FOR THE DEFENSE

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Artificial Intelligence and Criminal Defense: Why Your Client's Phone Is Now the Smartest Liar in the Room

Can a Medical Marijuana Patient be Charged with a Crime Under the Medical Marijuana Act?

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OPENING STATEMENT

Brian J. McMonagle, PACDL President

For three days in July of 1863, Union and Confederate soldiers waged a deadly battle in Gettysburg, Pennsylvania that would ultimately decide the Civil War. On the morning of November 19, 1863, Abraham Lincoln came to Gettysburg to dedicate the National Cemetery. Recognizing that brevity is the sole of wit, Lincoln delivered a ten sentence speech, which he assumed the world would little note nor long remember. It reads in part:

> Four score and seven years ago our fathers brought forth on this continent, a new nation conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that a nation might live. It is altogether fitting and proper that we should do this. But in a larger sense, we can not dedicate, we can not consecrate, we cannot hallow this ground. The brave men, living and dead have consecrated it far beyond our power to add or detract. The world will little note nor long remember what we say here but it can never forget what they did here…

Thankfully, the world has long remembered what Lincoln said there in Gettysburg almost 163 years ago. Lincoln's tribute to those who laid down their lives on that field so that people could be free is a wonderful reminder of the high price that we have paid for that freedom. Lincoln's immortal words are etched on the wall of the Lincoln Memorial in Washington, D.C. It was there on the steps of that same Memorial where Martin Luther King, Jr. delivered his "I Have a Dream" speech to over 250,000 supporters in August of 1963. One hundred years after Lincoln's address, standing in the shadow of Lincoln's statue, Dr. King spoke of a dream in which his children would live in a nation where they would not be "judged by the color of their skin but by the content of their character". Two of the greatest speeches of all time delivered within one hundred years of each other by great men who dared to dream and who lost their lives so that others could be free.

In the many years that have passed since Lincoln's ten sentence speech, this nation has indeed been tested and it has endured. We have endured a Great Depression, two World Wars, Vietnam, Watergate, 911, the COVID-19 Pandemic, and many other crises and catastrophes along the way. To be clear, we have been able to "long endure" only because of our commitment to freedom and to each other. As members of a time honored profession, it is our obligation as criminal defense lawyers to continue the never ending pursuit of protecting the rights of our clients and thereby ensuring all of our freedom so that we, and our country, can "long endure". In so doing, we honor those, who in the words of Lincoln, "gave their lives so that a nation might live".

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Artificial Intelligence and Criminal Defense: Why Your Client's Phone Is Now the Smartest Liar in the Room

Vito DeLuca

Detecting AI-generated evidence has become an arms race. Unfortunately, instead of missiles, the combatants are throwing mathematics at each other, and mathematics is winning.

Each time a developer creates an algorithm capable of identifying AI-generated content, another algorithm promptly learns how to evade detection. This cycle repeats every few weeks, which is deeply inconvenient because criminal court calendars are booked several ice ages in advance.

An industry has emerged offering what is marketed as "AI detection software," typically accompanied by confidence percentages, slick dashboards, and charts rendered in reassuring shades of blue. This visual language strongly implies scientific rigor. It is the same design language used by crypto scams and anything labeled 'clinically proven' in the hotel bathroom.

The problem is not that these tools are occasionally wrong. The problem is that they can be confidently wrong at scale in both directions: flagging human text as "AI" and AI text as "human," sometimes on the same day, in the same font, while maintaining the serene certainty of a weather app predicting sunshine during a blizzard. In criminal court, this level of reliability is what practitioners technically refer to as "not great."

Universities that relied on such tools to discipline students later discovered, after national embarrassment, that the software could not reliably distinguish between human writing, AI-generated text, and a severely sleep-deprived undergraduate.[1]

The unreliability is not just theoretical. Even the developers of generative models have struggled to build dependable detectors. When OpenAI released a classifier to identify text generated by its own models (including ChatGPT), it conceded that the tool was "not fully reliable." It correctly labeled only a fraction of AI-generated text while misidentifying substantial amounts of human writing as machine generated.[2] The classifier was ultimately discontinued,[3] which is a real-world reminder that even the creators of these systems cannot reliably detect them in the wild.

And because this is the legal system, the tools are not merely unreliable. They are *unevenly* unreliable. In a 2025 evaluation, human text was misclassified at high rates depending on the detector, with DetectGPT misclassifying human text at 31.94% overall and 36.11% for non-native authors in that dataset.[4] In other words: the detector is already shaky, and it gets shakier in a way that can map onto language background, which is exactly how 'technical certainty' turns into a fairness problem.

Authentication Under Pa.R.E. 901: "What Is This Thing, Really?"

Pennsylvania Rule of Evidence 901 requires that evidence be what its proponent claims it to be.[5] That inquiry was manageable when creating evidence required effort, access, or at least ownership of a functioning device.

That era is over.

Text messages can now be fabricated without a phone, photographs without a camera, audio recordings without vocal cords, and video without reality itself. Authentication has therefore shifted from whether something *looks* real to how it came into existence, who created it, and whether anyone can explain that process in a way that can be meaningfully tested in court.

Federal rule makers have been wrestling with what 'authentication' should look like in a world where reality can be rendered on demand. In their discussions, the Advisory Committee on Evidence explored whether deepfakes warrant a more explicit authentication framework, but ultimately did not advance a technology-specific authentication amendment at that time.[6]

Screenshots and the Myth of Self-Authentication

Screenshots illustrate the problem perfectly. They are the evidentiary equivalent of a witness beginning testimony with, "Trust me, bro," and then immediately leaving the courthouse. A screenshot contains no meaningful metadata, no inherent provenance, and no reliable indication that what is depicted existed in that form at the time alleged.

Pennsylvania does allow certain electronic evidence to be authenticated by certification, including (among other things) certified records generated by an electronic process or system, and certified data copied from an electronic device, storage medium, or file.[7] The mechanism is the point: the rule contemplates a qualified person, a described process, and notice.

And even then, the authentication step is only that: authentication. The Comment makes clear that authentication does not automatically satisfy hearsay requirements, and it does not magically convert "computer output" into "reliable truth."[8]

A screenshot, standing alone, satisfies none of these requirements. It is not generated by a verifiable electronic process, is not copied through a forensically validated method, and is not accompanied by any certification capable of scrutiny. Even where electronic evidence is properly self-authenticated under Rule 902, the rules make clear that authenticity does not equal reliability, and it does not preclude objections based on hearsay, relevance, or fabrication.

What makes screenshots uniquely dangerous in the age of artificial intelligence is how effortlessly they can now be fabricated. ChatGPT can pump out a photorealistic image of me riding a unicorn at a Dunkin' Donuts drive-through in less than a minute. It will not break a sweat creating a convincing screenshot of a text message, a Facebook post, or a direct message exchange, complete with plausible timestamps, profile photos, and conversational tone. The cost of fabricating such "evidence" has effectively dropped to zero.

Screenshots therefore represent the worst of both worlds: evidence that looks intuitively authentic to jurors but lacks the very safeguards that digital evidence rules were designed to require—at precisely the moment technology has made fabrication trivial.

Different Evidence, Different Problems

Text evidence is the most dangerous. Modern AI writes like a polite, well-educated human with just enough personality to be incriminating. Detection tools routinely label human

writing as AI-generated and AI-generated writing as human-authored, achieving the rare legal feat of being wrong in both directions simultaneously. Under Pa.R.E. 901 and 702, such tools frequently rest on methodologies that cannot be replicated, tested, or meaningfully explained.

Images at least provide traditional forensic clues: lighting inconsistencies, shadows, reflections, and the occasional bonus limb. Unfortunately, AI systems noticed practitioners were catching on and improved, particularly with hands and fingers, which are now disturbingly competent. Metadata, often proposed as the solution, can be edited, stripped, or fabricated entirely. Its absence proves nothing; its presence proves only slightly more.

Audio remains the least hopeless category. AI-generated voices sometimes reveal subtle irregularities in breathing or cadence. But poor recording quality and compression obscure these tells, while voice-cloning technology improves faster than your expert's curriculum vitae.

Video combines all of these problems at once. A single AI-generated video can include fake images, cloned voices, synthetic facial movements, altered timing, and invented context, all wrapped together and then helpfully compressed by the internet until most forensic clues are gone. As generative models improve, high-quality deepfakes increasingly resist detection through ordinary forensic review and may require specialized laboratories to identify them (labs that exist primarily in federal agencies, well-funded research institutions, and science fiction movies, but not, as a rule, in routine criminal prosecutions).

Expert Testimony and Pa.R.E. 702: Frye *Still Means* Frye

Pennsylvania applies the *Frye* standard to novel scientific evidence, requiring the proponent to show that the underlying methodology is generally accepted within the relevant scientific community. That requirement poses a serious problem for many AI "detection" tools. Proprietary algorithms (black boxes that cannot be independently examined) are the natural enemy of *Frye*. If the defense cannot see how a system works, the scientific community cannot meaningfully evaluate, test, or accept it.

It is worth emphasizing what the objection is not. The problem is not that these tools produce "probabilities." Courts have long admitted probability-based forensic evidence when the underlying method has earned that privilege. DNA evidence, for example, often comes packaged with statistics, but those numbers rest on standardized protocols, validated procedures, peer-reviewed research, and repeatable testing; meaning the math is tethered to something more substantial than a dashboard's "confidence score." In *Frye* terms, the issue is not whether probability evidence is admissible; it is whether the method used to generate that probability is generally accepted and meaningfully testable.

As of this writing, I am unaware of any Pennsylvania criminal decision holding that an AI-detection tool satisfies *Frye*. That should matter.

Proposed FRE 707 and the Risk of "Evidence Without a Witness"

In August 2025, proposed Federal Rule of Evidence 707 was published for public comment (with written comments due February 16, 2026).[9] The proposal targets a specific evidentiary gap: machine-generated output offered without an expert witness, in circumstances where the same assertion, if made by a human, would ordinarily trigger Rule 702 scrutiny.[10]

Rule 707 sets out a straightforward premise: the admissibility of a technical conclusion should not turn on whether it is delivered by a person or printed by a machine. If a party seeks to introduce machine-generated output without expert testimony, and that output functions as the equivalent of expert reasoning, the court must evaluate whether the proponent has established the reliability foundation that Rule 702 demands. The point is not to ban software from the courtroom; it is to prevent "expert conclusions" from entering through a procedural side door simply because the conclusion arrived in a PDF instead of a mouth.

Although Rule 707 is not yet binding, it provides a useful roadmap for arguments already available under Pa.R.E. 901, 702, and 403 when machine output is offered without meaningful explanation of how the system reached its result or how reliable that result actually is.

The Liar's Dividend and Pa.R.E. 403

Artificial intelligence introduces a more subtle problem known as the "liar's dividend," a concept developed and popularized by Professors Bobby Chesney and Danielle Citron. As deepfakes become more realistic and more widely known, fake evidence can pass for authentic, and, just as conveniently, authentic evidence can be dismissed as fake whenever it becomes inconvenient. The result is not merely more fabricated material, but a broader erosion of confidence in digital proof—an awkward development for a system that now conducts much of its fact-finding through phones, platforms, and files.

This dynamic changes how jurors experience evidence. In a traditional trial, jurors are asked to decide whether evidence is credible. In the age of deepfakes, jurors are increasingly asked to decide whether credibility itself still exists as a stable category. Once jurors are told that "AI can fake anything," skepticism stops being a careful analytical tool and starts functioning more like a universal remote, pressed selectively to mute evidence that does not fit the preferred storyline.

The problem is often made worse by attempts to restore certainty with numbers. A slide announcing a "93% likelihood" that a video, image, or message was AI-generated carries an air of scientific authority that is deeply reassuring, yet often untethered to validation commensurate with that precision. Jurors are rarely told what the number measures, how it was calculated, what the error rate is, or whether it will mean the same thing next month after the model updates. The number becomes less a piece of evidence and more a decision shortcut, allowing everyone to move on without asking the uncomfortable questions the Rules of Evidence are designed to force.

This is where Rule 403 earns its keep. The rule is not just about excluding gruesome photographs or preventing lawyers from showing the same chart seventeen times. It exists to

prevent evidence from misleading the factfinder or exerting an influence disproportionate to its actual reliability. In the context of AI-related evidence, the danger is not merely confusion, but distortion: where uncertainty becomes a feature rather than a flaw, and confidence is supplied by statistics that look precise but explain very little.

Rule 403 therefore gives courts both the authority and the responsibility to intervene when technological claims threaten to overwhelm jurors' ability to fairly assess reliability. When the persuasive force of AI-related evidence substantially outweighs its probative value, exclusion is not censorship. It is the court doing its job, preventing the trial from becoming a math-themed magic show and preserving the truth-seeking function of the process.

Conclusion: Skepticism Is Still the Job

Artificial intelligence has not broken evidence law. It has simply stripped away the illusion that technology is neutral, objective, or self-validating. If anything, the rise of generative AI has clarified why evidentiary rules exist in the first place.

Pennsylvania Rule of Professional Conduct 1.1 requires competent representation, and competence increasingly includes a working understanding of how modern technology can distort, fabricate, or package evidence into something that merely *looks* reliable. Defense counsel need not become engineers or data scientists, but they must be able to recognize when a technological process itself is the weakest link in the evidentiary chain.

The defense function has not changed. It still means demanding foundations, testing assumptions, exposing uncertainty, and reminding courts that computers are not witnesses, and they are certainly not neutral ones. The fact that a conclusion comes from a machine does not make it immune from scrutiny; it makes scrutiny essential.

In the age of artificial intelligence, skepticism is not paranoia. It is competence.

And when the evidence looks flawless and too good to be true, it probably had help (possibly from a machine that does not fear perjury).

NOTES:

[1] M. Petro, *University at Buffalo students protest use of AI detection tool*, GovTech, (2025), https://www.govtech.com/education/higher-ed/university-at-buffalo-students-protest-use-of-ai-detection-tool?utm_source=chatgpt.com (accessed Jan. 2026). See also, *Michael Coley, Guidance on AI Detection and Why We're Disabling Turnitin's AI Detector*, Vanderbilt University Brightspace, (Aug. 16, 2023), https://www.vanderbilt.edu/brightspace/2023/08/16/guidance-on-ai-detection-and-why-were-disabling-turnitins-ai-detector/?utm_source=chatgpt.com (accessed Jan. 2026).

[2] J. Koetsier, *OpenAI Can't Detect Its Own ChatGPT-Generated Text Most of the Time*, Vice, (2023), https://www.vice.com/en/article/openai-cant-detect-its-own-chatgpt-generated-text-most-of-the-time, (accessed Jan. 2026).

[3] See Jan H. Kirchner, Lama Ahmad, Scott Aaronson, and Jan Leike, *New AI Classifier for indicating AI-written text*, OpenAI ChatGPT (Jan. 31, 2023), https://openai.com/index/new-ai-classifier-for-indicating-ai-written-text/ (accessed Jan. 2026).

[4] A. R. Pratama, *The accuracy-bias trade-offs in AI text detection tools and their impact on fairness in scholarly publication*" 11 PeerJ Computer Science e2953 (Jun. 2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC12453642/ (accessed: Jan. 2026).

[5] PA. R. EVID. 901 - Requirement of Authentication or Identification, 225 Pa. Code Rule 901 (2026).

[6] Advisory Committee on Evidence Rules, *Agenda Book for the Meeting of November 5, 2025*, Judicial Conference of the United States (Nov. 2025), https://www.uscourts.gov/rules-policies/about-rulemaking-process/advisory-committees/evidence-rules (accessed Jan. 2026).

[7] PA. R. EVID. 902 - Evidence That is Self-Authenticating, 225 Pa. Code Rule 902 (2026).

[8] Comment, PA. R. EVID. 902 - Evidence That is Self-Authenticating, 225 Pa. Code Rule 902 (2026).

[9] Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence*, Committee on Rules of Practice and Procedure (Aug. 2025), preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf (accessed: Jan. 2026).

[10] See Committee Note to Proposed Rule 707.

About the Author

Vito DeLuca serves as Luzerne County's First Assistant Solicitor and Chief Artificial Intelligence Officer. A seasoned trial attorney, he has represented numerous municipalities and tried over fifty jury cases in state and federal courts. He previously served as Chief Solicitor for Luzerne County from December 2008 through April 2013.

Mr. DeLuca holds a J.D. from the University of Pittsburgh School of Law, a B.S. in Accounting from King's College, an MBA from Cornell University, and is currently completing an M.S. in Cybersecurity at NYU. In his current role, he leads the County's efforts to responsibly integrate artificial intelligence into government operations.

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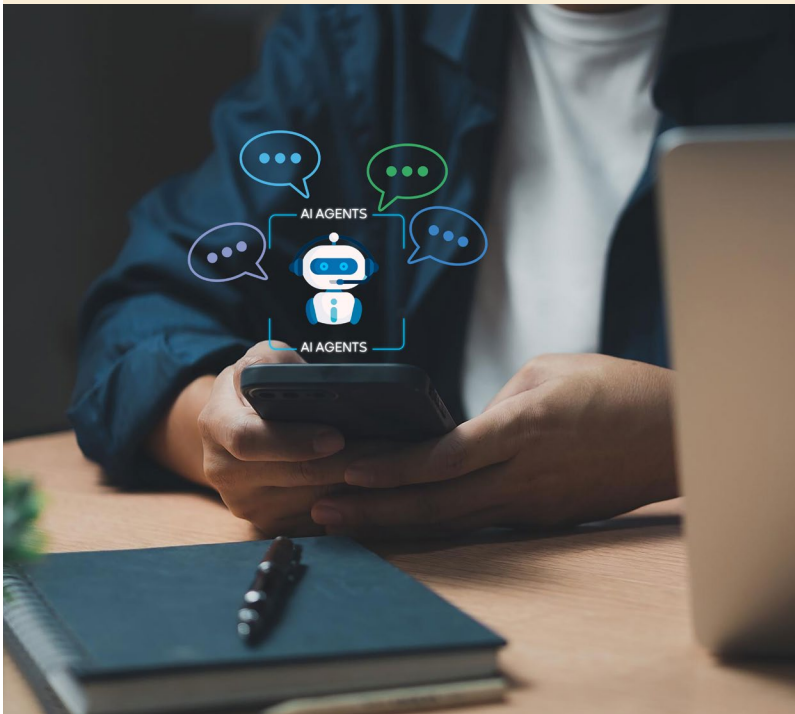

Can a Medical Marijuana Patient be Charged with a Crime Under the Medical Marijuana Act?

Patrick K. Nightingale

Introduction

In this article we're going to look at the criminal enforcement provisions of Pennsylvania's Medical Marijuana Act as well as practical tips for practitioners.

Seven years after the first bill was introduced in the General Assembly to legalize medical marijuana then Governor Tom Wolf signed the bipartisan Medical Marijuana Act ("MMA") into law on April 17, 2016, surrounded by patients and activists.[1] The MMA created a regulated framework overseen by the Department of Health to allow licensed entities to grow, process, and distribute medical marijuana products to qualifying patients with "serious medical conditions" as defined in section 103 of the MMA. Section 102 set forth the intent of the General Assembly:

> (3) It is the intent of the General Assembly to:
> (i) Provide a program of access to medical marijuana which balances the need of patients to have access to the latest treatments with the need to promote patient safety.
> (ii) Provide a safe and effective method of delivery of medical marijuana to patients.
> (iii) Promote high quality research into the effectiveness and utility of medical marijuana.

To provide qualifying Pennsylvania medical marijuana patients with access to medical marijuana products, the MMA provided for the issuance of twenty-five grow/processing facilities and fifty retail dispensary licenses, each of which allowed the license holder to operate three dispensaries. Applicants were required to demonstrate they had adequate capital; that they had appropriate real estate that met the requirements set forth in the MMA; that they had appropriate security, data retention, transportation, community engagement, waste disposal, inventory, and staff training plans; and that the principals did not have any disqualifying criminal convictions such as prior drug possession or drug trafficking convictions.

The Department of Health divided the Commonwealth into six geographic "zones" to ensure all Pennsylvania medical marijuana patients had reasonable access to medical marijuana. Applications were judged on a point system, with the highest points winning licenses. Unsuccessful applicants decried the lack of transparency in the grading process, and the Department of Health found itself defending numerous lawsuits.

Other provisions of the MMA created an Advisory Board to monitor the program and make recommendations to the Department of Health, such as adding qualifying conditions.[2] It created a physician registry with training requirements for physicians; a "caregiver" carve out for non-patients to purchase medical cannabis products for patients who are unable to access a dispensary; some protections

for patients holding professional licenses; some employment discrimination protections; and some custody protections.

Section 303 of the MMA set forth that it is not a violation of Pennsylvania's Controlled Substances Act if a Pennsylvania medical cannabis patient consumed medical cannabis as set forth in the Act.[3] A patient with a qualifying condition who has received a "recommendation"[4] from a physician registered with the Department of Health may purchase and consume medical cannabis in pill form, oil, tincture, topical, or liquid. Dry leaf was prohibited unless otherwise authorized by the Department of Health, which granted that authorization on August 1, 2018. As will be important later when we discuss criminal penalties, Section 303 places certain restrictions on medical cannabis. Medical marijuana may only be dispensed to the patient or his/her caregiver. Any unused medical cannabis must be kept in its original dispensary packaging. Section 304 adds additional restrictions—a patient may not "smoke" medical marijuana, and only a licensed entity may grow, process,[5] or sell medical marijuana.

Medical marijuana products became available to patients on February 15, 2018. The very first products were sold in Butler, Pennsylvania, and this writer was the third person and first patient to make a legal medical marijuana purchase in the Commonwealth of Pennsylvania. Shortly after the program came online, the Department of Health approved the sale of "dry leaf" flower,[6] but the prohibition on "smoking" medical cannabis remained.

Finally, pursuant to Section 304(a), the use of medical marijuana outside of the provisions of Section 303 is unlawful and is also a violation of Pennsylvania's Controlled Substances Act.

Criminal Penalties and Chapter 13 of the MMA

Anyone who practices criminal defense, even if it's a small part of their practice, is likely familiar with 75 Pa.C.S. §3801, *et seq.*, and 35 Pa.C.S. §§780-113(a)(16) (Possession), (a)(30) (Possession With Intent to Deliver/Delivery/Manufacturing), (a)(31) (Possession of a Small Amount), and (a)(32) (Possession of Paraphernalia). As set forth in Section 304(a) of the MMA, any marijuana use that falls outside of the parameters of Section 303 is unlawful and a violation of the Controlled Substances Act.

In addition to the potential penalties for violating the sections set forth in the preceding paragraph, the MMA provides additional criminal penalties in Chapter 13. Sections 1301 – 1307 deal with unlawful certifications, diversion, and retention. Section 1301 makes it a Misdemeanor of the First Degree for a practitioner registered with the Department of Health to certify a patient who does not have a qualifying condition. Section 1302 makes it a Misdemeanor of the First Degree if an employee, investor, or principal of a licensed entity to divert medical marijuana.[7] Section 1303 makes it a Misdemeanor of the Third Degree if a caregiver possesses an amount greater than what is permitted under the MMA, yet does not define a maximum quantity.[8] Section 1304 makes it a Misdemeanor of the Second Degree for a caregiver or patient to illegally divert medical cannabis. A second or subsequent offense is a Misdemeanor of the First Degree. Illegally diverting medical marijuana for pecuniary gain would also be illegal distribution under the Controlled Substances Act, an ungraded Felony. Section 1305 makes it a Misdemeanor of the Second Degree if an individual falsifies a patient identification card. A second or subsequent offense is a Misdemeanor of the First Degree.[9] Section 1306 makes it a Misdemeanor of the Second Degree if an individual "adulterates, fortifies, contaminates or changes the character or purity" of medical cannabis. A second or subsequent offense is a Misdemeanor of the First Degree. And, finally, Section 1307 makes it a Misdemeanor of the Third Degree to disclose patient information, which is confidential pursuant to Section 302 of the MMA.

Section 1308 is the "catch all" provision for any other violations of the MMA:

> (a) **Criminal penalties.—**In addition to any other penalty provided by law, a practitioner, caregiver, patient, employee, financial backer, operator or principal of any medical marijuana organization, health care medical organization or university participating in a research study under Chapter 19, and an employee, financial backer, operator or principal of a clinical registrant or academic clinical research center under Chapter 20, who violates any of the provisions of this act, other than those specified in section 1301, 1302, 1303, 1304, 1305, 1306 or 1307, or any regulation promulgated under this act:
> (1) For a first offense, commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of not more than $5,000, or to imprisonment for not more than six months.
> (2) For a second or subsequent offense, commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of not more than $10,000, or to imprisonment for **not less than six months** or more than one year, or both.

You read that correctly—Section 1308 of the MMA imposes the ONLY mandatory minimum sentence for a controlled substances offense in the Commonwealth of Pennsylvania.

So, is law enforcement charging Section 1308 violations? Fortunately, prevailing attitudes amongst law enforcement and prosecutors no longer reflects the "Reefer Madness" mentality of recent decades, with overwhelming public support for both medical cannabis and adult use legalization. Nonetheless, law enforcement is well aware that 1) medical marijuana must be kept in its original dispensary packaging; 2) that a medical marijuana patient may not "smoke" medical marijuana; and 3) that a patient may not possess another patient's medical marijuana.[10]

Considering the potential for a six-month mandatory minimum sentence for a second or subsequent violation of Section 1308, it is critical to shield clients from prosecution pursuant to that section. If a prosecutor is insistent on prosecuting a medical marijuana patient for violating the "original dispensary packaging" or "no smoking" provisions of the MMA the defense attorney should do their utmost to convince the prosecutor to proceed with charges under the Controlled Substances Act as opposed to the MMA. Practically speaking, many patients will continue to purchase cannabis from the street, incorrectly assuming their patient identification protects them from prosecution. In this scenario, the marijuana is not Pennsylvania medical marijuana, as it was not cultivated in a licensed Pennsylvania grow facility and not sold via a licensed Pennsylvania dispensary. Therefore, it cannot be "medical marijuana" that is not stored in its original dispensary packaging as it was never *in* original dispensary packaging.

Rescheduling and Adult Use

Would rescheduling from Schedule I to Schedule III at the federal level impact Pennsylvania's medical marijuana program? It could conceivably kill it. Tucked in Section 102 of the Declaration of Policy is the following provision:

> It is the further intention of the General Assembly that any Commonwealth-based program to provide access to medical marijuana serves as a temporary measure, pending Federal approval of and access to medical marijuana through traditional medical and pharmaceutical avenues.[11]

Despite President Trump's Executive Order directing that marijuana be rescheduled from Schedule I to Schedule III, it currently remains a Schedule I controlled substance. If it is rescheduled to Schedule III, then marijuana would be the only Schedule III controlled substance that has not undergone FDA clinical studies. Would the DEA take the position that it now has the authority to regulate state medical marijuana programs? Would it require FDA clinical studies for each and every product and strain? Even in Pennsylvania's limited medical marijuana market growers/processors offer dozens of different strains of medical marijuana, each with its own unique chemical profile. Would Cresco Labs, for example, be required to conduct FDA clinical trials for each of the strains it currently offers? For each of the different varieties of concentrates, vape pens, and ingestibles? The time involved in conducting such studies is not a study in efficiency. For example, the non-psychoactive hemp derived medical Epidiolex, effective in the treatment of seizure disorder, underwent years of clinical trials before being approved by the DEA as a Schedule V Controlled Substance.[12]

What effect might adult use legalization have on Pennsylvania's medical marijuana program? Well, it would most likely render the "no smoking" and "original dispensary packaging" requirements moot, but other states offer a cautionary tale where medical marijuana programs have been ignored once a more profitable market driven full legalization takes effect.

Conclusion

Many medical marijuana patients are at risk of unwittingly violating the MMA for smoking medical marijuana and for not keeping unused medical marijuana in its original dispensary packaging. Despite collecting almost 90 million dollars in tax revenue in 2025, the Department of Health has taken no steps to provide patient education. For many, the "no smoking" provision is ludicrous. There is also a lack of understanding that the MMA only provides protection for a patient in possession of medical marijuana that a patient purchased from a licensed Pennsylvania medical marijuana dispensary. Medical marijuana from Michigan (a state with reciprocity for patients) is 100% illegal in Pennsylvania. Until Pennsylvania embraces full adult use, our medical cannabis patient community will continue to face criminal charges for straying beyond the parameters of Section 303 of the MMA.

NOTES:

[1] Act of Apr. 17, 2016, P.L. 84, No. 16.
[2] *See* Sections 1201-1202.
[3] *See* Section 303(a).
[4] *See Conant v. Walters*, 309 F.3d. 629 (9th Cir. 2002) (DEA tried revoking ability to prescribe controlled substances from physicians recommending medical marijuana in California. The Ninth Circuit held that a physician has a First Amendment right to discuss treatment options with a patient).
[5] A patient may incorporate their medical marijuana product into an edible form. *See* §304(c).
[6] Section 303(b)(2)(iv) allows for "vaporization." Since dry leaf can be vaporized this proved to be a "back door" to flower sales, which account for over 50% of retail medical marijuana sales in Pennsylvania.
[7] A recent case from the Sunnyside dispensary in Pittsburgh involved a manager "gifting" a promotional product from a licensed grower/processor. The manager was charged with violating this section as well as the Controlled Substances Act.
[8] Possession limits were loosely defined as a "thirty-day supply." Possession limits were expanded to a ninety-day supply during the pandemic. This writer is unaware of any caregiver being charged under this section.
[9] Despite the fact that the patient identification uses the patient's driver's license or PA identification photograph for the patient identification, law enforcement has complained that they are unable to verify the validity of a patient identification. Section 1103 requires the Department of Health to confirm whether a patient is registered upon request from law enforcement. To date there is no mechanism in place to effectuate this provision.
[10] Taken to an extreme, spouses who are MMJ patients could be charged under 1308 if one spouse possessed the other's medical marijuana. Every individual unit sold in a dispensary has a label with the patient's name on it. The spouse whose medical marijuana is possessed by the other spouse could face prosecution pursuant to section 1304
[11] In denying a constitutional challenge to Pennsylvania's Schedule I classification of marijuana after the passage of the MMA, the Superior Court of Pennsylvania in *Commonwealth v. Jezzi*, 208 A.3d 1105 (Pa. Super. 2019) found that the General Assembly did not find that marijuana had medical efficacy and that section 102(4) demonstrated that it merely intended to set up a temporary program to explore the medical benefits of marijuana.
[12] Pursuant to the Farm Bill of 2018, Epiliodex was removed from the Controlled Substances Act in 2020 as it is derived from hemp plants with a THC level below .3% THC.

About the Author

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

Mr. Nightingale has spoken extensively on the subject of cannabis reform is a trusted voice on reform related questions, frequently appearing on local radio and television. He has also been privileged to testify on numerous occasions before Pennsylvania legislative bodies considering medicinal cannabis legislation.

Mr. Nightingale has taught Continuing Legal Education courses on the issue of cannabis policy and law to various associations. Mr. Nightingale also serves as a speaker for Law Enforcement Action Partnership. Mr. Nightingale is married to fellow activist Theresa and they have three children together – Perrin, Mac and Xavina.

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Ten Things Every Defense Lawyer Must Know About Autism

Doug Passon, Dr. Nick Dubin
& Dr. Laurie Sperry

We strive to provide the best defense for every client. But when it comes to autism spectrum disorder (ASD), we are at risk of falling short of that goal, either because we miss the issue, or fail to understand its relevance. As such, every lawyer must understand what ASD is, and why it matters at every stage of a criminal prosecution.

There is much to learn about ASD, and a lawyer who understands it can achieve seemingly impossible results. The goal of this article is to give you the highlights and additional resources that will allow you to continue educating yourself on ASD. To that end, the following list was created by three individuals with unique perspectives on autism and the criminal process: a nationally recognized autism expert and clinician (Dr. Sperry); an author, teacher, and advocate who has firsthand experience with the criminal system (Dr. Nick Dubin); and, a thirty-year criminal defense lawyer who represents autistic clients nationwide (Doug Passon).

1. Autism Matters in Every Case, and at Every Stage of the Proceedings

The latest statistics from the Centers for Disease Control and Prevention estimate that 1 in every 31 individuals is autistic.[1] That means every lawyer has likely represented several people "on the spectrum." The truth is that those with ASD are deeply vulnerable; they are vulnerable to becoming victims of crimes, and they can be vulnerable to committing crimes, often unwittingly.

The most common cases involve online offenses, because that is where so many autistic people spend inordinate amounts of time and are most vulnerable. However, we see autism in many other situations, including cases involving white collar offenses, susceptibility to online radicalization,[2] and sometimes even violent crimes. Perhaps most disturbing, some *innocent* clients are charged and convicted because police and prosecutors misinterpret autistic traits as evidence of guilt.[3] [4]

When a client has committed an offense, ASD puts the offense conduct in the proper context. It is not necessarily a defense, but it is *always* mitigating. When a client is innocent, ASD often explains innocent conduct, such as statements made during an interrogation, failure to express appropriate emotion when confronted with evidence, lack of eye contact, and so forth. A criminal defense attorney must educate prosecutors, judges, and juries about a client's autistic traits at every opportunity. It is especially important to integrate ASD into plea negotiations and sentencing presentations, especially when there is a possibility of incarceration. It bears noting that every person on the spectrum is unique, and the disorder manifests itself in different ways. Not every characteristic described below will apply equally to every client. Notwithstanding these differences, we can say with certainty: ASD is going to be a main character in the story of your defense.

2. Mind the Gap: The Double Empathy Problem.

The term "theory of mind" (ToM) was coined in the late '70s by psychologists David Premack and Guy Woodruff[5] and is central to understanding ASD. It describes the ability of a human being to imagine what others may be thinking or feeling. This ability helps humans navigate the social world. Having an intact ToM enables neurotypical people to connect, understand others' motivations and intentions, and predict their reactions and behaviors. This is not a skill humans are born with, but rather one that develops over years, through the course of the multitude of daily social interactions. But those with ASD struggle with ToM.

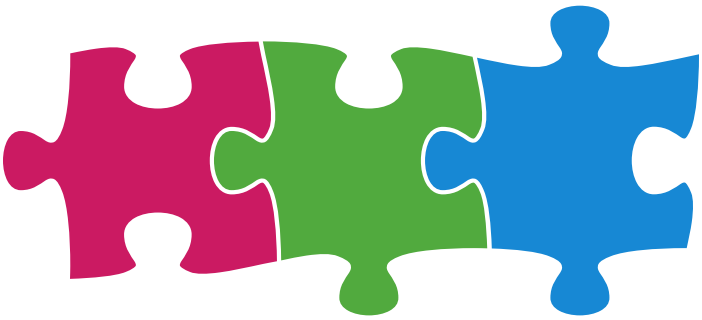
Indeed, renowned autism expert Simon Baron-Cohen says those on the spectrum are often "mind-blind."[6] In other words, they can lack the ability to take the perspective of others and intuit what they may be thinking or feeling. They do not understand that others have their own thoughts and interests, independent of their own. This is one of many real and significant deficits that render those on the spectrum deeply vulnerable when it comes to navigating the social world and the criminal system. But mind blindness is a two-way street.

When it comes to how most neurotypicals understand autism, they too can be prone to their own form of mindblindness. Autism researcher Damian Milton defined this as the "double empathy problem."[7] This is often the most significant hurdle a defense lawyer must overcome when representing a client with ASD. Those who don't know about autism, especially in the criminal system, have a total lack of empathy for how the autistic mind functions. They know how they see the world and can't imagine any different way. They weaponize terms like "high functioning" or "level one" and point to things many autistic people *can do* (such as hold a job, earn a degree, or drive a car) to argue the issues are so "mild" they play no role in the case.

They call autism the "excuse de jure" and accuse defendants of using ASD to avoid consequences. But the truth is, while a client's autism may appear mild to an ill-informed outside observer, the autistic deficits they experience are severe and often debilitating.

3. How to Recognize When Your Client May be Autistic; Late Diagnosis Should Not Be a Barrier

Obtaining a diagnosis of ASD in adulthood can be an arduous task for several reasons. As people age, certain core features of ASD may be less obvious. As the field has evolved, so too have diagnostic tools, becoming much more sophisticated and sensitive to the people at either end of the spectrum. Depending on their age, many may come to you without a diagnosis, or with a diagnostic label that was being employed at the time of their diagnosis. For instance, those diagnosed between 1994 and 2013 may carry a diagnosis of Asperger's Syndrome.



Pervasive Developmental Disorder (PDD) or PDD Not Otherwise Specified (PDD-NOS) was used synonymously with autism by many psychiatrists and psychologists for several years. The PDD-NOS was frequently used to describe adults and children who did not present as what was then considered classically autistic. Sometimes a client may have a veritable alphabet soup of diagnoses including Oppositional Defiant Disorder (ODD), Obsessive Compulsive Disorder (OCD), Social Communication Disorder (SCD), Sensory Processing Disorder (SPD) and/or Attention Deficit Hyperactivity Disorder (ADHD). Pay attention to their medical or psychological histories for diagnoses, that, taken together may be better reflected by the current criteria for Autism Spectrum Disorder (ASD) found in the DSM 5 tr.[8]

There may be other factors that play a role in late diagnoses. The literature clearly states that people of color are diagnosed later or not at all relative to Caucasian.[9] [10] [11] Lack of access to care in rural and remote areas and those in unserved and underserved communities may also be autistic, though never diagnosed. Where once, a diagnosis of autism was limited to a child who might be found in a corner, rocking and spinning a plate, the DSM5-tr identifies people who have language skills but are no less impaired by the intensity of their interests, the way they are able to access and use language and their significant social challenges. *It is the social impairments that impact the trajectory and every single aspect of their lives.*

I went through the criminal legal system and experienced how the effects of masking and scripting impacted me personally. For me, the strong urge to mask stemmed from a desire to appear intelligent, competent, and, most crucially, not "stupid" in the eyes of my attorney and others within the system. I wanted to project a level of knowledge I didn't truly possess. Unfortunately, this "performance," driven by embarrassment over my disability, only worked against me by obscuring my true needs, behaviors, and underlying disabilities that contributed to the commission of the instant offense. Focusing on masking while awaiting trial prevented me from seeing the "big picture." This was because I mistakenly prioritized appearing neurotypical over my defense strategy.

My personal account of navigating the criminal legal system illustrates a specific risk: feeling compelled to "mask" competence with an attorney to avoid being perceived as unintelligent. This masking can manifest as false "confidence" or "competence," where autistic individuals under extreme pressure may feign understanding or cooperation—a coping mechanism that ultimately harms their own interests. This observation is consistent with **research** indicating heightened anxiety and communication challenges for autistic adults during police-suspect interviews, warranting caution against standard investigative practices that risk misinterpreting autistic presentation.[17] False confessions can and do result from the perfect storm already set in motion.

~Dr. Nick Dubin

Attorneys can mitigate these challenges by proactively learning the client's communication style, developmental history, and how they function when not actively performing neurotypicality. Building rapport and assessing functional maturity can be achieved by exploring the client's special interests and social history. Additionally, involving "family historians" can provide concrete, behavior-based examples of the client's adaptive functioning across various settings and over time. A lawyer should constantly be confirming a client's level of understanding as the process unfolds.

4. Masking and Scripting - The Hidden Disorder

When an autistic client discontinues masking, they may show more noticeable challenges in areas like executive functioning (e.g., working memory, planning/generativity, cognitive flexibility), emotional regulation, and managing repetitive behaviors. These are domains where autism research documents measurable group-level difficulties, even in those with average intellectual ability.[12] [13] These unmasked difficulties often align with clinically meaningful support needs to be captured by adaptive-functioning measures[14] which assess real-world social and daily living skills in autistic people.[15] [16]

5. Executive Functioning Deficits Give Context to Bad Choices

Executive functioning encompasses cognitive functions such as the ability to resist impulses; consider the impact of one's behavior on others; shift attention and focus from one task/thought to another; regulate the size of emotional responses; the ability to start activities; to hold information in one's working memory; to plan, organize, and prioritize activities; and, to monitor one's own progress on an activity/task.[18] The Behavior Rating Inventory of Executive Functioning -2 Adult version[19] is an excellent tool to assess the impact of executive functioning deficits on a person's decision-making and actions. This assessment includes a self-report as well as an informant report which can be administered to your client's parents, caregiver, or spouse.

While many of the clinical scales on the BRIEF 2A may help provide context to your client's challenges and decision-making, there are a few clinical scales worth particular examination. The Inhibit scale measures how well a person can resist impulses and think through the "What Ifs" or consequences of their actions *before* they act. The Emotional Control scale measures how well a person can regulate their emotional responses. In other words, does the size of their response match the size of the problem? The Shift scale measures a person's ability to change their thought channel from one person, idea, activity to another. The Self Monitor scale measures a person's ability to notice how their behavior is affecting others or how others might view their actions. While many of the clinical scales are helpful in providing context, the aforementioned scales are often at play in decision-making that may result in contact with the criminal justice system.

The severe executive functioning deficits commonly associated with ASD helps a lawyer put a client's conduct in the proper light. Rather than a cold, calculated criminal, we find a person who engaged in crimes with little understanding of the implications and consequences associated with their conduct or

an impaired ability to shift focus away from a bad idea and think through a better solution to a problem.

6. Autism is a Condition of Profound Isolation

Autism is frequently discussed in terms of social alienation and loneliness, with qualitative and autobiographical accounts often using "alien" metaphors to describe the experience of living in a social world that feels like a different culture.[20] [21] Empirical and clinical-literature reviews likewise document elevated loneliness and social isolation concerns among autistic adults.[22]

Think of your client as functioning as a lifelong anthropologist on an alien planet, never quite understanding how the foreign civilization they are living in operates socially.[23] Your client has a social disability, leading to a perception of the world that can result in misunderstandings. Yet when misunderstandings are judged harmful, autistic defendants are still frequently assessed through neurotypical lenses. Research and practice-oriented guidance for justice professionals emphasize that autism-related affect, communication style, and stress responses can be misread as deception, defiance, or lack of remorse, and that accommodations and informed interviewing practices are critical.[24] [25] As the attorney of record, your role is twofold: educate the prosecutor and the court on the nature of your client's disadvantage and show how tailored structure and support can reduce risk and promote compliance.[26] [27]

Like many autistic people, my deepest desire as a child was to fit in. However, making friends proved extremely difficult. This was due to my inherent rigidity, a set of idiosyncratic special interests that my peers did not share, confusion over my sexual orientation (I am now a member of the LGBTQ community), and extreme sensory issues. Consequently, my isolation during childhood was profound and involuntary. This isolation, combined with my failure to meet many key social milestones, contributed to my involvement in the criminal legal system.

~Dr. Nick Dubin

7. Restricted and Repetitive Behaviors and Interests; Rigid Thinking and "Rule Following"

Restricted and repetitive behaviors are core characteristics of Autism Spectrum Disorder. These may include repetitive movements (hand flapping, body rocking) and repetitive speech (i.e. repeating words or phrases immediately or repeating phrases heard in videos). Restricted and repetitive behaviors may come in the form of resistance to change, including rigid rituals or routines. Some people have interests that are highly unusual in their focus (pad locks, duct tape) and/or the pursuit of their interests becomes so intense as to interfere with their lives and the lives of those around them.

When considering the actions and decision-making of your clients, it would be helpful to consider what role, if any, their deep interests play. For instance, perhaps their deep interest is duct tape, its uses, its tensile strength, its composition. So, they begin exploring that topic on the Internet, only to stumble across an entire subgenre of Child Sexual Abuse Materials (CSAM) involving duct tape. Perhaps, their deep interest has a shelf life. They may have been very interested in WWII airplanes as a young child and once they satisfied their need to know and exhausted the well of knowledge, they turned to WWII artillery, which resulted in Internet push algorithms sending them content about Nazism and genocide. Suddenly, they find themselves at the attention of law enforcement. In the case of stalking charges, the person may become their deep interest. Combined with deficits in self-monitoring and perspective taking, they may not be aware of the impact their behavior has on others.

Those on the spectrum often exhibit rigid thinking and rigid rule following. This often helps them navigate what is for them, the chaos, and confusion of the neurotypical world. It's hard to reconcile how and why a person with ASD might then break the rules. More often than not, they do so because they simply do not understand the rules, particularly the rules of social engagement. That said, when the rules are clearly defined, they typically remain unbroken. Rigid rule-following may be something your client insists on, not only for themselves but for others. When others "break the rules" they may feel compelled to point that out or impose a consequence on the rule breaker, which paradoxically carries its own consequences.

Along the same lines, those with ASD can be rigid in their thoughts and opinions about certain things. It may be relevant to offense conduct, and it may also cause conflict in preparing a defense, negotiating a plea, and making other important decisions in a case. When the attorney-client relationship is strained due to what is likely the result of autistic traits, counsel should seek the guidance of an expert on how to navigate conflict and set the relationship back on track.

8. The Need for QUALIFIED Experts

Lawyers are busy, and we've spent a long time cultivating a battery of top-notch experts. We know the court and the prosecution knows them, and they are our first call when we have a client with any suspected mental health issues. But, as good as they may be, they are likely the *wrong* experts for a case involving autism. Many (if not most) forensic experts have a surface-level understanding of what ASD is; the many ways it can impact a client; and most importantly, that it is almost certain to be relevant to the offense conduct, competence, or even innocence. This is one reason why so many of our clients come to us without a diagnosis in the first place—an otherwise qualified expert completely missed the issue, and/or misdiagnosed it.

Another problem with generalist forensic experts is that they usually do not conduct diagnostic tests that are essential to fully understanding the client's level of executive or adaptive functioning. The typical tests overlooked by unqualified experts are the ADOS-2, ADI-R, brief 2A, and Vineland.[28] These are tools that help pull back the curtain and reveal the full truth of a client's deficits.

For example, in a recent case, a client was charged with setting fire to a Tesla. This client had a stellar IQ, graduated with a degree in electrical engineering, and solved complicated math proofs in his free time. Imagine trying to explain to a decision

maker that this person didn't have a full understanding of the consequences of his actions, or the ability to talk himself out of this terrible idea once he decided to do it. But the testing supported those exact mitigators. The Vineland test showed that despite his high level of intellect, his emotional and adaptive functioning was on par with that of an eleven-year-old child. A decision maker can relate to the truth that even the smartest 11-year-old can do some really dumb things. When all this information was presented to the judge, she declined to follow the government's harsh sentencing recommendation and imposed the minimum.

9. The Need for Autism Specific Treatment to Reduce Recidivism

Those on the spectrum will almost never recidivate, provided they receive the proper treatment. But, again, like the "anthropologist on Mars," those on the spectrum are essentially living in a world that wasn't built for the way their brains function. Unfortunately, most treatment programs suffer the same problem because they are designed to treat neurotypical individuals. While people *without* autism may intuit unwritten rules, autistic people benefit from being taught explicitly where social, sexual, and legal boundaries exist. When they are not explicitly taught these rules, they may be forced to learn through trial and error. If it has been said once by a defendant with autism, it's been said a thousand times "I learned the rules by breaking them."

Adding insult to injury, when people with autism do cross social and legal boundaries, they are typically placed in the general population of a prison and treated using the same offender treatment programs that do not take their disability and learning characteristics into account.

The research is very clear that autism specific treatment results in the best outcomes and lowest rates of recidivism.[29] Given the social, communication, executive functioning and even sensory challenges of clients with autism, participating successfully would be nearly impossible. As a result, many are expelled from these groups because they cannot interact with the group in a typical manner, they may not be able to keep pace with the information that is presented verbally and have often been told they lack perspective-taking. Challenges with perspective-taking or Theory of Mind deficits are a core component of ASD. In other words, it would be akin to requiring a person in a wheelchair to make it up the stairs like everyone else and if they couldn't, they would be failed out of the program.

Again, here's the good news: when autism specific treatment is available and provided in a supportive environment which takes into account the learning characteristics, communication styles and social and behavioral challenges of people with autism, the rates of recidivism are substantially reduced.[30] This serves the dual purpose of improving the skill set of the individual while reducing recidivism and keeping society safer. It is imperative that decision-makers understand amenability to treatment, lest they believe that their disorder renders them dangerous and likely to reoffend. In fact, anecdotal evidence shows that recidivism rates among autistic defendants is nearly *zero*.

10. Changes are Happening, Slowly but Surely

The true breakthrough for change has come in Virginia, which was, in large part, made possible by the relentless advocacy of the nonprofit organization Decriminalize Developmental Disabilities.[31] The Virginia Model[32] provides a defined legislative solution for deferred disposition for persons with autism or intellectual disabilities. The law applies "[i]n any criminal case" with key exclusions (including capital murder, "acts of violence" as defined elsewhere in the Code, and crimes that already have their own deferred disposition statutes).

The Virginia concept is potentially being adopted in other jurisdictions. In South Carolina, pending House Bill 3749 (2025–2026) would establish an "Autism Spectrum Disorders and Intellectual Disabilities Pretrial Intervention Program."[33] The bill excludes "violent crime" (as defined by South Carolina statute), requires a qualifying diagnosis, requires a clear and convincing disability–offense nexus ("caused by or had a direct and substantial relationship"), and authorizes deferral into pretrial intervention with procedures for successful completion and violations governed by the state's pretrial intervention framework.

In Maryland, pending House Bill 940 (2025) would create a distinct mandatory "probation before judgment (PBJ)" pathway for defendants with ASD or intellectual disability when statutory criteria are met: following a guilty plea, nolo contendere plea, or finding of guilt, the court "shall" stay entry of judgment, defer further proceedings, and impose PBJ if it finds by clear and convincing evidence that the criminal conduct was a manifestation of the disorder or disability and that PBJ serves both the defendant's best interests and public safety/justice.[34]

Juvenile specialty-court models are also instructive. In Nevada, specialty dockets in Clark County such as the DAAY Court (Detention Alternative for Autistic Youth) and NEAT Court (Neurobehavioral court programming) have been publicly described as treatment- and supports-focused pathways for youth, with very low recidivism reported in local coverage (e.g., approximately 11% in one report) and dismissal outcomes tied to successful completion. Nevada has also codified and expanded autism-related juvenile court programming through statewide legislation.[35]

Other states show different (but still explicit) approaches. West Virginia law directs development of a statewide strategic plan using the Sequential Intercept Model to divert adults and juveniles—including those with developmental and cognitive disabilities—away from the criminal justice system and into treatment, emphasizing continuity of care and interagency coordination.[36] Indiana's statutory framework for forensic diversion includes explicit consideration of participants with developmental disabilities (including ASD) through its diversion architecture and conditions.[37] And Florida's Chapter 916 provides a specific statutory framework for defendants found incompetent to proceed due to intellectual disability or autism, including options such as designated forensic facilities and conditional release grounded in community-based training plans.[38]

These advancements in the law not only give us hope for widespread change, but also they can and should be used to

validate the significance of ASD in criminal prosecutions. In other words, pointing to changes in the legal landscape can be used to break through the wall of indifference in jurisdictions where decision-makers are still debilitated by the double-empathy problem.

Conclusion

Prosecutors, judges, legislatures, and commissions are beginning to understand ASD and why it matters. Lawyers who understand the issue and develop it thoroughly can achieve seemingly miraculous outcomes. But there is more work to be done to achieve system-wide reforms that aim to improve fairness, reduce unnecessary incarceration, and maintain public safety through disability-responsive legal pathways.

While the legislative progress in states like Virginia offers hope, the burden remains on defense counsel to bridge the gap between a rigid system and a neurodivergent client. We are moving past the era where autism is invisible or ignored in the criminal legal system. It is now our obligation to see what others miss, to contextualize what others judge, and to ensure that a disability is never mistaken for criminality.

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About the Authors

Nick Dubin was diagnosed with Asperger's Syndrome (now ASD level 1) in 2004. He holds a Bachelor's Degree in Communications from Oakland University, a Master's Degree in Learning Disabilities from the University of Detroit Mercy, and a Specialist Degree in Psychology and Psy.D. from the Michigan School of Professional Psychology. Nick had a profound speech delay—he was nonverbal until age 4—and experienced poor fine motor skills, jumped up and down, flapped his arms, was in special education from K-12, and had significant developmental delays that affected him throughout his childhood and teenage years. Despite this, he has authored many books on autism spectrum disorders including his most current one entitled *Autism Spectrum Disorders, Developmental Disabilities and the Criminal Justice System*. In 2009, he co-wrote a peer-reviewed article with Professor Janet Graetz on how spirituality manifests in autistic people, which was published in the journal *Religion, Disability & Health*. He has co-authored two academic book chapters with defense attorney Elizabeth Kelley, which published by Carolina Academic Press and Springer Publishing Company. He has spoken to the American Bar Association, the National Public Defender conference in Milwaukee and the Federal Defenders for the Western District of New York and the District of Kansas. Nick has personal involvement in the criminal justice system and intimately understands how the process works. Nick serves as board secretary for Decriminalize Developmental Disabilities (DThree). He advocates strongly for D3's mission and philosophy of prevention, intervention, and diversion.

Doug Passon is a practicing criminal defense lawyer with 30 years' experience in state and federal court. He has a national practice focused on holistic, narrative-based sentencing advocacy and autism-informed defense. (www.dougpassonlaw.com).

Passon is also an accomplished documentary filmmaker, having directed, filmed and edited award-winning short and feature-length documentaries that have played throughout North America and beyond. He has long been recognized as the pioneer in using short documentary films for mitigation in criminal and capital cases. Passon incorporates this form of visual advocacy into plea bargaining, sentencing and post-conviction relief. The goal is to use "legal documentaries" to humanize his clients and put their conduct in the proper context.

Passon produces and hosts a weekly podcast called Set for Sentencing (www.setforsentencing.com), the goal of which is to bring more awareness, fairness and hope to the sentencing process.

Dr. Laurie Sperry is a Licensed, Board-Certified Behavior Analyst-Doctoral and the Founder of Autism Services And Programs and Autism Forensics, in Wheat Ridge, Colorado. She has worked as a developer of the Neurodiverse Student Support Program at Stanford University, School of Medicine, Department of Psychiatry. Prior to joining Stanford, she was an Assistant Clinical Faculty at Yale University, Department of Psychiatry where she was a founding member of the Autism Forensics Group.

In 2006 she was added to the Fulbright Scholarship's Senior Specialist Roster for Autism. She moved to Australia in 2010. Her research focuses on people with ASD who come in contact with the criminal justice system to ensure their humane and just treatment. She has provided training to secure forensic psychiatric facilities across the globe and has published numerous articles and book chapters. Dr. Sperry has collaborated with the Behavior Analysis Unit of the FBI on cases involving people with autism and has worked with numerous law enforcement agencies to educate and support officers and other first responders.

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NOTICE OF 2026 PACDL ANNUAL MEETING AND OFFICERS AND DIRECTORS NOMINATIONS PROCESS

In accordance with PACDL Bylaws, notice is now given that the PACDL Annual Meeting of Members shall be held on the date, time, and place and for the purposes specified below:

Date: Thursday, April 9, 2026 at 12:30 p.m.

Place: Harrisburg Hilton
1 North Second Street
Harrisburg, PA 17101

Purposes:

1) Election of Board Members and Officers. At the annual meeting, officers and directors shall be elected by members in good standing who attend the annual meeting.

2) Any other business properly before the Association.

Nomination Process.

Any member qualified to vote may be nominated as a candidate for any Officer or Board of Director position. A member may be nominated by one of three means:

a) by the Board Governance Committee;

b) any member of the Association qualified to vote may nominate by petition any other Member qualified to hold office; or

c) any member qualified to vote may nominate by petition himself or herself.

The Board Governance Committee is charged with recruiting and nominating candidates for election as Directors and Officers of the Association. It strives to nominate qualified candidates, endeavors to assure diversity, and considers candidates' years of membership and service to the Association and the profession.

Below is the following 2026 slate of officers:
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Vice President, Middle District: Edward F. Spreha
Vice President, Western District: Amy Levenson Jones
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Board Member: Michael Comber
Board Member: Lindsay McDonald Dugan

Any member of the Association qualified to vote may self-nominate or nominate another member qualified to hold office. Individuals who want to submit a nomination petition must do so no later than March 9, 2026 by forwarding it to PACDL's office. A copy of a petition may be obtained by calling PACDL at 717.234.7403.

Eligibility.

Only members with voting rights and whose dues are current at the time of his/her candidacy may be candidates. A written nomination petition must be forwarded to PACDL, 214 Senate Avenue, Suite 602, Camp Hill, PA 17011 or winters@pacdl.org signed by at least twenty (20) members in good standing no later than March 9, 2026.

The Platform Committee has approved changes to the 2026 platform. They can be found at this document link.

NOTICE OF 2026 ANNUAL MEETING OF THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOUNDATION FOR JUSTICE

In accordance with the Pennsylvania Association of Criminal Defense Lawyers Foundation for Justice (Foundation) Bylaws, notice is now given that the Foundation shall hold its Annual Meeting on the date, time, and place and for the purposes specified below:

Date: Thursday, April 9, 2026

Time: Immediately following the Association's Annual Meeting (approx. 12:45 p.m.)

Place: Harrisburg Hilton
1 North Second Street
Harrisburg, PA 17101

Purposes:

1) Election of Board Members and Officers. At the annual meeting, officers and directors shall be elected by members in good standing who attend the annual meeting.

2) Any other business properly before the Association.

Election Process: According to the Bylaws, up to eight (8) Directors may be elected by PACDL members qualified to vote at the Annual Meeting.

Slate of Directors
The following individuals are seeking to retain their seats on the Foundation's Board of Directors.

Michael Engle, Philadelphia
Philip Gelso, Kingston
Carson Morris, Philadelphia

The Foundation: Members of the Board of the Foundation govern and act to help the Foundation achieve its charitable, scientific, and educational purposes listed below. Additionally, the Board has set a personal fundraising goal for each director to help the Foundation achieve its charitable purposes.

a) Provide financial support, scholarships and grants for criminal defense attorneys to attend educational events, seminars, and trainings offered by the Pennsylvania Association of Criminal Defense Lawyers (PACDL) and other approved training providers so that the criminal defense attorneys are better informed, prepared, and positioned to be the best advocates for those accused of crimes;

b) Restore a balanced, common sense perspective to the administration of criminal justice by contributing thought leadership and research at a variety of public policy forums, editorials, and other venues including media advocacy;

c) Provide opportunities through fellowship and work-study programs for graduating law school students and newly graduated law students concerning criminal justice issues;

d) Educate the public, judges, and the media to the benefits of a fair and balanced criminal justice system that ensures that criminal defense attorneys can most effectively represent the accused and ensure that client constitutionally guaranteed rights are protected;

e) Build a network of advocates, leaders and legal scholars, and form partnerships with other associations and organizations to focus on the intersection of equal justice, education, and public policy research; and

f) Provide other programs and initiatives in further of the other lawful purposes authorized by 15 PA.C.S.A. § 5301 and Section 501(c)(3) of the Internal Revenue Code including general education and training programs for members of the public and others.

Questions.

If you have any questions, please contact PACDL at 717.234.7403.

Searching Can Get You Searched: the *Kurtz* Decision

Jeremy Mishkin and Rachel Welsh

Do Pennsylvanians have a right to privacy in their Google searches? A recent Pennsylvania Supreme Court decision says "no"—at least for "unprotected" internet queries.

In *Commonwealth v. Kurtz*, the court upheld the use of a "reverse keyword search warrant" that allowed law enforcement to assess whether a victim had been "Googled" around the time she was attacked and then used that data to find, arrest, and convict the Googler. Key to the decision was the court's finding that the Google search in question was "unprotected."[1] Thus, the *Kurtz* case—which includes a heated dissent from Justice Donohue—highlights the constant stream of digital privacy challenges in the age of constant surveillance and foreshadows the coming battles over the steps internet users can take to shield their online activities from government intrusion.

The Search for the Internet Searcher

K.M. awoke in the middle of the night to discover an intruder, who tied her hands, gagged and blindfolded her, dragged her out of her home, drove her to a nearby camper, raped her, and fled.[2] K.M. could not identify her assailant and the collected DNA sample yielded no matches.[3]

Fearing their investigation was reaching a dead-end, Pennsylvania State Police ("PSP") investigators "decided to look in one last place: the internet."[4] Despite having "no evidence that the perpetrator used a computer or Google's internet search engine to assist him in committing his crimes," investigators nonetheless "believed that he had researched K.M.'s name or address beforehand" for four reasons: (1) the remote location of K.M.'s home led investigators to suspect the attack was not random; (2) investigators thought the assailant was familiar with K.M. and her home based on the circumstances of the attack; (3) investigators hypothesized that "many sexual offenders are predominantly fantasy driven" such that "there was a basis to conclude that K.M.'s assailant may have been stalking her over a period of time[;]" and (4) the police posited that because the assault occurred when K.M.'s husband was at work, the perpetrator may have researched K.M.'s personal life and schedule.[5]

Investigators consequently obtained a "'reverse keyword search warrant' for the records that Google generated during the week prior to the assault."[6] Unlike a standard warrant, this reverse keyword warrant "was not directed at a specific person's activity, but instead targeted all searches performed on Google's search engine for K.M.'s name or address."[7] The use of such warrants was

so new that "the 2016 warrant in this case predates even their first reports in the press" in 2017.[8]

Google's response showed that there were two searches for K.M.'s address a few hours before she was assaulted, and investigators traced both searches to the same IP address, which was associated with Kurtz's residence.[9] They then surveilled,[10] arrested, and interrogated Kurtz, who confessed to K.M.'s rape and abduction as well as the assaults of four other victims.[11]

Kurtz was charged with offenses relating to each of the five victims and, after the trial court denied his motion to suppress the evidence derived from the search of Google's records, a jury found Kurtz guilty on all counts.[12] He was sentenced to fifty-nine to two-hundred and eighty years in prison.[13]

The Kurtz *Decision*

After the Superior Court of Pennsylvania declined to overturn Kurtz's convictions or sentence, the Supreme Court of Pennsylvania granted *allocatur* to address whether an individual has "a reasonable expectation of privacy in his or her electronic content, particularly in his or her private internet search queries and IP address[.]"[14] [15] According to the opinion announcing the judgment of the court[16] ("OAJC") authored by Justice Wecht, "the central question in this case—whether a person has an expectation of privacy in his or her unprotected internet searches" turned on whether the traditional third-party doctrine, as opposed to an exception thereto, applies.[17] Under the traditional third-party doctrine, "a person lacks an expectation of privacy in information or materials when that person exposes them to a third party[.]"[18] However, in *Carpenter v. United States*,[19] the U.S. Supreme Court found that the third-party doctrine does not preclude cell phone users' expectation of privacy in their cell-site location information ("CSLI") records because (1) "cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society" and (2) "[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data."[20] Ultimately, the OAJC found that the third-party doctrine, not the *Carpenter* carveout, applied to Kurtz's facts. Under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution,[21] "Kurtz had no enforceable expectation of privacy in his internet searches" and therefore could "not prevail on a challenge to the validity of the search warrant executed in this case."[22]

In conducting its Fourth Amendment analysis and finding the third-party doctrine applied to Kurtz's facts, the OAJC emphasized that the "use of the internet is not involuntary"[23] and that whenever someone like Kurtz uses the internet, "that person makes a choice."[24] Thus, in distinguishing the *Carpenter* court's treatment of cell phone data records, the OAJC underscored the volitional nature of internet use:

> Unlike the cell phone user who cannot avoid creation of a data trail, the internet user can avoid or minimize the creation of such records by using other methods of research. A person seeking a restaurant reservation can telephone or visit the establishment rather than using the internet to book it. Someone hoping to learn more about dinosaurs or galaxies can conduct research in print materials at the library. Persons seeking privacy can shield their browsing history. The point is that the data trail created by ***using the internet is not involuntary*** in the same way that the trail created by carrying a cell phone is.[25]

In addition, the OAJC found that "even the ordinary, everyday use of the internet provides strong indicators that there is no privacy in the terms or information that the user voluntarily enters into a search engine"[26] and in Kurtz's case, he entered such information notwithstanding the warning on the "Privacy" tab of Google's homepage that Google might share personal information.[27] Kurtz therefore had no expectation of privacy here because he "voluntarily shared" the very data he claimed was protected.[28]

Kurtz's invocation of Article I, Section 8 of the Pennsylvania Constitution "fare[d] no better."[29] The OAJC construed his state constitutional argument as "resting primarily" on the Pennsylvania Supreme Court's decisions in *Commonwealth v. DeJohn*[30] and *Commonwealth v. Melilli*,[31] and found both cases "distinguishable" by again focusing on the voluntary and unprotected nature of Kurtz's internet use.[32] [33]

DeJohn concerned "bank records that police obtained through two subpoenas" and, according to the OAJC, the decision concluded that "because a person's use of a bank in modern society is involuntary[,]" a person has a reasonable expectation of privacy in his or her bank records such that "banking fell outside the parameters of the third-party doctrine."[34] Declining to extend the logic from *DeJohn* to internet searches, the OAJC reasoned, "the use of the internet is not an inextricable and involuntary aspect of our daily life" like "the banking system was" in *DeJohn*.[35] "[T]hat the internet is helpful, readily available, and convenient does not render its use involuntary in such a way that a person today has no choice but to rely upon it and, derivatively, has no choice but to share information with third parties."[36]

The OAJC also rejected Kurtz's argument based on *Melilli*, which recognized an expectation of privacy in telephone communications as a matter of state constitutional law due to their intimate and confidential nature.[37] Distinguishing *Melilli*, the OAJC explained that phone calls "involve two parties and often concern personal topics" while "[t]he average user [of the internet] logs on and transmits data about countless topics to internet service providers[,]" and found that "[s]urfing the web to access news or to make purchases on massive shopping websites while using an unprotected internet browser cannot reasonably be equated to private telephone calls between family members or friends."[38]

According to the OAJC, "[w]hen the average internet user opens an unencrypted internet browser and performs a search on a website such as Google, he or she voluntarily enables the creation and collection of data…."[39] As a result, the OAJC found that the user "has no societally recognized expectation of privacy[,]" concluding that "Kurtz had no enforceable expectation of privacy in his internet searches" and "cannot prevail on a challenge to the validity of the search warrant executed in this case."[40]

Searches After Kurtz

The OAJC appears to anticipate—if not outright invite—future challenges to searches that do not fall neatly within the facts presented in *Kurtz*. The decision cautions that its reach is "limited to general, unprotected internet use" and "[t]he result may, in fact, differ if an internet user has taken efforts to secure some degree of privacy[.]"[41] The OAJC goes as far as suggesting that a person

"using a virtual private network," using "an internet browser that does not collect or share data," or visiting "websites that are password-protected . . . might retain a constitutionally recognizable expectation of privacy."[42] As such, Pennsylvania courts may draw a different line if presented with such or similar facts in a future case, and defense attorneys should investigate internet provider policies and emphasize clients' efforts to protect their activities online to distinguish *Kurtz* where possible.

Practitioners looking to bolster arguments about expectations of privacy in internet searches would also be well-served to look to Justice Donohue's lengthy and impassioned dissent.[43] Therein, she casts the OAJC's conclusion "that using the search engine is merely convenient but not necessary" as "both divorced from reality and blind to the societal benefits flowing from ready access to infinite amounts of information available with the technology without fear of undeterred government surveillance."[44] Justice Donohue instead argues that under the heightened privacy protections vested in Article I, Section 8, "a Google user has a reasonable expectation of privacy in the information shared with Google via internet searches[.]"[45] [46] Justice Donohue reasons that even if there is some willful component to a user's internet use, under Pennsylvania law, "an individual's privacy interest extends to those areas of societal activities that are not entirely volitional because of the mandates of participating in modern society and where the collection of those records, in totality, provides a virtual current biography."[47] She also rejects the OAJC's premise that internet usage is not a societal necessity because there are viable alternatives and warns of the potentials for abuse that flow from OAJC's analysis, explaining:

> In our technology-driven society, there is no meaningful choice but to use search engines to conveniently access information and the vast majority use Google to accomplish that task. Their use is only voluntary to the extent it is voluntary to use a light switch to illuminate a room. Certainly, it is possible to use a flashlight or candles to accomplish the same goal—illumination—but it is not reasonable, convenient or efficient to do so in the daily tasks of modern society. For the vast majority of information, it is not realistic, or in some cases even possible, to use traditional source materials in hard copies like encyclopedias, phone books, atlases and specialized and generic dictionaries to access required or desired information.
>
> ***
>
> But even if every household in Pennsylvania, rich or poor, had unfettered access to every piece of information available through a Google search through alternative means, that would be irrelevant to whether one has an expectation of privacy in the search . . . it is patently obvious that to function in today's society, the utilization of internet searches is necessary for many daily activities and essential when an individual wants to gain knowledge in new areas . . . To suggest that exploring these inquiries on Google means that the government has unfettered access to those thoughts opens the door to vast police abuses…
>
> Pennsylvanians must be able to search freely for information about matters idiosyncratically personal and those more broadly societal like candidates' views, political issues, religious doctrine and community causes. Given the strength of privacy rights under our Charter, it is inconceivable that the government can monitor and collect this information and the virtual personal biography developed by the mosaic of our search queries without first establishing probable cause and securing a warrant.[48]

Thus, Justice Donohue's dissent is another useful source of arguments for narrowing *Kurtz's* application to future cases.

Recent developments at the federal level also signal that *Kurtz's* viability could soon be impacted by a new petition based on *Carpenter*. On January 16, 2025, just one month after *Kurtz* was published, the U.S. Supreme Court granted certiorari in *Chatrie v. United States* and agreed to consider a Fourth Amendment challenge to a "geofence warrant" that sought data from Google about every device located near a bank around the time it was robbed. The warrant relied on Google's "Location History" feature, which "draws from" multiple sources including "CSLI, IP address information, and nearby Wi-Fi networks."[49] It would therefore be reasonable to expect that any Supreme Court decision on the merits of *Chatrie* will revisit the reasoning and boundaries set forth in *Carpenter* and possibly apply Fourth Amendment principles to novel internet contexts. Thus, the future of reverse search warrants in Pennsylvania, and beyond, remains to be seen.

NOTES:

[1] No. 100 MAP 2023, 2025 WL 3670767 (Pa. Dec. 16, 2025).
[2] *Kurtz*, 2025 WL 3670767, at *1.
[3] *Kurtz*, 2025 WL 3670767, at *2.
[4] *Kurtz*, 2025 WL 3670767, at *2.
[5] *Kurtz*, 2025 WL 3670767, at *2 (internal quotation marks and citations omitted).
[6] *Kurtz*, 2025 WL 3670767, at *2.
[7] *Kurtz*, 2025 WL 3670767, at *2.

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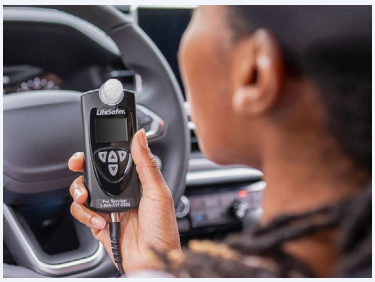

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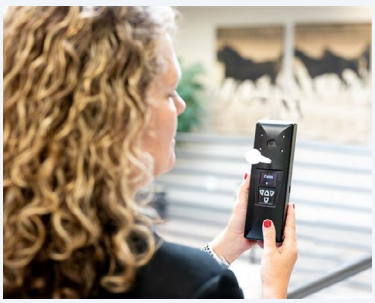

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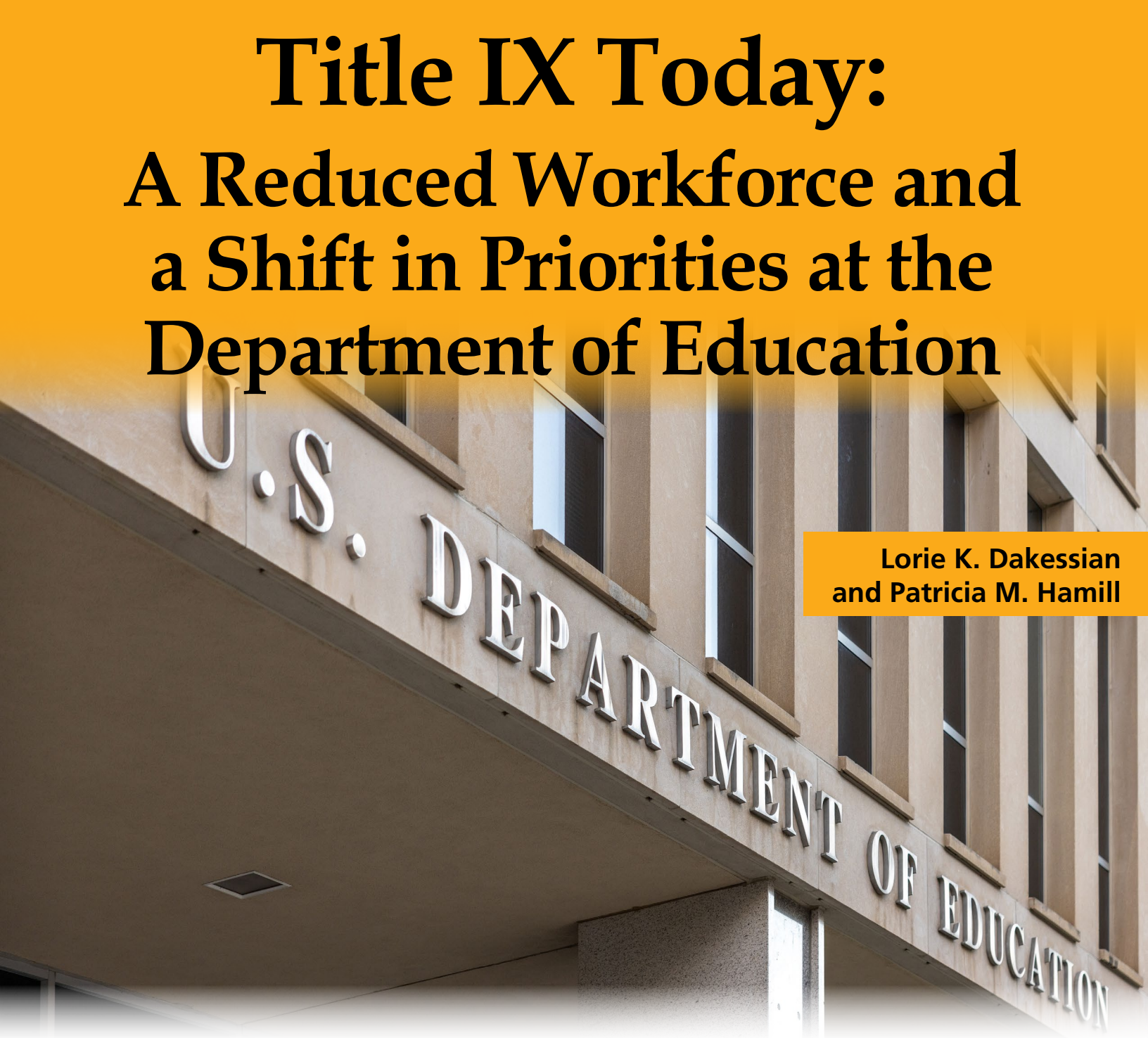

Lorie K. Dakessian and Patricia M. Hamill

Now more than ever, it is critical that students embroiled in university Title IX disciplinary processes facing complaints of sexual misconduct or harassment have their federal civil rights and contractual rights protected.[1] One year into the second Trump administration, significant changes at the U.S. Department of Education (ED), coupled with a reordering of government priorities, have reshaped the landscape of Title IX. The ED's Office of Civil Rights (OCR)—drastically reduced in size—now has a primary focus on transgender issues in sports and public facilities rather than the due process rights of accused students. As a result, one of the potential avenues to hold educational institutions accountable for unfair or discriminatory practices in their Title IX disciplinary processes – a Title IX complaint to ED – has been weakened, leaving litigation as the primary option for a student aggrieved by the outcome of a university Title IX proceeding.[2]

Last year began with a substantial disruption to the world of education. Within the first few weeks of 2025, the ED notified K-12 schools and institutions of higher education that OCR would return to enforcing the 2020 Title IX Regulations, clarifying that the 2024 Title IX regulations implemented in the last five months of the Biden Administration were not in effect in any jurisdiction.[3] This return to the 2020 regulatory framework followed the federal court's decision in *Tennessee v. Cardona*[4] which vacated the 2024 regulations nationwide. The reinstated 2020 Title IX regulations restored important procedural protections, including a party's right to cross-examination at a live hearing and the prohibition on investigators also serving as decision-makers.[5]

Meanwhile, in March 2025, the ED initiated a reduction in force that impacted nearly 50% of its workforce. The workforce was downsized from 4,133 workers to about 2,183 workers.[6] At the time, the Secretary of Education stated that the ED would continue to "deliver on all statutory programs that fall under the agency's purview, including formula funding, student loans, Pell Grants, funding for special needs students, and

competitive grantmaking."[7] Following this directive and the mass terminations, twenty states and Washington D.C. sued the Department in federal court, arguing that the reductions in force effectively "dismantle[d]" the Department and "incapacitat[ed] components" of the Department responsible for performing functions mandated by statute.[8] The federal district court granted the States' preliminary injunction motion. The First Circuit Court of Appeals denied the Government's request to stay the district court's preliminary injunction pending appeal.[9] Thereafter, the U.S. Supreme Court granted the Government's application for stay of the preliminary injunction pending the appeal in the "First Circuit and disposition of a petition for a writ of certiorari if such a writ is timely sought."[10] The Supreme Court's ruling essentially cleared the way for the administration to continue shrinking the ED.[11] Against this backdrop, President Trump issued an Executive Order that directed the Secretary of Education to take steps to close the Department of Education,[12] a move that would further weaken Title IX enforcement. By the end of 2025, the ED transferred numerous responsibilities to other government agencies, such as the Department of Labor (DOL), Interior (DOI), Health and Human Services (HHS), and State.[13]

Continuing the Government's shift in the ED's objectives, in the spring of 2025, the U.S. Department of Justice (DOJ) announced two initiatives reflecting its goal to assume a greater role in Title IX investigations. First, the DOJ and ED announced the creation of a Title IX Special Investigations Team known as "Title IX SIT."[14] The team, composed of both ED and DOJ personnel, is charged with investigating Title IX cases, with a priority on matters pertaining to transgender students' participation in women's sports and the use of all-gender facilities like bathrooms and locker rooms.[15] These investigations were based in large part on the President's pronouncements about gender in his Executive Orders.[16] The DOJ also established a Civil Rights Fraud Initiative.[17] The initiative is staffed by members of the DOJ Civil Division's Fraud Section and the DOJ's Civil Division. They will use the False Claims Act to investigate and pursue claims against recipients of federal funds that knowingly violate federal civil rights laws.[18] This initiative exposes schools receiving federal funds to scrutiny for False Claim violations, which can result in serious penalties, including treble damages.

Throughout 2025, OCR pursued investigations against multiple states and educational institutions, focusing in large part (like the DOJ) on investigating alleged violations of Title IX for allowing transgender girls and women to participate on girls and women's sports teams and/or maintaining all-gender restrooms. For example, OCR made findings of Title IX violations against Minnesota,[19] California,[20] and Denver.[21] While the OCR eventually reached resolution agreements with some higher education institutions such as the University of Pennsylvania and Wagner College (New York),[22] its investigation of Maine and its finding that Maine violated Title IX was referred to the DOJ for litigation when Maine refused to enter into a Resolution Agreement.[23]

Historically, OCR provided students with an important and easy to access avenue to challenge an educational institution's discriminatory and unfair disciplinary processes. A student did not need an attorney to file a complaint directly with OCR, and even with attorney representation, it could be a cost-effective way to pursue relief. While this did not always lead to a speedy investigation, it did at times provide some leverage to possibly negotiate a better outcome even without a full-blown OCR investigation. This could be done either through OCR's early resolution and mediation processes or simply directly with a school without OCR's involvement. But with OCR's capacity reduced and its responsibilities redistributed to other agencies, institutions are less concerned about the threat of an OCR investigation arising from an accused student's complaint of an unfair process and erroneous outcome. Students now have fewer effective paths for relief. As a result, litigation will likely become the primary means for students seeking to effectively challenge an institution's discriminatory practices and procedural unfairness. Attorneys representing students in Title IX disciplinary matters must be mindful, as always, and even more so now, to create and preserve the record at the university level with an eye toward to protecting their clients' federal civil rights and maintaining the viability of legal claims in case a student needs to seek recourse in the courts.[24]

NOTES:

[1] A university's policies, procedures, and handbooks may be construed as constituting contractual obligations between the institution and its students and faculty.

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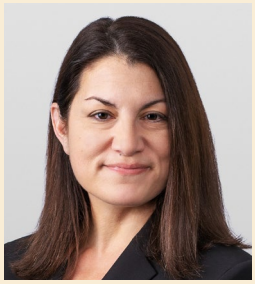
About the Authors



Lorie K. Dakessian is the Co-Chair of the Title IX & Campus Discipline practice at Clark Hill PLC (www.titleix.law) . She represents college students and faculty members nationwide who are under investigation for, or who have been disciplined by their colleges or universities for, alleged violations of sexual harassment and misconduct policies and academic misconduct. She also represents faculty members who are under investigation by their universities and federal agencies for allegations of sexual harassment or research misconduct. Lorie works closely with her clients to ensure that they understand the university's process and seek procedural safeguards. She helps students and their families understand and fully prepare for investigations and hearings and, where appropriate, helps clients who are seeking informal resolutions with the school while navigating the complicated issues accompanying mediation. When resolution cannot be reached at the disciplinary level, she brings litigation against colleges and universities for breach of contract, violations of Title IX, and related claims. In addition to her representation of college students and faculty members, Lorie represents clients in internal investigations and white-collar criminal matters.

Patricia M. Hamill is Co-Chair of Clark Hill's Title IX and Campus Discipline practice http://www.titleix.law"www.titleix.law, representing students, faculty, and administrators nationwide in campus disciplinary proceedings and related litigation. Nationally ranked by Chambers & Partners for Higher Education, she is recognized for her plaintiff-side Title IX work and praised for her judgment and human touch. A frequent speaker on Title IX developments, Patricia has testified before the U.S. Department of Education and the full committee of the U.S. Senate's Health, Education, Labor and Pensions Committee regarding campus sexual assault, student safety, and due process.

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Commonwealth v. Vance and the Authentication of Machine-Generated Evidence

Brooks T. Thompson

Vance *and the Authentication Question Left Open in* Wallace.

The Pennsylvania Supreme Court recently heard oral argument in *Commonwealth v. Vance*, a case that presents the Court with an opportunity to address authentication requirements for machine-generated information in the modern era of artificial intelligence and complex digital systems.[1] *Vance* is the natural progression from the Court's decision in *Commonwealth v. Wallace*, where the Majority acknowledged the reliability concerns posed by machine-generated evidence.[2]

In *Wallace*, the defendant argued that GPS location data generated by an ankle monitor constituted inadmissible hearsay. The Court rejected that claim, reasoning that because the GPS data was machine-generated, it was not a "statement" by a person within the meaning of the hearsay rule.[3] But the Majority did not suggest that reliability concerns vanish merely because the evidence is produced by a machine rather than a person. Instead, it signaled that questions concerning the reliability of machine-generated evidence are properly addressed through authentication. The Court did not reach the authentication issue in *Wallace*, however, because it was not raised.[4] *Vance* squarely presents the authentication question *Wallace* left unresolved.

What is Machine-Generated Evidence?

It is important to note at the outset that machine-generated evidence is not synonymous with digital evidence. Not all evidence that is "digital" is machine-generated for purposes of the Rules of Evidence. Many electronic records are simply digital versions of human assertions, such as emails, text messages, or social media posts. Those are created by people, and their admissibility typically raises familiar hearsay and authentication questions. Machine-generated evidence is different. It consists of outputs produced automatically by an electronic process or system, without active human involvement. GPS coordinates generated by an ankle monitor, automated location estimates produced by Google, facial-recognition match results, automated license plate reader

hits, or ShotSpotter gunshot-detection location alerts are common examples. In these cases, the evidentiary force of the record does not depend on a human declarant's perception or honesty, but instead on whether the underlying system is functioning properly and producing accurate results. This is precisely the rationale the Majority in *Wallace* identified in explaining that reliability concerns with machine-generated evidence are best addressed through authentication rather than hearsay doctrine.

Google Location Evidence in Vance.

The Commonwealth's murder-for-hire case against Ricky Vance relied heavily on Google location data. The Commonwealth offered that data to place Vance with one or more co-defendants before and after the killing, and at other points critical to its theory.[5] Unlike traditional cell site location information, which relies on a phone's connections to cell towers, Google's location estimates may be derived from multiple inputs, including Wi-Fi, cellular signals, Bluetooth, or some combination thereof. That input is processed through proprietary algorithms to generate a location estimate and, typically, an associated range of accuracy stated in meters.

The Commonwealth admitted the record of Vance's Google location information as a self-authenticating business record under Pa.R.E. 902(11) and Pa.R.E. 803(6), based on a certification signed by a person identified as Google's custodian of records. Therein, the custodian asserted: that he had personal knowledge of the facts stated in the certification; that he was familiar with how Google location records are created, managed, stored, and retrieved; that Google's electronic process produces an accurate result and that accuracy is regularly verified; and that the records are made and retained by Google and recorded automatically.[6]

The certification, however, contained no meaningful information that would allow the defendant to challenge or evaluate the reliability of the process used to generate the location outputs. It did not describe the process Google uses to generate the location estimate, how accuracy is determined, what "regularly verified" means in practice, what limitations or error characteristics apply to the data, what conditions may produce inaccurate results, or whether the system was functioning properly at the relevant time.

Defense counsel objected, arguing that to authenticate machine-generated evidence the Commonwealth must do more than attach a business-record certification. Where the evidence depends on an electronic process, the proponent must present information to describe the process or system, establish that it produces accurate results, and demonstrate that it was functioning properly at the time in question. These requirements are reflected in Pa.R.E. 901(b)(9), which requires the proponent to describe the electronic process or system and show that it produces an accurate result, and in Rule 902(13) which allows that showing to be made through certification by a qualified person.

The trial court overruled the defense objection and admitted the location information under Rules 803(6) and 902(11), the business-record exception and its self-authentication counterpart. Vance was convicted, and the Superior Court affirmed, concluding that the Google location evidence was properly admitted as a business record and that the certification satisfied Rule 803(6).[7] The Pennsylvania Supreme Court granted allocatur.

Why Machine-Generated Outputs Cannot Be Self-Authenticated as Business Records Under Rule 902(11).

Rule 803(6) Presupposes a Human Source

The Superior Court's holding in *Vance* contains internal inconsistencies. On the one hand, the Superior Court acknowledged that Google location information is not hearsay under *Wallace*. At the same time, the Superior Court treated Google's machine-generated location outputs as traditional self-authenticating business records within the meaning of Rule 803(6), a rule which presupposes information provided by a person.

Pursuant to Rule 902(11), records meeting the business-records exception under Rule 803(6) are self-authenticating if accompanied by a certification that satisfies Rule 803(6)(A)–(C). To satisfy the requirements of Rule 803(6)(A), the record must be "made at or near the time by, or from information transmitted by, ***someone*** with knowledge." (emphasis added).

Machine-generated location outputs, by definition, are not "made by" a person and are not "information transmitted by" a person with knowledge as required by Rule 803(6). That is the very logic supporting *Wallace's* conclusion that machine-generated GPS data is not hearsay: the output is not a human assertion. Accordingly, machine-generated location information cannot satisfy the requirements of Rule 803(6) because the record is not created "by or from information transmitted by someone with knowledge."

The "someone" language in Rule 803(6) is not surplusage. It is part of the rationale for admitting records without live testimony: the rule presupposes human participation by a person with knowledge acting in the regular course of business. When the evidence is generated by an automated process rather than a human actor, the question of reliability does not turn on the habits and incentives of accurate recordkeeping. It turns on the accuracy of the electronic process or system used to generate the evidence. Rules 902(11) and 803(6) are ill-equipped to ensure reliability of those processes.

Rule 902(11) Was Not Designed to Prove the Reliability of Complex Systems.

Rule 902(11) is an efficiency rule. It streamlines admission of conventional business records by allowing certification rather than live testimony about recordkeeping practices. It was not designed to permit a litigant to establish the reliability of a proprietary, complicated technological process with conclusory statements in a certification authored by a custodian of records.

In cases like *Vance*, the custodian certification is not simply authenticating that Google keeps records. It is being used to vouch for the accuracy of the system's output, without providing any information describing how the underlying process works or how accuracy is ensured.

The Proper Rules of Evidence: 901(b)(9) and 902(13).

Pennsylvania already has rules designed for evidence generated by electronic processes and systems. They place the inquiry where it belongs: the reliability of the process.

Rule 901(b)(9) permits authentication through evidence "describing a process or system and showing that it produces an

accurate result." It requires, at minimum, a meaningful description of the electronic process and a showing of accuracy. It also requires that information be provided by a competent witness who has knowledge of the underlying process used to determine the location information.

Rule 902(13) provides a certification-based alternative for a "record generated by an electronic process or system that produces an accurate result," but only if shown by "a certification of a qualified person." Rule 902(13) requires the same substantive information as 901(b)(9), but it allows that information to be set forth in a certification rather than through live witness testimony. Indeed, the Comment to Rule 902(13) makes clear, "a proponent establishing authenticity under this rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this rule."

Under either Rule 901(b)(9) or 902(13), a boilerplate certification that the system "produces an accurate result" without describing the process and without providing meaningful accuracy information would be insufficient.

What the Supreme Court Should Do in Vance.

The Court does not need to announce a new evidentiary doctrine to resolve *Vance*. The Rules already supply an appropriate framework. The Court should hold that where the Commonwealth offers machine-generated outputs as substantive proof, and where reliability turns on the operation of an electronic process or system, the proponent must satisfy a process-based authentication showing under Rule 901(b)(9) or Rule 902(13). Admission through the business-record path of Rules 803(6) and 902(11) should not be permitted to substitute for that showing.

Such a ruling does not necessarily mean the Commonwealth must disclose every proprietary detail of a commercial system in every case. But it does mean the Commonwealth must offer enough information to establish that the process produces accurate results in the manner asserted and under the circumstances presented. Authentication is the threshold showing that the evidence is what it purports to be. When the evidence is an output generated by an automated system, information establishing the reliability of the process used to generate the output seems essential.

Practical Suggestions While Vance *is Pending.*

1. ***Request technical discovery.*** Move for disclosure of technical specifications, algorithms, validation studies, known error rates, quality control procedures, and internal documents discussing system limitations.

2. **Objection to Authenticity/Motion *in Limine*.** Object to the admission of machine generated evidence as early as possible on the grounds that the Commonwealth failed to produce a meaningful description of the process, the accuracy, limitations, and proof that the system was operating properly at the relevant time.

3. **Force the Commonwealth to pick a position.** If the Commonwealth relies on *Wallace* to argue that the evidence is not hearsay because no person generated it, then the defense should challenge admission through the business records exception which presupposes a record made by, or from information transmitted by, "someone with knowledge."

4. **Invoke the correct rules expressly**. Cite Rule 901(b)(9) and Rule 902(13) in the trial court and what those rules require. Make clear that they exist for this category of evidence and that the boilerplate certificate by a custodian of business records does not satisfy their requirements.

Conclusion.

The Majority Opinion in *Wallace* identified authentication as the proper vehicle for addressing the reliability of machine-generated evidence. *Vance* is an opportunity for the Court to define what that requirement actually demands. The path forward seems clear: when the Commonwealth offers machine-generated evidence as proof of guilt, it must satisfy Rules 901(b)(9) or 902(13), the authentication requirements specifically designed for evidence generated by processes and systems. These rules require the Commonwealth to describe how the system works and demonstrate it produces accurate results through qualified technical witnesses, not through boilerplate certifications from records custodians. This is not an impossible burden, but it is a necessary one.

Machine-generated evidence will continue to pervade criminal prosecutions, from location data to facial recognition, and predictive algorithms. All rely on complex, proprietary systems. All can be damning evidence of guilt. Authentication should require proof, technical expertise, transparency, and not blind faith, trade secrets or boilerplate assertions of reliability. *Vance* provides the Court with the opportunity to establish the appropriate standard.

NOTES:

[1] *Commonwealth v. Vance*, 3 MAP 2025 (Pa. argued Nov. 19, 2025).
[2] *Commonwealth v. Wallace*, 289 A.3d 894 (Pa. 2023).
[3] *Id*. at 904-905.
[4] *Id*. at 907-908
[5] *Commonwealth v. Vance*, 316 A.3d 183, 187 (Pa. Super. 2024), appeal granted in part, 332 A.3d 1182 (Pa. 2025).
[6] *Id*. at 191.
[7] *Id*. at 190.

About the Author

Brooks T. Thompson practices criminal defense with McMahon, Lentz & Thompson, located in Montgomery County, Pennsylvania. He presented oral argument in *Commonwealth v. Vance* before the Pennsylvania Supreme Court and the Superior Court. The appeal was prepared and briefed in collaboration with his partners Erin Lentz-McMahon and John I. McMahon, Jr.

Mr. Thompson graduated from Penn State Dickinson Law in 2011 and joined what is now McMahon, Lentz & Thompson later that same year. He has a particular interest in privacy and evidentiary issues arising from law enforcement's use of cell phones, location data, and other forms of modern digital evidence.

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Rebooting Pardons

Once cutting edge, the pardons system is now broken.

Carl (Tobey) Oxholm III
and Zach Keasling

In March 2024, there was nothing but excitement around pardons. As the article "Expediting Pardons" in *For the Defense*[1] explained at the time, all fees had been eliminated, the application form had been simplified, and the Board of Pardons (BOP) had been given additional staff that was hard at work putting the application online. It was six months into a new Expedited Pardon Review Program[2] that promised a shorter pathway to a hearing than the four-plus years it would otherwise take, and the law had just been changed to make automatic the judicial expungement of pardoned crimes.[3]

Fast forward two years. Today, the system is … broken. Despite the very best efforts of the BOP's devoted staff, even the easiest cases are taking *three years* to get a hearing, and *that* can only be called "expedited" because it is taking over *eleven* years for everyone else.[4] For those who have turned their lives around since their convictions, their hopes of finally being seen in full color, not black and white, are being dashed every day. The system needs a reboot.

The Origins of the Crisis

The cause of this mess was not lack of passion. A mere nine months ago, on June 17, 2025, Lt. Governor Austin Davis (who chairs the BOP) announced, with evident pride, that the clemency application was now online, and that the new forms could be submitted by email.

> After hearing from nearly 1,500 pardon applicants over the past two-plus years, I've seen how many of these folks have worked hard to turn their lives around, make amends and are now contributing positively to their communities. They are fathers, mothers, aunts and uncles – and many of them have earned a second chance and a clean slate moving forward. At the Board of Pardons, we've been working hard, too, to make the clemency application process more transparent and more accessible, and today's announcement is the culmination of months of work across our Administration.[5]

The enthusiasm for this development was evident: over 240 applications were submitted electronically within just a few weeks.[6]

But behind the scenes there was a problem. A big problem. And it is getting worse every day.

The Big Problem

Pennsylvania's Constitution allows the Governor to grant a pardon only after first receiving "the recommendation in writing of a majority of the Board of Pardons … after full hearing in open session."[7] The Board decides who deserves a hearing at a public meeting called the "Merit Review."[8] Historical data from the BOP show that the Board had historically kept pace with the demand, merit reviewing almost exactly the same number of applications as it had received.[9] In 2018, for example, the BOP received 526 applications and merit reviewed 574.

But in 2019, the BOP[10] started opening the system and making it much easier to apply. As a result, volunteer "pardon projects" started forming in counties across the state to help low-income people who could not afford attorneys submit pardon applications. The results were dramatic: in 2020, over 2000 applications were received, and that's been the average ever since. But as excitement and hope for a second chance blossomed in communities everywhere, the Board fell behind, *way* behind, in reviewing the applications for merit. Today the backlog of clemency applications[11] exceeds 8,300.

	Applications Awaiting BOP Merit Review						
	2020	**2021**	**2022**	**2023**	**2024**	**2025**	**Totals**
Carryover awaiting MR @1/1		1321	2514	4099	5481	6874	
Applications Received	2068	1949	2243	2420	2302	2216	13043
Total pending MR during year (*)	2068	3270	4757	6519	7783	9090	
Applications Merit Reviewed	747	756	658	1038	909	772	4880
Applications Awaiting MR @12/31	1321	2514	4099	5481	6874	8318	
Annual diff bet new apps and MR	1321	1193	1585	1382	1393	1444	8318
(*) Carryover plus New Apps Rec'd							
Assumes no carryover from 2019							

It is into that backlog that all new applications, submitted online with such eagerness, are being dumped. And that is why it is taking eleven years and counting for most applicants to get a hearing.

Easy Fixes

The fact that the BOP has been recommending over 80% of the pardon cases it hears shows that most applicants qualify for a second chance. No one thinks they should have to wait eleven years to get it. Created by the Constitution, the BOP is essentially autonomous. It does not report to anyone, it sets its own rules, and it never has to explain what it does.[12] So what could it do to fix the problem, if it really wanted to?

Lt. Governor Austin Davis chairs the five-member Board of Pardons. In October 2025, he invited the Pennsylvania Association of Pardon Projects (PAPP) to submit recommendations on how the BOP could operate more effectively. Forty-five days later, PAPP delivered *Justice Delayed is Justice Denied*[13]—six pages of detailed, consensus-driven proposals that were grounded in years of direct experience supporting hundreds of pardon applicants across the state. Among the many recommendations are these five:

- Publish clear minimum eligibility requirements and give the Secretary authority to administratively dismiss applications that do not meet those standards. This would provide much needed transparency about who would be considered for clemency, and significantly reduce time spent on applications with virtually no chance of success.[14]
- Significantly expand its Expedited Pardon Review Program and immediately schedule qualifying cases for Merit Review. The data are clear: desistance is a fact. If the applicant has not reoffended within a specified number of years, or has the backing of the local District Attorney, how is that not enough?

- Hold more public hearings and make better decisions about who can be excused from them. Too few cases are being heard, and an enormous amount of hearing time is spent asking questions that were answered through the Department of Correction's investigation. To do so would require nothing more than discipline, focusing on what really matters (redemption), and not relitigating the crime.

- Create a web portal where applicants can see where they are in the pardon process. This would eliminate all the calls and emails BOP staff must answer, while ensuring systemic accountability.

- Restore to the Board's statistics page the data point "Applications Pending Governor Action," which was removed without explanation in 2024.[15]

Systemic Changes

While these proposals make sense and would go a long way toward ensuring the Board stays current in its pardon review process, the real solutions to the crisis are for the legislature to rethink expungements, the Governor to address marijuana convictions, and the courts to protect indigent defendants.

The General Assembly

The many thousands of people being driven into the pardon pipeline are there because of a statute. Pennsylvania law[16] specifies that a judge can expunge (erase) convictions for misdemeanors and felonies only if the applicant (1) has first been pardoned, (2) is over 70 years old and hasn't been arrested or under carceral control for at least ten years, or (3) has been dead for at least three years. This is contrary to logic as criminal history records are rarely needed for 70-year-olds, and most often needed by those in the prime of their productive lives with families to support.

Simply put, people age out of crime. Once someone is 40 and hasn't committed a crime in over ten years, the likelihood they will commit another offense decreases sharply.[17] The risk of recidivism also declines the longer a person has been living in the community without committing another crime, markedly so after ten years.[18]

If the statute were to simply change the eligibility age for expungements from 70 to 40, a clean record would be possible for people who committed crimes in their teens and twenties who had not been arrested or charged since. Talk about an incentive to do good during one's thirties! Instead of the decisionmakers being a statewide panel, they would be judges in the counties where the convictions occurred with direct involvement by the local District Attorney.[19] Petitions for expungement could be heard and decided within six months instead of eleven years, and the BOP could function more like an appeals court for applicants who believe their petitions were wrongly denied.

To reduce the pardons backlog, the new law should specify that once a pardon application from an eligible candidate had been accepted and filed by the Board of Pardons, it would be transferred to the county of conviction where it would be filed, docketed, and processed as a petition for expungement.[20] While this would not eliminate the entire backlog, it would go a very long way given that an estimated 75% of pardon applicants are over 40 years old.[21] Furthermore, it would return thousands of decisions to the jurisdictions that are most affected by them.

The Governor

Although medical marijuana was legalized in Pennsylvania in 2016, recreational adult-use cannabis remains criminalized. Data from the FBI's October 2025 report indicate that on average, 35 Pennsylvanians were arrested each and every day in 2024 for marijuana possession.[22] According to official court data, 270,663 people were arrested for marijuana-related crimes in just ten years (2012-2022), and 70,710 of them were convicted.[23] Drug convictions make it impossible to get jobs that are essential to our communities and our economy, such as health care, home care, child care, elder care, and any job involving routine interaction with children.

There is no possible way the pardon system could handle clearing the records of tens of thousands of Pennsylvanians one by one. Instead, the Governor could issue a general pardon, like our very first governor did for those involved in the Whiskey Rebellion.[24] If for whiskey, why not for weed?

In fact, in July 2022, a Petition for General Pardon was filed for all who had committed non-violent marijuana crimes.[25] That petition remains pending, having never been heard or decided. An updated Petition is expected to be filed in April.[26] The Governor should call for its consideration, and the BOP should promptly schedule it for a hearing. With the Lt. Governor leading the way behind the scenes, they should be in a position to negotiate the parameters of the pardon.

If a general pardon were to be issued, pardoned individuals would next file expungement petitions, which District Attorneys could decide whether or not to oppose, leaving the Court with only the decision as to whether the pardon applied. Proactive engagement by the criminal defense bar in every county would be essential to the speed and success of such a program.

The Supreme Court

The court's role in the pardon process often goes unnoticed. Beyond expungements and providing court records for pardon applications, the courts tax defendants hundreds and thousands of dollars in court fees, costs and fines (collectively, "legal financial obligations" or LFOs), regardless of their ability to pay. Despite unanimous and persistent calls from the community at large, the BOP is using unpaid LFOs to delay and deny pardon applications.[27] And that civil debt is making it impossible for low income individuals to get their driver's licenses restored,[28] qualify for public housing,[29] obtain small business loans or home mortgages, or save for a child's college education.

One easy remedy would be for the Board to stop using unpaid LFOs as a criterion. Another would be for the court to stop imposing them. An individual who qualifies for representation by a public defender or court-appointed attorney should necessarily be exempt from LFOs. The Supreme Court's Procedural Rules Committees have been "studying" this proposal to include almost six years.[30] An expansion of *in forma pauperis* protections for criminal defendants is long overdue.

Perfect Timing

More and more elected officials in Pennsylvania are discovering how important pardons are for their constituents and communities. The federal government is shredding social safety nets, imposing huge new costs on our state and making it even more essential that individuals (especially parents) be employed at their highest and best levels. Pennsylvania's Department of Labor and Industry and PennDOT are both experiencing workforce shortages. Our communities are experiencing unprecedented and unmeetable shortages in teachers,[31] radiologists,[32] nurses, home care specialists, health care aids and childcare workers.[33] If ever there was a need for action, it is now.

And as he runs for re-election, our "Gets Stuff Done" Governor who can rebuild an I-95 bridge in twelve days[34] has the historic opportunity to step in and build the speedy on-ramp to the second chance at a productive life that tens of thousands of everyday Pennsylvanians have earned and deserve.

If there is the will, there are surely the ways. Now is the time.

There will be several times this year when your advocacy could be key to achieving the reforms highlighted in this article. If you are willing to consider calls for action from the Pennsylvania Pardon Project, send an email to info@papardonproject.org.

NOTES:

[1] Suzanne Smith and Tobey Oxholm, Expediting Pardons, 9 For The Defense 1 (Jan. 2024), https//www.nxtbook.com/nxtbooks/PACDL/FORTHEDEFENSE_vol9_issue1_2024/index.php#/p/38.

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About the Authors

Carl (Tobey) Oxholm III has been a fixture of the Philadelphia legal and public interest communities since graduating from Harvard in 1979 with both a JD and a Masters in Public Policy. His 27-year career in the law included 17 years in private practice as a commercial litigator, 5 as Chief Deputy City Solicitor for Philadelphia, and 5 years as General Counsel for Drexel University. He went on to become Executive Vice President of both Drexel and Rowan Universities and President of Arcadia University before "retiring" to Wayne County where he runs the bar association's pro bono program and offers ADR services, www.JustResolutionsNEPa.org. He learned about expungements and pardons when he was a volunteer for Philadelphia Lawyers for Social Equity and served as its Executive Director, and it was there that he began the Pardon Project in 2018. He has led the reform of the pardon system in Pennsylvania ever since. www.PardonMePA.org.

Zach Keasling is the founder and Executive Director of Pathways To Hope, an organization that helps people apply for clemency, pathwaystohopepa.org. He is also the Chair of the Pardon Project Steering Committee, a statewide association of people with lived experience in the criminal justice system whose mission is to spread the word about the availability of pardons and to help individuals apply, www.PardonMePA.org/ppsc.

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The Time is Now: A Basic Practitioner Review of License Suspension Appeals

Jason Jefferis

So, what exactly is a license suspension appeal? Well, it is exactly what it says, a lawyer is appealing against a notice of license suspension received by a client. The scenario generally plays out the same way each time: a client will call the lawyer, hopefully immediately after receiving a letter from PennDOT advising their driving privileges are suspended beginning at 12:01am on a certain date in the future. Generally, for most criminal law practitioners, that suspension is normally the result of a refusal of chemical testing during a DUI stop under Section 1547 of the Motor Vehicle Code. Although 99% of the time that is the call the lawyer will receive and the triggering event, that is not the only suspension the lawyer can appeal. Should the lawyer find that rare unicorn of a client who received a suspension for some other Title 75 violation or even Title 18, though they are extremely rare since Act 107 of 2022 pretty much rescinded suspensions for things like possession of a small amount of marijuana, they can appeal those suspensions too, so long as the lawyer files the appeal within the thirty day deadline to appeal.

A lawyer should keep in mind when looking at these unicorn clients, that unless there are grounds to beat the conviction on direct appeal there is really nothing the lawyer can meaningfully do for these suspensions. When the lawyer files the License Suspension Appeal ("LSA"), they can apply for a stay of the suspension, which will, assuming they met all the deadlines and filed the appropriate paperwork, stop the suspension until the hearing date. However, PennDOT's attorney will do nothing more than enter into evidence the certified docket sheet showing a conviction for the underlying Title 75 or 18 violation and the suspension will be upheld. There are no witnesses generally being called in for those hearings. The lawyer will lose to the paperwork.

That is why it is imperative that an appeal of the underlying summary conviction be filed. If that is the case, the lawyer may find themselves with all the planets aligned: the LSA filed, the stay of suspension obtained and the underlining conviction overturned on appeal (either because the client has a professional assisting them or a favorite of lawyers throughout the Commonwealth… the officer fails to show at the appeal hearing and an oral motion to dismiss is granted). In that event, the client will be able to avoid a suspension, which is generally the goal. *Generally*, the goal? Wait…why isn't avoiding a suspension always the goal? Stay tuned.

To best understand the ins and outs of LSAs, think about the following scenario. The phone rings first thing on Monday morning from Client X. Client X, in anticipation of a pending snowstorm, drank all his beer and on the way to the distributor in search of another cold one, zigged when he should have zagged and got pulled over. A DUI arrest comes moments later and then…off to the hospital or central booking for a chemical test. Client X, armed with the knowledge that his friends at the local watering hole told him, heeds their advice and refuses to submit to a chemical test. He spends the next few hours in lockup and is released the next morning just as the lawyer is firing up his laptop ready to begin another week.

There is good news here. Client X made one exceptional choice in this whole ordeal…he called a lawyer. The title of this article is meaningful; *The Time is Now.* The biggest issue with LSAs is time. Thirty days. Treinta Dias. When the statute says thirty days, it means thirty days. That is the deadline for filing the appeal. If the lawyer is one second past, they do not pass go and they should not collect a retainer fee. This is essential. If the lawyer gets in an accident on the way to the courthouse trying to file the LSA, too bad, the appeal is likely rejected. Also, why would a lawyer be hand filing the appeal anyway? In a word, e-filing. In all seriousness, a lawyer cannot mess around with these deadlines, they are Plymouth rock.

If the lawyer cannot timely complete the entire petition and the request for a stay of the suspension, they should be telling Client X that, unfortunately, there is nothing they can do to help. These are hard conversations to have, especially when turning away business is not in the business model. For a *nunc pro tunc* LSA to be granted, there better be a true breakdown at the courthouse. Just because Client X did not understand or appreciate the deadline to file the appeal or the lawyer's computer crashes, the fact that they are not able to e-file the petition timely is generally not going to work. On the off chance a lawyer gets the right senior judge to grant their *nunc pro tunc* petition, PennDOT loves its appeals, and they will often successfully appeal the granting of a *nunc pro tunc* appeal.

Next, assuming no deadlines were missed, back to Client X. Remember he made that glorious decision to call a lawyer right away. Part of that initial consultation, beyond the normal discussions of momentary and minor deviations not forming the basis for a traffic stop, is an advisement to Client X that he needs to keep an eye on his mailbox because this PennDOT letter is coming. A lawyer should even suggest to clients to call PennDOT or check their record online to ensure the Department has the client's current mailing address on file. Lawyers must advise their clients that this deadline is of the utmost importance. Once they get the letter, their first call should be to the lawyer. The lawyer will need a copy of the letter because the mailing date of the letter is essential. The 30-day deadline is not from the start date of the suspension and is almost always well before it. The key date on the PennDOT letter is the mailing date. The date will be found at the top of the PennDOT letter, just below the address block for the Department. The deadline is 30 days from the date the letter was mailed to Client X.

It is important to remember that an LSA is a civil filing. Criminal practitioners rarely walk into the Prothonotary's Office at the courthouse. The Clerk of Court's and Court Administration are the go-to offices to visit but they cannot help the License Suspension Appeal lawyer with this one. The appeal is filed with the Prothonotary, the hearing will be held before a Common Pleas judge and if the need to appeal arises after the initial hearing, any appeal from the LSA hearing before the Common Pleas Judge must be appealed to the Commonwealth Court, not the Superior Court as is generally the norm in criminal proceedings.

This article focuses on the general things one should know about LSA's. There are great practitioners out there who can help a lawyer through a Commonwealth Court Appeal and, especially if a lawyer finds themselves in that arena early on, reaching out to the PACDL listserv community will usually get the right people involved. The Commonwealth Court is a helpful resource as well when a lawyer is trying to ensure their filing is meeting all the specific rules.

If the lawyer, now armored with knowledge and fear of missing any deadlines, has filed the appropriate appeal, filed for a stay of suspension and received a hearing date, what are they facing when they show up to the hearing? How does a lawyer defend these appeals? Who are the players at the hearings? What can a lawyer expect?

First off, (maybe more of a practice tip than anything else), alawyer must be prepared to walk into rooms of the courthouse they have never seen before. For example, if a lawyer thinks an LSA filing may finally get them into that courtroom in Adams County with the Gettysburg mural on the wall, think again. Generally, a lawyer will find themselves walking more miles in different courthouses throughout the Commonwealth on a quest to find courtroom "Q5" or some other obscure room which is always inevitably in the basement or some other random spot where the LSA hearing is being held. Technology may also be lacking, so a lawyer must be prepared if the MVR is essential to their case.

Back to the fight. What is the standard used to determine if a Section 1547 appeal will be successful? Welcome to the wonderful and heartbreaking world of ***reasonable grounds.*** There are really four prongs that PennDOT must meet to survive an appeal, but reasonable grounds are generally where the litigation begins and ends. Here are the four:

1. PennDOT must prove the licensee "was arrested for DUI by a police officer who had reasonable grounds to believe the licensee was operating or was in actual physical control of the movement of the vehicle while under [the] influence of alcohol."[1]
2. The licensee "was asked to submit to a chemical test.[2]
3. The licensee "refused to do so".[3]
4. The licensee "was warned that refusal might result in a license suspension."[4]

The last three out of the four are generally not very difficult for PennDOT to prove. These three prongs are usually established by asking the officer if they read the DL26 form in its entirety after requesting a chemical test and whether the licensee refused that test. There will be a packet of documents that PennDOT's attorney will introduce into the hearing which will include the DL26 form. That form alone is going to cover these three prongs, especially if Client X signed the line indicating a refusal; however, the officer will also be there to testify that these three prongs were covered at roadside as well.

So, if ***reasonable grounds*** is the standard, what is meant by reasonable grounds? Reasonable grounds has been defined as existing "when a person in the position of the police officer, viewing the facts and circumstances as they appeared at the time, could have concluded that the motorist was operating the vehicle while under the influence of intoxicating liquor."[5] A key part of that definition is the phrase "could have concluded." That's right, PennDOT does not have to establish that this officer concluded the motorist was under the influence; rather, they need only establish that a person in the position of the officer could have concluded they were. A lawyer may find a brilliant young officer agreeing with them, after a line of cross and upon reflection, that Client X may not have been under the influence. However, PennDOT's counsel may argue and even more significantly the Court may conclude that since an officer "could have concluded the driver was intoxicated," there were reasonable grounds to arrest. In other words: Appeal denied.

Thankfully, the courts have given us some guidance. The Commonwealth Court noted that although, "there is no set list of behaviors that a person must exhibit for an officer to have reasonable grounds for making an arrest, case law has provided numerous examples of what this Court has accepted as reasonable grounds in the past, *e.g.*, staggering, swaying, falling down, belligerent or uncooperative behavior, slurred speech, and the odor of alcohol."[6] That's right…, odor of alcohol? Seems reasonable it's a DUI. Client X being uncooperative (like refusing

to submit to a chemical test)? Reasonable grounds. A lawyer in this arena must focus on the positive conduct displayed by their client at roadside. If Client X was walking around fine, did not sway an inch in 30 mph winds at roadside, spoke clearly, and stood upright the whole time, the lawyer should be focusing on those facts in their argument of why reasonable grounds were not present.

One must be prepared for a few additional favorite quotes of PennDOT's attorneys. As our courts have held "reasonable grounds is not very demanding [,] and the police officer need not be correct in his belief that the motorist had been driving while intoxicated."[7] "Even if later evidence proves the officer's belief to be erroneous, this will not render the reasonable grounds void."[8] "It is not necessary for an arresting officer to actually observe the licensee operating the vehicle, nor does the existence of reasonable alternative conclusions bar the arresting officer's actual belief from being reasonable."[9] That's right, the officer can be completely wrong, evidence to the contrary can show it, and yet, the standard is not very demanding and as such the officer can still be seen as "reasonable." In other words: Appeal denied.

To further frustrate an eager practitioner ready to battle LSA's on a regular basis, our courts have held, a "police officer's reasonable grounds can be based on information received from a third party."[10] "Information from a passerby and another driver could be used to assess the officer's state of mind regarding the reasonableness of his belief."[11] The normal objection for any lawyer would be hearsay. Unfortunately, the courts have addressed that objection, too, holding that, "out-of-court statements are admissible to prove an officer's state of mind to establish the officer had reasonable grounds to believe an individual operated a vehicle.[12] Additionally, "a police officer may rely upon his experience and personal observations to render an opinion as to whether a person is intoxicated."[13]

Looking at the glass half full in cases involving third party callers, the test is a "totality of the circumstances" test that looks at, in addition to the above callers' location of the vehicle, whether the engine was running and whether there was other evidence indicating that the motorist had driven the vehicle at some point prior to the arrival of the police."[14] So again, when a lawyer finds themselves in these hearings, they must focus on the positives for their client and hopefully the engine was off, the 911 callers description bad and the odor of alcohol faint.

Before some final practice tips, the somber music keeps playing with yet one additional example of how difficult these cases can be, enter *Norris v. Department of Transportation.*[15] In *Norris*, the licensee was brought into the hospital for a chemical test after being found passed out in her car and failing field sobriety tests. She complied with the request for a blood sample initially after being read the DL26. The phlebotomist tried numerous times to get blood, but kept missing those good veins. After having enough of the endless poking, Norris said enough was enough. The police then obtained a warrant, and Ms. Norris allowed yet another poke. However, when that one was unsuccessful as well, Norris again refused to participate anymore. In response to Ms. Norris's claim that "I tried", the Court upheld her suspension, reasoning that "the Implied Consent Law permits multiple attempts at testing, and withdrawal of consent after unsuccessful attempted testing can constitute a refusal."[16] The Court in *Norris*, further explained, "anything less than an unqualified, unequivocal assent to submit to chemical testing constitutes a refusal to the consent thereto."[17]

What about cases involving a medical issue where Client X cannot, under any circumstances, comply? Well, in such a case, once PennDOT has established their 4 prongs, the burden shifts to the appellant licensee to establish that they were either incapable of making a knowing and conscious refusal, or they were physically unable to take the test.[18] And, when it comes to establishing physical inability to take the test, expert medical testimony is required.

After all that heartache, one may wonder, so what is the point? Well, there are cases where it really was not reasonable to believe the driver was a DUI. A lawyer must keep an eye out for facts that support such an argument and argue the positives of their case when they are in an LSA hearing. Additionally, a lawyer may run into that veteran officer who comes to the preliminary hearing and says, "I haven't submitted the refusal paperwork yet." At that point, the lawyer should see if some negotiating can be done to prevent the paperwork from being filed.

An LSA can be a great tool to delay suspension. That is not to say a lawyer should file a frivolous appeal; however, many times the PennDOT attorney may offer an additional 6-month delay on the imposition of the suspension if an agreement to withdraw the LSA is reached at the hearing date. That hearing date may also be continued a few times for scheduling conflicts and the like. That is really, as a practitioner, how a lawyer may use the LSA process.

Most of all, a lawyer should always set realistic expectations for their clients. Having a frank conversation with Client X about the low burden that must be met by PennDOT and of the unsupportive case law involved with LSAs can save a lot of anger a few months later. Again, not by filing a frivolous appeal, but by appreciating the low burden, a lawyer can explain to Client X that the appeal may ultimately just allow for time to take a breath and figure life out, e.g. set up rides for kids and ways to get to and from work. A lawyer that has these conversations early in the process, i.e. during the initial consultation, will protect the lawyer-client relationship from deteriorating in the event Client X is ultimately unsuccessful in the appeal.

NOTES:

[1] *Banner v. Commonwealth Dep't of Transp.*, Bureau of Driver Licensing, 737 A.2d 1203, 1206 (Pa. 1999).

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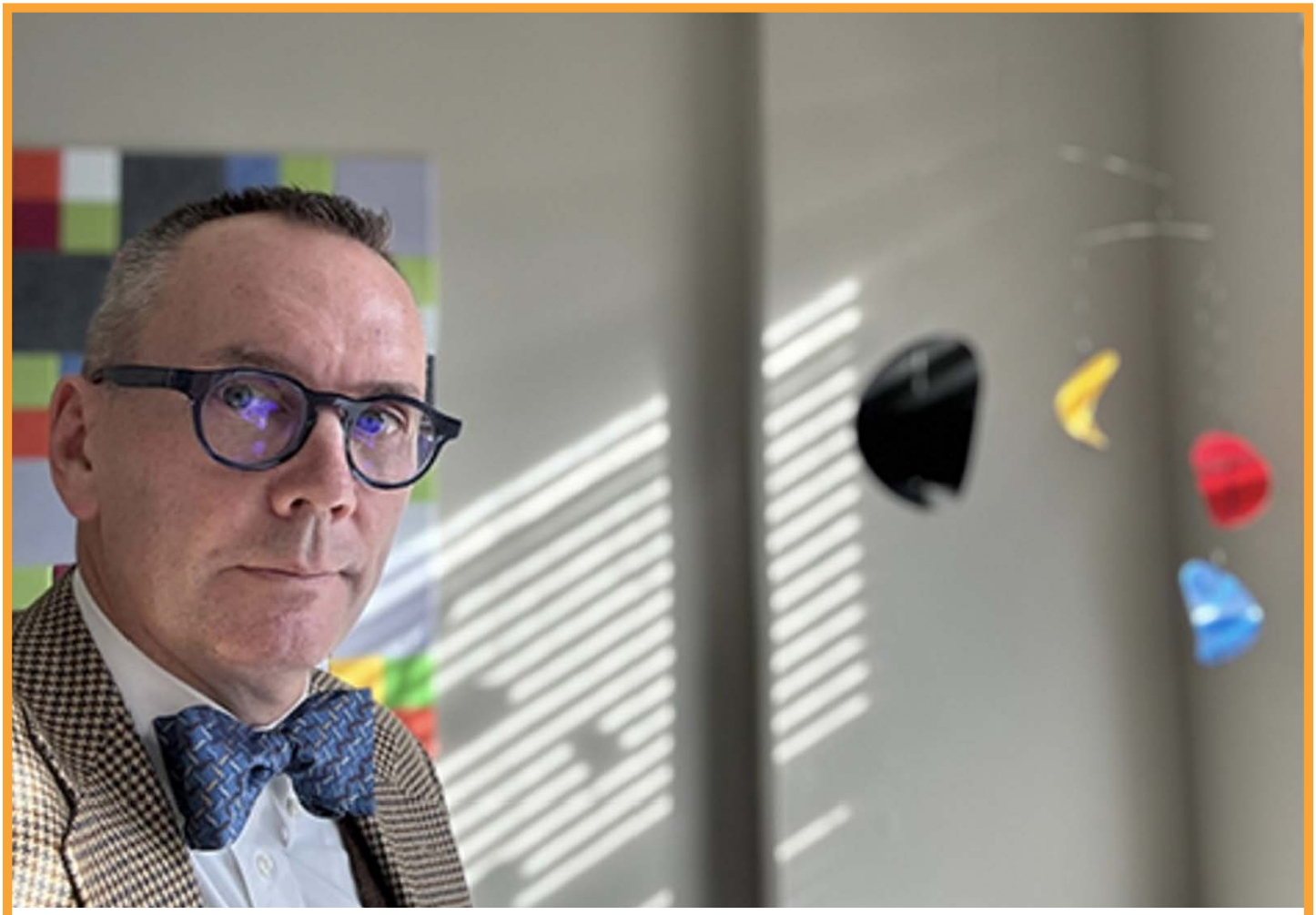

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