

# IN HOT PURSUIT of Federal Criminal Justice

## Message from the Chair

By Hartley M.K. West



On behalf of the Board of the Criminal Law Section, I want to express our excitement in reigniting and publishing the Spring 2018 In Hot Pursuit newsletter. It is with great appreciation that we recognize all of the members of our Section who have provided articles and case updates, and for all of those who have assisted with our continued efforts. Want to publish but didn't get your article finished in

time? No problem! We are always looking for new material. Please contact our Newsletter Co-Chair, Donna Coltharp: Donna.Coltharp@fd.org.

We are also pleased to report the resurgence of the Criminal Law Section Subcommittees. We are confident that these Subcommittees will enhance the value of your membership by building substantive programming, facilitating networking opportunities in your region and nationwide, and investing in the future leadership of the Section. As our Section continues to blossom and grow, you – our Membership – play a vital role in its success. The Corrections & Sentencing, Rules of Criminal Procedure & Evidence, Science & Technology, and Solo & Small Practitioners Subcommittees are currently accepting new members. If you practice or have a specialized interest in these areas, please contact Laura Conover at [laura@yourtucsonlawfirm.com](mailto:laura@yourtucsonlawfirm.com), and she will connect you with the appropriate Subcommittee Chair.

As always, I welcome your feedback and input on how our Criminal Law Section can better serve you. Please email any time at [Hartley.West@kobrekim.com](mailto:Hartley.West@kobrekim.com). •

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## “Advancing Clarity and Cooperation” – An Overview of the DOJ’s New FCPA Corporate Enforcement Policy

By Sarah Hyser-Staub & Maggie Meyers

On November 29, 2017, U.S. Deputy Attorney General Rod J. Rosenstein unveiled the Department of Justice’s (DOJ) latest Corporate Enforcement Policy on the Foreign Corrupt Practices Act (FCPA). The place and time were more than appropriate: Rosenstein’s announcement was made at the 34th International Conference on the FCPA, and 2017 marked four decades since Congress enacted the statute, which was the first effort by any country in the world to criminalize the bribing of foreign officials. The new Policy formalizes and builds upon many aspects of the DOJ’s previous FCPA Pilot Program, which explored how to best incentivize corporations to self-disclose FCPA violations committed by their employees. Fundamentally, the new Policy aims to clarify the terms and outcomes of voluntary disclosures and strengthen cooperation between the DOJ and private corporations in the complex struggle against global corruption. Although it is too early to say for sure, the policy appears to be achieving results.

### Evolution of the New Policy

The DOJ’s earlier Pilot Program, implemented April 5, 2016, was designed to test whether “promot[ing] transparency and accountability” in FCPA prosecutions would incentivize corporations to self-disclose violations. The Pilot Program required the DOJ to consider declining prosecution when the company met four criteria—self-disclosure, cooperation, remediation, and disgorgement of ill-gotten profits—essentially allowing corporations to trade their collaboration with the DOJ for possible leniency. This approach was undeniably successful: the DOJ received 30 voluntary disclosures of FCPA violations during the 18-month Pilot Program, compared to just 18 during the previous 18-month period. Moreover, the demonstrated willingness of corporations to weigh the pros and cons of disclosing wrongdoing—and to decide in favor of disclosure if the price is right—signaled that increased transparency and certainty in the DOJ’s decision-making process was a winning combination.

### Three Essential Differences between the Pilot Program and the Policy

The Policy, while building upon the success of the Pilot Program, features three essential differences: (1) a presumption of declination of prosecution; (2) increased leniency for corporations that do not qualify for declination; and (3) greater clarity concerning how the DOJ evaluates an appropriate compliance program for remediation credit. These improvements are intended to be powerful incentives for corporations to disclose, cooperate, and remediate according to the DOJ’s requirements, even if they do not qualify for declination.

Like the Pilot Program, the Policy requires companies seeking credit to disgorge, forfeit, and/or pay restitution for all monetary gain from their wrongdoing, which may be

satisfied by a parallel resolution with a regulating body like the Securities and Exchange Commission (SEC). However, instead of merely requiring the DOJ to consider declination for qualifying corporations, the Policy establishes a presumption of declination (in the absence of aggravating circumstances) for corporations that meet the DOJ’s standards of “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation.” Each of these requirements are set out in detail in the text of the Policy, adding to the increased certainty enjoyed by corporations weighing whether to disclose violations and seek leniency from the DOJ. The Policy also elaborates upon the aggravating circumstances that may overcome a presumption of declination, which include, but are not limited to: the involvement of the company’s executive management in the wrongdoing, the company making significant profit from the misconduct, the pervasiveness of the misconduct within the company, and criminal recidivism.

Even if the DOJ determines that aggravating circumstances exist, a company that has voluntarily disclosed the wrongdoing, fully cooperated, and timely and appropriately remediated will not go unrewarded. In this situation, the Policy requires the DOJ to recommend a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range, except when there is criminal recidivism. Furthermore, the Policy generally will not require appointing an independent monitor if the company has implemented an effective compliance program. If a company does not voluntarily disclose its misconduct, but later fully cooperates and timely and appropriately remediates, the Policy requires the DOJ to recommend a 25 percent reduction off the low end of the U.S. Sentencing Guidelines fine range. Accordingly, even companies that do not qualify for declination may nevertheless take advantage of the DOJ’s offerings of leniency.

The Policy also fleshes out the remediation requirement and the DOJ’s evaluation of a corporation’s compliance measures. The non-exhaustive hallmarks of an effective compliance and ethics program include: fostering a culture of compliance; dedicating sufficient resources to compliance activities; and ensuring that experienced compliance personnel have appropriate access to management and to the board.

### Initial Results are Promising

In his remarks last November, Deputy Attorney General Rosenstein prophesized that the Policy would “incentivize responsible corporate behavior and reduce cynicism about enforcement.” Indeed, the initial months of the Policy have been promising. Dun & Bradstreet received the first public declination explicitly citing the Policy on April 23, 2018, but the reverberations of the Policy have been felt since its announcement. The DOJ and SEC filed fewer FCPA enforcement actions in the first three months of 2018 than in any first quarter since 2014, and first quarter sanctions were

significantly lower than those imposed in any other first quarter period during the last decade. Six declinations were reported in the first quarter of 2018 alone, a pace that will easily surpass declinations under the Pilot Program if it continues.

Several companies have benefited from the Policy's other leniency provisions as well. In April 2018, Panasonic Avionics Corporation received a 20 percent reduction off the low end of its Sentencing Guidelines range and a deferred prosecution agreement (DPA) with a compliance monitor, after failing to self-report but later cooperating and remediating. In June, Société Générale received a 20 percent reduction, ultimately getting a DPA that does not include a compliance monitor. And in June, Legg Mason secured a non-prosecution agreement (NPA) from the DOJ, even though it chose not to self-disclose its alleged violations. After Legg Mason's extensive cooperation and remediation, the DOJ recommend a 25 percent fine reduction.

### Conclusion

Although results and implications continue to unfold, the DOJ's Corporate Enforcement Policy is further proof that the arc of white collar enforcement bends toward cooperation. Companies engaged in foreign business are advised to become familiar with the FCPA and the new Policy, and to consult with

counsel on compliance and strategy in the event of a violation.

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# Helping Incarcerated Individuals With Constitutional and Tort Claims Part 2: Opinion: The Doctrine of Qualified Immunity Operates Unfairly to Deprive Inmates of Constitutional Protections

By Ian Wallach

## Introduction

The purpose of this guide is to further provide a realistic assessment of available remedies— in tort or civil rights—to inmates who have been harmed while incarcerated. I believe that— because of the growth of the doctrine of qualified immunity—there are no longer viable claims to bring under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*) or Section 1983 for Eighth Amendment violations, and that soon the same will be true for Fourth Amendment violations. Practitioners should therefore look to state and federal tort claims acts to address conduct historically addressed by 42 U.S.C. § 1983 and *Bivens*.

The first portion of this guide addressed how to bring a claim under the Federal Tort Claims Act. This portion addresses the greatest threat to civil rights claims—the judicial adoption and expansion of “qualified immunity.”

## The Emergence of Qualified Immunity

The biggest impediment to an Eighth Amendment claim is the judicially created doctrine of qualified immunity. This doctrine is expanding such that it may likely soon swallow any Eighth Amendment claim brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (“*Bivens*”) or § 1983.

The words “qualified immunity” don’t appear in § 1983, or any related statute, or in *Bivens*. The doctrine was adopted by the Supreme Court in 1982, in *Harlow v. Fitzgerald*,<sup>1</sup> where the Supreme Court addressed whether absolute immunity would apply to a constitutional claim against high-level aides to the former President. The case had nothing to do with claims against police or corrections officers, or claims of excessive force or cruel and unusual punishment— *Harlow* concerned an Air Force employee who was terminated after testifying before Congress and brought a civil action against then-former President Nixon and his aides, alleging that his termination was retaliatory and violated his constitutional rights.<sup>2</sup> Although the issue was not before it, the Court addressed the multitude of constitutional claims being brought against lower-level government agents (such as police), the expense of defending them, and the chilling effect that the Court feared such actions would have on those trying to perform official duties.<sup>3</sup> So in addition to discussing whether absolute immunity was available to presidential aides, the Court also clarified the doctrine of “qualified immunity,” which had been relied on by some lower courts to allow defendants in § 1983 and *Bivens* actions to be immune from suit absent a showing that the right at issue had been clearly established.<sup>4</sup>

The *Harlow* Court stated that qualified immunity was necessary to protect government employees from baseless

claims and to not hinder their performance of official duties<sup>5</sup>—but did not discuss the impact that its creation would have on plaintiffs whose constitutional rights were injured and were pursuing valid claims. The Court did not define what “clearly established” meant, or what level of generality was required. As a result, defendants have been able to claim immunity for egregious or novel harms by defining the right at issue in such a particular manner that no precedent addressing that characterization exists.

This draconian remedy was judicially created in a case that did not concern the typical harms (like excessive force, false arrest, or cruel and unusual punishment) or typical defendants (present or former criminal defendants with valid constitutional claims). It’s unsettling that the Court was concerned with unfairness to officers defending against baseless claims, but not with unfairness to injured people bringing valid ones. And although the *Harlow* Court stated that “[b]y defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct,”<sup>6</sup> that’s precisely what happened.

The ugliness of *Harlow* is that, following the progress of Civil Rights gains, and in a single instant, in a case where those most affected were not represented, the Court shifted the focus of the inquiry of a constitutional claim from *what the victim suffered during the acts that formed the constitutional violation* to *what a reasonable person would be thinking when they committed the violation*—something never considered by the Supreme Court in *Bivens* or by Congress when enacting § 1983.

The Court’s most recent discussion of qualified immunity was in *Kisela v Hughes*, 138 S. Ct. 1148 (2018), where a police officer shot through a fence and wounded a mentally ill woman holding a knife. The officer stated that the victim lifted the knife as though she was about to attack another woman, but other officers did not recall this, and a witness described the victim as moving in a non-threatening manner. The Court summarized the facts thusly: “[w]hen Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after two commands to do so.” The Court stated that officers were responding to a call of Hughes acting erratically, and saw her and told her to drop the knife, and she looked calm but did not comply. The Court made a factual finding that Ms. Hughes heard the commands (Justice Sotomayor, dissenting, stated that this factual assertion was not supported by the record—which contained factual disputes as to whether Hughes even knew that the officers were there).

The Court acknowledged that the other woman presented an affidavit that she was never scared. Still, the Court ultimately determined that the doctrine of qualified immunity barred any civil rights claim. The Court reiterated that the “immunity protects all but the plainly incompetent or those who knowingly

violate the law.” The Court further stated that the officer must have notice that a specific kind of force is unlawful.

Justices Sotomayor and Ginsburg dissented. Sotomayor described the shooting in this way: “Officer Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home” and pointed out that the record established that Hughes was standing stationary, about six feet from Chadwick, and appeared “composed and content” and that the knife was down at her side, with the blade away from Chadwick, and that Hughes “was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else.” Still, Officer Kisela shot her four times. Sotomayor stated that the Court’s holding insulated Kisela’s conduct from liability, and that his conduct was unreasonable. Sotomayor believed that this was a question of reasonableness for the jury, not one of immunity for the Court.

Sotomayor further described the incident:

Kisela did not wait for Hughes to register, much less respond to, the officers’ rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chainlink fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, “Why’d you shoot me?” Id., at 308. Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

Sotomayor determined that “Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.” Sotomayor stated that “decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it.” Sotomayor concluded:

This unwarranted summary reversal is symptomatic of “a disturbing trend regarding the use of this Court’s resources” in qualified-immunity cases. *Salazar-Limon v. Houston*, 581 U. S. \_\_\_, \_\_\_ (2017) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 8). As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.” . . . Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment. The majority today exacerbates

that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

The doctrine of qualified immunity means that jailors and other government officials can do whatever they want to an inmate or any other citizen at the mercy of their actions—provided that their conduct has not been *previously deemed unlawful by a circuit court in the circuit where the prison is located*. This test is ludicrous and dangerous. It presumes that officers and jailors read local circuit court decisions. It relies on the concept that the reactions of police officers, corrections officers, or jailors are always the product of reasoned decision-making. And worse, it means that anyone has carte blanche to commit a heinous act against an inmate or citizen— provided that their specific act has not been previously and determined unlawful by the local circuit court. And such a determination will never exist—as the first time conduct is addressed, it is doomed to fail under the present test, because the new conduct could not have previously been evaluated to determine whether or not it was lawful.

Moreover, if the majority of victims of officer shootings or inmate mistreatment are people of color (and they are) then the application of qualified immunity has a disparate impact on communities of color.

### Extreme Examples Of the Breadth Of Qualified Immunity

Two examples from the Ninth Circuit show the breadth of the application of qualified immunity. First, in *Chappell v. Mandeville*, 706 F.3d 1052 (2013), jailors suspected that the plaintiff consumed contraband. So they placed him on a “contraband watch,” which the Court described as follows:

Contraband watch, also known as a “body cavity search,” is a temporary confinement during which a prisoner is closely monitored and his bowel movements searched to determine whether he has ingested or secreted contraband in his digestive tract. Under prison procedures, the prisoner is first searched and then dressed so as to prevent him from excreting any contraband and removing it from his clothing. The prisoner is placed in two pairs of underwear, one worn normally and the other backwards, with the underwear taped at the waist and thighs. The prisoner is also placed in two jumpsuits, one worn normally and the other backwards, with the suits taped at the thighs, ankles, waist, and upper arms. The tape on both the underwear and the jump suits is not meant to touch the skin; it is used to close off any openings in the clothing. The prisoner is then placed in waist chain restraints, which are handcuffs that are separated and chained to the side of the prisoner’s waist. This prevents the prisoner from being able to reach his rectum. The waist chain restraints are adjustable and can be lengthened if necessary. The prisoner is then placed in a surveillance cell where prison staff watch the prisoner at all times. The lights are kept on in the cell to allow staff to see the prisoner.

To prevent the inmate from concealing contraband, the cell does not have any furniture other than a bed without a mattress. The prisoner is given a blanket, and receives three meals a day and beverages. When the prisoner needs to defecate he must notify the prison staff who will bring him a plastic, moveable toilet chair.

*Id.* at 1055. The plaintiff in *Chappell* was subjected to the above treatment for *six straight days*. He claimed to have been shackled to the bed during this time, and since his waist restraints were never loosened, he was not allowed to use hands while eating.

The *Chappell* Court reiterated that “[o]fficials must have fair warning that their acts were unconstitutional” and stated that if they reasonably thought their actions were lawful, they are protected by qualified immunity. The Court stated that at the time offense took place, “the law was not clearly established as to whether the conditions Chappell experienced—either in isolation or combination—violated the Eighth Amendment.” Accordingly, the Court granted summary judgment to the defendants. *Id.* at 1052.

Similarly, in *Jackson v. Brown, et al.*,<sup>7</sup> hundreds of inmates alleged that the California Department of Corrections and Rehabilitation (“CDCR”) had knowingly incarcerated them in two prisons built on land that was hyper-endemic to cocci (the spores that cause Valley Fever—a chronic illness that individuals of African descent have a hyper-susceptibility to). The CDCR had acknowledged that it was aware of the problem and was aware that inmates would get sick (and some would die), which happened. The Court acknowledged that over 40 inmates died from the disease in a seven-year period preceding the action, and hundreds were infected and require life-long care. Still, the Court entered judgment for the defendants. The Court held that (a) neither the Supreme Court or the Ninth Circuit had previously addressed the issue in published decisions; and (b) some district courts examining the issue had found that an Eighth Amendment claim did lie, and others did not. Therefore there was no consensus and, thus, Department officials did not have notice that their conduct was unlawful. The Court held that, because the officials could not have known that their conduct was unlawful, claims against them were barred by qualified immunity.

How horrible the constitutional violation is has become irrelevant—all that matters is whether someone has previously and successfully sued based on that conduct. If not, the application of qualified immunity should result in a dismissal. This is dangerous law—because no one will set a precedent. It is now impossible for an inmate to succeed on an action based on a new type of injury (as in *Chappell*) or one based on a cruel response to an environmental danger (as in *Jackson*).

## Conclusion

After *Kisela*, it will be hard to mount a successful case for a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment and on the Fourth Amendment’s prohibition on excessive force. Provided that governmental

defendants can frame the right at issue in a novel fashion, they can likely successfully invoke qualified immunity. Traditional remedies under § 1983 or under *Bivens* are no longer available. Accordingly, if a lawyer seeks to assist an inmate in bringing a claim arising out of their confinement, they should look to the Federal Tort Claims Act or a state equivalent.

## Endnotes:

<sup>1</sup>457 U.S. 800 (1982).

<sup>2</sup>The facts that underlie the *Harlow v. Fitzgerald* decision are set forth in a companion case—*Nixon v. Fitzgerald*, 457 U.S. 731, 731 (1982).

<sup>3</sup>In *Harlow*, 457 U.S. at 814, the Court stated, “At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.” *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949). Justice Burger, who agreed with establishing “qualified immunity,” but believed that absolute immunity should extend to presidential aides, dissented. In his dissent, he expanded on the majority’s justification for the doctrine: “In this Court we witness the new filing of as many as 100 cases a week, many utterly frivolous and even bizarre. Yet the defending party in many of these cases may have spent or become liable for thousands of dollars in litigation expense. Hundreds of thousands of other cases are disposed of without reaching this Court. When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges. Those potential risks inevitably will be a factor in discouraging able men and women from entering public service.” *Harlow*, 457 U.S. at 827 (J., Burger, *dissenting*).

<sup>4</sup>*Harlow*, 457 U.S. at 818 (stating “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

<sup>5</sup>*Harlow*, 457 U.S. at 814, 819.

<sup>6</sup>*Harlow*, 457 U.S. at 819.

<sup>7</sup>1:13-cv-01055-LJO-SAB (E.D. Cal.) (Order Granting Summa

# Duress and Domestic Violence: The Law Has Not Caught Up With the Times

By Lisa Wood

In August 2005, Queen Nwoye, a Nigerian immigrant living and working as a nursing assistant in Maryland, made an ill-fated decision to begin a relationship with Adriane Osuagwu, a fellow Nigerian immigrant.<sup>1</sup> According to Nwoye, shortly after she and Osuagwu began dating, Osuagwu turned violent.<sup>2</sup> Osuagwu frequently slapped and beat Nwoye on her face and body, sometimes using his shoe as a weapon. In describing the abuse, Nwoye testified that Osuagwu beat her “like a drum.”<sup>3</sup>

To make matters worse, Nwoye and her two small children were living at Osuagwu’s home during the abuse.<sup>4</sup> Osuagwu often threatened to kill Nwoye and bury her in his home, and forced Nwoye to give him her ATM card and PIN.<sup>5</sup> He used her credit cards to make purchases, and even bought two homes under her name.<sup>6</sup>

Around Valentine’s Day 2006, Nwoye confessed to Osuagwu that between 2002 and 2004, she had engaged in an affair with Ikemba Iweala, a prominent Nigerian-born doctor who also lived in the area.<sup>7</sup> Both Nwoye and Iweala were married at the time of the affair. Osuagwu told Nwoye that the affair was “an abomination...where [they] came from,” and that Nwoye needed to have Iweala contact him.<sup>8</sup> Nwoye initially refused to put the men in touch, but testified that she relented after Osuagwu beat her.<sup>9</sup>

Between late February and April 2006, Osuagwu, with Nwoye’s help, extorted close to \$200,000 from Iweala by threatening to expose Iweala’s affair with Nwoye to Iweala’s wife and the medical board.<sup>10</sup> Nwoye provided assistance by meeting with Iweala and picking up money, and telling Iweala that he should do what Osuagwu said to do.<sup>11</sup> Nwoye also followed Osuagwu’s instructions regarding what to do with the money that Iweala had given her or wired to her account.<sup>12</sup> Ultimately, Osuagwu told Nwoye to transfer almost all of the money to him.<sup>13</sup> Nwoye did so.<sup>14</sup>

In January 2007, Nwoye was charged with conspiracy to extortion.<sup>15</sup> She proceeded to trial and took the stand in her own defense, explaining that she participated in the extortion plot only because of Osuagwu’s threats and violence.<sup>16</sup> Defense counsel requested the jury be instructed on the affirmative defense of duress, based on the evidence of Osuagwu’s abuse.<sup>17</sup> The duress instruction provides that, even if a defendant committed a crime, she should be found not guilty if there is sufficient evidence that she, (1) acted under an unlawful threat of imminent death or serious bodily harm; and (2) that there was no reasonable alternative to participating in the crime.<sup>18</sup>

The district court refused to give the instruction. The Court first reasoned that Osuagwu “wasn’t holding a gun to [Nwoye’s] head every day, every minute” and expressed skepticism that the required “imminent threat of death or bodily injury

ha[d] been shown.”<sup>19</sup> The Court then found that record was “completely devoid” of evidence of the second duress prerequisite, that Nwoye had no reasonable alternative but to commit the offense.<sup>20</sup> The Court noted that Nwoye attended school without Osuagwu, and that Osuagwu occasionally traveled and left Nwoye home alone.<sup>21</sup> Thus, the Court found, Nwoye could have avoided committing the crime by escaping or asking for help during the times that she was away from Osuagwu.<sup>22</sup> The jury subsequently found Nwoye guilty, and she was sentenced to 20 months’ imprisonment.<sup>23</sup>

The district court’s basis for denying Nwoye’s request for a duress instruction was consistent with a line of cases holding that allegations of intimate partner violence alone are insufficient to support a duress defense. The analysis undertaken in these cases, however, is flawed, given what we now know about domestic violence and its effects.

### Reasonable Fear of Imminent Death of Great Bodily Injury

The duress defense first requires a defendant fear imminent death or serious bodily harm at the time the crime is committed.<sup>24</sup> In some cases, the inquiry of whether a domestic violence victim may plead duress ends here. According to these courts, a “generalized fear” of one’s abusive, intimate partner is insufficient.<sup>25</sup> Instead, an explicit threat is required for these courts to find that a defendant had a reasonable fear of imminent death or injury.<sup>26</sup>

The lack of an overt threat, however, does not mean that an imminent threat does not exist, or that a defendant’s belief is unreasonable. In the case of intimate partner violence, victims are often “hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognize the danger.”<sup>27</sup> Indeed, just as “prisoners of war or hostages[ ] have great incentive to read their oppressor’s behavior accurately,” battered women have “the unfortunate opportunity to learn the behavioral clues that signal danger” in their partners.<sup>28</sup>

And, in considering whether a belief or act is reasonable, the defendant’s “particular circumstances,” must be taken into account.<sup>29</sup> This is true not just in the case of duress, but rather in virtually every reasonableness inquiry under the law.<sup>30</sup> A police officer’s on-the-job experience, for example, is undoubtedly relevant in determining whether he or she possessed reasonable suspicion sufficient for a Terry stop.<sup>31</sup> So too is an abuser’s “pattern of prior violence and abuse” in a duress case.

Applying this principle to Nwoye’s case, her familiarity

with Osuagwu's abuse would certainly qualify as one of the "particular circumstances" that should have been considered in determining whether the threat of harm against her was imminent, and in assessing the reasonableness of her belief.

### No Reasonable Alternative

The second prong of the duress defense requires that there be no reasonable alternative to participating in the crime.<sup>32</sup> In cases involving intimate partner violence, courts often seize on the fact that abusers do not, "hold[] a gun to [their victims'] head[s] every day, every minute."<sup>33</sup> From this, courts tend to reason that abused defendants could have left or escaped their abusers rather than committing the crime.<sup>34</sup> The problem with this reasoning is that it fails to consider the challenges and danger women may face in leaving abusive relationships and defying their abusers.

Without monetary resources, it may be practically impossible for a woman to leave her abusive partner.<sup>35</sup> Many victims of domestic violence rely, at least in part, on the money their abusers earn to pay for shelter, food, transportation and child care. Indeed, abusers often use money as a means to control and isolate their partners.<sup>36</sup> For these women, leaving such a relationship may mean risking homelessness, hunger, and losing custody of their children.<sup>37</sup> Regarding child custody in particular, studies show that abusers seek custody of children more often than their non-abusive counterparts, and are also awarded custody equally as often.<sup>38</sup>

Additionally, women who leave or attempt to leave their abusers face the very real threat of retaliatory violence.<sup>39</sup> Studies and homicide statistics suggest that abused women are more likely to be killed by their abusers after leaving them.<sup>40</sup> And, the threat of retaliatory violence extends not only to the abuse victim herself, but also to children, family, friends, and co-workers.<sup>41</sup> Fear that an abuser will engage in violence toward someone dear to the victim may well be enough to halt any thoughts of leaving.

So, while Nwoye was not physically prevented from leaving Osuagwu, she may well have felt trapped in the relationship for other reasons. Indeed, while the district court relied heavily on the fact that Nwoye attended school without Osuagwu, Nwoye also testified that Osuagwu "constantly monitored" her when they were apart.<sup>42</sup> Osuagwu even made her wear a Bluetooth headset, so she would always be able to answer his calls.<sup>43</sup> And, as stated above, Osuagwu allegedly threatened to kill Nwoye and bury her in his house if she defied him.<sup>44</sup> Given this record, a reasonable juror may well have concluded that Nwoye had "no reasonable alternative" but to go along with Osuagwu's extortion plot.

### Lessons From Nwoye's Case

In 2016, Nwoye finally scored a win. On collateral review, the appellate court concluded she was prejudiced by her trial counsel's failure to present expert testimony on battered women's syndrome.<sup>45</sup> An expert, the Court reasoned, could have educated the jury about the realities of intimate partner

violence, discussed above.<sup>46</sup> This, the Court found, would have entitled Nwoye to an instruction on duress. Ultimately, the Court concluded that had a duress instruction been given, there was a reasonable probability that Nwoye would have been found not guilty.

In light of this decision, criminal defense attorneys representing abuse victims should make every effort to present expert testimony on the insidious nature of intimate partner violence.<sup>47</sup> That being said, it is disheartening that courts and jurors still require education on the subject.<sup>48</sup> The research on intimate partner violence, discussed above, is not arcane and has been a part of public discourse for years. While certain, specific aspects of the research may fall outside the ken of the average juror, much is common sense. It should not, for example, take an expert to explain why a woman might stay with her abuser and comply with his demands if she thinks he will kill her if she defies him. Yet, according to Nwoye, this is within the realm of expert testimony.<sup>49</sup>

In addition to educating the trier of fact, expert testimony also serves to corroborate a party's position.<sup>50</sup> In the context of intimate partner violence, it seems that expert testimony is needed more for this purpose—to substantiate the abused defendant's testimony—than it is to explain complicated, specialized material. Why courts and jurors have trouble believing allegations of intimate partner violence is a mystery, given that it is relatively common. Indeed, roughly 1 in 3 women, and 1 in 4 men, have been the victim of some form of physical violence within their relationships.<sup>51</sup>

While courts should, of course, consider each request for a duress instruction on a case by case basis, it would do the justice system well to keep these statistics in mind.

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### Endnotes:

<sup>1</sup>*United States v. Nwoye*, 824 F.3d 1129, 1132 (D.C. Cir. 2016) ("Nwoye III"); *United States v. Nwoye*, 1:07-cr-00012-ESH (D.C. Dist.) ("Nwoye I") Doc. 60 at 304.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Nwoye I*, Doc. 66 at 13.

<sup>7</sup>*Nwoye I*, Doc. 60 at 309.

<sup>8</sup>*Id.* at 309-10.

<sup>9</sup>*Nwoye III*, 824 F.3d at 1132.

<sup>10</sup>*Nwoye I*, Doc. 66 at 2.

<sup>11</sup>*Id.* at 6.

<sup>12</sup>*Id.* at 14-17.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Nwoye III*, 824 F.3d at 1132.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 1133.

<sup>18</sup>*Id.*

<sup>19</sup>*Nwoye I*, Doc. 61 at 448-49.

<sup>20</sup>*Id.* at 448.

<sup>21</sup>*Id.* at 448-49.

<sup>22</sup>*Id.*

<sup>23</sup>*Nwoye III*, 824 F.3d at 1133.

<sup>24</sup>*Id.* at 1136-37.

<sup>25</sup>*United States v. Sixty Acres in Etowah County*, 930 F.2d 857, 861 (11th Cir. 1991), *United States v. Hatten*, 2010 WL 1815390 at \*2 (D. Neb. 2010)(Camp, J.).

<sup>26</sup>*Id.*

<sup>27</sup>*Nwoye III*, 824 F.3d at 1137, *citing* Lenore E.A. Walker, Battered Women Syndrome and Self-Defense, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 324 (1992).

<sup>28</sup>Mary Ann Dutton, Validity of “Battered Women Syndrome” in Cases Involving Battered Women 29 (1996), in Department of Justice and Department of Health and Human Services, The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials (1996)

<sup>29</sup>*Nwoye III*, 824 F.3d at 1137, *see also United States v. Johnson*, 956 F.2d 894, 898 (9th Cir. 1992) (“Fear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant with those applying the threat is such that the defendant can reasonably anticipate being harmed on failure to comply.”)

<sup>30</sup>*See, e.g., United States v. 16328 South 43rd East Ave., Bixby, Tulsa County, Okla.*, 275 F.3d 1281, 1285 (11th Cir. 2002)(Reasonableness in the forfeiture context); *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)(Reasonableness of suspicion in no-knock warrant context); *Shapiro v. Township of Lakewood*, 292 F.3d 356, 360-61 (3d Cir. 2002) (Whether accommodation was reasonable under the Americans with Disabilities Act.); *United States v. Spanish Foods, Inc.*, 131 F. Supp. 2d 1374, 1378-79 (CIT 2001)(Defining “reasonable diligence.”), *Carter v. Huterson*, 831 F.3d 1104, 1009 (8th Cir. 2016)(Reasonableness in context of excessive force).

<sup>31</sup>*United States v. Brignoni-Ponce*, 422 U.S. 873, 995 (1975), *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>32</sup>*Nwoye III*, 824 F.3d at 1137-38.

<sup>33</sup>*Nwoye I*, Doc. 61 at 449.

<sup>34</sup>*See, e.g., id.* (finding that Nwoye could have escaped from Osuagwu at school or work); *United States v. Homick*, 964

F.2d 899, 906 (9th Cir. 1992) (Noting physical distance between abuser and defendant at the time of the offense), *Johnson*, 956 F.2d at 902 (finding defendant could have escaped earlier), *United States v. Weis*, 891 F. Supp. 2d 1007, 1012 (N.D. Ill. 2012)(Bucklo, J.) (“Battered women also may have trouble proving lack of opportunity to escape, as the duress defense requires.”)

<sup>35</sup>Dutton, *supra* note xviii, at 39.

<sup>36</sup>*Nwoye III*, 824 F.3d at 1138, *citing* Lenore Walker, The Battered Woman, 129-32 (1979)

<sup>37</sup>*Id.*

<sup>38</sup>Dutton, *supra* note xviii, at 35

<sup>39</sup>*Nwoye III*, 824 F.3d at 1137-38, *citing* Dutton, *supra* note xviii, at 14-15; Desmond Ellis, Post-Separation Woman Abuse: The Contribution of Lawyers as “Barracudas,” “Advocates,” and “Counsellors,” 10 INT’L J.L. & PSYCHIATRY 403, 408 (1987).

<sup>40</sup>*Id.*, *citing* Dutton, *supra* note xviii, at 14-15.

<sup>41</sup>Dutton, *supra* note xviii, at 35

<sup>42</sup>*Nwoye III*, 824 F.3d at 1132

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at 1132. On remand, the U.S. Attorney’s Office dismissed the charges against Nwoye.

<sup>46</sup>*Id.* at 1140.

<sup>47</sup>In addition to *Nwoye*, *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006) also held that the failure to present expert testimony on battered women’s syndrome prejudiced a defendant for *Strickland* purposes.

<sup>48</sup>*Cf. United States v. Namedo-Ramirez*, 781 F.3d 563, 568 (1st Cir. 2015)(affirming exclusion of expert testimony on battered women syndrome because layperson capable of understanding the issue).

<sup>49</sup>*Nwoye III*, 824 F.3d at 1140 (“Expert testimony on battered woman syndrome could have helped Nwoye ‘dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time.’”)

<sup>50</sup>*See id.* (“[E]xpert testimony on battered woman syndrome would have bolstered the credibility of Nwoye’s testimony about Osuagwu’s abuse.”)

<sup>51</sup>Center for Disease Control, National Center for Injury Prevention and Control, Division of Violence Prevention, National Intimate Partner and Sexual Violence Survey: 2010 Summary Report (2011)

## The Federal Safety Valve

By Brock Benjamin

Confession is good for the soul. At least that is the view reflected by statutory and U.S. Guidelines provisions that reward confessing defendants by permitting them to be sentenced below a mandatory minimum on a drug offense. Referred to as “Federal Safety Valve” provision, guideline §5C1.2 entitles a defendant to receive a two-level guideline adjustment. But, more importantly, the court can sentence without regard to any mandatory minimum sentence.

Mandatory minimum sentences occur mainly with regard to drug offenses and are tied to the amount of drugs that a person is alleged to have possessed and the person’s criminal history.<sup>1</sup> Specifically under 18 U.S.C. § 841, possession with intent to distribute marijuana results in a 60 month (5 year) mandatory sentence for over 100 kilograms; 120 month (10 year) mandatory sentence for over 1000 kilograms. These minima are the same for cocaine, just the amounts are different.

United States Sentencing Guideline §5C1.2 provides that, as long as a defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) (which are also set forth in §5C1.2) the court can sentence defendants charged under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, without regard to any mandatory minimum sentence, if—<sup>2</sup>

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

A Court has held that the two-level reduction is mandatory if the defendant meets these criteria.<sup>3</sup>

In the southwestern border region, this type of case comes up frequently. A defendant is crossing the border with a car that has a controlled substance in it. Defendant is stopped and questioned; he provides all the information he has and is then arrested and charged. In these cases, the defendant usually has no criminal history points, no violence, and is a stipulated minor

participant. The government will usually agree that they have provided all of the relevant information. In addition, it is easier to defeat a charge of weapon possession under the safety-valve provision than under 18 U.S.C. § 924 or under §2D1.1. The defendant need only show by a preponderance that the weapon was not used in connection with the offense, not that it is clearly improbable as under §2D1.1(b)(1).<sup>4</sup>

More complicated issues can arise, however. For example, what happens when there is no weapon, but the government believes that your client is a leader or does not agree that your client has provided “all information and evidence the defendant has concerning the offense?” This must be litigated carefully. A role is best contested with the probation officer during the Pre-Sentence Interview. If you can convince the officer, you’re at least not contesting that standard with the Court and the Government.<sup>5</sup>

Courts have the ultimate determination in Safety Valve eligibility. The Government is allowed to make a recommendation. Guideline §5C1.2, app. note 8. How does the Government weigh in? The usual process is the client executes a sworn statement and provides that statement to the Assistant United States Attorney handling the case. That attorney makes a determination in their opinion as to cooperation and truthfulness. A favorable recommendation is then forwarded to the United States Probation Officer. If the prosecutor finds the statement untruthful, an interview can be scheduled to meet with the United States and its case agent. In cases where the AUSA will recommend that the adjustment be denied, the Court should be notified, and an evidentiary hearing requested.

In sum, the steps to obtaining safety-valve relief are deceptively simple. However one must be careful that the evidence reflects or can be shown to support the defendant’s version and also that the defendant is comfortable with any consequences that stem from his providing “all information.” In addition, a safety-valve request fares a much better chance of success if it is “litigated” with the relevant parties—the defendant, the prosecutor, and the probation officer—before it is brought to the court.

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### Endnotes:

<sup>1</sup>Some prosecutors will refer to these as (A) level or (B) level drugs based on either 21 U.S.C. § 841(b)(1)(A)(i) or 21 U.S.C. § 841(b)(1)(B)(i), which contain the applicable minimums.

<sup>2</sup>8 U.S.C. § 1324 another common mandatory minimum sentence statute, does not qualify for the Safety Valve.

<sup>3</sup>*U.S. v. Leonard*, 157 F.3d 343 (5th Cir. 1998) (finding safety valve mandatory, but no error).

<sup>4</sup>*See U.S. v. Nelson*, 222 F.3d 545 (9th Cir. 2000).

<sup>5</sup>A Court makes the determination based on evidence, but it is the Government’s burden to prove the defendant was not a leader. *See U.S. v. Milton*, 153 F.3d 891 (8th Cir. 1998).

## ***Carpenter: A Reason for Limited Optimism***

By Benjamin Dusing and Augustus Flottman

As any white collar practitioner will tell you, the significance of personal communications as evidence cannot be overstated. The issue in all white collar cases is a question of intent. But because there is no direct evidence of intent, the government must make its case with circumstantial evidence. Emails, text messages, and social media communications are absolutely critical in this regard. Consequently, judicial determinations about the admissibility of such evidence can be outcome determinative.

Of course, there are multiple avenues for the government to obtain personal electronic communications or similar data. Commonly, the government simply executes a warrant and seizes computers and servers on site. But this is not always possible in our digital world, and often impractical. The government can request such communications, but the Fifth Amendment production privilege is another obstacle to compulsive disclosure.

Consequently, for the government, third-party electronic service providers (“ESPs”) are increasingly becoming a key point of access to an individual’s electronic communications and data. This is because data from hand-held devices is typically automatically stored by ESPs and can be accessed without physical control over the particular device simply by logging into a cloud server or other remote access point. Law enforcement’s new focus on obtaining information from ESPs directly makes the issue of Fourth Amendment protection to digital personal communications that much more relevant.

Under the so-called “third-party” doctrine, an individual enjoys no Fourth Amendment protection in information he or she voluntarily turns over to a third-party, even where confidence is placed in the third-party. *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). However, this historical doctrine does not translate well to our modern reality. Even where an individual opts out of backing up their devices to cloud servers, just the use of technology in everyday life, by its mere operation and often without any affirmative act, involves the transmission of the utmost personal and sensitive information through the networks or applications of the ESP. As the U.S. Supreme Court itself observed in *Riley v. California*, the use of smartphones and inter-connected devices are no longer just a mere convenience, “but are necessary to participate in the modern world.” *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014). Accordingly, the notion that the transmission of data to a third-party ESP is necessarily voluntary simply because it occurs by mere operation of a device is tragically outdated. Clearly, the law needs to reflect the new digital reality.

The law recently evolved significantly in this regard by virtue of the U.S. Supreme Court opinion in *Carpenter v. United States*, 201 L. Ed. 2d 507 (2018). *Carpenter v. United States* asked the Court to decide whether an individual has a reasonable expectation to privacy under the Fourth Amendment to cell-site location information (“CSLI”), notwithstanding the fact that this

CSLI is shared with a third-party ESP (the wireless carrier), such that the government must get a warrant to obtain CSLI from the wireless carrier. *Carpenter*; 201 L. Ed. 2d 507, 519-20. CSLI, which provides a catalogue of an individual’s precise location and movement, is one of the many types of data that is stored and collected by our wireless carriers and other ESPs. In *Carpenter*, the Government obtained court orders pursuant to the Stored Communications Act to obtain CSLI from wireless carriers. *Id.* at 516; see, 18 USC § 2703. *Carpenter* moved to suppress the CSLI as evidence obtained in violation of his reasonable expectation of privacy under the Fourth Amendment. *Id.* The district court denied *Carpenter*’s motion, and, after conviction, *Carpenter* appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed. *Id.* In doing so, the Sixth Circuit found that *Carpenter* did not have a reasonable expectation of privacy to the CSLI because he had voluntarily shared that information with a third-party (the wireless carrier). The Supreme Court granted certiorari.

The Supreme Court reversed, finding that there was a reasonable expectation of privacy in the CSLI data that was gathered by the wireless carriers. It is firmly established that an individual maintains a reasonable expectation of privacy as to their physical movements, and, prior to the digital age, law enforcement could only monitor an individual’s movements for a limited period of time. CSLI, however, provides law enforcement the ability to secretly monitor and catalogue every single movement of an individual over a period of several years. *Id.* at 521. Noting that a cell phone is essentially an extension of human anatomy in the modern world and observing the qualitative nature of CSLI, the Court found a mechanical application of the third-party doctrine inappropriate because CSLI is not exactly voluntarily shared with a wireless carrier. Instead, it is shared simply by the mere operation of a cell-phone, without any particular affirmative act of the user. *Id.* at 524.

The most important aspect of the Court’s opinion was its recognition that a straightforward, mechanical application of the third-party doctrine was a square peg, round hole analysis given “the seismic shifts in digital technology.” *Id.* at 523. In this regard, *Carpenter* represents a major step forward in terms of our Courts recognizing that the technological advancements of the last decade require more thoughtful application of law developed in past decades. On the other hand, however, the Court expressly limited its holding to CSLI data, and declined to weigh in on the many other types of highly sensitive personal information that is shared with ESP’s by the mere operation of a device or use of a service or application. *Id.* at 525. Thus, the larger issues remain unresolved to some degree.

There are reasons for the defense bar to be less optimistic that the U.S. Supreme Court’s decision in *Carpenter* represented a critical pivot in the Court’s approach to the Fourth Amendment in the modern/digital age. Courts have

declined to read *Carpenter* broadly. For example, in *United States v. Ho et al*, 1:17-MJ-08611 (S.D.N.Y 2017), the defendant provided the password to his smart devices to law enforcement before law enforcement read the defendant his *Miranda* rights. The defendant sought to suppress the communications retrieved from the smart devices as fruit of the poisonous tree. Under existing precedent, *United States v. Patane*, 542 U.S. 630 (2004), statements obtained in violation of *Miranda* rights do not require the suppression of physical objects found as a result of those statements. The defendant relied on *Carpenter*, however, to argue that in today's digital age, non-digital precedent (such as *Patane*) should not be applied to the electronic communications on smart devices. Unfortunately, the Court rejected this argument. The court reasoned that self-incrimination is not implicated by the admission of evidence that is the physical fruit of a statement obtained in violation of *Miranda*, and therefore the communications retrieved from the defendant's smart devices were admissible.

The Court's refusal to mechanically apply the third-party doctrine in *Carpenter* engendered optimism that our courts are beginning to recognize the problems inherent in fitting the square analog era law into the round hole of the digital era. But the

defendant's unsuccessful invocation of *Carpenter* in cases like *United States v. Ho* illustrates the bevy of issues left unresolved by the Supreme Court's narrow holding in *Carpenter*, and the dimming of hope that *Carpenter* ushered in a new era of digital-age Fourth Amendment jurisprudence.

The bottom line is that we live in a world where technology is an intimate and necessary part of daily life, and transmitting personal data to electronic service providers is inescapable. There is nothing truly "voluntary" about participating in it. The importance of electronic communications as circumstantial evidence of intent in white-collar cases will queue up dozens of appealable issues as white collar defense attorneys, like those in *United States v. Ho et al*, ask courts to develop new rules, doctrines, and exceptions as cutting-edge as the technology that requires them. As our justice system continues to stack the deck against defendants, it is more important than ever that experienced white-collar defense attorneys are engaged to properly frame these issues before the courts.

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