ACBF Endowment Campaign enters home stretch

By Ron Cichowicz

Thanks in part to a generous gift from the Allegheny County Bar Association (ACBA), the Allegheny County Bar Foundation (ACBF) is in the “home stretch” of a second endowment campaign with a goal of raising $1.5 million.

The ACBF, the charitable arm of the ACBA, launched its Campaign in 2020. Titled “The Path of a Leader,” the Campaign is intended to raise funds to support growth in three primary areas: providing pro bono services, awarding legal aid grants and continuing to make an impactful difference in both the community and the profession.

To support this effort, the ACBA Board of Governors approved a pledge of $500,000 from the Bar Association to the Bar Foundation Endowment payable over a period of ten years.

“The Bar Association Board of Governors supports the charitable mission of the Bar Foundation and the need to increase the size of their Endowment so the additional work can be done to promote Pro Bono efforts for civil legal service efforts in Allegheny County,” said ACBA Executive Director David Blaner. “The Bar Association’s Development and Reserve Fund balance was in a very positive position at the end of the 2020-2021 fiscal year. As a result, the Board of Governors approved a transfer of $250,000 from the Bar to the Endowment Fund as of September 30.”

“The Board believes that the lump sum payment on our pledge will enable the Bar Foundation’s Grants Committee to increase the amount of their annual contributions to deserving organizations.”

The mission of the ACBF is to be the driving force in promoting justice for all and to improve the community through public service law-related programs. To fulfill this mission, the Foundation raises, manages and distributes funds, encourages and assists lawyers to provide pro bono legal services and develops and supports public information initiatives.

“The ACBF is the heart of the legal community,” said Lorrie Albert, ACBF Associate Executive Director. “Through our Campaign, we are asking people to create a legacy.”

Albert said the Campaign’s quiet phase had a target of $900,000 and was concluded successfully this past spring. “We started the Campaign before COVID hit and it slowed us down but didn’t stop us,” Albert said. “Despite the pandemic, we’ve been very successful.”

Albert credited that success largely to the hard work of the volunteers of the Campaign Committee, led by Chair Tom McGough, UPMC Chief Legal Officer. “We have a dedicated group of 20 volunteers on the Endowment Committee who are working hard on making calls,” she said. “We are in the middle of attending Section and Division meetings to tell them about the campaign. We’re pleased with our progress, but we want to do even better and exceed our goal.

Only 20 percent of Americans with low incomes receive the legal help they need. The ACBF believes that the legal community has a professional duty to increase access to quality legal services today and in the future.

“The Pro Bono Center has more than 40 programs and partners. With about 900 volunteers each year, the Center directly handles more than 1,200 legal inquiries annually.

Another primary goal of the Center is to provide support to its volunteers through training and mentoring programs, providing legal research opportunities and primary professional liability coverage for attorneys’ pro bono services.

The ACBF also assists local organizations providing legal services to residents with low incomes and connects them to well-trained pro bono volunteers.

Also, through programs such as the Uptown Legal Clinic and Attorneys Against Hunger, the ACBF is directly impacting lives in the most underserved neighborhoods in Allegheny County.

For more information about the ACBF Endowment Campaign, visit ACBF.org/endowment or email Lorrie Albert at lalbert@acba.org.
The full text and headnotes for the cases below appear in the online, searchable PLJ Opinions located at www.ACBA.org.

Commonwealth of Pennsylvania v. Dion Crawford, Cashman, J. ..............................................................................................................Page 189
Criminal Appeal—Sufficiency of the Evidence—Evidentiary Rulings at Trial
Like his sufficiency challenges, defendant’s evidentiary claims lack sufficient specificity.

Commonwealth of Pennsylvania v. Robert Lelock, Ranges, J. ..............................................................................................................Page 190
Criminal Appeal—PCRA—Ineffective Assistance of Counsel
ApPEal of a PCRA dismissal alleged eleven errors, including abuse of discretion, ineffective assistance of counsel at various stages, and failure of the court to merge sentences, but none were found to be meritorious and meet the burden required to disturb a PCRA court’s findings.

A message from the ACBA Criminal Litigation Section Chair

By Kevin McCarthy

Welcome to this special edition of the Lawyers Journal: Practice Profile on Criminal Law! We hope you find the articles contained within this edition to be beneficial to your practice. Despite the challenges continuing to be presented by the pandemic over the last 18 months, our Section has continued to serve the interests and needs of our members and to improve their professional experience as criminal law attorneys. We have conducted numerous continuing legal education programs, contributed articles to the Lawyers Journal, and provided other professional development opportunities.

The Section was formed to promote the administration of justice in criminal courts in the United States, and in particular Allegheny County; develop and encourage high ethical standards of practice in the administration of criminal justice; and promote social and professional relations and cooperation for the benefit of the legal profession and of the public among the lawyers of Allegheny County who engage in criminal trial practice.

In addition, we examine criminal law rules and procedure and promote their fair and just administration; study and report upon proposed, necessary, and desirable legislation; and promote legal education to members of the bar and the public on problems of criminal law rules and procedure by sponsoring meetings, institutes, and conferences, as well as preparing and publishing legal writings in these fields.

Our Section has over 200 members that come from many backgrounds in the legal profession ranging from judges to public and private attorneys. Our membership brings with it many perspectives on the practice of criminal law shaped by our practice areas.

We meet on the second Wednesday of the month from 12 to 1 p.m. at the ACBA headquarters or via webinar. I welcome your thoughts for any ideas that will help us to advance our Section’s mission and can be reached at KMcCarthy@alleghenycountyda.us. If you are not yet a member of the ACBA Criminal Litigation Section and your practice touches on this area, I would encourage you to join today!

Kevin McCarthy

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Effective response strategies for government investigations

By Danielle Bruno McDermott

Regulatory enforcement is on the rise, including an increase in government investigations of organizations. In the last year, the Department of Justice pledged additional oversight in a variety of areas, focusing on cyber-security-related fraud by government contractors, illegal cryptocurrency use, and healthcare fraud and abuse, just to name a few. In Pennsylvania, there has also been a noticeable uptick in investigations, particularly by the Pennsylvania Office of Attorney General, a trend that shows no sign of slowing down.

**Identifying Organizational Risks**

This landscape of intensified regulatory and prosecutorial scrutiny presents risks to organizations, especially those already subject to increased oversight or within industries subject to fraud and abuse.

Identifying and evaluating risk is an important first step for any organization. Procedures for internal oversight of high-risk processes can be tailored so that the organization can minimize risk and, in some instances, identify and address problems before government investigators get involved. Forward thinking risk assessment and mitigation can sometimes be costly and time-consuming, but greatly benefit the organization in the end.

It is more often the case that organizations learn of an active investigation only after the government has initiated the probe. Awareness of an investigation may take several forms: senior management learns that investigators contacted an employee; corporate headquarters receives a subpoena for documents; or employees receive subpoenas for grand jury testimony.

The initial hours and days after an organization learns of an investigation are critical. The following steps will facilitate an organization’s effective response to a government investigation.

**Preliminary Considerations to Facilitate Interactions with Government Investigators**

First, a foundational and critical point: there is an absolute duty to be truthful with law enforcement, both during initial conversations and all interactions thereafter. Failure to do so could lead to criminal charges, enhanced scrutiny, and other unintended consequences.

Second, investigative procedures vary significantly depending on whether the investigating agency is administrative, has criminal authority, or is empowered by a state or federal grand jury. For example, an information request from an administrative agency has different implications than a state grand jury subpoena for witness testimony or documents. Gathering as much information as possible about the entity conducting the investigation is critical, as well as ensuring that legal counsel is familiar with the arena in which the investigation is taking place.

Third, it is important to understand that investigators do not have to give you information about the investigation. While federal prosecutors are generally required to provide certain information about an individual’s status (i.e., if they are a target of the investigation), state prosecutors are not subject to the same requirements. If you are dealing with a prosecutorial agency (such as an Office of Attorney General or a U.S. Attorney’s Office), ensure that you know what information you are entitled to before interacting with investigators.

**Four Key Steps for An Effective Response**

1. Issue an investigative hold notice to ensure that documents subject to a request for documents.

   
   2. Designate an internal team to respond and communicate about the investigation. The team should be limited to those who “need to know.” This ensures that the investigation remains confidential and that external communications can be crafted to minimize the potential for reputational harm.

   
   3. Identify employees who may need independent counsel. To the extent possible, identify outside counsel and iron out retention agreements prior to any investigator request to meet with or interview employees. If the organization intends to retain its own outside counsel to conduct an internal investigation regarding the matter, it may be important to have outside counsel present for internal interviews as well. Once outside counsel is secured, consider the possibility of a joint-defense agreement among the various represented parties. These agreements may facilitate the sharing of information while preserving important privileges.

   
   4. Make a plan to gather all available information and conduct an internal review. By trying to determine what information the investigators may be most interested in, better decisions can be made about how, when, and to what extent to cooperate with investigators.

**Conclusion**

This is certainly not an exhaustive list, and due to the ever-changing nature of liability against organizations, there is not a one-size-fits-all response strategy. Organizations will greatly benefit, however, by addressing these important foundational pieces of the puzzle.

One of the most critical steps is to secure counsel that is familiar with the type of investigation underway – both for the organization and for any witnesses that may testify. Adequate witness preparation is crucial, which includes ensuring witnesses understand the truthfulness requirements associated with participating in interviews or testifying in front of a grand jury.

By taking these steps, it is more likely that the organization can quickly and effectively move from crisis-mode to crisis-resolution.

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Danielle Bruno McDermott is an Associate at Schnader Harrison Segal & Lewis LLP, resident in the Pittsburgh office, and a member of the Litigation Services Department. She focuses her practice on commercial and white-collar litigation, including state and federal enforcement. Along with Laurel Gift (Pittsburgh) and Randy Hsia (Philadelphia), co-chairs of the Criminal Defense Practice Group and the Internal Investigations, Ethics and Compliance Practice Group – Danielle performs internal investigations for organizations in many industries and represents witnesses in grand jury proceedings in federal and state courts throughout Pennsylvania.

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Prosecutors who don’t provide full juvenile or criminal records could stumble into double jeopardy

By Thomas N. Farrell

In 1991, the Pennsylvania Supreme Court in Commonwealth v. Johnson, 231 A.2d 807 (Pa. 2020) went further when ruling Article I, Section 10 bars retrial where the pending charge occurred or where the pending charge can be used for impeachment purposes. The crux of the problem is that the prosecutors wrongly apply the law or do not understand the relevancy to the defendant’s case. When requested to make a ruling, the trial courts often side with the prosecutors without reviewing the records that are involved and/or understanding the defenses. The bottom line is that the best person to determine if these records are relevant and admissible is defense counsel. In fact, that is what our Supreme Court said many decades ago.

Over the past several years, we have noticed a disturbing trend concerning individual prosecutors handling serious criminal cases in Western Pennsylvania, including attorneys from the Office of the Attorney General. When dealing with Commonwealth witnesses and/or victims, prosecutors refuse to hand over juvenile and/or criminal records that are in their sole possession. This refusal is either intentional or reckless, but the issue appears to stem from the fact that the prosecutors do not understand their duty and the law. The mere grant of a new trial seems to be a remedy that does not deter this abuse.

The reckless standard has not yet been applied to situations where the Commonwealth hides juvenile or criminal records of witnesses (including victims) controlled exclusively by the Commonwealth. Although our Supreme Court has said double jeopardy should be avoided if the defense is given full access while the admissibility of the evidence is argued at trial.

Our Supreme Court said many decades ago that Article I, Section 10 bars retrial where the state’s interest in preserving the confidentiality of juvenile delinquency adjudications do not outweigh a criminal defendant’s right under the Sixth Amendment Confrontation Clause of the United States Constitution. “Whatever temporary embarrassment might result to [the juvenile witness] or his family by disclosure of his juvenile record – if the prosecution insists on using [him] to make its case – is outweighed by petitioner’s right to probe into the influence of possible bias in the testimony of a crucial identification witness.” Davis, 415 U.S. at 315.

After Davis, our Supreme Court ruled that Article I, Section 9 of the Pennsylvania Constitution gives greater protection than the Sixth Amendment. Commonwealth v. Evans, 512 A.2d 626 (Pa. 1986). In Commonwealth v. Simmons, 555 A.2d 860 (Pa. 1989) and Commonwealth v. Slaughter, 394 A.2d 453 (Pa. 1978), our Supreme Court made it clear that the prosecution cannot be the sole arbiter of what records are relevant to the defense. Our Supreme Court rejected the Commonwealth’s argument that the defense had to explain how the juvenile records of the witness/victim would have been helpful to show bias before the defense could view the records.

The law has subsequently expanded to permit juvenile adjudications to be used in a criminal proceeding. 42 Pa.C.S. § 6354. See also Pa.R.E. 609(d). Criminal false convictions are not the only crimes that can be used for impeachment purposes. The defense has a variety of evidence in the form of juvenile or criminal records that can be admissible. The probationatory status of a Commonwealth witness is relevant to show motive. Impeachment with pending criminal charges is significant not only for the deals that may be in place but for the subjective intent of the witness who has pending charges without a deal. A pending charge can be used for impeachment of a witness no matter where the pending charge occurred or if the witness has the same charges as the defendant. Prosecutors know that
Selecting and working with forensic consultants: Optimizing benefits and minimizing problems

By Lee E. Martin

When hiring forensic experts, it is important to find the best fit available, provide the expert all pertinent information, and make any calendar or financial constraints clear. Doing so will enable the expert to contribute meaningfully to the resolution of the case at hand, and potential opportunities for misunderstanding will be minimized.

Reasons for retaining a forensic expert

In matters where specialized knowledge would assist the finder(s) of fact (judges and juries) understand concepts or events in a lawsuit, forensic experts can offer opinions based in science for consideration in determining ultimate outcomes. The role of the forensic expert is one of education in explaining technical details or how and why an event occurred. The expert is not an advocate, and his or her job is to present scientific evidence that explains a concept not known to, or understood by, most people in order to shed light on the event in question.

In some cases, the opinions the expert offers are disputed, and a motion in limine can be filed to disqualify the expert from testifying. When informed of a challenge, experts can offer rebuttal information based on science in such situations. Qualification will allow experts to remain in the case, defend their reports, and offer opinions for consideration by finders of fact.

Experts are also retained in insurance matters that most often do not end up in litigation. In such cases, experts can provide information that assists the insurance adjuster in determining coverage under terms of the policy, liability, extent of the loss, as well as opportunities for subrogation (recovery from other parties). Experts are also able, in many situations, to determine whether fraud was committed by the insured in an attempt to recover under provisions of the policy.

Types of cases and forensic experts

In virtually every area of human pursuit, if a condition or situation becomes a legal matter there is an expert to assist in explaining it. When selecting an expert, the primary consideration is finding one whose prior experience matches the requirements of the case at hand. Secondarily, the ability of the expert to communicate effectively, and his or her prior experience offering testimony in deposition and trial, are often considerations for retention. In some cases, more than one expert may be required to fully explain a condition or event.

Initial conversation

The initial discussion between attorney and prospective expert is critical in terms of selection, and also for establishing case parameters. The attorney needs to be confident that the expert being interviewed is best qualified to assist in the case based on background and ability to formulate accurate and relevant opinions based on the facts of the case. The expert needs to communicate what information would be most helpful in pursuing an investigation, and any special experience or knowledge the expert has that is pertinent to the case at hand. Cost and schedule should also be discussed and agreed to early in the process.

Communication

As a case progresses, it is important that attorneys, insurance adjusters, and others who retain experts provide those experts with all the information they need to properly evaluate the
In the case of double jeopardy, the police report described the skid and collision in a manner that placed liability on the teen driver. Defense attorneys retained an automotive expert who determined that the ice formed after city officials tested a fire hydrant earlier in the day and left a large amount of water in the street, where it froze. The expert further determined that the police report was inaccurate with respect to the interpretation of skid marks in the street, and the speed at which the vehicle was travelling when it slid on the unexpected patch of ice. As a result, charges against the teen driver were dismissed.

By clarifying scientific and technical principles or determining whether a standard of care was or was not maintained, forensic experts can assist attorneys, judges, and juries in reaching sound outcomes. Communicating effectively, and monitoring cost and schedule throughout the process, help proceedings run smoothly.

Lee Martin is a licensed architect and Principal Consultant with Rimkus Development Group, Inc. in Columbus, OH. Formerly the State Architect of Ohio and Chief Building Official for Miami Dade County, Lee has been a full-time forensic architect since 2009.

Learn more about the Criminal Litigation Section at ACBA.org/committees-divisions-sections/criminal-litigation-section.
Changing lanes without signaling no longer a viable pre-textual reason to conduct searches

By Mark A. Sindler

A tactic commonly deployed in traffic enforcement is no longer available to police investigators who use “pre-textual” reasons to conduct full-blown searches of motor vehicles. That’s the fallout from a recent decision by the Pennsylvania Superior Court, in Commonwealth v. Tillery, 249 A.3d 278 (Pa. Super. 2021). In Tillery, a three-judge panel unanimously upheld a suppression ruling that stemmed from a police stop predicated upon a motorist supposedly failing to use a turn signal when moving from one traffic lane to another.

For many years, the United States Supreme Court has sanctioned traffic stops that begin as summary-level offenses such as running a stop sign, driving with overly-tinted windows, or ignoring prohibited right turns on a red signal. The investigative objective in these instances is less about traffic enforcement than developing felony-grade cases involving narcotics, firearm possession, or counterfeit goods. In those instances, the subjective intentions of law enforcement are irrelevant and what matters is whether objective reasons justified the stop.

Now it turns out that police have one less feature to rely upon in these instances is less about traffic enforcement than developing felony-grade cases involving narcotics, firearm possession, or counterfeit goods. In those instances, the subjective intentions of law enforcement are irrelevant and what matters is whether objective reasons justified the stop.

After ordering a driver and passenger from the car, police then searched the interior, locating a firearm in a center console. No other suspicions were noted, commonly referred to as odor of marijuana, erratic driving, furtive movements, or unusual bulges in one’s clothing.

The trial court found the police officer’s testimony to be incredible. The appellate court did not nix those considerations, instead focusing upon the guidance provided by Section 3334 of the Pennsylvania Vehicle Code (Title 75). This provision controls turning movements and required signals and was central to the Tillery outcome. In that regard, subsection (a) sets forth three possible scenarios: turning, moving from one traffic lane to another, and moving from a parked position into a traffic stream.

Section 3334(a) requires motorists to accomplish any of these three tasks as further set forth in this statute. Tillery found that a complete reading of Section 3334 does not require a motorist to use a turn signal when moving from one travel lane to another. Instead, this statute requires a turn signal only when turning or when departing from a parked position. In other words, Section 3334(a) must be considered in light of the entire statute, and not just this initial subpart. A complete reading reveals that no turn signal is required when switching travel lanes. The Tillery panel deemed the motorist’s actions not a turn because the car did not change direction when completing the movement. Instead, the vehicle simply went to an adjacent position (curbside parking). Finding no probable cause to justify the stop, Tillery upheld this trial court’s decision that the incident under consideration was flawed from its outset. Hence, the subsequent firearm seizure was subject to suppression.

The tactic allows them to ratchet up an encounter from a minor matter into custodial arrest of a motorist or accompanying passenger. The decision in Tillery does nothing to alter that landscape as it continues to be viable under the United States Supreme Court decision in Whren v. United States, 517 U.S. 806 (1996).

For now, though, the formerly valid reason of changing lanes without signaling is no longer a viable pre-text in Pennsylvania. As was evident in Tillery, any seizures stemming from that kind of a traffic stop – assuming no other circumstances upon which police may rely – will be subject to suppression.

Mark Sindler is a criminal-defense attorney whose practice is based in downtown Pittsburgh. He represents individuals accused of criminal wrongdoing in state and federal courts across Pennsylvania.

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The ACBA Criminal Litigation Section’s “Criminal Law Symposium: A Look at Capital Crime” offered a full-day comprehensive review and edification of the law, practice and rules concerning capital cases on Oct. 1. The Hon. Bruce Beemer from the Criminal Division of the Allegheny County Court of Common Pleas spoke on preparation of capital cases, mitigating factors and more to a room full of attendees in-person at the Koppers Building.

The Hon. Bruce Beemer, Thomas J. Farrell, Lisa Middleman and Thomas N. Farrell answered questions and offered tips for finding mitigation evidence and the ethical issues concerning capital cases.
Why and how law enforcement officers interact with motorists matters

By Phillip P. DiLucente

As many Pennsylvanians begin returning to the roads following shutdowns and working from home, let us consider several recent appellate decisions involving law enforcement interactions with motorists. We will see that the reasons for those interactions and how they are conducted have real legal significance. They often make or, conversely, to ignore the officer and comply with any requests made or, conversely, to ignore the police presence and go about his business. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.

The first (such interaction) is a mere encounter, sometimes referred to as a consensual encounter, which does not require the officer to have any suspicion that the citizen is or has been engaged in criminal activity. This interaction also does not compel the citizen to stop or respond to the officer. A mere encounter does not constitute a seizure, as a citizen is free to choose whether to engage with the officer and comply with any requests made or, conversely, to ignore the officer and continue on his or her way.

The second type of interaction, an investigative detention, is a temporary detention of a citizen. This interaction constitutes a seizure of a person, and to be constitutionally valid police must have a reasonable suspicion that criminal activity is afoot. The third, a custodial detention, is the functional equivalent of an arrest and must be constitutionally valid police detention of a citizen. This interaction occurred to elevate the interaction beyond a mere encounter. The test, often referred to as the “free to leave test,” requires the court to determine whether taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.

The Adams Court was confronted with a police officer who observed a white Dodge Dart enter a parking lot serving two closed businesses and drive behind them at approximately 3:00 a.m. Id. at 1196-97. “Believing that the vehicle may have made a wrong turn,” [the officer] waited and watched for the vehicle to exit the parking lot.” Id. at 1197. It did not. The officer then drove into the parking lot to “simply check to see why a car drove behind two dark, closed businesses at three o’clock in the morning” as he recognized that the potential for drug activity or an alcohol-related offense existed. Id.

When the officer arrived behind the buildings, he located the white Dodge Dart. Id. Its engine and lights were off. Id. The parking lot lacked “no parking” signs. Id. It also had “no marked parking spots.” Id. The officer did not believe the public would mistake the officer for a homeowner, and he thought it “might be used for deliveries and employee parking.” Id.

As the Adams Court then explained: [The officer] pulled behind the vehicle in his marked police cruiser but did not activate his overhead lights or sirens. He radioed for backup. Id. Prior to his arrival, prior to his backup arriving, he exited his police cruiser and walked over to the parked vehicle. Id. The car was parked in a poorly lit area, and [the officer] utilized his flashlight, shining it into the vehicle as he approached. Id. He reached the driver’s side door and knocked on the window, at which time the occupant, ... Edward Thomas Adams ..., opened the car door. [The officer] reached into the vehicle and instructed Adams to roll down his window. According to [the officer], he did not feel safe allowing Adams, who was “not a short guy,” to exit his vehicle without another officer present. Adams explained to the officer that he could not open the window because he did not have the keys to the vehicle. (The officer) observed a set of keys (which he believed to be the keys to the vehicle) on the floor of the back of the car. [] Adams remained in the vehicle until backup arrived, which occurred approximately one minute later.

With another officer present, the (initial investigating officer) opened Adams’ door and began to speak with his statements confirmed that backup, but owner of [one of the businesses] and stated that he had just been inside [it]. The owner knew ... the officer had obtained strong odor of alcohol on Adams’ breath and observed that he had glassy eyes and slurred speech. Id. at 1197-98. Ultimately, Adams was arrested and prosecuted for driving under the influence of alcohol (DUI). Id. at 1198. Adams argued that his detention by the officer “was not supported by probable cause and/or reasonable suspicion of criminal activity and that all information and evidence obtained following his detention must be suppressed as fruits of the poisonous tree.” Id. Our Supreme Court agreed, holding that Adams’s detention was not a “to an investigative detention unsupported by reasonable suspicion of criminal activity.” Id. at 1207. In reaching that conclusion, the Court focused on the following:

Prior to the investigative detention, the only facts that [the officer] articulated were that a car was parked behind a closed business on public property at night. [The officer] did not observe Adams making any furtive or suspicious movements, nor by engine noise, and it was behavior occurring in that location ... [The officer’s] testimony evinced only generalized concerns about the possibility of criminal activity occurring, based solely upon time and place, i.e., the time and place of the incident. The officer provided no specific or articulable facts to support a belief that Adams was engaged or going to be engaging in criminal activity. Rather, in his opinion, Adams’s general concern about the company or car was about to commit any criminal offense or that Adams took any action that might suggest that he was about to commit any criminal offense. (The officer) merely observed a man sitting in his car at night.

Id. at 1206. The Superior Court faced a similar situation in Commonwealth v. Powell. There, officers noticed a truck parked in a small public parking lot at approximately 11:40 p.m. 228 A.3d 1, 2 (Pa. Super. Ct. 2020). No stores were then open, and there were no other vehicles in the parking lot. Id. There was no activity or suspicious behavior occurring in that location prior to backup arriving, which occurred approximately one minute later.

The parking lot lacked “no parking” signs. Id. It also had “no marked parking spots.” Id. The officer observed “the driver side of the truck, exited, and approached the truck’s driver and passenger side of the truck, exited, and approached the truck’s driver and passenger side of the truck, exited, and approached the truck’s driver and passenger side of the truck.” Id. The officer saw no activity or suspicious behavior occurring in that location. Id. Officers noticed Powell had glassy eyes and smelled of alcohol. Id. They believed Powell had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id.

Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.” Id. The officer ordered Powell to roll down his window. Id. Other officers had not received any complaints about the truck, nor had they “observed any bad driving or suspicious behavior.”

The superior Court affirmed. Id. at 8.

Evidence sufficient to support the existence of a mere encounter – and

Continued on page 14
Defendant’s autism diagnosis should be considered when resolving child pornography charges

By Lyle Dresbold

When resolving child pornography charges, defendant’s autism diagnosis should be considered.

The autistic brain has difficulty processing non-verbal information and social clues. Individuals are incapable of perceiving things from another’s perspective and are often unaware of other people’s feelings. They are not more likely to commit crimes, but their condition does make them more vulnerable to being victims of crime or being used by others to commit dangerous acts or criminal conduct. Situations that would appear taboo or dangerous to most, do not necessarily impact or alarm an ASD individual.

An autistic person is rule-bound, but the rules must be clearly and specifically articulated. Sexuality is inherently confusing as it mixes nuance and non-verbal clues in a way that can be indecipherable to the autistic brain. What leads young adults with ASD into legal trouble is not abnormal sexual desires, but their tendency to express or pursue normal interests in a manner outside social conventions. Once social and legal rules governing sexual conduct and interests are explicitly explained to the individual with ASD, this problem goes away.

Young adults with ASD often use the internet as an instructive tool to discover how to approach basic social skills. Though interested in sex and romance, their social isolation leaves them with limited sociosexual understanding, oblivious to the sexual boundaries and romantic protocols they typically developed peers take for granted. Interest in pornography can be a way of trying to understand relationships and sexuality. The desire for such material oftentimes becomes excessive and compulsive, like many activities and interests of ASD individuals.

Exploration of the online world of pornography inevitably leads some young men with ASD to discover child pornography. As they are unaware of the social taboo in looking at the material, it just represents a continuum of erotica which to them does not have age as a notable feature. They have no appreciation for the social implications of what was depicted in the image. The images do not cue them to understand that they have crossed any moral or social boundary or engaged in any wrongdoing. Unfortunately, parents do not think to discuss child pornography with their typically developed peers take for granted. Interest in pornography can be a way of trying to understand relationships and sexuality. The desire for such material oftentimes becomes excessive and compulsive, like many activities and interests of ASD individuals.

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By Patrick K. Nightingale

In April 2016, Pennsylvania Governor Tom Wolf signed Pennsylvania’s Medical Marijuana Act (MMA) into law, codified at 35 Pa.C.S. §10231.101 et seq., bringing Pennsylvania under a legal medical marijuana program to the Commonwealth. Retail sales began in February 2018, and as of the last report, over 650,000 Pennsylvanians have registered as patients and caregivers. According to the Department of Health, the most recent data over 350,000, are actively purchasing medical cannabis from licensed Pennsylvania dispensaries. Pennsylvania’s medical cannabis program.1

Unfortunately for Pennsylvania’s medical cannabis patient community our “praiseworthy” program has one glaring omission—prohibiting the presence of non-psychoactive metabolites. See 75 Pa.C.S. §3802(d)(i) and (ii). Proof of actual impairment is not required to arrest, prosecute and convict of DUI for using a medical treatment alternative permitted by the General Assembly regardless of whether the patient has any detectable level of Delta 9 THC provided there are detectable amounts of non-psychoactive Carboxy THC in the patient’s blood at the time they are operating a motor vehicle. One question I am often asked is “well, if the patient is not impaired why would law enforcement suspect the patient has THC or THC metabolites in their blood?” Three common scenarios come to mind. The Pennsylvania medical cannabis patient identification card contains the presence of non-psychoactive metabolites.

Pennsylvania is in the minority of states with a “zero tolerance” approach to the majority having either a per se Delta 9 mg/ml cutoff or requiring proof of actual impairment. The high times on drugs (THC) and the psychoactive chemical in cannabis that provides an intoxicating effect. The “high times on drugs” are bound to the psychoactive chemical in cannabis is inhaled and THC levels in the blood spike. Just as quickly THC begins to metabolize in the blood, converting to its psychoactive metabolite 11-hydroxy-THC (Hydroxy THC). A hydroxyl group of THC within a relatively short time. Hydroxy THC quickly converts to non-psychoactive metabolites (Carboxy THC). It is Carboxy THC than can be detected in the blood for hours, days and even weeks after consumption. In other words, one can be convicted of DUI in Pennsylvania for consuming one legally consumed in Terre Haute, Indiana or Toronto, Canada.2

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Pennsylvania’s “zero tolerance” DUI laws examined

The growth, processing, manufacturing, acquisition, sale, dispensing, distribution possession and consumption of medical marijuana permitted under this act shall not be deemed to be a violation of the The Controlled Substance, Drug, Device and Cosmetic Act relating to marijuana conflicts with a provision of this act, this act shall take precedence.

This is the section that protects a patient who is in compliance with the other provisions of the MMA from prosecution for possession of a controlled substance or its metabolite in the motorist’s blood. Read that again — a Pennsylvania medical cannabis patient can be arrested, prosecuted and convicted of DUI despite no evidence of impairment based on the presence of non-psychoactive metabolites.

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The Controlled Substance, Drug, Device and Cosmetic Act. Section 1004 defines a “controlled substance” as any substance so designated by the Secretary of the Department of Health. The Secretary of Health may designate a Schedule I controlled substance pursuant to Pennsylvania’s Vehicle Code. Section 6045 defines a “controlled substance” as any substance so designated by Pennsylvania’s Controlled Substances Act. Section 2101 of the MMA does not refer to the Vehicle Code, but only the Controlled Substances Act and our appellate courts have yet to rule on the issue.1

The Second reporting period of data from Pennsylvania’s medical cannabis program to the Commonwealth v. Jezzil, 208 A.3d 1105 (Pa. Super. 2019). In Jezzil the appellant challenged marijuana’s Schedule I classification as unconstitutional because the MMA demonstrated that marijuana has medical efficacy and cannot therefore meet the definition of a Schedule I controlled substance. The Superior Court reversed finding that the MMA and PA’s Controlled Substances Act can be interpreted consistently.

Regarding Appellant’s equal protection challenge, we first observe that medical marijuana is not listed in the CSA as a Schedule I substance, only marijuana is. The MMA provides a very limited and controlled vehicle for the legal use of medical marijuana by generally qualified under the MMA. See 35 P.S. § 10231.102(c). Outside the MMA, marijuana remains a prohibited Schedule I Controlled Substance. On Sept. 21, 2021, Sen. Bartolotta’s bill finally received a hearing in the Pennsylvania Senate Transportation Committee. With no witnesses, including, it said medical cannabis industry pharmacist who explained how THC metabolizes, a patient who is legally consuming in any state who, under PA law, are literally on the real work impact of “zero tolerance” who are unqualified. To dateSen. Bartolotta’s bill, SB167, has not been called for a Committee vote. 

Patrick K. Nightingale is a practicing criminal defense attorney in both state and federal courts throughout Pennsylvania. He began his legal career as a prosecutor with the Allegheny County District Attorney’s Office in 1996. In 1999 he helped to found the Domestic Violence Prosecution Unit. Since 2002 Nightingale has specialized in criminal defense with a particular focus on protecting the rights of cannabis consumers. Nightingale practices in state and federal courts throughout Pennsylvania and handles both trial, appellate and post...

**Continued on page 14**
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Flying the not so friendly skies: When guns are discovered in carry-on luggage at the Pittsburgh International Airport

By David J. Shrager and Jennifer M. Popovich

In what has been labeled as an epidemic by the Transportation Security Administration (TSA), agents are confiscating an alarming number of handguns from carry-on luggage at the Pittsburgh International Airport. During the week of September 26 alone, TSA located 4 handguns in carry-on luggage: a .380 caliber handgun on September 23, a 9mm handgun loaded with seven bullets on September 24, a .380 caliber handgun on September 25, and a 9mm handgun loaded with 16 bullets, including one in the chamber, on September 26. As of September 26, 2021, 26 firearms have been found in carry-on luggage at the Pittsburgh International Airport for the year-to-date.

Travelers are permitted to travel with firearms, but there are rigid guidelines. A firearm must be unloaded and locked in a hard-sided container and transported as checked baggage only. The United States Code, Title 49, Part I, Chapter 44 defines a firearm as "any weapon (including a starter gun) which will, or is designed orsea to be used, as a weapon." Rifles, shotguns, and revolvers are prohibited in carry-on luggage. Ammunition, including handgun ammunition, into their carry-on luggage, is a federally mandated suspension of the traveler’s carry conceal permit upon the first offense of bringing a firearm in one’s carry-on luggage. On October 6, 2021, the Acting U.S. Attorney for the Western District of Pennsylvania announced that his office would be reaching out to the Allegheny County Sheriff’s Office to have these permits revoked.

In a press release, U.S. Attorney Kaufman stated “The United States Attorney’s Office, the FBI, the Allegheny County Police and TSA currently review every incident in which TSA screeners discover a gun during security screening at the airport checkpoint. Almost inevitably, the passenger being interviewed claims not to know how the weapon ended up in their bag. The passenger is then interviewed by TSA security personnel. The TSA reviews every incident in which TSA screeners discover a gun during security screening at the airport checkpoint. They can administratively challenge them. Further action in these matters is determined on a case-by-case basis and may vary based on the facts and circumstances of each violation. Often, TSA will offer a 50 percent payment option in an attempt to expedite a resolution. These civil penalties are not the only possible consequences. Any traveler with a TSA pre-check status will have that status revoked as a result of the violation. Further, there is a federally mandated suspension of the traveler’s carry conceal permit upon the first offense of bringing a firearm in one’s carry-on luggage.

The passenger must retain the key/combination to the lock unless TSA requests it to ensure compliance. All firearms being transported must be declared at the time of checking the baggage. These rules carry over to parts for firearms. Magazines, clips, bolts, and firing pins are prohibited in carry-on baggage, but may be transported in checked baggage provided that they are securely boxed within a hard-sided case, either included with or apart from the firearm. Rifle scopes, however, may be transported in both carry-on and checked baggage. Ammunition must be packaged in a fiber, wood, plastic, or metal box and must be declared to the airline.

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to justify a prosecution for driving without a license. Enforcement officers observe, learn, and leave nothing more than ask the driver a few questions, and the driver was nervous and had glassy eyes. On his own volition, the trooper did not block from leaving the driveway.后代者As the trooper exited his patrol car, No lights or sirens were used. The vehicle's ability to exit the driveway was confirmed by the operator of the vehicle, and only when he could talk to the operator, the trooper agreed, and the trooper observed that the driver was nervous and had glassy eyes. The trooper ultimately learned that the driver was nervous and had glassy and bloodshot eyes. The trooper continued to pursue the vehicle until it was learned that he had been driving without an active license and had never blocked from leaving the driveway.

DEFENDANT’S AUTISM DIAGNOSIS

continued from page 10 and leave an already vulnerable person stigmatized as a predator. Nationwides, advocates are encouraging prosecutors to consider charging decisions that recognize this population’s unique lack of culpability and encourage diversionary programs that ensure compliance, but also employ compassion and awareness. Locally, Justice Kevin Dougherty has begun a series of regional discussions to help recognize this issue so that when the time comes, we are more prepared to serve the needs of our clients.

Lyfe Dredholt is a senior attorney with Shragger Defense Attorneys, where he practices criminal defense in state and federal court.

MEDICAL CANNABIS PATIENTS

continued from page 11 conviction litigation. He can be reached at 412-225-7955 or at pklaw@mac.com.

This does not include states with programs permitting the use of non-psychoactive cannabis products such as cannabidiol (CBD).

As an officer’s belief that a licensee was operating a vehicle while under the influence of alcohol or a controlled substance, as required for license suspension for the licensee’s refusal to submit to chemical testing, must only be objective in light of the surrounding circumstances. Demarchi v. Com., Dept. of Transp., Bureau of Driver Licensing, 999 A.2d 639, (Pa. Super. 2010).


5 Commonwealth v. Stone 828 WDA 2020 is pending before the Superior Court over the issue of whether the Commonwealth must prove that the THC in the motorist’s blood was from illegal cannabis and not legal medical cannabis.

Jezzi was not a medical cannabis case but rather involved an illegal grow operation pre-dating the enactment of the MMA.

FLYING

continued from page 13 that they forgot that the gun was in their bag and no criminal charges are filed. Nevertheless, bringing guns to the checkpoint is completely unacceptable and poses a serious security risk. In order to send the message that airport security checkpoints and guns don’t mix, we need a deterrent strategy, in addition to the stiff civil penalties issued by TSA. So today we are announcing that in旅anan cases involving an individual who possesses a valid concealed carry permit, we will be requesting County Sheriffs to rescind that resident’s firearms concealed carry license due to negligence.

As U.S. Attorney Kaufman stated, criminal charges are also possible in some cases in which a traveler has a firearm in their carry-on luggage, although they rarely occur. When TSA locates a firearm in a traveler’s carry-on luggage at the Pittsburgh International Airport, they call the Allegheny County Police, who respond and confiscate the firearm. They then conduct their own investigation as to whether the activity rises to the level of warranting criminal charges. The typical scenario involves the crime of Carrying a Firearms Without a License, as having a firearm contained within one’s carry-on luggage does constitute concealment. For those who do have carry conceal permits, criminal charges are rare.

If things continue at the current rate, 2021 will be a record-breaking year for the number of guns found in passengers’ carry-on bags at the Pittsburgh International Airport. However, absent a change in the law, the vast majority will only face civil, rather than criminal, penalties.

David J. Shragger is the managing partner at Shragger Defense Attorneys, a law firm focusing exclusively on criminal defense. Jennifer Povricht is a Senior Attorney at the firm and has been since 2019.
By Alex Cashman


Prior to Wright and Orr, the framework began to take shape in 2011 with a case of first impression, Commonwealth v. Koch, 39 A.3d 996 (Pa. Super. Ct. 2011). The defendant in Koch was arrested and convicted of possession with the intent to deliver marijuana. Police executed a search warrant on the house in which defendant and her brother lived. During the search of the house, two phones were found on a table near the defendant. The defendant admitted that one of the phones belonged to her.

At trial, the Commonwealth introduced 13 incriminating text messages. However, the Commonwealth’s expert conceded that he could not determine the author of the messages. The Commonwealth’s expert further stated that some messages referenced the defendant’s first name, showing that the defendant may not have authored the messages. Despite the expert’s concession, the trial court admitted the messages. On appeal, the fact that the evidence showed multiple people sending messages from the same phone troubled the court. As a result, the Superior Court reversed the trial court and held that either direct evidence from those who sent or received the messages or circumstantial evidence in the messages about the sender’s identity would be required to authenticate the messages.

Since Koch, several cases have outlined what courts have found to be acceptable evidence for authenticating not just text messages, but other digital evidence, including social media content. The Superior Court decided the Wright and Orr cases this past summer, providing additional clarity regarding the authentication of digital evidence.

In Wright, the defendant was arrested for drug offenses while in a Chevy Impala. The Commonwealth used text messages from the defendant’s phone to evidence the intent to deliver the drugs. The Commonwealth offered no direct evidence from either the defendant or the party receiving the messages. Rather, the Commonwealth relied on circumstantial evidence to authenticate the incriminating messages, including: (a) incoming and outgoing text messages using the defendant’s first name, (b) messages referring to whether defendant was driving the Impala that day, (c) messages from the defendant regarding checking the Impala for his keys, (d) the fact that the phone was found on the defendant’s person, and (e) the fact that the defendant provided the police with his passcode to unlock the phone. The court also took note that there was no evidence of any outgoing messages indicating any third parties used the phone.

In Orr, the defendant was tried and convicted of first degree murder of his ex-girlfriend. The sole issue on appeal was whether the trial court improperly admitted threatening messages sent from the defendant’s phone to the victim related to an ongoing custody dispute. Again, the Commonwealth offered no direct evidence that the defendant sent the messages, instead relying on circumstantial evidence to authenticate them.

On appeal, the Superior Court found no reason to believe that a third party would have the details of the custody dispute, would be upset about the custody issues, or would use the defendant’s phone to threaten the victim. The court noted, again, that there was no evidence of a third party accessing the defendant’s phone as a critical fact in its analysis.

The line of cases from Koch all require courts to examine the sum of the facts in the record to authenticate digital evidence. However, after the Koch court seemingly created an assumption that could only be overcome by affirmative evidence of authorship of the messages, the Wright and Orr courts have provided further clarity. That is, rather than requiring the proponent of the messages, when relying on circumstantial evidence, to solely draw from other messages on the phone that positively identify the sender, the Wright and Orr courts instead recognized the lack of evidence of third-party access to or use of the device as a critical factor in the authentication of the messages.

Moving forward, we should expect to see courts applying Pennsylvania Rule of Evidence 901(b)(11), the newly adopted rule governing authentication of or identification of digital evidence. Appellate courts have yet to consider...
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Pa. Supreme Court abandons traditional waiver rules in post-conviction cases, allowing petitioners their day in state court

By Corrie Woods

Last month, the Supreme Court of Pennsylvania held in Commonwealth v. Bradley, ___ A.3d ___, 37 EAP 2020 (Pa. filed Oct 20, 2021), that a criminal defendant petitioning for relief pursuant to the Post Conviction Relief Act (PCRA), may raise a claim of ineffective assistance of post-conviction counsel at the earliest available opportunity to do so, even on appeal. The 6-1 decision, authored by Justice Debra Todd, marks a major shift in Pennsylvania’s post-conviction jurisprudence, which previously forced virtually all claims of ineffective assistance of post-conviction counsel out of state court.

Prior to Bradley, petitioners waylaid by the ineffective assistance of post-conviction counsel, and, more abstractly, the integrity of Pennsylvania’s post-conviction adjudicatory system, faced a conundrum: although petitioners had a long-recognized right to the effective assistance of post-conviction counsel, they had virtually no procedural mechanism to vindicate it because by the time they discovered the ineffectiveness, they could no longer raise the claim. In the typical case, in which post-conviction counsel was ineffective after the dismissal of the petition by the PCRA court, the petitioner was required to obtain a copy of the PCRA court’s notice, hope that they could glean from it the PCRA court’s basis for its intent to dismiss the petition, and cogently detailing that its procedure set forth in Pitts, clearly and cogently detailing that its adoption and perpetuation was “purely dicta,” and, in any event, in part due to its patent and obvious impracticality, “deeply flawed.”

The Court further reasoned that the procedure, in essentially forwarding collateral relief in federal court. The Court noted that although the PCRA court is often the most appropriate forum for the review of claims of ineffective assistance of post-conviction counsel, petitioners were required to obtain a copy of the PCRA court’s notice, hope that they could glean from it the PCRA court’s basis for its intent to dismiss the petition, and come to the conclusion that present counsel was ineffective in some way in causing the dismissal, obtain present counsel’s withdrawal and, either pro se or via new counsel, who would have to obtain and review the record, plead a new claim of ineffective assistance of post-conviction counsel, complete with statutorily required averments, witness certifications, verifications, and any substantiating documents, all within 20 days. To say that such claims were rare is something of an understatement, and the sum effect of the aforementioned roadblocks and the procedure set forth in Pitts was that petitioners provided ineffective assistance of post-conviction counsel were essentially put out of state court and forced into subsequent actions for collateral relief in federal court.

In Bradley, the Court, led by Justice Todd, traced the history of the procedure set forth in Pitts, clearly narrow in theory, but impermeable in practice. To comply and raise a claim of ineffective assistance of post-conviction counsel, petitioners were required to obtain a copy of the PCRA court’s notice, hope that they could glean from it the PCRA court’s basis for its intent to dismiss the petition, of the PCRA from raising his claim in a serial petition. Indeed, it was only in an extremely narrow circumstance that petitioners could raise claims of ineffective assistance of post-conviction counsel at all: between the PCRA court’s issuance of a notice of intent to dismiss the petition without a hearing and its dismissal order 20 days thereafter. See generally Commonwealth v. Pitts, 981 A.2d 875 (Pa. 2009). And the procedure set forth in Pitts was narrow in theory, but impermeable in practice. To comply and raise a claim of ineffective assistance of post-conviction counsel, petitioners were required to obtain a copy of the PCRA court’s notice, hope that they could glean from it the PCRA court’s basis for its intent to dismiss the petition, and come to the conclusion that present counsel was ineffective in some way in causing the dismissal, obtain present counsel’s withdrawal and, either pro se or via new counsel, who would have to obtain and review the record, plead a new claim of ineffective assistance of post-conviction counsel, complete with statutorily required averments, witness certifications, verifications, and any substantiating documents, all within 20 days. To say that such claims were rare is something of an understatement, and the sum effect of the aforementioned roadblocks and the procedure set forth in Pitts was that petitioners provided ineffective assistance of post-conviction counsel were essentially put out of state court and forced into subsequent actions for collateral relief in federal court.

The Court noted that although the appellate record might be sufficient to review those claims in some instances, a remand to the PCRA court will often be appropriate where petitioners offer more than boilerplate assertions of inefficacy, consistent with the relative competencies and roles of appellate and trial courts.

In some ways, Bradley raises more questions than it answers, in part because it is only beneficial where a petitioner has changed counsel at some point in the post-conviction process, which, at least at present, is simply not the norm. Post-Bradley, is initial post-conviction counsel obliged to withdraw, or at least to offer to withdraw, so that his client may assert his ineffectiveness? Relatedly, is a PCRA court obliged to provide different post-conviction counsel on appeal? And do similar obligations inhere at each subsequent stage of the appellate process? Language in the Court’s opinion certainly suggests as much.
DIGITAL EVIDENCE

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the admissibility of digital evidence applying the new rule, which became effective on October 1, 2020, after the trials in both Wright and Orr. However, the analysis of digital evidence is unlikely to radically change when applying Rule 901(b)(11). In a footnote to Orr, the Superior Court recognized that Rule 901(b)(11) appears to be consistent with the standard set forth in Koch.

Presenting digital evidence will continue to evolve as the technology we use changes; however, ten years of case law and the new rule of evidence provide guidance on the admissibility and authentication of digital evidence. Alex Cashman is an Assistant District Attorney in the Homicide Unit of the Allegheny County District Attorney’s Office.

And perhaps more importantly, how many times can the new Bradley procedure apply in a given case? May a petitioner, dissatisfied with his second post-conviction counsel’s handling of a hearing on remand, seek and obtain new, third, or fourth, or fifth counsel to assert a claim of prior post-conviction counsel’s ineffectiveness? Depending on the answer, Bradley could become recursive, creating significant tension with the time-bar’s goal of finality.

In the years to come, the Court will likely grapple with these and myriad other questions that Bradley raises. Indeed, Bradley appears to mark the beginning, not the end, of a longer jurisprudential conversation about how to enforce petitioners’ right to the effective assistance of post-conviction counsel.

Corrie Woods is a Member/Attorney at Woods Law Offices PLLC, where he practices primarily in the area of appeals and criminal post-conviction actions in Pennsylvania state courts. Corrie also serves as the Chair of the Allegheny County Bar Association Appellate Practice Committee. Contact Corrie at 412-329-7751 or via email at cwoods@woodslawoffices.com.

POST-CONVICTION CASES

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Robert Berkley Harper
Robert Berkley Harper, 82, Professor Emeritus of Law at the University of Pittsburgh, passed away on October 12, 2021. He was the son of the late Frank P. Harper and Ouida Gribshy Harper. A product of the Pittsburgh Public Schools, Robert graduated from Fifth Avenue High School and received a BS Degree in Education at the University of Pittsburgh while working at the US Post Office at night.

He always had a strong desire to teach, but after graduating from college, he joined the United States Army. Lieutenant Harper taught weapons at the Armory School at Fort Knox in Kentucky after receiving a baccalaureate and algebra at Liberty Demonstration School. Robert went on to attend Law School at the University of Pittsburgh, graduating in 1971 and became the police Legal Advisor for the City of Pittsburgh.

He left that job to become Dean of Students at his Alma Mater and later became the first African-American, full tenured professor at that institution. He taught Criminal Law, Criminal Procedures, Evidence, Scientific Evidence and Law and Education. He loved his role in the area of Education Law and even taught legal education programs to lawyers and judges, as well as legal classes to police officers. Robert will be remembered as the Patriarch of the Harper Family: the brother, uncle, friend and neighbor you could always count on. He loved the Lord and attempted to follow His teachings. As a young adult he was active in Christian Tabernacle Church and most recently at Mt. Ararat, Saturday Night Live service. His hobbies related to reading and writing, and he would always say that one should try to read a book each week and write an essay every evening. You may have seen him at the Carnegie Library, Homewood Branch or even read one of his Letters to the Editor in a Pittsburgh newspaper.

Robert is survived by his brother, Henry (Yvonne), Delaware, best friend since high school, Richard Lee, MD, California, and a host of beloved family members, friends, colleagues and former students in Pittsburgh and across the country.
News and Notes

Local amateur documentarian seeks to interview members with personal insights/stories regarding the late venerable Judge Michael A. Musmanno, particularly those of a first or second hand nature. Contact Robert Rice at 724-462-1447.

Three additional divorce attorneys at Pittsburgh family law firm Pollock Begg recently completed training and certification in collaborative law, bringing the firm’s total number of collaboratively trained lawyers to eight. Partner Brian C. Vertz and associates Ashley M. Majorsky and Lindsay A. Nemitz are newly certified through the Collaborative Law Association of Southwestern Pennsylvania and became members of both CLASP and the International Academy of Collaborative Professionals.

The Pittsburgh Parks Conservancy, in partnership with K&L Gates LLP, planted a Sweetbay Magnolia Tree – the first of 75 donated trees by the law firm – in Mellon Square Park in downtown Pittsburgh in honor of the 75th anniversary of the establishment of K&L Gates’ Pittsburgh office, the firm’s first.

People on the Move

Sarah C. Norcott

Erik D. Slobe

Leech Tishman Fuscaldo & Lampl, LLC is pleased to announce the addition of two new attorneys to the firm, the Intellectual Property Practice Group in the Litigation Practice Group, and Norcott joins the firm as an Associate – in honors of K&L Gates’ Pittsburgh office, the 75th anniversary of the establishment of the firm, and Norcott as part of the firm’s first.

Change in Status

Maria Verardi Durrant, who has been on Retired Status, has never been suspended or disbarred, and has demonstrated that she has the moral qualifications, competency and learning in law required for admission to practice in the Commonwealth, shall be and is, hereby reinstated to active status as a member of the Bar of this Commonwealth.

Michael Alan Katz, who has been on Administrative Suspension, has never been suspended or disbarred, and has demonstrated that he has the moral qualifications, competency and learning in law required for admission to practice in the Commonwealth, shall be and is, hereby reinstated to active status as a member of the Bar of this Commonwealth.

Bar Briefs

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The Pittsburgh Foundation can provide a means to support charitable work helping those in need throughout SW Pennsylvania. For more information contact the Foundation at www.gtpresbytery.org/pghpresbyterianfdn.htm or Rev. Dr. Douglas Parke at 412-323-1400 Ext. 318.

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