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Section 5: Criminal Law

Institute of Bill of Rights Law at The College of William & Mary School of Law
V. Criminal

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In 1985, John Thompson (plaintiff-appellee) was convicted of attempted armed robbery and murder and was sentenced to death. After sitting on death row for fourteen years, an investigator in Thompson’s habeas proceedings discovered that prosecutors had failed to turn over a crime lab report in the attempted armed robbery case that contained exculpatory blood evidence. Thompson was retried for murder in 2003 and found not guilty. After his release, Thompson brought suit alleging various claims against the District Attorney’s Office and individual government employees (defendants-appellants), including a claim under 42 U.S.C. § 1983 for wrongful suppression of exculpatory evidence in violation of Brady v. Maryland. The district court entered a judgment awarding Thompson damages of $14 million and attorneys’ fees of approximately $1 million and the DA’s office appealed. The court of appeals affirmed the district court’s decision, finding that in establishing deliberate indifference, Thompson demonstrated that it was obvious that training about Brady was necessary and that a highly predictable consequence of failing to train attorneys about Brady was the infringement of the constitutional rights of criminal defendants. In 2009, the appellate panel decision was vacated by an equally divided en banc court, thereby affirming the decision of the district court.

Questions Presented: (1) Does imposing failure-to-train liability on a district attorney’s office for a single Brady violation contravene the rigorous culpability and causation standards of Canton and Bryan County? (2) Does imposing failure-to-train liability on a district attorney’s office for a single Brady violation undermine prosecutors’ absolute immunity recognized in Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009)?
PRADO, Circuit Judge, with whom KING, WIENER, STEWART, and ELROD, Circuit Judges, join:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

The panel opinion thoroughly explains why the evidence the jury heard in this case is sufficient to support its verdict. See Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008). Judge Clement's dissent ("the dissent") to this court's order affirming based on a tie en banc vote, however, overlooks much of the evidence the jury heard and ignores the standard of review that we apply to jury verdicts.

By reading the dissent, one would be hard pressed to even realize that a jury rendered the verdict in this case. At the outset, the dissent attempts to explain the standard of review but fails to acknowledge the deference we must accord to a jury's verdict. We have repeatedly admonished that our standard of review with respect to a jury verdict is especially deferential. As such, judgment as a matter of law should not be granted unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.

"A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." We must view the evidence the jury heard with this deferential standard in mind.

A review of the full record—as laid out in the panel opinion—reveals that the dissent is merely quibbling with the jury’s factual findings. This oversteps our bounds as an appellate court. The dissent presents nothing more than a skewed version of the facts in favor of the District Attorney’s Office. Its approach is directly contrary to the rule that we must view all evidence and draw all reasonable inferences in favor of the jury’s verdict.

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At bottom, the dissent seeks to retry this case through the appellate process. This approach abdicates this court’s duty to uphold a jury’s verdict unless the facts point so strongly in Connick’s favor that no reasonable jury could rule to the contrary. Indeed, the fact that reasonable judges on this court view the evidence differently suggests that these factual disputes were for the jury to resolve. As the extensive discussion in the panel opinion demonstrates, there was ample evidence to allow the citizens of this New Orleans jury to find for Thompson. Of course, this is an extraordinary case with extraordinary facts. Allowing this judgment to stand will not subject municipalities to widespread liability, as a holding that the need for training was “so obvious” and the lack of training “so likely” to create a constitutional violation will apply only in the rare instance. This is that rare case. The jury heard substantial evidence that the District Attorney’s Office provided no Brady-specific training, despite the known risk of the exact type of systemic nondisclosure that the failure to train caused here. Acknowledging the proper standard of review and viewing the jury’s verdict in the correct deferential light compels us to uphold the jury’s decision.
EDITH BROWN CLEMENT, Circuit Judge, with whom JONES, Chief Judge, and JOLLY, SMITH, GARZA, and OWEN, Circuit Judges, join, would reverse the district court for the following reasons:

We believe it imperative to explain why the result in this case should not encourage the extension of single incident municipal liability under Monell. John Thompson, the plaintiff-appellee, was convicted of murder and spent fourteen years on death row for a crime he did not commit because prosecutors failed to turn over a lab report in a related case. In this 42 U.S.C. § 1983 case, he sought compensation for the years spent in prison and on death row. The jury awarded Thompson $14 million against the Orleans Parish District Attorney in his official capacity. This appeal asks whether Harry Connick, the District Attorney, was deliberately indifferent to an obvious need to train his assistants on their obligations under Brady v. Maryland; it further asks whether a lack in Brady training was the moving force behind Thompson's constitutional injury. The district court, and a panel of this court, held that the evidence was legally sufficient to support both of these claims. The panel opinion was vacated by our order for en banc rehearing.

Only under the most limited circumstances may a municipality be held liable for the individual constitutional torts of its employees. Considering the strict standards of culpability and causation applicable here, we conclude that the evidence supporting Thompson’s claim was legally inadequate to hold the District Attorney’s Office liable for this employee failure. Along similar lines, we also conclude that the jury instructions given on “deliberate indifference” were plainly erroneous.

FACTS

In 1985, a few weeks before his murder trial, John Thompson was tried and convicted of attempted armed robbery. Because of the attempted armed robbery conviction, Thompson decided not to testify in his own defense in his trial for the murder of Raymond T. Liuzza, Jr. Thompson was convicted of murder and sentenced to death.

Fourteen years later, in 1999, an investigator in Thompson’s habeas proceedings discovered that prosecutors had failed to turn over a crime lab report in the attempted armed robbery case. That lab report indicated that the perpetrator had type B blood. Because Thompson has type O blood, the attempted armed robbery conviction was vacated. In 2002, the Louisiana Fourth Circuit Court of Appeals granted post-conviction relief and reversed Thompson’s murder conviction, holding that the improper attempted armed robbery conviction had unconstitutionally deprived Thompson of his right to testify in his own defense at his murder trial. Thompson was retried for Liuzza’s murder in 2003 and found not guilty.

After his release, Thompson brought suit alleging various claims against the District Attorney’s Office, Connick, James Williams, Eric Dubelier, and Eddie Jordan—the District Attorney in 2003—in their official capacities; and Connick in his individual capacity (collectively, “Defendants”). The only claim that proceeded to trial was a claim under § 1983 for wrongful suppression of exculpatory evidence in violation of Brady v. Maryland. Thompson presented two theories of liability to the jury: (1) that the Brady violation was due to an unconstitutional official policy of
the District Attorney’s Office, and (2) that the \textit{Brady} violation was caused by Connick’s deliberate indifference to an obvious need to train, monitor, or supervise his prosecutors. The jury found that the \textit{Brady} violation was not due to an official policy of the District Attorney’s Office, but was due to a failure to train. The jury awarded Thompson $14 million in damages. Defendants filed timely motions for judgment as a matter of law—before and after the verdict—as well as a motion to amend or alter the judgment and a motion for a new trial. The district court denied all of these motions, and Defendants appealed.

\textbf{STANDARD OF REVIEW AND APPLICABLE LAW}

... Judgment as a matter of law is appropriate if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” ... “[A] jury’s freedom to draw reasonable inferences does not extend so far as to allow the jury to draw an inference which amounts to mere speculation and conjecture.” ...  

Because we are reviewing a \textit{Monell} verdict against a government entity, our evidentiary review must take into account that § 1983 \textit{Monell} liability is fundamentally different from an entity’s vicarious liability, predicated on \textit{respondeat superior}, for its employees’ ordinary misconduct. Thus, when a plaintiff seeks to impose § 1983 liability on a municipality for its failure to train its employees, normal tort standards are replaced with heightened standards of culpability and causation. Liability will only attach if the municipality was \textit{deliberately indifferent} to the constitutional rights of citizens—a showing of negligence or even gross negligence will not suffice. Errors of judgment do not alone prove deliberate indifference, nor is such heightened culpability established simply by showing that a municipality could have ordered more or different training or even misjudged whether training was necessary. Similarly, to satisfy causation, the plaintiff must demonstrate that the failure to train was the \textit{moving force} behind the constitutional violation—“but for” causation is not enough. The Supreme Court has repeatedly cautioned that if we neglect these stringent standards, we risk collapsing the distinction between vicarious liability and direct liability. Heightened standards also guard against the potentially “endless exercise of second-guessing municipal employee-training programs,” a task for which federal courts are ill suited.

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To summarize, the requirements for imposing liability upon a municipality for the individual acts of its employees are demanding. Relaxing these heightened requirements would cause significant harm to the interests underlying this demanding evidentiary principle: “adopt[ing] lesser standards of fault and causation would open municipalities to unprecedented liability,” “would result in \textit{de facto respondeat superior} liability,” and would “engage the federal courts in an endless exercise of second-guessing municipal employee-training programs.” Therefore, we can hold a municipality liable only where the evidence demonstrates “unmistakable culpability and clearly connected causation” for the unconstitutional conduct of an individual employee.

\textbf{DISCUSSION}

\textbf{A. Sufficiency of the Evidence—Culpability}

The \textit{Brady} violation here was a failure of one or more of the four assistant district
attorneys involved with Thompson’s armed robbery prosecution to turn over the crime lab report to Thompson’s counsel. It is undisputed that the District Attorney’s Office did not provide formal in-house training regarding Brady. It is also undisputed that the assistant district attorneys were familiar with the general rule of Brady that evidence favorable to the accused must be disclosed to the defense. Thompson’s burden was to prove that Connick, the policymaker for the Orleans Parish District Attorney’s office, was deliberately indifferent to the need to train prosecutors in their Brady disclosure obligations.

As this circuit has recently recognized, “it is not enough for [Thompson] to show that the [District Attorney’s Office’s] training program is, in a general sense, wanting.” Instead, “the identified deficiency in a city’s training program must be closely related to the ultimate injury.” The plaintiff must prove an affirmative to the question: “Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?” Every prosecutor understood his general duty under Brady, so the identified deficiency was not a failure to train on this general duty, but was instead a failure to train on how to handle specific types of evidence such as the crime lab report at issue.

There was evidence that some prosecutors doubted whether Brady itself obligated the production of evidence that was not necessarily exculpatory. This confusion seems to have arisen because the report itself had the potential to be either exculpatory or inculpatory—depending on whether it matched Thompson’s blood type. Accepting that there was no training on the Brady obligations pertaining to potentially exculpatory crime lab reports, we must determine whether the need for that training was “so obvious” that a reasonable jury could find that Connick was “deliberately indifferent” to that need.

Thompson did not show any pattern of similar Brady violations, and instead relies exclusively on this single incident where prosecutors failed to disclose his crime lab report. In another case before this court, we sustained the district court’s conclusion that twenty-five years of records involving this District Attorney’s Office (covering the time period of Thompson’s trial) revealed no pattern of Brady violations. Connick testified that the District Attorney’s Office handled tens of thousands of cases annually around this time, and that in the ten years prior to Thompson’s case, only four convictions were overturned based on Brady violations, none of which was similar to the violation at issue. So in only a minute number of cases were convictions overturned based on Brady violations, and there was not a single instance involving the failure to disclose a crime lab report or other scientific evidence. Connick was not alerted to a need for further Brady training—especially not this specific type of Brady training—by previous violations at the District Attorney’s Office.

Nor has Thompson been able to refer us to a single reported opinion, issued before this 1985 prosecution, from the Supreme Court, any of the circuit or district courts, or any state court that involved a similar Brady violation and thus might have alerted Connick to the need for Brady training in this area.

Thompson instead points to the following as substantial evidence that the need for training in this area was “so obvious” that a failure to train constituted deliberate indifference. First, Thompson argues that Connick testified that he knew his
prosecutors would frequently come into contact with Brady evidence. Second, many prosecutors testified that the law regarding Brady contains “gray areas.” Third, Thompson noted that several of the assistant district attorneys were only a few years out of law school. Thompson also points to intra-office discussions and opinions of various assistant district attorneys from 1999 and later about whether the lab report was evidence covered by Brady.

This type of evidence amounts to no more than general observations that would apply to any area of law and any number of district attorney’s offices throughout the country. All district attorneys know that Brady issues—along with many other areas of constitutional law—are routine matters that their assistants handle every day. Every district attorney knows that nearly all issues he deals with are shaded with “gray areas,” whether they concern Brady, search and seizure, Miranda, evidence of a defendant’s other crimes, expert witnesses, sentencing, or many more. Incorrect prosecutorial decisions in any of these areas may lead to later reversal of convictions. Nearly all district attorney’s offices employ prosecutors only a few years out of law school. That there were different opinions about Brady evidence, or any other issue that may be raised among lawyers, should surprise no one. All of this evidence involves generic generalizations—not the type of exacting evidence required to show that Connick and the District Attorney’s Office were deliberately indifferent to an obvious need to further train its professional prosecutors. To the extent that this evidence could be used to show that the municipality’s training was, in a general sense, wanting, similar evidence could also support a deliberate indifference finding against any prosecutor’s office for nearly any error that leads to a reversal of a conviction.

We cannot accept the argument that generalized failure to train evidence sustains a finding of official deliberate indifference. [City of Canton v. Harris displayed] utmost caution toward generalized failure to train evidence:

Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Because this case concerns the actions of licensed attorneys who have independent professional obligations to know and uphold the law, there is even more reason than in City of Canton . . . not to rely on generalized statements about lack of training. Training is what differentiates attorneys from average public employees. A public employer is entitled to assume that attorneys will abide by the standards of the profession, which include both ethical and practical requirements. Thus, prosecutors are personally responsible as professionals to know what Brady entails and when to perform legal research to understand the “gray areas.” To hold a public employer liable for failing to train professionals in their profession is an awkward theory. By analogy, it is highly unlikely that a municipality could be held liable for failing to train a doctor it employed in diagnostic nuances. Mere nostrums about training in Brady, a basic due process principle of
criminal procedure, will not suffice.

* * *

As a matter of probability, if violations were the "highly predictable consequence" of a failure to train, then we would expect to see more than just one violation in hundreds or thousands of cases. Thompson has, as a legal matter, failed to prove that his violation was the "highly predictable consequence" of failing to train prosecutors. This means that the need for training was not "so obvious," and thus that Connick was not "deliberately indifferent" to Thompson's constitutional rights.

Because the District Attorney’s Office had a policy of disclosing all crime lab reports, there was no need to train on the specifics of which reports would or would not be covered by Brady. Just as a municipal policymaker could not be found deliberately indifferent to citizens' Brady rights if the policymaker established clear policies—such as an open-file policy—to protect those rights, Connick cannot be considered "deliberately indifferent" to a Brady violation based on a failure to disclose a crime lab report when his employees generally understood that they had to disclose exactly those types of reports.

For these reasons, under Monell, City of Canton, and Bryan County [v. Brown], the evidence in this record does not support the conclusion that Connick was deliberately indifferent to an obvious need for training. Consequently, the District Attorney cannot be held liable for the failure by his employees to disclose this crime lab report.

B. Sufficiency of the Evidence—Causation

Nor does the diffuse evidence of Brady misunderstanding among several assistant district attorneys satisfy the causation requirements relating to the violation at issue here. The specific question we ask is whether Connick’s failure to provide in-house training was the moving force behind the failure to turn over the lab report. If Thompson did not submit substantial evidence that the failure to produce the lab report was caused by confusion over Brady, the jury could not have reasonably concluded that the lack of training was the direct cause of Thompson’s injury, and judgment as a matter of law is required.

* * *

Thompson based his case upon a single causation theory: that one or more of the assistant district attorneys involved in Thompson’s prosecution decided not to turn over the report because they did not know that they were legally obligated to produce it and that training sessions on Brady would have avoided this incident. To prove his theory, Thompson must present substantial evidence from which a jury reasonably could conclude that the failure of Connick to provide training sessions on Brady was the actual cause of and the moving force behind the failure to produce the report. The precedents require substantial evidence of direct causation. This standard demands more than evidence of confusion over Brady’s "gray areas" in the District Attorney’s Office. Finally, Thompson must establish that this lack of understanding would have been remedied by an in-house training program.

Thompson’s brief fails to point out any such evidence to sustain municipal liability. As best we understand his brief, the only arguments he makes regarding causation are these: (1) the record supports the conclusion that these four prosecutors knew about the blood evidence and yet failed to disclose it; and (2) the jury was free to reject Connick's
theory of a single rogue prosecutor. Even if we accept both of these assertions as correct, they still fail completely to establish that the Brady violation was caused by unfamiliarity with Brady. And because Thompson bore the burden of proof, he had to do more than simply assert that the jury was free to reject Connick’s explanations for the violation. Thompson had to put forth substantial evidence supporting his own theory of causation: that the assistant district attorney (or attorneys) responsible for the constitutional violation did not understand Brady, that this lack of understanding caused the failure to produce the report, and that Brady training could have resolved this lack of understanding.

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The record fails to establish, by substantial evidence, that the actual cause and moving force behind the constitutional violation of not producing the lab report was the failure of the District Attorney to have in-house training sessions on Brady. For example, an assistant district attorney’s confusion regarding whether Brady applied to impeachment evidence may show a need for enlightening this assistant but is irrelevant here because the lab report clearly was not impeachment evidence and would not have been turned over on that basis. The policy manual, although incomplete in its instructions on Brady evidence and post-dating Thompson’s trial by several years, does little to establish the necessary direct causal link, and the jury concluded in its verdict that the violation was not due to an established municipal policy.

Thus, even assuming that Connick was deliberately indifferent to a need for training, Thompson failed as a matter of law to show that the lack of training was the actual cause of the constitutional violation. Therefore the judgment should be reversed and rendered for the defendant.

C. Jury Instructions

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CONCLUSION

... The Supreme Court has stated clearly and emphatically that the liability of municipalities is limited to cases where a municipal action caused the constitutional violation. The plaintiff must show the “requisite degree of culpability” on the part of the municipality—deliberate indifference to an obvious need for training—and must demonstrate a “direct causal link” between the failure to train and the constitutional violation.

Thompson failed to produce substantial evidence to support his claim that the District Attorney was deliberately indifferent to an obvious need for training of his staff. And he failed to produce adequate evidence of causation to show that the failure to train was the actual cause and moving force behind the failure to produce the lab report. Thompson has, in short, failed to meet the heightened standards for culpability and causation imposed by Monell, City of Canton, and Bryan County, and we would therefore reverse the district court’s judgment.
PRADO, Circuit Judge:

In Brady v. Maryland, the Supreme Court held that due process requires the prosecution in a criminal case to turn over evidence that is favorable to the accused when the evidence is material to guilt or punishment. The Supreme Court later expanded the Brady rule to require the disclosure of evidence that is relevant to the credibility of key government witnesses. In the criminal proceedings that prompted this lawsuit, it is undisputed that Brady evidence was not turned over to the defense. As a result, Plaintiff-Appellee John Thompson ("Thompson") was convicted of an attempted armed robbery of which he was actually innocent. Attorneys in the Orleans Parish District Attorney’s Office ("the DA’s Office") then used the attempted armed robbery conviction to help secure a conviction and death sentence for Thompson in an unrelated murder case. Eighteen years later—and one month before his scheduled execution—Thompson’s investigators uncovered the exculpatory evidence that indisputably cleared Thompson of the armed robbery charge. Thompson was then retried for the murder and found not guilty.

Thompson now seeks damages for the eighteen years he spent in prison, fourteen of which were in solitary confinement on death row. After a jury trial lasting several days, the jury determined that the DA’s Office was deliberately indifferent to the need to train, monitor, and supervise its attorneys on Brady principles. The jury awarded Thompson $14 million in damages, and the district court added approximately $1 million in attorneys’ fees. Defendants challenge that result on multiple grounds. Finding no reversible error for the majority of Defendants’ arguments, we AFFIRM in large part. Because the district court erroneously included non-liable defendants in the judgment, we REVERSE in part and REMAND with instructions to remove those defendants from the judgment.

I. FACTUAL BACKGROUND

II. PROCEDURAL HISTORY

III. DISCUSSION

A. Statute of Limitations
B. Sufficiency of the Evidence

Defendants next contend that the evidence admitted at trial does not support a finding of deliberate indifference. . . . Our standard of review with respect to a jury verdict is especially deferential. We can reverse the jury’s verdict only if “the facts and inferences point so strongly and overwhelmingly in the movant’s favor that reasonable jurors could not reach a contrary conclusion.” . . . We may not make credibility determinations or weigh the evidence.

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Here, the jury rejected Thompson’s argument that Connick’s Brady policy was unconstitutional but accepted the argument that Connick was deliberately indifferent to the need to train on Brady issues. On appeal, Defendants set forth numerous arguments as to why the jury could not reasonably have concluded that Connick, acted with deliberate indifference.

1. No Pattern of Similar Violations

Defendants first argue that there was no evidence of a pattern of similar Brady violations and that such a pattern is necessary to establish deliberate indifference. Thompson does not argue that there was evidence of a pattern, but instead contends that evidence of a pattern is not always necessary for a finding of deliberate indifference.

In City of Canton, the Supreme Court set the degree of fault for a failure-to-train case as deliberate indifference. In elaborating on that standard, the Court stated that

it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

The Court then included an example in a footnote:

“For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are “deliberately indifferent” to the need.

Thus, the Supreme Court recognized two possible methods of showing deliberate indifference: (1) when the need for training is obvious based on the nature of the conduct at issue and the potential for harm and (2) when there is a pattern of violations that makes it obvious to city policymakers that more training is necessary.

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Therefore, the Supreme Court has made it clear that a pattern of constitutional violations is not always a prerequisite to a
showing of deliberate indifference. However, the Court has limited those situations to circumstances in which the need for training is “obvious” and when the violation of rights is a “highly predictable consequence” of the failure to train.

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. . . [T]his court has explicitly recognized that a single incident of misconduct can, in the right circumstances, give rise to a claim of deliberate indifference. Consequently, the fact that Thompson did not establish a pattern of Brady violations by the DA’s Office is not dispositive of his claims.

Further, the evidence developed at trial clearly demonstrates that this case falls within the Supreme Court’s description of the narrow range of situations that do not require a pattern of misconduct before deliberate indifference can be shown. Here, there was evidence that Connick was aware that the attorneys in the DA’s Office would be required to confront Brady issues on a regular basis and that failure to properly handle those issues would result in constitutional violations for criminal defendants. . . .

***

There was also evidence that the need to train about Brady was obvious. Many of the attorney witnesses in this case testified that Brady was a “gray” area, subject to interpretation. . . .

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Besides the difficulty in interpreting Brady, there was evidence that many of the attorneys in the DA’s Office were only a few years out of law school, and thus lacking the legal experience that could have helped them clarify Brady issues without additional training.

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Thus, the jury heard evidence that attorneys, often fresh out of law school, would undoubtedly be required to confront Brady issues while at the DA’s Office, that erroneous decisions regarding Brady evidence would result in serious constitutional violations, that resolution of Brady issues was often unclear, and that training in Brady would have been helpful. Consequently, Thompson has met his burden of demonstrating that it was obvious that training about Brady was necessary and that a highly predictable consequence of failing to train attorneys about Brady was the infringement of the constitutional rights of those accused of crimes, such as Thompson. No pattern of similar violations was necessary to put Connick on notice that training on Brady’s requirements was needed. Therefore, under the tests set out in City of Canton and Board of the County Commissioners v. Brown, Thompson did not need to prove a pattern of Brady violations to demonstrate that the failure to train was deliberately indifferent, and the district court did not err in denying Thompson’s motion for judgment as a matter of law on that ground.

2. Deegan’s Act Broke Causation

Defendants next contend that Deegan’s unanticipated action in intentionally hiding the blood evidence in violation of Connick’s policy requires the conclusion that Connick was not deliberately indifferent and breaks any causal link between the alleged failure to train and Thompson’s injury. Thompson responds that there was sufficient evidence for the jury to conclude that Deegan was not solely responsible for the constitutional
violations in this case.

Defendants first argue that there must be evidence that Connick knew of and failed to control Deegan's "known propensity" for violating the constitutional rights of others to demonstrate deliberate indifference. This assertion is incorrect. . . . [F]ailing to demonstrate that Deegan had a known propensity for hiding *Brady* material is not dispositive of Thompson's claim; he did not pursue that theory of liability but rather alleged a failure to adequately train, supervise, and monitor.

Defendants next cite the Fourth Circuit's opinion in *Shaw v. Stroud* for the proposition that a supervisor cannot reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. Although we have no grounds to disagree with that statement, the Fourth Circuit's reasoning is not entirely applicable in this case. *Shaw* refers to anticipating misconduct from "properly trained employees." As discussed later in this opinion, there was evidence that the attorneys in this case were not trained on *Brady*'s requirements. Therefore, *Shaw* does not mandate a verdict for Defendants.

Defendants also generally allege that Deegan's confession to Riehlmann exculpates them from any failure to train because Deegan intentionally acted against his training in suppressing the evidence. However, Defendants read more into Deegan's statement to Riehlmann than is actually there. . . .

***

. . . [A]lthough there was evidence that Deegan acted alone, there is also evidence from which the jury could have believed that others had a hand in failing to turn over the exculpatory evidence.

***

In sum, then, drawing all inferences in favor of Thompson, a reasonable jury could have believed that the constitutional violations in this case were not solely attributable to Deegan's alleged criminal conduct, but instead were the result of confusion over *Brady* by various attorneys in the DA's Office. . . .

3. The Blood Evidence Was Obviously Exculpatory

Next, Defendants assert that because the blood evidence was obviously exculpatory and withholding the evidence was such a clear violation of the law, no training could have helped in this instance. . . .

The problem with Defendants' argument in this case is that several of Defendants' own witnesses contended that the blood evidence was not *Brady* material in the absence of knowledge of Thompson's blood type. . . .

***

Therefore, despite Defendants' current argument on appeal, Defendants' position at trial was less than clear about whether the evidence at issue was obviously exculpatory. Given Defendants' conflicting claims, there is no cause to overturn the verdict on the ground that the material was obviously exculpatory.

4. Connick Provided Adequate Training, Supervision, and Monitoring

Defendants' next contention is that Connick provided adequate training in the form of
on-the-job training, Saturday training sessions, dissemination of memos and case opinions, and counseling. Further, each attorney had received training in law school and participated in self-training after law school.

* * *

Although there was some evidence in this case that attorneys in the DA’s Office might have received some training, the jury was entitled to believe the ample evidence that the attorneys received no training on Brady’s requirements. None of the three prosecutors involved in Thompson’s prosecutions recalled receiving any Brady-specific training.

Other attorneys in the DA’s Office at the time of Thompson’s prosecutions testified consistently. Indeed, the government stipulated that “[n]one of the district attorney witnesses recalled any specific training session concerning Brady prior to or at the time of the 1985 prosecutions of Mr. Thompson.” That is, no prosecutor testified about a specific example of Brady-related on-the-job training, Brady-related Saturday training sessions, Brady-related advance sheets, or counseling or pretrial of a case that resulted in Brady-specific discussions. This evidence supported the jury’s finding that Connick failed to adequately train his attorneys on Brady and lent credence to the district court’s conclusion that Thompson did not need to prove a pattern of similar violations, as discussed above.

5. Miscellaneous Arguments

* * *

C. Jury Instructions

D. Exclusion of Guilt-Related Evidence

* * *

E. Amount of Damages

Defendants next argue that the $14 million in damages awarded by the jury is excessive and not warranted by the evidence.

* * *

Given the entirety of the testimony about Thompson’s experiences and suffering as a result of his wrongful incarceration, we cannot say that the jury clearly erred in awarding him $14 million in damages or that the district court abused its discretion in refusing to order a remittitur.

Defendants also make a passing assertion that similar cases have resulted in awards of, at most, $400,000 a year, whereas here, Thompson received over $700,000 a year for his eighteen years of imprisonment. However, Defendants fail to cite to a single Louisiana case in which the appropriate amount of damages for a wrongful incarceration was at issue. Further, neither case cited by Defendants concerned an individual who had been wrongfully sentenced to death. Therefore, we find this claim unavailing and affirm the decision of the district court to deny Defendants’ request for a remittitur.

F. Attorneys’ Fees

* * *

IV. CONCLUSION

Giving due deference to the district court’s decision and the jury’s verdict, we find no reversible error in this case other than the
naming of non-liable parties in the judgment. Therefore, we REVERSE IN PART and REMAND with instructions to remove the non-liable defendants from the judgment. However, we AFFIRM the remainder of the district court's judgment. Costs shall be borne by Defendants.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.
The Supreme Court agreed this morning to rule on a Louisiana dispute that could be an important test of prosecutorial immunity in a death penalty case.

In *Connick v. Thompson*, the U.S. Court of Appeals for the 5th Circuit affirmed a lower court verdict that awarded accused murderer John Thompson $14 million for the district attorney’s failure to train its lawyers about so-called Brady violations, a failure that led to his wrongful conviction and death sentence in 1985.

Current Orleans Parish District Attorney Leon Cannizaro Jr. appealed the ruling to the Supreme Court, asserting that upholding the 5th Circuit’s decision “exposes district attorney’s offices to vicarious liability for a wide range of prosecutorial misconduct.”

The National District Attorneys’ Association filed a brief also expressing concern that liability based on a single failure-to-train claim create the “alarming prospect” that the strong tradition of prosecutorial immunity will be eroded.

Thompson was accused of an unrelated armed robbery in addition to murder in the 1984 death of Raymond Liuzza Jr. The armed robbery trial preceded the murder trial, and prosecutors hoped a conviction in the first case would preclude Thompson from testifying in his murder trial. Thompson’s lawyers later learned that prosecutors withheld exculpatory evidence in the robbery trial that the perpetrator had a different blood type from Thompson’s. He was found guilty of robbery and did not testify at his murder trial. Thompson’s lawyers claim the prosecutors’ failure to reveal the evidence—a violation of prosecutors’ obligation under *Brady v. Maryland*—deprived him of the right to testify in his murder trial. Lower courts agreed and a trial ensued that resulted in the jury award against the prosecutor.

The Supreme Court faced a major prosecutorial misconduct case earlier in the term—*Pottawattamie County v. McGhee*—but the parties reached a settlement after oral argument, removing the case from the docket. The case granted today will be argued in the fall....
New Orleans District Attorney Leon Cannizzaro has enough on his plate trying to put today’s criminals in jail with scant resources, but now he also has to clean up a mess left by some of his predecessors.

For starters, the DA’s office may have to pay a $15 million civil judgment awarded after a prosecutor under former DA Harry Connick Sr. admitted he withheld evidence in a murder trial more than 20 years ago. In that case, John Thompson spent 14 years on death row at Angola and was later acquitted of the murder after a second trial. The case could have been settled long ago for substantially less, but former DA Eddie Jordan refused to negotiate. Now Cannizzaro has to figure out how to pay for those mistakes.

Financially, the Thompson case is the largest of its kind in New Orleans history and could lead to taxpayers paying for more prosecutorial misconduct. Last month, a three-judge panel of the U.S. Fifth Circuit Court of Appeals upheld a jury decision awarding Thompson $14 million in damages and $1 million in attorney fees because the DA’s office failed to properly train, monitor and supervise its attorneys on evidence disclosure.

Last week, Cannizzaro reportedly began exploring the possibility of asking the state to let his office declare bankruptcy. The only other alternative is to ask taxpayers to pick up the tab.

The Thompson case is a cautionary tale of prosecutorial misconduct.

On Jan. 17, 1985, Thompson was charged with the murder of hotel executive Ray Liuzza, who was robbed and killed a month earlier. Before that case went to trial, Connick’s office convicted Thompson of armed robbery in an unrelated case. Thompson’s attorneys in the murder case, knowing that prosecutors would use the armed robbery conviction against him if he testified in his own defense, advised him not to take the stand in the murder trial, which lasted three days. Thompson, who had 4-year-old and 6-year-old sons at the time, was convicted and sentenced to death.

Fourteen years later—just one month before he was scheduled to be executed by lethal injection—investigators working for Thompson discovered the DA’s office had withheld blood evidence that would have exonerated him of the armed robbery. It took another four years for Thompson to win a new trial on the murder charge, on grounds he was deprived of his constitutional right to testify in his own defense. Thompson testified in the second trial, and his attorneys presented other DA-withheld evidence—including police and incident reports, witness statements, and eyewitnesses to the crime. This time, a jury deliberated 35 minutes before acquitting Thompson.

In July 2003, Thompson filed a civil suit against the Orleans DA’s office, seeking damages for the time he spent in prison. His attorney, Michael Banks, who has worked on the case with Gordon Cooney since 1988, says their goal wasn’t to win a big check for Thompson. All the two attorneys hoped for was enough money to get Thompson back
on his feet with a place to live, education and some job training.

“One of the things about death row, as you can imagine, there’s no vocational training,” Banks says. “What are you going to train for? To die? You’re trained to have a needle stuck in your arm and injected with fatal chemicals.”

Before filing the suit, Banks says he and Cooney contacted Jordan’s office and made it very clear they were willing to negotiate. Jordan’s office rebuffed them repeatedly.

“Not $10,000 . . . $100,000 . . . $1 million—not anything,” Banks says.

In early 2007, jurors in the civil suit deemed the DA’s office under Connick had shown “deliberate indifference” to training attorneys in policies and procedures with regard to “Brady material”—a legal reference to the U.S. Supreme Court decision in the case of Brady v. Maryland, which requires prosecutors to turn over evidence favorable to a defendant when it is material to the defendant’s guilt or punishment.

During Thompson’s trial for the unrelated armed robbery, assistant DA Gerry Deegan knowingly withheld evidence—a pant leg that had the perpetrator’s blood on it. The blood on the pant leg was type B, but Thompson is blood type 0. Years later, on his deathbed in 1994, Deegan admitted his misconduct to another attorney. He died shortly thereafter of cancer.

Cannizzaro has asked the appellate court for a rehearing, but he admits Thompson was wronged. He maintains, however, that Connick did provide training with regard to Brady material and that the office shouldn’t be held liable. Cannizzaro spent the early part of his career as a prosecutor in Connick’s office; he was elected judge at Criminal District Court several years before the Thompson case.

“This is the most egregious of circumstances,” Cannizzaro says. “I don’t know if training would necessarily have helped anyone here, because someone opted to go out and literally break the law.”

Thompson, who now directs the nonprofit Resurrection After Exoneration, which helps wrongfully convicted people adjust to life outside of prison, disagrees with Cannizzaro. He says the DA’s office was more concerned with convictions than making sure the right person was incarcerated.

“This is what we hired Harry Connick to do as a prosecutor,” Thompson says. “We asked him to train his people to make sure they protect our rights. I don’t care if [Connick had a problem with murders]—I don’t want him to send an innocent man to jail.”

So far, the courts have agreed with Thompson. In addition to asking for a rehearing before the three-judge appellate panel that unanimously ruled against the DA’s office, Cannizzaro will request all the Fifth Circuit judges to hear the case. Banks says such an “en banc” hearing is rare and that Cannizzaro’s chances of prevailing are slim.

“When you get a unanimous opinion like this, it is much less likely,” Banks says.

As for individual responsibility for prosecutorial misconduct, federal and state courts traditionally have accorded prosecutors wide-ranging immunity from civil lawsuits. In 2005, however, the
Louisiana Supreme Court suspended former Orleans Parish assistant DA Roger Jordan for withholding testimony from the defense in the 1995 murder trial of Shareef Cousin. In that trial, Cousin was convicted of first-degree murder and sentenced to death. After the evidence was produced two years later, Cousin’s conviction was overturned and he was removed from death row. The court gave Roger Jordan a three-month suspended sentence for his misconduct.

Dane Ciolino, a Loyola University law professor, notes that Brady cases take a long time to develop, so it is possible more will surface from the Connick era. Innocence Project New Orleans, a nonprofit group, recently released a damning report on Connick’s 29-year tenure that claimed four innocent men were sentenced to death because prosecutors withheld evidence. Still, Ciolino says the Thompson case doesn’t set a legal precedent. The fiscal ramifications, however, are substantial.

“Fourteen million (dollars) is huge,” Ciolino says. “Keep in mind these weren’t the actions of a few rogue prosecutors; rather they were a pattern of practice in the DA’s office at the time.

If the Thompson judgment is upheld, it will be the largest—but not the only—civil judgment hanging over Cannizzaro’s office, which has an annual budget of about $11 million. In 2005, 40 former DA employees were awarded $1.9 million in a federal racial discrimination suit against Eddie Jordan for firing them after he took office. The DA dragged out the appeals process, and the $1.9 million grew with interest to $3.7 million by late 2007. The state and the city agreed to lend the DA’s office $2.7 million for the judgment—$1.7 million from the state and $1 million from the city—but the office must pay both the city and state $100,000 a year until the loan is repaid. The first payment to the state is due in 2010; the city’s repayment process starts in December of this year.

Cannizzaro says he has a legal obligation to try to overturn the Thompson decision, adding he will appeal the case all the way to the Supreme Court if necessary. Once the appeal process is exhausted, Cannizzaro says he would consider negotiating a settlement with Thompson. Cannizzaro filed a request with the state for permission to file for Chapter 9 bankruptcy, but as of Friday he had withdrawn that request. Banks says he sympathizes with Cannizzaro and is willing to negotiate a settlement, but time is running out.

“[Cannizzaro] is cleaning up a mess that was created in part by predecessors, but now he’s the guy with the broom,” Banks says. “You can sit around and complain all you want that there’s a mess on the floor of your kitchen, but if it’s your kitchen, you have to clean it.”
A Supreme Court case testing whether a prosecutor can be sued for framing suspects for a murder ended Monday when an Iowa county agreed to pay $12 million to two men who were freed after spending 26 years in prison.

In the past, the high court had said prosecutors could not be sued for doing their jobs, even if they sometimes convicted the wrong defendant. And in November, an Obama administration lawyer argued on behalf of Pottawattamie County, asserting that there is no constitutional "right not to be framed."

But several justices said they found that argument appalling. They signaled they were not prepared to shield prosecutors who knowingly fabricated a case against a suspect.

Over the holidays, the county and its lawyers offered to settle the case by paying $12 million to Terry Harrington and Curtis McGhee, who were convicted as teenagers in 1978 of murdering a night security guard. Both men are black.

On Monday, the Supreme Court said it was dismissing the case because it was settled.

"We're delighted to have this settled. It has been a long time coming for them," said Doug McCalla, a lawyer who sued on behalf of Harrington. "Cases like Terry's make it very clear that we need the powerful remedies provided by this country's civil rights statutes."

Harrington was a high school football star in Omaha when a retired police officer was shot and killed at a car dealership in nearby Council Bluffs, Iowa, in the summer of 1977.

A white suspect was identified by a witness, and after he was arrested, he failed a lie detector test.

But police changed direction after they picked up a 16-year-old black youth for stealing cars. When pressed for information on the Council Bluffs killing, he fingered Harrington and another black youth.

Although his initial statements were inaccurate on key details, including the weapon, police and prosecutors relied on the 16-year-old to build a murder case.

Despite their claims of innocence, the two men were convicted before an all-white jury and sentenced to long prison terms.

Decades later, they were able to obtain official files showing that police and prosecutors Dave Richter and Joe Hrvol coaxed the witness to implicate them, while ignoring evidence that pointed to the white suspect. The sole witness against the two men recanted his testimony.

The Iowa courts overturned their convictions five years ago. Harrington and McGhee then sued the county, prosecutors and police in federal court for violating their civil rights, alleging that the prosecutors knowingly used false testimony to convict
them.

The prosecutors said they still believed Harrington and McGhee were guilty.

In the Supreme Court, a lawyer for the prosecutors agreed that police could be sued for fabricating evidence, but not prosecutors, even if they worked together.

Justice Anthony M. Kennedy said that was "a strange proposition."

Justice John Paul Stevens called it "perverse."

Facing a likely loss in the high court, the county moved to settle the case.
Yesterday the Supreme Court agreed to hear a challenge to a $14 million award that a wrongly convicted Louisiana man won after serving 18 years in prison, 14 of them in solitary confinement on death row. New Orleans prosecutors who tried John Thompson for armed robbery in 1985 failed to turn over blood evidence that would have exonerated him. Then they used the robbery conviction to prevent Thompson from taking the stand in his murder trial and to obtain a death sentence (by noting that he had already been sentenced to 50 years without parole for the armed robbery). After an investigator working for Thompson's attorneys discovered the blood evidence in 1999, Thompson received a new trial on the murder charge and was acquitted.

A federal jury concluded that the district attorney's office was liable because it failed to properly train its prosecutors, who should have known they were constitutionally obligated to share exculpatory evidence with the defense. A 5th Circuit panel unanimously upheld the verdict on appeal, and the full court split evenly on the question, allowing the jury's decision to stand. Asking the Supreme Court to review the case, former Orleans Parish District Attorney Harry Connick Sr. argued that his office should not be held responsible for depriving Thompson of his right to due process because Thompson had not shown a pattern of misconduct or demonstrated a direct connection between a lack of training and the error that led to his conviction. (If the prosecutors deliberately withheld the evidence, meaning that lack of training was not really the issue, would that make their office less culpable or more?) More controversially, Connick claimed the rationale for granting prosecutors personal immunity—that the threat of lawsuits would have a chilling effect on their ability to do their jobs—also applies to the government's liability. The implication seems to be that the proper pursuit of justice requires preventing victims of injustice like Thompson, who was nearly executed on several occasions, from recovering any damages at all.

... Another recent Supreme Court case, *Pottawattamie County v. McGhee and Harrington*, involved the related but distinct question of when prosecutors can be held personally liable because they screwed over defendants while functioning as investigators rather than prosecutors. That case ... was settled for $12 million before the Court issued a ruling.
John Thompson spent 18 years in prison for a robbery and murder he did not commit.

In fact, he was only months away from execution while on Louisiana’s death row. Thompson’s fight for freedom was a long and tortured story of misdeeds, wrongful convictions and delay.

Thompson’s case included after-discovered evidence, prosecutorial misconduct, a death-bed confession, a last-minute stay of execution, exoneration and a multi-million dollar verdict. It had all the makings of a Hollywood blockbuster. In fact, The Nine Lives of John Thompson, starring Matt Damon, is already in production.

The full story of John Thompson and the legacy of his prosecution, conviction and exoneration, is unfinished, however.

Last month, the U.S. Supreme Court agreed to hear the Orleans Parish District Attorney’s Office appeal to John Thompson’s $14 million verdict in Connick v. Thompson. The suit alleged that Thompson’s civil rights were violated when the district attorney’s office failed to train prosecutors regarding their responsibilities under Brady v. Maryland.

In Brady, the U.S. Supreme Court declared that the failure to disclose evidence favorable to the accused violated due process where the evidence was material to either guilt or punishment. In the 1972 case Giglio v. United States, the high court expanded on Brady, holding that a prosecutor’s failure to disclose a promise of leniency made to a material witness that could be used for purposes of impeachment violated due process.

In this case, the Brady question is raised in the context of absolute immunity for prosecutors. Absolute immunity has long protected prosecutors from litigation attacking the exercise of their core public functions. Without absolute immunity, a prosecutor may be subject to an unnecessary depletion of resources and the unavoidable distractions that come with defending countless challenges to the decision-making process.

Last term, the U.S. Supreme Court decided Van de Kamp v. Goldstein. The court unanimously extended absolute immunity to claims that supervising prosecutors failed to train subordinate prosecutors on their obligation to disclose impeachment evidence as required by Giglio. The high court held individual prosecutors are immune from suits alleging failure to “adequately train and supervise deputy district attorneys” on disclosure obligations, and “failure to create any system” for managing impeachment evidence.

The Supreme Court is now being asked to decide whether a single-incident failure-to-train claim that is covered by absolute immunity for an individual prosecutor pursuant to Van de Kamp can stand against a district attorney’s office pursuant to a 42 U.S.C. 1983 civil rights action.
The facts of Thompson are compelling.

Thompson and an accomplice were arrested for the 1984 robbery and murder of a man outside his New Orleans home. As a result, Thompson’s photograph was in the newspaper.

The victim of a separate robbery identified Thompson, through the newspaper, as her assailant. Thompson was arrested for the second robbery. The robbery investigation revealed blood on the clothing of one of the victims. The blood was earmarked for testing.

The same two assistant district attorneys were assigned to Thompson’s pending murder and robbery trials. They made a tactical decision to try the robbery before the murder. The rationale was that a robbery conviction against Thompson would keep him from testifying at his murder trial. A robbery conviction could also be useful in obtaining a death sentence at the murder trial.

The blood from the robbery was tested on the eve of trial and found not to be that of Thompson. The blood test was not provided to the defense as required by Brady. Instead, the test was buried and a third prosecutor actually removed the blood stained clothing from the evidence room.

The trials proceeded as planned by the district’s office. Thompson was convicted of robbery, he did not testify during his murder trial and the robbery victims testified during the penalty phase following his murder conviction. Thompson was sentenced to death.

A BURIED BLOOD TEST

Fast forward 14 years and Thompson was on death row. He was scheduled for execution when a defense investigator found the buried blood test. A subsequent test of Thompson’s blood eliminated him as the offender in the robbery. It was then revealed that the assistant district attorney who removed the blood evidence was stricken with terminal cancer and made a death bed confession regarding the disposal of the evidence.

Thompson’s murder conviction was overturned by the Louisiana Court of Appeals due to the fact that his robbery conviction—now overturned—deprived him of his right to testify in his own defense during his murder trial. Thompson was awarded a new trial and subsequently found not guilty.

He sued the Orleans Parish District Attorney’s Office. The jury found that the district attorney’s office showed “deliberate indifference” to establishing policies and procedures to avoid unconstitutional Brady violations. The jury awarded Thompson $14 million and an additional $1 million in legal fees. A divided en banc panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the verdict.

The issue before the Supreme Court is whether a single-instance of failure-to-train gives rise to municipal liability, in this instance a district attorney’s office, and whether such a claim is compatible with the court’s previous decision affirming absolute immunity for failure-to-train as it applied to the occupants of that municipal body.

The U.S. Supreme Court has recognized municipal liability for failure-to-train under Monell v. Department of Social Services, City of Canton v. Harris and Board of the County Commissioners of Bryan County v. Brown.

Beyond the issue of municipal liability, the U.S. Supreme Court has shown a recent
interest in prosecutorial immunity.

Last term, it was *Van de Kamp* and another major prosecutorial immunity case, *Pottawattamie County v. McGhee*, was argued earlier this term before the parties reached a settlement.

The limits of prosecutorial immunity have garnered the attention of prosecutors across the country. The National District Attorneys Association filed a brief expressing concern that liability based on a single-incident of failure-to-train created an “alarming prospect” that the strong tradition of prosecutorial immunity may begin to erode.

Why are prosecutors concerned?

Holding an office liable for the conduct of its occupants, when those occupants individually have absolute immunity seems to abrogate the very holding of *Imbler v. Pachtman* and *Van de Kamp*. If a district attorney’s office were subject to the same litigation that is barred against its employees, how are those individual prosecutors protected from the “judgment-distorting burdens of litigation” protected through *Imbler* and *Van de Kamp*?

In *Thompson*, the very prosecutors who committed the egregious acts of withholding and destroying exculpatory evidence would be protected by absolute immunity. Their office, on the other hand, would not be protected by immunity on the premise that the office failed to train when, in fact, there is scant evidence that training would have had any impact on preventing the intentional misdeeds by the prosecutors involved in this glaring injustice.

Elected district attorneys need to take heed of the growing volume of civil rights suits alleging, among other things, “deliberate indifference” to training and establishing office policies regarding the intricacies of *Brady* and *Giglio*, and the constitutional implications of failing to meet those standards, and the liability issues that could follow.
John Thompson was 40 years old when he walked out of the Angola State Penitentiary in 2003 after spending nearly 18 years on death row for the 1984 murder of Ray Liuzza.

A jury acquitted him of all charges after a stunning disclosure from Orleans Parish District Attorney Harry Connick’s office.

In 1995, lead prosecutor Jerry Deagan told fellow prosecutor Mike Riehlmann he was dying of liver cancer and had a confession—he had concealed blood evidence that could possibly prove Thompson’s innocence.

After Deagan died, Riehlmann said nothing of his friend’s confession for five years while Thompson sat in a cell waiting for his date with the electric chair.

Riehlmann eventually went public with Deagan’s confession in 1999 and was briefly suspended by the Louisiana Supreme Court for his inaction.

Thompson, 44, spent 14 of 18 years in Angola on death row and survived seven execution dates.

Connick and Riehlmann did not respond to repeated calls for comment.

In April, Thompson won a $14-million civil suit against the Orleans Parish District Attorney’s Office, which has appealed the verdict.

Thompson left Angola with a small bag of possessions and $10 given to exiting inmates by the Louisiana Department of Public Safety and Corrections for bus fare.

“I went to prison normal but I’ll be damned if I came out normal,” Thompson said. “No way in the world you’re gonna tell me 18 years didn’t have some type of damage.”

Echoing Green, a New York-based foundation that supports social entrepreneurs, invested more in Thompson than Louisiana did. It gave him a two-year, $60,000-grant to establish Resurrection After Exoneration, an organization designed to give wrongfully convicted victims the financial, emotional and job skills needed to live a successful post-prison life.

“What we’re going through out here is all about what we went through in there,” Thompson said. “It’s hurt all of us. Don’t get me wrong, it hurt but it’s history. And until we put it to sleep, it’s gonna keep haunting us. So we have to deal with the effects of it and look for solutions.”

‘Broken human beings’

In April, the 200th person in the United States was exonerated based on DNA evidence. Louisiana has the fourth-highest rate of DNA exonerations in the country, and 24 people since 1990, including non-DNA cases, have been released from state penitentiaries based on new evidence, according to the New Orleans Innocence Project.
Rob Warden, executive director for Northwestern University's Center for Wrongful Convictions in Chicago, said wrongfully convicted victims experience the same problems as the guilty upon release from prison, including high rates of drug and alcohol abuse, mental health difficulties and recidivism.


"It took 17 years to exonerate them and when they emerged, they were absolutely broken human beings," Warden said.

An innocent man released from prison is not eligible for state probation and parole re-entry services such as education, counseling and job training—services meant for offenders only, not the wrongfully convicted, said Warden.

"If you're guilty, there are some government services. They're usually inadequate but at least there are services," Warden said. "But there's nothing to aid the wrongfully convicted. It's typically, 'Bye. Get the hell out of here.' There is a great reluctance to acknowledge a mistake. Let's just ignore it and sweep it under the rug."

Thompson said the government needs to provide services because it is responsible for releasing human time bombs back into society.

"I guarantee you if one of those guys was raped or molested in that prison, he's going to bring that home," Thompson said. "You get it so twisted in there that you develop hate toward the same people you got to come home to."

Services available

State Sen. Joel Chaisson, D-Destrehan, said Louisiana provided more service to the wrongfully convicted through the Innocence Compensation Fund in 2005, which gives up to $150,000 to the exonerated and job training, counseling services and college tuition.

Thompson said the wrongfully convicted have a hard time finding a place to live where they can be at peace. Most are forced to move in with family members, which can cause turmoil. Former inmates often have difficulties communicating because no one understands what they've been through and the effect it's had on their psyche.

"You can't communicate with your family. You don't know what you're supposed to be doing," Thompson said. "You're supposed to get a job but because of your record or attitude you can't. It's not what we wanted to come home to but we have no choice. And that's the worst—being a grown man having to depend on someone else for help. And it all goes back to that one thing—what I experienced in that prison but no one wants to recognize it."

Resurrection After Exoneration will offer the wrongfully convicted a place to live, jobs and courses in how to manage finances. Participants will be asked to set aside at least 25 percent of their paychecks in savings accounts. After a year, RAE will match the savings to help find independent housing.

'Pride and joy'

Thompson said it is difficult to shake the memory of 18 long years spent in a death row cell as a "dead man walking" for a crime he didn't commit.
He opens a 5-inch-thick, three-ring binder stuffed with legal papers and copied newspaper articles. Thompson points to a picture of a large white man standing behind an expensive mahogany desk. The man is attorney Jim Williams, the senior prosecutor who oversaw Thompson’s trial.

The sleeves of Williams’ white button-down shirt are rolled up revealing a gold watch on his left wrist. He is wearing thin wire framed glasses. Williams’ lips are tightly pursed and his broad chest puffed outward.

“Look at that picture,” Thompson said of the layout in Esquire magazine in the 1990s. “Look at it good.”

Standing on the corner of Williams’ desk in the photo is a small model of an electric chair. Seated in the toy execution device are pictures of five African-American men spread out like a deck of cards. The largest picture, dead center, is of Thompson.

“I was (Williams’) pride and joy,” Thompson said.

Williams sent all five men to death row and had the model electric chair made as a trophy to celebrate his accomplishments.

Of the five men in the miniature electric chair, none remain on death row. Two have been exonerated, one awaits a new trial and the other two had death sentences commuted to life.

Williams, now a private attorney in Gretna, refused repeated calls for comment.

“You done prosecute us, put us on death row, with lies you knew were lies,” Thompson said, standing and gesturing at the photo. “Every time we got an execution date, you was in front of the judge trying to push it. They try to straight up execute me when they know I didn’t commit the crime and yet they still trying to kill me. And this is not premeditated murder?

“They call it malfeasance of office and get a slap on the wrist while I’m up at Angola on death row for 18 years. Somebody help me understand this.”
“Free After 14 Years on Death Row, Man Seeks to Help Other Falsely Accused Ex-Prisoners”

*The Times-Picayune*

September 12, 2009

Lolis Eric Elie

When John Thompson’s lawyers arrived at Angola State Penitentiary for a somber meeting more than a decade ago, he didn’t ask for much detail about his case. He only asked them for a date—the day the state would put him to death.

May 20, 1999, they told him—one day before his youngest son was to graduate from high school in New Orleans.

Lots of dates had been set before then. Amid those dates and the appeals that separated them, Thompson had grown close to Michael Banks and Gordon Cooney, his Philadelphia lawyers. Their conversations at times drifted from life-and-death legal questions to more ordinary subjects: the New Orleans Saints and Philadelphia Eagles.

It was on the basis of that friendship that Thompson made this request: “You guys have to promise me that you’re going look out for my son,” Thompson told the lawyers. “He’s a good kid. You have to promise me you’re going to keep an eye out for him.”

Next, Thompson reassured the lawyers that he didn’t hold them responsible for his impending death, although they had inadvertently missed a deadline for filing a challenge that might have spared his life.

His lawyers saw in Thompson a dignity and grace, long after the former parking-lot attendant and petty drug dealer was wrongly sent to death row for allegedly killing a New Orleans hotel executive.

And Thompson’s supporters find the same traits in him today, six years after he was set free, having been exonerated in a second murder trial.

John Thompson, who is married now, is developing an organization to assist people newly released from prison, and he is speaking widely on injustices he sees in the criminal justice system.

But Thompson, 46, is best known as the man who is trying to collect on a $14 million federal court judgment against the Orleans Parish district attorney’s office, after he spent 14 years on death row.

The civil penalty came after a finding that a systematic training failure in the office, under former District Attorney Harry Connick, contributed to his prosecutors withholding of crucial evidence that could have kept Thompson out of prison. The $14 million court judgment is likely to be appealed by the DA’s office to the U.S. Supreme Court.

The evidence-hiding episode was hardly isolated: The Louisiana Supreme Court has reversed seven convictions as a result of the failure of Connick’s office to turn over relevant evidence to defense attorneys, according to Innocence Project-New Orleans.

Current District Attorney Leon Cannizzaro and others rail against a legal judgment that would deal a devastating financial blow to an office that has an annual budget of about
$11 million.

Louisiana Attorney General James “Buddy” Caldwell, meanwhile, is balking at the release of a $150,000 payment that may be due Thompson under a state program that compensates individuals who were wrongly imprisoned.

Caldwell argues that the DA’s office is a subdivision of the state and, therefore, the state may be giving Thompson double compensation if the civil judgment is paid. A state appeals court has rejected that position, and Caldwell is appealing to the Louisiana Supreme Court.

Malice toward none

Even as he waits to see whether he will collect, Thompson is moving on with his life’s work.

Cooney detected a certain selflessness in Thompson back in 1999, during his most fearful time, when he was given the new execution date.

“His first concern was not, ‘What else can you do to save my life?’ His first concern was about his son. His second concern was about us,” the lawyer said. “Having been through that, nothing surprises me about John.”

Thompson’s story has, indeed, taken surprising twists since his 14 years on death row.

While many exonerated of crimes simply struggle to make it on the outside, Thompson has established the organization Resurrection After Exoneration to help former inmates.

Thompson displays no bitterness when he talks about being railroaded. Perhaps his cool derives from the influence of older inmates during his years at Angola.

He was 22 when he was sent to Angola in 1985, and his youthful temper told him to strike back at abusive guards. His mentors told him to study the law and use the legal process to gain his freedom.

“I had brothers telling me, ‘Don’t fight them people like that. You can’t win,’” he said.

“The ones that are locking you up are not your enemy,” the older inmates told him. “They are oppressed just like you are. You have to look higher than them.”

“They taught me how to fight with a pen,” he said.

Voice of innocence

Now that he’s on the outside, he wants to teach parallel lessons to exonerees and other former inmates, lessons about how to become contributing members of society. While in prison, Thompson conceived of an organization to help such people.

In 2007, Thompson received a two-year fellowship from the Echoing Green Foundation in New York that included $60,000 in cash and more than $40,000 in other support to help his build his organization.

“What he walked away from being in prison for almost two decades with such an unbelievable attitude of wanting to give back and be of service,” said Lara Galinsky, senior vice president of the foundation. “His heart was in absolutely the right place.”

Thanks to a private donor, the organization has a building on St. Bernand Avenue.
Dubbed RAE House, it will provide housing for up to three exonerees and space for training classes, in addition to serving as a headquarters.

“We have over 10,000 inmates being released from jail in Louisiana per year,” Thompson said. “Out of that 10,000, 70 percent of them return (to prison) in one form or fashion within the first six months, or have some kind of interaction with the police again.

“Nobody is there to guide them. RAE wants to be there, to be that guidance.”

RAE has already produced a play, “Voices of Innocence,” in which four exonerees tell their stories.

“He’s the first exoneree around the country to do this,” said Emily Maw, the director of the Innocence Project New Orleans, an organization that bills itself as an advocate for “innocent prisoners with nonviolent records” in Louisiana and Mississippi.

“The reason that John is doing what he is doing, and is good at what he is doing, is that no lawyer and no social worker can relate to what these guys have been through,” said Maw, who chairs the board of Thompson’s organization.

Seeking stability

Thompson is more fortunate than most former inmates. So many lawyers and other supporters rallied to his cause during his 18 years in prison that Thompson had a support system in place when he was released.

Even so, he faced big adjustments as a free man.

“He didn’t have a toothbrush or a clean pair of underwear,” Banks said. “He had never used a cell phone or an ATM card.”

Even something as mundane as food prices were shocking to a man who had spent 18 years in prison.

“We’d go to Cooter Brown’s. It’d be $8 for a po-boy,” said Nick Trenticosta, one of Thompson’s New Orleans lawyers.

“John thought that we were at Commander’s Palace. His idea of a po-boy was $3.50. For a nice one!” said Trenticosta, who hired Thompson right after his prison release.

“What Thompson felt he most needed was a sense of stability—and new acquaintances. Most of his former friends, he said, are either in jail or dead. A “church woman” was what he wanted most.

“I wanted somebody to keep that Godly type manner around me,” he said. Divine providence, he believes, brought him Laverne Jackson, a young woman he had vaguely known when they grew up together in Central City, and who attended church with Thompson’s mother.

Their first phone conversation lasted most of the night. The first time he visited her home, he looked it over carefully for whatever information it could convey about her fitness for matrimony.

Forty-four days after his prison release, John and Laverne were married.

“We are so different it’s a crying shame,” he said. “But she gives me so much stability.”
As a teenager, Thompson had fathered two sons by two different mothers. Though young, Thompson said he took fatherhood seriously, both in and out of prison. Many of his conversations with his new wife were about his sons.

“He would talk about how (before he went to prison) his baby would fall asleep on his chest, and how he would bring his sons to the park, and how he would have them with him, everywhere he went,” Laverne Thompson said.

**Honor on death row**

In prison, he had friends, lawyers and his spiritual adviser bring his sons to see him. As the date of his scheduled execution loomed, Thompson focused on his youngest son, John Jr., or “Tiger,” as he used to be known.

Tiger had typical senior year expenses such as the prom and the class trip. “John really wanted to be able to do something for that,” said Carol Kolinchak, one of Thompson’s local lawyers.

“He started selling what meager possessions he had on death row—cassettes and a tape player and different things like that. He asked me if I would sort of coordinate it. So different guys on death row would have money orders sent to me and John would tell me how he wanted the money distributed.”

Such commerce is one of the many facets of life on death row that outsiders wouldn’t know about.

Thompson stresses the humanity of the men with whom he’d shared the death row experience. Some were undoubtedly crazy, he said. Some had committed horrible crimes. But some were innocent, he said, and many were surprisingly compassionate.

“Do you know that when somebody is going to be executed, everybody on death row-fast that night?” he said, adding that the inmates also hold a prayer vigil.

“That’s a side of death row that most people won’t hear,” he said. “Why? Because these are supposed to be these wild madmen that don’t care about nothing.”

**Big plans**

If he does get millions from the federal court judgment, Thompson said he will use the money to expand the work he is already doing. Talking about his plans, he flits from idea to idea exuberantly.

“My vision is bigger. If God gives me my money, I just can’t get over why we can’t have a trade school right in the city,” he said.

“Why can’t we take one of these schools and convert it and turn it into a university-type setting?” he said. “What is so hard about creating that?”

Thompson’s larger vision also includes trying to sensitize law enforcement officials to the plight of people like him.

“I’m looking for accountability,” he told a class of LSU law students last month. “I don’t have no problem with anybody in here wanting to be a district attorney. I want my streets safe too.

“When y’all leave out of here and y’all start working, y’all’s ethics are going to be put to a test,” he said. “When y’all see that decision and get to that point, just remember what happened to me and to the rest of these guys that we represent.”
Accused of abuse by a rebellious child, the parents were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. They then petitioned the criminal court, which found them "factually innocent" of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as "not true." Nevertheless, the parents were identified as substantiated child abusers and placed on California's Child Abuse Central Index (CACI). California offered no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. The district court granted defendant county and law enforcement officers' motion for summary judgment. The parents appealed. The appellate court determined that the stigma of being listed in CACI plus the various statutory consequences of being listed on the CACI constituted a liberty interest. The lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violated the parents' due process rights. The grant of summary judgment to the state and the county was reversed and the case was remanded.

Question Presented: Are claims for declaratory relief against a local public entity subject to the requirement of Monell v. Department of Social Services, 436 U.S. 658 (1978) that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom or practice attributable to the local public entity as determined by the First, Second, Fourth and Eleventh Circuits, or are such claims exempt from Monell's requirement as determined by the Ninth Circuit?

Craig Arthur HUMPHRIES; Wendy Dawn Aborn Humphries, Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; Leroy Baca, individually and in his official capacity as Los Angeles County Sheriff; Michael L. Wilson, individually and in his official capacity as a Detective and/or Deputy of the Los Angeles County Sheriff's Department; Charles T. Ansberry, individually and in his official capacity as a Detective of the Los Angeles County Sheriff's Department; Bill Lockyer, Attorney General, in his official capacity as Attorney General of the State of California, Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit

Amended January 15, 2009

[Excerpt; some footnotes and citations omitted.]
BYBEE, Circuit Judge:

Appellants Craig and Wendy Humphries are living every parent's nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them "factually innocent" of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as "not true."

Notwithstanding the findings of two California courts that the Humphries were "factually innocent" and the charges "not true," the Humphries were identified as "substantiated" child abusers and placed on California's Child Abuse Central Index ("the CACI"), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This case presents the question of whether California's maintenance of the CACI violates the Due Process Clause of the Fourteenth Amendment because identified individuals are not given a fair opportunity to challenge the allegations against them. We hold that it does.

I. FACTS AND PROCEEDINGS

II. ANALYSIS

To establish a prima facie case under § 1983, the Humphries must establish that: (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct violated a right secured by the Constitution and laws of the United States. Furthermore, the Supreme Court has insisted that even if there is a qualified immunity issue, we must still consider the threshold question of the "existence or nonexistence of a constitutional right as the first inquiry." There is no question that the Humphries' listing on the CACI occurs under color of state law. Thus, the issue in this appeal is whether the initial and continued inclusion of the Humphries on the CACI deprives them of any rights secured by the Constitution and laws of the United States. We find that it does. Accordingly, after our discussion of the existence of a constitutional violation we consider whether the individual and institutional Appellees are entitled to immunity for their acts.

A. Procedural Due Process

The Humphries argue that Appellees violated their Fourteenth Amendment right to procedural due process by listing and continuing to list them on the CACI, without any available process to challenge that listing. In procedural due process claims, the deprivation of a constitutionally protected interest "is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Our analysis proceeds in two steps: "the first asks whether there exists a liberty or
property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. The district court found that the Humphries' listing on the CACI did not deprive them of any constitutionally protected liberty or property interest. The court did not reach the second step of the due process analysis.

1. Deprivation of a Protected Liberty Interest

The Humphries contend that they have a liberty interest under the “stigma-plus” test of Paul v. Davis. The Humphries argue that the stigma of being listed in the CACI as substantiated child abusers, plus the various statutory consequences of being listed on the CACI constitutes a liberty interest, of which they may not be deprived without process of law. We agree.

In Wisconsin v. Constantineau, the Supreme Court held that a liberty interest may be implicated “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him.” The following year the Court stated that a government employee’s liberty interest would be implicated if he were dismissed based on charges that “imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.” In Paul v. Davis, the Supreme Court clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of “a right or status previously recognized by state law.” This holding has come to be known as the “stigma-plus test.”

a. Stigma

As the district court found, being labeled a child abuser by being placed on the CACI is “unquestionably stigmatizing.” We have observed that there is “[n]o doubt . . . that being falsely named as a suspected child abuser on an official government index is defamatory.” Indeed, “no conduct so unequivocally violates American ethics as . . . sexual predation upon the most vulnerable members of our society.” The horror deepens when such abuse occurs at the hands of the parents, who have an obligation to protect their children.

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b. Plus

The more difficult issue is whether the Humphries can satisfy the “plus” test. The Humphries must show that, as the result of being listed in the CACI, “a right or status previously recognized by state law was distinctly altered or extinguished.”

As the Court explained in Paul, when the chief of police in Constantineau posted the plaintiff’s name on a list forbidding the sale of alcohol to her, it “significantly altered her status as a matter of state law” by depriving her “of a right previously held under state law[—]the right to purchase or obtain liquor in common with the rest of the citizenry.” The Court concluded that “it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards.”

In Paul itself, the Louisville Chief of Police placed Davis’ name on a flyer distributed to Louisville merchants containing a list of individuals thought to be active in shoplifting. In contrast to the mandatory nature of the statute in Constantineau, the flyer merely “came to the attention” of Davis’ supervisor who warned him not to repeat his actions in the future. The Court
found that this harm to Davis' reputation was not sufficient to create a liberty interest. Notably, no law had required the Chief of Police to distribute this flyer, nor did any law require employers to check the list. Thus, although any impairment to Davis' employment opportunities "flow[ed] from the flyer in question," his injury only occurred because the flyer happened to have "c[o]me to the attention of [his] supervisor."

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The Humphries allege more than mere reputational harm—being listed on the CACI alters their rights in two general ways. First, state statutes mandate that licensing agencies search the CACI and conduct an additional investigation prior to granting a number of rights and benefits. These rights include gaining approval to care for children in a day care center or home, obtaining a license or employment in child care, volunteering in a crisis nursery, receiving placement or custody of a relative's child, or qualifying as a resource family. These benefits are explicitly conditioned on the agency checking the CACI and conducting an additional investigation. Second, information in the CACI is specifically made available to other identified agencies: state contracted licensing agencies overseeing employment positions dealing with children, persons making pre-employment investigations for "peace officers, child care licensing or employment, adoption, or child placement," individuals in the Court Appointed Special Advocate program conducting background investigations for potential Court Appointed Special Advocates, and out-of-state agencies making foster care or adoptive decisions. Although these agencies are not explicitly required by CANRA to consult the CACI, they may, as a practical matter, be required to do so by their own regulations or practices, as discussed below. Thus, inclusion in the CACI alters the Humphries' legal rights or status in a variety of ways that Californians who are not listed on the CACI are not subject to: applying for custody of a relative's child, becoming guardians or adoptive parents (inside or outside of California), obtaining a license for child care, becoming licensed or employed in a position dealing with children, obtaining employment as a peace-officer, and involvement in adoption and child placement. We have mentioned, and the district court found, that the Humphries were directly affected in their eligibility to work or volunteer at a local community center. The Humphries also introduced evidence indicating that Wendy was affected in her ability to renew her teaching credentials.

We recognize that being listed on the CACI may not fully extinguish the Humphries' rights or status. Agencies that obtain information from the CACI are responsible for "drawing independent conclusions regarding the quality of the evidence disclosed." Thus, for example, inclusion on the CACI does not necessarily bar the Humphries from obtaining a license for child care, but it does guarantee that the licensing entity will conduct an investigation anew before issuing or denying the license. However, we need not find that an agency will necessarily deny the Humphries a license to satisfy the "plus" test. Outright denial would mean that a listing on the CACI has extinguished the Humphries' legal right or status. Rather, Paul provides that stigma-plus applies when a right or status is "altered or extinguished."

We hold that where a state statute creates both a stigma and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated. A tangible burden exists in this context where a law
effectively requires agencies to check a stigmatizing list and investigate any adverse information prior to conferring a legal right or benefit. As outlined above, California created the CACI via CANRA and explicitly requires agencies to consult the CACI and perform an independent investigation before granting a number of licenses and benefits. This requirement places a tangible burden on a legal right that satisfies the "plus" test.

We find that a tangible burden also exists where the plaintiff can show that, as a practical matter, the law creates a framework under which agencies reflexively check the stigmatizing listing—whether by internal regulation or custom—prior to conferring a legal right or benefit. CANRA appears to create such a legal framework. CANRA explicitly provides that a variety of agencies will have access to the CACI, and we cannot turn a blind eye to the actions of these other agencies merely because they are not explicitly required by statute to receive CACI information.

* * *

Viewing the evidence in the light most favorable to the Humphries, we conclude that California has implemented a system whereby the CACI is reflexively consulted prior to the conferral of legal rights or benefits under California law, even where the statute does not necessarily require agencies to check the list on its face. The CANRA both stigmatizes the Humphries and creates an impediment to the Humphries' ability to obtain legal rights. The Humphries have asserted the existence of a sufficient liberty interest under the stigma-plus test, of which they may not be deprived without due process of law.

* * *

Thus, we conclude that the Humphries' legal rights or status have been altered. First, California has explicitly required some agencies to search a stigmatizing listing and conduct an additional investigation before issuing a license or benefit under state law. Second, California has made CACI information available to a variety of other agencies, and the Humphries have introduced evidence that those agencies—especially agencies charged with ensuring the safety and well-being of children—reflexively check the CACI before issuing a government license or benefit. Thus, being listed on the CACI places an added burden on entities wishing to confer legal rights or benefits, makes the chances of receiving a benefit conferred under California law less likely, and practically guarantees that conferral of that benefit will be delayed. Accordingly, we hold that the Humphries have satisfied the first step of the procedural due process analysis: They have a liberty interest in both their good name and using it to obtain a license, secure employment, become guardians, volunteer or work for CASA, or adopt. Listing the Humphries on the CACI places a tangible burden on their ability to exercise this liberty interest. We proceed to consider whether they have been deprived of this interest without due process of law.

2. Adequacy of the Procedural Safeguards

The Humphries must show that the procedural safeguards of their liberty interest established by the state are constitutionally insufficient to protect their rights. California currently provides some minimal safeguards against erroneously listing someone on the CACI.

A person who believes he has been wrongfully listed on the CACI has two possible remedies under CANRA. First, a listed person might try to get the agency who originally reported the information to
the CACI to correct its reports. As noted above, it appears that California agencies have a general duty to maintain accurate records and to advise CA DOJ of any report that subsequently proves unfounded. CANRA does not identify how an agency is to ensure that it has accurate records or who is responsible for correcting any errors. The CA DOD's responsibility is limited to ensuring that the CACI "accurately reflects the report it receives from the submitting agency"—it does not appear to have any duty to ensure the accuracy of the report itself. At best, CANRA implies that reports are subject to correction "by the investigator who conducted the investigation." However, California provides no formal mechanism for requesting that an investigator review a report or for appealing an investigator's refusal to revisit a prior report. Thus, for this first avenue of obtaining relief, at best an informal process exists in which the person seeking review must contact the agency blindly and hope the investigator is responsive. It is not clear what a person seeking review is to do if the investigator has transferred from the agency, retired, or died.

Second, the person may rely on a licensing or employing agency to conduct its own investigation and to "draw[ ] independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, placement of a child, employment or volunteer positions with a CASA program, or employment as a peace officer." Indeed, no particular process is required prior to the agency "drawing independent conclusions." Unless the agency unilaterally undertakes its own detailed investigation, it may only perpetuate any errors contained in the original report, even as it draws its own "independent conclusions." In addition, even if the agency has the time, funding, and resources to determine that the evidence contained in the CACI is erroneous or unfounded, it does not have power to expunge the listing. Thus, in the best case scenario for an innocent person placed on the CACI, the only remedy under this avenue for relief is that the agency might still confer the government benefit after taking the time to conduct an added background investigation. The CACI listing, however, remains.

We evaluate the process that California provides persons listed on the CACI under the three part test set out in Mathews v. Eldridge. Mathews instructs us to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation and the probable value of additional procedural safeguards; and (3) the governmental interest, including the fiscal and administrative burdens of additional procedures. The procedural due process inquiry is made "case-by-case based on the total circumstances." We will consider the private and governmental interests first, followed by a discussion of the risk of error in the procedures established by the state.

a. Private Interest

The Humphries' argument in support of their private interest at stake is essentially coextensive with their argument in support of their liberty interest. From all we have said, the Humphries have an interest in not being stigmatized by having their names included in a child abuse database that places a tangible burden on legal rights, if they have not committed the acts underlying the reports that led to their inclusion. Thus, they have an interest in pursuing employment and adoption, seeking to obtain custody of a relative's children, and securing the appropriate licenses for working with children without having to be subject to an additional investigation, delays, and possible
denial of a benefit under California law due to an incorrect listing on the CACI.

b. Governmental Interest

There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the CACI, is an effective and responsible means for California to secure its interest. Nevertheless, the operative question is not whether California has a significant interest in maintaining CACI—no one doubts that it does—but rather whether California has a significant interest in having a limited process by which an individual can challenge inclusion on the CACI, and to what extent adding additional processes will interfere with the overarching interest in protecting children from abuse.

We do not question, for example, that California has a significant interest in maintaining even “inconclusive” reports, which are reports that are neither “substantiated” nor “unfounded.” Such reports that only hint at abuse, when coupled with other information, can reveal patterns that might not otherwise be detected and can be useful to law enforcement. But it is equally apparent that California can have no interest in maintaining a system of records that contains incorrect or even false information. First, the effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims. . . . In addition, there is a great human cost in California, as elsewhere, to being falsely accused of being a child abuser. These costs are not only borne by the individuals falsely accused, but by their children and extended families, their neighbors and their employers. Indeed, with the same passion that California condemns the child abuser for his atrocious acts, it has an interest in protecting its citizens against such calumny.

California contends that requiring any process beyond what it currently provides will substantially impair the state’s ability to protect children because hearings are time-consuming and drain limited resources, resulting in less efficient delivery of primary services such as protecting children. It is true, of course, that giving individuals some additional procedure by which they can challenge their listing on CACI will impose administrative and fiscal burdens on California. However, generally these burdens are precisely the sort of administrative costs that we expect our government to shoulder. The state has not provided any evidence that the process required to sort through claims of an erroneous listing in the CACI is any more burdensome than the process due in any other context.

c. Risk of Erroneous Deprivation

The final, and perhaps most important, Mathews factor is the risk of erroneous deprivation and the probable value of additional procedural safeguards. As we evaluate this factor, we ask “considering the current process, what is the chance the state will make a mistake?” In this case, we ask, “after examining the process by which persons are listed on the CACI, what is the risk of someone being erroneously listed?” In light of the Humphries’ allegations—and keeping in mind that we are reviewing a grant of summary judgment in favor of the state—the answer is “quite likely.”

Appellees argue that the current procedures present little risk of erroneous deprivation because an agency may transmit a child abuse report only after it “has conducted an active investigation and determined that the report is not unfounded.” We are not
assuaged. A determination that the report is "not unfounded" is a very low threshold. . . . [It] is the reverse of the presumption of innocence in our criminal justice system: the accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable, or accidental. Incomplete or inadequate investigations must be reported for listing on the CACI.

We have no evidence in the record that indicates exactly how many "false positives" reporting agencies receive. However, given the high stakes in child abuse cases, presumably an agency investigation and child abuse report can be triggered by as little as an anonymous phone call. It is apparent in such a system there is a real danger of prank and spite calls. California should investigate such reports, and it can—and perhaps should—retain records on any reports it cannot determine to be "unfounded." When it retains all reports that are "not unfounded," it assumes a substantial risk that some of its reports are false, even if the investigator cannot prove to his own satisfaction that they are "unfounded." We understand the need for investigators who work off of hunches, disparate patterns, and minute clues to maintain files on unsubstantiated reports of child abuse for their own investigative purposes. But when such reports find their way into the CACI, there is a real risk that people, like the Humphries, will have to explain publicly how their names ended up on the state’s child abuse database.

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Any errors introduced at the time information is posted to the CACI arguably can be corrected. As we have noted, once the information is posted, the CA DOJ must notify the known or suspected child abuser that he has been reported to the CACI. At that point, if the person believes he has been reported in error, he has three options. First, he can try to informally persuade the investigator who reported it in the first place. Second, he can wait until an agency or other entity that is required to consult the CACI receives the information and rely on the agency or other entity's "independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions." Third, once an agency makes an adverse decision, some persons have a right to appeal the decision in court. None of these means for correcting erroneous information in the CACI is well designed to do so. We consider each in turn.

1. **Persuading the investigator.** First, attempting to persuade the investigating officer is not a satisfactory way to correct the records. The Humphries received notice that their names had been referred to the CACI. They were not told what information was there—although, given their recent experience, they had a pretty good idea—and were told, "If you believe the report is unfounded . . . please address your request to Detective M. Wilson." In other words, the only recourse offered to the Humphries was to try to get the investigator who had made the original determination that their case was "substantiated" to change his mind. Nothing in CANRA instructs Detective Wilson how to deal with the Humphries. He is not required to respond to the Humphries or address their concerns or pleas in any way, he has been given no standard for reevaluating his initial judgment, and no one else other than Detective Wilson is required to respond to the Humphries. If Detective Wilson refuses to reconsider his original evaluation, the Humphries have no statutory recourse elsewhere within the LASD.

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2. **Reaching an independent agency**
Appellees also argue that there is little risk of erroneous deprivation because an agency that has consulted the CACI must base its decision regarding the listed person on its own “independent conclusions.” Furthermore, California regulations make it “the responsibility of authorized individuals or entities to obtain and review the underlying investigative report and make their own assessment of the merits of the child abuse report.” The decision maker “shall not act solely upon [CACI] information.”

First, we note that by the time the decision maker has referenced the CACI and become charged with undertaking an additional investigation, the individual liberty interest in avoiding stigma and alteration of a legal right has already occurred.

Second, even if the agency conducts a thorough investigation, nothing the agency decides affects the CACI listing; that is, even if an agency, conducting its own investigation, decides that the claims against a listed person are unfounded, the agency has no power to correct the CACI listing. The person is stuck in CACI-limbo. Thus, the process proferred by Appellees fails to address the stigma of being listed on the CACI and resolve the fact that other agencies will still be forced to consult the CACI to confer other benefits under the law. Disregarding these limitations temporarily, it is not clear to us that an agency, in reality, can or will regularly engage in the process required to determine that charges against an individual are unfounded. As a practical matter, when a person’s name appears on the CACI, the agency must take that fact seriously and presume that the person has committed some kind of child abuse, even if there is no record of conviction.

In sum, any agency—and especially agencies that deal with children—are likely to presume the integrity of the information found on the CACI, assume that individuals listed on the CACI actually abused children, and deny the license rather than risk awarding, for example, a child care license to a listed individual.

3. Seeking court review. Finally, Appellees argue that some persons adversely affected by decisions resulting from their listing on the CACI may seek redress in the legal system on a case-by-case basis. The administrative review process offers some check on the system. As we know from our own experience, court review of agency decisions can be a cumbersome process. What is most troubling about the states’ argument, however, is that even court review cannot solve the problem. Even if an individual is ultimately successful and obtains, for example, a child-care license, the court’s favorable disposition has no apparent impact on the individual’s listing on the CACI. Thus, the judicial review afforded by the statute faces the same problem as the original agency determination: It cannot end the stigma or the tangible burden on government rights that an individual listed on the CACI faces.

In sum, we are not persuaded that California has provided a sufficient process for ensuring that persons like the Humphries do not suffer the stigma of being labeled child abusers plus the loss of significant state benefits, such as child-care licenses or employment. The processes in place in California do not adequately reduce the risk of error.
d. Balancing

Mathews requires that we consider the risk of error in light of the individuals' interest and the government's interest. In the end, this is not a difficult case. The lack of any meaningful, guaranteed procedural safeguards before the initial placement on CACI combined with the lack of any effective process for removal from CACI violates the Humphries' due process rights. Undoubtedly, California has a strong interest in protecting its youngest and most vulnerable residents from abuse, but that interest is not harmed by a system which seeks to clear those falsely accused of child abuse from the state's databases. CANRA creates too great a risk of individuals being placed on the CACI list who do not belong there, and then remaining on the index indefinitely.

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B. Qualified Immunity

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C. Monell Liability

Unlike Detective Wilson, the County is not entitled to qualified immunity for acting in good faith reliance on state law. Rather, the County is subject to liability under Monell v. Department of Social Services, if a "policy or custom" of the County deprived the Humphries of their constitutional rights. The district court did not address the County's liability under Monell because it found no violation of the Humphries' constitutional rights.

We have held that "[i]n order to avoid summary judgment a plaintiff need only show that there is a question of fact regarding whether there is a city custom or policy that caused a constitutional deprivation." CANRA itself did not create a sufficient procedure by which the Humphries could challenge their listing on the Index. Nothing in CANRA, however, prevented the LASD from creating an independent procedure that would allow the Humphries to challenge their listing on the Index. By failing to do so, it is possible that the LASD adopted a custom and policy that violated the Humphries' constitutional rights. However, because this issue is not clear based on the record before us on appeal—and because the issue was not briefed by the parties—we remand to the district court to determine whether or not the County is entitled to qualified immunity.

III. CONCLUSION

For the reasons described above, CANRA violates the Humphries' procedural due process rights, in violation of 42 U.S.C. § 1983. We therefore reverse the district court's grant of summary judgment to the State and the County and remand for further proceedings consistent with this opinion. We affirm the district court's grant of summary judgment to Detectives Wilson and Ansbery and Sheriff Baca on the grounds of qualified immunity.

AFFIRMED in part; REVERSED in part and REMANDED.
Craig and Wendy Humphries of Valencia have been “living every parent’s nightmare,” as a judge put it, since Craig’s rebellious teenager falsely accused them of abuse nine years ago. They were arrested by Los Angeles County sheriff’s deputies and had their other young children taken away from them.

It continues today. Even though the state courts agreed that the girl’s original complaint was “not true” and that the couple were “factually innocent,” the Humphrieses are still listed as child abusers on the state’s Child Abuse Central Index.

A federal appeals court ruled that Los Angeles County should pay damages to the couple, but the U.S. Supreme Court intervened Monday and said it would hear the county’s claim that it is the state that is at fault.

California’s Child Abuse and Neglect Reporting Act requires various state and local officers, including the police, to submit reports of child abuse even if they are “inconclusive.” The list includes 800,000 names. When the Humphrieses first tried to be removed from the index, they were told to contact the deputy who filed the original report. But he said the complaint was “substantiated” at the time he filed it, and therefore, could not remove their names. Wendy Humphries, a special education teacher, worried that being on the list could prevent her state credentials from being renewed.

“We’re still trying to get them out of the index, but it hasn’t happened yet,” said Esther Boynton, a Beverly Hills lawyer who has filed suits to challenge the law.

The Humphrieses had sued in federal court, alleging that their constitutional rights were violated. They won in 2008 before the 9th Circuit Court of Appeals, which said the system is unconstitutional because it does not give innocent people a procedure to have their names removed.

More than a year later, state officials say they are still pondering the matter. “We’re still in the process of determining what is needed to comply with the 9th Circuit’s decision,” said Evan Westrup, a spokesman for the California Department of Justice.

“The Humphries had sued in federal court, alleging that their constitutional rights were violated. They won in 2008 before the 9th Circuit Court of Appeals, which said the system is unconstitutional because it does not give innocent people a procedure to have their names removed.

More than a year later, state officials say they are still pondering the matter. “We’re still in the process of determining what is needed to comply with the 9th Circuit’s decision,” said Evan Westrup, a spokesman for the California Department of Justice.

“We’re still trying to get them out of the index, but it hasn’t happened yet,” said Wendy Humphries, a special education teacher, worried that being on the list could prevent her state credentials from being renewed.
California’s Child Abuse Central Index, a database of known or suspected child abusers, violates procedural due process in failing to give listed persons a fair opportunity to challenge the allegations against them and obtain delisting, the U.S. Court of Appeals for the Ninth Circuit held Nov. 5 (Humphries v. Los Angeles County, 9th Cir., No. 05-56467, 11/5/08).

Being listed on the CACI is stigmatizing in itself, and it also makes access to certain licenses, jobs, and benefits less likely, Judge Jay S. Bybee said. But the state spells out no procedure for getting delisted. Bybee thus concluded that the innocent plaintiffs’ being listed on CACI resulted in the “stigma-plus” needed under Paul v. Davis, 424 U.S. 693 (1976), for their reputational injury to be actionable under the 14th Amendment’s due process clause.

The court followed Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994), interpreting a similar New York statute, but rejected Smith v. Siegelman, 322 F.3d 1290 (11th Cir. 2003), involving a variant Alabama law, “[t]o the extent that the Eleventh Circuit refuses to recognize a liberty interest [under the due process clause] where the state functionally requires agencies to consult a stigmatizing list prior to conferring a government benefit.”

Under California’s Child Abuse and Neglect Reporting Act, Cal. Penal Code §§ 11164–11174, and implementing regulations, law enforcement and child welfare agencies are required to investigate reports of child abuse or neglect and determine whether the incident is “substantiated, inconclusive, or unfounded.” The incident must be reported to the California Department of Justice and included in the CACI unless it is determined by the investigator to be “unfounded,” that is, “false,” “inherently improbable,” an accidental injury, or not constituting child abuse or neglect.

CACI data is made available to state and local agencies and persons involved in licensing or making background inquiries regarding child care providers, peace officers, adopting parents, or foster parents. It is also made available for use in out-of-state background checks in foster or adoptive parent cases. Certain in-state agencies are required by statute to check the CACI before granting child care-related licenses.

An agency forwarding an incident for listing on the CACI must notify the listee. But the statute provides no procedure for challenging a listing, and, while indicating that the state DOJ shall not retain a report “which subsequently proves to be unfounded,” it does not specify who makes that determination, although the court surmised that it is the submitting agency.

Daughter Reports Abuse.

In this case, the plaintiffs’ 15-year-old daughter reported that they had abused her for several months. Based on an emergency room examination and a police report from Utah (where the child had driven herself to be with her biological mother), a Los Angeles County Sheriff’s Department
detective obtained warrants and arrested and booked the plaintiffs for cruelty to a child and torture. The couple's other two children were placed in foster care. The detective identified the case as a "substantiated report" of child abuse, and their names were listed on CACI.

The criminal case against the couple was dismissed, however, after the prosecutor learned that a doctor had surgically removed a melanoma from the daughter's shoulder and had fully examined her during the alleged period of abuse, but had found no signs of it. The couple was found "factually innocent" of the torture charge.

But when they asked the Sheriff's Department to remove their names from CACI, a sergeant told them that the fact that charges were filed "would indicate to us that some sort of crime did occur," and the dismissal of the case "would not negate the entries" into CACI. The couple then filed this 42 U.S.C. § 1983 suit, alleging in part that their initial and continued inclusion in CACI violated procedural due process, and seeking damages and injunctive relief against the county and individual officials. The defendants won summary judgment.

Stigma-Plus Test.

Reversing, the Ninth Circuit said that its procedural due process inquiry has two steps. It first asks whether a liberty or property interest exists with which the state has interfered. It then examines whether the procedures used to deprive any such interest were sufficient.

As for the first step, Paul v. Davis curtailed a trend toward recognizing reputational injury as implicating a protected liberty interest. It "clarified that procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of a 'right or status previously recognized by state law,'" the appeals court said, quoting in part from Paul. This is known as the "stigma-plus test," the court said.

Being placed on CACI is "unquestionably stigmatizing," because child abuse is a reviled offense, the court said. On the "more difficult issue," it decided that listing altered the plaintiffs' rights in two ways. First, state law requires licensing agencies to search CACI and conduct an additional investigation before granting certain rights and benefits, such as child care licenses. Second, the state DOJ makes CACI data available to other identified agencies. These steps placed "both a stigma and a tangible burden" on the plaintiffs' ability to obtain a number of licenses and benefits—whether the agencies "reflexively" check the list by dint of "internal regulation or custom"—and thereby violated the parents' liberty interests, the court ruled.

The statute does not provide adequate procedural safeguards against erroneous listing, the court ruled. It offers at best a vague, informal process for requesting an investigator to correct a listing. While listees have a significant interest in pursuing employment and adoption and custody rights unhindered by being listed, the state has no interest in maintaining a list with incorrect or false data, the court said. And the risk of an erroneous listing is "quite likely," given that a name remains listed as long as the report is determined to be "not unfounded," and the original lister is "tasked with being investigator, prosecutor, judge, and jury" with respect to a challenged listing, making it unlikely that he "will, in
effect, reverse himself.”

The court held that the state must “promptly notify a suspected child abuser that his name is on the CACI and provide ‘some kind of hearing’ [not necessarily predeprivation, but before someone other than the initial investigator] by which he can challenge his inclusion.”

Despite finding a violation of procedural due process, the court ruled that the individual defendants all enjoyed qualified immunity, either because they were not directly involved in the violation or reasonably relied on existing law. But the county could have established an independent procedure for handling listing challenges, and thus was not entitled to summary judgment.

Judge Milan D. Smith Jr. and U.S. District Judge Richard Mills, sitting by designation, joined the opinion.

Esther G. Boynton, Beverly Hills, Calif., argued for plaintiffs. Lillie Hsu, Greines, Martin, Stein & Richland, Los Angeles, argued for individual defendants. Deputy Attorney General Paul C. Epstein argued for the state.
A case granted review this week by the U.S. Supreme Court has implications for school districts in lawsuits alleging violations of the constitutional rights of students or district employees.

The justices agreed to decide whether plaintiffs suing local governmental agencies, such as cities, counties, and school districts, must show that a constitutional violation was the result of a policy, custom, or practice of the agency even when they are merely seeking a court order to end the violation, as opposed to monetary damages.

In a 1978 decision, *Monell v. New York City Department of Social Services*, the Supreme Court removed local governments' complete immunity from suits under a federal civil rights law known as Section 1983. That law allows suits for damages when government authority is used to deny a person's federal constitutional or statutory rights.

In *Monell*, the high court ruled that cities, counties, and school districts could not be held liable merely because they employed someone who violated a person's civil rights. But local governments could be liable if the deprivation of rights was tied to an official policy or custom of the agency.

The federal courts of appeals are divided, however, about whether a civil rights suit merely seeking declaratory relief, such as a court order, requires a showing that the challenged violation was the result of a policy or custom.

The Supreme Court granted review on Monday in County of *Los Angeles v. Humphries* (Case No. 09-350), which stems from a lawsuit brought by a California couple who were falsely accused of child abuse by their rebellious 15-year-old daughter and ended up on the state’s child-abuse index.

In what a lower court called a “parents’ nightmare,” Craig and Wendy Humphries found that there was no procedure for removing their names from the index, despite a court declaration that they were “factually innocent” of the abuse charges. The Humphries sued Los Angeles County and its sheriff, as well as the state, alleging a violation of their 14th Amendment right to due process of law. Among the difficulties the couple face, court papers say, is that Wendy Humphries is a special education teacher and her inclusion on the child-abuse index threatens her ability to remain licensed as a teacher.

Their suit sought damages as well as a judicial order to remove their names from the index and a finding that the state’s policies regarding the index were unconstitutional because they provided people with no means to challenge an unfair listing.

A federal district court largely ruled against the Humphries, but a panel of the U.S. Court of Appeals for the 9th Circuit, in San Francisco, held last year that the parents’ due-process rights were violated. It said the
Los Angeles County Sheriff's Department was potentially liable under *Monell* for not adopting its own procedure for the falsely accused to remove their names from the child-abuse index.

The county's appeal to the Supreme Court noted that several federal appeals courts have applied *Monell*'s policy or custom requirement to non-damages claims. But the 9th Circuit has a line of cases, including the one involving the Humphries, that exempts such non-damages claims from the rule.

"The result is an end-run around this court's repeated holdings that a public entity may only be held responsible for inflicting a constitutional injury where the conduct at issue was the result of a custom, policy or practice fairly attributable to the public entity," the county's appeal said.

Perry A. Zirkel, a professor of law and education at Lehigh University in Bethlehem, Pa., said in an interview that while the *Monell* issue is complicated, the new case is potentially significant for school districts. Districts are often sued in addition to school or district administrators over alleged constitutional violations. Districts are often able to argue at an early stage that a challenged action was due to an overzealous principal or other administrator but did not reflect the district's official policies, he said.

The district will argue "that a principal did this on his or her own, and [the plaintiff] has not been able to show a policy or custom, so we're off the hook," Zirkel said.

If the Supreme Court goes along with the 9th Circuit's approach, that could expose districts to some lengthier and more costly legal battles, at least where so-called declaratory relief was the remedy being sought, he added.

The Supreme Court will hear the case during the term that begins next October.
Nearly 800 Orange County residents landed on the state’s list of child abusers last year—based on investigations that failed to determine whether any abuse actually occurred.

The names of these 792 maybe/maybe-not abusers can remain on the California Child Abuse Central Index for 10 years, and the list can be seen by employers, schools, local police departments, adoption agencies, etc.

“In a laudable attempt to protect children, the CACI process jeopardizes the reputation and employment status of thousands of Orange County residents, the Orange County Grand Jury says in “CACI: Child Abuse Central Index: Guilty Until Found Innocent.”

“The process and guidelines for placing someone on the Child Abuse Central Index (CACI) based on an Inconclusive finding are confusing, highly subjective and provide little protection for those individuals falsely accused of abuse.”

Problem is, California law requires that inconclusive investigations be reported to the child abuse index. “This represents a conflict with the American legal principle of innocent until proven guilty,” the grand jury declares.

How to fix? “Orange County should join other counties in supporting a revision of the California Penal Code that would eliminate or modify the Inconclusive finding,” it says.

Which is sweet music to the ears of folks like George and Bette McFetridge, an Irvine couple who wound up on the child abuse list after an adoption-gone-awry.

The McFetridges fought back, and were ultimately removed from the list, but they’re suing the Orange County Social Services Agency in an attempt to change a system that they say shoots first and asks questions later.

“I’m thrilled that they took the time to investigate this, and they did a real good analysis of the law,” said George McFetridge (who, incidentally, is a deputy district attorney for Orange County). “The ‘inconclusive’ category has been eliminated in most states. Theoretically, there are 792 other lawsuits out there, and that’s just this year. This could get very expensive.

“It’s a great idea, you want to protect children, but a list that’s not accurate does more harm than good.”

Changing state law to eliminate the “inconclusive” finding “is something that’s been long overdue,” said Bette McFetridge.

The grand jury report comes at a time when other courts in the nation are declaring child-abuse registries like California’s to be unconstitutional, because alleged abusers had no chance to defend themselves before being listed.

The grand jury found that social workers are
as frustrated with the system as the McFetridges. It also recommends that:

• Orange County’s department of children and family services should be the central reporting agency for all county child abuse index reports, and should conduct all grievance hearings.

• Case files should reflect oral and written notification of the suspects and any unsuccessful contact should be noted.

• Registered mail should be considered for written notifications.

The county has 90 days to respond.
Accused of child abuse by a vindictive ex-girlfriend 22 years ago, Bakersfield stockbroker Scott Whyte ceased contact with their son for years, fearing that another allegation would land him in prison, before a court cleared him.

Craig and Wendy Humphries went to jail after a rebellious teenage daughter fled to Utah and told police there that her father and stepmother had abused her. While the Valencia couple were locked up in Los Angeles County on charges eventually ruled groundless, their two younger children were placed in foster care.

Esther Boynton, a Beverly Hills lawyer who helped Whyte and the Humphrieses fight to clear their names, had her own hellish experience getting off the state's Child Abuse Central Index, a database containing 819,000 names from which even a judgment of innocence isn't enough to secure removal. Unlike the better-known database created by Megan's Law, which registers and tracks 63,000 named sex offenders, the child abuse index is neither actively managed by the state nor periodically purged of erroneous or unsubstantiated entries—despite efforts by the wrongly included to escape its shameful stain.

The California Department of Justice has been ordered in at least three court decisions in recent years to create a standard way to remove from the index the names of those exonerated by courts or social service investigations.

But in response to the latest judgment, a U.S. 9th Circuit Court of Appeals ruling last month that the Humphrieses' privacy rights had been violated, the Office of the Attorney General plans another appeal in defense of the state's handling of the database.

Whyte, 59, looks back on a life irreparably damaged by the abuser label and the threat of punishment for a crime he didn't commit. When the mother of his then-4-year-old son made the false allegations against him in 1986 and Kern County authorities put his name in the abuser index, Whyte said, his initial anger "quickly gave way to complete terror."

The mother's report was made during a veritable witch hunt that grew out of child abuse allegations against day-care workers in the county throughout the 1980s.

"The atmosphere was such that if you were accused, you might as well turn yourself in to prison and look to spend the rest of your life there," Whyte recalled.

For months after learning of the report, Whyte so feared his arrest was imminent that he left a blank check and the deed to his house with a relative to post bond for him.

"I just couldn't believe that this could happen to a person in this country, that [authorities] would destroy families with nothing but a phone call," said the father who protected his liberty at the cost of any relationship with his son. "There are not any words strong enough to describe that situation, the shame, the travesty. Somebody ought to be shot."

The Humphrieses, still listed as abusers, "are
living every parent's nightmare,” the appeals court said. It ruled the state in violation of the 14th Amendment because people in the index aren't given a chance to challenge the allegations against them.

The couple's ordeal began in March 2001, when Craig Humphries' 15-year-old daughter from a previous marriage took their car without permission and drove to Utah, where her mother and stepfather lived. She told them she had been abused since being sent to California nine months earlier, and a Utah emergency room doctor who examined the teen reported to Los Angeles County authorities that she had "non-accidental trauma with extremity contusions."

On the basis of that one phone call, the Humphrieses were arrested, jailed and charged with felony torture. The arresting sheriff's deputy filed a "substantiated" child abuse report that got them entered in the index. Their two younger children were placed in protective custody.

"My clients didn't have any idea where their kids were," said Boynton, who, because the case is still in litigation, has advised the couple against discussing their ordeal with The Times.

The Humphrieses got their children back about 10 days later, and California medical records proved that the daughter's bruises were the result of surgical removal of melanoma.

"The Humphries have taken advantage of every procedure available to them, including the California courts," Judge Jay S. Bybee wrote in the 9th Circuit Court opinion. "They went to the dependency court, which found that the allegations were 'not true' and returned their children to them. They went to the prosecutor, who dropped all the charges against them. They went to the criminal court, which declared them 'factually innocent' and sealed their arrest records. None of this had any effect on their CACI listing."

Wendy Humphries, a teacher, had to hire an attorney to avoid losing her credentials, because employers of people who work with children are required to consult the index. The list can be accessed by educational, child-care, adoption, foster-care and child-welfare agencies throughout the country and is referenced about 400,000 times a year, said Abraham Arredondo, spokesman for the attorney general's office.

Boynton landed in the child abuse database in 1990 after accidentally splashing her 17-year-old daughter with hot coffee. She learned three years later, when applying to volunteer as a reading tutor, that the Los Angeles Police Department had reported her to the state based on her expressions of remorse to emergency room personnel for the burn on her daughter's shoulder.

It took two years and much expensive litigation to get their names expunged from the index, and Boynton remains suspicious that distorted records of the incident still linger elsewhere.

The state agreed to make individual changes in its listing, notification and challenge practices in Whyte and Boynton's cases and in a negotiated settlement with Amelia Gomez, a Los Angeles woman denied custody of her grandchildren because of index errors.

"We have an order requiring them to rewrite the regulations. As far as we know, they haven't done anything to comply with it," David Greene, a lawyer with the First Amendment Project in Oakland, said of the
state court ruling a year ago that the index violated constitutional privacy guarantees.

Among the changes the state agreed to were the rights of named individuals to see their government dossiers, to challenge inaccuracies and to have their versions appended to the records.

"To the extent you want this index to serve some function, to have usefulness, it has to be accurate," Greene said.

The law now requires that anyone added to the abuser index be notified, but the lawyers say decades of secrecy in compiling and maintaining the list created in 1965 probably means many on it are unaware of their inclusion and the need to pursue removal.

Those listed can now demand a hearing among officials of the reporting agency, whether a county child protective services office or law enforcement.

But the standard of proof of wrongdoing remains so low and the pressure to continue identifying any potential abuser so high that the hearings are often "almost worthless," said Peter Sheehan, a lawyer with the Social Justice Law Project in the Bay Area.

Though the intent of the index was noble in seeking to protect children, Sheehan said, its value and reliability are compromised by its flaws.

A halfhearted and piecemeal effort a few years ago to update the index showed significant error rates—more than 20% in some counties—among the few reporting agencies that carried out the reviews, Sheehan said. The 9th Circuit Court ruling in Humphries vs. County of Los Angeles cited a 2004 review of listings from San Diego County that suggested as many as half were erroneous.

Sheehan called the state’s request for 9th Circuit rehearing of the Humphries ruling and the possibility of an eventual appeal to the U.S. Supreme Court "the scary part," in light of the high court’s conservative majority and its tendency to rule against claims of government interference with privacy rights.

"What happened to the Humphries could happen again today," said Boynton, noting the state’s resistance to reforming its administration of the index. "Ultimately there will be critical mass, and the government will have to fix the system."

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The County of Orange cannot be sued for placing an innocent couple on California’s list of child abusers, its lawyers argue.

But the Irvine couple who successfully battled to get off that list say that the county must be held accountable—and that change must come to a system that shoots first and asks questions later.

“The abuse of children is a despicable act,” say George and Bette McFetridge in a recent court filing. “Adults who knowingly abuse children are to be utterly reviled, and rightfully so. And to be officially identified as a child abuser, one of the most heinous of labels, is the modern equivalent of being branded with the scarlet letter A like Hester Prynne in Nathaniel Hawthorne’s The Scarlet Letter. To be accused of child abuse may be our generation’s contribution to defamation per se, a kind of moral leprosy...”

“The central issue of this litigation is whether a single social worker, acting as judge and jury, may unilaterally stigmatize a parent as a child abuser and forward their name to an official government index, without meeting any burden of proof whatsoever, and without giving the parent any prior notice or opportunity to be heard, pursuant to a statute that violates due process and constitutional rights.”

“It happened to us before. It can happen to us again.”

“And if it can happen to us, it can happen to any parent, grandparent, foster parent or any individual who works with children.”

“This lawsuit seeks to prevent that. For ourselves and others.”

Both sides are to argue their positions in Orange County Superior Court at 9 a.m. Monday. And it couldn’t come at a more interesting time—when other courts in the nation are declaring child-abuse registries like California’s to be unconstitutional, because alleged abusers had no chance to defend themselves before being listed.

We told you recently about George and Bette McFetridge, who took a 14-year-old girl with beautiful long hair into their lives as their daughter in 2007, after their son was grown and gone. The girl’s biological mom had a drug problem and her biological dad was in jail, but she liked to read, enjoyed school and was doing well in her classes. The McFetridges hoped to shower her with love, show her what it’s like to live in a real family, and give her a better shot at succeeding in life.

One can read wrenching details of the McFetridges’ life with their new charge in the suit itself. Suffice to say their new daughter did a lot of lying, ran away and accused her new mother of striking her. Bette McFetridge quit her job as a nurse to tutor her daughter, and tried traditional discipline—taking away privileges—to no avail. The family is firmly opposed to corporal punishment and never struck the girl, she said, but one of the girl’s
complaints against them was, indeed, true.

After the girl returned home after running away, Bette tried to find out where she had been and what she had done. Bette warned the girl not to lie; and after a time, said that every lie would be paid for with a snip of the girl's lovely, long hair. Locks were cut until the girl began telling the truth.

An Orange County social worker was law-bound to investigate the girl's complaints of abuse. The social worker said that the claims of physical abuse were "unfounded," but the charge of emotional abuse was "inconclusive."

And thus, both the McFetridges were placed on the Department of Justice's Child Abuse Central Index. And were informed about it later.

George McFetridge is a lawyer, working for the Orange County District Attorney's office. He and Bette requested a hearing and ultimately cleared their names. But not everyone who winds up on the list is an attorney, and not everyone knows how to effectively fight back. That's the point of their suit.

COUNTY RESPONDS

The county's lawyers argue that the McFetridges are suing the wrong party—that their beef is with the state and belongs there.

"Under the Child Abuse and Neglect Reporting Act (California Penal Code section 11164 et seq., 'CANRA'), when a child protective agency such receives a report of suspected child abuse, it must conduct an active investigation," the county says. "If the agency determines the allegations are not unfounded, then it must submit a report to the DOJ. The DOJ maintains an index of such reports."

The county also argues that any alleged wrongs have been addressed—the McFetridges are no longer on the child abuse list—and that they therefore have no more complaint. "Plaintiffs are seeking a declaration that the County violated their constitution rights. Such a declaration is improper . . . Such a claim amounts to nothing more than a claim for money damages under causes of action that have already fully accrued."

The McFetridges "also seek a declaration that CANRA, the statutes that the County followed in this case, are unconstitutional. Again, such a declaration against the County is improper. These statutes were enacted by the California legislature. Any change to the statutes must come from the state, not the County. Plaintiffs simply have sued the wrong entity in seeking the change they desire."

And then there's this:

"A public entity cannot be held liable based on vicarious liability for the alleged wrongdoings of its employees," says the county. "There must be an existing unconstitutional municipal policy and a causal connection between the unconstitutional policy and the alleged constitutional deprivation in order for a public entity to be exposed to liability . . . Alternatively there must be a failure to train the public entity employees, where such failure to train rises to the level of deliberate indifference to the rights of the public. Liability does not attach to a municipality merely because a constitutional violation is caused by a municipal employee, even one acting within the scope of his or her authority."
THE McFETRIDGES RESPOND

Quoting the U.S. Supreme Court, they say that “One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.”

They conjure the case of Humphries v. County of Los Angeles—a very similar case that went to the U.S. Court of Appeals for the Ninth Circuit. That court determined that California’s child abuse index violates due process laws.

Said the Ninth Circuit court:

Appellants Craig and Wendy Humphries are living every parent’s nightmare. Accused of abuse by a rebellious child, they were arrested, and had their other children taken away from them. When a doctor confirmed that the abuse charges could not be true, the state dismissed the criminal case against them. The Humphries then petitioned the criminal court, which found them “factually innocent” of the charges for which they had been arrested, and ordered the arrest records sealed and destroyed. Similarly, the juvenile court dismissed all counts of the dependency petition as “not true.”

Notwithstanding the findings of two California courts that the Humphries were “factually innocent” and the charges “not true,” the Humphries were identified as “substantiated” child abusers and placed on California’s Child Abuse Central Index (“the CACI”), a database of known or suspected child abusers. As the Humphries quickly learned, California offers no procedure to remove their listing on the database as suspected child abusers, and thus no opportunity to clear their names. More importantly, California makes the CACI database available to a broad array of government agencies, employers, and law enforcement entities and even requires some public and private groups to consult the database before making hiring, licensing, and custody decisions.

This is the reverse of the presumption of innocence in our criminal justice system: The accused is presumed to be a child abuser and listed in CANRA unless the investigator determines that the report is false, improbable or accidental. Incomplete or inadequate investigations must be reported for listing.

TRIPPING UP ACROSS AMERICA

An investigation by The Associated Press found that the push to create a national database of child abusers, as authorized by Congress in 2006, “is barely progressing as serious flaws come to light in the state-level registries that would be the basis for a national list.”

- In North Carolina, an appeals court ruled that the state’s registry is unconstitutional because alleged abusers had no chance to defend themselves before being listed.

- In New York, a class-action settlement is taking effect on behalf of thousands of people who were improperly denied the chance for a hearing to be removed from the state registry.
And the U.S. Supreme Court will hear a case this fall arising from the California couple whose names remain on that state’s registry years after they were cleared of an abuse allegation made by their rebellious teenage daughter.

“Nobody wants to be seen as soft on child abuse—and that’s gotten us where we are,” Carolyn Kubitschek, a New York attorney who has waged several court battles over the registries, told AP. “In the state of New York, it is still almost impossible to get off the list.”

The abuse lists aren’t accessible to the public, but are used by daycare centers, schools, adoption agencies and other entities to screen people who want to adopt, be foster parents or get a job working with children, the AP says.

The story continued:

Even critics of the registries say they can serve a vital purpose in barring perpetrators of serious abuse from roles where they would interact routinely with children. It’s the process underlying many of the registries that has come into question—and their potential to entangle innocent people as well as wrongdoers.

A person doesn’t have to be convicted or even charged with a crime to get listed. Under the general practice in most states, entries are based on a child protection investigator’s assertion that the person committed an act of abuse or neglect; hearings or appeals, if granted at all, often come long after the name is entered.

“Anybody can call a child abuse hotline and report abuse—anybody, including your ex-spouse who hates you, your landlord who’s trying to evict you,” Kubitschek said.
Michigan v. Bryant

09-150


At defendant’s first-degree murder trial, the State introduced the victim’s statement to police in which the victim identified defendant as the person who shot him. On review of the appellate court decision affirming defendant’s second-degree murder conviction, the court held that, because the victim’s statements to the police were testimonial in nature under Crawford v. Washington and Davis v. Washington, they were inadmissible. The police found the victim lying on the ground outside a gas station; they asked him what happened, who shot him, and where the shooting had occurred. The victim’s responses related solely to events that had occurred in the past and at a different location. None of the statements referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator. As such, the circumstances indicated that the primary purpose of the questioning was to establish the facts of an event that had already occurred and not to enable the police to meet an ongoing emergency. As such, the statements were inadmissible under the Confrontation Clause of the Sixth Amendment. The judgment of the court of appeals was reversed, and the case was remanded to the trial court for a new trial.

Question Presented: Should certiorari be granted to settle the conflict of authority as to whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because “made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

Richard Perry BRYANT, Defendant-Appellant.

Supreme Court of Michigan

Decided June 10, 2009

[Excerpt; some footnotes and citations omitted.]

BEFORE THE ENTIRE BENCH

MARKMAN, J.

We granted leave to appeal to consider whether the victim’s statements to the police in this case constituted inadmissible testimonial hearsay within the meaning of the United States Supreme Court’s decisions in Crawford v. Washington and Davis v. Washington. The Court of Appeals held that the statements were non-testimonial under
the test set forth in *Davis* because they were made “in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency.” Because we conclude on the basis of *Crawford* and *Davis* that the “primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution,” we respectfully disagree and hold that the statements constituted inadmissible testimonial hearsay. Moreover, we conclude that the admission of these statements constituted plain error requiring reversal. Therefore, we reverse the Court of Appeals and remand for a new trial.

**I. FACTS AND HISTORY**

[The victim was shot in the abdomen during a routine drug deal through the defendant’s back door at 3:00 a.m. Police found him about 30 minutes later lying on the ground outside of his vehicle at a gas station six blocks away from the defendant’s house. Although the back door had remained closed, the victim identified the defendant to police by allegedly recognizing the defendant’s voice. The victim died several hours later at the hospital.]

***

Defendant’s first trial resulted in a hung jury. Following a second jury trial, and after two days of deliberations, defendant was convicted of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. The Court of Appeals affirmed.

Defendant appealed, arguing that the trial court erred by admitting the victim’s statements to the police identifying him as the shooter. . . .

**II. STANDARD OF REVIEW**

Whether the admission of the victim’s statements to the police violated defendant’s Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo.

**III. ANALYSIS**

Defendant argues that the admission of the victim’s statements to the police identifying defendant as the shooter violated his Sixth Amendment right of confrontation. The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees a criminal defendant the right “to be confronted with the witnesses against him. . . .” In *Crawford* the United States Supreme Court held that “[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Although the Court left “for another day any effort to spell out a comprehensive definition of ‘testimonial,’” it did say that “[w]hatever else the term covers, it applies at a minimum to prior testimony . . . and to police interrogations.” The Court defined “[t]estimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The Court explained that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” The Court recognized that “[v]arious formulations of this core class of ‘testimonial’ statements exist,” such as “pretrial statements that declarants would reasonably expect to be used prosecutorially” and “statements that were made under circumstances which would lead
an objective witness reasonably to believe that the statement would be available for use at a later trial." However, the Court indicated that “[s]tate[ments] taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard.” The Court stated that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.” The Court further stated that it was “us[ing] the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.” . . .

In *Davis*, the Supreme Court further expounded on the meaning of the term “testimonial hearsay statements.” The Court held that “[s]tate[ments] are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” On the other hand, “[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis* further explained that “in the final analysis [it is] the declarant’s statements, not the interrogation’s questions, that the Confrontation Clause requires us to evaluate.”

The statements in dispute in *Davis* were made to a 911 emergency operator. The victim told the operator, “[The defendant’s] here jumpin’ on me again”; “He’s usin’ his fists.” The Court held that these statements were non-testimonial. The Court asserted that *Davis* was distinguishable from *Crawford* because in *Davis*: (1) the victim was “speaking about events as they were actually happening, rather than [as in *Crawford* describ[ing] past events . . . hours after the events . . . had occurred”; (2) thus, in contrast to the victim in *Crawford*, the victim “was facing an ongoing emergency”; (3) “the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past”; and (4) the victim’s “frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe,” while, in *Crawford*, the victim was “responding calmly, at the station house, to a series of questions . . . .” The Court held that the “primary purpose” of the interrogation in *Davis* “was to enable police assistance to meet an ongoing emergency,” and, thus, the elicited statements were non-testimonial.

In *Hammon*, a companion case decided with *Davis*, the police responded to a reported domestic disturbance. When the police arrived, the victim was sitting alone on the porch and the defendant was inside. The victim told the police that the defendant had hit her and thrown her. The Court held that because “the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime,” the victim’s statements to the police were testimonial. The Court explained that *Hammon* was distinguishable from *Davis* because in *Hammon*: (1) “the interrogation was part of an investigation into possibly criminal past conduct”; (2) “[t]here was no emergency in progress”; and (3) “[w]hen the officer questioned [the victim], . . . he was not seeking to determine (as in *Davis*) what is happening,” but rather “what happened.” As the Court further explained:

The statements in *Davis* were taken when [the victim] was alone, not only unprotected by police (as [the
victim in *Hammon* was protected), but apparently in immediate danger from [the defendant]. [The victim in *Davis*] was seeking aid, not telling a story about the past. [The *Davis* victim’s] present-tense statements showed immediacy; [the *Hammon* victim’s] narrative of past events was delivered at some remove in time from the danger she described.

By contrast, the Court reasoned that *Hammon* was similar to *Crawford* because: (1) “[b]oth declarants were actively separated from the defendant”; “[b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed”; and (3) “both took place sometime after the events described were over.” Accordingly, the statements in *Hammon*, like those in *Crawford*, were testimonial.

In the instant case, there is no question that the victim is unavailable, and defendant did not have a prior opportunity to cross-examine the victim. Therefore, if the victim’s statements to the police were testimonial in nature, they are inadmissible. Accordingly, the only issue here is whether the victim’s statements were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an “ongoing emergency,” as defined by the United States Supreme Court, or whether the primary purpose of this interrogation was to establish or prove past events potentially relevant to a later criminal prosecution.

On remand, the Court of Appeals held that the statements in this case were non-testimonial, and thus affirmed defendant’s convictions. We, however, agree with defendant that the statements were testimonial pursuant to *Crawford* and *Davis*.

The police found the victim lying on the ground outside a gas station. The police asked him what had happened, who had shot him, and where the shooting had occurred. The victim told the police that defendant shot him about 30 minutes earlier at defendant’s house, which was about six blocks away, and that he drove himself to the gas station. These statements related solely to events that had occurred in the past and at a different location. None of these statements referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator. The circumstances, in our judgment, clearly indicate that the “primary purpose” of the questioning was to establish the facts of an event that had already occurred; the “primary purpose” was not to enable police assistance to meet an ongoing emergency. The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the “primary purpose” of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator.

*Davis* stated that “in the final analysis [it is] the declarant’s statements, not the interrogation’s questions, that the Confrontation Clause requires us to evaluate.” The declarant here (i.e., the victim) made these statements while he was surrounded by five police officers and knowing that emergency medical service (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency of the type identified by the United States Supreme Court, but was instead to tell the police who had committed the crime against him, where
the crime had been committed, and where
the police could find the criminal. That is,
the primary purpose of the victim’s
statements to the police was to “establish or
prove past events potentially relevant to later
criminal prosecution.”

Further, the officers’ actions do not suggest
that the officers themselves considered the
circumstances at the gas station to constitute
an “ongoing emergency,” at least not as the
Supreme Court defines that term. None of
the officers testified to taking any actions to
secure the area, to search the station for the
possible presence of any armed individuals,
or to provide cover for other officers. None
of the officers indicated that he drew his
weapon at the gas station, took up a
defensive position out of concern that the
shooter might be nearby, or called for any
backup assistance to ensure the safety of the
officer himself or others in the area. And
none of the police officers questioned people
who were in or around the gas station (other
than the victim and the gas station attendant)
or searched in any way at the station for the
shooter. Rather, they acted in a manner
entirely consonant with officers who knew
that the crime had already been committed,
that it had been committed at a different
location, and that there was no present or
imminent criminal threat. Indeed, once the
EMS unit arrived for the victim, the police
left the gas station and immediately
proceeded to defendant’s house, where they
then called for backup assistance because
they feared that defendant might still be
inside.

The primary purpose of the police
questioning of the victim at the gas station
was to determine who shot the victim and
where the shooter could be found so that
they could arrest him. The police were at the
gas station to investigate a past crime, not to
prevent an ongoing one, and the victim was
not “speaking about events as they were
actually happening,” as in Davis, but was
“describing past events,” as in Crawford
and Hammon. The primary purpose of the
victim’s statements was not “to describe
current circumstances requiring police
assistance,” as in Davis, but to “establish[]
the facts of a past crime, in order to identify
(or provide evidence to convict) the
perpetrator,” as in Crawford and Hammon.

* * *

Equally unpersuasive is the Court of
Appeals argument that the police were
“responding to an emergency” because
“someone at the gas station was shot and
laying on the ground.” Once again, this type
of “emergency” almost always exists when
the police respond to a victim who has been
seriously injured. That is, if we were to
adopt the Court of Appeals analysis, all
statements made while the police are
questioning a seriously injured complainant
would be rendered non-testimonial, and this
is also clearly inconsistent with the
commands of the Supreme Court by
confusing a medical emergency with the
emergency circumstances of an ongoing
criminal episode. . . .

The hearsay statements at issue in the instant
case are significantly different from the
admissible hearsay statements in Davis i.e.,
the statements made to the 911 operator
while the defendant was still attacking the
victim, because, unlike in Davis, this victim
was describing past events, rather than
describing a criminal episode as it was
unfolding, and, unlike in Davis, this victim
was away from defendant and the crime
scene, and was in the protection of five
police officers. On the other hand, this case
is significantly similar to Hammon because
in both cases the police were seeking
through their questioning to determine what
had previously occurred, rather than what
was occurring at the time of the questioning,
and the victims were separated from the defendants and in the protection of the police. That is, in both Hammon and this case, (1) "[the] declarants were actively separated from the defendant[s]"; (2) "[the] statements deliberately recounted, in response to, police questioning, how potentially criminal past events began and progressed"; and (3) "[they] took place sometime after the events described were over." Here, the officers were obviously attempting to find out "what had happened in the past," as evidenced by the fact that the first question asked was "what happened." The officers were not "seeking to determine (as in Davis) 'what is [now] happening,' but rather 'what happened.'" Most importantly, the victim's actual statements pertained to what had happened previously, rather than to what was actually happening at the time of the interrogation. For these reasons, the victim's statements to the police were testimonial and, thus, inadmissible.

* * *

In addition, in our judgment, the error clearly prejudiced defendant. The evidence against him was far from overwhelming and the victim's statement indicating that defendant was the one who shot him was obviously extraordinarily damaging. In fact, the prosecutor essentially conceded that the error was prejudicial when, at the suppression hearing before trial, he conceded that the admission of the victim's statements to the police is a "crucial issue to the prosecutor's case; . . . if this court rules that the excited utterance is not going to be admissible, then we won't have a trial here. . . ." In addition, during his opening statement to the jury, the prosecutor repeatedly referred to the victim's statements to the police and explained:

The most important piece of
evidence you will hear during this trial is [the victim] in many respects speaking to you. [The victim] will tell you that it was the defendant who shot him. Obviously he won't be here to tell you that. But before he died, the last—one of the last—probably the last thing he was able to say was that Rick shot, Rick shot me . . . And . . . the police, all of them, heard [the victim] say Rick shot me. . . . The most important piece of evidence you'll hear during this trial, in other words, will be [the victim] in a certain respect speaking to you from the grave and telling you what happened in this case and telling you who's responsible. . . . All of the evidence here but mainly [the victim's] own words before he died point to [defendant] having pulled the trigger and having killed [the victim].

The prosecutor also relied heavily on the victim's statements in his closing statement to the jury, stating:

The main reason we know enough about what happened to be able to decide beyond a reasonable doubt whether the charges that have been made out here, the main reason we know is because of [the victim's] words himself, his own words to you through those police officers in the early morning of April 29th, 2001. [Emphasis added.]

Further evidence that the error was prejudicial is the fact that defendant's first trial resulted in a hung jury. Finally, the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." For these reasons, we believe that defendant is entitled to a new trial.
IV. CONCLUSION

Because the victim’s statements to the police were inadmissible testimonial hearsay statements pursuant to Crawford and Davis and the admission of the statements constituted plain error requiring reversal, we reverse the Court of Appeals and remand this case for a new trial.

DISSENT

WEAVER, J. (dissenting).

I dissent from this Court’s decision to reverse the Court of Appeals and remand for a new trial. I would affirm the judgment of the Court of Appeals for the reasons stated in its unpublished opinion on remand, specifically, that the declarant’s statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation’s primary purpose was to enable police assistance in an ongoing emergency.

CORRIGAN, J. (dissenting).

I respectfully dissent. The Court of Appeals reasonably concluded that the victim’s statements—made within a half-hour of being shot while he lay bleeding in a parking lot—were non-testimonial for Confrontation Clause purposes because they were elicited by police officers addressing an ongoing emergency.

As recounted in the majority opinion, police officers arrived at a Detroit gas station at 3:25 a.m. within minutes after receiving a report of a shooting. It appears that they did not know how long ago the shooting had occurred, where it took place, or whether the shooter was at the gas station. They found the gunshot victim lying on the ground, bleeding, visibly in pain, and having trouble talking. They asked him what happened. He reported that defendant shot him about 3:00 a.m. at a residence six blocks away. The majority concludes that the primary purpose of the officers’ questions “was to establish the facts of an event that had already occurred,” not to “enable police assistance to meet an ongoing emergency.” But the majority considers the facts in hindsight, rather than with an objective view of the circumstances at the time the statements were made. The United States Supreme Court’s opinion in Davis clearly establishes that the statements must be viewed through an objective assessment of the circumstances surrounding them: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”

In any event, even if we assume that the reported shooting occurred a full 25 minutes earlier at 3:00 a.m., this time lapse certainly does not prohibit as a matter of law the conclusion of the Court of Appeals that an emergency was ongoing. Rather, the officers knew that an armed assailant had been within six blocks of their location. They could not be sure that the assailant would not harm others or pursue the victim. One could reasonably conclude that the assailant posed an immediate, continuing danger. Therefore, even if we assume that about 30 minutes had passed, this case does not become automatically comparable to cases such as Crawford, where police questioned the declarant at the police station “hours after” the relevant events occurred.
Contrary to the majority’s assertions, *Davis* does not establish an artificial threshold after which all questions are assumed to be for purposes of retrospective investigation and all statements in response are presumed testimonial. The semantic difference between what is “actually happening” and what has already “happened” is not so simple when applied to the real world, where context controls which legal labels most aptly apply. The amount of time that has elapsed between the onset of an emergency and statements about that emergency clearly must be considered in context.

For similar reasons, I disagree with the majority’s presumption that the victim’s statements were not made during an ongoing emergency as a matter of law because the victim had escaped to the gas station. A mere distance in space between an initial event and the ensuing statements by a victim is not dispositive. Neither *Davis* nor *Crawford* states a bright-line rule establishing that an emergency ends the moment the assailant and victim are physically separated to any extent.

***

This case seems to fall midway on a spectrum between the facts of *Crawford* and those of *Davis*. As the *Davis* Court explained, in *Davis* the 911 caller “was speaking about events as they were actually happening, rather than ‘describ[ing] past events.’” The call was “plainly a call for help against [a] bona fide physical threat.”

***

In *Crawford*, in contrast, the declarant’s statements were made during questioning at the police station that took place “hours after the events she described had occurred.” The *Davis* Court also described the “striking” difference in the “level of formality between the two interviews.” The declarant in *Crawford* was “responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers.” The declarant in *Davis*, on the other hand, provided “frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.”

I agree with the majority that this case is not precisely comparable to *Davis* because, here, the victim was not facing an immediate physical threat from an assailant, and the police had arrived on the scene. But this case is also by no means directly comparable to *Crawford* because, here, the shooting had just occurred, the statements were made only blocks away from the crime, the victim was in pain from untreated wounds that would soon prove to be fatal and was having trouble talking, and it was uncertain whether he, the police, or the public were out of physical danger. For these reasons, I conclude that this case is more similar to *Davis* than to *Crawford*. And, most significantly, to the extent this case’s location on the spectrum presents a close question, the Court of Appeals did not clearly err when it concluded that the emergency was ongoing and the victim’s statements were non-testimonial.

***

In conclusion, the Court of Appeals did not clearly err when it decided that the victim’s statements were admissible because they were non-testimonial under *Crawford* and *Davis*. . . .
“U.S. Supreme Court Rules on ‘Dying Declaration’”

The Detroit News
April 1, 2010
Joel Kurth

The paper

A one-paragraph announcement from the U.S. Supreme Court that a Detroit case could decide whether a dying man’s description of his alleged killer can help convict a man for murder.

The chase

Anthony Covington was found bleeding in a gas station lot April 28, 2001. A Detroit Police officer asked what happened. Covington said “Rick” shot him through a door, and gave a description of the shooter. Hours later, Covington died at a hospital.

His dying words led police to a home blocks away where they discovered blood, a bullet hole in a door, the victim’s wallet and a man named Richard Perry Bryant. The first trial ended in a hung jury. In the second, Bryant was convicted of second-degree murder.

But last year, the Michigan Supreme Court overturned the conviction and ordered a new trial. The divided court’s rationale: Covington’s words couldn’t be used against Bryant because defendants have constitutional rights to confront their accuser in court. Covington, being dead, couldn’t be cross-examined.

A retrial date hasn’t been set.

Why it matters

“Dying declarations”—statements made during the last breaths of life—have been allowed to convict and free the accused in U.S. courts since at least 1770. That’s when then-lawyer and future president John Adams used the last words of a Boston Massacre victim to secure acquittals and reduce charges for some of the accused British soldiers.

But the deceased can’t be cross-examined, which some contend rubs against constitutional protections against hearsay.

The U.S. Supreme Court in the past few years has tweaked the standard for hearsay, allowing it if the testimony comes during an “ongoing emergency.”

The Detroit case could help define what that means. Prosecutors argue in court papers “any human being . . . coming upon another human being with blood pouring from a gunshot wound to the stomach will be painfully aware that the situation is an emergency.”

But defenders counter that statements to police about a shooting that occurred 30 minutes prior don’t meet that standard.

The Supreme Court agreed in March to weigh the issue.
On June 10, 2009, the Supreme Court issued its opinion in *People v. Bryant*, No. 133725, in a 4-3 decision by Justice Markman, joined by Chief Justice Kelly and Justices Cavanagh and Hathaway. The Court considered whether the Confrontation Clause to the U.S. Constitution bars the State from introducing hearsay statements made by a witness dying of gunshot wounds, who died prior to trial. The Court concluded that under recent U.S. Supreme Court case law, the statements at issue were "testimonial," i.e., made pursuant to an interrogation primarily motivated for later criminal prosecution and not for securing emergency assistance. Accordingly, the Court held that it was plain error to admit the statements through hearsay, and remanded the case for a new trial, reversing the Court of Appeals.

On October 31, 2006, the Michigan Supreme Court remanded *Bryant* back to the Court of Appeals for consideration in light of the U.S. Supreme Court’s decision relating to the Confrontation Clause in *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* held that statements made in a 9-1-1 call by a woman reporting a domestic violence emergency and requesting immediate police assistance were “non-testimonial,” and thus could be introduced through hearsay without offending the Confrontation Clause. *Davis* defined “testimonial” statements as those made for the primary purpose of investigation in securing a criminal conviction, and not for the primary purpose of securing police assistance in an emergency.

The Court of Appeals held that the police questioning was primarily part of an emergency response to ascertain whether the witness with the gunshot wound was the “victim,” and where the shooter might be and if he continued to pose harm to them and the public. The statements were made after an emergency call, while the man was still on the ground, in acute distress and awaiting medical attention. Even though the information could also aid in the investigation, the police’s primary purpose in asking the questions at the time was for emergency response.

The Supreme Court reversed, holding in the majority opinion that statements that indicate what happened in the past, as opposing to events currently happening as with the 9-1-1 call in *Davis*, tend to be “testimonial” and are typically made primarily to aid in investigation. The Court held that to be the case here, where it found
the statements related only to past events, did not indicate the presence of an on-going threat or the possible presence of the perpetrator. When the shooting had occurred 30 minutes earlier, in a house six blocks away, the Court concluded that the primary purpose of the questions asked and answers given was to identify, locate and apprehend the perpetrator. While the focus of the inquiry is on the declarant’s statements, and not the interrogator's questions, facts concerning the interrogation can be considered to determine the primary purpose of the declarant. The police questioned the declarant while EMS was already on its way to treat his injuries, and took no steps to secure the area out of concern that the perpetrator could be nearby. The police, as the Court said, “acted in a manner entirely consonant with officers who knew that the crime had already been committed, that it had been committed at a different location, and that there was no present or imminent criminal threat.”

In a footnote, the Court rejected the prosecutor’s suggestion that the statements might have been admissible under the excited utterance exception in the Rules of Evidence, noting that the Constitution requires the defendant’s ability to confront witnesses against him in the case of “testimonial” statements and trumps an evidence rule.

Justice Weaver wrote a brief dissent, indicating that she agreed with the Court of Appeals’ reasoning.

Justice Corrigan wrote a separate dissent, in which Justice Young joined. Her dissent concluded that most of the majority’s analysis was unnecessary because the statements would have been admissible as dying declarations. Justice Corrigan argued that the U.S. Supreme Court suggested that dying declarations could be a rare exception to what was a new rule under the Confrontation Clause, and historically predated that Clause. Although the prosecution abandoned the argument because of the state of the law at the time of trial, Justice Corrigan found that the issue should have been considered in fairness to the State. She also concluded that an objective victim or police officer, at the time of the events at issue, would very well have considered the statements to be for the primary purpose securing assistance, and that the Court of Appeals should not be overturned on such a close fact question. She found that the estimated elapsed time since the shooting was insignificant and agreed that ascertaining the identity and whereabouts of the shooter was for the purpose of ensuring safety, and not primarily for investigation.
A recent Michigan Court of Appeals decision could have wide-ranging implications for prosecuting and defending in sexual assault cases.

At issue is whether information gained from victims during a medical forensic examination and recorded on a forensic form, are testimonial hearsay and excludable from evidence, or can be used by prosecutors.

In People v. Spangler, the court remanded the case to the Ingham County Circuit Court to consider the totality of the circumstances relating to the complainant’s statements.

In this case, a mother took her alleged sexually assaulted son to the hospital, where she “signed a permission form authorizing a SANE [sexual assault nurse examiner] to perform a medical forensic examination and take medical forensic photographs.”

There isn’t a published case in Michigan that gives trial courts direction on whether SANE reports are testimonial or not, said Herb Tanner, who is the Violence Against Women Project training attorney for the Prosecuting Attorneys Association of Michigan.

Peter Van Hoek, assistant defender at the State Appellate Defender Office, agreed, saying there is lack of record and discussion in trial court in Michigan dealing with SANE reports.

Tanner cited People v. Bryant, as a similar case that lays out circumstances of the admissibility of taking information after the fact or in the course of an ongoing emergency.

In Bryant, the Michigan Supreme Court held that a shooting victim’s statements to police “constituted inadmissible testimonial hearsay within the meaning of the U.S. Supreme Court’s decisions in Crawford [v. Washington] and Davis [v. Washington]” because the “primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution.”

One argument is that the SANE exams are for medical treatment, the other side argues that the nurse examiner is nothing more than a cop in a white coat and are gathering facts for later, Tanner said.

In the face of Bryant, Van Hoek said, where the statement was taken 39 minutes after the incident—and still considered hearsay—it would be hard in this case for prosecution to say it was made during an ongoing emergency.

“From my perspective it would be very difficult for the prosecution to establish it would be anything other than testimonial,” Van Hoek said.

In the Spangler trial court, defense counsel argued that the statements were testimonial hearsay, relying on the fact that they had been recorded on the forensic form.

Conversely, “The prosecution argued that because the statements were made to a nurse
for the purpose of obtaining medical treatment, they were non-testimonial," Judge Kirsten Frank Kelly wrote in the opinion.

"The trial court made no attempt to gain any information regarding the process of the examination, what prompted the complainant's statements, or how the forensic form was filled out. Rather, it simply granted the motion to preclude any testimony from the nurse, based solely on the format of the forensic form[,]" added Kelly, who was joined by Judges Mark J. Cavanagh and Jane M. Beckering.

The distinction is whether the statement was made describing as a passing event, like testimony, as compared to a statement made during an ongoing emergency, Van Hoek said.

This is a situation where the subject may be too young to testify at trial, he said.

But, if the witness could testify, there likely would be no need to use the SANE forensic form in court, and the whole confrontation issue would not come up.

He pointed to the U.S. Supreme Court decision in Crawford, which held a wife's statement to police could not be used against her husband (because she could not testify against her spouse), and would violate his Sixth Amendment right of confrontation.

"Likely they will determine this is forensic and testimonial and inadmissible as far as testimony," Van Hoek said of Spangler.

"The broader question is it looks like the child who is the complainant may not testify, so the question is, would admitting the hearsay statement of the child violate the right of the defendant [under the confrontation clause of the Sixth Amendment]," Tanner said.

"It's a long way from resolution, it's[likely] not going to end at the trial court, and it may not end at the Court of Appeals, depending on how the facts develop," he added. "I think there are arguments on both sides."
Since Crawford v. Washington, some courts have said that a statement is not testimonial unless it is made in response to governmental interrogation. And indeed, some have gone further, refusing to characterize a statement as testimonial unless it meets a restrictive definition of interrogation as “structured police questioning.” This idea has begun to distort police practices, as police try to act in such a way that prosecutors can later argue that statements made to the police were not in response to interrogation.

I believe that the whole supposed interrogation requirement is entirely mistaken. Interrogation is a factor that in some contexts supports an inference that the statement is testimonial, but the statement may be testimonial even though it is not in response to interrogation. In this post, I will not contend against the less extreme proposition that only if a statement is made to a government agent can it be testimonial. I believe that proposition is also erroneous, but I will address it in a later post.

Those who contend that interrogation is necessary for a statement to be deemed testimonial have language they can point to in Crawford, though it is quickly apparent that the language does not really support them. Sylvia Crawford’s statements were made in response to police interrogation, and the Court held that, whatever else the category of testimonial statements might include, statements made in response to police interrogation certainly are. Here are the passages in question, with emphasis added in each case:

The Clause’s primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with to the abuses at which the Confrontation Clause was directed.

There is no indication, then, that statements not made during formal testimonial events—a preliminary hearing, grand jury or a former trial—must be in response to police interrogation to be considered testimonial. The Court is very clear that it is merely listing a core class of testimonial statements, a class that plainly includes the statements at issue in the case, and is deciding no more than that these statements are testimonial.
Left for another day is the question of what additional statements, if any, shall be considered testimonial. It is true that the Court left open the possibility that it will not consider any statements beyond this core class to be testimonial. Indeed, the fact that the Court took the care, in footnote 4, to offer some elaboration on the meaning of "interrogation"—saying that it was using the term in a colloquial sense, that it did not have to choose among definitions, and that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition"—confirms that the Court preserved the possibility that the term would in some circumstances be decisive. But that is as far as the Court went in this direction. It offered no intimation that a statement not made in response to interrogation would not be considered testimonial. And it certainly did not suggest that if a statement was not "knowingly given in response to structured police questioning" it would not be testimonial; it merely said that a statement meeting that standard "qualifies under any conceivable definition."

So *Crawford* does not tell us that a statement must be in response to interrogation to be characterized as testimonial. And common sense tells us that there is no such requirement. Suppose that at trial a prosecutor gives an observer an opportunity to come to the front of the courtroom and then says, "Ms. Observer, I invite you to tell us what you know about this incident." After the witness does so, the prosecutor says, "Thank you. You may go." Of course, defense counsel objects because of a lack of confrontation. "But," says the prosecutor, "this was no witness. I did not subject her to any interrogation." The prosecutor is right that there was no interrogation, but of course we would expect the legal argument to be rejected sneeringly. What Observer was doing was testifying. It does not matter that her statement was not given in response to questions; nor would it matter whether she or the prosecutor took the initiative in arranging for her to give the testimony.

So now suppose the invitation comes not at trial but at the police station: "Ms. Observer, if you care to make a statement, please feel free to do so. I will videotape it, and when we this perpetrator stands trial I will give the prosecutor the tape so that she can play it in front of the jury." I think it is equally obvious that a statement made in response to this invitation is testimonial. And now suppose an observer walks into the police station and says, "You don't know about a crime that has been committed, but I am now going to tell you, and I expect that you will then want to prosecute. Please record what I am about to say, because I expect you will want to use it at trial—I do not like the idea of being under oath and having to answer questions by some aggressive defense lawyer." I cannot see a plausible basis on which this statement should not be deemed testimonial. Or suppose the observer walks in to the police station with an affidavit completed, describing the crime. Does anyone seriously contend that this is not testimonial?

Now, of course, the statements in these hypotheticals are less formal than in the usual case, in which a witness makes a statement to a police officer in the field, perhaps before the officer is confident that a crime has been committed. But, for reasons that I have already analyzed in a post called The Formality Bugaboo, formality is not required to render a statement decisive. If the declarant in that field situation understands full well that, once the officer receives the statement, it is likely to be used for prosecutorial purposes, it is testimonial. The declarant is creating evidence, and this critical reality is unaffected by the facts that the police officer was not confident until the
moment that the statement was made that a crime had been committed, and that structured questioning by the officer was not necessary to secure the statement.

The bottom line is that if the declarant is making the statement with the reasonable anticipation of prosecutorial use, it is testimonial, even if it is made without questioning by government authorities or entirely on the witness’s own initiative. Interrogation may, however, be a significant factor in indicating that the declarant did have this anticipation, because if the authorities are interrogating that is a factor that would often convey to the declarant the likelihood of prosecutorial use. But when the declarant is reporting a crime this factor is not necessary to characterize the statement as testimonial; she knows that she is conveying to the authorities information about a crime, and presumably she understands that they will use that information to invoke the machinery of criminal justice. To hold that such a statement is not testimonial is merely to try to avoid Crawford because it makes prosecutions more difficult.
A crime victim’s emergency call to 911 can be introduced as evidence at trial even if the victim is not present for cross-examination, the Supreme Court ruled unanimously on Monday.

At the same time the court held that prosecutors cannot make similar use of the transcript of a police interview that was conducted principally for the purpose of investigating a crime rather than responding to a developing emergency.

The court addressed the two situations in light of the Confrontation Clause in the Sixth Amendment, which guarantees a criminal defendant the right “to be confronted with the witnesses against him.”

The court has interpreted this guarantee to bar the use of “testimonial statements” by witnesses who do not appear in court. The question in the two cases, which the court answered in a single opinion by Justice Antonin Scalia, turned on whether a 911 call on the one hand, or a statement given to the police at a crime scene on the other, qualified as “testimonial.”

A call for help to 911 is not inherently “testimonial” because the caller is not acting as a witness, Justice Scalia said. “No ‘witness’ goes into court to proclaim an emergency and seek help,” he explained.

On the other hand, statements given to police officers who are investigating the scene of a crime, if similar to statements that might be made in court, qualify as testimonial and generally may not be admitted, he said, at least to the extent that they are “neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”

Justice Clarence Thomas dissented from that part of the opinion. Both the statements at issue were “nontestimonial and admissible,” he said. He added that in excluding the statement to the police, the court “extends the Confrontation Clause far beyond the abuses it was intended to prevent.”

It was something of a surprise that the court decided the two cases in a single opinion. They were appeals from separate courts and had been argued separately in March.

In the 911 case, Davis v. Washington, No. 05-5224, the Supreme Court of Washington permitted prosecutors to use the 911 call to convict a man, Adrian M. Davis, of violating a domestic protective order. His former girlfriend, Michelle McCottry, had made a frantic call to a 911 operator to say that Mr. Davis was in the house and was beating her. At the time of Mr. Davis’s trial, the authorities were unable to locate Ms. McCottry. In the absence of witnesses, the 911 call was vital evidence for the prosecution.

In the other case, Hammon v. Indiana, No. 05-5705, police responded to a report of a domestic disturbance and found evidence of a physical struggle between a husband and wife, Amy and Hershel Hammon. After interviewing Mrs. Hammon, they arrested
her husband, who was charged with battery.

Ms. Hammon was subpoenaed but did not appear at his trial. The officer who had interviewed her testified about what she had told him. Mr. Hammon was found guilty. The Indiana Supreme Court, rejecting his argument that the statement should not have been admitted, upheld his conviction.

The two cases attracted attention from groups concerned with domestic violence. Several “friend of the court” briefs told the justices that victims of domestic violence were often afraid to appear in court, and that prosecutions should not be lost under an expansive interpretation of the Confrontation Clause. When the cases were argued, it was evident that some justices were concerned about the potential impact of such a ruling.

Addressing that concern in his opinion, Justice Scalia said defendants who “seek to undermine the judicial process by procuring or coercing silence from witnesses and victims” would forfeit the protection that the Confrontation Clause would otherwise give them.

* * *
The Supreme Court ruled yesterday that prosecutors may not introduce as evidence witness statements made out of court even if a judge has deemed them reliable, overturning a 24-year-old precedent in favor of a new standard likely to be more favorable to criminal defendants.

The court ruled unanimously that the state of Washington violated Michael Crawford's constitutional right to confront and cross-examine witnesses against him at his 1999 trial for attempted murder when it played a tape recording of his wife Sylvia's police interrogation, in which she undermined her husband's claim that he had acted in self-defense. Sylvia Crawford could not testify in person, because Michael Crawford had invoked the spousal privilege to block her appearance.

The state was able to do this because of a 1980 Supreme Court ruling that permitted the introduction of a witness statement made out of court if the trial judge finds specific reasons why it is trustworthy. In this case, the state argued that the reliability of Sylvia Crawford's statement was established because it overlapped with her husband's version of events.

But yesterday, in an opinion written by Justice Antonin Scalia, the court overruled the 1980 case, *Ohio v. Roberts*, holding that the language and history of the Sixth Amendment to the Constitution clearly require that witness testimony be challenged on cross-examination.

“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty,” Scalia wrote. “This is not what the Sixth Amendment prescribes.”

Statements by absent witnesses should be admissible in court only when the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine, Scalia wrote.

Chief Justice William H. Rehnquist, joined by Justice Sandra Day O'Connor, wrote separately to say that he agreed with the result in the case, but that the court could have reached it without overruling Roberts. The court’s decision “casts a mantle of uncertainty over future criminal trials,” Rehnquist wrote.

Crawford had been supported in the case by the National Association of Criminal Defense Lawyers and the American Civil Liberties Union, which argued in a friend-of-the-court brief that Roberts was too vague and was being inconsistently applied.

“The Supreme Court’s decision will fundamentally alter the way that criminal defendants are tried across the nation,” Crawford’s lawyer, Jeffrey Fisher, said in a prepared statement. “No more will governments be able to convict people of crimes on the basis of accusations that they are unable to cross-examine.”
In its brief, Washington state had maintained that overturning the Roberts rule would undermine the truth-seeking function of trials. "The Roberts framework represents a fair balance between a defendant’s right to confrontation and valid considerations of public policy and should not be abandoned," the state argued.

The Bush administration had urged the court to modify the Roberts rule, but not to bar all out-of-court testimony. It proposed instead a rule that would have permitted "inherently reliable" statements.

But the court swept that proposal aside, with a majority made up of the court’s two leading adherents to a “textualist” approach to reading the Constitution, Scalia and Justice Clarence Thomas, and its four most liberal members, Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justice Anthony M. Kennedy also joined Scalia’s opinion in full. The case is Crawford v. Washington, No. 02-9410.

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"Domestic Violence Cases Face New Test Ruling that Suspects Can Confront Accusers Scares Some Victims from Court"

The Dallas Morning News
July 6, 2004
Robert Tharp

Each day, up to one-half of all domestic-violence cases set for trial in Dallas County are thrown out because of a recent U.S. Supreme Court ruling reasserting a suspect’s right to confront his accuser in court.

The ruling applies to all criminal trials, but the county's two bustling courts devoted to domestic-violence offenses are affected the most. The reason: Domestic-violence victims, usually wives or partners, often refuse to cooperate with prosecutors out of fear for their safety or because they reconcile with their alleged attackers.

... *** ...

In the past, prosecutors rarely flinched when a battered woman changed her mind about prosecuting her mate. The widely accepted practice was to hold a trial anyway, often winning a conviction by having a police officer recount what a victim said happened at the scene of an assault.

But since the Supreme Court handed down its ruling in the case of Crawford vs. Washington in March, courts across the country have found it much harder to use those statements in trial unless the victim is available to be cross-examined by the defense.

... *** ...

"This is going to knock out a bunch of cases, and it’s too bad,” said County Criminal Court Judge Lisa Fox, who presides over domestic-violence trials exclusively. “On the other hand, in every other case a defendant has a right to address, face and confront his accuser.”

The unanimous Supreme Court ruling March 8 stems from a case in which a Washington state man was convicted of assault and attempted murder. At his trial, prosecutors presented a recorded statement made by the suspect’s wife during a police interrogation as evidence that the stabbing was not self-defense.

In recent years, a battered woman’s cooperation often was not important in trial because prosecutors would have police officers testify about what victims reported at the scene. The high court ruled that type of hearsay testimony in most cases violates the Sixth Amendment right to confront an accuser.

In an opinion written by Justice Antonin Scalia, which referred to Roman law and the 1603 treason trial of Sir Walter Raleigh, the justices agreed that for hearsay testimony to be allowed in a trial, the accusing witness in most cases must be available for cross-examination.

Convictions on hearsay

Defense attorneys, such as public defender Susan Anderson, praise the ruling, saying it levels the playing field. The reliance on the use of police officers’ hearsay statements to win convictions had become an “epidemic”
across the country, she said.

"You can no longer convict based on the word of a police officer," Ms. Anderson said. "What it's saying is: We're not willing to convict you on the word of someone else. We want to look them in the face and determine whether or not you're lying to me. A lot of cases boil down to he said," she said.

"A lot of times these people are convicted on hearsay, and the DAs either won't or don't call the complaining witness if they've found that they've recanted or [it] is not credible," Ms. Anderson said.

Public defender John Carlough, a former Tarrant County family violence prosecutor, said it had been too easy for prosecutors to rely on testimony by police officers.

"Before Crawford, all we had to do was get the officer to testify and then say that the victim was too upset because of what had happened," Mr. Carlough said. "You could make an entire case with the testimony of a police officer."

The new ruling makes it much harder to use those statements, and individual judges are being asked to determine whether the ruling applies in each of the cases that comes before them.

The determining factor: whether the victim spontaneously blurted out what had happened to the officer or whether the information was gleaned in response to direct questions from the officer.

Until the ruling, prosecutors rarely issued subpoenas to compel domestic-violence victims to testify. The idea was that forcing a victim to testify could "revictimize" her, placing her in danger if a defendant were not convicted or did not receive jail time as punishment.

Spontaneous statements can still be used in court without the witness being available for cross-examination, but information taken in response to police questioning cannot. Judges are drawing the line somewhere between when a police officer's duties shift from keeping the peace to investigating a crime.

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Showing up for trial

"This is a criminal case," Ms. Dyer said. "The county has said this behavior is wrong. The burden of proving it up is on the DA's office on behalf of the community. It is not on behalf of the victim."

For now, when a victim can't or won't show up for a trial that falls under the ruling, the charges are being dismissed in most cases. . .

***

The two domestic-violence courts are not alone in the upheaval. Prosecutors are also re-examining the way they have used statements from criminal accomplices in trial.

An appeals court has already overturned an April 2002 aggravated robbery conviction of a Dallas County man because prosecutors used a statement taken by police from his accomplice without making the man available in the trial to be cross-examined. The appeals court ordered a new trial in that case.

Even so, many judges, attorneys and legal experts such as Southern Methodist
University law professor Fred Moss welcome the high court's ruling because it adheres to long legal tradition as well as constitutional law.

"Crawford means the Constitution trumps evidence law," he said. "They totally redesigned the rules because the rules as they existed were absolute nonsense."
Defendant pled guilty to conspiracy to distribute methamphetamine and was initially sentenced to 24 months' imprisonment based on a 75% downward departure under U.S. Sentencing Guidelines Manual. The sentence was remanded and the district court again imposed a 24-month sentence based on a 40% downward departure and a downward variance based on factors including defendant's post-sentencing rehabilitation. The matter was remanded again because the district court considered improper factors; that decision was vacated by the U.S. Supreme Court, and the court of appeals remanded once more. The district court then granted a 20% downward departure and denied a downward variance. The court of appeals held that the law of the case did not require a 40% downward departure, as the court of appeals did not limit the discretion of the district court in resentencing defendant. The district court properly refused to consider defendant's post-sentencing rehabilitation and the cost of his incarceration, as those were not permissible grounds for varying downward. Upon the third remand, the district court sentenced defendant to 65 months' imprisonment. The defendant appealed and the appellate court affirmed.

Questions Presented: (1) Whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after Gall v. United States? (2) Whether as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation? (3) When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

UNITED STATES OF AMERICA, Appellee,

v.

Jason PEPPER, Appellant.

United States Court of Appeals for the Eighth Circuit

Filed July 2, 2009

[Excerpt; some footnotes and citations omitted.]

RILEY, Circuit Judge.

At issue in this appeal is whether the district court exceeded the scope of our court’s remand, committed procedural error, and abused its discretion in resentencing Jason Pepper (Pepper). This is the fourth time our court has considered Pepper’s case. We have remanded the case for resentencing three times, and Pepper has been resented by
two different district court judges after pleading guilty to conspiracy to distribute methamphetamine. Having carefully reviewed the record, we now affirm the sentence and judgment of the district court.

I. BACKGROUND

On October 22, 2003, Pepper was charged with conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Pepper pled guilty to the charge pursuant to a plea agreement. Based on Pepper's total offense level of 30 and criminal history category I, Pepper's advisory United States Sentencing Guidelines (Guidelines or U.S.S.G.) range was 97 to 121 months imprisonment. Although the charge to which Pepper pled guilty carried a mandatory minimum sentence of 120 months imprisonment, the mandatory minimum did not apply because Pepper was eligible for safety-valve relief pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2.

The government filed a motion for a downward departure, pursuant to U.S.S.G. § 5K1.1, based on Pepper's substantial assistance, and recommended a 15% downward departure. The district court judge assigned to Pepper's case at the time sentenced Pepper to 24 months imprisonment. The district court explained it arrived at the sentence of 24 months imprisonment because this was the minimum sentence Pepper could receive and still be eligible for the drug treatment program at the federal prison in Yankton, South Dakota.

The government appealed, and we reversed and remanded for resentencing, holding the district court erred by considering a matter unrelated to Pepper's assistance in granting the downward departure, "namely its desire to sentence Mr. Pepper to the shortest possible term of imprisonment that would allow him to participate in the intensive drug treatment program at the federal prison in Yankton." We also reasoned, "given the pedestrian nature of Mr. Pepper's assistance, it is far from certain that the district court would have arrived at the same guidelines sentence had it considered only assistance-related elements."

On remand, the district court again sentenced Pepper to 24 months imprisonment. The district court arrived at this sentence by first granting a 40% downward departure based on Pepper's substantial assistance, bringing the bottom of Pepper's advisory Guidelines range to 58 months. The district court then granted a downward variance from the 58 months to a sentence of 24 months imprisonment. The downward variance was based on Pepper's lack of a history of violence, the disparity in sentences between Pepper and his co-defendants, and Pepper's post-sentencing rehabilitation.

The government appealed this sentence, and we again reversed and remanded for resentencing. We concluded that, while it was "a close call, we [could not] say the district court abused its discretion by the extent of the [U.S.S.G.] § 5K1.1 departure." However, we held the district court abused its discretion in granting the downward variance because the district court considered improper factors, namely Pepper's post-sentencing rehabilitation, his lack of a history of violence, and the disparity in sentences among Pepper and his co-defendants "without adequate foundation and explanation." Based on statements the district court made during Pepper's resentencing hearing, expressing a
reluctance to resentence Pepper should the case again be remanded, we remanded the case for reassignment and resentencing by a different district court judge.

In the district court, Pepper’s case was reassigned. On July 18, 2007, after giving the parties an opportunity to file briefs, the new district court judge issued an order on the scope of the remand (Remand Order), declaring, “The court will not consider itself bound to reduce [Pepper’s] advisory Sentencing Guidelines range by 40% pursuant to U.S.S.G. § 5K1.1.” The district court also informed the parties, in determining the appropriate downward departure pursuant to U.S.S.G. § 5K1.1, it would not consider any evidence of substantial assistance Pepper provided after Pepper’s first resentencing.

In the meantime, Pepper petitioned the Supreme Court for writ of certiorari, and the Supreme Court granted the petition on January 7, 2008, vacating Pepper II and remanding the case to our court for further consideration in light of Gall v. United States. In Pepper III, we “considered Gall’s impact on Pepper’s case,” and we again reversed the sentence and remanded for resentencing before a different district court judge.

Pepper’s case was again reassigned. The district court convened a resentencing hearing on October 17, 2008, at which time the parties presented witness testimony and other evidence, and counsel made arguments. The district court informed the parties, due to the extensive procedural history in Pepper’s case, the district court intended to consider the arguments and evidence, issue a sentencing memorandum, and sentence Pepper at a later date.

On December 22, 2008, the district court issued a twenty-seven page sealed sentencing memorandum (Sentencing Memorandum). The district court noted the remand language of Pepper III was nearly identical to the language in Pepper II, and for the reasons stated in the earlier Remand Order, the district court again determined it was not “bound to reduce [Pepper’s] advisory Sentencing Guidelines range by 40% for substantial assistance pursuant to [U.S.S.G. § 5K1.1].” The district court determined Pepper was entitled to a 20% downward departure for his substantial assistance. The district court next considered Pepper’s request for a downward variance pursuant to 18 U.S.C. § 3553(a) based upon Pepper’s characteristics and history, post-offense and post-sentencing rehabilitation, the disparity in sentences among Pepper and his co-defendants, and the cost of Pepper’s incarceration. After considering the 18 U.S.C. § 3553(a) factors and Pepper’s arguments, the district court denied Pepper’s motion for a downward variance.

On January 5, 2009, the district court reconvened Pepper’s resentencing hearing to impose a sentence. Based on the district court’s decision to grant a 20% downward departure pursuant to U.S.S.G. § 5K1.1, Pepper’s advisory Guidelines range was 77 to 97 months. The district court sentenced Pepper to 77 months imprisonment and 12 months supervised release. Thereafter, the district court granted the government’s January 2, 2009, Rule 35(b) motion to reduce Pepper’s sentence further for the assistance Pepper provided after he was initially sentenced, reducing Pepper’s sentence to 65 months imprisonment. Pepper’s appeal followed.

II. DISCUSSION

A. Standard of Review

“We review all sentences, whether inside or outside the Guidelines range, under a
deferential abuse of discretion standard." We “must first ensure that the district court committed no significant procedural error.”.

B. Downward Departure

1. Scope of Our Remand for Resentencing

Pepper first argues “[t]he scope of the remand and law of the case from Pepper II and Pepper III required [the district court] to reduce Pepper’s advisory [Guidelines] range by at least 40% pursuant to U.S.S.G. § 5K1.1.” The government disagrees and contends the law of the case doctrine does not apply because our court did not place any limitation upon the district court’s discretion in resentencing Pepper.

“On remand for resentencing, all issues decided by the appellate court become the law of the case, and the sentencing court is bound to proceed within the scope of any limitations imposed . . . by the appellate court.” “Under the law of the case doctrine, a district court must follow our mandate, and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate’s terms.” “Ultimately, the scope of a remand must be determined by reference to the analysis contained in the opinion.” When we decide to remand a case for resentencing, we have two options: (1) we may remand the case with instructions limiting the scope of the district court’s discretion, or (2) we may remand without placing any limitations on the district court’s discretion.

We used the following remand language in the conclusion of Pepper III: “For the foregoing reasons, we again reverse and remand Pepper’s case for resentencing consistent with this opinion. As the district court expressed a reluctance to resentence Pepper again should the case be remanded, we again remand this case for resentencing by a different judge.” Pepper III’s remand language is nearly identical to the remand language in Pepper II.

In the district court’s Remand Order, which was reaffirmed by the district court in the Sentencing Order, the district court explained, “The only specific restrictions on the court’s decision on remand were (1) the second resentencing hearing should take place before a different judge and (2) such judge’s decision should be ‘consistent with [Pepper II].’” The district court observed that while our court “indicated that a 40% downward departure was not an abuse of discretion[,]” we did not “hold that a 40% downward departure [wa]s the only reasonable outcome for [Pepper] or that the [district] court must impose a 40% downward departure on remand pursuant to USSG §5K1.1.”

We agree with the reasoning of the district court. Our remand was a general remand for resentencing. Our opinions in Pepper II and Pepper III did not place any limitations on the discretion of the newly assigned district court judge in resentencing Pepper. We did not specify the district court’s discretion would be restricted to considering whether a downward variance was warranted, nor did we specify the district court would be bound by the 40% downward departure previously granted. We concluded a 40% downward departure was not an abuse of discretion. In other words, a 40% downward departure was within the range of reasonableness. Under the circumstances of Pepper’s case, a complete resentencing without any restrictions on the district court’s discretion was preferable, in contrast to a partial, piecemeal resentencing limiting the sentencing judge’s discretion. We conclude neither scope of our remand, nor the law of the case doctrine, required the district court to grant Pepper a 40% downward departure
for substantial assistance.

2. Extent of the Downward Departure

We turn to Pepper's next argument that the district court abused its discretion by refusing to depart downward by more than 20% based on Pepper's substantial assistance. We dispose of this argument easily. "[T]he extent of a downward departure in the defendant's favor lies within the district court's discretion and is virtually unreviewable on a defendant's appeal, absent an unconstitutional motive animating the district court." As Pepper has not asserted an unconstitutional motive played a role in the district court's decision, we lack jurisdiction to review the extent of the departure. We affirm the district court's judgment with respect to the extent of the downward departure.

C. Downward Variance

Pepper next challenges the district court's denial of his motion for a downward variance. Pepper argues the district court abused its discretion in refusing to consider Pepper's post-sentencing rehabilitation and the cost of his incarceration as bases for varying downward under 18 U.S.C. § 3553(a).

1. Post-Sentencing Rehabilitation

While Pepper acknowledges our court explicitly has stated that post-sentencing rehabilitation is not a permissible factor to consider in granting a downward variance, and that the district court was merely following our precedent in refusing to consider this factor, Pepper nevertheless suggests, under the unique circumstances of his case, post-sentencing rehabilitation is an appropriate consideration. Pepper urges us to consider the fact Pepper's rehabilitation began before Pepper "realized his 24 month sentence of imprisonment and five years of supervised release would turn into a 65 month term of imprisonment and one year of supervised release."

We agree Pepper made significant progress during and following his initial period of imprisonment. While in prison, Pepper completed a 500-hour drug treatment program. Three days after we issued our opinion in Pepper I, Pepper completed his term of imprisonment on June 27, 2005, and began serving his term of supervised release. Pepper enrolled at Western Iowa Tech Community College. In 2007, Pepper married and became a stepfather to his wife's daughter. At the time of his second resentencing in October 2008, Pepper was working as a supervisor of the night crew at Sam's Club and attending school in Illinois.

We commend Pepper on the positive changes he has made in his life. However, the law of our circuit is clear. "[E]vidence of [a defendant]'s post-sentence rehabilitation is not relevant and will not be permitted at resentencing because the district court could not have considered that evidence at the time of the original sentencing." "This panel is bound by Eighth Circuit precedent, and cannot overrule an earlier decision by another panel."

2. Cost of Incarceration

Finally, Pepper contends the district court abused its discretion in refusing to consider the cost of incarceration as a basis for varying downward. In the Sentencing Memorandum, the district court cited as support for its decision our prior opinions in United States v. Collins and United States v. Wong. The district court then opined, even if the cost of incarceration were an appropriate consideration under Eighth Circuit precedent, the district court did "not believe the cost of incarceration fits with any of the
factors listed for imposing sentence under 18 U.S.C. § 3553(a)."

We agree with the reasoning of the district court, and this view was shared by another panel of our court in a recent opinion. The district court did not abuse its discretion in refusing to consider the cost of Pepper's incarceration as a basis for varying downward.

Further, "giv[ing] due deference to the district court's decision that the § 3553(a) factors, on a whole, justify" Pepper's sentence, our review of Pepper's sentence reveals no abuse of the district court's considerable discretion and no basis for concluding Pepper's sentence is substantively unreasonable.

III. CONCLUSION

We affirm Pepper's sentence and the judgment of the district court.
The U.S. Sentencing Guidelines do not allow federal trial courts to consider factors unrelated to a defendant’s assistance to prosecutors when entering a downward departure based on a motion by the government, the 8th U.S. Circuit Court of Appeals said Friday in *United States of America vs. Jason Pepper*.

The appellate court adopted the reasoning of the 7th Circuit in *United States vs. Thomas*, decided in 1991. The 7th Circuit said, “Had the Sentencing Commission wished to permit courts to consider factors unrelated to the quality of the defendant’s cooperation when departing because of that cooperation, it seems likely that it would have promulgated a list of examples encompassing factors unrelated to cooperation.”

Arnold added, “Buttressing this conclusion is the fact that the finely reticulated structure of the guidelines indicates that the commission was neither careless in its selection of examples nor bent on giving courts the sort of discretion that follows from allowing them to extend or shorten departures for any reason under the sun. We believe that the same arguments apply to the background section of the commentary to the guidelines.”
In arriving at this conclusion, the appellate court rejected as dicta pronouncements it had made in two earlier decisions. The language in each decision allowed the consideration of matters unrelated to the substantial-assistance departure motion. In the 1998 decision of *United States vs. Anzalone*, the court said a district court could consider post-plea agreement drug use, but the question before the court dealt with what matters the government could consider when deciding whether to file a substantial-assistance departure motion in the first place. In *United States vs. Pizano*, decided in April, the court looked at the commentary of the provision regarding the nature, extent and significance of the assistance and said those aren’t the only legitimate considerations and that relevant factors are to be considered. According to the court, this was dictum because the panel had already decided the extent of the downward departure hadn’t been based on a factor unrelated to the assistance.

Once the 8th Circuit determined unrelated factors may not be considered in substantial-assistance departures, it found the trial judge’s reasoning behind the decision to sentence Pepper to 24 months in prison was unrelated to the assistance Pepper gave the government. Specifically, the judge decided on the 24-month sentence because that was the minimum sentence Pepper could receive and still take part in the prison’s intensive drug treatment program.

The 8th Circuit remanded the case back to the trial judge for resentencing.

Senior Circuit Judge C. Arlen Beam and Circuit Judge William Jay Riley concurred with Arnold’s opinion.

*United States of America, appellant, vs. Jason Pepper, appellee;* No. 04-2057; handed down June 24.
A federal appeals court has overturned the prison sentence of a convicted methamphetamine dealer, and removed the judge who had sentenced him twice before.

The St. Louis-based 8th U.S. Circuit Court of Appeals ruled that Jason Pepper, who pleaded guilty three years ago to conspiring to distribute more than 500 grams of methamphetamine in the Sioux City area, should be sentenced a third time. It also said U.S. District Judge Mark Bennett should be replaced as the sentencing judge, citing his reluctance to sentencing Pepper again.

The case was reassigned to U.S. District Judge Linda Reade.

Pepper was released from prison after serving nearly all of his initial 24-month sentence. He now lives in Illinois, where he works full-time and goes to college.

Bennett reduced Pepper’s sentence by 75 percent because he pleaded guilty and testified on the government’s behalf.

Prosecutors appealed, saying the sentence should only have been reduced by 15 percent.

The appeals court agreed, saying Bennett’s reduction was too lenient and returned the case for resentencing. Bennett sentenced Pepper again, reducing it by 59 percent, and prosecutors appealed.

The appeals court cited several factors in reversing Pepper’s sentence, including that other co-defendants received much longer sentences.

The court also said that Bennett abused his discretion in issuing the lighter sentences. Bennett declined comment.

Patrick Parry, Pepper’s attorney, objected to the court’s decision.

“He’s out of custody now . . . and he’s going to have to go back to prison potentially when everyone agrees he doesn’t pose a risk to the community for something for which he’s already done his time,” Parry said.
Travel plans called for Jason Pepper to say goodbye to his daughter Tuesday morning at their home in St. Joseph and then begin a long drive with his wife to Florence, Colo., where he was to report Thursday to a minimum-security prison.

"It's rough. I'm having good hours and bad hours," Pepper said the day before he was scheduled to depart.

At the same time, the 29-year-old was philosophical about his return to prison after a federal appeals court ruled that his initial two-year sentence, which ended in 2005, was too short and that he must be resentenced to a longer period of incarceration.

"It's not something that's going to kill me... If they're going to make me do it, what choice do I have?" he said.

The News-Gazette reported in early March about Pepper's legal troubles.

A former methamphetamine addict who sold the drug to finance his habit, Pepper was arrested by federal agents in Sioux City, Iowa, where he was living, in October 2003. He pleaded guilty to methamphetamine distribution and was sentenced by U.S. Judge Michael Bennett to two years.

Pepper broke his addiction to meth during his incarceration and said he vowed to make a productive life for himself after his release. Discharged from federal prison in Yankton, S.D., following 21 months in custody, he went back to school, worked and married.

Meanwhile, prosecutors appealed the judge's initial two-year sentence. Finally, after a series of appeals that went all the way to the U.S. Supreme Court and took more than three years, the government won a ruling that Pepper must be resentenced.

Earlier this year, U.S. Judge Linda Reade resentenced Pepper to 65 months of incarceration but allowed him to remain free until contacted by the federal Bureau of Prisons and told where to report. Pepper said he received a phone call two weeks ago telling him he should report on Thursday to the Colorado facility.

It's unclear how long Pepper will be held. He was sentenced to 65 months. But he's already served 21 months and been given good-time credit for another three months. He also participated in an addiction education program at Yankton that entitles inmates to a 12-month reduction in sentence, a discount Pepper never received because of his 2005 release.

So while Pepper is certain not to serve 65 months, the Bureau of Prisons will have to determine how long he will be held.

Whatever it is, Pepper faces a considerable separation from his wife, Hannah, and his child.

Pepper said he's trying to be as positive as he can about the future. Noting that smoking is banned in federal prison, Pepper said he is
pleased that "I'm going to get to quit smoking."

"That's one positive. But my list of positives does not outweigh my list of negatives," he said.

Pepper last week resigned a job he held at Sam's Club in Champaign. A supervisor on the night shift, he said he hopes to return to the company when he's released and work his way into management. "I don't think (going back to work there) is an issue," he said, noting that his bosses have supported him during his appeals.

Pepper is not without hope of a legal reprieve. His lawyers have appealed Judge Reade's 65-month sentence to the 8th Circuit Court of Appeals in St. Louis. They also have asked, so far without response, that he be allowed to remain free on bond while the issue is in litigation.

Pepper's story is a cautionary tale about the astounding addictive power of methamphetamine. He said he had experimented with alcohol and other drugs while in high school. But his intended experimentation with methamphetamine turned into a multiyear addiction that dominated his every waking moment.

He said amphetamine use can end in one of two ways—jail or death. Pepper said he was glad he ultimately was arrested, because being locked up and cut off from meth prevented an early death.
The Supreme Court on Thursday named a New York City lawyer and former Supreme Court clerk to argue the side of a criminal sentencing case that the federal government normally would defend. The government, however, has sided with the prison inmate challenging his sentence in *Pepper v. U.S.* (09-6822)—a case granted review near the end of last Term and not yet scheduled for oral argument.

At issue in the case is whether, under federal law, a judge imposing a new sentence after an earlier one was set aside is barred from reducing the sentence as a way to give the individual credit for having made efforts to rehabilitate himself after the initial sentence was imposed. The Justice Department now takes the position that the judge may do so. The Department had urged the Court to send the case back to the Eighth Circuit Court to consider the Department’s present position, but the Supreme Court went ahead and granted review June 28 of an appeal by the Iowa prisoner, Jason Pepper.

In Thursday’s order, the Court chose Adam G. Ciongoli to enter the case as a friend-of-the-court and present a merits brief and an oral argument that a judge lacks that authority. Ciongoli, now engaged in corporate practice and teaching part-time at Columbia Law School, is a former law clerk to Justice Samuel A. Alito, Jr.

Pepper pleaded guilty to a charge of conspiring to distribute an illegal drug, methamphetamine, after being arrested during a federal probe of a “meth” trafficking ring in Iowa. Under federal guidelines, his sentence could have been set between 97 and 127 months, but the judge imposed a sentence of only 24 months—a figure the judge chose to make Pepper eligible for drug rehabilitation at a federal prison.

That reason was rejected by the Eighth Circuit, but, at a new sentencing proceeding, the judge again gave Pepper 24 months, in part because of Pepper’s efforts at rehabilitation since the original sentencing. After federal prosecutors appealed, that sentence, too, was set aside. Ultimately, after further proceedings, a new judge gave Pepper 65 months in prison. He had already served the original 24-month sentence, so was ordered back to prison to serve the additional 41 months.

After finishing his initial sentence, Pepper had enrolled in college, had married and become a stepfather, and was working as a supervisor of the night crew at a Sam’s Club retail store. After the new, longer sentence was imposed, Pepper appealed the case to the Supreme Court, gaining review.

Once Pepper’s lawyers and Ciongoli file briefs on the merits, the case will be scheduled for oral argument. If Justice-designate Elena Kagan is on the Court when the case is considered, she presumably will not take part, since she was counsel of record for the government in the case in her post as U.S. Solicitor General.
Schwarzenegger v. Plata

09-1233


In Plata v. Schwarzenegger and Coleman v. Schwarzenegger, the federal courts initially issued narrow orders requiring California to develop and implement remedial plans to bring the California prison system’s medical and mental health care into constitutional compliance. However, as the state time and again failed to meet its own remedial targets, both courts were forced to adopt increasingly drastic remedies, culminating in the Plata court’s 2005 appointment of a receiver to manage the prison medical system. Ultimately, by late 2006 it became apparent that the overcrowding in California’s prisons rendered the efforts of the courts insufficient. At the request of the Plata and Coleman courts, the Chief Judge of the United States Court of Appeals for the Ninth Circuit convened a three-judge court to consider the plaintiffs’ request for a court-ordered reduction in the California prison population. The court found overcrowding to be the primary cause of violations within California’s prison system. It approved a population limit of 137.5% of design capacity, and it ordered the state to submit a plan as to how it can best reduce the current prison population from its present level of more than 190% of design capacity. On November 12, 2009, the State timely submitted a plan to reduce the prison population to the required 137.5% of design capacity by December 2011. At the plaintiffs’ request, a three-judge panel then entered an order requiring the defendants to achieve the population reduction benchmarks set forth in the plan.

Questions Presented: (1) Whether the three-judge district court had jurisdiction to issue a “prisoner release order” pursuant to the Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3626. (2) Whether the court below properly interpreted and applied Section 3626(a)(3)(E), which requires a three-judge court to find, by clear and convincing evidence, that “crowding is the primary cause of the violation of a Federal right; and . . . no other relief will remedy the violation of the Federal right” in order to issue a “prisoner release order.” (3) Whether the three-judge court’s “prisoner release order,” which was entered to address the allegedly unconstitutional delivery of medical and mental health care to two classes of California inmates, but mandates a system-wide population cap within two years that will require a population reduction of approximately 46,000 inmates, satisfies the PLRA’s nexus and narrow tailoring requirements while giving sufficient weight to potential adverse effects on public safety and the State’s operation of its criminal justice system.

Ralph COLEMAN, et al., Plaintiffs,

v.

Arnold SCHWARZENEGGER, et al., Defendants.
Marciano Plata, et al., Plaintiffs,

v.

Arnold Schwarzenegger, et al., Defendants.

United States District Court for the Northern District of California

Decided January 12, 2010

[Excerpt; some footnotes and citations omitted.]

On August 4, 2009, this three-judge court issued an Opinion and Order finding, by clear and convincing evidence, that crowding is the primary cause of the constitutional inadequacies in the delivery of medical and mental health care to California inmates and that no relief other than a "prison release order," as that term is broadly defined by the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(g)(4), is capable of remedying these constitutional deficiencies. We further concluded that relief requiring the State to reduce the population of its thirty-three adult prisons to 137.5% of their total design capacity was narrowly drawn, would extend no further than necessary to correct the violation of California inmates' federal constitutional rights, and was the least intrusive means necessary to correct that violation. Accordingly, in consideration of this court's limited role and the State's "wide discretion within the bounds of constitutional requirements" we ordered the State to provide "a population reduction plan that will in no more than two years reduce the population of the CDCR's adult institutions to 137.5% of their combined design capacity." As required by the PLRA, we also gave "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" and determined, based on the evidence presented at trial, that means exist by which the defendants can accomplish the necessary population reduction without creating an adverse impact on public safety or the operation of the criminal justice system.

The State submitted a proposed prison population reduction plan on September 18, 2009, but that proposed plan would have reduced the prison population to only 166% of design capacity in two years absent further legislation, and 151% of design capacity in two years if all of the proposals were granted legislative approval. Because the plan that the State provided did not comply with our August 4, 2009 Order, we rejected the plan and ordered the State to submit a revised population reduction plan that complied with our August 4 Order. On November 12, 2009, the State timely submitted a revised plan. In accordance with our Orders, this revised plan proposed measures estimated to reduce the prison population to the required 137.5% of design capacity by December 2011.

On December 7, 2009, plaintiffs agreed that the State's revised plan satisfied the requirements of our August 4, 2009 Order and proposed that we enter an order requiring the defendants to achieve the six-month population reduction benchmarks set forth in the revised plan without ordering implementation of any specific population reduction measures. We agree that such an order is appropriate because it would afford the State maximum flexibility in its efforts to achieve the constitutionally required population reduction.
As defendants and county intervenors observe in their December 18, 2009 replies to plaintiffs’ response, we have not evaluated the public safety impact of each individual element of the State’s proposed plan. However, the evidence presented at trial demonstrated that means exist to reduce the prison population without a significant adverse impact on public safety or the criminal justice system. Certain of the measures suggested by the State, such as raising the threshold for grand theft and limiting the maximum sentence for certain enumerated felonies to 366 days to be served in county jail, were not included within the means we considered in our August 4 Opinion and Order, and were thus not evaluated from the standpoint of public safety. We noted, however, that they had previously been endorsed by state officials, and thus, presumably, “would not have an adverse effect on public safety.” Certain measures that we concluded would substantially reduce the prison population that we did evaluate positively from a public safety standpoint, such as changes with respect to the churning of technical parole violators, appear to be included only in part in the State’s plan. We believe, as we did when we issued our prior Order, that it is appropriate for the State to exercise its discretion in choosing which specific population reduction measures to implement, and, in doing so, to bear in mind the necessity for ensuring the public safety. We are satisfied that, as we previously held, the reduction in prison population that we have ordered can be implemented safely and trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction. Should the State determine that any of the specific measures that it has included in its plan cannot be implemented without significantly affecting the public safety or the criminal justice system, we trust that it will substitute a different means of accomplishing the constitutionally required population reductions.

We emphasize here that we are not endorsing or ordering the implementation of any of the specific measures contained in the State’s plan, only that the State reduce the prison population to the extent and at the times designated in this Order. We also emphasize that we do not intend by this Order to prohibit the State from taking actions that may have the effect of reducing the prison population, whatever their impact on public safety, should those actions be taken for reasons other than compliance with our Order.

The concerns that county intervenors express regarding funding may have merit. Counties may well require additional financial resources from the State in order to ensure that no significant adverse public safety impact results from the State’s population reduction measures. Counties may, for example, need additional financial resources in order to fund the additional costs of ongoing rehabilitation, re-entry, drug or alcohol, educational, and job training programs. Reducing the number of persons it imprisons should result in significant savings to the State. We do not now decide whether and to what extent the State should allocate part of its savings from such reductions to the counties; instead, we note that whether public safety requires such a reallocation demands serious consideration by the State, both under its general responsibilities to the public and in accord with the PLRA.

In light of all of the above, as well as our August 4, 2009 Opinion and Order, IT IS HEREBY ORDERED that:

1. In accordance with the figures in
defendants’ November 12, 2009 revised population reduction plan, defendants shall reduce the population of California’s thirty-three adult prisons as follows:

a. To no more than 167% of design capacity by six months from the effective date of this Order.

b. To no more than 155% of design capacity by twelve months from the effective date of this Order.

c. To no more than 147% of design capacity by eighteen months from the effective date of this Order.

d. To no more than 137.5% of design capacity by twenty-four months from the effective date of this Order.

“Design capacity” for purposes of these benchmarks may not remain static. For example, an increase in design capacity through construction would decrease the number of inmates by which the prison population must be reduced. Conversely, a decrease in design capacity, such as would result from the closing of a prison, would increase the numeric reduction required.

2. All population reduction measures undertaken by defendants must comply not only with our Orders and the PLRA, but also with any relevant orders entered by other courts, including the individual Plata and Coleman courts.

3. Within fourteen days following each of the deadlines described above, defendants shall file a report advising the court whether the estimated population reduction has been achieved. This report shall include the total reduction in the population of California’s adult prisons that has been achieved; the current population of those institutions, both in absolute terms and as a percentage of design capacity; and the reductions associated with each of the individual measures that defendants described in their November 12, 2009 plan as well as any additional or alternative population reduction measures that it may have subsequently adopted. If the State has failed to achieve the required population reduction, defendants shall advise the court as to the reasons for such deficiency and what measures they have taken or propose to take to remedy it. They also shall advise the court as to whether such deficiency could have been avoided by the exercise of executive authority, such as that invested in the Governor and other officials by the California Emergency Services Act. Finally, defendants shall advise the court whether legislative changes are required to remedy any deficiency and, if so, what efforts defendants have made to obtain such changes, including specific proposals made to the legislature and the legislative responses to such proposals. Defendants are advised that we may also order the submission of interim reports informing the court of what specific tasks defendants intend to undertake during each six-month period and the specific persons responsible for executing those tasks.

4. If, at any time, the State believes that the waiver of state law by this court is necessary to permit it to meet any of the above population reduction deadlines, defendants shall promptly file a statement with this court, explaining the reasons that they believe such waiver to be necessary; whether they have considered and rejected all other available remedies; if they have rejected such remedies, the reasons therefor; and why the proposed waiver is permissible under the PLRA and the Constitution of the United States.

5. To the extent that population reduction measures implemented by the State increase
the need for re-entry, rehabilitation, education, job training or other community services provided by the counties, or necessitate other measures be undertaken by such counties, defendants shall, in cooperation with the counties, calculate the amount of additional funds that the counties may require from the State in order to maintain the level of public safety at or about the existing level. Within thirty days of the effective date of this Order, defendants shall file with this court a statement setting forth (1) the amounts agreed upon or, should there be no agreement, the parties' respective positions as to such amounts, and (2) what steps defendants have taken or plan to take to fulfill their obligations to the counties in connection with the implementation of the prison population reduction measures, including the allocation to the counties of a portion of any budgetary savings resulting from such implementation. It would be in the interest of both the State and the counties to commence such discussions prior to the effective date of this Order.

6. The effective date of this Order is STAYED pending the United States Supreme Court's consideration of the appeal of our August 4, 2009 Opinion and Order and any appeal of this Order. Unless this Order is rendered moot by the Court's disposition of any such appeal, the effective date of this Order shall be the day following the final resolution by the Court of a timely-filed appeal of this Order or, if no such appeal is filed, the later of the day following the expiration of defendant's time for filing an appeal and the day following the Court's final resolution of the appeal of our August 4 Opinion and Order.

7. We note that this stay grants the State additional time in which to reduce the population of its adult prisons, which Defendant Governor Arnold Schwarzenegger has proclaimed are in a state of emergency due to overcrowding. In addition, the stay affords defendants the time and opportunity to seek legislation enacting those prisoner population reduction measures that they proposed in their November 12, 2009 revised plan, but asserted that they lacked the authority to implement. We also note that defendants represented in their November 12, 2009 plan that they would seek legislation affording them such authority. Accordingly, within fourteen days of the effective date of this Order, defendants shall file a report advising this court whether they have obtained the requisite authority for such measures or for other alternative measures that would achieve equal or greater reductions in the prison population, and, if not, what efforts they have made towards obtaining such authority, including what specific proposals they have made and what specific responses have been received from the legislature, if any.

As we have repeatedly stated, we do not intervene lightly in the State's management of its prisons. However, the State's long-standing failure to provide constitutionally adequate medical and mental health care to its prison inmates has necessitated our actions, and our prison population reduction Order is the least intrusive remedy for the constitutional violations at issue. We reiterate our "hope that California's leadership will act constructively and cooperatively . . . so as to ultimately eliminate the need for further federal intervention." We do, however, necessarily reserve the right, and indeed we have the obligation, to order additional steps to implement our August 4 Order should the actions taken by the State fail to meet any six-month reduction goal set forth in this Order.

IT IS SO ORDERED.
Agreeing to hear an appeal from Gov. Arnold Schwarzenegger, the U.S. Supreme Court said Monday it will decide whether the state can be forced to release 46,000 inmates—more than one-fourth of its prison population—to relieve overcrowding.

The justices said they would hear the case in the fall and rule early next year.

The court’s intervention was a victory for the governor and state prison officials.

“We continue to believe federal judges do not have the authority to order the early release of prisoners in our state,” said Rachel Arrezola, a spokeswoman for the governor. “California should be able to take action on its own to keep its citizens safe without interference from the federal courts.”

At issue in the case is whether federal judges can cure a constitutional violation in a state prison system by ordering the release of some inmates.

A special three-judge panel decided last year that the state’s prisoners were being given inadequate medical and mental health care. Denying needed care to prisoners has been held to violate the 8th Amendment’s ban on cruel and unusual punishment.

The judges concluded the overcrowding was the “primary cause” of this violation, and they ordered the state to cap the population of its prisons at 137% of capacity. State officials say they would have to release 46,000 inmates over two years to comply with that order.

California’s state prison system is the nation’s largest, with 165,000 inmates.

The governor and a group of Republican state lawmakers appealed the prisoner-release order, arguing that the judges had overstepped their authority under a federal law intended to restrict lawsuits involving prisons. In his appeal, Schwarzenegger called the order “unprecedented” and said it “intrudes on the state’s authority over its prison system.”

The case was years in the making, however. U.S. District Judges Thelton Henderson in San Francisco and Lawrence Karlton in Sacramento had ruled in separate cases that prisoners were being denied needed medical care. Court officials stepped in and decided to have a three-judge panel consider the state’s prison system as a whole. Judge Stephen Reinhardt from Los Angeles, who serves on the 9th Circuit Court of Appeals, was added to panel.

The judges said last year that they concluded they saw no other remedy than to reduce the prison population. However, they agreed to put their order on hold until the state appealed.

The Supreme Court said it would hear the case, known as Schwarzenegger vs. Plata, in its new term beginning in October and decide whether the judges went too far.

Donald Specter, director of the Prison Law Office that brought the class-action suit alleging inadequate healthcare, said he was not surprised by the high court’s action. “There was always a danger,” he said, that
the liberal-leaning panel in California would be reversed by a conservative majority of justices in Washington.

“But the three-judge panel did exactly what Congress told them to do in these situations,” Specter said.

“And the three judges are also doing what the governor has tried to in each of the past three years” by reducing the prison population and the state’s spending on corrections.
It sounds like the opening of a lousy movie (set in "the near future," of course, like most dystopia pics): prison wardens reluctantly throwing open their doors after orders from well-intentioned but misguided judges fed up with prison overcrowding.

What’s happening in California isn’t quite that dire, but the prison system got a stern rebuke from a three-judge panel yesterday, which tentatively ruled that the state must reduce its prison population by as many as 57,000 people.

The ruling came in the midst of a lawsuit brought by inmates claiming that the California prison system had deprived them of a constitutional level of medical and health care.

Their order is not final, but U.S. District Court Judges Thelton Henderson and Lawrence Karlton and the Ninth Circuit’s Stephen Reinhardt—a left-of-center panel, to be sure—effectively told the state that it had lost the trial and would have to make dramatic changes in its prisons unless it could reach a settlement with inmates’ lawyers.

“There is . . . uncontroverted evidence that, because of overcrowding, there are not enough clinical facilities or resources to accommodate inmates with medical or mental health needs at the level of care they require,” the judges wrote in a 10-page decision.

State officials immediately said they would appeal.

If the state is ordered to reduce the prison population, it would likely be able to do so over two or three years, so it would not have to release large numbers of inmates at once. Some methods of cutting the population include limiting new admissions, changing policies so parole violators return to prison less frequently, and giving prisoners more time off of their sentences for good behavior and rehabilitation efforts.
Gov. Arnold Schwarzenegger filed a plan Friday to ease prison overcrowding that falls well short of a demand by federal judges to reduce 40,000 inmates in two years.

The main proposal would cut 18,212 inmates in the next two years.

Schwarzenegger will submit an alternate scenario that would reach the three-judge panel’s target in five years by reducing 44,907 inmates—if the Legislature approves additional changes. Those include an “alternative custody” proposal allowing lower-level offenders to go on house arrest for their final 12 months. The Assembly rejected that idea last week.

Even under the alternate scenario, the state would only reduce the prison population by 23,312 over the next two years.

If the judges reject Schwarzenegger’s plan, they could ask him to make further reductions. They also could hold Schwarzenegger and corrections chief Matthew Cate in contempt for not submitting a plan that meets the court order.

Cate framed the proposal as a “good-faith effort” that was in “substantial compliance” but fell short because of the Legislature. The governor will ask lawmakers to pursue his prison changes.

“We were disappointed that more didn’t get done,” Cate said. “I think there were a lot of legislators who were disappointed that more didn’t get done.”

The judges last month ordered the state to dramatically reduce its prison population in response to lawsuits alleging that overcrowding has led to unconstitutional and inadequate levels of medical and mental health care. They asked the state to submit a plan by the end of Friday.

The governor’s plan incorporates measures lawmakers sent to him last week, including parole changes that attempt to keep lower-level offenders from re-entering the system and keeping some offenders in county facilities rather than state prisons.

Schwarzenegger wants to expand inmate transfers to out-of-state prisons by 2,500, on top of the 8,000 already housed in other states. He would also expand the use of private prisons each year and commute the sentences of 600 undocumented immigrant felons eligible for deportation.

The plan calls for new prison beds at existing prisons, using bond funds previously approved by the Legislature. The state would add 764 beds this fiscal year, 2,364 in 2010-11 and 3,904 in 2011-12.

Donald Specter of the Prison Law Office, co-chief counsel for the inmates, said, “There’s no question that it’s far short of what the court ordered. . . . What’s very distressing to me is that it appears not to be a good-faith effort.”

Specter said Schwarzenegger’s plans to deal with overcrowding with new beds are overly optimistic because construction historically
has been slower than planned. He also suggested Schwarzenegger could pursue alternative custody on his own or ask the court to waive state laws.

Some Republicans welcomed the fact Schwarzenegger's plan will defy the judges' order, hoping it will lead to an ultimate U.S. Supreme Court review of whether the judges can order such reductions. They also applauded the construction of new prison facilities. But Sen. Tom Harman, R-Huntington Beach, said he was not happy with Schwarzenegger's renewed demand for alternative custody.

Assembly Speaker Karen Bass, D-Los Angeles, said in a statement, "We must ensure public safety and find responsible solutions to prevent the wholesale release of prisoners by federal judges. This will take the cooperation of leaders throughout the state, including Republicans, who need to look past the throw-away-the-key approach to corrections and work with us on implementing proven rehabilitation, intervention and prevention measures."
A panel of three federal judges Tuesday approved a court-ordered plan submitted by Gov. Arnold Schwarzenegger to reduce overcrowding in California prisons by 40,000 inmates within two years.

The judges ruled against the state in August in two lawsuits by inmates who argued that overcrowding was the main cause of inadequate medical and mental health care in the prisons.

Schwarzenegger has appealed that ruling to the U.S. Supreme Court, but he was ordered in the meantime to come up with a plan to fix the problems. U.S. District Judges Thelton Henderson and Lawrence Karlton and 9th U.S. Circuit Court of Appeals Judge Stephen Reinhardt make up the panel.

They rejected his first proposal in October, saying it did not meet the required population targets or timeline. The governor’s next attempt, submitted in November, was acceptable, the judges said. They ordered Schwarzenegger to implement it pending the resolution of his appeal of the case to the Supreme Court.

“We do not intervene lightly in the state’s management of its prisons,” the judges wrote Tuesday. “However, the state’s longstanding failure to provide constitutionally adequate medical and mental health care to its prison inmates has necessitated our actions.”

The nation’s high court is expected to decide as early as Friday whether to take up the matter. Schwarzenegger’s spokesman, Aaron McLear, said in a statement that administration officials “expect that the U.S. Supreme Court will hear our appeal on whether federal judges have the authority to order the early release of prisoners in our state.”

If the state loses, the judges said, officials will have to meet interim population targets every six months, while submitting progress reports, before completing the plan within two years.

Schwarzenegger said in his plan that he would work with lawmakers to approve measures they rejected last year, including home detention with satellite tracking devices for some inmates; permitting some felons to serve time in county jails instead of state prisons; and reducing sentences for property crimes.

The governor also said he would need more prisoner transfers to other states, private prison construction and suspension of Civil Service rules, among other solutions.

If lawmakers refuse to go along, the judges could waive state law and order the measures implemented, Schwarzenegger said. The judges said they would consider waiving laws once the state had shown that other solutions had failed.

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Saying the Schwarzenegger administration is thumbing its nose at three federal judges with a flawed plan to ease overpopulation of prisons, inmates' attorneys Thursday asked the judges to find the governor in contempt.

Rather than complying with the three-judge panel's Aug. 4 order, a defiant Gov. Arnold Schwarzenegger and Corrections Secretary Matthew Cate "essentially have told the court that they will reduce the prison population as the state sees fit, to a level the state deems appropriate, and in a time frame the state has set for itself," the attorneys wrote.

"The court must issue an order requiring (the administration) to submit a plan that fully complies with this court's order, and requiring Gov. Arnold Schwarzenegger to show cause why he should not be held in civil and criminal contempt of court," the inmates' attorneys said in a 19-page response to the plan.

The administration has until Oct. 19 to file its reply to the inmates' opposition.

"The state filed a plan that complies with population reduction and does not create undue risk to public safety, and we continue to object to the panel's arbitrary cap under a two-year timeline and are continuing our appeal to the U.S. Supreme Court," Schwarzenegger spokeswoman Rachel Cameron said Thursday.

State officials tried to avoid submitting a plan by asking for a stay of the Aug. 4 order, which allowed them 45 days to come up with a blueprint for cutting the population of 33 adult prisons to 137.5 percent of design capacity within two years. But the three-judge panel and the Supreme Court denied requests for a stay.

The high court told the state to come back after the panel has issued a final order adopting a reduction plan.

The design capacity of the institutions at issue is approximately 80,000 and the population is just under 150,000. The court's order requires that the latter figure be slashed to 110,000.

Cate spokesman Gordon Hinkle said the Department of Corrections and Rehabilitation "believes it has submitted a plan that is substantially compliant with the court's desires."

"We don't believe contempt proceedings are appropriate," he added.

Under the Prison Litigation Reform Act of 1996, if a panel is convened to consider allegations of unconstitutional conditions, an appeal of its final ruling goes directly to the Supreme Court.

The panel is made up of 9th U.S. Circuit Court of Appeals Judge Stephen Reinhardt of Los Angeles and U.S. District Judges Lawrence K. Karlton of Sacramento and Thelton E. Henderson of San Francisco.

They made a formal finding in the Aug. 4
order that overcrowding is the primary cause of prison health care delivery so deficient that it violates the Eighth Amendment ban on cruel and unusual punishment.

Because the governor "would be able to purge civil contempt sanctions by belatedly complying with the Aug. 4 order," he should be subjected to a criminal contempt proceeding and fined, Thursday's brief says.

It has become a test of wills between Schwarzenegger and the jurists. The governor and Cate feel the panel is meddling where it shouldn't and they simply do not want to bow to the judges' wishes. The judges feel strongly that California inmates need their help to escape a health care system that for years has been mismanaged and to achieve a constitutional level of medical and mental health treatment.

This summer Schwarzenegger submitted a proposal to the Legislature that would, he said, safely reduce the population over two years by 37,000, just shy of the court's mandate. Cate trumpeted this plan and urged lawmakers to adopt it.

"Nonetheless," the inmates' attorneys said in Thursday's brief, the administration "submitted a very different and far inferior plan to this court."

The state plan submitted to the panel would reduce the population to 166 percent of design capacity in two years, but does not anticipate a time when 137.5 percent would be realized.

The court's order requires the plan to include six-month benchmarks so the judges can measure progress. The state's plan has one-year benchmarks tied to its fiscal year. Contrary to the court's order, the state refused to identify any state law barriers to reducing the prison population.

Moreover, inmates' attorneys noted in their brief, the plan relies on construction for more than half of overcrowding relief, yet many of the construction projects are being planned jointly with a court-appointed medical receiver whose termination the state is seeking at the 9th Circuit.
Gov. Arnold Schwarzenegger declared California’s prison system dangerously overcrowded Monday and ordered a special legislative session to enact proposals to build new prisons and shift thousands of inmates from mostly rural prisons into new housing units in urban areas.

Less than a week after a court-appointed watchdog blasted the governor for abandoning prison reform, Schwarzenegger guaranteed a spotlight on prisons this year by calling for the special session, which will begin today and will allow bills to advance through the legislative process more quickly. But administration officials conceded they had no legislation ready and details of the proposals—such as how much the governor wants to spend and how many new cells they hope to create—were not available. Some lawmakers reacted with skepticism.

“It seems like a rather obvious response to the report from last week,” said Assemblyman Mark Leno, D-San Francisco, chairman of the Assembly’s Public Safety Committee.

Speaking at a conference of state district attorneys in Newport Beach, Schwarzenegger characterized jam-packed prisons as being in crisis and warned that courts could take over the system and “order the early release of tens of thousands of prisoners.”

He noted that a system designed to hold about 100,000 inmates houses more than 171,000, and more than 16,000 inmates are sleeping in gyms, dayrooms and other areas of lockups not intended for housing.

The governor proposed a four-pronged approach: building at least two new prisons; enacting rules to suspend some state laws to allow the new prisons to be built quickly; shifting 4,500 female inmates from prisons to community-based facilities closer to their families; and opening new facilities designed to help male inmates adjust to life outside prison.

The new housing for male inmates would serve inmates about to be paroled and would provide them with programs to help them get jobs and steer clear of crime.

The re-entry proposal and the idea to move some female prisoners would be a major change for the system, creating thousands of spots for inmates who would receive services like drug rehabilitation and job training that are not widely available in prisons. It could also shift a substantial number of inmates from rural areas, where most prisons are located, to urban areas, where the bulk of the prison population comes from.

That could lead to battles with local governments and residents about where the new facilities are located. Administration officials said the new lockups could house as many as 500 people. Acting Corrections Secretary Jim Tilton said he hoped to locate them in warehouse districts, not residential areas, and he admitted that finding sites for the mini-prisons would be a significant issue.

New community prisons could be built or run by private companies, although Tilton said state prison guards would provide
security.

Schwarzenegger said his proposals were aimed at two critical problems: overcrowding and a recidivism rate he called the highest in the nation, noting that 70 percent of inmates end up back in prison.

The new proposals mark at least the third time Schwarzenegger has tried to revamp state prisons.

His administration promised to reduce the inmate population in 2004 when it unveiled changes to parole policy intended to send parolees who failed drug tests or committed other parole violations to programs instead of back to prison. But that idea was scrapped amid opposition from victims' rights groups and the state's prison guards union and after Schwarzenegger's corrections secretary admitted the proposal was not well thought out.

Last year, the governor proposed a bureaucratic reshuffling that changed the name of the corrections department and gave more clout to the head of the department.

Legislators were quick to remember those moves.

"The track record of the department of corrections has not been stellar," said Assemblyman Todd Spitzer, R-Orange, who acts as the Assembly Republicans lead negotiator on prison issues. "They've come up with reforms in the past, where they weren't capable of implementing them."

Spitzer said he would evaluate the new proposals with significant skepticism.

Schwarzenegger has pitched some of the proposals before. He included prison-building in his January proposal to issue bonds for new roads, schools and levees, and he also proposed moving some female inmates out of prisons.

The Legislature balked at both ideas, and whether there will be more interest now remains to be seen.

Some lawmakers said more policy changes were needed to lower the inmate population. "We can look at bricks and mortar, but we have to look at sentencing reform and parole reform—that's where change is needed," said state Sen. Gloria Romero, D-Los Angeles, who carried unsuccessful legislation this year that would have amended the state's three-strikes law to lessen the use of lengthy sentences for some non-violent offenses.

Romero was also critical of the governor's proposal Monday to use a specific type of bond, called a lease-revenue bond, to build prisons that wouldn't require voter approval. The bonds could be issued with approval from lawmakers.

"That's just a way of getting around voters, with polls showing no one is interested in building more prisons," she said.

A spokesman for the prison guards union, which has considerable clout in the Legislature, reacted more positively.

"Given the overcrowding, this is a welcome signal from the administration," said Lance Corcoran, executive vice president of the California Correctional Peace Officers Association.

Administration officials said they had been contemplating calling a special session on prisons for several weeks and denied the announcement Monday was a response to the report issued last week. In the report, a
special master working for U.S. District Judge Thelton Henderson criticized Schwarzenegger for bowing to pressure from the state's politically powerful prison guards union and warned that the governor was retreating from reforms.

The governor was quickly attacked Monday by his adversary in this year's gubernatorial election, who noted that calling a special session would likely allow bills to become law only one month earlier than they would have under the normal legislative process.

State Treasurer Phil Angelides said Schwarzenegger was taking cosmetic action after presiding over a "meltdown of a prison system that is threatening our public safety." Angelides offered no specifics as to how he would fix the system if elected, however, saying he would conduct an audit after taking office and then come up with a plan.

**Prison proposals**

Gov. Arnold Schwarzenegger called Monday for a special session of the Legislature to deal with state prisons. He proposes four ideas for lawmakers to consider:

- Issuing bonds to pay for new prisons.
- Suspending of state construction laws to speed prison building.
- Moving 4,500 nonviolent female inmates from prisons to community-based facilities.
- Moving male inmates who are about to be released on parole into new housing units designed to help them adjust to life in their communities.

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“State Prisons Releasing Parole Violators Early”

Los Angeles Times
July 15, 2009
Michael Rothfeld

California prison officials, facing severe overcrowding and a financial crisis, have been releasing inmates who were serving time for parole violations before they finished their scheduled terms.

State officials said the dozens of prisoners set free from the California Institution for Men in Chino and from lockups in San Diego and Shasta counties had 60 days or less left on their terms, or had been accused of violations and were awaiting hearings. The releases were approved by the state parole board.

At least 89 inmates have been freed or approved for early release during the past two months. Others have been sent to home detention, drug rehabilitation programs or similar alternative punishments.

They were screened to ensure that they had never been convicted of the most serious crimes, such as murder, manslaughter, kidnapping or sex offenses, the officials said. They may have been convicted of grand theft, weapons possession, driving under the influence of alcohol or other crimes. Their parole may have been revoked for missing an appointment with a parole agent, shoplifting, robbery or any number of other offenses.

The moves came as county authorities in Los Angeles and elsewhere said they could no longer house—and in some cases, threatened to release—inmates awaiting transfer to state prisons from their own teeming jails. Counties routinely hold newly convicted prisoners or those picked up on parole violations until the state can take them.

But California’s huge deficit has left the state without enough money to pay for all of those its laws designate for punishment. Gov. Arnold Schwarzenegger and lawmakers are considering numerous ways, including the early release of inmates, to save money by reducing a prison population of nearly 170,000.

No budget decisions have been made, and Schwarzenegger spokesman Matt David said the governor had been unaware of the recent releases, most of which were in response to complaints by Los Angeles County that the state had left nearly 2,000 prisoners in its jails. That number represents about 10 percent of the prisoners in the county’s jail system, which has a court-ordered population cap.

“This was an emergent crisis,” Terri McDonald, the state’s chief deputy secretary for adult operations at the Department of Corrections and Rehabilitation. “We don’t want a system failure in the county jail.”

The inmates released from Chino opened up beds for some of those being held in Los Angeles. McDonald said the state, to be “good partners” with the county, put other inmates in prison gymnasiums that officials had planned to stop using as dormitories, and took additional measures to free up space.
Los Angeles County Sheriff Lee Baca, however, said the burden had not been alleviated, and the inmates, who cost the county $70 million a year to house, are the state's responsibility.

"If they're releasing them ... that's their call," Baca said. "For them to blame me for their decision is absurd. All I'm saying is, 'I don't want them in my jail any longer. You're not paying me, and we're not offering a free ride.'"

In a June 30 e-mail, a state parole administrator told agents that the Chino prison would be the "first target" for releasing parole violators. Because of the fiscal crisis, the e-mail said, "we are starting to experience some resistance and refusals of the counties to hold our prisoners" and the state was "incapable" of taking them.

Shasta County, for instance, had recently been forced to close a jail wing due to layoffs of sheriff's deputies, wrote the administrator, whose e-mail was provided to the Los Angeles Times without a name attached.

The county had notified the state on the previous Friday that unless "30 or so" inmates were transferred, it would "release them to the streets over the weekend," the e-mail said.

Five were evaluated and released early, with approval from the parole board; the rest were transferred to state prisons, corrections officials said.

In San Diego, 200 inmates are transferred from local jails to state prisons each week. After the state abruptly stopped accepting them in May, then-Sheriff William Kolender warned prison officials that he would release 138 parole violators to avoid exceeding his jails' court-ordered population cap.

"We regret to take this drastic action, but we have no other alternative given our responsibility to adhere to a court order," Kolender wrote in a letter on May 5. He added that the county had been "burdened with holding state prisoners for an inordinate amount of time and cost."

The county did not carry out its threat because the state approved two inmates for early release, sent some home on alternative sanctions and transferred others to state prisons.

California has one of the nation's most stringent policies of supervising ex-convicts once they are released; parole violations account for 70,000 prison admissions each year.

Joan Petersilia, a prisons expert who has advised Schwarzenegger's administration, said it makes "good public-policy sense" to reduce that number and reserve prison beds for those who are most dangerous.

"We simply can't afford the punishment that we've had in California," Petersilia said.
California is often on the cutting edge of national trends—and so it is now with the “ugly bed.” That is prison lingo for double and triple bunks that are jammed into gymnasiums and dayrooms because there is nowhere else to put the inmates. It is an inhumane and dangerous way to house prisoners, but it is one that has become all too common in California’s jam-packed correctional facilities.

It has been nearly four years since Gov. Arnold Schwarzenegger declared a “Prison Overcrowding State of Emergency,” warning that conditions in the state’s 33 adult prisons posed a serious risk to inmates and staff. But the overcrowding has continued.

And while California’s legislature has dithered, the federal courts have stepped in, ordering the state to bring down its prison population. On Monday, however, the Supreme Court accepted an appeal in this California prisons-condition case. It is an ominous development, one that could make prisons far worse in all 50 states.

California’s correctional facilities are among the nation’s most overcrowded. The driving force has been the state’s harsh and at times bizarre criminal laws and parole practices. Under the state’s notorious three-strikes-and-you’re-out law, criminals can be sent away for life for even minor, non-violent crimes—including shoplifting. Not surprisingly, then, the prison population has soared over the past few decades, from about 20,000 in the early 1970s to past 160,000 in recent years.

The results have been disastrous, with Schwarzenegger’s state-of-emergency declaration painting a grim picture. Because of the overcrowding, it was difficult for the guards to monitor prisoners and to prevent violence from breaking out. There were frequent power outages. And the sewage systems were overtaxed, creating a risk of disease. “Immediate action is necessary,” the governor warned, “to prevent death and harm.”

That action never came—at least not on the scale that was needed—but the death and harm did. Prisoners have been dying and suffering injuries at alarming rates. Last summer, 250 inmates were injured in a riot at a state prison in Chino. The facility was built to hold 3,160 inmates, but roughly twice that number had been crammed into it.

Last summer, a special three-judge federal court intervened. It ruled that California’s prison medical system—which a judge had declared to be responsible for one inmate death a week—violated the Eighth Amendment’s ban on cruel and unusual punishment. The court ordered the state to cap its prison population at 137% of capacity, and to release about 40,000 inmates—roughly a quarter of the total population—over two years.

It was a good and important ruling, which promised to begin making California’s increasingly barbaric prisons safer and more civilized. But the Supreme Court’s decision this week throws that potential bit of progress into doubt, and not just for California.
The United States is a country that likes to put people behind bars. It has less than 5% of the world’s population, but almost one-quarter of the world’s prisoners. One in every 100 American adults is behind bars, the highest incarceration rate in the world; between 1972 and 2008, the number of state prisoners soared by 708%. Making matters worse, this rush to incarcerate has not been matched by an equal commitment to funding.

The Supreme Court, which is likely to schedule arguments in the case during its next term, starting in the fall, could end up upholding the lower-court ruling from California, but there is good reason to think it might not. The court’s conservative majority has taken an unduly narrow view of the Eighth Amendment in recent years. And it could use the case to rewrite prison conditions law and to make it extremely difficult for judges to bring down prison populations, even when they reach dangerous levels.

That would be unfortunate. Overincarceration is not only inhumane—it is terrible correctional policy. Crowded prisons are more likely to have riots and inmate-on-inmate violence, including sexual assaults. Inmates in jam-packed prisons also have less opportunity to improve themselves, and are more likely to come out of prison unrehabilitated and hardened. That is bad news for law-abiding citizens, since most prisoners are eventually released back into society.

Some people argue that governors and legislatures are the branches of government that should decide how prisons are run—and for the most part, they are right. But when those branches repeatedly fail to ensure that prisons are run in a minimally adequate way, judges have to have the authority to step in and enforce the Constitution.
Nearly three decades after California cracked down on rising crime rates with tougher sentencing laws, the bill is coming due for what experts say has been one of the most ill-planned and flawed prison expansions in the country.

At the heart of the problem is a simple but overpowering mismatch—lawmakers and prosecutors sent far more criminals to prison than Californians, ultimately, were willing to pay for. The result has been such acute overcrowding that critical prison programs and services are breaking down and require enormously expensive fixes.

On Thursday, a federal judge expressed shock at what he called the neglect and “depravity” in parts of the prison health care system, and ordered that a receiver take control. Court-ordered improvements could send costs soaring in a program that already spends $1.1 billion a year.

Just weeks before, the Corrections Department opened Kern Valley State Prison, built at a cost of $716 million and hailed as the last of 22 new prisons in a $4.5 billion construction program. But days later, the head of the agency, Roderick Q. Hickman, told The Chronicle that Kern Valley could not possibly be the last prison, because the system holds twice the number of inmates it was designed for and is still adding more.

Hickman said taxpayers will also have to pay many millions of dollars to upgrade older prisons and to comply with court orders demanding the correction of conditions so abysmal that they violate inmates' constitutional rights. With some of the highest costs per inmate, the most violence, the highest rate of parolees going back to prison and the worst crowding, California’s corrections system is unlike any other system in the United States.

“There’s California and then there’s the rest of the country,” said Michael Jacobson, the director of the Vera Institute of Justice in New York and the former head of New York City’s jail system. The costs of the failures are now becoming clear:

- A major cause of overcrowding is a parole system that sends far more released inmates back to prison than other states. Decisions by corrections officials and politicians to de-emphasize rehabilitation programs, lengthen parole periods and send violators back to prison instead of giving them treatment have produced a return rate of about 60 percent, the nation’s highest.

- The health care system is so neglected that up to 30 percent of its physician jobs are vacant and some examination rooms don’t even have sinks. Once the federal court appoints a receiver, taxpayers will have to pay the bill for hiring new staff and renovating facilities. Meanwhile, longer sentences are producing an aging inmate population with much more expensive medical needs.

- In a system that moves people in and out of prisons hundreds of thousands of times a year, management is hobbled by an obsolete information technology system. Officials say a modern computer network that would cut costs, reduce errors and streamline
California's problems are particularly striking because they run counter to a broad national trend that is saving other states millions of dollars while making citizens safer. If it could fix its dysfunctional programs, experts say, a department that is projected to spend $7.3 billion this fiscal year could save hundreds of millions of dollars a year.

Even strict law-and-order states such as Mississippi and Louisiana have embraced new models that involve elements like shorter sentences, improved rehabilitation programs and more alternatives to prison. Texas, which has a higher crime rate than California and houses nearly as many inmates, puts only a fraction as many parole violators back in prison.

"California has used policies that show no evidence of effectiveness; all they show is high cost," said Jeremy Travis, president of the John Jay College of Criminal Justice in New York City. "The state is the poster child for corrections policies that have no benefit to public safety."

Hickman, in an interview, said of the parole system: "California, quite frankly, is aberrant compared with anywhere else in the country."

Gov. Arnold Schwarzenegger appointed Hickman on his first day in office to be secretary of the Youth and Adult Correctional Agency, which operates the adult prisons and the much smaller juvenile system. Hickman leaped into motion, declaring that he was determined to overhaul the parole system because its problems were so central to prisons being overstuffed with some 164,000 inmates.

This Friday, 20 months later, he reached a landmark when his agency took the name Department of Corrections and Rehabilitation as part of the reorganization.

But some critics express deep disappointment that so little has been accomplished. While they call for urgency, Hickman said that it could take an additional 18 to 24 months to institute major new policies in the areas suffering the gravest problems.

"My emphasis with adult corrections right now is evaluating the prisons, evaluating the safety of the prisons, and then reconfiguring the prisons within the mission we now have," he said.

The foundation of the current problems was laid in the late 1970s, when Gov. Jerry Brown, a Democrat, and Republican officials toughened the state’s criminal-justice policy.

As rising crime rates fed a law-and-order mood, Brown signed legislation requiring judges to impose fixed sentences. Other laws provided longer sentences for drug crimes, sex crimes and for habitual offenders, reaching a peak with "three strikes" in 1994, which mandated life sentences for some repeat offenders.

There were warnings that the state was unprepared. In 1979 the head of the Corrections Department, Jiro Enomoto, warned that the prison population could shoot out of control, to 27,000 by 1986 from about 20,000. By 1986 there were 54,000, and the state never caught up.

Today the prisons hold nearly twice the number of inmates they were designed for, many having converted gyms and other areas into large dormitories. The crowding
has raised racial and other tensions, made prisons more difficult to control, and hindered the limited treatment and education programs that are provided.

"People are consistently coming out worse than they're going in," said Barry Krisberg, president of the National Council on Crime and Delinquency in Oakland. He served on a blue-ribbon commission 15 years ago that examined the prisons and recommended major reforms, most of which were ignored.

"It's getting worse," said Krisberg, "and it is harming public safety because these people are going back in their communities."

**Parole**

Overcrowding is at the root of many of the system's failures, and parole is at the root of the overcrowding. Experts blame the state's policy of keeping most released inmates on parole for far longer periods than other states and sending most of those who violate parole back to prison, even for relatively minor offenses such as missing meetings or failing drug tests.

So many parole violators are returned to prison that they make up more than one third of all inmates. The Little Hoover Commission, an independent state research body that provides policy recommendations, estimated 18 months ago that the prisons spend about $1.5 billion a year on parole violators and parolees who commit new crimes.

When inmates do make it back home, they are ill-prepared, either by their stay in prison or parole programs, to hold down jobs or stay out of trouble. The Little Hoover Commission found that 10 percent are homeless, half are illiterate, as many as 80 percent are unemployed. Eighty percent are drug users.

Experts say that spending money on treating or training parole violators is more effective than sending them back to prison for typical stays of 90 to 120 days.

Among parolees who met drug treatment goals at intensive residential centers, only 15.5 percent returned to prison within a year of being released, compared with more than 40 percent for all offenders, said Sheldon Zhang, a professor of sociology at Cal State San Marcos.

But the Schwarzenegger administration has cut funding for some programs and poorly planned others. One drug treatment program in a prison, for example, performed poorly because it did not isolate the inmates who were in treatment from the general prison population, where they had access to drugs.

Two years ago, the state said new parole programs emphasizing treatment and alternatives to prison for violators would cut the prison population by 15,000 inmates. But they were poorly designed, in some cases sending drug violators to halfway houses with no drug programs, and never even implemented properly. In April the state stopped sending parole violators to these programs.

Parole violation cases have risen sharply this year, one of the reasons the Corrections Department had to ask for an additional $207 million for a larger inmate base.

**Health care**

California already spends $1.1 billion a year on health care for inmates—a doubling in costs in just seven years—but the level of care is so poor that U.S. District Judge Thelton Henderson has said it violates
inmates’ constitutional right against cruel and unusual punishment. Henderson, based in San Francisco, ruled Thursday that a receiver would be appointed to order improvements.

No budget figures were discussed, but most expect costs to soar, perhaps for years, because of the system’s desperate needs. In a separate area, mental health, a department consultant has estimated it could cost $1.4 billion to meet the needs of the growing number of mentally ill inmates.

Last year the department asked if the University of California, with its big, highly regarded medical system, could take over management of the prison health care programs. The university said no almost immediately.

“We just were not able to take on something of that scale,” said Jeff Hall, director of policy for the university’s Division of Health Affairs.

High vacancy rates for doctors, nurses, psychiatrists and pharmacists who must work under difficult conditions will require heavy spending for recruitment, as well as bonuses and other incentives to attract qualified people to some remote prison locations.

The department has also agreed to hire a new level of supervisors and regional managers to oversee care, putting even more pressure on the budget.

Many doctors are furious, saying they are being unfairly blamed for the problems when they have to work in deplorable conditions and are badly overworked.

“The prisons were designed to incarcerate inmates,” said Dr. Charles Hooper, who works at the California State Prison, Sacramento. “They were not designed to be the Mayo Clinic. They are essentially dungeons.”

Hooper said that as many as half the inmates he sees for treatment show up without charts. The frequent lockdowns at the prison, often a result of tensions due to crowding, also disrupt proper treatment.

“It can be a fiasco at times,” he said.

Health costs could also soar because of the rapidly rising number of geriatric inmates. According to an internal Corrections Department report, the total cost of an elderly inmate is three times that of a younger one. New facilities for them could also require major renovations.

The number of inmates 60 and over, among the most expensive to care for, nearly doubled in only six years, from 1,781 in 1998 to 3,358 in 2004.

Health costs are also affected by the high level of violence in the prisons. California’s prisons have roughly twice the number of violent incidents reported in Texas prisons and almost three times the number in federal prisons, both of which have similar numbers of inmates, according to the Legislative Analyst’s Office.

**Technology**

Some people complain that the system seems immune to even the smallest changes. David Warren, a volunteer chaplain and member of the Family Council, which works with prison officials on behalf of inmate families, tells of a prison dentist who was concerned that the toothbrushes he was supplied were so hard that they were actually causing dental problems. He sought
to have the state order softer brushes. He succeeded—after 18 months.

"There is a mind-set that you have to see to understand," Warren said.

On a much broader level, the department's technology experts say it will be years before the prisons have computer networks that will enable them to keep track of the movements and needs of the inmates and a staff of about 54,000.

Only recently have prison officials been able to communicate through the same e-mail system. Jeff Baldo, the head of the department's information technology division, said state-of-the-art optic fibers were installed in some prisons a decade ago, then left unused.

He said the department has one information technology specialist for every 1,000 employees; typically, a state agency of its size would need one technology expert for every 6 to 10 employees.

"I've never been in a place where you see this," Baldo said.

As a result, transferring large volumes of data from one prison to another is nearly impossible, the department's experts said. Most medical records are on paper, and when inmates are moved, their records sometimes fail to catch up. Thus prison officials often have to make decisions without complete data on inmates' records, medical conditions and special needs.

The officials said that building an adequate computer system could cost well over $100 million and take at least five more years.

"It could be less, but it also could be triple that amount," said Robert Horel, the corrections agency's chief of fiscal programs. "It doesn't take a very long term for the problems to grow when you're in the dark as much as we are."
"California, in Financial Crisis, Opens Prison Doors"

The New York Times
March 23, 2010
Randal C. Archibold

The California budget crisis has forced the state to address a problem that expert panels and judges have wrangled over for decades: how to reduce prison overcrowding.

The state has begun in recent weeks the most significant changes since the 1970s to reduce overcrowding—and chip away at an astonishing 70 percent recidivism rate, the highest in the country—as the prison population becomes a major drag on the state’s crippled finances.

Many in the state still advocate a tough approach, with long sentences served in full, and some early problems with released inmates have given critics reason to complain. But fiscal reality, coupled with a court-ordered reduction in the prison population, is pouring cold water on old solutions like building more prisons.

About 11 percent of the state budget, or roughly $8 billion, goes to the penal system, putting it ahead of expenditures like higher education, an imbalance Gov. Arnold Schwarzenegger has vowed to fix.

The strains on the system are evident inside the state prison here, about 50 miles north of Los Angeles, where 4,600 inmates fill buildings intended for half as many. A stuffy, cacophonous gymnasium houses nearly 150 people in triple-bunked beds stretching wall to wall.

The new effort this year is intended to remove from prisons criminals who are considered less threatening and divide them into two categories: those who pose little or no risk outside the prison walls, and those who need regular supervision.

The goal is to reduce the number of inmates in the state’s 33 prisons next year by 6,500—more than the entire state prison population in 2009 of Nebraska, New Mexico, Utah or West Virginia. In all, there are 167,000 prisoners in California.

“People in the criminal justice world are looking at California with great interest,” said Jeremy Travis, president of John Jay College of Criminal Justice in New York. “Some very important reforms are under way.”

The effort, narrowly approved by the Democratic-controlled State Legislature and signed into law by Mr. Schwarzenegger, a Republican, will be achieved through a range of steps long recommended by independent analysts and commissions.

To slow the return of former inmates to prison for technical violations of their parole, hundreds of low-level offenders will be released without close supervision from parole officers. Those officers will focus instead on tracking serious, violent offenders.

Some prisoners may also be released early for completing drug and education programs or have their sentences reduced under new formulas for calculating time served in
county jails before and after sentencing.

The effort represents a "seismic shift," said Joan Petersilia, a criminologist at Stanford Law School and a longtime scholar of the state's prisons.

Public safety concerns have other states rethinking their decisions to save prisons costs by releasing inmates early and expanding parole.

The same red flags are being raised here, but the overcrowding problem dwarfs that of any other state and the budget deficit—$20 billion and climbing—has left lawmakers with virtually no choice but to move ahead.

The Schwarzenegger administration has floated a number of other ideas to reduce costs, including building prisons in Mexico for illegal immigrant offenders, turning over prisons to private contractors and, last week, having the University of California handle inmate health care.

The release of prisoners in California has stirred a backlash. Several hundred inmates at county jails were released in the last couple of months because of confusion over time credits in the new law.

Attorney General Jerry Brown, a Democrat who is running for governor, issued a directive clarifying the law, but not before one inmate in Sacramento was arrested shortly after his release and charged with attempting to rape a woman. The man had been released on probation after serving time on an assault charge.

That case prompted several lawmakers to call for abandoning early releases. And crime victim and law enforcement groups have been sounding alarms about what they consider the dangers of not more aggressively tracking the low-level offenders.

"We are concerned about victims these felons will leave in their wake before being rearrested for committing new crimes," said Paul M. Weber, the president of the Los Angeles police union.

Proponents, including Mr. Schwarzenegger's corrections secretary, Matthew Cate, have stood by the law, calling it overdue and necessary. The state spends, on average, $47,000 per year to house a prisoner. Early estimates suggest the new changes could save $100 million this year.

"This was an opportunity to do something impactful without imperiling public safety," Mr. Cate said, adding that allowing parole officers to focus on more serious offenders will improve public safety.

Even with the new law, the system falls short of providing the kind of rehabilitation, drug treatment and education and job programs that academics and prisoner advocates have called for to help ensure prisoners and parolees do not commit new crimes.

The governor and the Legislature received a report on March 15 from a state oversight board warning that cuts to inmate rehabilitation programs would jeopardize the effort to reduce recidivism.

California is the only state that places all prisoners on parole at release, no matter the offense, Professor Petersilia said, and usually for one to three years. If a parolee is arrested or fails a drug test or misses an appointment with a parole officer, the
offender lands back in prison.

Now, low-level offenders will not need to meet regularly with a parole officer and must be convicted of a new crime to be sent back.

Eric Susie, 24, recently had his parole terms readjusted under the new law. Mr. Susie had served 13 months in prison for possessing an M-80 firecracker wrapped with razors near a school (he argued, unsuccessfully, that it belonged to a friend).

Now, more than a year out of prison, he no longer reports to a parole officer or submits to monthly drug tests and can travel more freely, including out of state to visit family in Las Vegas.

“I feel like I am finally free,” Mr. Susie said. “I feel like I don’t have that monkey on my back, like being a prisoner. I feel like I am a human being and can get my life together.”

Even the guards’ union, which so heavily promoted and supported the tough sentencing of the past that fueled the prison building and expansion boom, now says it supports the idea of alternatives to prison and did not publicly object to the new law.

The overcrowding, union officials now say, poses a physical threat to its members, and the union has sided with plaintiffs battling in federal court to force even greater reductions of 40,000 inmates over the next two years.

But even with the progress in recent months, State Senator Mark Leno, a Democrat from San Francisco who helped push through changes in the prison system, suggested that further reductions would be a hard sell. Mr. Leno called the changes under way “a noble effort” and the best that could be achieved in the current political climate.

Many lawmakers, he said, still want to lengthen sentences and spend more on incarceration, both politically popular notions.

“We can’t control ourselves,” Mr. Leno said. “Or some of my colleagues can’t control themselves.”
Editor's Note: This January, a panel of three federal judges ruled the State of California must reduce its prison population by up to 40,000 inmates, bringing it to 137.5 percent of its designated capacity (which, at 160,000 inmates, is currently at 200 percent of capacity). The order grew out of lawsuits alleging inadequate medical and mental health care in California’s prisons, primarily the result of overcrowding, which had brought the state prison under court receivership.

The court, however, stayed its order until the U.S. Supreme Court rules on the appeal filed by the Governor Arnold Schwarzenegger administration, which will not likely be decided before the end of this year. In the meantime, the state has put forth its own plan, which would increase prison capacity, divert some prisoners to county jails, reduce some parole revocations, and grant certain prisoners additional credits toward early release.

Below, two of those prisoners respond to the proposals of the California Department of Corrections and Rehabilitation, and to the conditions they face on a daily basis. Both are serving long prison sentences in Salinas Valley State Prison (Soledad). They represent opposite ends of the age spectrum.

What Will Not Work (by Michael Cabral)

I once heard that there is no such thing as “right” or “wrong”—that there is only “that which works” and “that which does not work.” At the time I was presented with this philosophy, I immediately discarded it as a simple cop-out, as a way of justifying one’s disregard for consequences as long as something desirable comes from it. That was, however, before the great state of California decided that the safest, most effective solution to its grossly overcrowded prison system problem was to dump thousands of neglected, uneducated, untrained prisoners back into society, the same (if not more) bitter men they were, with the same personal and social issues they had when they came to prison in the first place. Now, I understand that action, right or wrong, is necessary, especially in the name of that which works. The only question to ask is: “What works?”

There has been much public outcry over the state’s plans to grant early releases to certain non-violent prisoners, and rightly so. But I’m not sure that people opposed to this plan are outraged at the right things, or for the right reasons. For as detrimental to public safety as such releases are potentially, making inmates serve out their entire sentences—given no rehabilitation programs—only delays the inevitable. And that should make people mad. Just like it makes mad those of us on this side of the walls.

I have been in prison for seven years now, and in that time, yes, I have met some of the meanest, nastiest, most cold-hearted human beings. But for the most part, I have met men who hate where they’ve ended up; who actually want better (for themselves, their families, and even their communities); who are embarrassed and frustrated with themselves—and starving for that which
works. Yet, over the past year alone, we have seen many excellent rehabilitative programs with proven results, such as various vocational training courses, college programs, a number of self-help and substance abuse programs, and even, for a while, GED classes, all disappear. What's worse is that the very programs being eliminated are the same ones that the public believes inmates are required to complete before being released early, when actually, the only inmates for whom rehabilitation is a requirement before being released at all, are those of us who likely will never be granted parole.

When I asked Ben, a thirty-year-old fellow prisoner serving nineteen years, eight months, what he thought about the early release program, he summed it up as accurately as I've ever heard, and in two simple words: "It's bullshit!"

A little deeper into our conversation, Ben also made the observation that if any inmates really are required to complete rehabilitative programs, or even given access to such programs, it must only be those inmates in Level 1 or Level 2 prisons who have been deemed "low risk" by the CDCR. Meanwhile, Level 3 and 4 (the highest security level) prisoners, who have committed the most serious offenses, or committed offenses more regularly, proving the greatest need for rehabilitation, are consistently being denied the necessary tools (e.g. anger management, substance abuse treatment, job training programs) to build even a chance at becoming successful, contributing members of society.

Against popular belief, most of us incarcerated people actually want to be better and make things better. We have the heart and we have the desire. What we are lacking, however, is support. Which is perplexing to me. Because whether anybody likes it, whether it is "early" or according to schedule, we will be on your streets again. And once there, we will either know how to succeed, or how to get ourselves back to prison. Whichever works for you.

Magicians, Creating an Illusion of Change (by Dwight Abbott)

The three judges who stayed their order to reduce the state's prison population, I believe to be naïve, or possibly tired and becoming fatalistic. Schwarzenegger has absolutely no intention of complying, only delaying. Before the Supreme Court considers the state's appeal, he and his bunch will be long gone, and another administration will begin the process anew—using our system of "justice" to grant a seek a postponement until California's new ruler has had time to "study the proposal," and in turn, begin submitting his discourse, and "revised plan."

It has now been nearly fourteen years since this fiasco began, fourteen years of evasive legal maneuvering. All the while, inmates continue to die unnecessarily, the direct consequence of the overcrowding that perpetrates violent confrontation and overworked doctors, unable to provide reasonable, basic medical care.

The facts today are now known by anyone who reads the newspaper; California's Corrections Administration has always known them. Yet, it took a federal takeover to squeeze out an admission that "there are problems." This from the same people who immediately after, refused to comply with demands to repair what is broken. All the while, both sides—the courts who have the authority to force the reform, and the state officials not wanting it to—appear to have forgotten the inmates who are continuing to die unnecessarily because of the inhumane conditions being wrangled over . . .
Collateral damage.

End overcrowding? End warehousing and abusing incarcerated juveniles? Compel California to act on previous court orders issued through the years? The Administration has no fear of the courts, with good reason. No person calling the shots in this matter has yet to be charged (much less jailed) for being in contempt of a court mandate after refusing to comply. Until that changes, the children will not be “rehabilitated.” They will not be allowed an education (locked inside a 4’x4’ screened cage five hours a day), participate in therapy, or to partake in vocational training, watched over by an independent watchdog group assuring what is supposed to be happening. The 90% recidivism rate among juvenile offenders will not change. They are fodder to fill the state’s bloated adult prisons.

What programs could be brought to life to change this dismal, unending record of failure? In the long run, only a return to indeterminate sentencing, with built-in incentives (like early release) for prisoners to participate can work to reduce a cycle that no one seems able or willing to break. If prisoners knew that immersing themselves in programs that teach them to read, to address their addictions, to learn violence reduction strategies, to have access to vocational training that actually prepares a prisoner for meaningful employment, you would see a dramatic decline in the worst aspects of prison life, and a dramatic increase in legal and productive behavior when they hit the streets, as almost all will.

What to do right now about overcrowding? Admit parole is a fake! Under California’s sentencing guidelines, those today being paroled have, in reality, completed their sentence. The problem lies with the courts adding on years of parole, to be served after a sentence is completed. Implemented, perhaps, with the best of intentions, in truth, parole only serves a huge number of men and women employed by the state as Parole Officers at a cost of over a billion dollars annually. They in turn guarantee the CDCR its prisons remain overcrowded with “technical parole violators,” which then guarantees prison guards (whose annual salary ranges between $50,000 and $60,000) an opportunity to pad their checks with an additional $100,000+ of taxpayer’s money in overtime pay each year.

What should be obvious to anyone reading this: there is no need to release so much as one convict who has not yet completed his/her sentence. Instead, release those who have, and are presently among the 30,000 “technical” parole violators who, at any given time, languish in California’s overcrowded prisons for up to one year, trapped by a broken system which has recidivism rates of close to 70%, the highest in the United States.

If you want to know what you get for the $32,000 it costs to imprison these parole violators (a billion dollars annually), take a look, for example, at San Quentin’s South and West cellblocks where hundreds of men lie sweltering in bunks stacked three high out on the tiers, who must duck and dodge 24/7 the trash thrown from the four tiers above. They are among the 30,000 parole violators who should be released, and thus end—even if only temporarily—the overcrowding crisis, eliminating the need to release inmates who have not completed their sentences. Once prisoners have completed a prison sentence, they should remain in society, unless they commit a new crime.

Thus, having temporarily resolved the overcrowding problem, those truly interested in serious reform of this failed
system will then have time to sit back, take a deep breath, and present a multitude of ideas that have worked in other states, without the necessity for short-term fixes demanded when the system is in crisis, and inmates are dying.

I cannot end without drawing on my five decades of experience in this system to add that whatever plan is given over to CDCR to improve conditions inside its prisons, will be abused. I have lived it. The CDCR is comprised of magicians, creating the illusion that it is a faithful steward of the people and their billions of tax dollars that allow them to operate. Their magic gives those who want to believe the illusion that its intentions are honorable. The truth is quite the opposite.

Dwight Abbott, the author of I Cried, You Didn’t Listen, is serving four life sentences at Salinas Valley State Prison, Soledad, California. Michael Cabral is in his sixth year of a 15-Life sentence at Salinas Valley State Prison, Soledad, California.
One day last fall, Norman Williams sat drinking hot chocolate with his lawyer, Michael Romano, at a Peet’s coffee in Palo Alto, Calif. At an outdoor table, Williams began to talk about how he’d gone from serving a life sentence at Folsom State Prison to sitting there in the sun. “After being shut down for so many years. I didn’t believe it,” he said of the judge’s decision to release him in April 2009.

Williams, who is 46, was a homeless drug addict in 1997 when he was convicted of petty theft, for stealing a floor jack from a tow truck. It was the last step on his path to serving life. In 1982, Williams burglarized an apartment that was being fumigated: he was hapless enough to be robbed at gunpoint on his way out, and later he helped the police recover the stolen property. In 1992, he stole two hand drills and some other tools from an art studio attached to a house; the owner confronted him, and he dropped everything and fled. Still, for the theft of the floor jack, Williams was sentenced to life in prison under California’s repeat-offender law: three strikes and you’re out.

In 2000, three years after Williams went to prison, Steve Cooley became the district attorney for Los Angeles County. Cooley is a Republican career prosecutor, but he campaigned against the excesses of three strikes. “Fix it or lose it,” he says of the law. In 2005, Cooley ordered a review of cases, to identify three-strikes inmates who had not committed violent crimes and whose life sentences a judge might deem worthy of second looks. His staff came up with a list of more than 60 names, including Norman Williams’s.

Romano saw Cooley’s list as an opportunity. After working as a criminal-defense lawyer at a San Francisco firm, he started a clinic at Stanford Law School in 2006 to appeal the life sentences of some three-strikes convicts. In search of clients at the outset, Romano and his students wrote to Williams at Folsom about the possibility of appealing his conviction. Most prisoners quickly follow up when the clinic offers free legal help. But Williams didn’t write back. At Peet’s, Williams said he’d been too nervous. “I didn’t want to use the wrong words,” he said.

“You were lucky you were at Folsom,” Romano said. “It’s only a couple of hours’ drive from here. So we decided to come up and see you.”

“Yeah, if not, I’d still be there, staring at the walls,” Williams said. “Never had visitors before you came. I didn’t know what the visiting room looked like.”

In 1994, the three-strikes ballot measure in California passed with 72 percent of the vote, after the searing murder of 12-year-old Polly Klaas, who was kidnapped from her slumber party and murdered while her mother slept down the hall. When the killer turned out to be a violent offender recently granted parole, support surged for the three-strikes ballot initiative, which promised to keep “career criminals who rape women, molest children and commit murder behind bars where they belong.”

The complete text of the bill swept far more broadly. Under California’s version of three strikes, first and second strikes must be
either violent or serious. These include crimes like murder, attempted murder, rape, child molestation and armed robbery. But in California, “serious” is a term of art that can also include crimes like Norman Williams’s nonconfrontational burglaries. And after a second-strike conviction for such an offense, almost any infraction beyond jaywalking can trigger a third strike and the life sentence that goes with it. One of Romano’s clients was sentenced to life for stealing a dollar in change from the coin box of a parked car.

California’s repeat-offender law is unique in this stringency. Twenty-five other states have passed three-strikes laws, but only California punishes minor crimes with the penalty of a life sentence. About 3,700 prisoners in the state are serving life for a third strike that was neither violent nor serious, according to the legal definition. That’s more than 40 percent of the total third-strike population of about 8,500. Technically, these offenders are eligible for parole after 20 years, but at the moment, the state parole board rarely releases any prisoner early.

In 2004, reformers put an initiative on the ballot, Proposition 66, that would have reduced the number of people going to prison for life by removing nonviolent property and drug offenses from the list of three-strikes crimes. Gov. Arnold Schwarzenegger attacked the ballot measure. He credited three strikes for a major drop in crime—to the frustration of most experts, who point out that California’s dip began in 1991, well before three strikes passed, and ended in 2000. “The great weight of empirical studies discounts the role of three strikes in reducing crime,” states a 2004 report signed by six criminal-law professors, including Franklin Zimring at U.C. Berkeley. Still, Prop 66 fell short, with 47 percent of the vote.

Now California is in the midst of fiscal calamity. Supreme Court Justice Anthony Kennedy, who had been a judge in California, recently bemoaned state sentencing and spending on prisons. In an address at Pepperdine University, he said that “the three-strikes law sponsor is the correctional officers’ union, and that is sick!” And yet Schwarzenegger has vowed not to touch the law. Meg Whitman and Jerry Brown, the leading Republican and Democratic contenders to succeed him in November, are just as unbending.

If there’s a way to reform three strikes, it may follow Norman Williams’s route out of prison. Michael Romano, who is 38, got his client released without opposition from the L.A. district attorney by forging a working relationship with Cooley’s office. The 63-year-old Republican prosecutor seems an unlikely ally for a young defense lawyer. He joined the D.A.’s office straight out of law school. His office notched more death sentences last year than the state of Texas, and his lunchmates include Pete Wilson, the former governor who signed three strikes into law. Yet despite his conservative bona fides, Cooley shares the conviction that some number of third-strike offenders like Norman Williams don’t belong in prison for life.

After three strikes became law, Cooley watched one of his colleagues in the D.A.’s office prosecute Gregory Taylor, a homeless man who at dawn one morning in 1997 went to a church where he’d often gotten meals and pried open the door to its food pantry. The priest later testified on his behalf. Taylor’s first crime was a purse-snatching; his second was attempting to steal a wallet. He didn’t hurt anyone. Taylor was sentenced to life. “It was almost one-upmanship,
almost a game—bye-bye for life,” Cooley says, remembering the attitude in the office.

Three years later, Cooley ran for D.A. on a platform of restrained three-strikes enforcement, calling the law “a necessary weapon, one that must be used with precision and not in a scatter-gun fashion.” In office, he turned his critique into policy. The L.A. district attorney’s office no longer seeks life sentences for offenders like Norman Williams or Gregory Taylor. The presumption is that prosecutors ask for a life sentence only if a third-strike crime is violent or serious. Petty thieves and most drug offenders are presumed to merit a double sentence, the penalty for a second strike, unless their previous record includes a hard-core crime like murder, armed robbery, sexual assault or possession of large quantities of drugs. During Cooley’s first year in office, three-strikes convictions in Los Angeles County triggering life sentences dropped 39 percent. No other prosecutor’s office in California has a written policy like Cooley’s, though a couple of D.A.’s informally exercise similar discretion.

It’s a mistake, though, to cast Cooley as a full-tilt reformer. He opposed Prop 66 for ignoring a defendant’s criminal history. Instead, in 2006, he offered up his own bill, which tracked his policy as D.A., taking minor drug crimes and petty theft off the list of three-strikes offenses unless one of the first two strikes involved a crime that Cooley considers hard-core. For staking out even this middle ground, Cooley became prosecutor non grata among his fellow D.A.’s. No district attorney, not even the most liberal, supported his bill, and it died in Senate committee.

Cooley could once again pay a price for his three-strikes record. This spring, he announced his candidacy for California attorney general. His Republican rivals have hammered him for his moderate stance. “He’s acting as an enabler for habitual offenders,” State Senator Tom Harman told me. “I think that’s wrong. I want to put them in prison.” The race has developed into a litmus test: for 15 years, no serious candidate for major statewide office has dared to criticize three strikes. If Cooley makes it through his party’s primary on June 8—and especially if he goes on to win in November—the law will no longer seem untouchable. If he loses, three strikes will be all the more difficult to dislodge.

Michael Romano has another, complementary strategy for changing the law. He has won victories for 13 three-strikes lifers in two years, 5 of them with the help of Cooley’s office, and he sees that small number of victories as making a case for larger reform. (He was on a panel I moderated at Yale Law School last month.) While that may sound far-fetched, the tactic has worked before. Romano’s boss, Lawrence Marshall, helped prove the innocence of 13 death-row inmates in Illinois in the late 1990s. His work set in motion a reassessment of the death penalty. A result was a statewide moratorium on executions that has held for a decade. “The hardest step is to get people’s attention,” says Marshall, associate dean for clinical education at Stanford. “And you can only get it with sympathetic cases.”

Romano started thinking about three strikes when he clerked for Judge Richard Tallman on the U.S. Court of Appeals for the Ninth Circuit in 2004. One afternoon, Romano watched his boss and two other judges quickly dispense with routine matters. One of them was a three-strikes appeal. “This guy, Willie Joseph, was doing life for aiding and abetting a $5 sale of crack cocaine,” Romano remembers. Legally speaking, his case for release was so weak that it took the
judges "less than a few minutes" to reject the appeal.

And yet Willie Joseph's life sentence was effectively the same as the punishment imposed on the most vicious killers in California. While 694 convicted murderers sit on the state's death row, only 13 have been executed since the Supreme Court allowed for reinstatement of the death penalty in 1976. The 3,700 nonviolent, nonserious three-strikers serving life in California outnumber the 3,263 death-row inmates nationwide.

By working with three-strikers, Romano is trying to highlight the plight of criminals he sees as more pathetic than heinous. "I think about explaining to my kids what I do, and I see no moral ambiguity," Romano says about his work. Capital defendants, of course, deserve representation, he explains. "But there are other lives to be saved, of people who haven't done horrible things, who haven't actually hurt anyone."

In practical terms, Romano points out, the difference between being convicted of capital murder and a small-time third strike is this: a murderer is entitled to a far greater share of legal resources. California spends at least $300,000 on the defense side of a capital murder trial. The courts give extra scrutiny to each capital appeal that comes before them. And it's only in death-penalty cases that the state pays lawyers to file a writ of habeas corpus, the route to challenging a conviction once direct appeal has been exhausted.

A three-strikes case, by contrast, is just one more file in the stack on a public defender's desk and a judge's docket. Romano has a client whose appellate lawyer cut and pasted into her brief for him the more serious criminal history of another man—incorrectly telling the judges that her client was far more violent when he actually was.

In court, Romano and his students don't simply argue that their clients are minor offenders who don't deserve to spend the rest of their lives in prison. That route to release is mostly blocked by the Supreme Court's twin rulings on three strikes. In 2003, the justices voted 5-4 to reject the argument that three strikes violates the Eighth Amendment's protection against cruel-and-unusual punishment. Because of criminal histories, the high court let stand the life sentences for Leandro Andrade, convicted of a third strike when he shoplifted videotapes from two Kmart stores, and Gary Ewing, who walked out of a store with three golf clubs in a leg of his pants.

But the California Supreme Court has left open a different route to appeal. In 1998, the court told trial judges who were weighing a bid for leniency at sentencing after a three-strikes conviction that they could consider whether a defendant's "background, character and prospects" place him outside the "spirit" of three strikes.

Romano argues that, as in capital cases, his clients deserve to ask for lesser sentences based on "mitigating evidence"—often of child abuse, mental illness or mental retardation. Romano's students track down clients' old files, ask about their childhoods and pry confirmation out of family members. From Norman Williams's juvenile files and probation reports, Romano's students pieced together a story of unbroken woe. The 8th of 12 children, Williams grew up with a mother who was a binge drinker. She pimped out Williams and his brothers to men she knew. A social worker wrote, "These men paid the boys money to perform anal intercourse on the boys and they . . . gave the money to their mother for wine." As an adult, Williams became a cocaine addict and lived on the streets of Long
Romano’s students laid out this mitigating evidence, which hadn’t been introduced at trial, in a 56-page habeas brief before the state court in Long Beach last year. They got back a one-sentence order denying their claim.

Frustrated, Romano took the habeas petition to one of Cooley’s deputies, Brentford Ferreira. Would he agree that after 12 years in prison, Williams had done enough time? Would he say so to the judge?

Ferreira, a 24-year veteran prosecutor, fired back with questions of his own. “I said, O.K., what you’ve really shown me is that all this guy knows how to do is steal,” he remembers. “So why should I let him out? What are you going to do for him?” Romano knew that Ferreira was right. If just one of his clients got out and hurt someone the whole project would look menacing rather than crusading. Defense lawyers don’t usually act like social workers, but it was vital for Romano and his students to come up with a plan and a home for Williams, from the moment he walked out of Folsom.

Romano’s efforts to help Williams succeed on the outside led him to Eileen Richardson. Once the C.E.O. of Napster, she now runs a $500,000 program, the Downtown Streets Team, which contracts with the city of Palo Alto and local nonprofits to provide janitorial services. The work is done by former offenders and homeless people. Richardson pays them in rent subsidies and Safeway and Wal-Mart gift cards. They attend a weekly support meeting and wear different colored T-shirts as they move up a “ladder of success.”

With Richardson’s promise to give Williams a try, Romano persuaded Ferreira to go with him to see the judge in Long Beach. The prosecutor’s support made the difference: Williams was resentenced to time served. Shortly after he left Folsom a year ago, he started on the Streets Team mopping and waxing the floors of a local shelter. Richardson says Williams hasn’t missed a day of work since.

If Steve Cooley wins the Republican primary for attorney general, on almost every issue—most visibly the death penalty—he’ll run to the right of his probable Democratic opponent, the San Francisco district attorney Kamala Harris. But on three strikes, Cooley will run to Harris’s left. (She didn’t support his 2006 proposal, though she is one of the prosecutors who, on a case-by-case basis, refrains from seeking a life sentence for some nonviolent three-strikers.) It’s a reminder of how far the prosecution of Gregory Taylor, the homeless man who broke into the church, has taken Cooley from the expected comfort zone of a prosecutor.

Cooley is couching his support for amending three strikes statewide more carefully during campaign season. “Any changes to the three-strikes law will have to be in the context of overall prison reform,” he told me in March. At the same time, Romano and Families to Amend California’s Three Strikes, the group that fought for Proposition 66, are increasingly interested in using Cooley’s Los Angeles policy as the basis for a new statewide reform effort in 2012, because it suggests a way to reserve life sentences for the three-strikers who have committed crimes of violence.

Between 2001 and 2008, the Los Angeles D.A.’s office automatically sought life sentences for about 5,400 repeat offenders whose third strike was violent or serious. The office also screened 13,900 cases in which the third strike crime was neither
violent nor serious, to find out whether the defendant had a past record of hard-core crimes. During these years, prosecutors asked for life in only 25 percent of these cases. The other 75 percent are the nonviolent three-strikers whom the law could safely be amended to spare, Romano argues. "Those are the folks who shouldn't be doing life," he says. If Cooley becomes attorney general, he'd have more clout to put behind a 2012 reform initiative, if he chose to.

Norman Williams will soon move into his own apartment in Palo Alto. None of the other clients for whom the Stanford clinic has won release have gotten in trouble. And Romano and his students recently started representing Gregory Taylor, who is still serving life in San Luis Obispo prison.
Skinner v. Switzer


Plaintiff Henry Skinner was convicted of capital murder as a result of his having committed multiple murders during one criminal episode. The jury sentenced Skinner to death. Skinner filed a federal habeas corpus action, but a district court determined that his conviction and death sentence were constitutional and federal habeas corpus relief was denied. The Fifth Circuit Court of Appeals affirmed the district court's denial of federal habeas corpus relief, and the Supreme Court refused to grant a writ of certiorari. Skinner filed an additional suit in district court invoking 42 U.S.C. § 1983. Skinner claims that state officials violated his constitutional rights by denying to him access to biological evidence recovered from the scene of the murders for purposes of conducting DNA testing. A district court held that Skinner failed to state a claim in his § 1983 complaint upon which relief may be granted and dismissed Skinner's complaint. The Supreme Court issued a stay of execution to hear the case.

Question Presented: May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

Henry Watkins SKINNER, Plaintiff,

v.

Lynn SWITZER, District Attorney, 31st Judicial District of Texas, Defendant.

United States District Court for the Northern District of Texas

Decided January 15, 2010

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS AND TO DISMISS § 1983 COMPLAINT

Before the Court is plaintiff's complaint, alleging a cause of action under Title 42 U.S.C. § 1983 and asserting that defendant's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. For the reasons set forth, the undersigned recommends to the United States District Judge that defendant's motion to dismiss be GRANTED and that plaintiff's complaint be DISMISSED.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, defendant, and the Court of Criminal Appeals have adequately set forth
the procedural background of this case. For the purposes of these findings, conclusions, and recommendation, however, the following summation is provided.

Plaintiff Henry Skinner was convicted in the 31st District Court of Gray County, Texas, of the offense of capital murder as a result of his having committed multiple murders during one criminal episode. The jury sentenced plaintiff to death. He is currently scheduled to be executed by the State of Texas on February 24, 2010.

Because of procedural issues not relevant to this § 1983 proceeding, the merits of Skinner’s state habeas claims were never addressed during state habeas corpus proceedings. Skinner did present claims in a federal habeas corpus action filed in this Court, which resulted in a determination that his conviction and death sentence were constitutional and federal habeas corpus relief was denied. The Fifth Circuit Court of Appeals affirmed this Court’s denial of federal habeas corpus relief. Plaintiff filed a petition for a writ of certiorari in the case on November 23, 2009, which is pending before the Supreme Court.

By this lawsuit, plaintiff seeks, for purposes of conducting DNA testing, access to biological evidence recovered from the scene of the murders and never before tested. Although the evidence has not been previously tested, it is not newly discovered evidence, but was available to plaintiff at the time of trial. Plaintiff does not contend the results of any DNA testing would in fact be exculpatory, but contends the results might be exculpatory. In seeking this evidence post-conviction, plaintiff filed two motions in Texas courts, in 2001 and in 2007, for DNA evidence pursuant to Article 64.01 of the Texas Code of Criminal Procedure. The state trial court denied both of those motions, and the Texas Court of Criminal Appeals (CCA) affirmed both denials. Plaintiff did not seek relief from either of the CCA’s denials of the Article 64.01 motions by petitioning the United States Supreme Court for a writ of certiorari.

II. THE ALLEGATIONS

By his complaint, plaintiff asks the Court to require defendant to release certain items of biological evidence for DNA testing. Plaintiff alleges he is entitled to obtain certain biological evidence, which he lists with specificity, for DNA testing and that the withholding of the evidence violates his due process rights under the Fourteenth Amendment and his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Less than one month after filing his complaint and motion for preliminary injunction, plaintiff filed a Notice of Recent Relevant Authority, in which he acknowledged relevant Fifth Circuit caselaw that appears to require this Court to dismiss plaintiff’s complaint for failing to raise a cognizable § 1983 claim. By his Notice, plaintiff suggests the Court dismiss the case pursuant to the screening provisions of the Prison Litigation Reform Act.

In response to the complaint, defendant has filed a motion to dismiss, urging four grounds for dismissal:

1. The Court lacks subject matter jurisdiction under the Rooker-Feldman doctrine to rule on plaintiff’s claims and should therefore dismiss the complaint under rule 12(b)(1) of the Federal Rules of Civil Procedure;

2. The Court is bound by Heck v. Humphrey as interpreted in Kutzner v. Montgomery County and should
therefore dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure;

3. Plaintiff’s complaint presents claims that are essentially identical to several prior claims decided against plaintiff at the state and federal levels and should therefore be dismissed pursuant to 28 U.S.C. § 1738; and

4. The complaint is in essence an improper, successive petition for habeas corpus relief and should therefore be dismissed pursuant to 28 U.S.C. § 2244(b)(3-4).

III. JURISDICTION

Notwithstanding plaintiff’s notice of Recent Relevant Authority, this Court must, prior to discussing the merits of the case, determine if it has jurisdiction. Defendant contends the Rooker-Feldman doctrine precludes this Court from obtaining jurisdiction over this case. That doctrine bars federal district courts from exercising “appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme] Court.” The Court clarified the scope of the doctrine in Exxon Mobil Corp. v. Saudi Basic Indus. Corp. In that case, the Court established “[t]he Rooker-Feldman doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”

Research has not uncovered any Fifth Circuit guidance directly on point. The Second Circuit, however, has discussed Rooker-Feldman in the context of a case where a prisoner sought access to DNA evidence via a § 1983 claim. In that case, the court, relying on Exxon, determined the state-court decision denying plaintiff access to DNA evidence did not cause injury to constitutional rights. Rather, the injury existed before the state court entered its judgment and was “simply ratified, acquiesced in, or left unpunished by the state court.”

The Sixth Circuit, however, in evaluating a factually similar situation, reached a different conclusion. In In re Smith, an unpublished decision, the court, likewise relying on Exxon, held a § 1983 plaintiff was barred by the Rooker-Feldman doctrine from seeking DNA evidence. The plaintiff in In re Smith complained the state trial court incorrectly denied his motions for access to DNA evidence. The Sixth Circuit concluded this was a complaint of an injury caused by the state-court judgment and which sought review and rejection of that judgment, and, as such, was barred by Rooker-Feldman.

Plaintiff’s claims for relief are limited to those asserted in his complaint and the only causes of action asserted in his complaint are that defendant Switzer violated his Fourteenth and Eighth Amendment rights. The issue is made more difficult, however, because it is not clear from plaintiff’s pleadings whether he is attempting to assert other claims. It may be that plaintiff is attempting to assert at least two different theories of relief: (1) that defendant’s actions violated his constitutional rights (as contained in his complaint) and (2) that the state court’s actions in applying the state DNA testing statute violated his constitutional rights (not asserted in his complaint). The first of these claims is similar to those in McKithen, while the second is more similar to those in In re Smith. As such, the first of these claims is
not barred by the *Rooker-Feldman* doctrine, but the second, if in fact it is being asserted, very well may be barred.

**A. Issues Not Precluded by the *Rooker-Feldman* Doctrine**

“A claim which is not raised in the complaint . . . is not properly before the court.” Thus, the Court’s analysis must begin with and is determined by the particular causes of action plaintiff brings in his complaint. In his complaint, plaintiff identified two causes of action, *i.e.*, that defendant deprived plaintiff of (1) his right to due process of law under the Fourteenth Amendment and (2) his right to be free from cruel and unusual punishment under the Eighth Amendment. Critically, plaintiff’s *complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the CCA’s judgments denying him access to the DNA evidence. While plaintiff does, in various other pleadings, complain about the decisions of the CCA, he has not set out a specific cause of action challenging those decisions, as discussed in detail *infra*.

Any injuries caused by defendant’s refusal to release DNA evidence predate and are not caused by the CCA’s decisions to not grant plaintiff access to the biological evidence. As in the *McKithen* case, the state-court decision denying plaintiff access to the evidence did not, in fact, *cause* the injury of which plaintiff initially complains. Moreover, plaintiff affirmatively disclaims he is claiming any injury caused by the state court judgment. Because plaintiff is not “complaining of injuries caused by [the] state-court judgment[.]” and does not seek review of those judgments, review of the claims for relief set out in the complaint is not barred by *Rooker-Feldman*.

**B. Issues Likely Precluded by the *Rooker-Feldman* Doctrine**

Ordinarily, the Court would not address claims which the plaintiff has not properly plead. As set forth above, the undersigned finds plaintiff to only have alleged those causes of action set out at paragraphs VII and VIII of his complaint. Since these findings, conclusions, and recommendations will be subject to review by the District Judge, the undersigned has included a review of the additional arguments plaintiff has set out in his pleadings even though such claims were not identified as specific claims for relief. The reasoning in *In re Smith* would seem to apply to the arguments plaintiff makes that the state court’s actions in applying the state DNA testing statute violated his constitutional rights. In his Response to Defendant’s Motion to Dismiss, plaintiff contends Article 64 of the Texas Code of Criminal Procedure is unconstitutional *as applied* to his case. These allegations appear to directly challenge the state court action, and by making them, plaintiff includes an argument that the Texas Court of Criminal Appeals violated his due process rights by incorrectly applying the state statute. By directly pointing to a state court’s actions as a source of injury, and by asking the Court to review such state court actions, plaintiff raises claims likely barred by *Rooker-Feldman*. If the CCA did indeed incorrectly and unconstitutionally apply Article 64 of the Texas Code of Criminal Procedure, the proper relief for plaintiff would have been to appeal the judgment directly to the United States Supreme Court.

Those claims, however, are not further addressed because plaintiff has not raised them as a claim for relief and has not sought to amend his complaint to assert them. For purposes of this Report and Recommendation, the undersigned finds no
such claims to be asserted.

The undersigned also finds that paragraph 31 of the complaint, in which plaintiff states “[a]s a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing,” not to state an additional cause of action or claim for relief. The Court notes this paragraph is not under the paragraphs plaintiff identifies in his complaint as claims for relief. (Paragraphs VII and VIII). Moreover, paragraph 31 appears merely to be a chronological statement that defendant has continually refused to release this evidence both before and following the CCA’s denial of plaintiff’s Article 64 motions. To the extent plaintiff contends otherwise, the Court does not believe this singular, vague statement can properly be read as directly challenging the CCA’s decisions because if it were so read, plaintiff would be taking mutually exclusive positions, i.e. as set forth in footnote 1, plaintiff, in response to the motion to dismiss, affirmatively states the injury of which he complains existed prior to any state court decision and that he does not complain of injuries caused by a state court judgment.

Consequently, if the undersigned is correct in the determination of the claims presented, no Rooker-Feldman bar is present. If, however, the undersigned is incorrect and plaintiff is asserting any additional claims that the application of Article 64 by the CCA deprived him of due process, then it would appear he is complaining of an injury caused by the state court judgment and defendant’s motion to dismiss based upon the Rooker-Feldman doctrine has considerable merit and the issue would have to be revisited. At this stage, plaintiff has not formally asserted these other claims in his complaint as causes of action and the Court will not further address plaintiff’s contention regarding the improper application of Article 64 by the Texas courts.

IV. Application of Kutzner

Defendant next contends plaintiff fails to state a claim upon which relief may be granted. Citing the Kutzner decision, issued by the Fifth Circuit in 2002, defendant contends plaintiff’s claims are not cognizable under § 1983 and must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff agrees the Kutzner decision is binding upon this Court.

In Heck v. Humphrey, the Supreme Court emphasized that a petition for a writ of habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. In evaluating § 1983 suits, the Court instructed district courts to “consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”

Thereafter, the Fifth Circuit evaluated a § 1983 claim seeking to compel the production of biological evidence for DNA testing. In that case, the plaintiff contended that state officials refused to release biological evidence for DNA testing and thereby prevented him “from gaining access to exculpatory evidence which could exclude him as a perpetrator” of the offense for which he was convicted. Applying Heck, the court held such a claim was not cognizable in a § 1983 action. Rather, the court pointed to 28 U.S.C. § 2254 as the
proper statute for bringing such a claim:

claims seeking to attack the fact or duration of confinement, as well as claims which are “so intertwined” with attacks on confinement that their success would “necessarily imply” revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. Under Martinez, a prisoner’s request for DNA testing of evidence relevant to his prior conviction is “so intertwined” with the merits of the conviction as to require habeas corpus treatment.

Three years after the Kutzner opinion, the Supreme Court issued Wilkinson v. Dotson. In that case, the Court evaluated its caselaw regarding the difference between claims cognizable under § 1983 and claims cognizable in habeas corpus.

The Dotson court found the § 1983 action, involving parole proceedings, should be allowed to proceed as a § 1983 action. Although Dotson did not involve a request for evidence for DNA testing, circuit court of appeals have interpreted the language in Dotson to allow a prisoner to bring a claim for biological evidence for DNA testing as a § 1983 claim, as opposed to the Fifth Circuit’s approach requiring a prisoner to bring such a claim as a habeas corpus petition. Additionally, the Eleventh Circuit’s position, established before Dotson was issued, is in agreement with that taken by the Second, Seventh, and Ninth Circuits. The Fifth Circuit has not ever discussed the Dotson decision in the context of its application to post-conviction requests for DNA evidence. It has, however, cited the Kutzner case after Dotson was decided in a case involving a post-conviction request for DNA evidence—indicating Kutzner remains the law in this circuit. Even were this Court to question the validity of Kutzner after Dotson, it recognizes that only the Fifth Circuit may overrule its own law, and even though there is an intervening Supreme Court decision in this case, there is also a latter Fifth Circuit decision.

Based upon the foregoing, there is no reason not to apply Kutzner. In considering whether Kutzner applies, the undersigned notes that the Supreme Court expressly left the Heck issue open when it decided Osborne. In fact, the Supreme Court, while acknowledging that the Courts of Appeals had applied Dotson to allow § 1983 DNA lawsuits, specifically declined to address the issue of Heck v. Humphrey. It now appears the Fifth Circuit will address the viability of Kutzner in light of Dotson and Osborne.

This Court must follow the law established in Kutzner and hold that plaintiff Skinner’s § 1983 claims are cognizable only in habeas corpus. As such, plaintiff fails to state a claim in his § 1983 complaint upon which relief may be granted and his complaint should be dismissed on such grounds. Because the Court recommends the dismissal of the case for failure to state a claim upon which relief may be granted, it foregoes further discussion of other grounds for dismissal at this time.

Although the Court declines further discussion of other grounds for dismissal urged by the defendant, there are two issues which the undersigned identifies in the event the District Judge finds them to be cognizable. First, there is no freestanding substantive due process right to DNA evidence. Were the District Judge to find Kutzner did not bar this lawsuit, then that issue would be presented as to any consideration of the merits.

Second, defendant’s res judicata arguments have not been addressed. If the undersigned
is correct in the determination that plaintiff's claims are limited to those identified in his complaint, then neither res judicata nor Rooker-Feldman bar the consideration of the case. If, however, plaintiff is in fact asserting the additional claims as discussed in section III of this Report and Recommendation, res judicata would be an issue.

V. RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the 42 U.S.C. § 1983 filed by plaintiff HENRY WATKINS SKINNER be DISMISSED for failure to state a claim upon which relief may be granted and that the motion to dismiss filed by defendant LYNN SWITZER be GRANTED.
A Texas death row inmate will get a hearing before the Supreme Court over his claims of "actual innocence" and demands authorities conduct more thorough DNA testing of evidence gathered at the crime scene. At issue [in *Skinner v. Switzer*] is whether capital inmates have a basic federal civil right to have forensic evidence reviewed late in the appeal process.

Supporters of Henry Skinner, convicted of the murders of three acquaintances, say if he loses this appeal, an innocent man could be put to death.

The state says he is not entitled to testing of evidence that was not analyzed before his 1995 trial.

The justices had issued a stay just before his scheduled March 24 execution. The court will now schedule oral arguments for the fall, to decide the larger constitutional questions. Federal appeals courts have split on the issue in recent years.

Skinner, 47, was convicted of the New Year's Eve 1993 killings of his live-in girlfriend and her two adult sons. He strongly denies any involvement, and claims retesting would prove his innocence and determine the real killer.

His lawyers welcomed the high court's decision to intervene. "We look forward to the opportunity to persuade the court that if a state official arbitrarily denies a prisoner access to evidence for DNA testing, the prisoner should be allowed to challenge that decision in a federal civil rights lawsuit," said attorney Rob Owen.

Prosecutors maintain forensic evidence gathered at the scene and witness statements point to Skinner.

A female friend of Skinner's who lived four blocks away testified at Skinner's trial that he walked to her mobile home and told her that he may have kicked Twila Busby to death, although evidence did not show she had been kicked. The neighbor has since recanted parts of her testimony.

Authorities followed a blood trail from the crime scene to the female friend's home and found Skinner in the closet, authorities said. He was "wearing heavily blood-stained jeans and socks and bearing a gash on the palm of his right hand," according to the Texas attorney general's summary of the case.

Also found stabbed to death were Elwin "Scooter" Caler, 22, and Randy Busby, 20.

In addition, authorities said cuts on Skinner's hand came from the knife used to stab the men. The onetime oil field worker said he cut it on glass. Some DNA testing was done that implicated Skinner, but not on the items he now wants examined, including vaginal swabs from Busby, fingernail clippings, two knives, and items of clothing.

"DNA testing showed that blood on the shirt Skinner was wearing at the time of his arrest was Twila's blood, and blood on Skinner's
jeans was a mixture of blood from Elwin and Twila,” state officials said.

However, Owen wrote in the Supreme Court filing, “the victims’ injuries show that whoever murdered them must have possessed considerable strength, balance and coordination.” Skinner claimed he had been passed out on a couch from a combination of vodka and codeine, and that he was physically unable to commit the crimes.

An expert testified at trial that Skinner would have been too intoxicated to commit the crimes, and a review of the evidence suggests that Skinner might have been even more intoxicated than initially thought, Owen wrote.

Texas Gov. Rick Perry had received more than 8,000 letters from Skinner’s advocates urging a new trial, according to the Innocence Project and Change.org, whose members and supporters have sent the letters through their Web sites.

Evidence presented at trial suggested that Twila Busby’s uncle, Robert Donnell—who is now dead—could have been the killer. At a New Year’s Eve party she attended for a short time on the last night of her life, Donnell stalked her, making crude sexual remarks, according to trial testimony. A friend who drove her home from the party testified she was “fidgety and worried” and that Donnell was no longer at the party when he returned.

“The defense presented evidence that Donnell was a hot-tempered ex-con who had sexually molested a girl, grabbed a pregnant woman by the throat and kept a knife in his car,” according to Owen’s letter to Perry.


“I’m convinced of his innocence not because I love him and he’s my husband, I’m convinced of his innocence . . . [because] there is scientific forensic evidence to prove that he was not even in a state to stand up at the time of the crime let alone murder three people that he loved,” Ageorges-Skinner, a French woman, said on “Larry King Live.” “There is absolutely no motive.”

Texas has executed more prisoners than any state since 1976. Ten condemned inmates have died by lethal injection since January.

Recently, questions have swirled in Texas regarding the 2004 execution of Cameron Todd Willingham for a fire that killed his three daughters, and allegations he was not guilty of the murders.

On March 19, Perry issued a posthumous pardon for Timothy Cole, who was serving a 25-year sentence for aggravated sexual assault when he died in prison from an asthma attack. After his death, DNA tests established his innocence, and another man confessed to the crime.

The Supreme Court case is Skinner v. Switzer (09-9000).
The U.S. Supreme Court will consider broadening the ability of convicted murderers to seek new DNA testing, [in *Skinner v. Switzer,*] agreeing to consider an appeal from a Texas man whose execution the court halted in March.

The justices will hear arguments from Henry W. Skinner, convicted of the 1993 murders of his girlfriend, Twila Busby, and her two adult sons in the north Texas town of Pampa. Skinner, 48, says DNA testing could exonerate him and might implicate Busby's uncle as the perpetrator.

The case will test whether condemned inmates who say they didn't receive a fair trial can use a federal law to seek DNA testing that might prove their innocence. The high court considered that question, but didn't resolve it, in a 2009 case.

"This is a life-or-death case brought by a possibly innocent man whose guilt or innocence can be determined by DNA testing," Skinner's appeal argued.

More than 250 people have been exonerated after conviction through DNA evidence, according to the Innocence Project, which investigates cases and represents inmates. Forty-seven states, including Texas, give convicted criminals in at least some circumstances the right to conduct post-trial DNA testing.

Prosecutors said in court papers that Skinner didn't meet the requirements for DNA access under Texas law. They argued that the state statute "contains all of the key elements that the Innocence Project recommends should be in a good DNA access law."

**Holiday Murder**

Twila Busby was choked and bludgeoned with an axe handle and Randolph Busby and Elwin Caler were stabbed to death in the home they shared with Skinner on New Year's Eve 1993. Skinner says he had consumed so much alcohol and codeine that he couldn't possibly have committed the crime.

Skinner is seeking DNA testing of seven sets of items, including vaginal swabs taken from Twila Busby, her fingernail clippings and two knives that were found at the house. His lawyers say his inability to get testing of those items shows the inadequacy of the Texas DNA procedures.

Skinner is invoking a provision in federal law known as Section 1983, which lets individuals sue over violations of their constitutional rights by state or federal officials. A New Orleans-based federal court barred his suit.

Last year, the high court ruled that inmates don't have a "freestanding right" to demand access to DNA evidence for testing. That ruling left open the possibility that inmates could use Section 1983 to seek DNA access when their rights haven't been adequately protected by state procedures.

The Supreme Court halted Skinner's execution March 24, issuing an order less than an hour before he was scheduled to die. ...
Acting on a petition from condemned killer Henry W. Skinner, the U.S. Supreme Court today announced it will consider whether inmates’ requests for DNA testing can be considered as civil rights claims [in *Skinner v. Switzer*]—a question that has split the nation’s top federal courts.

Skinner, 47, was sentenced to die for the 1993 murders of his Texas Panhandle girlfriend and her two adult sons. The high court stayed his execution on March 24, just one hour before Skinner was to have been put to death.

After deliberating last week, the Supreme Court announced its decision to review Skinner’s DNA case without further comment.

Skinner, whose case has become a cause celebre among capital punishment opponents, has requested that DNA testing be conducted on bloody knives found at the murder scene, material found beneath his victim’s fingernails, rape kit samples and other items previously not tested.

Skinner’s request, filed as a Section 1983 civil rights claim, was turned down by the U.S. 5th Circuit Court of Appeals.

The issue of whether such requests can be considered as civil rights claims or must be presented as habeas corpus claims has split the nation’s federal courts of appeal. Five allow civil rights claims; five are undecided; and two, including the 5th Court, do not.

At the heart of the controversy is whether a prisoner simply is seeking DNA testing of evidence or is demanding to be released from prison. An effort to be set free typically would be presented as a habeas corpus petition.

Skinner was convicted of the 1993 New Year’s Eve murders of Twila Busby, who was strangled and battered with an ax handle; and her sons, Elwin Caler and Randy Busby, who were stabbed.

Skinner, who worked as a paralegal before his arrest, consistently has claimed innocence.

His case gained international notoriety after journalism students from a Chicago university reviewed the case, located potential new witnesses and drew attention to evidence that had not been DNA tested.

Earlier, the Supreme Court declined to review a 5th Court ruling that dismissed Skinner’s claim of insufficient trial counsel.
The U.S. Supreme Court on Wednesday stopped the execution of condemned prisoner Hank Skinner about an hour before he could have been taken to the Texas death chamber.

Skinner asked the court and Gov. Rick Perry for the delay for DNA testing that he insisted could clear him in a triple slaying.

The brief order grants him the delay but does not ensure he will get such testing. Perry had not decided on the delay.

Skinner, 47, faced lethal injection for the bludgeoning and strangling of his girlfriend, 40-year-old Twila Jean Busby, and the stabbings of her two adult sons. The slayings occurred at their home in the Texas Panhandle town of Pampa on New Year’s Eve in 1993.

The court order came as relatives of Busby were climbing the steps of the Huntsville prison to prepare to witness his punishment. In the order, the justices said they would put off the execution until they decide whether to review his case. If the court refuses the review, the reprieve is lifted, according to the order, and that would make Skinner eligible for another execution date.

‘I’m greatly relieved’

Skinner, in a small holding cell a few feet from the death chamber, expressed surprise when was informed of the reprieve in a phone call from his lawyer.

“I had made up my mind I was going to die,” he said. “I’m eager to get the DNA testing so I can prove my innocence and get the hell out of here.

“I’m greatly relieved. I feel like I really won today.”

Rob Owen, Skinner’s lead attorney and a University of Texas law professor, said the court action suggested the justices believed “there are important issues that require closer examination.”

“We remain hopeful that the court will agree to hear Mr. Skinner’s case and ultimately allow him the chance to prove his innocence through DNA testing,” he said.

Skinner, splattered with the blood of at least two of the victims, was arrested about three hours after the bodies were found. Police found him in a closet at the trailer home of a woman he knew.

The former oil field and construction worker said he was present when the three were killed but couldn’t have committed the murders. Skinner said a combination of vodka and codeine left him passed out on a couch and physically incapable of clubbing Busby 14 times with an ax handle and stabbing her sons, Elwin “Scooter” Caler, 22, and Randy Busby, 20.

“I’ve been framed ever since,” he said last week. “They’re fixing to kill me for something I didn’t do.”

Prosecutors argued Skinner wasn’t entitled to testing of evidence that wasn’t analyzed before his 1995 trial. Courts over the years since his conviction have agreed, rejecting
his appeals.

**Similar appeal to Perry**

Skinner’s lawyers want to pursue in federal district court a civil case against the Gray County District Attorney, whose office prosecuted Skinner initially. That suit seeks to make evidence available for testing.

They’d made a similar appeal to Perry.

Skinner’s attorneys want DNA testing on vaginal swabs taken from Busby at the time of her autopsy, fingernail clippings, a knife found on the porch of Busby’s house and a second knife found in a plastic bag in the house, a towel with the second knife, a jacket next to Busby’s body and any hairs found in her hands that were not destroyed in previous testing. Only the hairs were tested previously and those results were inconclusive, according to court documents.

Skinner’s trial lawyer, Harold Comer, chose not to test all the evidence because he feared the outcome would be more damaging to his client.

Comer said he now favors the testing but defended his trial strategy.

“I would make the same decision with the same circumstances again,” he said.

Trial prosecutor John Mann, who has since died, also did not have all the evidence tested. Current District Attorney Lynn Switzer, now the defendant in Skinner’s lawsuit, declined to comment about the case as Skinner’s execution neared. Lawyers representing her office challenged the suit as improper.

Skinner would have been the fifth person executed this year in Texas, the nation’s most active capital punishment state. Twenty-four people were put to death in Texas in 2009.
Hank Skinner, who is on death row in Texas, had a simple request. Before the state took his life, he wanted to test DNA evidence from the crime scene that could prove he was wrongly convicted. Texas prosecutors, whose love for the death penalty is legendary, refused.

Skinner then sued, claiming that federal civil rights laws gave him a constitutional right to do the testing. A federal appeals court ruled against him.

On Monday, the U.S. Supreme Court agreed to hear Skinner's case [in Skinner v. Switzer]. That's good news. The Justices should use the case to expand the right to do DNA testing. But Skinner's case also gives the court a chance to confront a disturbing aspect of the nation's approach to the death penalty: the fact that the legal system does not always seem to care whether the people it executes are actually guilty.

There's no denying the crime Skinner, now 48, was convicted of in 1995 was a vicious one. Skinner's girlfriend and her two mentally challenged sons were stabbed, strangled and bludgeoned to death. But Skinner has always insisted he is innocent. The evidence against him is largely circumstantial, and his lawyers argue that the girlfriend’s uncle, who they say had been harassing her that night and acted suspiciously after the crime, was likely the real murderer.

When students from Northwestern University’s Medill Innocence Project investigated, they found evidence that raised serious questions about the prosecution's case. A toxicologist who testified for the defense said he had “never known a verdict of the jury to be so at variance with what I believe to be scientific fact.”

It's not hard to believe Skinner could have been wrongly convicted. With the rise of DNA evidence, we now know that people are falsely convicted of crimes, including capital crimes, all too often. According to the Death Penalty Information Center, 138 people have been released from death row since 1973 with evidence of innocence.

Skinner has tried for 10 years to get access to key pieces of biological evidence—including his girlfriend's rape kit and two knives that may have been used in the killings. After prosecutors turned him down, Skinner sued, arguing that the refusal violated due process and constituted cruel and unusual punishment.

The U.S. Court of Appeals for the Fifth Circuit, one of the most conservative courts in the country, rejected his claim in a brief decision. The judges focused on legal fine points without engaging the larger injustice of the situation—that Texas was seeking to execute a man while denying him access to evidence that could exonerate him.

Skinner’s case never should have gotten this far. When someone facing the death penalty asks for relevant evidence for DNA testing, the state’s answer should simply be yes. After all, the government’s interest is not in seeing people put to death or in reflexively defending criminal convictions. It is in
making sure that the guilty are punished and the innocent go free.

Prosecutors do not always see it that way. They defend all sorts of practices that call into question the reliability of the convictions they obtain. A while back, in an infamous case, Texas fought to execute an inmate even though his lawyer slept at his trial—repeatedly, and for long stretches of time. The Fifth Circuit ultimately ruled that the defendant was entitled to a new trial.

This callousness about death-penalty cases is not limited to states like Texas—or to prosecutors.

Supreme Court Justice Antonin Scalia set off a firestorm last summer when he wrote a dissent—joined by Justice Clarence Thomas—that the highest court in the land is not necessarily concerned with whether a person facing execution had actually committed the crime. The court “has never held,” Justice Scalia wrote, “that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a . . . court that he is ‘actually innocent.’” Scalia was taking issue with the court’s ruling that a lower court give Georgia death-row inmate Troy Davis a new hearing.

This idea that the Constitution allows innocent people to be put to death should be abhorrent to anyone who cares about justice. As Harvard Law School professor Alan Dershowitz pointed out, Justice Scalia seemed to be saying that if a man was convicted of murdering his wife and then showed up in court with the wife, who was still alive, seeking a new trial, it should not matter. As long as the man’s conviction was procedurally proper, Justice Scalia apparently believes, he should still be executed.

The Supreme Court—which will take up Skinner’s case in its next term—should rule that people accused of capital crimes can use federal civil rights laws to obtain the DNA evidence they need to prove their innocence.

And the Justices should use the case to underscore that we, as a nation, care whether people facing the death penalty have actually committed the crimes they were accused of.
Texas Gov. Rick Perry The state of Texas was 47 minutes from executing Henry "Hank" Skinner in March when Justice Antonin Scalia gave him a last-minute stay. Last month, the Supreme Court as a whole agreed to hear Skinner’s case in the fall [in *Skinner v. Switzer*]. At issue is whether Skinner should be given access to crime-scene evidence and DNA testing that he and his lawyers say will prove his innocence. However the court comes out, Skinner’s case raises a fundamental question about how police and district attorneys investigate and prosecute crimes: Why wasn’t this evidence tested before Skinner’s trial? And why hasn’t it been tested since?

The answers lie in the adversarial nature of our criminal justice system. There are times when neither the prosecution nor the defense is particularly interested in discovering the truth. That’s where policy makers need to step in. In cases like Skinner’s, they should establish a common-sense rule: When there is biological evidence at the crime scene, all of that evidence should be sent for DNA testing. No exceptions.

The details of Hank Skinner’s case illustrate both the problem and how such a rule would solve it. Skinner was convicted in 1995 for the 1993 murders of his girlfriend Twila Busby and her two adult sons.

Skinner doesn’t dispute that he was in the house when his girlfriend and her sons were murdered. He claims he was unconscious at the time, knocked out by a near-lethal mix of alcohol and codeine. Back in 1995, the evidence against him seemed formidable. He was present at the crime scene. He had smears of blood from two of the three victims on his shirt. Andrea Reed, Skinner’s neighbor and ex-girlfriend, says Skinner came to her home shortly after the crime and first implicated himself, then told Reed a number of other implausible and contradictory stories about who committed the murders.

But Skinner has always maintained his innocence. In 1999, Northwestern University’s Medill Innocence Project began looking into Skinner’s conviction. As professor David Protess and his student journalists began interviewing witnesses and reviewing evidence, the state’s case against Skinner started to unravel. Reed recanted her testimony and now says she was pressured by police investigators to implicate Skinner. Toxicology reports showed the amount of codeine and alcohol in Skinner’s blood at the time of the murders would have likely have rendered him unconscious or put him in a hazy stupor. His defenders say he couldn’t have killed three adults in that condition. The students also found that Busby had been stalked by an allegedly lecherous uncle named Robert Donnell, whom witnesses said had approached her at a party the night of her death. She left frightened, and he appeared to have followed her. Friends say Donnell had raped Busby in the recent past. Days after the murders, a neighbor saw Donnell cleaning and repainting his truck.

There are other problems with Skinner’s conviction. His court-appointed attorney, Harold Lee Comer, was a disgraced former prosecutor who left office after pleading guilty to siphoning off asset forfeiture funds
in a drug case. The judge, a friend of Comer's, appointed him to represent Skinner, then ordered Comer's pay in an amount roughly equal to what Comer still owed for his own criminal conduct. Worse, Comer had previously prosecuted Skinner on a minor assault and theft charge. At Skinner's sentencing trial, the prosecution argued that those two crimes were aggravating factors that should be considered in Skinner's sentencing. Comer didn’t object.

Most of these flaws have been litigated, and the courts have found that none of them is enough to win Skinner a new trial. But the most troubling aspect of Skinner's case is the biological material collected from the crime scene. Law enforcement officials tested the small blood smears on Skinner’s shirt, and those matched two of the three victims. But given that Skinner admits he was at the crime scene and says he awoke to find the victims’ bodies, it isn’t surprising that he’d have some of their blood on his shirt. The blood on the murder weapons has never been DNA tested. Nor has any material from the rape kit taken from Busby. The state also never tested skin cells taken from under Busby’s fingernails, or a blood-stained windbreaker left at the scene that witnesses say matched one often worn by Donnell. “They only tested the material they thought would implicate Skinner,” Protess told me via phone. “They fixated on their suspect, and once they thought they had enough for a conviction, they stopped.”

Actually, it’s worse than that. In 2000, on an episode of the *Nancy Grace Show*, Protess publicly challenged Skinner’s prosecutor to test the remaining biological evidence, even offering to pay for the testing himself. “He agreed, and I actually sent him an e-mail complimenting him,” Protess says. But when mitochondrial DNA testing of the hair Busby was clutching in her hand at the time of her death didn’t match Busby or Skinner, the state halted the testing of any more evidence and has refused to run any tests since. As Skinner’s execution neared in March, Texas Gov. Perry again declined to grant Skinner a stay so the evidence could be tested, even after a lab in Arizona offered to conduct the tests for free. Never mind that all of this comes amid continuing controversy over Texas’ 2004 execution of Cameron Todd Willingham, a man many believe was innocent, as well as allegations that Texas Gov. Rick Perry subsequently undermined an investigation into the dubious forensic evidence used at Willingham’s trial.

For the prosecution, refusing to test the crime scene evidence is about establishing finality and closure, regardless of justice. But Skinner’s defense counsel wasn’t interested in discovering the truth either. At trial, Skinner could have asked for DNA testing of the remaining evidence. Skinner actually told his attorney Comer, in writing, that he wanted the tests. But Comer declined on his behalf. Comer says he feared the test would have confirmed Skinner’s guilt. That’s possible, Comer’s shortcomings aside. Criminal defense attorneys often represent guilty people, and they wouldn’t be doing their jobs if they allowed for testing that may confirm a client’s guilt. Of course, Comer also seems to have been incompetent. But Skinner’s request for the tests doesn’t mean his attorney would have been obligated to ask for them.

Nor does Skinner have a constitutional right of due process to DNA testing following conviction. In a case last year, the Supreme Court rejected exactly this proposition, and so Skinner is asking the court to revisit the question under federal civil rights law. In *District Attorney’s Office for the 3rd Judicial District v. Osborne*, last year’s case, Justice Alito argued in a concurring opinion
that guilty people could refuse to request DNA testing at trial, then prolong the appeal process (and stave off execution) by requesting DNA testing afterward. To find a right to post-conviction testing in the Constitution’s protection of due process, Justice Samuel Alito wrote in his concurrence, “would allow prisoners to play games with the criminal justice system.”

That’s precisely why the testing should be done before trial. Arguing over which evidence gets tested shouldn’t be part of either side’s strategy. The prosecution and the defense should begin knowing that all of the evidence has been tested or will be. For old cases like Skinner’s, if there’s significant doubt about the defendant’s guilt that testing could resolve, legislators shouldn’t wait for the courts—they should make sure themselves that testing is done. A typical DNA sample costs about $1,000 to analyze, with a usual turn-around time of about 30 days. Innocence Project spokesman Eric Ferrero told me that his organization on average pays about $8,500 per case for DNA testing, since most cases have multiple samples of evidence.

No less a death penalty supporter than George W. Bush said in 2000, when he was governor of Texas, “Any time DNA evidence can be used in its context and be relevant as to the guilt or innocence of a person on death row, we need to use it.” Bush then granted a stay of execution to accused killer Rickey Nolen McGinn to allow for such testing. It confirmed McGinn’s guilt. Did McGinn game the system to buy extra time? Probably. Does it matter? McGinn got an extra month of life. Everyone else in Texas got certainty that the state didn’t execute an innocent person—and that the actual killer wasn’t still running free.

DNA testing may well confirm Hank Skinner’s guilt, too. But the incriminating DNA may also match Robert Donnell (or someone else). In which case Skinner would become the 252nd person to be exonerated by DNA. Either way, we’d know. By refusing to answer the question, Texas officials are acting as if preserving a conviction is more important than knowing for certain who killed Twila Busby and her sons.
“Hank Skinner Death Penalty Case: Texas Jurors Reconsider Verdict”

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Rachel Cicurel, Gaby Fleischman, Emily Glazer & Alexandra Johnson

In March 1995, a jury left a Fort Worth, Texas, courthouse having unanimously decided that DNA testing and compelling testimony led to an inescapable verdict: Henry “Hank” Skinner deserved to die for the murders of his live-in girlfriend, Twila Busby, and her two adult sons in their home on New Year’s Eve 1993.

Twila was bludgeoned to death; her sons were stabbed. The jury primarily based its decision on evidence that showed the victims’ blood on Skinner’s clothes and the testimony of a neighbor. They deliberated for less than two hours, and Skinner has been on Texas’ death row ever since.

But the jurors were never presented with complete DNA results of the physical evidence, nor could they have imagined that the prosecution’s star witness would recant her testimony and that subsequent developments would strengthen the case that another man may have been responsible for the murders.

Last month, the U.S. Supreme Court announced it would take Skinner’s case and determine whether he can bring a civil rights action to seek DNA testing of the remaining evidence found at the scene. The untested evidence includes vaginal swabs, bloodied knives, fingernail clippings, hair clutched in the female victim’s hand, and a blood-stained windbreaker strikingly similar to one worn by the alternative suspect.

In April of our senior year, the four of us—22-year-old journalism students from Northwestern University’s Medill Innocence Project—arrived in Texas in search of the jurors. (The trial had been moved to the Fort Worth area from rural Gray County in the Panhandle because of massive pre-trial publicity.) The Medill Innocence Project investigates possible wrongful convictions in homicide cases. In the five days allotted for our reporting trip, we hoped to get in touch with at least one juror. We were pleasantly surprised, however, when more than half the jury opened their doors and memories.

In light of new developments that have surfaced in the 15 years since Skinner’s trial, several of the original jurors are no longer sure of his guilt. Five say they might have had reasonable doubt at the time of the trial if they had known then what they know now. Seven are calling for DNA testing of all the evidence so they can be certain they convicted the right man. An eighth juror we contacted declined to comment.

Some jurors had followed developments in the case, searching the Internet and Texas newspapers for Skinner’s name; others avoided it, hoping never to revisit this traumatic experience. In kitchens, living rooms, garages, and eateries across Fort Worth and suburban Arlington, the jurors recalled the experience of being sequestered—how detached they felt watching “Forrest Gump” rather than the news of the day.

But plugged back in 15 years later, they considered statements by two of Twila’s friends that the alternative suspect—Twila’s uncle, Robert Donnell, who died in 1997—
allegedly raped her on two occasions and stalked her at a party the night of the murders, as well as those by neighbors who said they had seen him tearing the carpeting out of his truck the morning after the crime and repainting the vehicle within a week.

They also took into account a new medical report indicating the likelihood that Skinner was barely conscious from drinking a mixture of alcohol and codeine at the time of the crime, and sworn statements by the prosecution’s star witness, Andrea Reed, who repudiated her testimony. In the original trial, Reed, Skinner’s ex-girlfriend who lived nearby, had testified that when Skinner came to her trailer shortly after the murders, he made incriminating statements and demanded that she not call the police. But in 1997, she recanted her testimony to a private investigator, claiming that law enforcement had intimidated her into falsely testifying. In 2000, she repeated that claim to another group of Medill Innocence Project students.

“I had no idea that she recanted her story, her testimony; that brings new light,” said Tiffany Daniel, the youngest member of the jury. “That puts a lot of questions in my mind.”

Sitting at her kitchen table, Daniel slowly reintroduced herself to an experience she had closed well over a decade ago. “We were responsible for sentencing,” she said. “If we weren’t presented with all the evidence that could potentially free a man or convict a man... if [he’s put to death] and if this man didn’t do that, that would be something I have to live with.”

Many of the jurors interviewed were taken aback by the amount of untested evidence, stunned that even the blood on two of the murder weapons had not been analyzed. The seven jurors agreed that all the evidence should undergo DNA analysis. “That’s the only way you can come to the right conclusion of if he’s innocent or guilty,” said Danny Stewart, the jury’s foreman. “I would hate personally to put a man to death if he’s innocent.”

Lynn Switzer, the current district attorney of Gray County who is being sued by Skinner in the case before the Supreme Court, has refused to test all the remaining evidence. “If defendants are allowed to ‘game the system’ then we will never be able to rely on the finality of the judgments entered in their cases,” Switzer said in a statement following the court’s decision to take Skinner’s case. “Mr. Skinner has been given plenty of opportunity to show that additional testing could prove his innocence, but he could not show that.”

Texas courts have repeatedly denied Skinner’s requests for DNA tests, ruling that he should have had the testing done at the time of the trial, a position Switzer supports.

Switzer was appointed district attorney by Texas Gov. Rick Perry after District Attorney Richard Roach was convicted of stealing and abusing methamphetamines. In January 2005, the FBI arrested Roach in the Gray County courthouse—a place where he had both injected meth in front of an employee and made a career of prosecuting constituents for using the same drug. Roach had ousted the late John Mann, who served Gray County during Skinner’s trial in 1995.

At his trial, Skinner was represented by Harold Comer, another former district attorney of Gray County. In that role, Comer had earlier prosecuted Skinner on charges of theft and assault. Although Comer resigned from office in 1992 before pleading guilty to criminal charges of embezzling cash confiscated in drug cases, he was later appointed by the judge to represent Skinner.
at his capital murder trial. To many jurors’ current dismay, however, Comer didn’t request DNA tests prior to trial, saying he did this to protect his client from potentially damaging results.

“All of it should have been tested,” juror Stewart said. “All the DNA evidence should be tested. Period.”

Some additional tests were done following Skinner’s conviction. After being confronted on CourtTV in 2000, Mann had a change of heart. He ordered additional tests on head hairs clutched in Twila’s hand, bloody gauze on the front sidewalk of her home, a cassette tape in the bedroom, and other items.

While some results put Skinner in the home—where he indisputably was at the time of the crime—the tests on one of the head hairs, the blood on the sidewalk, the cassette tape, and an unmatched fingerprint found on a plastic bag containing a bloodied knife all excluded Skinner. At that point, the district attorney’s office—led by Richard Roach when he took over from Mann—halted further testing and returned the evidence to a storage locker, where it sits today.

It was this most recent round of DNA tests that prompted five jurors to say they could have reached a different verdict if they had known at the time of the trial what they know today. The two others said they really didn’t know if the tests would have changed their minds.

“It would have been reasonable doubt,” Daniel said, wiping away tears. “Especially if we had all that evidence, and another person’s fingerprints was on it, or if someone else’s skin was underneath Twila Busby’s fingernails. That’s reasonable doubt that it could be somebody else.”

Douglas Keene, a jury expert and president of Keene Trial Consulting in Austin, said it is “not at all common” for jurors to question their original verdict. “Over time, they become more cemented into that original view because they can’t even tolerate the view that they might have made a mistake on something so serious,” he said.

Keene emphasized that jurors might feel anxiety that they may have come to the wrong conclusion, regardless of whether it was their fault. “Even if they didn’t have an opportunity to know the exculpating evidence, jurors could become distraught that a man’s life might have been taken in error.”

But in Skinner’s case, information suppressed during the trial and developed over the last 15 years has caused five jurors to contemplate their guilty vote in light of the high stakes Keene described. With someone’s life on the line, Keene said, jurors take the burden of their responsibility very seriously.

In worn-in jeans and a T-shirt, juror Jerry Williams perched on a stool in his garage. He wonders now if DNA results could put the case to rest.

“What’s right is right and what’s wrong is wrong,” Williams said. “It should have been tested before... Somebody’s life is at stake.”

Meanwhile, Hank Skinner remains on Texas’ death row, within 47 minutes of execution on March 24 until the Supreme Court issued a stay. He has maintained his innocence since the night in 1993 that Twila Busby and her sons were murdered, and hopes the high court will give him the right to prove it.
Like a vast majority of inmates on Texas’s death row, Calvin Jerold Burdine could not afford a lawyer for his trial. So the court paid a lawyer named Joe Frank Cannon to represent him. Today, 16 years after Burdine was convicted of murder and sentenced to die, no one disputes that Cannon did a lackadaisical job. In fact, during important stretches of testimony, he was asleep at the defense table.

Yet despite Cannon’s documented incompetence, Texas authorities argue that Burdine should be executed. He remains on death row, facing lethal injection as his appellate lawyers fight the state’s attempt to deny him a new trial.

... A review of the state’s death penalty files show that Burdine is one of many capital defendants whose legal proceedings were poorly handled by lax, inept or inexperienced lawyers.

With few public defender offices in Texas, most indigent defendants must rely on court-appointed lawyers. Interviews with lawyers and other experts, as well as a review of 16 Texas death penalty cases, revealed instances in which lawyers in capital trials slept through key testimony, failed to file crucial legal papers correctly or on time, or had been cited for professional misconduct repeatedly in their careers.

* * *

Since Jan. 17, 1995, the day [Gov. George W.] Bush took office, 127 prisoners have been put to death in Texas, an average of one execution every two weeks for 5 1/2 years. As of today, 465 inmates, almost all of them indigent, are awaiting lethal injections. No one has yet produced incontrovertible evidence of an innocent person being put to death. However, at least one prisoner has been executed during Bush’s tenure despite the fact that his attorney slept through significant parts of his trial. And besides Burdine, at least two other death row inmates whose lawyers snoozed in court are seeking new trials.

Other dead or condemned prisoners were represented by court-appointed lawyers with extensive disciplinary records for professional misconduct, usually for negligent handling of previous clients’ cases...

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Leading in Executions

Texas has the busiest death penalty system in the Western world. Since 1982, the state has executed 214 inmates, including one last night. The next highest total is Virginia’s 76. Only a few states have reached 25.

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Harris County, which includes Houston, is the epicenter of the death penalty in Texas. No jurisdiction in America imposes more death sentences. If Harris County had a death row, it would be bigger than the death rows in 29 states.
The Sixth Amendment entitles a defendant to “the assistance of counsel” at a trial, and the U.S. Supreme Court has said that such assistance must not be “ineffective.” But in a 1984 case, *Strickland v. Washington*, the court ruled that when an appeals court weighs a claim like Burdine’s, it must start with a “strong presumption” that the trial lawyer’s conduct was reasonable and require the appellant to prove otherwise. Even when an appellant makes that case, he must convince the appeals court that if not for the attorney’s inadequate work, the outcome of the trial most likely would have been different.

**Partisan Patronage**

Texas’s 400-plus trial judges run in partisan, often hard-fought campaigns for their four-year terms. Advocates for indigent defendants contend that in courthouses across the state, judges frequently dispense court-paid cases—including capital cases—as a form of patronage to lawyers who help them politically. Bush, they say, has blocked reform of the system, also for political reasons.

The case of death row inmate Henry Watkins Skinner is an extreme example of cronyism in the appointment process, according to Skinner’s appellate attorney.

Skinner, now 38, went on trial in a small Texas Panhandle city in 1995, charged with strangling his girlfriend and fatally stabbing her two grown sons. The judge, M. Kent Sims, appointed a longtime political friend, lawyer Harold Lee Comer, to defend Skinner. Comer had been the local district attorney before resigning in 1992 amid an investigation of his handling of seized drug money. After leaving office, he pleaded guilty to a misdemeanor in a deal that allowed him to keep his law license.

Comer had twice personally prosecuted Skinner for other crimes, which created a potential conflict for him in defending Skinner. State law required the judge to hold a hearing on the question, then give Skinner the option of a new lawyer if it became clear in the hearing that Comer had a conflict. But according to the trial record, Sims, who was aware of Comer’s history with Skinner, did not hold such a hearing.

Sims later approved $86,000 in legal fees for Comer’s work in the case, one of the biggest sums ever paid to a court-appointed attorney in Texas. At the time, Comer was in debt to the Internal Revenue Service for about the same amount, according to court documents.

In an interview, Comer said the fee and his debt “had nothing to do with one another.” Although “there are a lot of lawyers in capital cases who are incompetent,” Comer said, he is not one of them. Sims, who is no longer a judge, also has denied any impropriety.

The bill Bush vetoed last year would have given county officials control over the appointment process. Supporters said the measure was meant to promote the creation of independent appointment commissions, if not public defender offices.

But Bush, agreeing with judges who lobbied against the bill, said it “inappropriately takes appointment authority away from judges, who are better able to assess the quality of legal representation.”
Problems on Appeal

The problems Texas capital defendants have had with court-appointed lawyers extend to the appellate level. Mistakes and failures by court-appointed attorneys have jeopardized some inmates’ chances for any meaningful review of their convictions and sentences, according to trial records and legal experts.

Advocates for indigent defendants say the problem results from a law Bush signed in 1995 that was meant to speed the death penalty appeals process. They say Bush’s support for that law is at odds with his promise of “full access to the courts” for death row inmates.

A condemned inmate’s state appellate lawyer routinely files what is called a “habeas corpus” petition, asking the Court of Criminal Appeals to throw out the conviction and sentence based on constitutional violations—including “ineffective assistance” of trial counsel. Before the 1995 law, inmates often waited on death row for years until experienced appellate attorneys volunteered to prepare their habeas petitions, as David Dow did in Carl Johnson’s case. And in some cases, they were allowed to file second petitions if their initial ones failed.

But under the 1995 law, a habeas lawyer is court-appointed for a newly condemned inmate, and has 180 days to file a petition. The law forbids the filing of “successive” petitions except in rare cases. So any issues the lawyer neglects to raise in the initial filing are usually lost forever—because later, during the federal appeal, under federal law, judges are allowed to consider only claims that were made at the state level, except in rare cases.

For defendants, the new law places a heavy weight on the quality of their appellate attorney. But in several recent cases, untrained or careless state habeas lawyers—approved by the Court of Criminal Appeals to represent indigent death row inmates—have filed cursory petitions, occasionally late, containing claims that were poorly researched and sometimes garbled.

The court, after receiving thin petitions, has upheld several death sentences in recent years, even though the appointed habeas lawyers later attested that they were unqualified to handle such complex cases.

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Texas’s Road to Execution

Trial

A capital murder defendant has a trial before a state judge in the county where the killing occurred. He is constitutionally entitled to a defense attorney who isn’t “ineffective” as the law defines the word. If he is indigent, the trial judge appoints a local lawyer to represent him. If the jury convicts him, the panel then decides whether he should be sentenced to life in prison or death.

Direct Appeal

If sentenced to death, the defendant challenges his conviction before the nine-member Texas Court of Criminal Appeals, in Austin, the state’s highest court for criminal matters. The direct appeal is limited to issues that arose during the trial, such as the judge’s decision to admit certain evidence or testimony over the defense’s objection.

State Habeas Corpus

A death row inmate whose direct appeal
fails may begin another stage of appeals called "habeas corpus" proceedings, aided by a new lawyer. The new attorney's job is to search the trial record for constitutional violations. A state habeas appeal often alleges, among other things, that the inmate's trial lawyer was "ineffective," depriving him of a constitutional right. The state Court of Criminal Appeals rules on this pleading.

**Federal Habeas Corpus**

If his state habeas appeal fails, the prisoner may file a similar appeal with a U.S. District Court judge in the area where the killing occurred. After the federal judge issues a decision, either the inmate or lawyers for the state may ask the New Orleans-based U.S. Court of Appeals for the 5th Circuit to reverse the ruling. The decision by the 5th Circuit panel may then be appealed to the U.S. Supreme Court. But the high court agrees to hear such appeals only in rare cases involving what it thinks are important constitutional issues.

**Clemency**

After all appeals fail and the execution is imminent, the inmate asks the 18-member Texas Board of Pardons and Paroles to recommend a sentence commutation to life in prison. The members, who are scattered across the state, do not meet as a group, but review clemency petitions individually, then fax their votes to Austin. The governor may commute a death sentence only if a majority of the board recommends that he do so. But the board, appointed by the governor, almost always votes unanimously against clemency. When that happens, the governor may only grant a one-time, 30-day stay of execution.

**Execution**

At 6 p.m. on his final day, the inmate is strapped to a gurney in the death chamber at the state prison in Huntsville. After he is given a chance to make a final statement into a microphone dangling a few feet above his head, the lethal chemicals begin to flow.

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