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UNREASONABLE DOUBT

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President's Column – Bill Hart

The Fentanyl Panic, and the New War on Drugs

The war on drugs has been going since 1971, with little to no tangible result besides the highest number of people incarcerated in the world. According to the latest Department of Justice numbers (as of 2021), the United States has a prison population of 1,767,200, which is greater than the second country on the list—China—exceeding their prison population by almost 100,000 despite China having 4.35 times the population.

Of those 1.7 million incarcerated individuals, it is estimated that 85% of them suffer from substance abuse disorders or were incarcerated for a crime that involved drugs, *i.e.* being under the influence at the time. *See* National Institute on Drug Abuse, Drug Facts, https://nida.nih.gov/sites/default/files/drugfacts-criminal-justice.pdf.

The newest drug war bogeyman is Fentanyl.

Fentanyl is a synthetic opiate that even in very small doses can be deadly. There have been videos circulating online with law enforcement personnel overdosing just by touching it or being in its presence. We now know that these "exposures" are not overdoses, but most likely panic attacks, as Fentanyl cannot be readily absorbed through the skin, according to numerous studies, including the latest FAQ sheet from UC Davis published in January of 2023. *See* https://health.ucdavis.edu/blog/cultivating-health/fentanyl-overdose-facts-signs-and-how-you-can-help-save-a-life/2023/01.

At the same time, we know that Fentanyl causes approximately 67,325 preventable deaths in the year 2021, representing a 26% increase from the prior year of 2020, based on the latest reporting from the National Safety Council. *See* https://injuryfacts.nsc.org/home-and-community/safety-topics/drugoverdoses/. With that grim reality, we are left trying to figure out the best way to combat this new wave of drug use and overdoses, and, not surprisingly, many are trying to harken back to the early days of the drug war. In the 2023 legislative session, Governor Lombardo introduced SB412, a "tough on crime" initiative intended to, in part, roll back the progress made from AB236 from the 2019 legislative session. Within his proposal was punishment of possession of "a mixture containing fentanyl" as a category B felony, with punishment not less than 1 year and a maximum of not more than 6 years in prison. This would saddle any user who possessed a drug mixture that contained ANY Fentanyl, even without their knowledge (which is true more often than not), with a lengthy prison sentence for use.

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In addition, SB128 sought to criminalize simple possession of Fentanyl or any mixture which contains any level of Fentanyl as a category B felony punishable by no less than 2 years to a maximum of 20 years in prison. This bill had a threshold of 4 milligrams or .004 grams. This amount is so miniscule as to criminalize use of any Fentanyl or any mixture in which it was contained with even harsher sentences than SB412. SB128 had escalating punishments that included 4–20 years for 6 milligrams or .006 grams up to 10–life or 10–25 for 8 milligrams or .008 grams or more of fentanyl or a mixture containing it.

For easy reference, your average Starbucks sugar packet weighs 5 grams, so .008 grams would be the equivalent to 0.16% of a sugar packet punishable by life in prison.

A third bill, SB197, was also introduced with much of the same penalties.

After much compromise and debate, the legislature did pass a fourth bill, SB35, seeking to address the Fentanyl "crisis" criminalizing possession of Fentanyl at weights of 28-42 grams as a category B felony carrying a possible 1–10 years.

While this past session did temper the temptation to overreact and overcriminalize Fentanyl use, the bogeyman remains.

Although Fentanyl related deaths are preventable, prison and overcriminalization are not the answer to this problem. As we should have learned from the crack-cocaine overcriminalization under the Anti-Drug Abuse Act of 1986, harsh and unrelenting prison sentences for possession and use don't deter, they just disparately harm those communities that are caught in its crosshairs.

A better solution to the Fentanyl problem is not more prison, but more treatment. Any public defender can tell you that at least 95% of their clients are either struggling with substance use, mental health, or usually both. As much as the war on drugs has tried, lengthy prison sentences do not help treat these clients. The Legislature should instead focus on what does work: a holistic approach to treating and supporting our most vulnerable population with housing, treatment, and specialty courts.

Specialty courts have proven that treatment with proper support systems reduce recidivism, save lives, and save money. We should not lose focus on the 2019 session, in which AB236 was passed with overwhelming evidence in support, in order to act tough on crime in ways we know only increase prison population without addressing the underlying issues. A better use of resources is in treatment, not incarceration, and we must not lose track of that fact when discussing Fentanyl.

§1983 and the Fifth Amendment: A Viable Claim for Relief?

By Austin Barnum

Imagine this: Your client was questioned by law enforcement without a *Miranda* warning and provides a confession. The trial court finds the confession is admissible but, nonetheless, the trial results in the client's acquittal. For some readers, the scenario is not hard to imagine, but the next question is not always considered. Does your client have a viable civil rights action under 42

U.S.C. §1983?

A complaint focused solely on the failure to administer the *Miranda* warnings will not succeed. In *Vega v. Tekoh*, the Supreme Court held, "A violation of the *Miranda* rules does not provide a basis for a § 1983 claim." 142 S.Ct. 2095, 2096 (2022). The Court reasoned that even *Miranda* failed to hold that a violation of its prophylactic rules constitutes a Fifth Amendment violation. *Id.* at 2101. Yet that's not the end of the §1983 conversation.

If the complaint raises a violation of the client's Fifth Amendment right to be free from involuntary statements, then there may be a viable cause of action. The *Vega* Court stated that the Fifth Amendment protects against "out-of-court statements obtained by compulsion." *Id.* (citation omitted). Accordingly, the viability analysis should consider the same arguments raised in the *Miranda* decision. That is, "in-custody interrogation is psychologically rather than physically oriented" and "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individual." 384 U.S. at 448, 455. It is the psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 47. The psychologically coercive tactics, germane to custodial interrogations, may become the foundation for a claim. *Vega* notwithstanding, a §1983 complaint focused not solely on the failure to administer the *Miranda* warnings, but on circumstances establishing coercion or intimidation stands a respectable chance of defeating the inevitable motion to dismiss for failure to state a claim.

The *Vega* Court noted that civil rights actions based on *Miranda* warnings violations raise important procedural questions. *See* 142 S.Ct. at 2017. Would a court hearing the civil rights case owe deference to the trial court's factual findings during an evidentiary hearing? Do plain error rules or harmless-error rules apply? Are civil damages available when the statements had no impact on the outcome of the criminal case? The questions are important for civil rights litigators to consider before contemplating a § 1983 claim founded in violation of the Fifth Amendment. While some answers may work against the strength of a case; I'm not convinced the answers defeat the viability of the claim. The bigger question is that of damages.

The Nevada Supreme Court's decision in *Mack v. Williams*, 522 P.3d 434 (Nev. 2022) provides a partial answer. According to *Mack*, a self-executing protection in Nevada's Constitution gives rise to an independent cause of action for monetary damages. Nevada's corollary to the Fifth Amendment, Article 1, Section 8, is likely self-executing because of its prohibitive language. So, civil rights litigators should also include a State Court because such a claim gives rise to monetary damages on its own. A plaintiff may also prove up monetary and non-monetary damages through medical bills, loss of income, distress, anguish, trauma, loss of employment, and other commonly used damages in civil litigation.

The Fifth Amendment's protections and claims for relief under § 1983 are still alive in the wake of *Vega*. Civil rights litigators just need to be sure their claims are rooted in the voluntariness of the statements and the reasoning underlying *Miranda* and not the *Miranda* warnings alone.

Objection, Your Honor!

By Melissa Barry

Young v. State, 139 Nev. Adv. Op. 20 (July 20, 2023), is a recent Court of Appeals case that makes you want to jump up and object.

Young was convicted of several crimes arising from the summer of 2020. He was convicted of 20 charges including 12 counts of burglary, 4 counts of larceny from a person, victim 60 years of age or older, one count of grand larceny, and 3 counts of fraudulent use of a credit or debit card. He was acquitted of 2 charges of fraudulent use of a credit card.

Young appealed the convictions raising many issues for the first time that had gone unobjected to at trial.

The first issue was an evidentiary issue where Young argued that uncharged bad acts were improperly admitted. Young didn't object at trial. The statements Young challenged included Walmart employees saying Young was a person they had prior problems with and were concerned he was trying to steal, a police officer saying that Young was smooth, good, and had been doing this for a long time, that they identified Young because they watched a lot of video surveillance, and that a records check in the LVMPD system found a match to Young. The Court of Appeals found that "none of those statements clearly constituted 'evidence of other crimes, wrongs or acts' to prove Young's character or show that he acted in conformity therewith." *Id* at 17.

The court went on that because there was no objection there was no determination regarding which acts were being argued. Evidence of these crimes would be directly at issue in this trial. However, even if the references were to his past conduct, there was no demonstration that it affected his substantial rights, *i.e.* a miscarriage of justice or actual prejudice.

The court emphasized that there was no objection at trial and therefore there was not a record developed enough to determine the context with accuracy. Despite the lack of objection, the court did direct the State to better prepare and control witnesses due to the number of questionable statements.

The next issue addressed was the trial courts permitting the officers to narrate the surveillance video during testimony. Again, no objection at trial so the review standard is plain error. The court decided that because of the complexity and variations of the videos the district court could have concluded that the narration was helpful to the jury. These thefts involved distraction which may not have been visible or clear on the video and the officers testifying had other knowledge of Young to allow them to identify Young.

The next issue was a detective's testimony that Young had no room at the hotel where he was observed in the elevator with one of the victims. While this time Young objected on hearsay grounds, the court allowed the State to lay the foundation. The witness then testified that he later learned that Young was not a guest of the hotel. At that time Young failed to object. Because there was no objection, it was unknown if the purpose was for the truth of the matter asserted, if it was nonhearsay, or if an exception applied. Ultimately, even if admitted the court said the admission would have been harmless error because it was a minor piece of information.

The next issue was whether the district court abused its discretion in not excusing a juror who offered to give each of the victims $2,000 by way of note to the

court. The juror clearly sympathized with the victims. The court and Young canvassed the juror who reiterated that they could be fair and impartial and were only offering to help the elderly victims who lost money. Here, Young did not challenge the rehabilitation efforts on appeal. The court found there was no implied or inferable bias, but rather actual bias. Actual bias can be rehabilitated so long as the court determines the juror will be impartial despite the bias. The juror affirmed that he could be fair and impartial at two different times during the canvassing. It should be noted that Young did not raise the actual bias argument or challenge the rehabilitation efforts on appeal, so those issues are waived.

Further, Young contended that there was an error because the court allowed Young to argue and challenge the juror's conduct in the presence of that juror. On appeal, the court said that Young invited and possible error there. Additionally, this argument was not brought up at trial and therefore would only be evaluated for plain error.

The next issue was a jury instruction that misstated Nevada law. The State conceded and one conviction for larceny from a person was overturned due to the inaccurate instruction. The court directed "to avoid instruction error going forward, district courts should consider the recently adopted Nevada Pattern Jury Instructions: Criminal in settling jury instructions."

So at least they provided some direction for courts to avoid instruction error in the future. Young's conviction on Count 2 was overturned because the evidence did not show the purse being on the victim, but the other convictions were affirmed because evidence showed the items were "on the person."

The court found that the instructions given for lesser included offenses were proper, evidence supported the convictions when viewing in light most favorable to the State, and that Young did not satisfy any exceptions to appeal the ineffective assistance of counsel at sentencing.

Ultimately what we can learn from this case is make sure to object. Preserve the record. Use the Nevada Pattern Jury Instructions; criminal, when possible. Make sure that the record clearly lays out the reasons for admission of evidence so it can be addressed on appeal.

Remembering Freedom for Chol Soo Lee

by Randy Fiedler

After the judge announced my death sentence, I heard a young college student named Jeff Adachi shout out, "Freedom for Chol Soo Lee." The other supporters followed his lead in chanting, "Freedom for Chol Soo Lee! Freedom for Chol Soo Lee!"

Just because I'm a public defender doesn't mean I listen to every true crime podcast or Netflix series or documentary that comes out every three seconds. So, please forgive me for not watching Serial: The Musical, or whatever it is you think I *just have* to watch because it shows how the system "really works."

Still, even I was drawn in by the documentary *Free Chol Soo Lee*, about Chol Soo Lee, who was wrongfully convicted of one murder, then receives a death sentence for a prison killing. A Korean American

Free Chol Soo Lee (cont. from page 5)

journalist started looking into the case, noticing that it'd be pretty unusual for someone with a Korean name to commit a Chinese gang murder. Officers ignored the Asian American witnesses on hand and instead relied on the identifications of some white tourists.

The reporting on the case motivated a young Jeff Adachi and his roommate David Kakishiba to start organizing, leading to a large-scale Asian American movement, Freedom for Chol Soo Lee. After post-conviction proceedings (#habeas!), Chol Soo Lee was given a new trial in both cases. He was then acquitted in the first homicide, and then pled guilty in the second case in a negotiation that, with his credit for time served, meant he'd be free. He's a person who went from death row to the street.

The film doesn't shy away from Chol Soo's challenges upon release. Traumatized both before prison and then in prison, he faced addiction on the outside. His relationships complicated; he committed an arson, turned government witness, and then went into witness protection.

But then he came back, wiser and more mature for the experiences, and began lecturing to young people about the injustices of prison, before finally passing away in 2014.

Chol Soo inspired a generation into activism. And the young people who worked on his case grew into professionals who grounded their careers in social justice and activism. The story's well-timed: after Kung Flu, the summer of Black Lives Matter, and the rise in anti-Asian violence, Asian Americans are taking more interest in political activism. And this history, of Chol Soo Lee's case as a flashpoint for Asian American activism, was a history at risk of being forgotten.

The Nevada Coalition Against the Death Penalty organized a screening, at The Beverly, and then had a panel discussion after with David Kakishiba (one of the activists featured in the film), Senator Rochelle Nguyen, and Boyd law Professor Stewart Chang (and then some other guy who talked too much as moderator). So, as a community, we watched the film, and then the panelists talked about the death penalty, Asian American political action, and how we could all learn from Chol Soo's case.

From left to right: Randy Fiedler, David Kakishiba, Professor Stewart Chang and Senator Rochelle Nguyen

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First Wednesday of Every Month! Noon, ZOOM
Some business, a lot of good information, and brainstorm opportunities

LWOP Will Tear Us Apart: The Pardons Board Considers the Extent of Its Power

by Shelly Richter

After two hearings, the Pardons Board has not yet answered the question of whether it can commute a life-without-parole sentence for an offense committed after 1995, despite the prohibition expressed in NRS 213.085. That statute says that, when it comes to convictions for offenses committed by adults after 1995, the Board shall not commute either (1) a death sentence, or (2) a life-without-parole sentence, to a sentence that would allow parole.

In June 2023, the question went before the Pardons Board for the first time. Applicant Sally Villaverde's attorney argued that while the Board could not commute his life-without-parole sentence to a life-with-parole sentence—because that would violate the statute's restriction on granting a commutation "that would allow parole"—the Board could grant other relief. It could, for example, commute his life-without-parole sentence to time served or to a determinate sentence. This would potentially allow immediate release without parole. Counsel for Mr. Villaverde argued the Board should follow the plain meaning of the statute and heed the Supreme Court's approach in *Schick v. Reed*, 419 U.S. 256, 268 (1974), which indicates that commutation to time served does not offend a no-parole condition.

The Board was torn. On the one hand, Justice Pickering and Justice Lee supported Mr. Villaverde's position, with Justice Cadish ultimately joining them. For these justices, it is not for the Board to read into the statute a broader prohibition on commutation than its text reflects. Justice Herndon and Justice Parraguirre took the opposite position, moving from plain meaning to legislative intent; they asked why the Legislature would want to prohibit the Board from commuting a sentence to one that would allow parole, but not prohibit the Board from commuting a sentence to one that would allow immediate release without any conditions.

Majority rules when it comes to the Pardons Board: Justices Pickering, Lee, and Cadish voted in favor of Mr. Villaverde, and Justices Herndon, Parraguirre, and Stiglich opposed. Attorney General Ford recused himself, and Governor Lombardo and Justice Bell were absent. So while the Board did not grant relief, it continued the hearing to September. At that hearing, that Board voted to effectively stay the application until Mr. Villaverde concluded his federal habeas proceedings, reasoning that otherwise, Attorney General Ford could not weigh in.

The issue of commuting a post-1995 life-without-parole sentence is sure to come before the Board again soon. Between the two positions, the plain meaning argument is the better one. Regardless, the Legislature should repeal this law, which ignores people's ability to change, unfairly penalizes the exercise of trial rights, and is a relic of the knee-jerk policies that produced mass incarceration. NRS 213.085 is not concerned with the severity of the crime, but of the sentence. This means Nevadans serving the harsh sentences that NRS 213.085 affects are largely those who refused to plead guilty, went to trial, and lost. A society that seeks to combat mass incarceration's worst effects cannot tolerate the cruelty this law promotes.

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Unreasonable Doubt

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