MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Stephen Foertsch
Editor

Minnesota Association of Criminal Defense Lawyers
Publisher

Andy Birrel
President, MACDL

Piper Kenney Wold
Executive Director, MACDL

VI Magazine Committee

Patrick Cotter
Keala Ede
Stephen Foertsch
Ryan Garry
Andrew Mohring
Doug Olson
Lisa Peralta
Ed Shaw
Piper Wold

VI Magazine is published by MACDL, a Minnesota nonprofit corporation. MACDL works to advance the advocacy skills of MACDL members, inspire and motivate aggressive, ethical, and effective defense for all accused, and connect the criminal defence community in Minnesota.

Articles express the opinion of the conributors and not necessarily that of VI Magazine or MACDL. Headlines and other material outside the body of articles are the responsibility of the Editor. VI Magazine accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases.

Contact
Stephen Foertsch, Attorney
Bruno Law, PLLC
4272 Dahlberg Drive
Golden Valley, MN 55422
(763)545-7900 (Office)
(651)246-2103 (Cell)
stephen@brunolaw.com

MACDL VI Magazine

Features

President's Column

Andy Birrell

MACDL Members:

I write to you with great optimism. It almost goes without saying that this past year was an extraordinarily hard year to be a criminal defense lawyer.

A year ago, we were in the beginning of the coronavirus pandemic and had no idea of the toll it would take on our country and court system. Then, while the country grappled with that, we saw two instances of once-in-a-generation unrest; with George Floyd's death at the hands of the Minneapolis Police Department leading to nationwide anger and protests against our criminal justice system; and then, a few months later we saw an insurrection reach inside our nation's capitol building (apparently spurred on by our outgoing president) after the most contentious election in recent memory.

These events hit the criminal defense bar hard. We are simultaneously attacked by some for being a part of the "establishment" and by others for pushing back against it. We have had to vindicate our clients' constitutional rights via Zoom hearings. We have had to deal with trials being pushed back by as much as a year or more and the justice system being ground to a halt. We have felt isolated – my tenure will end with no live MACDL events – and many members have been financially stressed too as trials slowed to a crawl.

I am excited to report that the worst is certainly behind us. Coronavirus case numbers are dropping precipitously. Our members are getting vaccinated, and increasingly quickly. State and Federal trials are expected to be getting back to normal in the next few months. I cannot wait until we can again sit down together and share war stories. I know that will come soon.

While the past year was hard, our brotherhood and sisterhood remains strong. We are poised for success this year and well into the future. I am more proud than ever to be a part of the MACDL. ■

Andy Birrell

Confronting Two-Way Remote Technology

Jill Brisbois

Introduction

As the courts begin to resume criminal jury trials, prosecutors and judges now have another tool to keep the conveyor belt of justice moving; two-way remote technology. All courts across the state are now equipped to easily implement the technology if a witness decides they do not want to or cannot come to court.

The purpose of this article is to simply lay out the argument why the use of two-way remote video violates the Confrontation Clause using a recent experience in trial where the court was prepared to ignore the Clause and allow the State to call one of their witnesses via Zoom. Hopefully, you are prepared to prevent government and court from moving forward with a trial on terms that fit their agenda.

What is the Confrontation Clause?

The Confrontation Clause is a simple phrase in term lieu of saying that the Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him, her, or them.

Purpose of the Confrontation Clause

The U.S. Supreme Court's earliest case interpreting the Confrontation Clause describes "[t]he primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, *but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242–43 (1895) (emphasis added).*

How is it satisfied?

The witness must be under oath, physically present so their demeanor may be observed by the trier of fact, and subject to cross-examination. *Id.*; California v. Green, 399 N.W.2d 149, 158 (1970).

State v. MAF

In November 2019 MAF was charged with 4th Degree Criminal Sexual Conduct. Specifically, the state alleged that he touched the inner thigh of a 14-year-old female (LS) while at a hot tub party. LS and her friend (SG) advertised a party on snapchat with a picture and caption stating they were over 18, mobile, and smoked. MAF responded to the add and brought alcohol at the request of the two females. The trio spent the next 6 hours watching tv and swimming. Two

other males showed up for a couple of hours and hung out.

An argument broke out when MAF asked the females to pay him for the alcohol and he learned their true ages. He stupidly threatened to call the cops and left. Instead, the two females called the police and reported MAF for a DWI and that he tried to kiss the 14-year-old. Two sets of cops were sent to respond to the call. One to arrest MAF for DWI and an investigator to speak with the two females about a "possible sexual assault."

LS told the investigator that MAF touched her thigh and tried to get between her legs. MAF was arrested and charged with 4th Degree Criminal Sexual Conduct based on this statement.

Fortunately for MAF, law enforcement continued to investigate the case. In the time between LS's initial statement to police and trial, she was never interviewed again to clarify her initial statement. However, SG was interviewed again after the police discovered surveillance video of many of the events from that evening. After being confronted with the surveillance video, SG admitted many of the things that they told the police were not true, including concealing that there were two other people present.

About a month and a half after the incident, police interviewed RK who was present for part of the incident. Initially when asked if MAF was doing anything inappropriate, RK stated "nah I don't remember." After prompting, he agreed that MAF was acting inappropriately with the 14-year-old, but he could not remember where MAF was touching her specifically. However, 11 months later, he told the prosecutor in a prep meeting that he saw MAF touch LS's butt. This statement was inconsistent with all other witnesses and his previous statement to police. Impeaching RK was critical to the trial.

MAF's case, like many other cases, was continued several times due to the pandemic. MAF had immigration issues that needed to be address immediately, so he put in a speedy trial demand. At the second trial setting after the speedy trial demand was entered, there was a judge and a courtroom available to hold the trial. Nonetheless, the state asked to continue the matter because SG was in Mexico and would not be returning until mid-trial. The state did not want to call SG as a witness until she had a negative COVID test. The judge denied the state's request for a continuance finding MAF had a "legitimate" reason for his speedy trial demand.

On the morning of openings (prior to the jury being sworn) the state made another request for a continuance, or in the alternative, to allow RK to testify via Zoom because he was near a friend that just tested positive for COV*Id.*

The judge gave MAF a choice, pick between your right to a speedy trial and your right to in-person confrontation of a witness. Obviously, this is not a choice an accused person has to make. Therefore, MAF required the judge to rule on the continuance motion prior to addressing the issue of RK testifying remotely. The judge denied the request for a continuance because of the speedy trial demand.

The judge ruled that RK could testify via Zoom. I was completely unprepared to address this scenario and the judge allowed about 5 minutes for legal research on the issue. The judge's findings boiled down to this; there is not an absolute right to confront a witness and courts around the country have allowed remote testimony in certain circumstances, specifically citing *Maryland v Craig*, 497 U.S. 836 (1990). He also stated that there was a trend toward using the technology but when pressed, was not able to provide a concrete example.

The trial began and LS testified, *in a tube top with her stomach exposed*[1], that MAF touched her thigh. As she stated this, she made a gesture with her hand. This gesture was described on the record and it was revealed that MAF touched her *outer thigh*, this is not a crime. After the direct examination, the state dismissed the sexual assault charge.

Fortunately, the trial came to an end and RK never testified. However, what happened with LS highlights the importance

[1] I do not highlight this point to "slut shame" someone who did not receive guidance from the state on appropriate court attire, but to point out that a witness' appearance could impact a jury's credibility determination. Again, this is why in-person testimony is always preferred.

of why Zoom/two-way remote testimony should not be used unless an exception to the Confrontation Clause applies. Specifically, if we had been using Zoom technology, the jury probably never would have seen the witness as she appeared for court. But more importantly, the non-verbal gesture with her hand never would have been seen nor described for the jury.

Did *Maryland v. Craig* apply in MAF?

The court in MAF was correct. The U.S. Supreme Court has never held that the procedural guarantees of the Confrontation Clause are absolute. However, as outlined below, *Craig* did not apply to the circumstances in MAF.

In *Maryland v. Craig*, 497 US 836, 841 (1990) the US Supreme Court examined a Maryland Statute that permits a child to testify via one-way closed circuit in abuse cases if it can be shown the child would suffer from serious emotional distress such that the witness cannot reasonably communicate.[2] The prosecutor presented expert testimony on the distress to the individual child witnesses. *Id.* at 842. The Court applied a balancing test that examined the public policy behind the statute and how the reliability of the testimony was otherwise assured. *Id.* at 850. Because the State has a legitimate interesting in protecting the welfare of children and statute requires case specific findings that the child would suffer serve emotional distress the Confrontation Clause was not violated.[3] *Id.* at 855-856. The Court also specifically observed that this form of testimony should not be viewed as the witness is unavailable but unable to be present in same space as defendant.[4] *Id.* at 858.

There are other examples of exceptions to the Confrontation Clause but are not relevant in this circumstance.

Does remote two-way video satisfy the Confrontation Clause in a criminal jury trial?

So far, no... Below are two examples in other jurisdictions where the government has tried and failed to circumvent the confrontation clause by using two-way remote technology to get its conviction.

In *United States v. Carter*, 907 F3d 1199 (9th Cir. 2018), the defendant's conviction was reversed after the court granted the government's motion to allow the two-way video testimony from a witness. As an alternative, the government proposed conduct an in-person deposition during trial (including flying the defendant out to MN). *Id.* This motion was brought because the witness was seven months pregnant, residing in Minnesota and could not travel and was hospitalized for complications. *Id.* However, the government never produced any documentation about the witness' to travel. *Id.* The court found the defendant had the right to physically confront an adverse witness (child or adult) unless *Craig's* stringent standards are met. *Id.* at 1206. Specifically, the government did not show that it was necessary because they did not provide any medical documentation. *Id.* Second, other options were available including severing the trial (this was a trafficking case with multiple counts and victims), continuing the trial, or a deposition would have been preferred.[5] *Id.* at 1208-1209.

[2] Equivalent to Minn. Stat. 595.02 Subd. 4.

[3] *Compare Coy v. Iowa*, 487 U.S. 1012 (1988) (conviction reversed after the defendant challenged a procedure that allowed a child witness testified behind a screen based on generalized legislative presumption of trauma).

[4] Courts have interpreted *Craig* to still be good law despite *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* found out-of-court statements by witnesses that are testimonial are barred unless the witness is unavailable, regardless of whether the statement is found to be reliable. *Craig* distinguished that the child was not unavailable rather the child was not available to be in the same space as the Defendant.

[5] A deposition is an exception to in-person live testimony if the other requirements of the Confrontation Clause are met.

Carter at 1206 to 1207, provides a list of reasons in-person, face-to-face confrontation serves as the symbol of fairness:

- It is easier to tell a lie behind someone's back than face-to-face;
- In-person testimony enhances the accuracy of fact finding at trial;
- The witness not being in the courtroom in front of the jury diminishes the profound truth-inducing effect upon a person standing in the presence of the person the witness accuses;
- The witness's angle of the courtroom will be distorted;[6] and
- No assurances that the witnesses alone and not being coached or otherwise influenced during the testimony.

In *People v. Jemison*, 952 N.W.2d 394 (Mich. 2020), the trial court permitted a forensic analyst to testify about their findings and another analysts' findings via two-way interactive video testimony.[7] *Id.* at 396-97. The rationale for use of the technology was cost savings to the State, which was sanctioned by the Court of Appeals using the rationale in *Craig*. *Id.* at 400. The Michigan Supreme Court found that cost-savings is not a justification for a constitutional shortcut. *Id.* Moreover, *Craig* applies to a very fact-specific circumstance. *Id.* The conviction was reversed for further findings on whether the error was harmless. *Id.* at 401.

What should have happened in MAF

In this post-mortem, the answer is easy. The court should have continued the trial for the witness to isolate. This decision should not have been thrust on MAF. It was the court's difficult decision to make.

Although the judge cited to *Craig* as its basis for utilizing the technology, it did not conduct the necessary analysis. What was the important public policy for using the technology? And did the state present a specific need for its use?

Were there public policy reasons for not bringing RK into the courtroom? Of course, no one should knowingly be exposed to COVID while serving as a juror or working on trial. It would not be credible to argue that there were not strong public policy reasons for keeping RK out of the courtroom.

However, the state failed to articulate why it felt the use of the technology was necessary. It did not provide factual evidence in support of its request. Without factual evidence showing the need for remote technology, the court, after denying the continuance request, should have ordered the trial to move forward without RK.

Conclusion

Here is what to remember in a pinch. If a witness can testify by two-way remote technology, they are not unavailable, and the Confrontation Clause requires the witness to be physically present. The only possible exception to the physical presence requirement is the *Craig* exception. Remember why the statute in *Craig* passed constitutional scrutiny. First, there was a strong public policy reason to allow the use of the technology, avoiding causing a child serious emotional distress to the point it cannot communicate. Second, there must be a particular showing for the use of the technology, not just the unsubstantiated representations of the government. There are alternatives outlined in Carter, a continuance, sever charges, or a deposition. The Constitution is not satisfied by cross examining a face on a screen. As Mattox pointed out 125 years ago, the nonverbal testimony sometimes is more important than the verbal testimony.

Sometimes it is not easy to convince our clients that in-person testimony is essential and preferable to moving forward with a compromise like a remote video feed. MAF got lucky that

[6] In *Carter*, the witness stated that she could not really see the defendant due to the camera angle.

[7] The Michigan Supreme Court also found that permitting one analysist to testify about the other analyst's findings was a violation of the Sith Amendment. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

his attorney, who was prepared for an in-person impeachment of RK, did not have to attempt to impeach a juvenile witness with prior statements via Zoom. ■

About Jill Brisbois

For more than 15 years, attorney Jill Brisbois has provided skillful, fearless representation to Twin Cities clients. She defends clients against a vast spectrum of charges, including sex crimes. Because the Minnesota State Bar Association has certified her in criminal defense, other attorneys throughout the state seek her counsel regarding criminal law, family law, personal injury and other civil matters.

Absolute Bail Bonds

612-333-3030

1-800-408-1101

www.absolutebailbond.com

"It's Good To Have A Friend On The Outside"

Local Agents Available Statewide **24 Hour Service**

Payment Plans Available **Clear Warrants**

Absolute can post bond to get your client Off Alcohol Monitor or Conditional Release

Doing business since 1994

Professional, Courteous, and Discreet

THE COVID-19 JURY TRIAL AND WHAT IS TO COME NEXT

Patrick L. Cotter

I walked out of the federal courthouse in Bismarck, North Dakota earlier this month. The windchill bit the skin on my face on the outside, but it was the ache in my heart that had my attention. Yet another young African-American man was off to federal prison for 22 years on my watch. The prosecutor, with a straight face, was demanding 50 years for selling drugs. We always feel we can do better, no matter the odds. The question currently before us is whether the COVID-19 protocols change the odds, and if so, how.

My co-counsel Dan Mohs and I commenced a jury trial in September in North Dakota, just shortly before that state was recognized as a hotbed for the Covid-19 virus. Our client, a 26-year-old man from the Twin Cities, was accused of leading a group transporting and selling copious quantities of methamphetamine and heroin in the Bismarck area. I am not going to write about a grand victory, but rather a defeat. I am not going to tell a "war story" but rather level with you on an experience. The relevant matter was this prosecution was one largely reliant on a litany of co-defendants and local drug addicts who would be paraded before the jury to point the proverbial finger at our client.

Upon entering the courthouse on the first day of trial, a wave of anticipation and anxiety hung in the air. Our case was the first federal trial in North Dakota during the Covid-19 pandemic. The courthouse is a throwback scene with the United States Post Office, Senate and Congressional official offices, and Federal Court located in the same building. There are three courtrooms. It felt as if all hands were on deck to assist with the "show" of the trial.

Jury selection was the first tangible COVID-19 change. Thousands of trees have been killed to cover the written musings of lawyers regarding the selection of a jury. As others who have tried a case during this pandemic year will attest, the new reality involved multiple courtrooms. What struck me is a fundamental aspect of jury selection: the community of jurors "in the box" to experience together the questions to test their fitness and allow the attorneys to introduce themselves and their case. This is lost in the COVID-19 trial. Now we had potential jurors spread all over a very large courtroom with a second set of potential jurors spread out in a separate courtroom piped in via closed network television. Each potential juror wore a face mask. A podium was set up in the middle of the courtroom with each potential juror asked to step forward to a microphone in front of the podium when his/her name was called. The judge made clear it was the jurors' choice whether to remove their masks while answering questions or keep their faces covered. The covering of the faces deleted one of the hallmarks of a trial lawyer's jobs as they take in the nonverbal cues and facial expressions of a person who will, if chosen, hold the fate of the client in their hand.

Then the trial began. Much to the chagrin of counsel, the judge instructed each witness that it would be his or her choice whether they continued to wear a face mask during the course of his or her testimony.

Call my accuser before my face. Let him speak his piece. --Sir Walter Raleigh

COVID-19 and the face covering challenges us to grapple with whether the right of confrontation truly requires a face-to-face meeting. In this trial, several key witnesses testified and directly accused our client, with their faces covered. Surely, the practical answer during a worldwide pandemic is

no. Think further about what this means for the craft of cross-examination. Non-verbal communication is often one of the hallmarks of the test for credibility. I always watch the jury as a witness completes the walk to take the oath before sitting to testify. You can almost feel the sub-conscious minds of each juror judging the mannerism of the witness's gait, dress, and facial expressions. Once in the box, the witness's non-verbal cues test the truth of the words that come from their mouth. Anger, bitterness, sadness, coyness or indifference all can be gleaned from the expressions of a witness during the most important moments of his or her testimony. With a face mask covering most of a witness's face, this essential element of cross examination is crippled. I certainly felt that efforts to draw out the flaws in the witness's credibility were hampered by the masks.

Throughout the COVID-19 pandemic, contested evidentiary hearings and sentencings over a zoom or other video-conference platforms have become the norm. In this format we do confront witnesses over a video screen. I will leave it to the plethora of other articles regarding potential problems with witness testimony from home. The concern I bring forth is the loss of the face-to-face meeting of witness and examiner, with the fact-finder in live observation of the communication, both verbal and non-verbal. I am confident that we will get past this pandemic and that face masks will not be worn in our courtrooms. However, I am concerned that there will be temptation to continue to have contested hearings and sentencings by video conference. I, for one, would caution against it.

Make no mistake, courts are doing their very best to meet the demands of justice and the right to fair trials. COVID-19 has required and will continue to require the judicial system to grow more efficient and shed some procedure that is antiquated. However, it is incumbent upon all of us to work to ensure that the right to true face-to-face confrontation of witnesses is preserved.

As my colleague Dan Guerrero stated as I contemplated this article, "Tell everyone I miss seeing them in the halls of justice." Until then, stay safe! ■

About Patrick L. Cotter

Patrick Cotter, Sieben & Cotter, PLLC

Untying the Knot, the Unconventional Way

Dan Guerrero

Post-conviction work is hard. That knot is tied tight. It is difficult and time consuming to untie, especially in a system which places such a premium on finality. Usually your best shot is your first shot—a victory at the trial level. If you don't succeed there, chances are slim you'll succeed on appeal, or in a post-conviction hearing. One only has to look at the weekly cases coming out of the Supreme Court or the court of appeals to see how often the word "Affirmed" is repeated to know how tough it is to change the results of a guilty verdict.

So, after thirty years as a criminal lawyer, it was uniquely special to have played a part in the release of an innocent man from prison, coming in the form of a rare sentence commutation, rather than a post-conviction petition. Coming from the advocacy of lawyers and students, and reporters and community members who impressed upon our Governor and Attorney General that a 45-year sentence for a juvenile was not warranted, and that eighteen years behind bars was enough, irrespective of this young boy's apparent role in the offense. But of course, his role, or more precisely his lack of a role in this crime, while irrelevant to the Pardon Board's decision, is extremely important when considering the travesty of sending an innocent man to prison — something we know happens more often than society realizes or is prepared to accept.

While incarcerated, this young boy did not sit idle. He took advantage of the limited opportunities afforded to him, and he created his own along the way. He grew to be a dedicated father and husband, a leader in faith and stature, and respected among his fellow inmates and prison officials alike over the course of his many years in prison. His name is Myon Burrell. Myon was 16 years old when Minneapolis Police snatched him off the street one day, five days after an 11-year-old girl named Tyesha Edwards was shot and killed while sitting at her dining room table doing her homework. To say the authorities felt pressure to solve her murder is an understatement, and they did so at the expense of a young teenager who spent more years locked up than he has spent free, for a crime he did not commit.

The two men responsible for Tyesha's death—Ike Tyson and Hans Williams—have longed maintained Myon had nothing to do with her death. Williams essentially exonerated Myon immediately after police arrested him, three days after the crime. Tyson did so in recorded jail house calls in the hours and days following his arrest, only three days after he aimed badly and fired his gun, piercing the wall of Tyesha's house with a bullet that struck her heart. Police and prosecutors discounted Williams' statement, and simply ignored Tyson's jailhouse calls, and his many attempts to take responsibility since. Myon himself told police they only had to view the surveillance tapes at Cup Foods, now infamous for the location of George Floyd's death, and to interview a person he was with outside the store to know he was not involved. Police did neither.

Myon suffered through two trials years apart, with prosecutors employing different strategies at each trial.[1] His first trial was bad enough with prosecutors conditioning the

[1] Myon was convicted following his first trial but the Supreme Court reversed on appeal, ruling that multiple

guilty pleas of Myon's two co-defendants on agreeing *not to testify* for Myon, a fact the Supreme Court found unusual and concerning. As the Court noted, "[t]ypically, pleas are conditioned on a co-defendant agreeing *to testify*, not to keep quiet." *Burrell*, 697 N.W.2d at 605. As an example, Hans Williams, who specifically told investigators immediately after he was arrested that Myon was *not* the third person with him and Tyson that day, was asked during his change of plea:

> Q. (By prosecutor) And to put it another way, Mr. Williams what you're telling us today about that third person is you don't know who it was and you do not know who it was not. You could not say one way or the other, is that correct?
>
> A. That is - - That is correct.

How is that for convoluted reasoning? Similarly, prosecutors, aware Ike Tyson had made previous statements to close friends exonerating Myon, under circumstances inherently conducive to truthfulness, conducted the following colloquy with him at his change of plea:

> Q. (By prosecutor) Would you agree, Mr. Tyson, that if you had said – if you've said anything inconsistent with what you've said in court today, that what you're saying in court today is the truth?
>
> A. Yes.
>
> Q. So if you had said something to somebody prior to today that would be inconsistent with what you've said here, what you've said here today is the truth?
>
> A. I don't understand what you're saying.
>
> Q. Okay. If you told somebody something different about what happened prior to coming in here today, that would not be true, would it, it's what you said here under oath that's true?
>
> A. Yes, this is true, what I'm saying now.
>
> Q. Okay. Now what you may have said on another occasion – is what you're saying here today, that's the truth?
>
> A. Yes.
>
> Q. And, for example, if down the road you, you know, a day, two months from now or whatever, if somebody were to say that you told them a different version, that would not be true, either. It's what you said here today, that's the truth, is that right?
>
> A. Yes.

With all potential help from his co-defendants conveniently and effectively denied, the State's case largely rested on the word of a 17-year-old boy named Timothy Oliver, an alleged rival. There was no physical evidence connecting Myon to the crime, yet there was evidence to suggest that an older gang member, who the State used as its "gang expert" at trial, actually directed Oliver to name Myon as the third person in an effort to curry favor with investigators to obtain his own release from jail. The so-called expert testified that while at the county jail he called Oliver, who told him that Myon was the shooter. He then called detectives to tell them about Myon and that he had instructed Oliver to turn himself in. Neither the jailhouse call from the "expert" to Oliver nor the jailhouse call from the "expert" to police, both of which were presumably recorded, were ever recovered. Once the lead investigators learned Myon's name (or more appropriately his nick name "little skits"), they never let go, never even considered the possibility he may be innocent, despite known witnesses who heard Tyson claim responsibility for

errors, including the trial court's failure to suppress statements Myon made to the lead detective during a three-hour interrogation where he asked for his mother no less than thirteen times, deprived him of a fair trial. He maintained his innocence throughout the three-hour interrogation. *See State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005).

the murder shortly after it occurred.

Between the first trial in 2003 and the second in 2008 – Oliver—the one and only eyewitness to implicate Myon, was shot and killed. As a result, Oliver's testimony from the first trial was read into the record at Myon's second trial. Unlike the first trial, however, the State suddenly discovered and called upon to testify up to six jailhouse informants to build its case. These men, all acquaintances, most of them housed together at Sherburne County, testified to previous incidents where Myon had supposedly shot at them or made admissions to them while they were housed together in the county jail or state prison. They did so in exchange for time off from the sentences they were currently serving or expected to serve. It was all very nebulous, without any real or specific, disclosed written details to any of the informants' deals. This apparently did not trouble the trial judge, who found the informants credible, and convicted Myon a second time.[2]

Another appeal followed which ended in the word "Affirmed". Then came a post-conviction petition which led to a hearing where witnesses weren't properly subpoenaed, another failed to appear, and without the requested help of the County Attorney's Office and the trial court, were impossibly difficult to bring in from federal custody. The post-conviction court (the same judge who presided at trial) denied the petition on procedural grounds rather than the merits. Such is life in the post-conviction world.

That's where I came in. Meeting with Myon's father, his sister, and other family members in the law firm library, I listened to the story of their long wait for their son and brother to come home, hearing the sadness in their voices, their frustration with a system that would allow an innocent boy to be unfairly prosecuted and convicted. But I also heard the hopefulness in their voices. They were once again placing their faith in a lawyer, presumably learned in the law who would surely help end this long nightmare.

Although it did not end as soon as they would've liked. Again, such is life in the post-conviction world. Things typically do not go quickly. I represented Myon for close to four-and-a-half years, making many drives to and from Stillwater Prison, interviewing witnesses, and pouring through Banker's Boxes filled with trial transcripts and old police reports, and reports of previous investigators, and court pleadings filed by former lawyers, and Supreme Court Opinions dealing with Myon's case, etc., trying somehow to overcome *Knaffla* and the time bars imposed by statute. Then good fortune struck, in the form of an AP reporter named Robin McDowell. Robin took a deep dive into the case, reviewing all transcripts, reports, and statements, interviewing Myon, and jailhouse informants who testified at his trial. In February 2020, she published her article about the serious questions surrounding Myon's case.[3] Her article returned the public eye to the case, exposing weaknesses in the State's evidence, the travesty of using jail house informants and the lack of true objective work on the part of the Minneapolis Police Department, in particular of the three main homicide detectives who failed to investigate leads which pointed to Myon's innocence.

Robin's article also put pressure on Senator Klobuchar (who was County Attorney when Myon was first indicted and tried). She called for a review of the case, to look at evidence both old and new. It got the attention of AG Keith Ellison. Importantly, the article spurred lawyers Laura Nirider and Barry Scheck to form an independent panel of scholars and legal experts, defense lawyers and former prosecutors from around the country to review all phases and aspects of Myon's case – at least the aspects that were made available to them.[4]

[2] Based on statements the trial judge made before trial critical of the State's case, Myon's trial lawyer advised him to waive a jury. It turned out to be the wrong advice.

[3] https://apnews.com/article/115076e2bd194cfa7560cb4642ab8038

[4] Though the Hennepin County Attorney pledged cooperation with the panel, because of challenges the office faced during

The panel interviewed many people involved in the case, old players and new, including me and County Attorney Freeman (who oversaw Myon's second trial). Their work culminated in a 44-page report, and an appendix written by Harvard Law Professor, Alexandra Natapoff, who conducted her own review of the case.[5]

The panel explored the phenomenon of "tunnel vision" and how it played into Myon's case as the detectives, once fed Myon's name, even though the source was suspect, focused solely on Myon while overlooking, discounting and ignoring facts which showed his innocence, including Tyson's early jail calls and Williams' girlfriend, who had turned in her boyfriend and had told investigators she overheard Tyson say exactly how many shots he fired that day. Professor Natapoff identified the myriad of problems associated with the use of jailhouse informants, including possible collusion when multiple informants are involved, repeat informants who know how to manipulate the system and the inherent and psychological barriers to evaluating the credibility of this type of testimony. I believe the Panel Report was important not only to Myon's release but also to the cause for criminal justice reform. For those of you who have not read the report and the accompanying appendix, I recommend you take some time to read it. It is an amazing deconstruction of a flawed criminal case, replete with ideas and research you can use for better advocacy when these issues arise.

In the months leading up to Myon's release, I met often with Robin McDowell, Perry Moriearty from the U of M Law School, Myon's wife and his sister, and others to come up with a comprehensive, factually based, legally sound argument for a renewed post-conviction challenge that would withstand attack – again no small task given *Knaffla* and the time limits set forth in Minn. Stat. § 590.01. We conducted a day long "retreat" at my office to brainstorm about the case, piecing together the many witnesses, their stories, and motives, the short-sightedness of the police investigation, questionable tactics of previous lawyers, including the prosecutors, everything to help recreate what went wrong.

In the meantime, we knew about the formation of the Independent Panel. I elected to wait until the panel released its findings to ensure that our post-conviction petition was consistent with the panel's findings. We also knew that Myon's commutation application would be heard on the December calendar. We had information that AG Ellison would be supportive of a commutation, and with another stroke of luck, Justice Gildea recused herself. We felt good with Ellison and Governor Walz and as you know, they voted to release Myon. Later that same evening, he walked through the heavy, grinding, slow moving doors guarding the prison lobby from the bowels of the prison itself where he had spent so many sad and difficult years, into the long-suffering arms of his family and to a supportive crowd. He was finally free. It was a joyous event.

It has been a team effort as these post-conviction struggles surely are. Credit goes to Robin, in addition to my law clerk/investigator, Rachael Melby, who wrote the first post-conviction draft (many times revised) and obtained exculpatory statements from newly discovered alibi witnesses, and recantations from several of the jail house informants who admitted they lied at Myon's second trial. Both her and Robin's investigation uncovered critical, and much needed evidence of Myon's actual innocence. Credit to Myon's family who loved him, believed in him, stood with him and waited for him all these years. And credit certainly to Professor

the pandemic, the age of the case, the volume of materials, as well as the time, expense and personnel required for production of the file, the office did not release its file to the panel, who were working on a tight schedule.

[5] https://news.stthomas.edu/wp-content/uploads/2020/12/2020-12-Burrell-Report-Master.pdf Report of the Independent Panel to Examine the Conviction and Sentence of Myon Burrell, (December, 2020) (hereinafter "Panel Report").

Moriearty and two of her law students for their excellent work on the commutation.

We need to remain vigilant to some to the troubling issues Myon's case presented, which plague our cases still – the heavy reliance on informants, the treatment of juvenile offenders, trumped up sentences for alleged gang affiliation, unethical plea bargains, and other potential patterns of abuse by police and prosecutors. This vigilance needs to take place on the front end to prevent unjust convictions like this one. As I've discovered, it takes commitment, hard work and a bit of luck to remedy mistakes, or misconduct from the back end.

As a coda, a recent collaboration between the AG's Office and the Great North Innocence Project, with full buy-in from County Attorneys John Choi and Mike Freeman, has produced Minnesota's first ever Conviction Review Unit (CRU). Many of its appointed 16-member Advisory Board are intimately familiar with Myon's case, including University of St. Thomas Law School professor, Mark Osler, who chaired the Independent Panel. Myon's release was amazing, and unprecedented. I am so very happy for him and his family, but there is more work to do. He is free but still bears the mark of a convicted felon. We intend to fix this. As soon as the case-review criteria is established and the application process opens, we intend to present Myon's case to the CRU for review. We intend finally to fully untie this exceedingly prolonged and tightly bound knot. Myon's freedom was secured in an unconventional way. I believe his exoneration will be similarly unique. ■

About Dan Guerrero

Dan Guerrero is a partner at Meshbesher & Spence, where he has practiced criminal defense for 32 years. He was a long-time Board member and past President of MACDL.

> *Thank you for 20 years of business. It's my honor to continue serving the attorneys of MACDL.*
>
> – Jeff Wold, Founder

WHO WE ARE

Wold Consulting Services, Inc. provides expert witness and computer/mobile device forensics services.

WHAT WE DO

Expert Witness Services in the following areas:

- Computer, Smartphone, and Tablet Forensics
- Electronic Data Analysis
- Cybersecurity
- Data Recovery
- Information Systems Policy
- Corporate IT Management

CELEBRATING TWENTY YEARS

WOLD CONSULTING SERVICES, INC.

WOLDCSI.COM | JWOLD@WOLDCSI.COM | 651-308-1349
TEXAS DEPARTMENT OF PUBLIC SAFETY LICENSE # A09427901

Compassionate Release:

COVID-19 and Beyond

Andrew Mohring

Almost to the day, the past year has seen an explosion of activity under a combination of statutes that now allows prisoners to seek and receive compassionate release reductions in federal criminal sentences. The Federal Defender and U.S. Attorney's Offices have screened over 524 cases for possible compassionate relief. Many of them, more than once. Many dozens of federal prisoners who were convicted and sentenced in Minnesota have been released, often years, and occasionally a decade or more, before the scheduled expiration of their terms of imprisonment.

This explosion of activity has taken place at the arguably random intersection of several unrelated legal and factual developments.

Statutory Background

A statutory provision for compassionate release reductions in sentences dates back to 1984.[1] In addition to a provision allowing the commutation of sentence for prisoners at least 70 years of age who have served at least 30 years in prison, this statute, 18 U.S.C. § 3582(c), allows for the reduction of sentences where "extraordinary and compelling reasons warrant such a reduction." As initially adopted, however, section 3582(c) only gave courts the ability to grant compassionate release reductions in sentence "upon motion of the director of the Bureau of Prisons." In other words, although the actual sentence reduction was performed by the Court, the statute gave the only key to the Bureau of Prisons. The Bureau of Prisons, in turn, developed a program statement articulating things that in its opinion could constitute extraordinary and compelling reasons for sentence reductions.[2] Subject to age and the amount of their sentence prisoners had served, these situations included a terminal medical condition with a life expectancy of 18 months or less, a debilitating medical condition from which they will not recover, and the death and or incapacitation of a sole family caregiver. The readers of this publication will not be surprised that the Bureau of Prisons initiated compassionate release proceedings very infrequently. And unless the Bureau initiated, Courts were powerless to act.

The statutory structure for compassionate release sentence reductions was changed meaningfully as one of the provisions of the First Step Act. Effective December 18, 2018, for the first time in the history of compassionate release, the amended statute allowed compassionate release reductions in sentences to happen "upon motion of the defendant."[3] Subject to an exhaustion/waiting period requirement, under which prisoners are required to ask their Warden for a sentence reduction and wait for thirty days before accessing the courts, federal prisoners have been able to seek compassionate release sentence reductions directly from the courts since December 2018. The statute now allows judges to reduce the term of imprisonment if extraordinary and compelling reasons warrant such a reduction, after considering the basic

[1] 18 U.S.C. § 3582(c), enacted October 12, 1984 and effective October 12, 1987.
[2] BOP Program Statements 5050.50.
[3] 18 U.S.C. § 3582(c)(1)(A).

sentencing considerations,[4] with the additional evaluation of considerations of any post-sentence developments, including rehabilitation.[5]

Notably, the compassionate release statute also requires a finding that the reduction is "consistent with applicable policy statements issued by the Sentencing Commission."[6] For its part, the Sentencing Commission offered such guidance as it has chosen to provide before the First Step Act's modifications to the compassionate release statute. Meaning that the Commission and Guidelines do not address the First Step Act. This guidance, a policy statement and application notes appearing at U.S.S.G. § 1B1.13, defined extraordinary and compelling reasons for sentence reductions in terms only slightly more expansive than those expressed by the Bureau of Prisons.

The First Step Act's expansion of prisoner access to the courts in pursuit of compassionate release sentence reductions saw a noticeable but mild increase in compassionate release litigation.

COVID-19

And then the virus hit. Unsurprisingly, given the inability to accomplish anything like social distancing in prison environments and the unavoidability of staff-driven disease vectors both into and within prisons, the past year has seen explosions of prisoner infection rates in federal and state prison facilities. Early outbreaks at Elkton FCI (Ohio) and Oakdale FCI (Louisiana) were followed by outbreaks in dozens and dozens of federal prison facilities including Waseca FCI, Sandstone FCI, and Duluth FPC. The term 'outbreak' does not do justice to the violence of which the virus hit the incarcerated. Over the course of a few weeks, infection rates went from a small handful of prisoners to many hundreds. As an example, the arrival of the virus at Seagoville FCI (Texas) saw seven cases in late June 2020, which grew to 1,282 cases one month later. Similar outbreaks were experienced at various times throughout the federal and state prison systems. Over the course of the past year, a number of federal prison facilities have seen this process replicated twice and even three times. Adjusting for age and sex distributions within prison populations, the death rate for infected prisoners is three times higher than in the general population.[7]

As the virus spread through the population generally, deepening understandings of medical conditions that put people at increased risk of death or serious consequences, should they become infected, became known and articulated. Though far from the only entity to express conclusions on this point, the Centers for Disease Control have outlined medical risk factors since the early days of the pandemic. Although these have shifted some over time, for the most part the CDC divided risk factors into three (3) categories: medical conditions that put people who have them at risk of death or serious complications (such as cancer, heart disease, diabetes II), conditions that might put people who have them at risk (such as moderate to severe asthma, and diabetes I) and, by definition, everyone else.

This combination - the explosion of the virus in federal prison facilities, a statute that allows prisoners to seek court-ordered sentence reductions directly, and objectively verifiable medical conditions that put people who have them in harm's way - led to an explosion of compassionate release litigation, in the District of Minnesota and federal courts across the country.

[4] 18 U.S.C. § 3553(a).
[5] Pepper v. United States, 562 U.S. 476 (2011).
[6] 18 U.S.C. § 3582(c)(1)(A).
[7] *See* COVID-19 Cases and Deaths in Federal and State Prisons, https://jamanetwork.com/journals/jama/fullarticle/2768249.

District of Minnesota

Beginning in March 2020, the components of the federal court system in Minnesota began a collaboration to address these intersecting phenomena. The Federal Defender, U.S. Attorney, Clerk of Court, and U.S. Probation Offices developed a compassionate release screening protocol that was approved by the bench and that went into operation in mid-April. The screening protocol had several distinguishing characteristics. First, it cast a wide net. Any inquiry made by or on behalf of any prisoner serving a federal sentence that was imposed in the District of Minnesota would start an investigation. Through the collaborative process outlined in the screening protocol, defense and prosecution representatives are able to receive prompt access to Bureau of Prisons medical records, through the Probation Office. The challenge is to effectively and efficiently deal with a collection of cases that involves both high volume and high stakes. This access, often obtained in as little as a day or less, is essential to the screening process the system has observed over the course of the past year. The screening process has allowed the parties to identify those prisoners most at risk and to accelerate the investigation and litigation of their cases.

Each of the constituent entities identified and designated personnel for the CR screening process.[8] However, important decision points were occupied by the original sentencing Judge, if still active, and the line assistant United States Attorney, if still in the office. In some cases it has been possible to reach consensus to a sentence reduction. Most cases, however, led to expedited litigation. Dozens of lawyers on the CJA panel have stepped up and taken and litigated cases, very often to successful conclusions. Dozens and dozens of prisoners have been released. The successful conclusion of compassionate release motions affords defense counsel the opportunity to tell complete strangers and their families that they are going home, often years sooner than anticipated. Nice work if you can get it.

The Future

Initially, the expectation had been that this flurry of CR litigation would be limited by the course of the virus itself. That is, that it would begin with the first cases of the virus in federal prison facilities, and that it would end with the widespread vaccination of prison populations, something that is still pending. Court decisions interpreting the statutes and guidelines outlined above, to the contrary, will keep compassionate release proceedings with us through the foreseeable future. First, a number of the Courts of Appeal have held that the Sentencing Commission's policy outline at U.S.S.G. § 1B1.13 is not exclusive.[9] Effectively, what is extraordinary and compelling is whatever is extraordinary and compelling to the eye of the judicial beholder. Claims that a case presents extraordinary and compelling circumstances, and the scope of those potential circumstances, are therefore limited only by the creativity of the litigant. Increasingly, claims of procedural unfairness resulting in excessive sentences that had previously merely augmented COVID-based medical claims, are now being made in stand-alone support of compassionate release motions. As will be discussed in a follow-up article, Judge Schiltz issued a recent order denying one such motion that can fairly be characterized as unwelcoming to non-medical

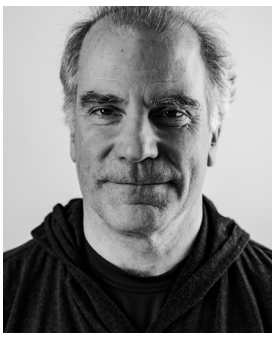
[8] Federal Defender personnel: Assistant Federal Defenders Andrew Mohring, Keala Ede, Lisa Lopez, Sarah Weinman, and Assistant Paralegal, Haley Knopik. U.S. Attorney's Office: Assistant U.S. Attorney, Kate Buzicky; Clerk of Court: Operations Manager, Lou Jean Gleason, and Assistant Operations Manager, Michael Vicklund. U.S. Probation Office: Deputy Chief U.S. Probation Officer, Darren Kerns, Michael Schmidt, Supervising U.S. Probation Officer, Sharon Rose-Mitchell, Support Specialist.

[9] See e.g., *United States v. McGee*, 2021 WL 1168980 (10th Cir March 29, 2021), joining the second, fourth, sixth, and seventh circuits.

claims of extraordinary and compelling circumstances.[10] Although the volume of compassionate release motions has slowed, we can reasonably expect the phenomenon of compassionate release claims to continue.

Finally, the phenomenon of compassionate release motions has an additional largely unintended component. By definition, in every instance where a request for a compassionate release reduction in sentence is made, the parties making it and the Judge receiving it each have the opportunity to reconsider the original sentence, both on its own terms and in light of whatever has happened in the time since it was imposed. This opportunity to reconsider and to reevaluate the original sentence is built into the process. As such, the compassionate release process, accelerated by the FSA's giving prisoners direct access to the Courts in its pursuit and the arrival of the COVID-19 pandemic, presents a vehicle for the application of what has come to be called Second Look Sentencing, whether intended or not. An expanded discussion of Second Look Sentencing will appear in the next issue of this magazine. ■

About Andrew Mohring



Andrew Mohring is a partner at Goetz & Eckland P.A. and a former Assistant Federal Defender and First Assistant, practicing in the areas of criminal defense and plaintiff's civil rights litigation.

[10] See *U.S. v. Logan* 97-cr-099(3) (PJS/RLE) (ECF 432).

One team, one result: Success.

Digital Forensics | Private Investigations | Forensic Accounting

The partnership between CFS and 360 provides clients with a comprehensive and seamless team-based approach to investigations and security. 360 and CFS are proud to profile Mike Carlson.

Mike Carlson is an Associate Director at 360 Security Services (360) and helps lead 360's investigative relationships with our legal community and corporate partners. Mike also liaisons between CFS and 360, bridging digital forensic needs with traditional investigative needs. Mike is a 31-year veteran of Law Enforcement. He began his career in 1987, working on a Metro Area Narcotics Task Force. In 1988, Mike began working for the Minneapolis Police Department. During his 19-year career with Minneapolis, Mike was Commander of the Homicide Unit, the Narcotics Unit, as well as the Organized Crime Unit. In 2007 Mike went to the Hennepin County Sheriff's Office (HCSO) where he served as Chief Deputy, the highest-ranking appointed law enforcement officer. As Chief Deputy, Mike led the day-to-day operations of the Sheriff's Office to include managing 820 personnel and a budget of $110 million. Mike served as Incident Commander during the 35W Bridge collapse in 2007, the 2008 Republican National Convention, and Super Bowl LII, as well as overseeing the Hennepin County Crime Lab as it received International Accreditation. Additionally, during his tenure in the Sheriff's Office, Mike created and implemented the Violent Offender Task Force (VOTF) which conducted proactive investigations on the County's most violent offenders. Mike spearheaded the creation of the Criminal Information Sharing and Analysis Unit (CISA), providing predictive policing services and criminal analysis to law enforcement agencies throughout the region. 360 and CFS are excited to have Mike available as a resource for their clients.