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Message From the Chaiir

It is my distinct pleasure to provide a brief introduction to four articles that once again demonstrate the valuable thought leadership we are committed to providing our members. The first article by Kevin King, a 2015 graduate of U.C. Hastings law school, is an excellent example of the thoughtful work being done by the next generation of legal analysts. Mr. King's article is a detailed analysis of juveniles' privacy rights in the context of social media and probation conditions. The second article by Mr. Thomas Weathers shines a bright light on a unique cannabis legal quandary: "Uncharted Territory: Tribal Medical Marijuana in California." Ms. Azar Elihu's article provides a very pragmatic analysis of current California law regarding expungement of criminal convictions. The final article is the excellent work of yet another law student, Ms. Ashley Robertson, Stanford Law class of 2016. Ms. Robertson's article makes a strong argument for the necessity of differentiating among psychiatric disorders in furtherance of criminal justice.

On behalf of the Criminal Law Section Executive Committee of the State Bar of California, I thank the authors and our members for their continued dedication to excellence in law. As this is my final "Message from the Chair," I want to personally thank the Executive Committee members and State Bar staff for their incredible support and partnership over the last year.

Teresa M. Caffese
Chair

The Editors of the Criminal Law Journal take great pride in publishing the following article, which was authored by Kevin King, a law student at the University of California, Hastings College of the Law. Mr. King won one of four Honorable Mention Prizes in the 2015 Competition for Student Papers in the Criminal Law and/or Criminal Procedure, sponsored by the Criminal Law Section of the State Bar.

The judges of the writing competition were impressed by the quality and caliber of entries in this year's competition and offer their gratitude and encouragement to those students, from law schools throughout the country, who submitted articles. All law students are cordially invited to participate in the 2016 Competition.

Protecting Juveniles' Privacy Rights: Proper Probation Condition Analysis in the Wake of *Riley v. California*

By Kevin King*

I. Introduction

As social media use has risen generally, so has law enforcement use of social media for investigative purposes.[1] Over eighty percent of law enforcement officials use social media as an investigative tool.[2] Social media investigation gives law enforcement officials the ability

The views and opinions expressed in the articles are those of the authors and do not necessarily reflect the official policy or position of the Criminal Law Journal or the Criminal Law Executive Committee.

to identify and gather information on suspects, identify a suspect's location, gather incriminating evidence, and prevent mob crimes.[3] Courts may facilitate this ability by ordering search conditions for electronics and social media. For instance, a court may order an all-access, electronics search condition for a probationer who perpetuated a sex offense through the Internet.[4] The probationer is ordered to surrender all electronics and social media passwords to the probation department, which may monitor the probationer's activity for compliance.[5]

California courts, in particular, have applied all-access, electronics and social media search conditions (hereinafter "electronics search condition") to juveniles.[6] Such a condition may be appropriate where there is a nexus between the underlying offense and electronics/social media use. However, as enumerated in *Riley v. California*, the grave privacy interest in an individual's electronics use requires careful consideration of law enforcement intrusion.[7] The risk of intrusion is magnified with juveniles given their high frequency and volume of social media and electronics use.[8]

Thus, if there is no nexus between the underlying offense and a juvenile's electronics and social media use, an electronics search condition should not be imposed.

II. Under the *Lent* Standard, for an Electronics Search Condition to Be Valid, There Must Be a Nexus Between the Underlying Offense and the Condition

In California, the juvenile court may "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced."[9] When fashioning probation conditions, the juvenile court should consider both the juvenile's entire social history and the circumstances of the crime.[10]

The court's discretion in probation sentencing is not boundless.[11] Under *Lent, a* probation condition is invalid if it "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . '"[12] This standard also applies to juvenile cases.[13]

The California Court of Appeal has applied the *Lent* standard in *People v. Ebertowski* and *People v. Pirali*.[14] In *Ebertowski*, the defendant was placed on probation after pleading no contest to criminal threats and resisting an officer for the benefit of a gang.[15] The court imposed probation conditions requiring the defendant to:

> (1) 'provide all passwords to any electronic devices, including cell phones, computers or notepads, within [his] custody or control, and submit such devices to search at any time without a warrant by any peace officer' and (2) 'provide all passwords to any social media sites, including Facebook, Instagram and Mocospace and to submit those sites to search at any time without a warrant by any peace officer.'[16]

In requesting these conditions, the prosecutor stated the conditions "should be imposed here [because] the defendant has used social media sites historically to promote the Seven Trees Norteno criminal street gang. Those documents were provided in discovery, delivered by MySpace to the District Attorney's office pursuant to a subpoena duces tecum." [17] In holding that the probation condition was reasonable, the court explained as follows:

> The password conditions were related to these crimes, which were plainly gang related, because they were designed to allow the probation officer to monitor defendant's gang associations and activities. Defendant's association with his gang was also necessarily related to his future criminality. His association with his gang gave him the bravado to threaten and resist armed police officers. The only way that defendant could be allowed to remain in the community on probation without posing an extreme risk to public safety was to closely monitor his gang associations and activities. The password conditions permitted the probation officer to do so.[18]

In *Pirali*, the court placed the defendant on probation after pleading no contest to felony possession of child pornography.[19] The court imposed the following probation conditions:

> You're not to enter any social networking sites, nor post any ads, either electronic or written, unless approved by probation officer [sic].
>
> You're to report all personal e-mail addresses used and shall report Web sites and passwords to the probation officer within five days.
>
> You're ordered not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer.
>
> You are not to have access to the Internet or any other on-line service through use of your computer or other electronic device at any location without prior approval of the probation officer. And shall not possess or use any data encryption technique program.[20]

On appeal, the defendant challenged the conditions as unconstitutionally overbroad.[21] The court reasoned that fact-specific analysis, challenging reasonableness, was forfeited and only ruled on facial constitutionality.[22] The court concluded that the conditions were not overbroad because they did not constitute a blanket prohibition on Internet use.[23]

Both *Ebertowski* and *Pirali* involve a strong nexus between the electronics search condition and the underlying offense, which satisfies the first prong of the *Lent* standard. Both

defendants had historically used social media and electronics for purposes directly related to their offense. It also follows that the conditions were directly related to preventing future criminality, which satisfies the third prong of the *Lent* standard.

In sum, the following reasonableness analysis applies when the court imposes an electronics search condition on a juvenile. Applying the *Lent* standard, there must be a relationship between the underlying offense and the condition. As in *Ebertowski* and *Pirali*, an electronics search condition may be appropriate to curb gang activity and sexual predatory activity. Absent such a clear nexus, an electronics search condition fails the first prong of the *Lent* standard. Applying the second prong, electronics search conditions relate to conduct that is not itself illegal. Using electronic devices and social media is not illegal. In fact, using such devices is protected because it implicates privacy and freedom of expression rights.[24] Lastly, an electronics search condition must be *reasonably* related to future criminal activity. In turn, generalizations that minors use electronics and social media to perform or broadcast illegal conduct are not sufficient to meet this standard. There must be some evidence that the juvenile had previously used electronics and social media for illegitimate purposes.

III. An Electronics Search Condition Must Be Narrowly Tailored to Limit the Impact on a Juvenile Probationer's Privacy Rights

Although the court enjoys broad discretion in formulating conditions of probation, that discretion is not limitless.[25] A probation condition that infringes upon a probationer's constitutional rights is subject to additional scrutiny. If a probation condition restricts the probationer's constitutional rights, then (1) it must be narrowly tailored to serve the interests of public safety and rehabilitation and (2) it must be narrowly tailored to the individual probationer.[26] In *In re White*, the court applied this standard. In *White*, the defendant was convicted of soliciting an act of prostitution.[27] The court granted her probation and imposed the following condition: "Not to be present within the following designated areas at any time, day or night, or be present upon either side of any street which is a border of such area."[28] The defendant challenged the condition as an unconstitutionally overbroad violation of her right to travel.[29] The defendant stated she had several friends and family members in the restricted areas, previously frequented restaurants in the area, previously used a bus station in the area and had difficulty taking her children to the local park and zoo because it bordered one of the restricted areas.[30]

The court held that the blanket restriction on certain areas was unconstitutionally overbroad and violated the defendant's right to travel.[31] The condition was "unduly harsh and oppressive" because it encompassed perfectly legal activities that had no relation to the underlying charge.[32] The court noted that there were less restrictive alternatives to meet the state's goal of rehabilitation.[33]

The gravity of a juvenile probationer's privacy interest in their electronics use cannot be overstated. While it may be argued that a electronics search condition is no different from traditional search conditions, the United States Supreme Court, in *Riley v. California*, made it clear that cell phone data differs from other physical object/records in both a qualitative and quantitative sense.[34] Ninety percent of American adults and seventy-eight percent of teens carry cell phones on their person, which contain an immense amount of private information.[35] Cell phones contain a digital record of nearly every aspect of the carrier's lives.[36] Internet browsing history can reveal the carrier's most private interests and concerns, such as medical issues, political affiliation, and religious views.[37] Cell phone data also reveals the carrier's location, which can allow probation officers to precisely reconstruct a probationer's movements.[38] Such tracking can reveal a carrier's "familial, political, professional, religious and sexual associations."[39] Additionally, most cell phones have application software capability, which allow carriers to use tools ("apps") for managing private, detailed formation.[40] For example, there are apps tailored for political affiliation, addiction treatment, tracking pregnancy symptoms, budgeting, and romantic life.[41] The average smart phone user has an average of thirty-three such apps and "[Fifty-eight percent] of all teens have downloaded apps to their cell phone or tablet computer."[42]

The privacy interest in a carrier's cell phone is magnified by the immense storage capacity.[43] "The current top-selling smart phone has a standard capacity of [sixteen] gigabytes [which] translates to millions of pages of text, thousands of pictures, or hundreds of videos."[44] This storage capacity has several interrelated privacy consequences.[45] For instance, cell phones contain several types of information, such as bank records, notes, address books, contact history, videos and pictures, which can reveal more in conjunction with one another.[46] Also, cell phone data can span several years back and a carrier's life can be reconstructed with all of the above information.[47] Again, location storage and increasingly popular photo/video sharing, labeled by time, location and description, make tracking a carrier's life very easy.[48]

As Justice Sotomayor noted in *United States v. Jones*, "[a]wareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."[49] An all-access electronics search condition gives probation departments the power to access a probationer's most intimate details: their every move, association, political, religious and sexual expression and thought. The juvenile would not be able to have private conversations with friends or discuss particular issues with groups of friends freely. Every electronic message sent (e-mail, text and social media), every Facebook post, every Facebook comment, every Instagram photo post, every Instagram comment, every Twitter post, every typed word and every click would

be subject to probation department scrutiny. An electronics search condition, that places no limit by time, medium or category, exacerbates the potential for intrusion and abuse.

Given a probationer's privacy interest in their location history, conversations, associations (familial, intimate, religious, political), expression and speech, an electronics search condition must be narrowly tailored for the purposes of public safety and rehabilitation. An all-access electronics and social media probation condition is far too sweeping and runs the risk of being "unduly harsh and oppressive." Such a condition is more infringing because, unlike adult probationers, juveniles do not have the right to refuse the condition due to their minor status.[50] There are often less restrictive alternatives to meet the state's goal of rehabilitation and public safety, including a standard search condition. Lastly, an electronics search condition must be narrowly tailored to each individual juvenile. There must be a relation between the underlying offense and the condition. Courts must properly apply this standard, in full, for equitable dispositions in juvenile justice.

IV. An Electronics Search Condition Poses a Risk of Illegal Eavesdropping Under the California Invasion Of Privacy Act

In 1969, the California legislature declared the following: "[A]dvances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and . . . the invasion of privacy resulting from the continual and increasing use of such devices and techniques *has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.*"[51]

It is illegal to use a recording device to eavesdrop on or record private, confidential communications without the consent of all parties involved. Electronic communication is covered under this offense.[52] In *People v. Nakei*, the defendant argued that his Yahoo! chat dialogue with another individual constituted confidential information, and that, accordingly, that individual unlawfully recorded their dialogue without his consent.[53] Though the court held that, given the circumstances, the defendant did not have a reasonable expectation of privacy in the communication, the court noted that (1) Cal. Penal Code § 632 applies to electronic communication, including both typed dialogue and images and (2) taking screenshots of a computer monitor and printing chat dialogues constitutes a "recording" with a "recording device" for the purposes of the statute.[54]

Additionally, electronics users can have a reasonable expectation of privacy in their communications. In *In re Yahoo Mail Litig.*, the plaintiffs sued Yahoo! Inc. for both California (Cal. Penal Code § 631) and federal (18 U.S.C. § 2511(1)(a)) wiretapping violations, which stemmed from Yahoo! Inc.'s practice of scanning and analyzing emails of non-Yahoo Mail users.[55] Though the court held that the plaintiffs did not allege their expectation of privacy with enough specificity, it still "conclude[d], as others have, that there can be a legally protected privacy interest or reasonable expectation of privacy in any confidential and sensitive content within emails."[56]

Text messages and social media messaging are functionally equivalent to e-mail: they are sent from one user to one or more others, from a password protected device/account, and they are not open to the general public.[57] Thus, individuals with whom juveniles communicate have the same reasonable expectation of privacy in their text messages and social media messages.[58] In *State v. Hinton*, the Washington Supreme held that the defendant had a reasonable expectation of privacy in text messages that he sent to a third party.[59] The court held that an officer, who possessed a text message recipient's phone, and subsequently intercepted the text messages, violated the sender's privacy rights.[60] Additionally, In *City of Ontario v. Quon*, the United States Supreme Court assumed, without deciding, that the plaintiff had a reasonable expectation of privacy in text messages that he sent via a pager provided by the City.[61]

Electronics search conditions, allowing probation departments to monitor a juvenile's electronic activity, pose a risk of illegal eavesdropping. "Texting dominates teens' general communication choices."[62] About seventy-five percent of all teens text, sixty-three percent use text to communicate with others daily and twenty-nine percent of all teens exchange messages through social media.[63] As noted earlier in this section, the California Invasion of Privacy Act was created to curb threats to the exercise of this personal liberty. Given the likely frequency and volume of a juvenile probationer's electronic communication with others and the parties' privacy interest in that confidential communication, an electronics search condition allows for a grave privacy intrusion without limitation. In addition to accessing the communication, there is potential for probation departments to intercept and engage in communication with third parties as in *Hinton*. For these reasons, electronics search conditions must be imposed and utilized scrupulously. Otherwise, individuals with whom juvenile probationers communicate may have civil claims against the state for Cal. Penal Code § 632 violations.[64]

V. Conclusion

After *Riley v. California*, courts should reconsider jurisprudence in light of the grave privacy interests implicated from electronics and social media use. To account for the privacy interests of juvenile probationers, the courts must undertake stringent analysis to determine whether electronics search conditions are appropriate. That analysis includes reasonableness under the *Lent* standard and constitutional overbreadth. This is especially important given that probation department abuse may leave the state liable for illegal eavesdropping under the California Invasion of Privacy Act. Precedent is necessary to strike a balance between rehabilitating juveniles, while still respecting their privacy rights in their electronics and social media use.

(Endnotes)

* Kevin King is a 2015 J.D. Candidate at the University of California, Hastings College of the Law.

1. *See generally*, U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES, SOCIAL MEDIA AND TACTICAL CONSIDERATIONS FOR LAW ENFORCEMENT (May 2013), *available at* http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/social%20media%20and%20tactical%20considerations%20for%20law%20enforcement%202013.pdf; U.S. DEPARTMENT OF HOMELAND SECURITY, PRIVACY COMPLIANCE REVIEW OF THE NOC PUBLICLY AVAILABLE SOCIAL MEDIA MONITORING AND SITUATIONAL AWARENESS INITIATIVE (Nov. 8, 2012), available at http://www.dhs.gov/sites/default/files/publications/privacy/PCRs/PCR%20NOC%20Situational%20Awareness%20Initiative%20(FINAL)%2020121108.pdf.
2. LEXISNEXIS RISK SOLUTIONS, SOCIAL MEDIA USE IN LAW ENFORCEMENT 2 (Nov. 2014), *available at* http://www.lexisnexis.com/risk/downloads/whitepaper/2014-social-media-use-in-law-enforcement.pdf.
3. *Ibid*.
4. People v. Pirali, 159 Cal. Rptr. 3d 335 (Ct. App. 2013).
5. *Id*. at 338.
6. See generally In re J.S. (2013) 158 Cal. Rptr. 3d 888; In re Paige W., 2015 WL 765402; In re Andre B., 2012 WL 5353806.
7. 134 S. Ct. 2473 (2014).
8. PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, TEEN FACTS SHEET (2014), *available at* http://www.pewinternet.org/fact-sheets/teens-fact-sheet.
9. WELF. & INST. CODE § 730(b) (West 2014).
10. In re Todd L., 169 Cal. Rptr. 625, 629. (Ct. App. 1980).
11. People v. Keller, 143 Cal. Rptr. 184, 187 (Ct. App. 1978).
12. Lent, 124 Cal. Rptr. at 908.
13. In re T.C., 93 Cal. Rptr. 3d 447, 454 (Ct. App. 2009).
14. 176 Cal. Rptr. 3d 413 (Ct. App. 2014); 159 Cal. Rptr. 3d 335 (Ct. App. 2013).
15. Ebertowski, 176 Cal. Rptr. 3d at 415.
16. *Id*. at 416.
17. *Ibid*.
18. *Id*. at 418-419.
19. Pirali, 159 Cal. Rptr. 3d at 337.
20. *Id*. at 338.
21. *Id*. at 337.
22. *Id*. at 340.
23. *Id*. at 343-343.
24. Riley, 134 S. Ct. at 2494-2495 ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' [citation]. The fact that technology now allows an individual to carry such information in [their] hand does not make the information any less worthy of the protection for which the Founders fought."); In re Englebrecht, 79 Cal. Rptr. 2d 89, 96 (Ct. App. 1998).
25. Keller, 143 Cal. Rptr. at 187.
26. In re Babak S., 22 Cal. Rptr. 2d 893, 897 (Ct. App. 1993).
27. 158 Cal. Rptr. 562, 564 (Ct. App. 1979).
28. *Id*. at 564.
29. *Ibid*.
30. *Ibid*.
31. *Id*. at 566.
32. *Ibid*. at 566.
33. *Id*. at 568.
34. Riley, 134 S. Ct. at 2489-2490.
35. *Ibid*; MARY MADDEN, ET AL., PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, TEENS AND MOBILE APPS PRIVACY: MAIN FINDINGS 3 (Aug. 22, 2013), *available at* http://www.pewinternet.org/2013/08/22/main-findings-3.
36. Riley, 134 S. Ct. at 2490.
37. *Ibid*. MAEVE DUGGAN AND AARON SMITH, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, CELL INTERNET USE 2013 2 (Sept. 16, 2013), *available at* http://www.pewinternet.org/2013/09/16/cell-internet-use-2013 (Sixty-three percent of cell phone users use their phones to access the internet.).
38. Riley, 134 S. Ct. at 2490; KATHRYN ZICKUHR, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, LOCATION-BASED SERVICES 2 (Sept. 12, 2013), *available at* http://www.pewinternet.org/2013/09/12/location-based-services (Cell phone *service usage* also reveals location: "[Seventy-four percent] of adult smartphone owners ages 18 and older…use their phone to get directions or other information based on their current location… Among adult social media users ages [eighteen] and older, [thirty percent] say that at least one of their accounts is currently set up to include their location in their posts…Some [twelve percent] of adult smartphone owners say they use a geosocial service to "check in" to certain locations or share their location with friends.").
39. United States v. Jones, 132 S. Ct. 945, 955 (2012).
40. AARON SMITH, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, SMARTPHONE OWNERSHIP 2013 2 (June 5, 2013), *available at* http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013.
41. Riley, 134 S. Ct. at 2490.
42. *Ibid*. MADDEN, supra note 35, at 3.
43. Riley, 134 S. Ct. at 2489.
44. *Ibid*.
45. *Ibid*.
46. *Ibid*.
47. *Ibid*.
48. *Ibid*. MAEVE DUGGAN, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, PHOTO AND VIDEO SHARING GROW ONLINE 2 (Oct. 28, 2013), *available at* http://www.pewinternet.org/2013/10/28/photo-and-video-sharing-grow-online.
49. Jones, 132 S. Ct. at 956.
50. In re Tyrell J., 32 Cal. Rptr. 2d 33, 41 (Ct. App. 1994).
51. CAL. PENAL CODE § 630 (West 2014).
52. CAL. PENAL CODE § 632 (West 2014).
53. 107 Cal. Rptr. 3d 402, 413-414 (Ct. App. 2010).
54. *Id*. at 418.
55. 7 F. Supp. 3d 1016, 1020 (2014).
56. *Id*. at 1040.
57. R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp.2d 1128, 1142 (2012).
58. *Ibid*.
59. 319 P.3d 9, 12-16 (2014).
60. *Id*. at 816 (The officer posed as the recipient, engaged in communication with the sender and facilitated a drug sale between the two.).
61. 560 U.S. 746, 760 (2010).
62. PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT, TEEN FACTS SHEET (2014), *available at* http://www.pewinternet.org/fact-sheets/teens-fact-sheet.
63. *Ibid*.
64. *See generally*, Flanagan v. Flanagan 117 Cal. Rptr. 2d 574 (Ct. App. 2002) (The plaintiff had standing to sue the defendant for a Cal Pen. § 632 violation where she used a recording device on a third party's phone.).

UNCHARTED TERRITORY: TRIBAL MEDICAL MARIJUANA IN CALIFORNIA*

By Thomas Weathers**

Indian tribes are separate sovereigns similar to states. But, unlike states, Indian tribes are subject to federal control and oversight. While many states like California have legalized marijuana in some form despite a federal ban, it has been unclear whether Indian tribes can exercise that same power on their tribal lands.

In December 2014, the U.S. Department of Justice sought to clarify the issue in a Policy Statement Regarding Marijuana Issues in Indian Country distributed to Indian tribes. According to the Department, it will essentially treat tribes wishing to legalize marijuana the same as it treats states that have legalized marijuana. However, just as federal law still makes marijuana illegal in the states, the Department was quick to remind tribes that marijuana activity in Indian Country would also continue to be illegal under federal law.

Since 1970, it has been illegal under federal law to manufacture, distribute, dispense, or possess marijuana. Nevertheless, in November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996 (CUA) that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana for medical use. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001). But, the CUA left several questions unanswered.

So, in 2003, the California Legislature enacted the Medical Marijuana Program Act (MMPA) to address those open issues. *See Marin Alliance for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1147 (N.D. Cal. 2011). The MMPA allowed medical marijuana patients and primary caregivers to form collectives to mutually cultivate marijuana for medical purposes, and to allow cities, counties and other governing bodies to adopt and enforce rules and regulations about marijuana consistent with the MMPA. *See Qualified Patients Assn. v. City of Anaheim*, 187 Cal. App. 4th 734, 744 (2010). Qualified patients and primary caregivers could collectively grow marijuana in amounts necessary to meet their reasonable medical needs without risk of state prosecution for unlawful possession, cultivation, or possession for sale so long as they earned no profit and the local jurisdiction permitted it. *See City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 762 (2013); *People v. London*, 228 Cal. App. 4th 544, 554 (2014).

Following California's lead, almost two dozen states have now legalized marijuana in some form. Given this trend towards legalization in the states and inquiries from several Indian tribes, the federal government felt the need to address marijuana in Indian Country. So, in December 2014, the U.S. Department of Justice released its Policy Statement Regarding Marijuana Issues in Indian Country to provide guidance to tribes on the enforcement of federal criminal marijuana laws on tribal lands.

The Department confirmed that its policy with regard to Indian Country legalization and cultivation of marijuana would be consistent with that for states as set forth in an earlier policy memo. While marijuana activities continue to be illegal under federal law, the Department indicated it would be less likely to prosecute on tribal lands when those activities are authorized by a strong and effective tribal regulatory system and do not threaten the following federal priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing authorized marijuana activity from being used as cover or pretext for the trafficking of other illegal drugs or illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.

Tribal lands are not considered public lands or federal property for purposes of this policy statement.

This policy statement has led several Indian tribes, including many in California, to consider legalizing marijuana on their tribal lands. But, further complicating matters in California is the fact that California criminal law applies on tribal

lands in California. This has made the prospect of marijuana legalization in Indian Country in California complex and confusing. To minimize the risk of prosecution, a California tribe should comply with both California marijuana law and the U.S. Department of Justice policy statement—but even then might still be subject to criminal action. Until the federal government legalizes marijuana, this will all remain uncharted territory.

(Endnotes)

* Printed with permission from Marin County Bar Association.

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Dismissed or Expunged: Penal Code 1385 versus 1203.4

By Azar Elihu*

California criminal convictions may be erased from defendants' records in two ways, pursuant to Penal Code section 1385 or section 1203.4. Dismissals under these two sections are subject to different procedures and lead to different results.

Penal Code 1385(a) authorizes the judge on his own motion or upon the application of the prosecuting attorney to dismiss a case in furtherance of justice, and the reason for the dismissal must be set forth in the minute order. A case dismissed under this section is eradicated from the defendants' criminal records as it never existed, and cannot be used against them in subsequent prosecutions. "Dismissal under [Penal Code] section 1385 of the charge underlying a prior conviction operates, as a matter of law, to erase the prior conviction as if the defendant had never suffered the conviction in the initial instance." *People v. Haro* (2013) 221 Cal App.4th 718.

Penal Code 1203.4 known as the expungement statute authorizes criminal defendants to apply for dismissal of their case, by filing the Judicial Council Form CR-180, *Petition for Dismissal* (optional but commonly used). Expungements are only granted if applicants are not on probation on any case and have no pending criminal cases.

Unlike section1385 dismissals that are permanently erased from defendants' records and impose no economic obstacles and disclosure duties, section1203.4 dismissal of felonies can be used in subsequent prosecutions to increase prison sentences and carries certain disabilities that applicants ought to be notified of by the court. Sections 1203.4(a)(1) and (2) require trial courts to inform the applicants of their obligation to disclose the dismissed conviction in response to any direct question contained in any questionnaire or application for public office, for professional licensure, for contracting with the State Lottery Commission; and that they not allowed to have any firearm if the underlying conviction prohibited it.

In a recent unpublished opinion *People v. Duboise* (2014) B254601, 2nd Dist. Div.3 http://www.courts.ca.gov/opinions/nonpub/B251490.PDF, Duboise appealed, among other issues, his 14 years sentence, by challenging his 1999 felony conviction that was dismissed in 2008, but as a strike and a prior felony conviction, added nine years to his prison sentence. On appeal, the court of appeal dismissed that conviction with prejudice, reversing the nine years enhancement.

In 1999, Duboise had pleaded to felony criminal threats following a plea bargain with the district attorney who promised to dismiss his case after one year if the defendant obeyed all laws. Duboise did not pursue to dismiss that case until 2008.

Then in 2013 he was prosecuted on a new case in a Compton court and was convicted of assault and criminal threats with a knife, and his 1999 felony conviction was found true.

Throughout trial and sentencing of the new case, Duboise and his public defender insisted that the 1999 case was dismissed in 2008 and did not exist to increase his sentence, without presenting the file and records of the 1999 and 2008 hearings. Relying on a 2008 minute order which read "*case dismissed pursuant to section 1203.4 Penal Code,*" the trial court assumed the 1999 conviction was expunged without being reduced to a misdemeanor, and added a total of nine years to Duboise' sentence.

On appeal, we requested copies of the 2008 motions (*Motion to Dismiss (Specific Performance of Plea), Motion to Withdraw plea/Petition for Coram Nobis*) Duboise had filed to enforce his 1999 plea agreement, and the hearing transcripts of those motions. We found no reference to Penal Code 1203.4 and expungement nor to Penal Code 1385 in those records. The dismissal order also lacked the statement of reason required under section 1385. Nevertheless, the following evidence in those documents corroborated Duboise' contention that his 1999 case was vanished under section 1385, not section 1203.4:

In 2008 Duboise was not eligible for expungement since he was on probation on another case, he had not filed the Judicial Council Form CR-180, and the judge had not advised him of the disabilities imposed under 1203.4. Besides, the prosecution had not filed any opposition to Duboise' motions, nor did he pose any objection during the hearing of those motions. The court of appeal agreed with us that the critical evidence showing the 1999 conviction was dismissed and not expunged, was the judge's order: "*the plea is withdrawn and the case dismissed. That doesn't exist any more*". No statement of reason under section 1385 was required since the judge had not dismissed the case on his own motion, but had enforced the 1999 plea bargain between the parties. None of this evidence was introduced during Duboise' sentencing in 2013.

Prior felony convictions and prior prison terms lead to lengthy even life prison sentences for repeat offenders. Minute orders generated by court clerks, sometimes

weeks after the court hearings and by different clerks are not official and often do not accurately reflect the court proceedings. Before sentencing, criminal defense attorneys should carefully review the files and hearing transcripts of defendants' past felony convictions to ascertain their validity and prevent unauthorized lengthy sentences.

(Endnotes)

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Who Are the Mentally Ill? Why Lawmakers Must Differentiate Among Psychiatric Disorders

By Ashley Robertson*

The Editors of the Criminal Law Journal take great pride in publishing the following article, which was authored by Ashley Robertson, a law student at Stanford Law School. Ms. Robertson won one of four Honorable Mention Prizes in the 2015 Competition for Student Papers in the Criminal Law and/or Criminal Procedure, sponsored by the Criminal Law Section of the State Bar.

The judges of the writing competition were impressed by the quality and caliber of entries in this year's competition and offer their gratitude and encouragement to those students, from law schools throughout the country, who submitted articles. All law students are cordially invited to participate in the 2016 Competition.

> *"If we leave these homicidal maniacs on the street, they're going to kill,"*
>
> - Wayne LaPierre, NRA CEO
> (on the Aurora mass shooting)

After tragic shootings, the country often returns to a familiar refrain: we must help the mentally ill. A Gallup poll taken after the Aurora shooting revealed, "Americans fault the mental health system for mass shootings, even more than inadequate gun laws."[1] These conversations shed light on an at-risk population and also renew rallying cries for mental health reforms. For example, the May 2014 shooting in Isla Vista, California reignited concerns about mental illness, and lawmakers floated proposals that ranged from restricting a mentally ill person's gun rights to reinvesting in mental health care. In September 2014, California enacted AB 1014, a relatively mild firearms restriction that allows law enforcement to temporarily seize guns from "people determined by the courts to be a threat to themselves or others."[2] But any reform directed at the mentally ill raises a critical question: Who are "the mentally ill"?

That question is relevant for more than just high-profile shootings. In fact, "[n]early 1 in 5 people (18%) involved in [the United States'] correctional system suffers from mental illness" and prison mental health care is often woefully inadequate.[3] In 1990, mentally ill inmates challenged California's mental health care as unconstitutionally poor. After decades of litigation, the inmates won substantive victories for prison rights in *Coleman v. Wilson*[4] and its progeny, *Brown v. Plata*.[5] But *Coleman*'s lead litigator, Michael Bien, recently lamented that the reform largely left behind the group it meant to help.[6] Although California has downsized prisons, almost no offenders with serious mental illnesses have been released.[7] In fact, between April 2000 to September 2013, the total CDCR population decreased by 30,091 prisons (-19.6%), while the mental health population increased by 14,321 (73%).[8]

Not only are individuals with mental illness overrepresented in the prison population, but they are also more often placed in solitary confinement than average inmates and frequently receive additional infractions in prison as they struggle to adapt to such a structured setting.[9] Michael Bien highlighted one video that depicts a prison guard dousing a mentally ill inmate with pepper spray, as the anguished man screamed for help.[10] Bien argued that such episodes reflect systematic problems with California's prison system, noting "These guys were doing it according to the book, and if that's according to the book, there's something wrong."[11] California, however, is not anomalous among states. For example, one South Carolina judge recently found that "inmates have died in the South Carolina Department of Corrections for lack of basic mental health care."[12] Likewise, Colorado paid three million dollars in December 2014 to settle a lawsuit stemming from the death of Christopher Lopez, an inmate with schizophrenia.[13] Video footage revealed guards and nurses ignoring Lopez as he suffered two grand mal seizures and ultimately died facedown after six hours in shackles.[14]

These stories indicate that mental health care in state prisons is at a breaking point. But simply repeating cries to aid the "mentally ill" ignores that these people do not belong to a homogenous group. This Article provides a brief overview of the key subgroups that comprise the "mentally ill." The Center for Disease Control and Prevention defines mental illness as "disorders generally characterized by deregulation of mood, thought, and/or behavior, as recognized by the Diagnostic and Statistical Manual, 4th edition, of the American Psychiatric Association (DSM-IV)."[15] Using the DSM-IV's traditional categorizations as guideposts, I divide mental illnesses into Axis I and Axis II disorders. Historically, Axis I disorders encompassed clinical syndromes, while Axis II disorders included personality disorders. The most recent DSM-V consolidated Axis I and Axis II into a single classification, but this Article adopts these distinctions because lawmakers might still usefully distinguish between the two groups, at least to profile mentally ill offenders.

The Article then considers the causal link—or lack thereof—between mental illness and criminal offending. I caution that lawmakers should avoid two extremes: either viewing mentally ill offenders as hopelessly violent or completely autonomous in their actions. The Article concludes that

policymakers must understand these varying forms of mental illness and stop treating the "mentally ill" as one homogenous population. Otherwise, resulting reforms will remain too broad to be truly meaningful.

I. A Brief Background on Mental Illness

A. *Axis II: Antisocial Personality Disorder and Psychopaths*

Media outlets often use the "psychopath" label casually and interchangeably with derogatory terms like "maniac" or "madman." From a psychiatric perspective, however, the term connotes a very narrow subset of Antisocial Personality Disorder, or the "disregard for and frequent violation of the rights of others." Robert Hare's famous PCL-R, or psychopathy checklist, catalogues a variety of traits associated with the disorder, including "glib and superficial charm," "grandiose estimation of self," "lack of empathy," and "cunning and manipulative" behavior.[16] Looking at the 16-point criteria, a disconcerting picture emerges of a disturbed individual who can mask his mental disorder. While a "psychotic" patient might have readily visible delusions, a psychopath will typically be charming and lack any overt manifestations of his illness. In other words, he or she is difficult to identify.

In the novel *Columbine*, Dave Cullen presents an in-depth portrait of Eric Harris and Dylan Klebold, the two teenagers who killed thirteen peers in a Colorado school shooting.[17] Cullen compiles substantial evidence that Harris was a prototypical psychopath, who processed feelings in neurologically distinguishable way from typical humans and possessed an uncanny ability to charm those around him. Harris was receiving treatment and medication at the time of the mass shooting. He consistently charmed officers in his Juvenile Diversion program, who gave him glowing reviews after an earlier felony arrest, all while Harris posted on a website and plotted in his journal, "I feel like God . . . I will choose to kill."[18]

Eric Harris's story is eerily similar to the emerging portrait of Elliot Rodger, the Isla Vista shooter. Like Harris, Rodger documented his desire to kill in a 137-page manifesto posted immediately before the shootings.[19] Pundits have criticized his parents, the police, and mental health providers for failing to detain Rodger.[20] Those laments, however, underestimate the difficulty in detecting a psychopath or recognizing individuals with personality disorders. Unfortunately, even if lawmakers curtail the gun rights of the "mentally ill" or increase the ability to civilly commit individuals, they are unlike to help individuals like Harris or Rodger—both had already seen psychiatric professionals but failed to raise serious red flags. More likely, lawmakers will "catch" individuals with more obvious and transparent Axis I disorders.

B. *Axis I: Psychotic and Mood Disorders*

Axis I disorders include "serious mental illnesses," such as schizophrenia, major depressive disorder, and bipolar disorder. Schizophrenia, which often first manifests between the ages of 16-25, is "a specific type of psychosis marked by disturbances of thought, language and behavior not due to a primary mood disorder, substance use, or medical condition."[21] When the public imagines a "lunatic," they likely imagine a paranoid schizophrenic,[22] which is marked by "preoccupations with one or more delusions or frequent auditory hallucinations [that] tend to center around a theme," such as grandeur or persecution.[23] Seung-Hui Cho, the shooter in the "Virginia Tech Massacre," Jared Lee Loughner, the alleged shooter in Tucson, Arizona, and John Hinkley, the attempted assassin of Ronald Reagan, all suffered from schizophrenia.[24]

Meanwhile, Major Depressive Disorder is a form of mood dysregulation that often lacks a psychotic element. The DSM-V characterizes Major Depressive Disorder as including either a "depressed mood" or a "loss of interest and pleasure," and at least five qualifying symptoms "present during the same two-week period," including significant weight loss, insomnia, loss of energy, and feelings of worthlessness.[25] Dave Cullen portrays Dylan Klebold, the other Columbine shooter, as a "meek, self-conscious and authentically shy" adolescent, whose severe depression made him highly susceptible to peer influence.[26] Dylan toyed with suicidal ideas, and his disregard for his own life made murder more palatable. Dylan was also painfully passive: "[He] fanaticized about suicide for years without making an attempt. He had never spoken to the girls he dreamed of. Dylan Klebold was not a man of action. He was conscripted by a boy [Eric Harris] who was."[27]

Finally, Bipolar Disorder I features at least one major depressive episode that alternates with "manic" episodes. The National Institute of Mental Health defines a manic episode as an "overly long period of feeling 'high,' or an overly happy" or "extreme irritability."[28] Again, certain symptoms must be present, including grandiosity, flight of ideas, distractibility, and decreased need for sleep.[29] Although often treatable through medication, bipolar disorder usually does not manifest until early adulthood and is often initially difficult to identify.[30] Nathan Dunlap, who was 19-years-old when he killed four people in the so-called Chuck E. Cheese massacre in Aurora, allegedly suffers from bipolar disorder.[31] At Dunlap's trial, psychologist Suzanne Bernard testified that he was "in a manic rage . . . at the time of the murder."[32]

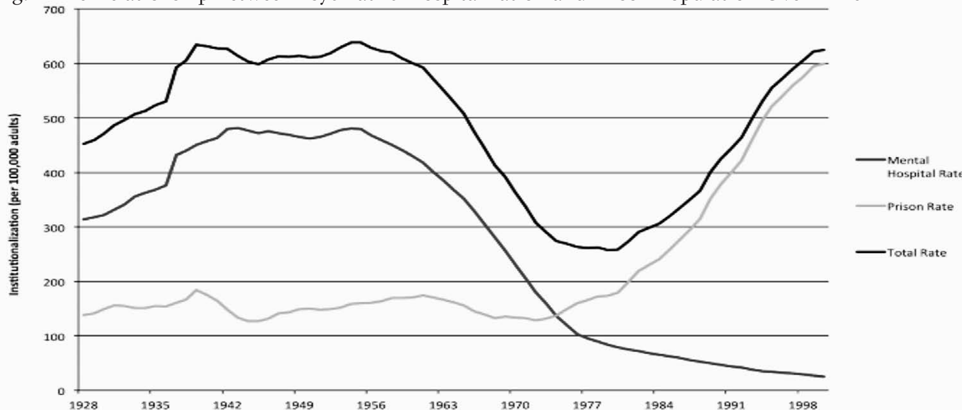
II. The (Often Missing) Link Between Mental Illness and Crime

High-profile shootings perpetuate certain myths about the mentally ill, including the largely false presumption that persons with mental illnesses are prone to violence. Although murderers like Eric Harris, Dylan Klebold,

and Nathan Dunlap become the face of their mental illnesses, researchers with the MacArthur Foundation have concluded that controlling for substance abuse disorder, "[t]he prevalence of violence among people who have been discharged from a [mental] hospital . . . is about the same as the prevalence of violence among other people living in their communities."[33] As noted above, mentally ill offenders are vastly overrepresented in prisons, which might lend credence to the "violent" mentally ill offender stereotype. In a 2012 study, Jennifer L. Skeem and Jilliam K. Peterson looked past that correlation and examined the causal link between serious mental illness and criminal offending.[34] They concluded that mental illness directly causes less than 10% of actual crimes, and they instead attributed criminal activity to the indirect relationship between disorders and offending, such as the increased likelihood of substance abuse.[35]

Skeem and Peterson's article highlights that lawmakers cannot simply solve the "mentally ill problem" through "reverse" transinstitutionalization, or shifting the mentally ill population from prison to mental institutions. The graph below illustrates the stark inverse correlation between the number of people in mental institutions and the number incarcerated:[36]

Fig. 1 The Relationship Between Psychiatric Hospitalization and Prison Population Over Time



The chart suggests that prison serves as a substitute for psychiatric hospitals. In a 2010 study, however, Seth J. Prins offers evidence that debunks the transinstitutionalization hypothesis:

a) Most people released from state psychiatric hospitals do not become incarcerated.

b) The characteristics of people with SMI in jails and prisons (largely African Americans in their 20s and 30s) differ from both the characteristics of people who were deinstitutionalized and the current state psychiatric hospital population (largely white, middle-aged men with a diagnosis of schizophrenia).

c) "Community-based treatment works for the majority of people with SMI."[37]

Prin's last point is critical: the majority of people with mental disorders are generally able to function effectively and contribute to their community.

Skeem and Peterson, however, might also misleadingly inflate the level of autonomy that mentally ill patients hold over their actions. Skeem and Peterson largely relied on their own empirical research, which found, "[o]nly 5 percent of mental illness manifested a pattern that was attributable to hallucinations, delusions and other symptoms of psychosis." They also cited Junginger et al.'s research, which concluded that only 8% of symptoms caused mental illness. But Junginger's study defined "a direct effect of serious mental illness … as the specific influence of concurrent delusions or hallucinations on the criminal offense identified in the police arrest report."[38] That definition examines an extremely narrow set of mental illness symptoms and excludes the vast majority of people who suffer from affective disorders, such as bipolar disorder or depression.

In a more recent article, Peterson and Skeem acknowledged, "[t]he distinction between symptoms of mental illness and 'normative' risk factors for crime becomes difficult once the definition of symptoms is broadened beyond psychosis."[39] For example, they noted that while many mood disorders include heightened anger, anger is also a "fundamental and functional human emotion" and they worried about "pathologizing a normal emotional state." But policymakers should also worry that by ignoring mental illness as an underlying cause, they will eschew the most effective way to treat anger in mentally ill people. Many mental disorders, after all, are simply extremes along the regular emotional continuum. While delusions and hallucinations may stand out to us as more distinctly "abnormal," extreme sadness (a universal emotion) forms one criteria of major depressive disorder. People with bipolar disorder can be completely asymptomatic and tranquil when outside of a manic cycle, but when they enter a hypomanic state, simple anger management techniques will not be efficacious. David Cullen's profile of Dylan Klebold illustrates the dangers of mood disorders like depression. Unlike Eric's journal, which focused on his superiority, Dylan's journal complains, "I wanted happiness!! I never got it!!! Let's sum up my life. [T]he most miserable existence in the history of time."[40] In a comprehensive study examining all school shooters from a 26-year period, the Secret Service "found that 78 percent of shooters had a history of suicide attempts or suicidal thoughts. Sixty-one percent had a documented history of extreme depression or desperation."[41]

Notably, when Skeem and Peterson replicated their study and included anger and impulsivity, 62% of the crimes committed by participants with bipolar disorder "were completely or mostly related directly to the symptoms." Quanbeck et al. provides a more in-depth examination of inmates with bipolar disorder.[42] They studied 66 Los Angeles inmates with clear bipolar diagnoses and found the majority was manic (74.2%) at the time of arrest. These bipolar inmates also disproportionately suffered from comorbid substance abuse (75.8%) compared to the general population (18.5%).[43] When examining the high comorbidity between inmates with bipolar disorder and substance abuse, it is tempting to diminish the role of bipolar disorder and emphasize the role of substance abuse, a common criminogenic need. For bipolar patients, however, substance abuse likely stems directly from their underlying mental disorder. Various studies have revealed that patients with bipolar disorder report using substances as self-medication, attempting "to reduce the intensity of their symptoms through alcohol and street drugs."[44] Without first treating bipolar disorder, the most effective substance abuse treatment might fail, as patients will face constant temptation to regulate their mood swings with alcohol or drugs. Skeem and Peterson highlight that most individuals with mental illness are not violent and that solely treating mental illnesses is insufficient to decrease rates of offending. But it is equally important to recognize that sometimes mental illness *does* cause criminal behavior, and these offenders require treatment for the disorder before they can fully capitalize on other counseling.

III. Conclusion

Mass shootings reignite fears and misunderstanding about the "mentally ill." Those same misconceptions surface in the criminal justice context, where states both over-incarcerate mentally ill offenders and mistreat them once in prison. The Stanford Three Strikes project recently found that people with mental illnesses receive disproportionately harsher sentences than those without a disorder.[45] The disparity likely stems in part from stereotypes that conflate the average mentally ill offender with an outlier like Elliot Rodger or Eric Harris. Ensuring appropriate punishment and treatment for mentally ill offenders requires acknowledging that sometimes the mentally ill are delusional and violent. More often, they are not. Ultimately, solving the "mentally ill" problem is impossible, just like curing all physical illnesses would be. But lawmakers *can* stop conceptualizing reforms in terms of aiding "the mentally ill," and start targeting specific mental disorders. If they begin differentiating along the vast spectrum of illnesses, vague rallying cries can become more concrete reforms to help specific individuals.

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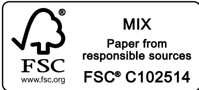

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