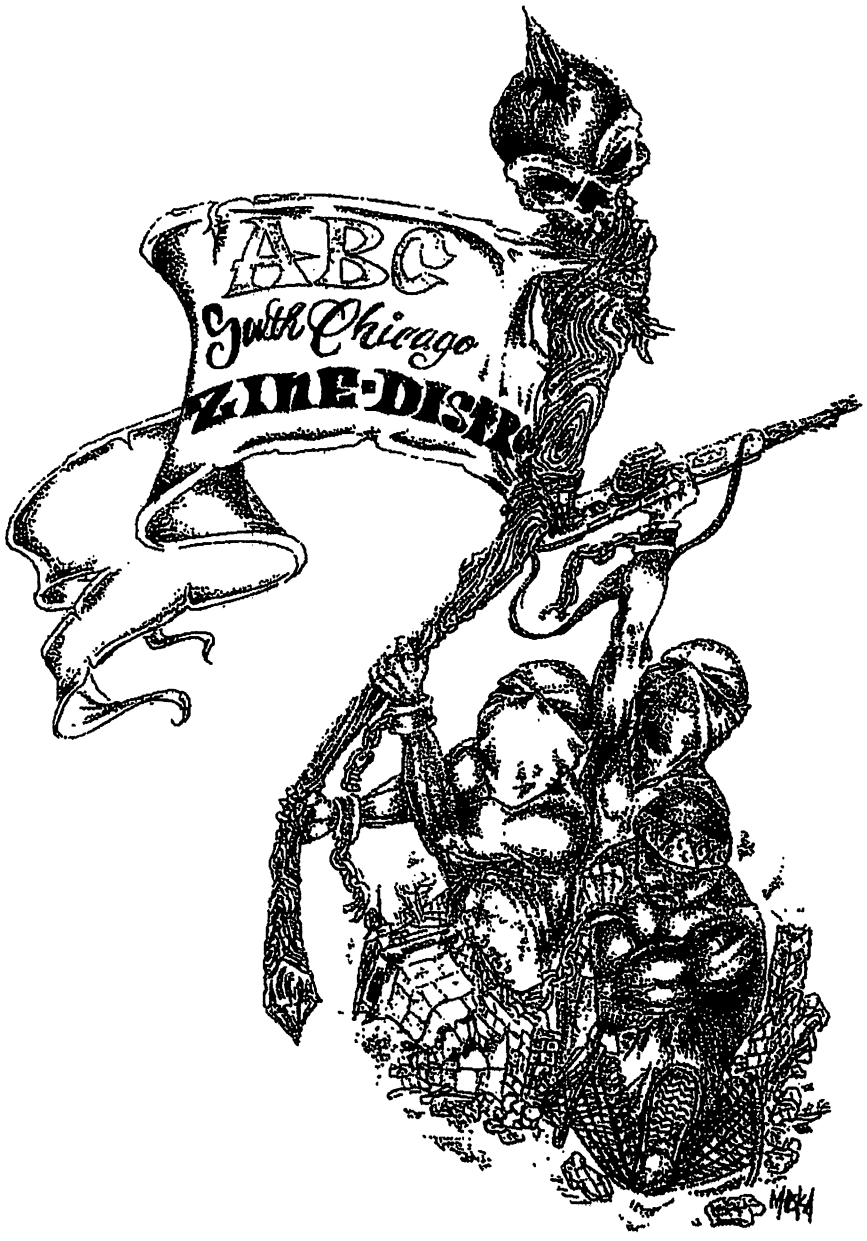

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CRIMINAL LAW CONCEPTS

Salerno

This informational booklet (DIY legal zine) contains educational and instructional articles on Criminal law and legal theory. Nothing within this booklet is meant as legal advice: it is wholly meant for educational and instructional use only. Students of law should always conduct their own research and should always check all case citations. The author assumes no liability.

Written By:

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'The true teachers are those who help us think for ourselves' Sarvepalli Rakhakrishnan

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This Legal Zine, Criminal Law Concepts, is meant to be a companion to the other legal booklets:1) How To Use The Law Library And Write Your Own Law Work, 2) Criminal Law Forms, and 3) Case Citator.

Other fine informative Zines (short for magazine) are available from your local ABC. A Zine is a Do It Yourself edukational tool and there are Zines on every topic imaginable.

About The Author

D. M. Salerno was convicted, in Michigan, of first degree pre meditated murder based upon the false testimony of an Ohio jail inmate, Thomas J. Huff, who was in jail with Salerno for only 11 days; Huff was sentenced to serve 14 months in prison for Fraud and was released the morning after he lied in court. Salerno was sentenced to serve Life Without Parole.

Salerno is also serving a 22 year to life sentence, in Ohio, for the self defense killing of the man responsible for the murder he was convicted of in Michigan.

He is challenging the wrongful conviction with limited to no access to Michigan state law material and and he has no outside support.

Mr. Salerno has written a few legal booklets and other informative Zines which have been distributed to prisoners free of charge through a few ABC chapters and Free Books to Prisoners Outfits. Salerno has also been published over a dozen times in the Idaho Observer newspaper.

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Sample Direct Appellate Brief

favorite Monopoly cannot save a prisoner's life. These are mere trivial games and are meant to keep prisoners minds captive, enslaved, idle, useless. Keeping prisoners focused upon card games allows prisoner growth to stagnate. nothing is being learned. no books are being read. Self-reflection is non-existent. however, the prisoner got along socially at time of arrest is how, then, the prisoner will get along socially upon release; even if imprisoned for twenty years. How can this be? Why no social growth? You mean to tell me a Fifty Year old who served 30 years may think and act as if he were still the 20 year old he was when arrested? This sad occurrence happens for too often.

Lay down the cards and turn off the television. Pick up a book and go to the law library. Don't believe the government when it tells you that you are unable to grasp the 'law.' Don't believe the government when it wants you to believe you deserve prison and won't amount to anything more. Nothing is beyond your reach; anyone can learn to use the law library and the books within it in about an hour. anyone can do this even without graduating from high school and you don't need a GED either.

...

It is up to each of us to rise above the labels heaped upon us by the government. The prejudicial weight of socioeconomic class, for example, has caused many to falter and succumb to the expected outcome of a person belonging to one of the class categories. Don't allow yourself to be described as a label; realize the potential within you. Learn, grow, live.

...

I'm hopeful something within this collection of writings has been helpful. I wish you well on your journey.

Sempre avanti -- Always forward
April 2010
D.M.Salerno

The following is a draft for a proposed newsletter submission. This was never finished and was not submitted but it seems fitting for this space...

Why don't you see what's going on? It is all choreographed appeasement, mis-direction, and brainwashing. The moment someone enters a prison reception center it is ever present. The law library isn't spoken of and yet playing cards abound. Chess boards to the left, radio listeners and television watchers outnumber book readers, the recreation yard is open but again, no mention of he law library.

Keep 'em happy. Give them something to do. Just keep them busy. Don't advertise anything about the law library. No. If they see the 'law' is accessible and that they are able to learn, quickly, the ways of the Brethren Of The Bar, well, nothing good could come of that. Nope, they'll all start filing paperwork. Can't have that. Some will win new trials, lower sentences or release. Release?! Oh... Can't have that. Not at all. What would the government do with all the prison staff if people in prison actually filed something and had sentences reduced or reversed?

Think of the ramifications of each prisoner filing just one simple motion. For sake of this illustration it doesn't matter what the motion is for as long as it is Not frivolous. If even half the prison population in any state all filed only one motion the system would have to stand up and recognize the masses for the intelligent, worthy beings they are.

If every prisoner filed one motion the legislature would, ultimately, have to restructure laws, judges would need to reduce sentences and prosecutors would not be able to file charges against people unless absolute evidence of guilt existed. None of that could happen due to the influx of motions necessitating the court's attention for correction of the abuses wrought upon defendants. Court cases won by prisoner litigants would create new laws and would overturn illegal statutes. One motion could free the otherwise cast-aside, lost-soul who was told to die in prison.

Hearts, Spades, Dominoes, Chess, and the all time

Criminal Law - Part One
From Theory to Conviction

In order to properly learn a discipline, we must first understand its basic principles. Criminal Law is no different. The fact that it is 'Criminal Law' and not 'How to use a hammer' should have no bearing on learning. It's honestly not that hard to grasp, so let's remove the stigma so we can see how criminal law really works.

When someone is arrested the government begins building a case. This happens through collecting 'evidence.' Evidence comes in many forms - not all are important for this particular discussion, but may include such things as statements, clothing, and residue.

The prosecuting attorney takes whatever evidence there may be and creates a 'theory.' This is important to understand. Regardless of the type or amount of evidence, it is the prosecutor's job to prosecute those believed to have committed a crime. Though there is a presumption of innocence ('Innocent until proven guilty'), the prosecutor believes the person arrested is guilty.

Now, the prosecutor makes up a theory. He makes it up. This is fiction, like John Saul or Stephen King would write - fiction, falsehood, a tale, a story. He makes up a story that he thinks will convince a jury or judge to convict the accused person.

The defense attorney is also said to have a theory. This is true for all defendants, including those who assert innocence of the charge. It is understandable that a person guilty of the offense charged would make up the best story possible in an attempt to win the trial.

Why, though, is it considered a mere defense 'theory' when the defendant states he or she is innocent? Why isn't the defendant considered by the court to be innocent until the government's 'theory' proves guilt?

This is due to the amount of information available to support a defendant's plea of innocence. If the

defendant is innocent but does not trust the defense counsel, not much information is going to be given to the attorney to form the defense . In this scenario, the defense counselor would need to write some fiction as well, based on his client's assertion of innocence. Another reason it is a defense 'theory' would be doe to the lack of evidence supporting the defendant's story. This could be due to destruction or withholding of evidence, or maybe it is undiscoverable for some reason.

The proceedings at a criminal trial are said to be adversarial. This means that two sides come to the bench to present their side of the story. The stories presented can only be termed 'theories at this point because the jury, or judge if it is a bench trial, has not yet decided who to believe. The story that is believed by the trier of fact (judge or jury) is then called 'truth' even if it is not representative of what really happened.

The judgment of the court is considered a 'common law' ruling. Common law means a judicially-created statute, right, or opinion.

Some refer to the judgments of courts as 'legal fiction.' this is due to the case being decided upon theories, or fiction.

The books in the law libraries containing court cases are termed 'case books' because case law (judgments from courts) are shown in them. All those cases are common law.

Because a criminal trial is based upon made up stories judged upon a believability scale, it is imperative that we be able to think as clearly as possible. It is therefore necessary to remove our emotions from the case. Colossal errors occur in life due to emotions acting without benefit of intellect. In order to confront the government's fictionalized story, you must remove your emotions, think clearly, and pay attention. You can visit your emotions some other time. they are part of you and aren't going anywhere.

If you understood what you just read, stay tuned for discussions on common law v. statutory law vs. constitutional law, standards of review, and more.

See also, Page 27 for a list of cases mentioned within the Sample Direct Appeal Brief, Pp. 27-36.

As of April 4, 2010, Parts I through VIII, herein, have been published by the Idaho Observer Newspaper. They appear here with little to no alteration from how they appeared in print. The Idaho Observer is a monthly newspaper with articles reporting issues the mainstream media rarely if ever report. Also, there is a full page dedicated to prisoner letters and articles entitled, 'Behind the razorwire' on page 20 of each issue.

For prisoners, there is a discounted subscription and, they allow prisoners to also send FOUR new stamps or embossed envelopes for each monthly issue.

The Idaho Observer
PO Box 457
Spirit Lake Idaho 83869

www.idaho-observer.com

Otherwise, the Idaho Observer has no connection to this booklet.

Criminal Law - Part Two
Three Laws and a Standard

Common Law is made up of judicially (judge or court) created rules, laws and orders. The opinions of all criminal cases are considered Common Law. Common Law that has not been reversed for being unconstitutional may find its way into becoming a court rule, such as a rule of evidence or criminal procedure.

Statutory law is comprised of statutes. State laws are listed (codified) as statutes and are usually catalogued by a numbering system. For example, in Ohio one of the state law statutes listing the crime of murder is found in Ohio Revised Code § 2903.02. This statute is a law that shows the elements of the offense or, put another way, the items the government MUST prove for the accused to be found guilty of violating the statute. Generally, statutes are laws passed by the legislatures of the several states, each of which consist of House of representatives and a Senate. Once each has agreed on what the law should contain, they vote on it and, if it passes, the bill becomes law and a statute is born. Statutory law came into being in an attempt to bring substance and consistency to the common law.

Both common law and statutory law must be in harmony with constitutional law, which is supposed to be the 'law of the land.' The Constitution, though, is open to interpretation and application of law by the various courts. As court justices change so may the interpretation of the Constitution. Common law and statutory law are tested for constitutionality through court actions, which might be brought forward as an appeal or styled as one of the many forms of 'writs' available to petitioners. For instance, an argument could be presented asserting the negative common law, or statute, is unconstitutional. If the reviewing court agrees, the law is changed to comport (agree) with constitutional standards, as interpreted by the court at that time.

These three types of law - common, constitutional and statutory - are used when challenging a conviction as together they create various standards of review.

The specific standard of review tells the reviewing court what to look for and what common law(s) the standard is based upon. When challenging a court ruling it is important to know what the standards of review are for your claims of constitutional violation. If a constitutional claim is a chocolate chip cookie, the argument, then, would be that the evidence either does, or does not, contain the ingredients for the chocolate chip cookie.

A claim of 'insufficient evidence' is a claim based on 'legal insufficiency,' which means the government failed to prove the accused guilty of the charged offense as it is defined by the 'elements' in the statute that was alleged to have been violated.

The constitutional claim might look like: 'The government failed to produce sufficient substantial, competent, reliable evidence on all elements of the offense charged.'

For the reviewing court to determine whether sufficient evidence exists to support the conviction, it must look to the 'recipe' for sufficient evidence. The recipe is the standard of review, which might read something like: 'The due process clause requires the government to prove every element of the crime for which a defendant is charged. Before a charge can be submitted to a fact-finder (judge or jury) the prosecutor must have produced sufficient evidence from which a reasonable fact-finder can find all elements of the charge beyond a reasonable doubt. In re Winship, 90 S.Ct. 1068 (1970); Jackson v. Virginia, 99 S.Ct. 2781 (1979); Fiore v. White, 121 S.Ct. 712 (2001); Sullivan v. Louisiana, 113 S.Ct. 2078 (1993)

Sufficiency of the Evidence speaks about Legal Innocence or Guilt. Stay tuned for a discussion about factual innocence. - Sempre avanti -

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B. (.2) Additionally, it is questionable that any reasonable advocate, in counsel, would advise a defendant to ever a plea to the charges of carrying a concealed weapon and weapons under disability where the plea would invite consecutive sentences, as if viewed as allied offenses guilt of one may rely upon a finding on the other. The question remains how any reasonable advocate would advise a defendant to enter a plea of guilt for such charges for a consecutive sentence.

As actions of the defense counselor fell below a reasonable standard of professional assistance, this Court is respectfully urged to set aside the conviction and remand for trial.

C. In determining a claim of ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that deficiencies in performance prejudiced the defense. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984); Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357 (2002). It is submitted the Appellant, Mr. ---, has met this standard. If the Court reaches a different conclusion, the Court is requested to assess the cumulative impact of all deficient performance claims. Williams v. Taylor, 529 U.S. 362 (2000); also, Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir. 2000).

It is respectfully urged that this Court vacate the conviction and remand for trial.

CONCLUSION

As constitutional and reversible error has occurred, Defendant-Appellant --- respectfully requests that the Court reverse his conviction and remand for trial, or Grant any and all other relief as is deemed just.

Respectfully submitted,

Defendant-Appellant
name - signature
Address

Criminal Law - Part III
Insufficiency, Manifest Weight, and
The Presumption of Correctness

In a criminal trial, the government MUST prove the defendant guilty of ALL elements of the offense charged. If, in the light most favorable to the government, the offered evidence proves the accused guilty of all elements, beyond a reasonable doubt, the defendant is said to be 'legally guilty.' The claim of 'insufficient evidence' is a question of legal guilt and is, therefore, a question of law for both the state and federal courts to resolve. If the government has failed to prove guilt on all elements the accused must be acquitted. See, In re Winship, 90 S.Ct. 1068 (1970). A person may be legally guilty but also be found NOT guilty by the finder of Fact (jury or judge at a bench trial) due to what is believed from the evidence. This is called the state court 'finding of fact.'

In case of conviction, a 'manifest weight' of the evidence claim challenges the finding of fact. The claim might be, 'Appellant's first degree murder conviction is against the manifest weight of the evidence and must be reversed must be reversed as a 'manifest miscarriage of justice has occurred.'

This is a claim that the factual determination is flawed; it is a question of fact and may only be brought in the state courts as the state court 'trier-of-fact' is deemed to be in the best position to make decisions of fact regarding the evidence, including whether or not a witness was credible. Generally, what the finder of fact believes from the evidence will remain as his verdict. Along with the claim we need to know the Standard of Review which, for Ohio, might read like, 'In determining whether a verdict is against the manifest weight of the evidence, the reviewing court sits as the 'thirteenth juror' and weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered' State v. Martin, 128 NE2d 7 (1955); State v. Otten, 515 NE2d 1009 (1986); State v. Thompkins, 678 NE2d 541 (1997); See also, Tibbs v. Florida, 102 S.Ct. 2211 (1982).

The reviewing court then would review the supporting argument along with all evidence and decide whether to grant a new trial. It only takes one juror to vote 'not guilty' - the reviewing court acts as an UNdecided juror.

The state court finding of fact is presumed to be correct. One way to challenge the presumption of correctness is through the claim of conviction against the manifest weight of the evidence, as above. Presumption of correctness does not apply when the finding of fact relies on facts 'not in evidence.'

The presumption of correctness was born from the 1670 trial of William Penn and exists to ensure 'fair trials' without government influence. Presumption of correctness does not allow the government to reverse the decision of the people who have judged an accused 'not guilty,' effectively protecting against being tried twice for the same crime, or 'double jeopardy.' The presumption of correctness also does not allow a constitutionally infirm conviction to stand when a state court fact-finder has erred in convicting an accused based upon faulty fact finding. In short, the government cannot force a conviction, even if the acquittal was against evidence. However, a conviction against the evidence must be reversed. The presumption of correctness is not to be used by the government to keep a wrongfully-convicted person imprisoned. Application of a presumption of correctness in that manner creates a 'bill of attainder,' which is a constitutionally-prohibited law that takes away a person's rights or liberties without trial and completely undermines the duty of the various courts' power of review.

Stay tuned... a discussion on ineffective trial counsel is next.

Sempre avanti

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A . Defendant-Appellant --- was fond to be an indigent person, as defined by Ohio law, and a public defender was appointed to represent him for alleged felony offenses.

During sentencing, the appointed counselor failed to object to imposition of court cost payment. It is well settled in Ohio law that where an indigent defendant appears for sentencing and payment of court costs is made part of the sentence, the trial court will set aside payment of said costs upon objection of the defense, and failure of trial counsel to request such waiver id ineffective assistance of counsel. State v. Masterson, 2008 WL 4263442, State v. Blade, 2007 WL 5323.

This Court is respectfully urged to vacate payment of the assessed costs and Order reimbursement of already garnished funds.

B. (1) During the 6-9-05 plea hearing, defense counsel failed to notify Mr. --- of the real nature of the sentence be advised entering a plea to. Appointed defense counsel stated the sentence, if agreed to by by the court, would be for a term of imprisonment of 21 years to life. At no time did counsel inform the Appellant the sentence was, in reality, a minimum of 21 years to life up to a maximum of 30 and one half years to life, when PRC violation penalties would be factored in. The additional 10 and one half years is due to statutory imprisonment for up to one half of the original sentence if terms of PRC are violated.

By failing to properly advise his client, the counselor was not an effective advocate. The counselor advised the Defendant to enter a change of plea from not guilty to a plea of guilty. Counselor's actions were unreasonable and Mr. --- was prejudiced by this deficient performance. Had counsel been an effective advocate and had his performance been reasonable, Mr. --- would not have entered a plea of guilty and would have proceeded with trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

This Court is respectfully urged to set aside the conviction and remand for trial.

III. THE SENTENCED IMPOSED IS VOID DUE TO NO PROPER PRC NOTIFICATION

On June 9. 2005, Defendant-Appellant, Mr. ---- , appeared for sentencing before the --- County Common pleas Court. Judge --- imposed an aggregate sentence of 21 years to life imprisonment for conviction, by plea, on four charges. The sentence, however, is void due to the court failing to impose post release control properly for sentences imposed for each offense. State v. Bezak, 868 NE2d 961 (2007).

In State v. Broadnax, 2008 WL 1723675, the Court held, at ¶6:

> In Bezak, the Ohio Supreme Court concluded that when a defendant is convicted of or pleads guilty to one or more offenses and post release control is not properly included in a sentence for a particular offense, the sentence for that offense is void, and the sentence must be vacated and the matter remanded to the trial court for resentencing.

Further, the Court, in State v. Simpkins, 884 NE2d 568 (2008), stated a post release control error during sentencing requires de novo sentencing. Here, the Court failed to notify Mr. --- of the term of post release control mandated for each section of the Revised Code he was convicted of violating. Instead, the Court used catch-all phrasing:

> As part of the sentence of this case, the defendant is subject to the post release control supervision of R.C. 2967.28. (6-9-05 sentence order, page 2.)

The Court fails in its duties when using catch-all phrasing. An entirely new sentencing hearing must be held where, while present, the Defendant would be properly notified of post release control; Otherwise the sentence remains illegal as he was not notified of the entire sentence being imposed upon him.

This court is respectfully urged to vacate the sentence and remand for de novo sentencing.

Criminal Law - Part IV
Ineffective Trial Counsel

Unfortunately, most of us are unable to choose our vehicle for the road through criminal court matters. We end up with whatever is on the lot at the time. Could be a Chevette, Could be a Porsche. Heeey! Look at that beat up Ford... It's got a 460 under the hood ... A sleeper, no one'll ever see it coming! Regardless of the 'model,' no single attorney is an all-knowing mass of legal knowledge. No one is. Because the law changes each day. With numerous influences, and the imperfection of human knowledge, we must always carefully scrutinize conduct of the Defense Counselor.

Though the Defense Counsel's performance is presumed to be reasonable professional assistance, and it must be shown that 'counsel's representation fell below an objective standard of reasonableness,' Wickline v. Mitchell, 319 F.3d 813, 819 (6th Cir. 2003), possible mistakes are too numerous to list here. Anything said to be trial strategy cannot be listed as counselor mistake.

If you feel 'there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' Strickland, infra (below), the first thing to do is make a list. Some things on your list might refer to basic duties of Defense Counsel; the Court in Strickland, infra, listed some basic defense counsel duties: Defense Counsel must 1) practice loyalty and avoid conflicts of interest, 2) advocate the defendant's cause, 3) consult the defendant on important developments during the course of the trial, and 4) bring to bear such skill and knowledge as will render the trial as a reliable adversarial testing procedure. Now, write a short story for each item on the list. This short story is the base of the argument in support of your Constitutional claim.

The claim might be? Assistance of Appointed Trial Counsel was Ineffective.

One Standard of Review consists of two parts: the

FIRST part may be: 'In determining a claim of ineffective assistance of counsel an appellant must show that counsel's performance was deficient and that deficiencies in performance prejudiced his defense.' Strickland v. Washington, 104 S.Ct. 2052 (1984); Woodford v. Visciotti, 123 S.Ct. 357 (2002). This shows what is called the Strickland standard. You need to show the attorney made mistakes (the deficiencies), and them must show the mistakes harmed you - that errors of counsel actually had an adverse effect on the case (the prejudice). Depending on what mistake counsel made, prejudice may be presumed if defense counsel was absent, suspended during a period of 'discovery,' drunk, didn't ask questions or object, was asleep, or other act rendering counsel 'absent.' Strickland, supra, at 692; Also, United States v. Cronic, 466 US 648 (1984).

Now we look to the SECOND part of the Standard of Review, which might read:

'... (2002); If no single deficient performance claim amounts to prejudice, the reviewing court must assess the cumulative impact of all deficient performance claims. Williams v. Taylor, 529 U.S. 362 (2000); Also e.g., Wiggins v. Smith, 123 S.Ct. 2527 (2003); Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir. 2000).'

The reviewing court has to look at each claimed mistake individually to see if he individual mistake harmed you. If the court doesn't rule that any one mistake, by itself, harmed you, then it must, under this standard, take ALL the claimed mistakes together, then see if together they were prejudicial. If one snowflake falls on a roof, nothing happens. It's ONE snowflake. But, if three feet of snow is on the roof it may collapse under the weight.

The claim of Ineffectiveness of Counsel is sticky as a reviewing court has a lot of room to fit counsel's actions into - kind of like throwing a baseball into a pool. With good argument and research their baseball won't come close to making a splash.

Stay tuned for a discussion on 'Fruit of the Poisonous Tree.'

colloquy, judge ---- failed to make certain Mr. --- had an understanding of the maximum penalty involved, thus failing to determine whether Mr. --- was voluntarily agreeing to the possibility of being sentenced to the statutory maximum penalty. The judge failed to advise Mr. --- that the maximum penalty involved includes a statutory mandatory term of post release control (PRC) for each of the charges involved, including the possibility of serving additional imprisonment, after release, for any violation of the terms of PRC, which could cause him to serve up to one half of the original sentence in prison.

Mr. --- was sentenced to serve a term of 21 years to life in prison. The maximum penalty, then, includes not only the mandatory term of PRC but also the possibility of imprisonment for an additional 10 and one half years. Nowhere does the judge mention PRC at all. The court failed to discover whether Mr. --- was entering a voluntary plea to the charges under such maximum punishment sentencing terms.

In State v. Sarkozy, 117 Ohio St.3d 86, 2008 Ohio 509, the Ohio Supreme Court held (1) that if a trial court fails during plea colloquy to advise a defendant that the sentence will include a mandatory term of post release control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw plea or upon direct appeal; and (2) if the trial court fails during plea colloquy to advise the defendant that the sentence will include a mandatory term of post release control, the court fails to comply with Criminal Rule 11, and the reviewing court must vacate the plea and remand the cause.

Therefore, this Court is respectfully urged to vacate the plea in this matter and remand the cause for trial.

II. BECAUSE THE TRIAL COURT FAILED IN ITS DUTIES UNDER OHIO CRIMINAL RULE 11 C, THE PLEA WAS UNKNOWING AND INVOLUNTARY

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), the Supreme Court ruled 'it was error, plain on the face of the record, for the trial court judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.' Further, Mr. Justice Douglas, delivering the Opinion of the Court, said the standard to be used for determining whether a guilty plea is voluntarily made is the same as the standard the Court used previously to determine whether an accused voluntarily waived the right to counsel:

> ... The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'

Ohio Criminal Rule 11(C) states, in part:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

Here, Appellant ---, appeared in open court on June 9, 2005 for the purpose of changing his plea of not guilty to a plea of guilty. During mandatory Rule 11

Criminal Law - Part V
Fruit of the Poisonous Tree

While standing on a hill we watch as little Michael plays in his sandbox. The sandbox is under a nice fruit tree that offers shade from the hot sun. A neighbor noticed that Michael eats fruit from the tree while playing, which makes him ill. This happens time and time again. The neighbor decides to help. He brings over a ladder and gathers all the fruit available. The neighbor, though, doesn't account for Michael's young age. When hungry, Michael looks for fruit. Seeing none he now gnaws on the bark of the tree, which makes him just as ill as the fruit did. Michael's mom takes him to the doctor once more. When they return the neighbor speaks with her stating how he tried to help by plucking the fruit from the tree. The boy's mom replies that the problem is not necessarily the fruit but the tree itself. The neighbor realizes he should have cut down the tree itself. By attacking the tree itself Michael would no longer have been in danger.

Illegally obtained evidence is often used against an accused. One of many ways this occurs is by the use of evidence discovered when an item already seized is further investigated. Let's say an accused is arrested and brought to the police station. Once there officers seize only the suspect's shirt. Remaining clothing items are seized later when a warrant may properly be obtained based upon probable cause. The seized shirt is submitted for testing for the presence of gunshot residue. A few molecules of the three elements comprising GSR, Barium, Lead, and Antimony, are found present on a sleeve.

At trial Defense Counsel challenges the admission of the alleged GSR evidence. The motion is denied and the alleged evidence is allowed in to court. The counselor is merely plucking fruit when challenging the GSR. The relationship is causal - there would be no fruit without the tree. There should also have been a motion filed to suppress the 'tree,' which is the shirt, as there was no warrant. Gather the fruit and

the tree still stands. Chop down the tree and you are rid of both the fruit and tree; else the shirt would remain in evidence, even if the GSR found upon it had been suppressed.

In order to more fully protect the rights of an accused in any criminal proceeding, each piece of alleged evidence should be challenged. Simply because an investigative search is done on an item, causing discovery of other alleged evidence, our attention should not be distracted. Each piece should be challenged. Look to the tree as well. How was it seized? Was there a warrant? Does the government claim an exception to the Fourth Amendment requirement for seizing without a warrant?

In this example seizure was without a warrant or probable cause. The government, undoubtedly, will claim one of a vast array of exceptions to the warrant requirement, such as plain view, inevitable discovery, independent source, or good faith. Regardless, evidence obtained illegally may not be introduced at trial to prove guilt otherwise reversal is due. Chapman v. California, 386 U.S. 18, 23-24 (1967). This is part of the judicially created Exclusionary Rule which applies to state courts for Fourth Amendment violations through Mapp v. Ohio, 367 U.S. 643, 654-55 (1961), and to the federal government through Weeks v. U.S., 232 U.S. 383, 398 (1914). The rule also applies to evidence obtained in violation of the Fifth Amendment, Bram v. Alabama, 361 U.S. 199, 205 (1960), and the Sixth Amendment as well. U.S. v. Wade, 388 U.S. 218, 237-39 (1967); Massiah v. U.S., 377 U.S. 201, 206-07 (1964).

By gathering the fruit and taking an axe to the tree, the evidence is more properly challenged. Stay tuned for a discussion on the Plain View Exception.

- Sempre avanti -

'entered' date boxes and dated judge's signatures. The face of those documents, however, clearly show the date of the judge's signature occurring before the date of the 'entry' date. (appendix 3, 4).

Judge --- dated and affixed his signature to the two pages of the judgment entry of sentence on 6/14/05. That signed and dated judgment entry has not ever been entered on the journal by the clerk, therefore, no valid sentence exists in this cause. The signed but not entered judgment is not a final judgment. State v. Moore, 2007 Ohio 4941; See also, State v. Baker, 2008 119 Ohio St.3d 197, 2008 Ohio 3330.

This Court is respectfully urged to remand the cause where the Defendant- Appellant will appear for de novo sentencing.

ASSIGNMENTS OF ERROR

I. NO PROPER OR FINALIZED JUDGMENT ENTRY OF SENTENCE HAS BEEN ENTERED BY THE TRIAL COURT.

On June 9, 2005, Defendant-Appellant ---- appeared and was sentenced by Judge ----. Evidently, the Court Clerk 'entered' the judgment that very same day, 6-09-05, as noted within a square appearing at the upper left portion of each of the two pages of the judgment entry. (appendix 1, 2). This 'square' lists a date entered as 6-9-05, and shows an 'Image' number as 678, with the second page showing a date of 6-9-05 and an Image number of 679.

At the opposite side of the form, at the top right corner, appears a signature of trial judge -----, and below the signature appears the date '6/14/05'.

No other courthouse or Clerk's office 'stamps' not any other type or kind of 'official' stampings nor markings appear on the two page judgment entry.

Ohio Criminal rule 32(C) states:

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

To be in compliance with Ohio Criminal Rule 32(C), a judgment being entered by a clerk must be signed by the judge beforehand.

In Ohio, A Court speaks through its journal. State ex Rel. Worcester v. Dennellon, 551 NE2d 183 (1990). Here, we see the journal entry having a date of 6-9-05. The judge's signature is dated '6/14/05', a full five days after being journalized. No signed judgment entry has been entered on the court journal, in violation of procedure set by Criminal Rule.

Other court documents in this case which were entered on the journal by the clerk bear similar

Criminal Law - Part VI
The Plain View Exception

The Founding Fathers meant to protect Americans from arbitrary, general searches which plagued the English through something called a Writ of Assistance; this writ allowed an officer to search however he wished to find evidence of British tax law violations. The Fourth Amendment to the United States Constitution was to protect privacy against a blanket authority to search through requirement of a warrant to search or seize persons or things. Katz v. U.S., 389 U.S. 347, 357 (1967); Johnson v. U.S., 333 U.S. 10, 14 (1948). The warrant must state with particularity what is to be searched or seized. Marron v. U.S., 275 U.S. 192, 196 (1927); Coolidge v. U.S. 443, 467 (1971).

Though police must, whenever practical, obtain advance judicial approval of searches and seizures through the warrant procedure, numerous exceptions to this requirement have been created. Terry v. Ohio, 392 U.S. 1, 20 (1968). One of the myriad of exceptions, known as the 'Plain View' exception, was born by the ruling in Coolidge, supra at 465.

In order for an item to be seized without a warrant through the Plain View exception, certain criteria must be met: 1) the object seized must be in 'plain view,' 2) the officer must be legally present where the object can be plainly seen, 3) the incriminating nature of the object must be immediately apparent, and 4) the officer must have a right of access to the object. Horton v. California, 496 U.S. 128, 136-37 (1990).

Let's look specifically to the 'immediately apparent' requirement, which exists to protect against a lawful particularized search from becoming an unlawful exploratory search. See, Arizona v. Hicks, 480 U.S. 321, 334 (1987).

To determine whether something is 'immediately apparent' we have a three-part test, U.S. v. McLevain, 310 F.3d 434, 441 (6th Cir. 2002): 1) a connection between the item seized and the items particularized in the warrant, 2) whether the appearance of the object gives probable cause to believe the item is associated

with criminal activity, 3) whether 'the executing officers can, at the time of discovery of the object, on the facts available to them, determine probable cause of the object's incriminating nature.' The courts have stated an object's incriminating nature is not immediately apparent if it 'appears suspicious but further investigation is required to establish probable cause as to its association with criminal activity' and an officer must recognize the incriminating nature of an object as a result of his 'immediate' or 'instantaneous sensory perception.' U.S. v. Garcia, 496 F.3d 495, 511 (6th Cir. 2008).

In Hicks, supra, police viewed stereo equipment with suspicion, but not probable cause, to believe it was stolen. An officer moved the stereo to see serial numbers, which he wrote down. The court held that the officer engaged in an investigatory search when moving the stereo, thus, it was not immediately apparent to be incriminating evidence. No instantaneous sensory perception means no plain view exception.

The remedy is said to be through the exclusionary rule which mandates suppression of illegally seized evidence. Mapp v. Ohio, 367 U.S. 643, 657 (1961). This is a judicially created rule. The existence of a rule does not mean it is consistently followed, especially where federal review of Fourth Amendment claims arising from a state court conviction are concerned. If relief is denied we must continue to request review if ever the reality of liberty is to be known to us.

Stay tuned for the next topic... To Object and Preserve.

- Sempre avanti -

STATEMENT OF THE CASE AND FACTS

This section of the brief would contain information about what has occurred in the case thus far.

On --/--/----, Appellant ---- was arrested and subsequently charged with Disorderly conduct. 11 days after being admitted to the County Jail for the charge, an indictment was returned charging two counts of Special Felony Murder, 1 Count Weapons Under Disability, ... etcetera...

Before trial two motions to suppress ---- evidence were filed and the court denied both - you would mention these suppression motions IF your appeal claims concern an issue about the motions, for instance, if the motions were denied and should not have been you would mention them.

You should only mention what is relevant to the appeal.

Trial began on --/--/-- with Judge --- presiding. After 27 days of testimony and 6 days of deliberation the jury convicted Mr. ---- of ----.

The Appellant now presents this court with his Direct Appeal from that conviciton.

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The government builds a story against the accused through something called evidence. To help ensure an effective defense each individual 'piece' of evidence must be challenged. Prior to and during trial, anticipated evidence should be challenged - before the evidence is actually offered, through a motion filed 'in limine,' meaning on the threshold or at the beginning. See Luce v. U.S., 469 U.S. 38, 40 n.2 (1984). A motion to suppress is one example.

Such a challenge would not ordinarily warrant appellate review unless facts supporting appeal were discoverable only after trial, i.e., U.S. McKenzie, 768 F.2d 602, 609 (5th Cir. 1985), or an objection at trial would have been futile.

The first line of defense at trial is through raising an objection. Challenging evidence includes objecting to witness examination: Common objections are:

1. Objections to the substance of the question: the attorney raising this objection is objecting to the answer the question calls for. Generally, the objection would be the witness is incompetent to answer, the answer is immaterial/irrelevant, the question calls for hearsay or an inadmissible response, there was insufficient foundation for the question or the question is beyond the scope of the direct examination.

2. Objections to the question: The wording of a question may be objected to for being argumentative, misstating facts, assuming facts not in evidence, being misleading/vague, calling for speculation, or for leading. An attorney is not allowed to lead his own witness. This is to help ensure the sought for response is not suggested to the witness. The judge has great discretion regarding leading of witnesses. If a witness appears to be hostile to examination, the attorney may request the witness be labeled a 'hostile witness;' in this case, leading questions are allowed. Leading questions are also used during cross

examination to test witness credibility and statements made during direct examination.

3. It can be difficult to take in everything happening at trial - tone of voice, questions, body language - and be able to object fast enough to stop the witness from answering. If this happens, the attorney must try to frame the objection as one 'to the answer.' Generally, these objections are for unresponsiveness, an inadmissible opinion or hearsay.

4. If an objection is untimely made, say, during the fourth day of trial for something occurring on the second day, the issue is preserved for appeal, but only for 'plain error' review. Plain-error is one that is clear or obvious and affects the substantial rights of the defendant. See, U.S. v. Olano, 507 U.S. 732-35 (1993), also, Johnson v. U.S., 520 U.S. 461, 467 (1997).

5. Further, let's say you are at trial and feel something should be objected to but you aren't exactly sure why - can you object? Yes. Would this objection preserve some sort of issue for appeal? Yes. A non-specific objection is preserved for plain-error reveiw. See, U.S. v. Stewart, 306 F.3d 295, 312-13 (6th Cir. 2002).

Though it is seen as a requirement under the 'contemporaneous objection' rule, see Turner v. Murray, 476 U.S. 28, 37 (1986), failure to object during trial doesn't necessarily preclude raising the issue on appeal. This review would be limited to 'plain-error' review. Plain error review may occur if rights were not timely asserted, which is mere 'forfeiture,' but may not occur if the right to review was 'waived,' see, Olano, supra at 733.

A criminal trial is a serious matter regardless of whether the potential sentence is 30 days or life without parole. All evidence must be tested through objection. Doing so may save your life.

Stay tuned for a discussion on Access To the Courts.

- Sempre avanti -

TABLE OF AUTHORITIES

In The Court of Appeals
-Your- Appellate district
-Your- County Ohio

Your name	:	Ct. of Appeals No.:
Appellant	:	Trial Ct. No.:
v. :		
State of Ohio	:	
Appellee	:	

_____ /

_____

BRIEF OF APPELLANT -Your Name-

_____

Your Name
Address and Number
City/State

PRO SE APPELLANT
_____ /

---- County Prosecutor
Address

FOR APPELLEE
_____ /

Date: / /

_____
-Your Name - Sign on the line-

It may be difficult or impossible to discover what duties prison administrators have to ensure a prisoner has adequate and meaningful access to the courts, because prisoners are at a tremendous disadvantage when it comes to having access to legal material to study and research the 'law.' The Supreme Court has ruled that prisoners have a 'fundamental constitutional right of access to the courts.' Bounds v. Smith, 430 U.S. 817 (1977), and that the right is guaranteed through the due process clauses of the Constitution. Procunier v. Martinez, 416 U.S. 396 (1974). Yet, due to unconstitutional prison policies, many state and federal prisoners still suffer from lacking resources or outright denial of assistance. Law libraries may be inaccessible or may have unduly restrictive hours, Taylor v. Perini, 413 F.Supp. 189, 203, 205 (N.D.Ohio 1976), and many do not provide adequate case books. Gilmore v. Lynch, 319 F.Supp. 105, 110-11 (N.D.Cal. 1971), affirmed sub nom, Younger v. Gilmore, 404 U.S. 15 (1971); Ramos v. Lamm, 639 F.2d 559, 584 (10th Cir. 1980); Wade v. Kane, 448 F.Supp. 678, 684 (E.D.Pa 1978), affirmed 591 F.2d 1338 (3rd Cir. 1979).

Instructional, educational and research matter may be unavailable for prisoners to learn how to prepare and file challenges to a criminal conviction, or the law library may be understaffed. Taylor, supra. Regardless, prisoners are entitled to some form of assistance when litigating constitutional claims. Walters v. Thompson, 615 F.Supp 330, 336 (N.D.Ill 1985); also, Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992), and prisoners should be allowed to help each other conduct research and prepare legal documents. Johnson v. Avery, 393 U.S. 483 (1969).

Often, when a prisoner is placed in segregated housing, access to personal legal material and a law library is denied. Owens v. Maschner, 811 F.2d 1365, 1366 (10th Cir. 1987). An 'exact cite' case request system, mandating use of exact citations to request case law and other material, may be inadequate,

DeMallory v. Cullen, 855 F.2d 442, 446-49 (7th Cir. 1988), and segregated prisoners who are denied physical access to law books may be entitled to free photocopies. See Walters, supra at 340.

Courts have addressed financial inability of prisoners to afford supplies and postage: 'It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.' Bounds, supra; Wade, supra at 685, Smith v. Erickson, 884 F.2d 1108, 1109-11 (8th Cir. 1989).

When a prisoner is housed in one state but challenging an out-of-state conviction 'adequate' access must still be provided. The fact that out of state legal material is being sought is irrelevant; the inquiry should be whether a particular prisoner is being denied access to materials from the relevant jurisdiction that are necessary to challenge the conviction. See Lehn v. Holmes, 364 F.3d 862 (7th Cir. 2004); Corgain v. Miller, 708 F.2d 1241 (5th Cir. 1983). Some courts have ruled that inadequate libraries may, but do not necessarily, constitute a state imposed impediment which would allow for tolling (pausing) time limitations for filing habeas corpus petitions. Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003); Whalen-Hunt v. Early, 233 F.3d 1146 (9th Cir 2000). An 'impediment' is whatever prevents a prisoner from filing his petition. Davis v. Johnson, 158 f.3d 806, 811 (5th Cir. 1998); Moore v. Battaglia, 476 f.3d 504 (7th Cir. 2007).

It is bitterly offensive for a government to convict people based upon mere theories, spun into melodramatic fiction for courtroom display, and again when it restricts a prisoner's access to the courts after the fact. Such malicious action should not be tolerated from a government that is supposed to be by and for the people.

Stay tuned for a discussion on Hearsay.

Sample Brief on Direct Appeal

The following is an example of how a Brief might appear after it had been prepared for an Appellant in the State of Ohio who is filing his/her first appeal from a state court conviction. This appeal follows a trial court conviction, whether by trial or plea, and is called a Direct Appeal. This appeal is heard in one of the state courts of appeal.

There are peripheral documents that must be prepared and filed prior to the Brief, such as a Notice of Appeal, docketing Statement, Praecipe, Motions for Appointment of Counsel, Preparation of Transcripts and possibly others. Normally, an appellate attorney would be assigned to represent a defendant for the Direct appeal, however, if you are not appointed an attorney or if you for reason wish to do the appeal on your own, Consult your Rules of Court to find out what is required in your jurisdiction.

There are many ways of writing a legal argument and varied ways to present that argument in an appeal brief. The brief that follows builds on the principles discussed and presented within the first two legal 'zines' in this series: 'How To Use The Law Library and Write Your Own Law Work,' and 'Criminal Law Forms.' Those booklets, like this one, has been made available to prisoners across the United States through our Brothers and Sisters at a few of the ABC Chapters and Free Books To Prisoners outifts. They are volunteers; copies and postage are paid out of their own pockets. So please don't hesitate to donate. You will be helping them help others.

Use of Bad Character evidence '... is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.' Michelson v. U.S., 335 U.S. 469, 475-76 (1948); McKinney v. Rees, 993 F.2d 1378, 1385-86 (9th Cir. 1993).

The government poisons the well, against established principles of American Jurisprudence, and deprives the accused of a fair trial by focusing attention on whether he/she is 'bad' rather than on whether admissible evidence, and the belief of the trier of fact, support a conviction on the underlying charges. The accused is therefore denied 'the right to a fair opportunity to defend against the state's accusations.' Chambers v. Mississippi, 410 U.S. 284 (1973); Crane v. Kentucky, 476 U.S. 683 (1966).

Comments and allegations of ill-repute meant to emotionally charge one's thoughts are illegal tactics often employed by the government. Use of bad character evidence implicates Due Process, Lesko v. Owens, 881 F.2d 44, 51-52 (3rd Cir. 1989), and is a claim falling under the umbrella of Prosecutor Misconduct. If the prosecutor's remarks were improper and prejudicial, a mistrial may be granted. U.S. v. Yarborough, 852 F.2d 1522, Cert. Dn'd 109 S.Ct. 171 (9th Cir. 1988). Otherwise, on appeal, the prosecutor's conduct must be shown to have been improper, and when the trial is viewed as a whole, violated Due Process. See, Darden v. Wainwright, 477 U.S. 168, 181 (1986); U.S. v. Beverly, 369 F.3d 516, 543 (6th Cir. 2004).

Stay tuned ... More discussions are on the way...

- Sempre avanti -

Criminal Law - Part IX
Hearsay

The first people to arrive in the Colonies set up colonial courts. They used common law rules of evidence derived from miscellaneous rules found throughout the English courtrooms. Today, those rules are known as the rules of evidence which govern the use and admission of evidence. In an attempt to ensure a Defendant's rights under the federal constitution are not violated, the states model their respective rules of evidence after the Federal Rules. Rules of Evidence exclude Hearsay, unless one of many exceptions apply, because use of un-cross-examined testimonial evidence violates the Sixth Amendment's Confrontation Clause. Exclusion of Hearsay is meant to better protect against convictions gained upon unfair, false, or unsupported accusations.

A definition for Hearsay is found within the Federal Rules of Evidence (FRE): hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' FRE 801(c).

A statement offered to prove the matter asserted within it. This means the statement itself is being used to prove what is said in the statement. Bob calls Sue from a neighbor's house and tells her someone broke into his house and that he is watching the burglar leaving. Bob says the man is carrying a cash box and wearing a purple jacket. Sue calls her friend and says a man broke into Bob's house and left while wearing a purple jacket and carrying a cash box. Sue's statement to her friend is Hearsay. Her testimony would be inadmissible ID it were being used to prove the matter asserted, which is that a man wearing a purple jacket left Bob's house... Sue has no direct knowledge. Sue's knowledge of the event is second hand - Sue only 'heard it said.'

Bob's statement is the only one that could be used to prove that the man left the house, wore a purple jacket and carried a cash box. Sue's statement cannot be used for proving the man in the purple jacket left

Bob's house because Sue does NOT have first-hand knowledge of it; her statement is based upon what she heard said. In order to use Sue's statement we must look at it from a different angle and ask ourselves, 'what does Sue have first-hand knowledge' of? Sue had direct knowledge of what Bob knew. Bob told her that he watched a male burglar leave his house while wearing a purple jacket and carrying a cash box. Sue's statement would be used to prove what Bob knew and would be admitted for that limited purpose only.

The Sixth Amendment to the U.S. Constitution guarantees an opportunity to cross-examine all testimonial evidence. Statements and affidavits may be testimonial; if so, they are inadmissible unless the defense has the opportunity to effectively cross-examine the person who allegedly has the first hand knowledge. The veracity of the statement cannot be tested through cross examining Hearsay; the person who 'said it' is the one who is to be questioned on the witness stand as body language, motivation for making the statement, veracity (truthfulness), and other factors often may only be tested through examination of the actual person with direct knowledge. There are, as with anything in 'law,' numerous exceptions when Hearsay may be used at trial, such as: Dying Declarations, FRE 804(B)2 ; State of Mind FRE 803(3); Business Records FRE 803(6); Past Recorded Recollections FRE 803(5); and Excited Utterances FRE 803(2), among others. Further, there is a Forfeiture by Wrongdoing exception which the states have historically misapplied. See Giles v. California, 128 S.Ct. 2678 (2008). Giles may apply to other exceptions as well.

An alarmingly small percentage of people, including judges and attorneys, understand Hearsay. Learning the rules of evidence will better ensure your research and arguments are thorough. Stay tuned for a discussion on Bad character Evidence.

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Criminal Law - Part X
Evidence of Bad Character

'Birds of a Feather Flock together.' This well-used phrase encompasses the concept of 'bad character evidence' - You must be guilty if those around you are guilty; You must be guilty if you had ever been in trouble; You deserve the reputation of your friends, or the stereotype of your ethnicity or of your name if it ends with a vowel. Use of 'bad character evidence' is effectively a Bill of Attainder, tainting or staining someone based upon their prior actions or alleged reputation. Introducing, or causing a witness to mention, an accused's prior conviction(s) is considered 'bad character' evidence. Such judgment is prejudicial as the jury is unable to objectively view circumstances of the charged offense(s). See ie. Cook v. Bordenkircher, 602 F.2d 117, 120 (6th Cir. 1978).

The Presumption of Innocence and Constitutional Due Process guarantees are meant to protect defendants from the use of evidence of bad character. Palko v. State of Connecticut, 302 U.S. 319 (1937), overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969). You can't put dung back in the donkey. Once the prosecution has shown the accused to have a 'bad character' it is difficult to impossible to remove the idea of being a 'bad guy' from the mind. A prosecutor must limit his comments to admissible evidence. U.S. v. Cole, 755 F.2d 748 (11th Cir. 1985). Guilty by reputation is not the same as being found guilty through a showing of substantial, reliable, competent evidence. U.S. v. Jenkins, 345 F.3d 928, 941 (6th Cir. 2003); U.S. v. Morrison, 10 Fed.Appx. 275 (6th Cir. 2001).

The advisory committee not to Federal Rule of Evidence 404 b states: '[C]haracter evidence ... tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.