

Rap Sheet

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COLORADO CRIMINAL
DEFENSE BAR
WINTER 2008

Remembering Bryan Shaha

BY BERT NIESLANIK

Could you call up 400 lawyers that you know and ask them for a big favor? When I say big favor, I mean a *big favor!* The favor is to do a criminal case at about 1/3 of your normal rate. In 1996-7 until 2006, that is what Bryan Shaha did, everyday. As the first director of the Office of Alternate Defense Counsel, he called criminal defense lawyers everyday asking them to be an advocate for a poor person accused by the state, deliver excellent lawyering and to do it at a third of their normal rate. And we all said “yes”.

Why is that?

Because Bryan never asked anyone to do something that he had not done or would not do himself. Bryan tried more death penalty cases than almost anyone in Colorado. Bryan represented sheer volumes of defendants that stagger the mind. Bryan co-counseled with many of us, co-worked with the rest. Bryan was never on the outside looking in, he was either on the inside looking out with us or standing among us taking our licks. Bryan had 400 or even a 1000 “friends” in the defense bar that he could call up for a favor and be assured that out of our sheer respect for him, we would not only take the call but pick up the phone knowing that it would be ugly and we would say yes.

And when that phone call came, the secretary might say that a General Shaha was on the line. She or he might say that Judge Shaha was on the line, or someone from the Attorney Regulation Council. It usually depended on the size of the favor - the ugliness of the case. My favorite was the bad case call I got when he told the staff he was *Captain Notso Green*. For me, it never felt like a favor that Bryan was asking for. It felt



Bryan Shaha and wife Carol Haller

like I was a soldier in the fight for justice and Bryan was handing out the next assignment in the war. He commiserated, sympathized, and encouraged, but I always knew that he would never ask more than I was capable of. And he never did.

Bryan D. Shaha, Centennial, formerly of Greeley, died on October 24, 2007, of cancer.

Bryan was born October 27, 1941 in Oklahoma City. He graduated from U.S. Grant High School. He received a Bachelor of Arts in economics from University of Central Oklahoma in 1964.

Bryan served in the U.S. Marine Corps from 1964 to 1969. During his service he flew 130 combat missions in the A6, receiving the Distinguished Flying Cross, 10 Air Medals, Air Force Commendation Medal and a Purple Heart. He was honorably discharged as a Captain.

Bryan graduated in 1972 from the University of Colorado School of Law. While in law school, he represented indigent persons for the Legal Aid Clinic. This early experience formed a lasting impression on Bryan, who spent his legal career making sacrifices without regard for personal gain in the defense of the accused and indigent persons in both civil and criminal courts.

Bryan worked for Colorado Rural Legal Services from 1973 to 1974. The attorneys and staff working for CRLS at that time were passionate people willing to risk much to promote change for the poorest people

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in our society, including migrant workers and meatpackers.

In 1974, Bryan went to work for the Colorado State Public Defender system in the Greeley office serving as deputy state public defender and Office Head of the Greeley Regional Office for over 14 years. Bryan was a leader in criminal defense in Colorado and nationwide, representing indigent persons throughout the State of Colorado. Although he left the public defender system in 1979 for five years, he continued his representation of the criminally accused during his time in private practice, including

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Remembering Bryan Shaha continued from page 1

his defense of persons facing the death penalty. In his career, Bryan tried six death penalty cases. None of his clients were ever executed.

Bryan left the Colorado State Public Defender system in 1996 to become the Alternate Defense Counsel for the State of Colorado, a state agency to assign counsel in criminal matters for indigent persons who could not be represented by a state public defender. Bryan created a state agency that became a national model for assigned counsel programs. He retired in March, 2006.

During his career, Bryan received numerous awards including Public Defender of the Year (1993), the Jonathan Olom Award (1996), the Charles Dorsey Award from the ABA (2005), Distinguished Alumni Award, University of Colorado School of Law (2006) and Abolitionist of the Year Award (2006). His work training attorneys in Colorado and nationally allowed him to share his passion and expertise with numerous attorneys and investigators.

Bryan married Claudia "Corky" Wells in 1966. They have one son, Colin. Corky and Bryan remained friends despite their divorce in 1989.

Bryan married Carol Haller in 1991. They have one daughter, Meaghan.

Bryan volunteered as a coach for soccer teams for both of his children, taught Great Books, was a Sunday school teacher, and coach for Destination Imagination. He was athletic his entire life, riding bikes on trips with favorite people, hiking and climbing, running races including marathons, playing handball, racquetball and squash. He was a member of the Lawyer team for Partners Superstar Competition in Greeley for years. He was a baseball player and fan, attending many Bears, Zephyrs, and Rockies games. Bryan was an avid reader who kept a lifetime list of books he read and he believed Pete Rose should be in the hall of fame.

Bryan is survived by his wife and both children. In addition, he is survived by daughter-in-law Cindy and grandson Beck Shaha, of Greeley. Other survivors include mother Margaret Shaha, Oklahoma City; sister Terry Silvey of Edmond, Oklahoma; brother Ken Shaha of Fort Worth. He has numerous nieces and nephews. Survivors also include a multitude of friends and colleagues who treasure Bryan's life of selfless giving to others. Bryan was preceded in death by his father, Lewis Shaha.

In an effort to honor Bryan, a scholarship is being established at the University of Colorado Law School to provide financial help to law students who follow in his footsteps toward a career in public service. Applicants will be screened for need and for a demonstrated desire to work in indigent defense, particularly in the Office of Public Defender. Scholarships will be awarded to deserving recipients to help defray the cost of their law school educations and help future lawyers continue Bryan's noble and powerful legacy. To make a donation, please make a check out to C.U. Foundation, and write Bryan Shaha Scholarship Fund on the memo line. Mail contributions to Marilyn Moses, Development Associate, University of Colorado Foundation, Law School Development Office, 401 UCB, Boulder, CO 80309-0401.

A Look at 2008

BY SANDY MULLINS, EXECUTIVE DIRECTOR

This year we are working on several new CCDB projects for 2008, along with a longer list than ever of legislative initiatives.

Last October, in collaboration with the Office of Alternate Defense Counsel, we held the first training in our new series of educational programs for investigators. It was an extremely successful debut that will be followed by a more intensive program on February 8. The Board recently approved the addition of a new standing committee specifically to address the needs of our investigator members.

Our Sex Offender Management Board Working Group, an offshoot of our Policy Committee, is now working with a new official sub-committee of the Sex Offender Management Board that is examining defendant justice issues. This means that in addition to our new private criminal defense attorney seat on the SOMB, we have a regular opportunity to bring the issues you all helped identify to the SOMB's attention in a format that will hopefully lead to changes in the standards. The Working Group is also looking at other options to remedy injustices at DOC and in probation.

The Membership Committee is looking at additional ways the CCDB can support our new attorneys, including the implementation of a mentoring program and the inclusion of more new attorneys on our standing committees. We are also in the process of forming an ad hoc Technology Committee to look at upgrading and improving our website.

One of our biggest organizational goals for 2008 is to increase member involvement on our committees. To this end, we will be sending out a monthly calendar with all of our upcoming committee meeting dates, locations, and general agenda items. All members are invited to attend or send us your comments to pass along to the committee if you can't make it in person. Although most of our committee meetings are held in the Denver area, they can all be attended via conference call, and we encourage all of you who are outside of the Denver metro area to participate by phone.

Thanks to our generous membership, we are two-thirds of the way to attaining the \$60,000 we need to maintain the defense community presence at the legislature. We are grateful to all of you who have sent your contributions to the 07-08 Raptor Fund. If you haven't already, please consider making a contribution and help us keep our voice in the legislature. As you'll read in the Policy Committee Update, we have a lot of important work ahead of us, both offensively and defensively, in the upcoming General Assembly session.

Please send us your suggestions as to how we can improve, in 2008 and beyond. Be kind, remember that while our staff and budget limitations might not allow us to make immediate changes, we do try to integrate your ideas and feedback into our organizational and committee work. I hope to see more of you this year as we further strengthen your criminal defense bar.

Policy Committee Update

BY MAUREEN A. CAIN, POLICY DIRECTOR

The Policy Committee (fka Legislative Committee) is hard at work defining legislative priorities for this session which will be submitted and (hopefully) approved by the CCDB Board. We have sponsors to carry our Sealing of the Records bill again this session. I have met with the Governor's staff and we hope to have some agreement on the language of the bill before the session starts so that we have full support of his office for the bill. CCJRC will continue to work with us on this effort.

We plan to have a Procedural Omnibus bill again to address certain procedural problems (generally non-controversial) that impact the fair administration of justice for our clients. Thank you to all who submitted ideas for this bill.

We have identified certain juvenile issues — largely direct file and transfer — as one of our top priorities at this point. We may have a sponsor for this legislation. We anticipate much opposition to change in this area, from both CDAC and the Governor.

We have been approached by another legislator to work on a bill to change the underlying factual basis and sexual history language in the sex offender statutes. The intent would be to clarify who decides who is a sex offender — the Court or DOC/

Probation. This bill is a work in progress but preliminary discussions show that DOC might be willing to work on change in this area.

We will certainly have many bills to oppose since this is an election year. We know that one Senator wants to introduce the Death Penalty for certain sex offenders. Hopefully, this idea will die early in the session.

The Policy Committee (and other members) continues to be involved in a long term project with SOMB to try to address some of the problems with the SOMB Guidelines and the implementation of those guidelines by the Probation Departments. This project is still in the early stages but we are glad that SOMB is willing to sit down and talk with us on an on-going basis.

Once we get through the session, the Policy Committee will devote more time to formulating and writing position papers on various criminal justice issues so that we can use these papers in both our legislative work and our community outreach/media work. All position papers will be reviewed by the Board and then published/distributed as determined by the Board. Any member who would like to work with us on this project is certainly welcome.

Contribute to the Raptor Fund. CCDB is working to be a force in public policy creation and we need your support.

The Raptor Fund – YOUR VOICE!

The CCDB thanks and recognizes those generous members who contributed to the 2007-2008 Raptor Fund



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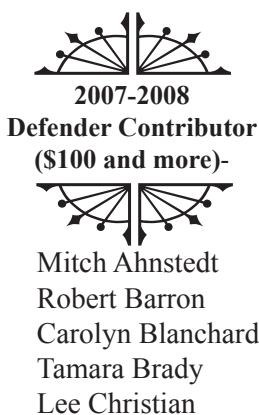
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Advancements in Forensic Science and the Need for Preservation of Evidence

BY PHILLIP B. DANIELSON, PH.D.



Dr. Phillip B. Danielson is a professor of molecular biology at the University of Denver. His research program encompasses studies in forensic genetics - particularly the application of new technologies for the separation of mitochondrial DNA mixtures. Dr. Danielson has worked in collaboration with forensic scientists around the world. His work has been featured in such professional journals and magazines as the Proceedings of the National Academy of Sciences, The Scientist magazine, USA Today and Law Enforcement Technology magazine. He has also developed training programs for law enforcement professionals on the collection and use of DNA evidence in criminal investigations.

It is often said that the “wheels of justice move slowly”. On the contrary and beyond any reasonable shadow of a doubt, the wheels of science are anything but slow. In fact, they seem to perpetually accelerate. Consider that some states continue to employ the Frye standard (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) as a general test for the admissibility of scientific evidence in the 21st century. By comparison, one would be hard pressed to find any molecular biologists who would consider many of the biological treatises of 1920’s as much more than “quaint”. So perhaps it is not all that surprising that from issues of intellectual property rights to assisted reproduction, our lawmakers and justices often find themselves trying to catch up with science and technology.

An important battle ground where this has taken place in recent years has been the debate over post-conviction testing and the preservation of evidence. The advent and impact of increasingly advanced genetic testing technologies have had a major role in fueling this debate. With respect to post-conviction DNA testing, some opponents argued passionately that the doctrine of *res judicata* should apply to maintain the integrity of the justice system; that victims needed closure and that convicts acting as their own attorney would flood the judicial system with frivolous motions. Proponents of such testing countered that these concerns could not outweigh the expense of a wrongful conviction that condemned an innocent person to prison and left a predator free to strike another day. In the end, the passage of the Innocence Protection Act of 2004 was a victory for those who believe that the overriding purpose of the criminal justice system is the adjudication of cases to seek the truth so as to make a fair determination of guilt or innocence.

Between the reinstatement of the death penalty in 1976 and the enactment of the Innocence Protection Act, 111 people in 25 states had been cleared through the analysis of DNA evidence. These overturned convictions freed people who had spent years on death row for crimes they did not commit. This simple fact makes the debate over evidence preservation much more than an academic exercise in normative jurisprudence. Rather, it is a debate that goes to the heart of our judicial system and one where the law may once again have to play catch up with science.

The United States Supreme Court case of *Arizona v. Youngblood*, 488 U.S. 51 (1988) figures prominently in debates over the constitutionality of evidence preservation/destruction as a function of the Due Process Clause of the Fourteenth Amendment. Writing for the majority, Chief Justice Rehnquist

focused heavily on the need for a criminal defendant to show bad faith on the part of the police in the destruction of potentially exculpatory evidence. The failure to preserve potentially useful evidence out of simple neglect was not held to constitute a denial of due process of law. In his concurring opinion Justice Stevens added that, “... *the fact that no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant suggests that the lost evidence was “immaterial.”*” and that ““*[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt, “*...”

To many, the *Youngblood* decision was wrongly decided and should be revisited. The fact that Larry Youngblood was ultimately exonerated by DNA testing of a separate swab after having been imprisoned for 9 years has added an inconvenient footnote to the court’s decision. As a scientist, I would not presume to wade further into the constitutional law end of this debate but I cannot help but wonder if *Youngblood* would have been decided differently if the justices at the time had had a better appreciation for the advances in genetic analysis that were about to revolutionize forensic investigation? It is certainly possible since in their dissent, Justices Blackmun, Brennan and Marshall recognized that, “*As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise.*” and “*The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable*”. The apparent foresight embodied in this dissenting opinion is impressive given that back in 1988, DNA had not yet become a household term – or CSI a major entertainment franchise.

As the debate over the relative merits of preserving or destroying evidence is certain to continue, it may be useful to heed the dissenters in the *YOUNGBLOOD* decision by looking carefully at what lay ahead in the realm of scientific advances in forensic science. An understanding of what is to come may help to better inform the debate over the value of properly preserving evidence and the contention that not to do so represents more than simple neglect. To glimpse the future of forensic technology, one needs to look no further than the extensive list of research and development activities funded by the National Institute of Justice. Significant advances are being made in a broad range of forensic disciplines. In the area of latent prints

researchers at Oak Ridge National Laboratory are developing macro-Raman imaging methodologies to enhance the efficiency and quality of latent print detection on challenging surfaces and/or following environmental degradation. Complementing this is work being conducted at Ultra-Scan® Corporation aimed at developing software to better predict friction ridge growth patterns. This may aid the identification of young children and improve the accuracy of automated database searches. In the area of trace analysis, the University of Central Florida is investigating the use of Fluorescence Line Narrowing Spectroscopy as a highly discriminating but non-destructive approach to forensic fiber examination. Digital forensics is one of the newest areas of research where researchers seek to develop authenticity verification algorithms for digital photographic evidence along with tools for Internet protocol (IP) tracing and the recovery of hidden or encrypted data.

Among the forensic disciplines, however, it is the genetic analysis of biological evidence with its potential to identify the guilty and exonerate the innocent that has captured both the public's interest and a lion's share of federal resources - as exemplified by the President's billion dollar DNA initiative. We are certainly no longer at the dawn of the forensic DNA era but the dissenter's prediction in *Youngblood* that the ability to obtain conclusive results to any number of questions would increase as technology advanced remains as true today as it did back in 1988. Accordingly, the questions that may be answered as a result of new technologies already in the forensic biology R&D pipeline are germane to the debate over the preservation of evidence. This is especially true when dealing with evidentiary material that fails to yield results with existing methods as well as results that are open to variable interpretation such as DNA mixtures or minimal samples that are too limited for complementary serological testing to determine the source tissue of the DNA profile. With an eye to the future, the technologies described below may enable analysts to obtain more potentially probative information from evidentiary material than is possible using current methods.

Low Copy Number Analysis

The application of the polymerase chain reaction (PCR) to forensic genetic analysis produced a quantum leap in the ability to obtain DNA profile data from a broad variety of low abundance DNA sources. These include such items as saliva on cigarette butt, residual blood on washed clothing, dander from a robbery cap and even the gut contents of pubic lice and mosquitoes that had consumed human blood. As impressive as this may be, however, the PCR process is theoretically capable of amplifying DNA from even a single cell. Thus, the "holy grail" of some in the forensic community has been to obtain DNA profiles from even less abundant sources such as the cells deposited in a latent print - what has been called "touch DNA".

To obtain results from this type of evidence, a variety of Low Copy Number (LCN) DNA profiling approaches have been developed - and hotly debated. The term LCN, refers to amplification of short tandem repeats (STRs) from very few (*i.e.*, 5-20) cells. Generally, this means samples having less than 100pg of DNA. To achieve amplification from LCN samples, researchers typically add more thermal cycles to the PCR amplification protocol. In addition, they may employ more readily

amplifiable mini-STR primer sets; alter the concentration of the chemicals used in the amplification reaction; use whole genome pre-amplification steps to increase total amount of target DNA in an extract; and even attempt to repair damaged DNA prior PCR amplification. LCN technology was originally developed by the UK Forensic Science Service but has been a focus of research interest for several years. Work going on in Europe where LCN profiling was first used for casework at the end of the 1990s is at a more highly developed stage than that in the US. Nonetheless, US law enforcement agencies and forensic labs have been slowly wading into the LCN waters. This progress has been accompanied by a vigorous debate over the kinds of special considerations that may be needed to interpret results for a process where apparently "random" amplification irregularities are not uncommon. As further technological advances are made, however, it is not difficult to imagine how "Touch DNA" analyses may be used to extract potentially probative information from evidentiary items that are untestable today.

Laser Capture Microdissection

DNA mixtures such as those which are commonly encountered with evidentiary items from sexual assaults can present a significant challenge for analysts, experts and juries alike. Although methods to separate spermatozoa from comingled vaginal epithelial cells exist, the effort to isolate them can be time consuming for the analyst and in cases where few intact spermatozoa remain or when the sperm are on microscope slides, the resulting yield of extractable male DNA is often disappointing. Moreover, current approaches to selectively recovering the male cells often fail to completely eliminate the female component. The resulting DNA profile, therefore, presents as a mixture which can be challenging to interpret and juries may struggle to understand the nuances of the statistics applied to the analysis of mixtures. Therefore, methods for the precise separation of spermatozoa from surrounding cellular tissue are crucial to unambiguously determining an assailant's DNA profile.

Laser capture microdissection (LCM) technology may provide a solution. This is relatively novel method of recovering target cells one at a time from a mixed population of cells. The approach employs a laser beam to literally 'cut around' and remove selected cells or sections of tissue from glass slides. The DNA of the target cell is not destroyed by the laser during the excision process and the analyst has the option of being able to visually inspect both the captured cells and the area from which they were cut. In the biomedical world, the use of LCM has grown significantly in recent years. In the forensic arena, LCM has been shown to outperform differential lysis (*i.e.*, the method currently employed by forensic labs) for the separation of sperm from increasing proportions of vaginal epithelial cells. Beyond its direct utility in sexual assault cases, LCM can also facilitate successful DNA profiling to determine paternity in homicides involving pregnant females. This can serve as a valuable means of identifying persons of interest in an investigation. In a rather unusual case in this vein, LCM was employed to isolate residual fetal cells from the former placenta implantation site of a 32-year-old female homicide victim. This enabled successful paternity testing five weeks after a therapeutic abortion. The utility of LCM is just beginning to manifest itself in forensic

investigations. Given its enormous potential, however, this is an approach that is likely to find increased use in the future.

Mitochondrial DNA Mixtures Resolution

Mitochondrial DNA (mtDNA) analysis can provide information with crucial value to a forensic case when the quantity and quality of DNA for standard STR testing would otherwise be limiting (e.g., highly degraded evidence, skeletal remains, hair shafts without a root). The difficulty of analyzing mtDNA mixtures, however, presents a significant obstacle to successful mtDNA analyses by standard methods and this has been a significant obstacle to its broader use in forensics. Unlike STRs, mtDNA must be characterized by direct DNA sequencing. Depending upon the type and complexity of a mixture, formulating an accurate interpretation of resulting data is often complicated if not impossible. The ability to accurately and unambiguously determine the specific mtDNA types of individual contributors to a mixture can greatly reduce the number of “false inclusions” associated with current approaches to mtDNA mixture interpretation.

A promising solution to the problem of mtDNA mixtures is a technology called Denaturing High-Performance Liquid Chromatography (DHPLC). Originally developed and now well established as an extremely sensitive method detecting subtle low abundance mutations in medical molecular diagnostic assays, the approach has recently been applied to forensics. The technology makes it possible to detect the presence of mtDNA mixtures that would be missed by existing methods and then to physically pull apart the individual contributors to a mixture prior to DNA sequencing. This makes it possible to unambiguously determine the mtDNA type of each contributor without secondary amplification or excessive manipulation, a feature that helps to minimize the opportunity for DNA contamination during analysis. The ability to improve the detection of a minor secondary contributor in a forensic sample and then to obtain a reliable mtDNA type for that individual can be especially relevant to a broad range of forensic cases.

Body Fluid Identification

DNA profiling transformed the field of forensic serology by making it possible to link biological stains to individual humans. The identification of the stain itself, however, continues to present a significant challenge. Genetic analysis of an evidentiary swab may reveal the presence of a DNA profile consistent with an alleged victim or perpetrator but a profile cannot indicate if the DNA came from saliva, vaginal secretions, urine or a host of other sources. The value of complementary serological testing in many cases is actually quite limited. For example, there is no definitive test for the presence of vaginal secretions, no confirmatory test for saliva and tests for blood cannot distinguish between venous and menstrual blood. The ability to associate a DNA extract with a specific tissue source, however, can be critical to a criminal investigation and to a just trial outcome.

Consider the case of an alleged sexual assault where a DNA profile consistent with the victim is found on the fingers of a suspect. The victim states that the suspect used his fingers to penetrate her. The suspect counters that the alleged victim had been licking food off of his fingers and that no sexual contact occurred. Both claims could account for the presence of the victim’s DNA on the suspect’s fingers. The ability to detect and differentiate between

trace amounts of saliva versus vaginal secretions in this case could help to either confirm or refute these opposing claims. Other scenarios could easily be imagined where the ability to differentiate between menstrual and venous blood, or urine and saliva would have significant probative value.

To solve this problem, a number of research teams are using the newly emerged fields of “comparative transcriptomics” to identify body fluids based on the presence of unique RNA (ribonucleic acid) molecules. Unlike its chemical cousin, DNA, different body fluids contain different kinds of RNA. Thus, it may be possible to use RNA as an identifying feature of a given body fluid. For example, there is an RNA (matrix metalloproteinase RNA) found in the lining of the uterus that has potential utility as a marker for differentiating between menstrual and venous blood. Body fluid profiling based on RNA offers the potential for PCR-based amplification. This is a feature that is not only compatible with existing DNA technology but which also has the potential to yield an enormous increase in sensitivity and accuracy over traditional serological testing methods.

An alternate approach to body fluid identification is growing out of research in the field of “comparative proteomics”. Like RNA, different body fluids and tissues contain different proteins. Accordingly, proteins found to be unique to a given body fluids can be used as highly discriminating biomarkers. Ongoing research seeks to achieve this by mapping and comparing thousands of proteins among several forensically informative human body fluids. Once identified, these unique markers can be used in high-sensitivity antibody-based assays that offer the potential for direct body fluid identification without the need for an amplification step. Rather than being competing technologies, the use of RNA and proteins for body fluid identification is complementary in nature.

Conclusion

One thing is for certain, the law evolves and science evolves. As a result, forensic R&D programs both here and abroad will continue to improve the accuracy, sensitivity and speed of forensic testing. The technologies described above are but the tip of the iceberg as progress is made on a wide range of other projects including the development of handheld nanotechnology-based devices for DNA analysis, the identification of genetic markers for the determination of the physical characteristics of an individual from a biological stain and tools to potentially restore some of the integrity of environmentally damaged DNA.

In a recent Denver Post article concerning the destruction of evidence either by accident or in accordance with that allowed under current laws, Denver’s District Attorney was quoted as saying “*The law recognizes that this is a human system. They recognize that evidence gets destroyed.*” Here, I agree in part with the DA. This is a human system. That being the case, however, we must also recognize that, as with the wrongful conviction of Larry Youngblood, to err is human. We need only look at our experiences over the past quarter of a century to realize that technological advances can in fact yield pivotal new information which makes the “apparently immaterial” of today very material tomorrow. Only by preserving evidence, do we give ourselves an opportunity to right those human mistakes no matter how rarely they may occur. Not to do so forecloses on the overriding purpose of the criminal justice system.

Standards of Review in Criminal Appeals

BY ANTHONY VIORST

Anthony Viorst has practiced in Colorado for more than 18 years. From 1989 to 1996, he served as a trial lawyer in the Colorado State Public Defender's Office. From 1996 to 2003, in both public and private practice, Mr. Viorst served as an appellate specialist in civil and criminal cases. He has argued and won numerous cases before the Colorado Supreme Court and Court of Appeals. Mr. Viorst currently concentrates his practice in the fields of criminal defense, personal injury, and civil and criminal appeals.

A. INTRODUCTION

Colorado Appellate Rule 28(k), passed on June 22, 2006, requires that the appellant articulate the applicable standard of review. The subsection, in its totality, states as follows:

(k) Standard of Review; Preservation. For each issue raised on appeal, the party raising such issue must provide, under a separate heading placed before discussion of the issue: (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on, if the issue involves (I) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review. A citation of where the issue was preserved for appellate review shall include, if applicable, the record reference where an objection, offer of proof, motion in limine, motion for directed verdict, or other relevant motion was made and ruled on. For each issue, the responding party must provide, under a separate heading placed before discussion of the issue, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

As a general rule, a trial court's legal rulings are reviewed on appeal under a *de novo* standard, while rulings that involve factual findings are entitled to more deference. This article will discuss the standard of review applicable to common legal issues that arise on appeal in criminal cases. In addition, this article will discuss the standard for reversal when a reviewing court determines that the trial court erred.

B. DIFFERENT STANDARDS OF REVIEW

Under the *de novo* standard, applicable to the legal rulings made by trial courts, an appellate court will review the legal issue "anew; afresh; a second time."¹ Under the clearly erroneous standard, applicable to factual findings by the trial court, those findings will be upheld unless so clearly erroneous as to not find support in the record.² The abuse of discretion standard applies to virtually every other type of trial court determination. A ruling will not satisfy this standard unless it is manifestly arbitrary, unreasonable, or unfair.³ The rationale for applying these different appellate standards has been described as follows:

Findings of fact are generally reviewed under a clear error or abuse of discretion standard, whereas conclusions of law are generally reviewed under a *de novo* standard. The reasons are straightforward. *De novo* means "anew; afresh; a second time." *Black's Law Dictionary* 392 (5th ed.1979). Indeed, appellate courts can and should review anew the question of whether a trial court reached the correct conclusion of law, or the right of appeal would be essentially meaningless. On the other hand, the

appellate courts defer to the factual findings of the trial court because the trial judge is in the courtroom, and is charged with the duty to find facts. Appellate courts may not undertake fact-finding.⁴

C. ERROR DOES NOT NECESSARILY REQUIRE REVERSAL

1. Harmless Error and Plain Error

Even where a trial court has made an erroneous ruling, the error may be deemed harmless. A harmless error is defined in Criminal Procedure Rule 52(a) as an error that "does not affect the substantial rights of the parties." This means that if the appellate court concludes that the error did not contribute to the verdict, the judgment will be affirmed.⁵

The harmless error analysis is limited to those situations in which the appellant has preserved the issue by making a contemporaneous objection at trial.⁶ In contrast, when no contemporaneous objection is made, any error is reviewed under a "plain error" standard of review.⁷ Criminal Procedure Rule 52(b) recognizes that plain errors "may be noticed" by an appellate court.⁸ A plain error is one that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment.⁹

2. Constitutional Errors: Trial Error v. Structural Error

There are two types of constitutional errors: (1) structural errors, which affect the framework in which a trial proceeds, and which require automatic reversal whether or not the defendant objected at trial, and (2) trial errors, which occur "during the presentation of the case to the jury and . . . may therefore be quantitatively assessed in the context of other evidence presented."¹⁰

Structural errors require automatic reversal regardless of whether the defendant objected at trial.¹¹ Structural errors are found only in a limited class of cases. Examples of structural error include the complete deprivation of the right to counsel, trial before a biased judge, improper exclusion of a member of the defendant's ethnic group from a grand jury, and violation of the right to a public trial.¹² Although omissions in jury instructions generally do not rise to the level of structural error, such error can occur if the jury is not properly aware of the standards used in determining a defendant's guilt or innocence.¹³ Thus, structural error may arise where the jury is not fully apprized of the requirement of proof beyond a reasonable doubt, or the presumption of innocence.¹⁴

Constitutional trial errors span a broad range of situations. Unlike structural errors, which require automatic reversal, constitutional trial errors are subject to a harmless or plain error analysis.¹⁵ Constitutional trial errors include the improper admission of an involuntary confession, the admission of

evidence obtained in violation of the Fourth Amendment, the deprivation of a defendant's right to confront and cross-examine witnesses, the denial of a defendant's right to be present at trial, improper comment on a defendant's silence at trial, and most errors related to jury instructions.¹⁶

D. PRETRIAL ISSUES

1. Motions to Suppress Evidence

Judicial review of rulings on motions to suppress evidence are subject to the same standard of review, regardless of which constitutional amendment formed the grounds for the motion. A trial court's findings of historical fact are entitled to deference, and will not be overturned if supported by competent evidence in the record.¹⁷ A trial court's determination of the ultimate issue – e.g., whether a suspect was in custody for *Miranda* purposes, whether a statement was voluntary, or whether probable cause supported a search – is an application of law to historical fact, and is reviewed *de novo*.¹⁸ Even where a trial court erroneously denies a motion to suppress evidence, a conviction may be affirmed where the error was harmless.¹⁹

Pretrial rulings of a non-constitutional magnitude, which relate to the disclosure, admission, or exclusion of evidence, are generally subject to an abuse of discretion standard. For instance, resolution of discovery issues under Crim. P. 16 is subject to an abuse-of-discretion standard,²⁰ as is the admission of similar-transaction evidence, under CRE 404(b).²¹

E. Trial Issues

Rulings on challenges for cause to prospective jurors are reviewed for an abuse of discretion.²² However, a ruling on a *Batson* challenge, made in response opposing counsel's use of a peremptory challenge, is subject to *de novo* review.²³

A trial court's ruling regarding the admission or exclusion of evidence is reviewed for an abuse of discretion.²⁴ This standard applies to all evidentiary rulings, including those relating to expert testimony.²⁵ In addition, when an appellate court reviews a trial court's ruling under Colorado Rule of Evidence 403, it "must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected."²⁶ One exception to the abuse-of-discretion standard applies to confrontation-clause violations, which constitute constitutional trial errors, and require reversal unless the error was harmless.²⁷

F. Jury Instructions

As a general rule, a trial court is only required to charge the jury with standard instructions, found in the Colorado Revised Statutes or the Colorado Jury Instruction Manual (*COLJI-Crim.*), and is not required to give supplemental jury instructions, as long as the standard instructions adequately inform the jury of the applicable law.²⁸ The trial court's rulings regarding supplemental jury instructions are subject to an abuse of discretion standard.²⁹

A trial court's erroneous failure to instruct the jury as to an applicable standard instruction will generally constitute constitutional trial error, subject to a harmless error standard if preserved, and a plain error standard if unpreserved.³⁰ This standard applies to trial court's failure to give a lesser-included offense instruction,³¹ a similar-transaction limiting instruction,³² or an elemental instruction.³³

Some standard instructions are so significant that their omission constitutes constitutional structural error, requiring automatic reversal. This standard applies where the jury is not fully apprized of the requirement of proof beyond a reasonable doubt, or the presumption of innocence.³⁴

G. SPECIAL INSTRUCTIONAL ISSUES

Although standard jury instructions are generally sufficient to apprise the jury of the applicable law, this general rule does not apply under all circumstances. One exception is the modified unanimity instruction, a non-standard instruction which serves to ensure jury unanimity as to the act or acts committed by the defendant,³⁵ and whose wrongful omission constitutes constitutional trial error, subject to harmless or plain error review.³⁶ Another exception is the defendant's theory of the case instruction. In this state, an instruction embodying a defendant's theory of the case must be given by the trial court if the record contains any evidence to support the theory.³⁷ Finally, when a deliberating jury indicates to the judge that it does not understand a matter of law central to the guilt or innocence of the accused, a trial court's failure to adequately answer that question, over a defense objection, constitutes non-harmless reversible error.³⁸

H. POST-TRIAL CHALLENGES

In addition to any of the challenges described above, an appellant may seek to argue that the evidence presented at trial was insufficient to support his conviction.

In assessing the sufficiency of the evidence supporting a guilty verdict, a reviewing court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable doubt.³⁹ When applying this standard, the court must give the prosecution the benefit of every reasonable inference that might fairly be drawn from the evidence.⁴⁰

When the claim of insufficient evidence is based upon an argument that a witness was incredible, the standard is even higher. Under such circumstances, the appellant must show that the witness' testimony was incredible as a matter of law, because the witness testified as to facts that the witness physically could not have observed or events that could not have happened under the laws of nature.⁴¹ Testimony that is merely biased, inconsistent, or conflicting is not incredible as a matter of law.

I. Conclusion

When trying or appealing a case, it is helpful to keep the standards of appellate review in mind. Legal rulings, subject to the *de novo* standard of review, have the best chance of success on appeal. Fact-related rulings, subject to an abuse-of-discretion standard, are more difficult to overturn.

In addition to considering the standards of review, a trial or appellate lawyer should also consider the standard for reversal. Structural constitutional errors require automatic reversal whether or not the defendant objected at trial. In contrast, constitutional trial errors, as well as non-constitutional errors, are subject to a harmless or plain error analysis. Preserved errors, subject to a harmless error analysis, are more likely to succeed. Nonetheless, unpreserved errors may rise to the level of plain error, such that they should also be subjected to appellate-court scrutiny.

Standards of Review in Criminal Appeals Footnotes

- ¹ *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (citing Black's Law Dictionary, 392 (5th ed. 1979)) (Kourlis, J., dissenting).
- ² *Lyon v. Amoco Production Co.*, 923 P.2d 350, 353 (Colo. App. 1996).
- ³ *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002).
- ⁴ *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (citing Black's Law Dictionary, 392 (5th ed. 1979)) (Kourlis, J., dissenting).
- ⁵ *People v. Montoya*, 141 P.3d 916, 920 (Colo. App. 2006).
- ⁶ *People v. Vigil*, 127 P.3d 916, 930 (Colo. 2006).
- ⁷ *People v. Elie*, 148 P.3d 359, 364 (Colo. App. 2006).
- ⁸ Crim. P. 52(b).
- ⁹ *People v. Elie*, *supra*, 148 P.3d at 364.
- ¹⁰ *Blecha v. People*, 962 P.2d 931, 942 (Colo. 1998) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991)).
- ¹¹ *People v. Boykins*, 140 P.3d 87, 93 (Colo. App. 2005).
- ¹² *People v. Wilcoxon*, 80 P.3d 817 (Colo. App. 2002).
- ¹³ *People v. Baenziger*, 97 P.3d 271, 273 (Colo. App. 2004) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).
- ¹⁴ *Id.*
- ¹⁵ *People v. Boykins*, 140 P.3d 87, 93 (Colo. App. 2005) (citing *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).
- ¹⁶ See Generally *People v. Boykins*, 140 P.3d 87, 93 (Colo. App. 2005) (setting forth a list of constitutional errors).
- ¹⁷ See *People v. Quezada*, 731 P.2d 730 (Colo. 1987) (applying standard to *Miranda*-related challenge under Fifth and Sixth Amendments); *People v. Valdez*, 969 P.2d 208, 211 (Colo. 1998) (applying standard to voluntariness challenge under Fifth Amendment); *People v. McClain*, 149 P.3d 787, 789 (Colo. 2007) (when reviewing a suppression order under the Fourth Amendment, "this court defers to the trial court's findings of historical fact and will not disturb those findings if they are supported by competent evidence in the record."); *People v. Hammas*, 141 P.3d 966, 969 (Colo. App. 2006).
- ¹⁸ See *People v. Matheny*, 46 P.3d 453, 468 (Colo. 2002) (custody); *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991) (voluntariness);
- ¹⁹ *People v. Boykins*, 140 P.3d 87, 93 (Colo. App. 2005).
- ²⁰ See *People v. El Paso County District Court*, 790 P.2d 332, 336 (Colo. 1990).
- ²¹ See *People v. Quintana*, 882 P.2d 1366, 1371 (Colo. 1994).
- ²² *Freedman v. Kaiser Foundation Health Plan*, 849 P.2d 811, 814 (Colo. App. 1992).
- ²³ *Valdez v. People*, 966 P.2d 587, 597 (Colo. 1998).
- ²⁴ *People v. Coney*, 98 P.3d 930, 933 (Colo. App. 2004) (admission); *People v. Webster*, 987 P.2d 836, 841 (Colo. App. 1998) (exclusion).
- ²⁵ *People v. Shreck*, 22 P.3d 68, 73 (Colo. 2001).
- ²⁶ *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995).
- ²⁷ *People v. Fry*, 92 P.3d 970, 980 (Colo. 2004) ("Confrontation clause violations are trial errors"); accord, *Edwards v. People*, 129 P.3d 977 (Colo. 2006).
- ²⁸ *People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005).
- ²⁹ *People v. Renfro*, 117 P.3d 43, 48 (Colo. App. 2004).
- ³⁰ *People v. Baenziger*, 97 P.3d 271, 273 (Colo. App. 2004) (citing *Griego v. People*, 19 P.3d 1 (Colo. 2001)).
- ³¹ *Mata-Medina v. People*, 71 P.3d 973, 984 (Colo. 2003).
- ³² *People v. Moore*, 117 P.3d 1 (Colo. App. 2004).
- ³³ *Griego v. People*, 19 P.3d 1 (Colo. 2001).
- ³⁴ *People v. Baenziger*, 97 P.3d 271, 273 (Colo. App. 2004) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).
- ³⁵ *People v. Hansen*, 920 P.2d 831, 836 (Colo. App. 1996).
- ³⁶ See *People v. Devine*, 74 P.3d 440, 443 (Colo. App. 2003) (trial court's failure to give modified unanimity instruction may rise to the level of plain error).
- ³⁷ *People v. Nunez*, 841 P.2d 261, 264 (Colo. 1992); *People v. Fuller*, 781 P.2d 647, 651 (Colo. 1989).
- ³⁸ *Leonardo v. People*, 728 P.2d 1252, 1256 (Colo. 1986); accord, *People v. Hoover*, ___ P.3d ___, ___, 2006 WL 3456296 (Colo. App. Nov. 16, 2006).
- ³⁹ *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988).
- ⁴⁰ *Id.*
- ⁴¹ *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005); *Halliburton Services v. Miller*, 720 P.2d 571, 577-78 (Colo. App. 1986).

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CCJRC Releases New ReEntry Guide

The Colorado Criminal Justice Reform Coalition (CCJRC) is proud to announce the release of its newest publication, *Getting On After Getting Out: A ReEntry Guide for Colorado*.

This is the first reentry guide of its kind in Colorado and one of only a handful of guides published in the United States specifically to help people leaving prison.

CCJRC undertook this project because there was such a gap of information that was available to people who were trying to successfully reintegrate back into the community following release and those trying to help.

Carol Peeples wrote the reentry guide and it took over 3 years to complete. Carol interviewed more than 200 people including those who had been on parole, family members, DOC personnel, parole board members, and community service providers.

Getting On After Getting Out covers many topics, including

- Planning for release
- Understanding parole/community corrections
- Finding a job and a place to live
- Reconnecting with family and friends
- Getting help from community organizations
- And much more....

Because of generous support from the Piton Foundation, Denver Foundation, Daniels Fund, and the Annie E. Casey Foundation, CCJRC distributed 20,000 free copies of the reentry guide to people in prison and on parole. Since there are 30,000 people in prison and on parole, there are not enough copies for everyone so each facility has developed some criteria for distribution. Copies should also be available in all the facility libraries. People in prison can ask their case manager, reentry specialist, or other program staff for a copy. People on parole can ask their parole officer.

Copies are also available to the public for \$10 (plus \$2.50 s/h) through CCJRC (www.ccjrc.org or 303-825-0122, info@ccjrc.org.)

The issue of reentry has (finally) gained some more prominence both by elected officials and corrections staff in Colorado. CCJRC welcomes the greater opportunity to discuss the reasons behind both success and failure. However, if the goal of reducing the recidivism rate is to be realized, some serious and systemic reform is needed.

Last year, 10,087 people were released from state prison in Colorado. For those released on mandatory parole, 65% will be revoked and returned to prison within 3 years. Parole revocations accounted for 37% of total annual prison admissions. Of those parole revocations (n=3,826), 73% were for technical parole violations (n=2,792) and 27% were for the commission of a new crime (n=1,034). Re-incarceration costs for those returned to prison on a technical parole violation would exceed \$77 million annually.

The Piton Foundation and CCJRC conducted a recent study of people on parole in Denver. Surveys were conducted of 150 people back in prison following a parole revocation and 250 people on parole. The study found that people leaving prison face many struggles and barriers that impact their ability to successfully reintegrate back into their families and communities. Some of the findings include:

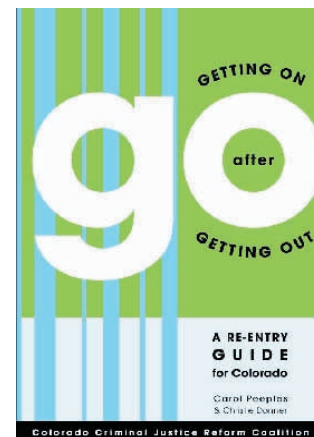
- 25% of people on parole in the metro area and 37% of people on parole in Denver are released to homeless shelters or other temporary housing.
- 55% of those whose parole was revoked report continued substance abuse problems after their release which directly contributed to their revocation.
- 66% of people coming out of prison felt unprepared and weren't finding the help they needed from their parole officers, families or community organizations.
- 56% reported that finding and keeping a job is a significant problem and one of the biggest reentry challenges they face. Parolees cite lack of identification papers, employers' reluctance to hire people with criminal records, and an inability to get permission from parole officers to drive as barriers to finding employment. The median wage of survey respondents who worked full time was \$10 an hour, or about \$21,000 a year.
- 69% of parolees reported being depressed. The majority described a sense of being overwhelmed and a deepening sense of hopelessness over time.
- 59% said that they did not have enough money to support themselves and pay for all the parole related expenses (drug/alcohol screens, mandatory classes, child support, restitution, parole fees, etc).

Many people coming out of Colorado prisons face not one, but most of these challenges. One parolee who is back in prison described his experience: "I was nervous at first and then I got scared because I didn't have a sturdy foundation out there. I had no job and I was lost without hope. I know I can succeed, but with the constant debt that I was in with restitution, I had to pay for classes and all, broke as a joke, so I ran to the drugs to drown it all."

Another parolee said, "I was afraid. I was nervous and somewhat shy. I felt like I was from another planet after doing seven and a half years. I was lost; trying to remember phone numbers and addresses was a nightmare. The only number I couldn't forget was my Department of Corrections number."

When analyzing the challenges and barriers to success, however, there were few differences between those who had already failed and those who were struggling to succeed. Overwhelmed with requirements and financial burdens, they struggle to find a job and stable housing, and feeling ill prepared and unsupported. All this takes its toll. What starts out as confidence quickly deteriorates. "I was lonely and lost, didn't have anyone, didn't know anyone. I wanted to have a regular life but I felt completely out of place and I felt as sad as I used to feel in prison," said another parolee who was returned to prison.

The findings were reported in the spring 2007 Piton *Perspective* and is available on line at www.piton.org and www.ccjrc.org. CCJRC will be publishing a more comprehensive report of findings in early 2008.



Colorado Case Summaries July 1, 2007 to Oct. 4, 2007

BY HOLLIS WHITSON, SAMLER & WHITSON

APPEALS & STANDARDS OF REVIEW

People v. Sherrod, ___ P.3d ___, 2007 WL 2128188, 03CA1105 (Colo. App. July 26, 2007). On direct appeal, reversing convictions for assault, sex assault, child abuse, etc. COA held that the chief judge could not retroactively confer authority on the county court judge by entering the order *nunc pro tunc*. Therefore, it concluded that the pretrial proceedings between August 2000 and August 2001 were conducted without jurisdiction. COA disagrees that jurisdictional errors always warrant reversal. Reversal may or may not be necessary, depending on the nature of the ruling and its effect on the trial. Here, the Court determined that the defendant established prejudice because the county court judge ruled on significant issues of consequence and the district court judge did not revisit these pretrial rulings after he acquired the proper authority.

CIVIL RIGHTS

- rejecting civil rights claim challenging “twist-lock maneuver” used by Aurora Police Department.

Novitsky v. City of Aurora, 491 F.3d 1244 (10th Cir. July 5, 2007). Affirming summary judgment for defendants, City of Aurora and its police officers, for detaining an arrestee and using a “twist-lock maneuver” on his arm as he got out of his car. The plaintiff was a back-seat occupant of a car in which the front seat occupant and the plaintiff were both sleeping. Police rousted them because they had received a “man down” call. In getting plaintiff out of the car, police applied the “twist-lock maneuver” on his arm. The court found that this maneuver was not the result of any official City policy, and was not unreasonable. For purposes of the civil Section 1983 lawsuit, the court was not bound by the fact that the criminal court, in the plaintiff’s criminal case, had found the maneuver to have been unconstitutional. For purposes of the civil action the officers did not act unreasonably, nor was there evidence of malicious prosecution sufficient to overcome the summary judgment motion.

COUNSEL - Appointment, Ineffective Assistance of Counsel (IAC)

- counsel of choice - no abuse in denying continuance

U.S. v. Flanders, 491 F.3d 1197 (10th Cir. July 3, 2007)

Affirming all but one count on various charges of bank fraud. Upholding denial of defendant’s third motion for continuance, even though defendant claimed it was necessary to permit representation by private counsel of choice, instead of hybrid part-retained, part-appointed representation he had. Reversing one count of willful misapplication of bank funds based on lack of proof of intent to injure bank as required by 18 U.S.C. §656; borrower was fully collateralized. Affirming restitution order, and trial court’s intended loss amount under U.S.S.G. §2F1.1(b)(1). Rule 32(h)’s requirement for advance notice to the

parties applies to both upward and downward “variances” (aka departures) from the Guidelines.

- public defender - sufficiency of notice of conflict

People v. Mills, Nos. 06SA316, 06SA317, --- P.3d ---, 2007 WL 1881168 (Colo. July 2, 2007) Public defender moved to withdraw, asserting a conflict of interest in investigating constitutionality of prior convictions under possible ineffective assistance of counsel (IAC) at the same time they represented the defendants in the current cases. Conclusory statements alleging a good faith basis to assert IAC did not warrant appointment of Office of Alternate Defense Counsel (OADC) to investigate, but court could appoint OADC if the Public Defender raised colorable claims in their sealed affidavits.

- appointment - indigency - disagreement between PD & defendant - restitution

People v. Steinbeck, ___ P.3d ___, 2007 WL 2728609 (Colo. App. Sept. 20, 2007). Reversing conviction of pro se defendant, where defendant did not qualify for Public Defender services, but could not actually afford counsel. Even though the trial court was on notice that the defendant might be indigent and that he disagreed with the Public Defender’s assessment, the court did not review the Public Defender’s evaluation and forced the defendant to trial without counsel. Addressing restitution, court holds that defendant could be responsible to pay expenses related to the victim’s death, even though he was charged only with leaving the scene of an accident. See C.R.S. §18-1.3-602(3)(a).

- effective assistance - conflict of interest - post-conviction counsel

People v. Chang, ___ P.3d ___, 2007 WL 2493900 (Colo. App. Sept. 6, 2007). Reversing denial of Crim.P. 35(c) motion & remanding for extensive evidentiary hearing and further findings regarding post-conviction defendant’s claim that Public Defender failed to adequately investigate his post-conviction claim and file it within the statute of limitations. The COA sets forth the standards it will use in post-conviction *Silva* claims to assess whether post-conviction counsel has a conflict of interest (applying *Cuyler v. Sullivan*, *People v. Kenny*). In a multi-step remand process, the COA basically requires the trial court to inquire into the reasons for the Public Defender’s inaction and determine whether it was the result of a conflict, or whether it was because the defendant’s motion has no arguable merit (in which case he may not have a *Silva* right to post-conviction counsel).

CRE 403 - Right to Present a Defense- Rape Shield Statute

People v. Garcia, 05 CA 16, ___ P.3d ___, 2007 WL ___ (Colo. App. Oct. 4, 2007). Reversing sex assault conviction because trial court excluded defendant’s proffered testimony, i.e. that he and alleged victim had been acting out her favorite rape fantasy, and that the incident was not an “actual” sexual assault. Defendant’s evidence passed the CRE 403 test – its probative value was not outweighed by unfair prejudice.

DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL – Waiver of Presence

People v. Richardson, ___ P.3d ___, 2007 WL 2728590 (Colo. App. Sept. 20, 2007). Affirming conviction for stalking and forgery. A person can commit stalking by filing lawsuits against another person. No violation of defendant's right to be present, even though he was absent for a continuance motion and an answer to a question from the jury. Rejecting venue challenge based upon the claim that, since the computer disks containing the alleged forgeries were seized in Arapahoe County, venue was improper in Park County. See C.R.S. §18-1-202(7)(a).

DOUBLE JEOPARDY AND MERGER

- resentencing – lower overall sentence, but higher sentence on particular count - no constitutional violation

People v. Woellhaf, 06CA75, ___ P.3d ___, 2007 WL ___ (Colo. App. Oct. 4, 2007). Affirming resentencing entered after first appeal. In the first sentence, defendant got 48 years, 12 years on each of 4 counts, consecutive. In the first appeal, the Supreme Court ordered a merger on remand. On remand, the trial court got 24 years on one count, with the other applicable counts run concurrent. Defendant claimed that because the sentence per count was higher (12 yrs vs. 24 yrs), double jeopardy was violated. On re-appeal, the COA says no, the "aggregate" sentence controls and because it was shorter (48 yrs vs. 24 yrs), no double jeopardy violation.

- enhancements vs. substantive offenses - merger - lesser-included offenses

People v. Lovato, ___ P.3d ___, 2007 WL 2264627, 04CA1177 (Colo.App. Aug. 9, 2007). Robbery of an At-Risk Adult (RARA) is a lesser included offense of aggravated robbery, and therefore COA vacates the defendant's conviction for RARA. Negligent Bodily Injury to an At-Risk Adult is a substantive offense and not a sentence enhancer. The Court recognized that § 18-6.5-103(2)(a) could act as an enhancer for the general offense of negligent homicide under § 18-3-105, C.R.S.2006. But there is no "general offense" that -103(2)(a) could be enhancing. The Court also rejected the argument that the RARA statute is unconstitutionally vague.

EXTREME INDIFFERENCE ASSAULT

People v. Baker, 04CA514, ___ P.3d ___, 2007 WL ___ (Colo. App. Oct. 4, 2007). Vacates F3 felony aggravator on sex assault count ("threats of retaliation"), affirms all other counts first degree assault, sex assault, kidnapping, etc. Extreme indifference first degree assault does not require "universal malice," so it can be found even when there is only one victim. Also affirms trial court's aggravation of sentence based on lack of remorse. If defendant maintains his innocence at trial and does not speak at sentencing, it is error to aggravate based on assertion of innocence. Here, however, defendant spoke at sentencing and his failure to apologize or express sympathy or remorse could be considered in aggravating the sentence. A defendant's threat of future retaliation, made after the sex assault, i.e. threatening harm if victim told anyone, does not fall under C.R.S. §18-3-402(4)(c), because it occurred only *after* the assault. Other rulings went against the defense on CRE 404(b), elements of first degree assault, cross-exam, etc. Finding no error under the facts

here, but affirming the proposition that, where new matters are brought out on redirect exam, the confrontation clause mandates that defendant gets a re-cross examination. Permitting admission of evidence of prior sex assault committed 7 years previously in New Mexico.

FEDERAL SENTENCING GUIDELINES

U.S. v. Chavez-Calderon, 294 F.3d 1266 (10th Cir July 2, 2007). Affirming sentence within the Guidelines range, finding judge's statements of reasons were procedurally adequate.

- reviewing downward variances - standards of review
- acceptance of responsibility

U.S. v. Tom, 494 F.3d 1277 (10th Cir. August 1, 2007). Defendant loses this Government's appeal of the sentence; defendant was not entitled to an offense level reduction for acceptance of responsibility. In reviewing downward variances, the Tenth Circuit does not impose any presumption of unreasonableness. Instead, the extremity of the variance between the actual sentence imposed and the applicable guidelines range determines the amount of scrutiny the court of appeals applies in its substantive reasonableness review of such sentences. Defendant loses this Government's appeal of the sentence; defendant was not entitled to an offense level reduction for acceptance of responsibility, because he went to trial on the charge and claimed at trial that he lacked the requisite *mens rea* for guilt.

- judge does not have to find the Guidelines range "unreasonable" before considering defendant's request for downward "variance"

U.S. v. Arrevalo-Olvera, 495 F.3d 1211 (10th Cir. July 31, 2007). Finding error in the judge's sentencing process, but affirming sentence because error was harmless. The judge refused to consider defendant's request for a downward "variance" until and unless the court determined that a sentence within the Guideline range was "unreasonable." This is error. However, the error was harmless; the 60-month sentence for illegal reentry of a deported alien previously convicted of an aggravated felony was near the bottom of the 57-71 month range, and the court of appeals had no reason to think that the district court would impose a different sentence on remand.

- written objections to PSIR are not sufficient to preserve objections for appeal – counsel must renew and argue the objections at the sentencing hearing

U.S. v. Carrasco-Salazar, 494 F.3d 1270 (10th Cir. July 30, 2007). Affirming 70 month sentence for illegal reentry after deportation for a violent felony. Defendant waived his objection to the 16-level enhancement of his guidelines offense level, because he did not renew his written objections verbally at the sentencing hearing. Prior to his sentencing, the defendant filed objections to the pre-sentence investigation report (PSR), contesting both the 16-level enhancement and the calculation of his criminal history score, but at sentencing hearing, after the district court sustained defendant's objection to two of the criminal history points assessed against him, the court asked defense counsel if all of the objections to the PSR had been resolved, and defense counsel responded that they had.

– *intended loss – bank fraud*

U.S. v. Flanders, 491 F.3d 1197 (10th Cir. July 3, 2007). Facts supported trial court's finding of the amount of intended loss under U.S.S.G. §2F1.1(b)(1).

– *criminal history - calculation - prior uncounselled misdemeanor convictions*

U.S. v. Jackson, 493 F.3d 1179 (10th Cir. July 9, 2007). Federal sentencing court may, consistent with the Sixth Amendment, take into account a defendant's previous uncounselled misdemeanor convictions, together with any sentence that does not result in actual imprisonment, although it is constrained to disregard portion of uncounselled misdemeanor sentence resulting in prison term. Sentencing court did not violate Sixth Amendment right to counsel in considering drug defendant's prior uncounselled state misdemeanor conviction itself and associated fine to assess a criminal history point under advisory Guidelines, notwithstanding that state court's additional imposition of suspended sentence of imprisonment violated Sixth Amendment right to counsel, and thus court properly refused to apply statutory safety value for defendants with only one criminal history point based on disqualifying second point assessed on basis of uncounselled misdemeanor conviction.

– *crime of violence*

U.S. v. Ruiz Rodriguez, 494 F.3d 1273 (10th Cir. August 1, 2007). Reversing sentence because Nebraska prior offense was not a crime of violence (COV) as found by the district court. Under categorical approach for deciding whether a prior is a COV, defendant's prior Nebraska conviction for first degree false imprisonment did not have as an element the use, attempted use, or threatened use of physical force against the person of another, and thus, it was not categorically a COV, for purposes of 16-level Guidelines offense level enhancement in defendant's sentencing for unlawful reentry after deportation (subsequent to an aggravated felony conviction); under Nebraska statutes, a defendant could be convicted for restricting a person's movement by deception under terrorizing circumstances, which is not necessarily an "element of force."

FIREARMS - STUN GUN

People v. Wheeler, ___ P.3d ___, 2007 WL 2728627 (Colo. App. Sept. 20, 2007). Affirms convictions for use of a stun gun and menacing. Applies well-known statutory construction standards to question of whether defendant "used" a stun gun within the meaning of C.R.S. §18-12-106.5, or whether statutory language was ambiguous. Defendant waived his insufficiency of the evidence argument because of how he framed the argument on appeal.

HEARSAY - CONFRONTATION

Hinojos-Mendoza v. People, ___ P.3d ___, 2007 WL 2581700, 05 SC 881 (Colo. Sept. 10, 2007). Affirming conviction. Drug lab reports are testimonial hearsay and their admission without a valid waiver from the defendant violates the right to confrontation. However, such a waiver can be inferred from trial counsel's failure to follow the statutory procedure in C.R.S. § 16-3-309(5), i.e., counsel must request the live testimony of the agent no later than ten days prior to trial. Counsel can waive the right for the defendant, without

defendant's personal participation in the decision. Counsel's knowledge of the law is presumed. Here, counsel said that he did not know about the law, however, that amounts to a claim of ineffective assistance of counsel, which is not before the court on direct appeal. A stinging dissent (Martinez, Bender) attacks the concept that a waiver can be inferred through counsel's inaction, with no showing that either counsel or the defendant was aware of the right or that the defendant made a knowing, voluntary, and intelligent waiver.

Coleman v. People, ___ P.3d ___, 2007 WL 2581530 (Colo. Sept. 10, 2007). Affirming conviction, holding that statute governing the admissibility of drug lab reports is not unconstitutional. This is a companion case to *Hinojos-Mendoza v. People*, ___ P.3d ___, 2007 WL 2581700, 05 SC 881 (Colo. Sept. 10, 2007), above, which contains the court's more in-depth analysis. As in *Hinojos-Mendoza*, Martinez & Bender write a strong dissent.

JURY CHALLENGES – Batson, Peremptories, Challenges for Cause

People v. Merrow, ___ P.3d ___, 2007 WL 2389671 (Colo. App. August 23, 2007). Reversing conviction because trial court erred in refusing to dismiss for cause a juror who said that a defendant's drug use would completely skew his ability to perceive and negate a self-defense claim. The juror, who was a teacher, referred to a student who had been burned to death by his parents because they were "loser meth addicts." The special concurrence contains interesting language addressing the abuses that may occur when a judge rehabilitates a juror, and urges that judges must remain neutral during this process.

JURY VIEW OF VIDEOTAPES

– *permissible to let jury have the videotape of child victim's prior statements during jury deliberations*

Frasco v. People, 06SC314, --- P.3d ----, 2007 WL 1881170 (Colo. July 2, 2007). The trial court acted within its discretion in allowing the jury access to the videotape of the child victim's prior statement during jury deliberations.

JUVENILES

People v. Vickers, 2007 WL 2128324 (Colo.App. July 26, 2007). COA rejected the State's position that adult sentencing was required because the defendant pled guilty to an offense subject to direct filing because (1) the arrest warrant alleged the use of a deadly weapon and thus established a factual basis, and (2) the original information charged her with a crime of violence. The Court noted that the offense is not a *per se* crime of violence, and the People did not plead and prove the elements of a crime of violence. It also noted that merely alleging the use of a deadly weapon as part of the factual basis does not make the offense an enumerated offense under the direct file statute. COA concluded the trial court had the discretion to impose either a juvenile or an adult sentence and therefore remanded the case for resentencing.

MIRANDA - Experts – Presentence Confinement Credit – Anders Brief

People v. Wallin, No. 04CA1011, --- P.3d ----, 2007 WL 2002992 (Colo. App. July 12, 2007). Defendant was convicted of committing an assault, right after getting out of prison on parole,

when he found out that, while he was in prison, his wife had a child by another man. Tape recorded contents of defendant's telephone call to the police was voluntary, despite the fact that the parole officer told him he had to call the police. Upholds People's use of "expert" witness in battered women recantation. Defendant's presentence confinement credit properly went only to his original (paroled) sentence; he does not get PSCC for the new assault charge, see C.R.S. § 18-1.3-405. COA discusses *Anders* requirements for appellate briefs; because counsel raised a non-frivolous issue, *Anders* was inapplicable.

PLEA BARGAINS

U.S. v. VanDam, 493 F.3d 1194 (10th Cir. July 10, 2007). Reversing sentence entered pursuant to a plea because the Government breached its plea agreement by failing to recommend sentence at the bottom of the Sentencing Guidelines range. The Government first recommended sentence at the middle of the range and then, when that was reversed, Government essentially remained silent at resentencing. Neither approach satisfied the plea agreement. Mere reciting the nature of the plea agreement in the written PSR did not constitute "recommending" a sentence pursuant to the agreement. Tenth Circuit was not persuaded that it all happened too fast for Government to interject a recommendation. Court would not apply harmless error analysis, but remanded for another resentencing.

PROBATION/PAROLE

People v. Villanueva, ___ P.3d ___, 2007 WL 2728629 (Colo. App. Sept. 20, 2007). Affirms probation revocation and aggravated sentence against *Blakely* challenge. COA finds *Blakely*-compliant factor in the defendant's admissions at his probation revocation hearing. There is no requirement for a separate, specific waiver of *Blakely* jury trial rights. Probation proceedings provide lesser constitutional protection. This case holds that the trial court need not provide any *Blakely* advisement, disagreeing with a different division's holding in *People v. Banark*, 155 P.3d 609 (Colo.App. Jan. 25, 2007).

RESTITUTION

People v. Leonard, No. 06CA405, --- P.3d ----, 2007 WL 2002991 (Colo. App. July 12, 2007). Upholds restitution order. Discusses definition of "restitution" in the criminal statutes, C.R.S. § 18-1.3-602(3)(a). Where defendant engages in a licensed profession without a license, the restitution amount can equal all pecuniary losses incurred by persons stemming from regulated business activities with the unlicensed defendant. Rejected on factual grounds defendant's claim for an offset against restitution owed one victim.

People v. Smith, 2007 WL 2389673 (Colo.App. Aug. 23, 2007). COA reversed the trial court's restitution order. The rule of *Apprendi* and *Blakely* does not apply to Colorado restitution orders. The State's burden of proof for establishing the amount of restitution owed is a preponderance of the evidence. The trial court erred in limiting restitution to the value of the damaged object. It held that restitution can include repair costs even if those costs exceed the damaged object's value.

RETURN OF PROPERTY

People v. Hargrave, 2007 WL 2389674 (Colo.App. Aug. 23, 2007). COA, with one dissenting opinion, held that the trial court has ancillary jurisdiction to resolve a motion for return of property, including the issue of towing and storage fees. The Court reversed the trial court's order on the basis that the trial court itself, should determine ownership of the property and it should allocate or discharge the towing and storage fees. The Court did not address the defendant's contention that conditioning the return of his property on the payment of the towing and storage fees contracted for by the city is an unconstitutional deprivation of his property, because this contention was not raised in the trial court.

SEARCH AND SEIZURE

U.S. v. Valenzuela, 494 F.3d 886 (10th Cir. July 12, 2007). Affirming district court's denial of suppression motion, thus affirming conviction pursuant to defendant's conditional guilty plea. Upholds traffic stop when defendant straddled lane divider for several seconds. The officer's questions did not appreciably lengthen the duration of the stop. Because defendant said, "Not that I know of," when asked if he had weapons or illegal items, the officer reasonably asked whether he could search the vehicle, and search was consensual.

U.S. v. Samuels, 493 F.3d 1187 (10th Cir. July 9, 2007). Conviction affirmed. Vehicle stop okay, based on officer's uncorroborated testimony that CI paged him, said that he saw a black male selling crack cocaine out of a white vehicle in the parking lot of a convenience store on several occasions, that such individual was presently in such vehicle in such lot, and that CI had provided him with accurate information 25-30 times in the past, resulting in 10 to 20 arrests. Also ruled that court did not err in refusing to exclude officer's testimony even though he violated the sequestration order.

U.S. v. Cortez-Galaviz, 495 F.3d 1203 (10th Cir. July 31, 2007). Affirming police conduct of running suspect's license plate prior to establishing a reason to stop the suspect's car. Police check comes back that insurance records for the car are "not found," and police stop the car at that point. Passenger is making furtive movements, cop opens door to car and sees drugs in plain view. This was upheld. Court notes import of new U.S. Supreme Court, *Brendlin v. California*, 127 S.Ct. 2400 (2007) and, while not deciding, notes that it may not grant standing for a passenger to contest a search of the car.

U.S. v. McKerrell, 491 F.3d 1221 (10th Cir. July 5, 2007). Affirming felon in possession of firearm conviction. Defendant barricaded himself in the house to avoid arrest on outstanding warrants. He refused to come out, but did not explicitly say that he was objecting to a search of his home. Eventually, he was arrested and taken to the station, at which time the police obtained consent from his wife to a search of the home. Defendant claimed that the police removed him to silence him from dissenting from this consent, however, the Tenth Circuit found no showing, and upheld the trial court's denial of the suppression motion.

SENTENCING – State Cases

People v. Corral, ___ P.3d ___, 2007 WL 2264630, 05CA1979 (Colo.App. Aug. 9, 2007). COA vacated defendant's sentence. Because the defendant had not yet been sentenced, he was not serving a sentence on the manslaughter conviction at the time he escaped from the Adams County facility. Therefore, C.R.S. § 18-8-209 did not require the trial court to impose a consecutive sentence. The Court held that the trial court violated the defendant's right to due process by imposing a sentence in the aggravated range when he was only advised of the possibility of a sentence in the presumptive range at the providency hearing; the

appropriate remedy is to remand and allow the defendant, after advisement of the proper sentencing range, to reaffirm his plea or withdraw it.

- structural error found – sentencing

Medina v. People, 06SC188, --- P.3d ----, 2007 WL 1881169 (Colo. July 2, 2007). Refusing to apply plain error, finding instead structural error, the S.Ct. reversed the sentence. The trial court violated due process and the right to jury trial when it sentenced the defendant for a class 4 accessory after the jury convicted her of only class 5 accessory.

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The Limitations of Fingerprint Identifications

BY DREW NEWMAN

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Of all the methods of identification, fingerprinting alone has proved to be both infallible and feasible.

-Wall Street Journal, quoting an FBI manual.

On May 6, 2004, US federal agents descended upon Brandon Mayfield, a Portland, Oregon, civil and immigration lawyer - and a Muslim convert - and detained him as a material witness without charges for more than two weeks. Within hours, his face was flashed on television screens and Web sites around the globe as the United States government congratulated itself on arresting one of the suspected ringleaders of the high profile March 11, 2004, train bombings in Madrid that killed nearly 200 people. Mayfield's family was shocked. Labeled a terrorist, Mayfield's reputation was ruined, his law practice in disarray, and his life forever changed. Yet it was all an enormous mistake.

Following the Madrid attacks, the US government pledged its full cooperation in investigating the bombing. When Spanish police found latent fingerprints on a suspicious bag located near the site of one of the bomb blasts, they shared the forensic evidence with experts from the Federal Bureau of Investigation (FBI). The FBI then ran the latent print through its Automated Fingerprint Identification System (AFIS) - a database of over 45 million fingerprints. Expert analysts from the FBI's Latent Print Unit compared the print taken from the bomb scene to 20 possible matches provided by AFIS and concluded that the Madrid print matched Mayfield's prints "100 percent." (Steven T. Wax and Christopher J. Schatz, *A Multitude of Errors: The Brandon Mayfield Case*, THE CHAMPION, Sept.-Oct. 2004, at 6; available at <http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/3de4fa9c7d85256f3300551e42?OpenDocument&Highlight=0,Mayfield.>)

Although Spanish fingerprint examiners insisted that the latent prints did not match Mayfield, the FBI analysts and an independent, US court-appointed examiner persisted in their opinion that the latent print from the bomb scene matched prints on file for Mayfield's stint as a lieutenant in the US Army. (*Id.*) Not until Spanish authorities identified an Algerian national living in Spain as the man whose fingerprints were found at the bomb scene did a U.S. court finally order Mayfield's release. (*Id.*)

Three thousand miles away, Stephan Cowans was convicted by a Boston court in 1998 for shooting a police sergeant. The strongest evidence against him was a latent fingerprint found on a coffee cup, as testified by two Boston police analysts. (Edward Humes, *Fingerprint Evidence Not Good Science, Scholar Says*, ORANGE COUNTY REGISTER, Oct. 27, 2004.) After being imprisoned for seven years, a DNA test exonerated Cowans, and a re-examination of the print conducted last year concluded that there was no match between the two fingerprints. (*Id.*)

Mayfield and Cowans are not alone in being falsely accused or convicted as a result of fingerprint misidentifications. Simon Cole, a professor of criminology at the University of California, Irvine, has documented more than 20 cases of similar fingerprint misidentifications in the United States and United Kingdom since

1918. (Jonathan Saltzman, *Cases in Which Fingerprint Evidence Misled Juries and Judges*, BOSTON GLOBE, Sept. 5, 2005, at B4. See also *Fingerprints Fail Reliability Test*, THE (LONDON) TIMES, Sept. 20, 2005, at Features 9.) These errors in fingerprint matching highlight the limitations of fingerprint identifications in the twenty-first century and the harsh consequences misidentifications have on those falsely accused.

Evolution of fingerprint identifications

Decades before DNA was known, fingerprint matching was the standard means of identifying criminals. Dactylography, the analysis of fingerprints, has greatly evolved since it was first used 100 years ago and is perceived to have a high level of reliability. (Itiel E. Dror, Ailsa E. Peron, Sara-Lynn Hind & David Charlton, *When Emotions Get the Better of Us: The Effect of Contextual Top-Down Processing on Matching Fingerprints*, 19 APPLIED COGNITIVE PSYCH., May 10, 2005, at 799 [hereinafter *Emotions*].) Despite the development of new forensic identification tools, fingerprint matching remains the most frequently used method for identifying persons because it is nonintrusive, relatively cheap, easy to collect, and easy to analyze. (*Id.*)

Scientists agree that fingerprints are an objectively reliable means of identification because of the unique nature of each individual's prints. (Jonathan Saltzman, *SJC To Hear Arguments on Banning Fingerprint Evidence*, BOSTON GLOBE, Sept. 5, 2005, at A1 [hereinafter "*SJC to Hear Arguments*"].) Scientists have yet to find two people with identical fingerprints; even identical twins have different fingerprints. (*Id.*)

The ACE-V (analysis, comparison, evaluation, and verification) system is used by the FBI and police agencies throughout the country to identify fingerprints. The first step is "analysis" of a latent fingerprint's distinctive patterns, which then undergo a "comparison" to those of rolled fingerprints. The examiner then performs an "evaluation" of the two sets of fingerprints to determine if they are the same. The examiner's conclusion is then subject to "verification" by a second examiner.

The reliability of fingerprint identifications has been called into serious question recently by mistaken fingerprint identification, such as the Cowans and Mayfield cases, which raise major concerns about the accuracy and reliability of fingerprint matching. The International Association for Identification, considered the "oldest and largest professional forensic Association in the world," gives little credibility to fingerprint matches. (Andy Coghlan & James Randerson, NEW SCIENTIST, Sept. 19, 2005.)

Those who challenge fingerprint identifications do not question the underlying premise of fingerprint matching -

that fingerprints are unique to each individual. Instead, they claim that the process of comparing and matching two sets of fingerprints is very subjective, inherently subject to human error and contextual influences, and that the accuracy of examiners' comparisons is untested.

Lack of scientific studies

Despite the tremendous progress of forensic methodology, the reliability of fingerprint examiners to discern a match remains relatively unknown. There are no universal standards for conducting fingerprint examinations. The FBI allows individual fingerprint analysts to decide for themselves whether or not they have enough points of comparison to conclude that a match exists. (Flynn McRoberts & Steve Mills, *U.S. Seeks Review of Fingerprint Techniques: High-Profile Errors Prompt Questions*, CHI. TRI., Feb. 21, 2005, at A1.) "Different jurisdictions, and even different examiners, have different criteria, and the courts have simply left it to the experts' judgment." (Jennifer Mnookin, *A Blow to the Credibility of Fingerprint Evidence*, BOSTON GLOBE, Feb. 2, 2004, at A14.) Complicating the process is the fact that most fingerprints found at crime scenes are either smudged, distorted, or are only partial prints. It is argued that these poor quality latent fingerprints can make the fingerprints of two individuals, whose full prints are entirely different, look similar enough for an examiner to erroneously conclude that there is a match. (*Id.*)

In contrast to fingerprint matching, DNA testing has been scientifically proven to be reliable. (Edward Humes, *supra*.) Because that technology was first met with great skepticism by courts, hundreds of scientific studies have led to the standardization of DNA testing practices and the acceptance of its reliability. Yet, DNA examiners are generally prohibited from testifying that a perfect DNA match exists. (*Id.*) Experts on DNA, hair, fiber, ballistics, and essentially every other forensic testing can only testify that samples are "consistent" and occur only with in an extremely small portion of the general population, while fingerprint examiners are permitted to testify the two prints are an "exact match" and identical. (*Id.*)

In 2004, the FBI's Quantico, Virginia, fingerprint lab conducted a study using 50,000 fingerprints in its database and compared each one individually to the entire database. (Andy Coghlan, *supra*.) The study concluded that the probability of each fingerprint being mistaken for one of the other 49,999 fingerprints was infinitely small: just 1 in 10⁹⁷. However, the study's author, FBI analyst Stephen Meagher, acknowledged that the study only proved the fundamental premise for the fingerprint matching, that each person's fingerprints are unique. Critics contend that this study fails to test the reliability of fingerprint identifications because the prints used in the study were full, clean prints, unlike the messy, partial, latent prints often found at a crime scene that require a human analyst to determine if a match exists. (*Id.*)

An unpublished study tested 92 students, each of whom had at least one year of experience in analyzing fingerprints, using latent prints from mock crime scenes. Out of the 5,861 comparisons, only two were incorrect, an error rate of 0.034 percent. (*Id.*) However, this study was conducted in an academic lab and used neither real, latent, crime scene prints nor experienced, practicing fingerprint examiners.

A small handful of proficiency tests conducted with qualified fingerprint analysts revealed a higher error rate. Based on these tests, Professor Cole has estimated that false matches occur at an average rate of 0.8 percent in the United States, which equates to nearly 2,000 false fingerprint matches a year. (*Id.*) In one year, this false-match error rate was as high as 4.4 percent. (*Id.*) Another proficiency test of fingerprint examiners in 1995 revealed a 20 percent error rate. (Edward Humes, *supra*.) Professor Cole stated that these misidentifications "appear to be occurring at an accelerating rate." (Sharon Begley, *Fingerprint Matches Come under More Fire as Potentially Fallible*, WALL ST. J., Oct. 7, 2005, at B1; available at http://www.law.northwestern.edu/news/article_full.cfm?eventid=2180.) Yet, experts state that there have been "no formal scientific studies on the reliability of fingerprint examiners or the frequency of errors." (Edward Humes, *supra*.)

Empirical tests: Can context influence fingerprint exams?

In the past two years, Professor Itiel Dror of the University of Southampton in the United Kingdom, with the cooperation of the Sussex police, has led a team of researchers that conducted the world's first tests on the effective contextual influences on fingerprint matching.

Professor Dror and his colleagues published a study of 27 students, who made 2,484 judgments as to whether pairs of fingerprints matched. (*Emotions, supra* at 799.) Two-thirds of the fingerprint pairs were either unambiguous matches or unambiguous non-matches, while the remaining third were ambiguous. (*Id.* at 802.) The purpose of this study was to test whether outside, contextual information increased the likelihood of participants finding a match. The outside information included emotional background stories, vivid crime scene photographs, and other subliminal messages that are sometimes present when fingerprints are examined in real world criminal investigations.

The results of the study showed that outside contextual information did not influence the examination of fingerprints that were either unambiguous matches or unambiguous non-matches. If the fingerprints clearly looked like a match or obviously did not match, the contextual information did not influence the examiners. (*Id.* At 805.) However, Professor Dror discovered that outside context influenced whether the ambiguous pairs of fingerprints were judged to be a match. Introducing a "high emotion" context increased the likelihood of a match by 23.4 percent and adding subliminal messages increased the likelihood of a match by 40.4 percent (*Id.* at 806.) This study showed that contextual information can significantly influence decisions in fingerprint matching.

Professor Dror's most recent study relates to the Mayfield misidentification. (Itor E. Dror, David Charlton, and Ailsa Peron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identification*, 156 FORENSIC SCI. INT'L 74-78 (2006) [hereinafter *Contextual Information*].) Dror and his team identified five certified fingerprint experts from police agencies around the world. Each examiner had an average of 17 years' experience and was unfamiliar with Brandon Mayfield's fingerprint. For each expert tested, Professor Dror obtained two fingerprints that the examiner previously testified for an exact match approximately 5 years earlier. Outside examiners

confirmed that these archived fingerprint pairs were matches.

A colleague presented the examiners with the very same pairs of fingerprints that the examiners concluded had matched five years earlier. The colleague first told the examiner that the prints were Mayfield's and that the latent print was found on the suspicious bag near the Madrid bombing site, and then asked the examiner why the FBI and other experts had mistakenly concluded the pair matched.

Despite being told by his colleague that the pair of fingerprints was from two different people, Mayfield and the bomber, one expert (20 percent of those tested) concluded that the fingerprints were indeed a match - confirming what the examiner had testified to in court five years earlier. However, the other four experts (80 percent of those tested) reached different conclusions. Although each of the four examiners testified five years earlier that the fingerprints they had examined were a match, three of the examiners now concluded the prints were not a match, while the fourth determined that there was not enough information to reach a conclusion. Professor Dror wrote, "This is striking given that all five experts had seen the identical fingerprints previously, and all had decided that the prints were a sound and definite match." (*Id.* at 76.)

Critics question Dror's results because his experiment involved just five participants. The number of participants in this study was limited because of the difficulty in obtaining access to fingerprint examination archives and finding fingerprint analysts who had previously consented to participating in anonymous studies, were able to be covertly tested, and had not seen the real Mayfield prints. (*Id.*) However, Dror argued that the fact that there are four fingerprint examiners who reached conclusions that were different from what they testified in court can have a dramatic effect on hundreds of defendants. He also argued that even if the study were increased to 50 participants, and if the 45 additional examiners concluded that the prints were a match as they did five years ago, nearly 10 percent of the fingerprint examiners tested would still have been found to have changed their minds as a result of the contextual information presented. (*Id.*) Therefore, Dror argued, his study would still be very significant, if there were 50 participants.

Professor Dror's 2005 study empirically shows that fingerprint analysts can be greatly influenced by outside context, *id.* at 77, and that it is possible to alter fingerprint expert's conclusions on the similarity of two fingerprints by displaying them in a different context. (*Id.*) Because fingerprint matching involves human judgment, outside influences have been proven to affect the judgment of fingerprint experts.

Challenging the admissibility of fingerprints in court

Despite little research on the reliability of fingerprint identifications, American courts have been reluctant to bar fingerprint evidence. Relying on a transcript of a five-day evidentiary hearing, senior U.S. district judge Louis Pollack held that fingerprint matching was insufficiently tested and peer reviewed, and lacked both a known rate of error and a standardized method. (*United States v. Llera Plaza*, 188 F. Supp. 2d 549, 552 (E.D. Pa. 2002).) He then precluded experts from testifying as to their opinion that fingerprints identified a person. Concerned that its "prosecutorial effectiveness...

would be seriously compromised," the government moved for reconsideration. (*Id.*)

After a new evidentiary hearing, Judge Pollack reversed himself two months later. The court explained that "there are many situations in which an expert's manifestly subjective opinion... is regarded as evidence in an American courtroom." (*Id.* at 570.) Although concluding that fingerprint matching remained untested, the court found that the FBI's error rate was not "unacceptably high" and that the FBI examiners followed sufficient standards. (*Id.* at 564, 566, 571.) Judge Pollack wrote:

I am not persuaded that courts should defer admission of testimony with respect to fingerprinting... until academic investigators financed by the National Institute of Justice have made substantial headway on a "verification and validation" research agenda. For the National Institute of Justice, or other institutions both public and private, to sponsor such research would be all to the good. But to postpone present in-court utilization of this "bedrock forensic identifier" pending such research would be to make the best the enemy of the good. (Id. at 572.)

Therefore, the court ultimately admitted fingerprint identification testimony.

All eyes then turned to the Commonwealth of Massachusetts in 2005 where fingerprint experts, prosecutors, defense lawyers alike anxiously awaited a decision from its Supreme Judicial Court. (*Commonwealth v. Patterson*, 840 N.E. 2d 12 (Mass. 2005).) The court heard an interlocutory appeal midway through the retrial of Terry Patterson challenging the admissibility of fingerprint identifications. The prosecution's case against Patterson, who was on trial for murdering an off-duty policeman, rested largely on a group of four latent prints found on the car door in which the victim died. (*Id.* at 14.) Although no single latent print could be matched to Patterson, an examiner testified that four prints were likely made simultaneously and when analyzed collectively matched the defendant's prints. (*Id.*)

Patterson argued that fingerprint matching falls within the "junk science" standard for expert, scientific evidence, discussed by the Supreme Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). (Sharon Begley, *supra.*) In *Daubert*, the Court created a four-part test for federal courts to determine the admissibility of scientific evidence: 1) Has it been empirically tested? 2) Has it been peer-reviewed and published? 3) What is its error rate? 4) Is it generally accepted by the scientific community? (569 U.S. at 593-94.) Fingerprint matching has no known error rate, as do other forensic tests. A 2002 handbook of forensic science states that error rates are as high as 63 percent for voice matches, 40 percent for handwriting identifications, 64 percent for bite mark matches, and 12 percent for hair identifications. (Sharon Begley, *supra.*)

Patterson's defense counsel argued that fingerprint identification has never been scientifically studied for its reliability, lacks uniform standards for concluding two prints match, and lacks a proven error rate. (*SJC to Hear Arguments, supra.*) The court was asked to bar fingerprint evidence in court until it is scientifically proven to be reliable. (*Id.*)

Patterson's prosecutors contended that fingerprint analysis has been proven to be reliable because it is used daily in criminal

cases and because no two fingerprints have been found to be identical in the century that fingerprint identifications have been used. (*Id.*). This case attracted a number of amicus briefs challenging the long-standing belief that fingerprint matching is infallible.

The court held that single latent fingerprint identifications meet the *Daubert* standard and “are sufficiently reliable to admit expert opinion testimony.” (840 N.E. 2d at 15.) However, the court questioned the reliability of matching a group of simultaneous latent fingerprints. (*Id.* at 33.) It overturned the trial court’s ruling that the simultaneous fingerprint identification with multiple partial prints was admissible and held that there were not enough facts in the record to meet the *Daubert* test. As a result of the exclusion of the simultaneous fingerprint identification, Patterson pled guilty to the lesser charge of manslaughter. By excluding simultaneous partial fingerprint identifications as unreliable, the court draws into question the entire system for identifying fingerprints.

The future of fingerprint evidence

More research is needed into the reliability of fingerprint matching. The national attention created by the Cowans and Mayfield cases and the results of the recent fingerprint studies have caused the federal government to take action. The National Institute of Justice (NIJ), the research arm of the Justice Department, has begun investigating how to measure the quality of crime scene fingerprints, the accuracy of fingerprint comparisons, and how to improve the fingerprint identification process. (Flynn McRoberts, *supra.*) Ronald Singer, president of the American Academy of Forensic Sciences, called this action “very significant,” although he believes the NIJ is seeking to “fund the research that will validate the process” of fingerprint identifications. (*Id.*)

Professor Cole suggests that the reliability of fingerprint matching can be improved if an independent person acts as the intermediary between the police and prosecution in the fingerprint analysts. The independent official would distribute evidence blindly to examiners who would work in isolation and know as little as possible about each case. (Andy Coghlan, *supra.*) The Scientific Working Group on Friction Ridge Analysis, Study and Technology (SWGFAST), an FBI sponsored group creating guidelines for fingerprint identification, is now encouraging police agencies to employ blind verification. (SWGFAST, *Quality Assurance Guidelines for Fingerprint Examiners*, Sept. 28, 2006, available at http://www.swgfast.org/Quality_Assurance_Guidelines_for_Latent_Print_Examiners_3.0.pdf.) However, it is unclear how frequently fingerprint identifications are blindly verified.

Dror predicts that computers will be able to determine if a clear set of fingerprints matches. But, if latent, crime scene fingerprints are distorted, unclear, or contaminated, human experts will still be required to determine if a pair of fingerprints matches. (*Emotions, supra* at 807.)

Fingerprint identifications remain the most frequently used method for identifying persons, *id.* at 799; therefore, understanding their reliability and how fingerprint comparisons can be influenced by human nature and contextual information is essential to the criminal justice system. The few studies

that have been conducted on fingerprint comparisons show that fingerprint identifications are not as infallible as courts have assumed. Because thousands of convictions are based on fingerprint evidence each year, determining the reliability of fingerprint evidence is of critical importance in order to prevent misidentifications and wrongful convictions.

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