

# NOTHING IS CLEAR AND NOTHING IS MANDATORY

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## IF AT FIRST . . .

- *In Re Personal Restraint Petition of Andress*, 147 Wn.2d 602 (2002)
- *State v. Gregory*, 192 Wn.2d 1 (2018)

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## AREAS FOR DISCUSSION

- 1. MANDATORY SENTENCING
- 2. YOUTHFUL OFFENDERS
- 3. WASHINGTON'S AUTO-DECLINE SYSTEM
- 4. ARTICLE I, SECTION 7
- 5. EVIDENTIARY CONSIDERATIONS
- 6. OUR BAIL SYSTEM
- 7. MANDATORY DETENTION

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## LEGAL REALISM

- The law is not predictive; it is riddled with ambiguities, contradictions, gaps, vague terms, and conflicting rules of interpretation.
- Often confused with the concept of “judicial activism”

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## LEGAL REALITIES

- *State v. Ha'mim*, 132 Wn.2d 834 (1997)
  
- *State v. O'Dell*, 183 Wn.2d 680 (2015)
  
- *Matter of Light-Roth*, 191 Wn.2d 328 (2018)

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## SEARCHING FOR CLUES

- *State v. Houston-Sconiers*, 188 Wn.2d 1 (2017)
  - Kids are different
  - Eighth Amendment Requires Discretion
  - Washington Article I, Section 14
  - *State v. Brown*, 139 Wn.2d 20 (1999) is wrong
  - RCW 9.94A.010 (purpose of the SRA)

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## ARTICLE I, SECTION 14 CRUEL PUNISHMENT

- *State v. Witherspoon*, 180 Wn.2d 875 (2014)
- *State v. Bassett*, 192 Wn.2d 67, 82 (2018)  
Thus, we hold that in the context of juvenile sentencing, Article I, Section 14 provides greater protection than the Eighth Amendment.

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## “AUTO-DECLINE?”

- *In re Boot*, 130 Wn.2d 553 (1996)
- *State v. Watkins*, 191 Wn.2d 530 (2018)
- *What Comes Next?*

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## ARTICLE I, SECTION 22 DUE PROCESS

- *State v. Clark-El*, 198 Wn.App. 614 (2016)
  - State constitution is more protective
  - The right to jury trial “shall remain inviolate”
  
- *State v. Munzanreader*, 199 Wn.App. 162 (2017)
  - State constitution is **not** more protective

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## ARTICLE I, SECTION 22 ELEMENTS

- ELEMENTS OR SENTENCING FACTORS
  
- *Alleyne v. United States*, 570 US 99 (2013)
  
- *State v. Allen*, 431 Wn.App. 117 (2018)

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## ARTICLE I, SECTION 7

- SEARCH OR SEIZURE WITHOUT A WARRANT
- INEVITABLE DISCOVERY
- KNOCK AND TALK (HOMES)
- SWEEPS AND ROAD BLOCKS
- THERMAL IMAGING
- PRETEXTUAL STOPS
- JOINT FEDERAL/STATE ACTION
- GARBAGE

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“An expert witness is a person who can assuredly tell you precisely what must have occurred even if he wasn’t there.”

- Hon. John C. Coughenour

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## FORENSICS

- Police Agent as “Matching” Expert
- Myth of the Snowflake
- No scientific rigor?

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## THE NAS REPORT



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## Ultimate Conclusion

- With the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

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## THE PCAST REPORT

REPORT TO THE PRESIDENT  
Forensic Science in Criminal Courts:  
Ensuring Scientific Validity  
of Feature-Comparison Methods

Executive Office of the President  
President's Council of Advisors on  
Science and Technology

September 2016



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## Think About What this Means

- Fingerprint comparisons
- Ballistics and Toolmark Comparisons
- Pattern Evidence
- Accident Reconstruction
- Tracking
- Profiling

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## *THE FRYE STANDARD*

or

## *DAUBERT*

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## THE *FRYE* PARADOX

- Only applies to “novel scientific evidence”
- Does not apply to “eyeballing of similarities”
- Review on appeal is for abuse of discretion
- Courts seem to reject challenges since the defendant is always free to challenge the testimony before the jury
- Often rigorously applied in certain civil contexts

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## WHY FILE THE MOTION

- The World is Changing
- You Might Win
- Educate the Judge
- Sometimes You Win Simply Because the Judge Orders a Hearing
- Perhaps the Judge Will Limit the Expert's Testimony

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## OUR BAIL SYSTEM

- *Pugh v. Rainwater*, 572 F.3d 1053 (5th Cir. 1978) (en banc) “in the case of indigents, equal protection standards require a presumption against money bail.”
- *Odonnell v. Harris County*, 892 F.3d 147 (5<sup>th</sup> Cir. 2018)
- *Little v. Frederick*, 2018 WL 6036911 (W.D. La., August 28, 2018)

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## CURRENT TARGETS

- COMPUTER/PHONE EVIDENCE
- INTENTIONAL VIOLATIONS OF FIFTH AMENDMENT
- IDENTIFICATION PROCEDURES
- ARTICLE I, SECTION 24
- “DETERMINATE PLUS” SENTENCING

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## It Isn't Easy



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