545 (1975) (note 2 omitted) (“[T]he voir dire procedure is being attacked as a cumbersome, time-consuming, meaningless part of the jury trial.”); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986) (“A more equitable legal system would eliminate peremptory challenges and would rely exclusively on cause challenges and on expanded voir dire to root out only those jurors unable to follow the judge’s instructions.”); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989) (highlighting the gains of eliminating peremptory challenges) (“[S]ubstantial economic savings, the effective control of racial and other widely condemned forms of group discrimination, and the control of countless other, less frequently employed, less generalized classifications that insult and diminish human beings.”); Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 420-23 (1992) (arguing for abolition of peremptory challenges); Professor Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1148-49 (1994) (proposing that peremptory challenges should be abolished for all litigants except criminal defendants, and that the peremptory challenges for all litigants except criminal defendants be replaced with an expanded for-cause system); Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 486 (1995) (“[T]he simplest way to eliminate discrimination . . . is to eliminate the peremptory challenge”); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT’L & COMP. L. REV. 363, 363-64 (2009) (arguing that peremptory challenges should be abolished in the United States); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 97 (2009) (arguing that the best course of action to remove race and racism as factors in

expressed their disapproval of peremptory challenges,⁵¹ including a few Supreme Court justices.⁵²

Conversely, litigators are overwhelmingly in favor of peremptory challenges.⁵³ There are both positive and negative aspects of the peremptory challenge. Moreover, there would be both positive and negative effects of eliminating peremptory challenges.

A. Benefits of the Peremptory Challenge

The Court has stated that peremptory challenges are “one of the most important of the rights secured to the accused.”⁵⁴

i. Rooted in Tradition

Peremptory challenges have a long history in the American legal system.⁵⁵ The concept of an impartial jury has been aided by the peremptory challenge throughout time. While there are disadvantages associated with the use of peremptories, as discussed below, they have long been utilized as a valuable tool in the creation of impartial juries.

ii. Provides Discretion to Litigants

The peremptory challenge gives litigants discretion in arbitrary selecting potential jurors, in that “its exercise is left wholly within the discretion of the litigant,”⁵⁶ and litigants have the discretion to act upon prejudices conceived from “the bare looks and

discretionary challenges is to abandon peremptory challenges altogether); Maisa Jean Frank, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota As A Case Study*, 94 MINN. L. REV. 2075, 2077 (2010) (arguing that reform should include the elimination of the peremptory challenge in most cases, since the for-cause challenge provides an adequate avenue for party participation in jury selection); Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 422 (2010) (“[C]ourts and legislatures should consider limiting or eliminating peremptory challenges”).

⁵¹See Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1713 (2006) (“The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing.”); see also *Alen v. State*, 596 So. 2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (arguing to abolish the peremptory challenge as inherently discriminatory); *Com. v. Rodriguez* 931 N.E.2d 20, 44 (2010) (Marshall, C.J., concurring) (“[I]t is either time to abolish them entirely, or to restrict their use substantially.”); *State v. Buggs*, 581 N.W.2d 329, 347 (Minn. 1998) (Page, J., dissenting) (“[I]t is time for this court to consider seriously Justice Marshall’s admonition in his concurrence in *Batson* that the goal of ending ‘the racial discrimination that peremptories inject into the jury-selection process can be accomplished only by eliminating peremptory challenges entirely.’”); *Flowers v. State*, 947 So. 2d 910, 939 (Miss. 2007) (“[W]e would be well within our authority in abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials.”).

⁵²See *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (J Marshall, concurring) (stating that the only way to end the racial discrimination that peremptories inject into the jury-selection process is to eliminate peremptory challenges entirely); John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907 (2003) (arguing that peremptory challenges create significant costs and require the expenditure of valuable court time while producing “minimal benefits at best”); *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (J Breyer, concurring) (stating the case “reinforces Justice Marshall’s concerns” regarding peremptories and racial discrimination); *Rice v. Collins*, 546 U.S. 333, 344 (2006) (J Breyer, concurring) (“I continue to believe that we should reconsider *Batson*’s test and the peremptory challenge system as a whole.”).

⁵³ See *infra* Part III.A.

⁵⁴ *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1965)), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986)

⁵⁵ See *infra* pp 6-8.

⁵⁶ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 633 (1991).

gestures of another.”⁵⁷ The discretion surrounding peremptories “is a mechanism for the exercise of *private* choice in the pursuit of fairness. . . . an enclave of private action in a government-managed proceeding.”⁵⁸

iii. Fosters a “Middle Ground” Jury

Peremptory challenges enable participants to exclude those jurors they believe will be most favorable to the other side, which provides a means of eliminating “extremes of partiality on both sides.”⁵⁹ Peremptory challenges allow participants to eliminate individuals who don’t meet the standard for challenge for cause but still propose a potential bias, even if minimal, which helps to assure “the selection of a qualified and *unbiased* jury.”⁶⁰ Essentially, peremptories can be seen as a supplement to the challenge for cause. In theory, the resulting jurors form a middle ground jury, capable of hearing both sides to come to a fair decision.⁶¹

iv. Perception of Fairness

Peremptory challenges provide a perception of fairness in criminal trials. They have “always been held essential to the fairness of trial by jury.”⁶² By allowing litigants to participate in the selection of jury members through peremptory challenges, a perception of fairness is created because “the impartiality of the adjudicator goes to the very integrity of the legal system.”⁶³ Litigant involvement and a jury created to decide the case based on the evidence placed before them foster a perception of fairness among both the parties and the public.⁶⁴

v. Protection of Voir Dire

While litigants are permitted to voir dire the venire before raising a challenge for cause, this voir dire may be more extensive in regards to peremptory challenges. If a litigant were to examine a venire person to the level of discomfort in the pursuit of a challenge for cause and subsequently lose that challenge for cause, the litigant can fall back on a peremptory challenge to remedy the potential for a damaged relationship between the litigant and venire person. Without the peremptory challenge to fall back on, litigants may be hesitant to pursue the elicitation of deeper biases on behalf of the venire person and a subsequent challenge for cause in fear of having to proceed with a juror who may develop negative feelings towards the litigant during that process. Moreover, the peremptory challenge requires a voir dire in order for litigants to make decisions regarding peremptory challenges. The peremptory challenge allows litigants to use voir dire to identify predisposed jurors and unreciprocating jurors.⁶⁵

⁵⁷ *Lewis v. United States*, 146 U.S. 370, 376 (1892).

⁵⁸ *Edmonson*, 500 U.S. at 633-34.

⁵⁹ *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91 (1986)).

⁶⁰ *See id.* (emphasis added).

⁶¹ *See Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986) (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”).

⁶² *Lewis*, 146 U.S. at 376.

⁶³ *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

⁶⁴ *See Swain*, 380 U.S. at 219.

⁶⁵ *See Jean Montoya, The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1010 (1996). Survey respondents in favor of retaining

B. Detriments of the Peremptory Challenge

i. Requires Many Resources

The use of peremptory challenges requires many resources. First, enough jurors must be called to make up a jury pool large enough to allow litigants to exercise peremptory challenges. Second, litigants sometimes hire jury consultants to opine on the potential biases of venire persons. Lastly, the constitutional limits placed on peremptory challenges sometimes require that a separate hearing be held,⁶⁶ which requires significant judicial resources.

ii. Inhibits the Cross Section of Community Concept

By using peremptory challenges “to eliminate extremes of partiality on both sides,”⁶⁷ the concept of having a jury of one’s peers or a jury representing a cross section of the community is inhibited. Justice White stated that “the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”⁶⁸ Eliminating venire persons because of their personalities, experiences, background, beliefs, tendencies, or any other reasons decreases the probability that the jury will truly be a fair cross section of the community.

Moreover, because individuals with different backgrounds and experiences may bring a different perspective to the deliberations, the quality of verdicts is limited by peremptory challenges. Excluding certain groups of individuals makes it less likely that the verdicts are truly representative of the values of the community as a whole.

iii. Prejudicial Element

In the pursuit of equal protection, constitutional limits have been imposed on how participants may exercise their peremptory challenges.⁶⁹ However, the peremptory challenge is still an “arbitrary and capricious species of challenge”⁷⁰ that allows litigants to act upon prejudices conceived from “the bare looks and gestures of another.”⁷¹ Peremptory challenges require some sort of prejudice, in that litigants make a decision to remove venire persons based on an impression or short interaction. While this may be non-race based discrimination, there is still a level of discrimination involved, be it discrimination based on facial expression, area of origin, expressed preference towards a particular litigant, or any other reason that does not rise to a level of challenge for cause.

peremptory challenges stated the challenges were valuable to them because “peremptory challenges allowed them to assemble a fair jury because they could eliminate predisposed jurors and weed out unreceptive jurors.”
Id.

⁶⁶ See, e.g., David H. Stacy & Brenda M. Sauro, *Edmonson: Dramatic Change in the Use of Peremptory Challenges*, 21 COLO. LAW. 687, 689-90 (1992) (discussing required hearings for *Batson* challenges).

⁶⁷ *Swain*, 380 U.S. at 219 (1965).

⁶⁸ *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

⁶⁹ See *supra* Part I.C.ii.

⁷⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES *346.

⁷¹ *Lewis v. United States*, 146 U.S. 370, 376 (1892).

C. Effects of Eliminating Peremptory Challenges

i. Effects on Judicial Efficiency

Eliminating peremptory challenges would likely result in a flood of challenges for cause. Litigants will have to use challenges for cause to eliminate any bias. Because there is no peremptory challenge to fall back on for a semi-biased juror, litigants will be required to make challenges for cause for any perceivably biased juror. These effects will require additional use of judicial resources.

On the other hand, eliminating peremptory challenges could potentially require less time for voir dire. Because litigants are only seeking to identify partial or biased jurors on which to exercise a challenge for cause, no additional voir dire will be required other than to identify those partial or biased jurors. Litigants will have no reason to further probe the venire.

ii. Effects on the Fair and Impartial Jury

Demonstrably partial or biased jurors are eliminated through challenges for cause.⁷² Jurors survive a challenge for cause if “the juror would render a fair and impartial verdict based on the evidence presented at trial and the instructions given by the court.”⁷³ Therefore, if challenges for cause work perfectly, abolishing peremptory challenges should not have an effect on the fair and impartial jury.

However, challenges for cause might not completely accomplish the goal of providing impartial and unbiased jurors. All venire persons will come through the door with some type of experiences and background that lend to biases. The challenge for cause sets a bar in which jurors who are demonstrably unable to separate their preconceived notions from the case at hand will be struck from the jury. The peremptory challenge allows litigants to strike jurors that fall below that line, but still present a concerning level of partiality or extremity.⁷⁴ Without the peremptory challenge, litigants will be required to rely solely on challenges for cause to secure a fair and impartial jury.

iii. Effects on the Defendant

Although the right to peremptory challenges “is one of the most important of the rights secured to the accused,”⁷⁵ there is no Constitutionally guaranteed right to peremptory challenges.⁷⁶ In contrast, “individual jurors themselves have a right to nondiscriminatory jury selection procedures.”⁷⁷ Individual jurors also have a right to equal protection under the laws,⁷⁸ which extends to discrimination surrounding peremptory

⁷² *E.g.*, *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). *See also* *Skilling v. United States*, 561 U.S. 358, 442 n.8 (2010).

⁷³ *People v. Vigil*, 718 P.2d 496, 500-01 (Colo. 1986) (quoting *People v. Wright*, 672 P.2d 518, 520 (Colo. 1982)).

⁷⁴ *See Swain v. Alabama*, 380 U.S. 202, 219 (1965) (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁷⁵ *Pointer v. United States*, 151 U.S. 396, 408 (1894).

⁷⁶ *E.g.*, *Stilson v. United States*, 250 U.S. 583, 586 (1919). *See also* *Rivera v. Illinois*, 556 U.S.148, 149 (2009).

⁷⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-41 (1994).

⁷⁸ *See* U.S. CONST. amend. XIV, § 1.

strikes.⁷⁹ Eliminating peremptory challenges would deprive defendants of this important right to remove perceivably biased jurors who were not subject to a challenge for cause.⁸⁰

iv. Effects on Deliberations

One of the functions of peremptory challenges is to “eliminate extremes of partiality on both sides.”⁸¹ Abolishing the peremptory challenge would prevent these “extremes” from being excluded from the jury. A jury room that includes these “extremes” would undoubtedly increase the amount of opinions offered in deliberations, thereby resulting in increased deliberation times and increased number of hung juries.

v. Effects on Prejudice and Discrimination

Abolishing peremptory challenges and instead seating the first twelve jurors who survive challenges for cause is the simplest and most effective manner to eliminate prejudice and discrimination involved in peremptory challenges. Completely removing race and racism as factors in peremptory challenges could be accomplished at the source – by abandoning peremptory challenges altogether.⁸²

PART III

A. Practitioner Opinions Regarding Peremptory Challenges

Although peremptory challenges are not popular among judges⁸³ or academic commentators,⁸⁴ litigators are in favor of keeping them. In a survey conducted by Jean Montoya, “practitioners overwhelmingly described peremptory challenges as valuable.”⁸⁵ 81% of lawyers who answered a question regarding the value of peremptory challenges “described peremptory challenges as having great value,” “18% described peremptory challenges as having some value,” and “[f]ewer than 1% described peremptory challenges as having no value.”⁸⁶

A question regarding the value of peremptory challenges revealed that 83% of the responding prosecutors, 80% of the responding defense attorneys, 82% of the responding state court practitioners, and 83% of the responding lawyers who had practiced in both federal and state courts believe peremptory challenges are of “great value.”⁸⁷ Conversely, only 56% of the responding federal court practitioners indicated that they

⁷⁹ See, e.g., *Batson*, 476 U.S. at 89 (“[T]he component of the jury selection process at issue here, the State’s privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.”).

⁸⁰ See *People v. Lefebvre*, 5 P.3d 295, 303 (Colo. 2000) (“The function of peremptory challenges in a criminal proceeding is to allow both the prosecution and the defense to secure a more fair and impartial jury by enabling them to remove jurors whom they perceive as biased, even if the jurors are not subject to a challenge for cause.”), *overruled by* *People v. Novotny*, 320 P.3d 1194 (Colo. 2014).

⁸¹ *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by* *Batson*, 476 U.S. 79.

⁸² See *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”).

⁸³ See *supra* notes 52-53 and accompanying text.

⁸⁴ See *supra* note 51 and accompanying text.

⁸⁵ Montoya, *supra* note 66, at 1000.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1026 n. 102.

believed peremptory challenges had great value.⁸⁸ However, the exclusively federal court practitioners made up a small sample of respondents.⁸⁹ The main reasons lawyers cited in indicating why peremptory challenges are valuable are that “peremptory challenges allow litigants to exclude jurors with whom the attorney has “bad chemistry” or to exclude jurors on the basis of “gut feeling.””⁹⁰

While respondents “felt that peremptory challenges had depreciated in value following *Batson* and *Wheeler*,” they indicated that an additional value peremptory challenges hold is a level of control on behalf of litigants over the composition of the jury because peremptories “allow litigants to exclude jurors on the basis of unprotected group membership (e.g., occupation), to *skew the panel in the client's favor by excluding panelists in the opponent's favor*, and to exclude the “screwballs” (the quirky, unpredictable jurors).”⁹¹ Respondents who felt peremptory challenges were only of some value commented that their ability to discover biases was limited due to time and other limits on voir dire.⁹² Both prosecutors and defense attorneys felt that peremptories have diminished usefulness due to inadequate voir dire; specifically, “they noted inadequate questioning of the jury panelists before the lawyers are called upon to exercise their peremptory challenges as a problem.”⁹³

Prosecutors in particular found “peremptory challenges valuable to shape a working group of jurors” in the pursuit of obtaining a unanimous verdict.⁹⁴ The overwhelming weight of respondents support retaining peremptory challenges; “98% of attorneys who answered the questions said that peremptory challenges should not be eliminated.”⁹⁵ Prosecutors and defense attorneys alike shared the sentiment that peremptory challenges should not be eliminated: 99% of responding prosecutors and 99% of responding defense attorneys thought peremptory challenges should not be eliminated.⁹⁶

B. Effectiveness of Peremptory Challenges

While there is little evidence on the effectiveness of peremptory challenges, a study by Hans Zeisel and Shari Seidman Diamond examines the effect of peremptory challenges on the jury and verdict.⁹⁷ Zeisel and Diamond conducted the study to discover whether trial lawyers’ use of peremptory challenges affect the outcome of the case.⁹⁸ In this study, peremptorily excused jurors stayed in the courtroom as shadow jurors.⁹⁹ At the end of the trial, shadow jurors revealed how they would have voted in the case.¹⁰⁰ By combining that knowledge with posttrial interviews of the real jurors, Zeisel and Diamond were able to reconstruct the vote as it would have been had there been no peremptory strikes.¹⁰¹ The reconstructed vote is what the result would have been if the first 12 jurors

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1000.

⁹¹ *Id.* at 1001 (emphasis added).

⁹² *Id.*

⁹³ *Id.* at 1003.

⁹⁴ *Id.* at 1001.

⁹⁵ *Id.* at 1009-10.

⁹⁶ *Id.* at 1026 n. 139.

⁹⁷ Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in A Federal District Court*, 30 STAN. L. REV. 491, 491-92 (1978).

⁹⁸ *Id.*

⁹⁹ *Id.* at 492.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

in the venire had formed the jury – if only challenges for cause were made and not peremptory challenges. Zeisel and Diamond then compared the result of the reconstructed jury with the real jury, enabling them to “gauge the effect, if any, of the peremptory challenges on the composition of the jury and its verdict.”¹⁰²

The experiment was conducted with 12 criminal cases.¹⁰³ Each case had three juries: the real jury, the jury composed of peremptorily challenged jurors, and a jury selected randomly from the remaining venire.¹⁰⁴ Five out of the twelve cases produced notable shifts in the probability of a guilty verdict.¹⁰⁵ In the remaining 7, however, “the combined effect of challenges was minimal and did not produce the expectation that the verdict of the “jury without challenges” would have differed from that of the real jury.”¹⁰⁶ The full results were as follows.¹⁰⁷

COMPARISON OF THE RECONSTRUCTED “JURIES WITHOUT CHALLENGES” AND THE REAL JURIES AFTER CHALLENGES

Case No.	Percentage Votes On Ballot	Guilty On First	Corresponding Percentage Probability That the Verdict Will Be Guilty ^{a1}	(4) Real Jury	(5) Actual Verdict	(4) - (3) Percentage Shift in Probability of Guilty Verdict as a Result of Challenges
	(1) “Jury Without Challenges”	(2) Real Jury	(3) “Jury Without Challenges”			
1 ^{aa1}	49	42	41	23	NG	- 18
2	88	83	96	94	G	- 2
3 ^{aaa1}	41	42	22	23	NG	+ 1
4	50	33	42	11	NG	-30
5	77	83	91	94	G	+ 3
6	53	50	55	42	NG	- 13
7	72	83	89	94	G	+ 5
8	100	100	100	100	G	0
9	50	50	42	42	Hung	0
10	72	92	89	97	G	+ 8
11	38	17	17	2	NG	-15
12	67	33	84	12	NG	-72

^{a1}Percentages are interpolated from Graph 1. See note 23 *supra* and accompanying text.

^{aa1}Assuming an initial vote of 5 to 7. See note 20 *supra*. If an initial vote of 6 to 6 is assumed, (1) becomes 54% and (2) becomes 50%; if 4 to 8 is assumed, (1) becomes 44% and (2) becomes 33%.

^{aaa1}Assuming an initial vote of 5 to 7. If an initial vote of 6 to 6 is assumed, (1) becomes 46% and (2) becomes 50%; if an initial vote of 4 to 8 is assumed, (1) becomes 36% and (2) becomes 33%.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 499.

¹⁰⁵ *Id.* at 507.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

The data was then used to obtain an idea of how well the litigants used their allotted peremptory challenges to excuse jurors who would have voted against their side if on the jury.¹⁰⁸ Zeisel and Diamond formulated a performance index for the attorneys, with +100 representing optimal challenge performance and -100 representing worst challenge performance.¹⁰⁹ The results were as follows:¹¹⁰

ATTORNEY PERFORMANCE INDEX

Case No.	Prosecutor	Defense
1	+23	+46
2	-59	+ 6
3	+44	+30
4	-20	+44
5	+31	+48
6	-61	-11
7	+ 9	-10
8	-32	-62
9	0 ^{a1}	+12
10	+58	+46
11	+62	+36
12	-61	+19
Average (Mean)	- 0.5	+17.0
Average Fluctuation Around the Mean	±38	±25

^{a1} The prosecutor exercised only one challenge, and the challenged juror did not participate in the study.

The collective scores do not indicate a particularly positive performance of the attorneys in their use of peremptory strikes.¹¹¹ The averages indicate that the prosecution made about as many good challenges as bad ones, and the defense did not score much better.¹¹² The averages are misleading however because the surrounding deviations from the average are so large.¹¹³ While the average scores hover around zero, in some cases the attorneys performed very well, and in others they performed very poorly.¹¹⁴

C. The Peremptory Paradox

As previously mentioned, one of the main reasons attorneys value peremptory strikes is that excluding jurors allows the attorney to “skew the panel,” which is done “by excluding panelists in the opponent’s favor.”¹¹⁵ However, both sides get to exercise peremptory challenges. Therefore, both sides have an opportunity to “skew the panel” or exclude “panelists in the opponent’s favor.” The panel cannot be skewed in favor of both the prosecution and the defense at the same time. This paradox could potentially cancel out the benefits peremptory challenges afford each side.

¹⁰⁸ *Id.* at 513-14.

¹⁰⁹ *Id.* at 514.

¹¹⁰ *Id.* at 516.

¹¹¹ *Id.* at 517.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Montoya, *supra* note 66, at 1001.

While it is possible for peremptory challenges to hold value for both sides simultaneously, it is not possible for both sides to be simultaneously advantaged by peremptory strikes. Peremptory challenges could be *avored* simultaneously by both the prosecution and defense, for, say, resulting in more accurate jury decisions, or a fairer decision making process. But peremptories cannot provide the prosecution a systemic advantage over the defense and the defense a systemic advantage over the prosecution at the same time. Therefore, there are only three possibilities for advantage with regards to peremptory strikes: (1) the prosecution is advantaged, (2) the defense is advantaged, or (3) neither side is advantaged.

As shown through the deviations in Jean Montoya's study, there is no clear answer regarding which side benefits from the use of peremptory challenges. There are, however, a multitude of reasons why the use of peremptory challenges would benefit one side over the other.

D. Reasons The Defendant or Prosecution Would be Advantaged Over the Other

i. Location

The location of a criminal jury trial will likely affect which party will be advantaged by peremptory challenges. In a county that has a large group of a certain demographic, it may behoove one side to peremptorily challenge members of that demographic if that demographic is perceivably biased towards a party. While such use of peremptory strikes is potentially rooted in stereotypes, the strategy may be advantageous. For example, if a criminal case was being tried in a jurisdiction that contains a large majority of older, conservative individuals, a defendant charged with a drug crime relating to marijuana may benefit from peremptorily challenging individuals from that demographic. On the other hand, if the case was being tried in a jurisdiction that contains a large majority of younger, liberal individuals who have been exposed to a more tolerant view of marijuana use, the prosecution may benefit from peremptorily challenging individuals from that demographic.

However, both the prosecution and defense could take advantage of this jurisdictional situation. For example, in the conservative jurisdiction mentioned above, it seems as though the defendant would benefit most from peremptory challenges because he has the opportunity to strike members from the majority. But it only takes one juror to hang a jury – so the prosecution might benefit from using a peremptory to strike the one minority juror that could have hung the jury. On the same token, a defendant might benefit in the liberal jurisdiction mentioned above by using a preemptory to strike the one minority juror that would keep a jury from acquitting.

These fictitious jurisdictions highlight the peremptory paradox in that peremptory challenges hold value for both sides simultaneously, but cannot simultaneously advantage one side over the other.

ii. Attorney Skill

The attorneys' abilities will likely influence which side will be advantaged by the use of peremptory strikes. If an attorney is not able to effectively conduct voir dire and exercise meaningful peremptory challenges, the challenges will likely not be

advantageous. If an attorney is able to effectively conduct voir dire and exercise meaningful peremptory challenges, the results of such could be extremely advantageous. The skill with which the attorney conducts voir dire will dictate whether the attorney chooses the “right” venireman to excuse.

iii. Presiding Judge

The judge presiding over the criminal case will potentially play a role in what side is advantaged by peremptory challenges. If the presiding judge tends to grant one side’s challenges for cause more often than another’s, then the peremptory challenges will likely be more useful to the side that was less successful with the challenges for cause. The litigant for this side who was unsuccessful with the challenges for cause will then have to decide whether to use the peremptories on those who survived the challenges for cause. Conversely, the litigant who prevailed with challenges for cause will then have the autonomy to use the peremptories on other venire persons.

CONCLUSION

Peremptory challenges have a long history, rooted in tradition and constitutional values. While there are many benefits to the use of peremptory challenges in criminal jury trials, these benefits are potentially overstated because the challenges cannot simultaneously advantage both the prosecution and the defense. There are however, many factors that will influence which side is advantaged. Despite of the potential for the opposing side to be advantaged, peremptory challenges are overwhelmingly favored by practitioners and will likely continue to be in the future. A look at the potential advantageous possibilities of peremptory challenges will provide practitioners insight into how to most effectively use their challenges.

