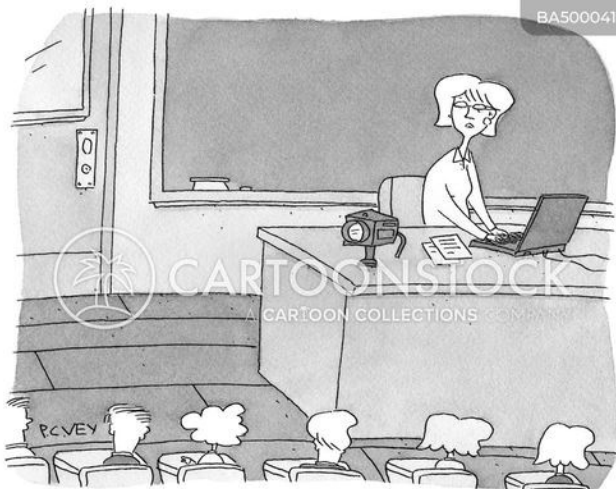


HAPPY NEW YEAR And Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

# SHERI'S SIDEBAR



"Until the face recognition software is installed I'm going to have a hard time remembering all your names."



**What has our world become... and what are we going to do about it?**



"And this one has a butt recognition feature.  
Only you will be able to sit in it."

1. Are you aware that an undergrad using AI has published a scientific paper claiming that fingerprints are not 100% unique? **SOMETHING TO WATCH.**

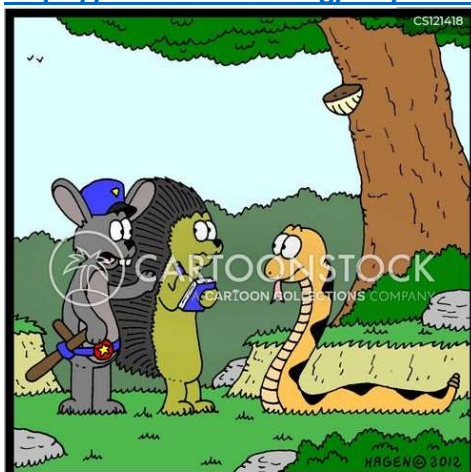
**Does the discovery of "Intra-Person Fingerprints" by AI benefit our clients, or does it pose a risk?** The report suggests that this breakthrough allows law enforcement to link a single fingerprint at a crime scene to our client's full set of prints. However, it remains unclear how the AI excludes potential similarities from other individuals since they are matching new points never previously considered within the fingerprints, nor whether such attempts were made after the new comparison method was identified.

Article:

<https://www.msn.com/en-us/news/technology/ai-proves-that-human-fingerprints-are-not-unique-shattering-a-long-held-belief/ar-AA1mLA6B?ocid=socialshare&cvid=731fa53a930f40448f8be4a069667775&ei=20>

Scientific paper:

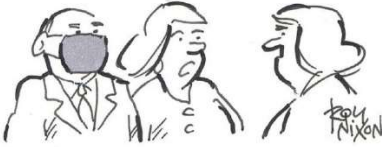
<https://www.science.org/doi/10.1126/sciadv.adi0329>



There were fingerprints at the crime scene inspector:  
Shouldn't that clear this suspect?



"They're expelling Drew from camp for hiding his face from the security cameras."



"IT'S FACIAL RECOGNITION HE'S SCARED OF, NOT COVID."

**2. Are you aware that the Benton County Sheriff’s Office has contracted with Clearview AI to implement Facial Recognition Software use to identify suspects, alleging no search warrants are needed, and it is not any invasion of privacy because only publicly available photos are searched?**

In 2021, the Illinois ACLU successfully sued Clearview AI under the state's robust Biometric privacy laws. Unfortunately, Washington's Biometric Laws (RCW 19.375 for private individuals and companies, and RCW 40.26 for state agencies/government actors) lack the same level of privacy protection for residents. Unlike Illinois, Washington does not grant its citizens a private right to sue, leaving them dependent on the Attorney General or legislative changes to address the inadequate privacy safeguards initially adopted in 2017.

Let’s get that started people because Clearview AI is here – they actively pursued Benton County to use them and their data base, and they are actively recruiting other law enforcement agencies in Washington as well.

In the settlement agreement, the Illinois ACLU secured major terms, including a nationwide ban on Clearview AI providing free or paid access to private entities or individuals that doesn't comply with the Illinois Biometric Information Privacy Act (BIPA) sections 15 and 25. These sections mandate written consent for collecting biometric data. Clearview AI is restricted to selling access only to law enforcement agencies in the United States, and other use in foreign countries, which does include private individuals and commercial uses there. Notably, Clearview AI has been banned, and/or court ordered to pay fines for violations of privacy laws in several countries, including Greece, Italy, France, the United Kingdom, Canada, Australia, with even police in Sweden and Finland being reprimanded for its unauthorized Clearview AI use in violation of privacy laws.

Here is who IS using it and why, we as concerned people and as defense attorneys, should be worried enough to start lobbying legislation AND fighting back when these public meetings arise. Also, why we need to start figuring out arguments to fight these facial recognition matches on cases:

U.S. Immigration and Customs Enforcement Obligated Clearview AI an “additional \$1 million between June-September 2022.”

<https://techinquiry.org/?entity=clearview%20ai,%20inc>.

There is a NY Times article alleging somehow a defense attorney obtained use of it (must be through the OPD agency or through a violation of the settlement agreement) to prove the innocence of their client, but other defense attorneys are not buying the...perspective Clearview AI is selling.

<https://www.nytimes.com/2022/09/18/technology/facial-recognition-clearview-ai.html>

CEO Hoan Ton-That also revealed Clearview now has 30 billion images scraped from platforms such as Facebook, taken without users' permissions. He alleges all image sources were open



sources. <https://www.bbc.com/news/technology-65057011>

### ➤ What are our arguments going to be about Facial Recognition?

- **1) It is unconstitutional surveillance – no different than the police cannot put a GPS tracker on someone’s car to surveil them without a search warrant.**
- Analogy: Even though they are driving around in public - just because they could sit their happy ass in a patrol car and follow them in public. Because the court said, fine sit your happy ass in a patrol car and follow them then. You might do that for 10-12 hours, maybe 2-3 days but a tracker is 24/7 without limits due to it being technology and that violates the individual’s privacy in a manner in which we are not going to allow! GPS tracking devices require a search warrant. See e.g. State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003).

Imaginary hypothetical argument....

- Your honor-ful-of-yourself-ness, Imagine, if you will, law enforcement affixing a GPS tracker to *my client's countenance* merely because it made a cameo in the public arena. Alas, the whimsical notion that a face glimpsed in passing becomes fair game for high-tech surveillance, sans search warrant, is an affront to the very principles we hold dear. This, Your Honor, is not the noble art of police legwork – no gallant officer embarked on the arduous journey of investigation – whether at a desk, computer, or my lands, forbid out in the public himself and face the very

danger of being surveilled himself <gasp for dramatic effect>; no interviewing whether by telephone, social media, text, in person or telegram even occurred; no actual human being typed into an address bar ANY social media name of the sources to choose from in order to scrutinize those resources personally; there was no effort expended to draft a crime stopper ad, nothing was posted on the law enforcement Facebook, come snitch out your friends you dirty traitors – NO REAL POLICE WORK occurred to create leads here. Instead, they opted for the unholy alliance with Clearview AI, a digital sorcerer processing information at the speed of light.

Let us draw a sharp distinction between the diligent detective trailing a suspect in the tangible world and the sorcerer's apprentice, commanding a computer to sift through 30 billion images in the ethereal realm. The biometric ballet that followed involved the clandestine gathering, enrolling, and storing of my client's personal identifiers in Clearview AI's secretive repository—devoid of his knowledge or consent, akin to a magical act of disappearing privacy.

The grand finale of this spectacle saw the ill-gotten biometric treasure handed over to law enforcement without the courtesy of a search warrant, as if privacy rights were mere props in this bewildering theater of the absurd.

This has already been found to violate the Fourth Amendment and Art. 1 Sec. 7 as a GPS Tracker on a Car. This is so much worse your honor, they are tracking my client's face without the officer sitting in his car and doing any of the work personally.

- See below for additional info – Clearview AI has multiple photos and provides LEO the URL and possibly the Geotag information. So, it isn't just the photo but also LOCATION DATA provided to officers! Also, the photo does not match only the "suspect" but provides the officer every other person within the photo and matches and provides information on THOSE PHOTOS TOO – you know so the officer can harass them to find out who the suspect is in case they can't find him/her, even though those others are not suspects, there is no PC, there is no criminal investigation, case number, reason to look them up etc. SOOOOOO MUCH WRONG WITH THIS!
- Now I don't know what the remedy is if at this point it is only used for suspect identification – perhaps still evidence suppression for everything after that point! And we know that won't be the only use anyway. None of us here are new or stupid. Well, I mean we might be new, but I mean "new" as in so naïve that you would believe the technology is not going to be misused or used for other things.

➤ WHAT ELSE?

- The Washington Constitution under Art. 1 § 7 provides Washington citizens greater protections than the Fourth Amendment under the U.S. Constitution. Therefore, don't tell the Court anything about "The FBI is using it, Homeland Security is using it...." – NOT TO MENTION, those agencies are also protected by the USA PATRIOT ACT, or its replacement, the USA FREEDOM Act, which granted federal agencies pretty much unfettered authority to do whatever they wanted to under its name in collecting and using data. A local city, county, state police force has no such unfettered authority to invade our privacy, to violate our civil liberties, nor those of our clients!

➤ WHAT ELSE?

- Racial bias and the unreasonably disproportionate error rate against people of color.
- Find and use statistics! In *State v. Sum*, the Supreme Court expressly stated they are admissible, the court must allow you to bring in articles, statistics etc. about race if it demonstrates the law enforcement agency had a racial bias or used any racial bias in the case or against your client. Although Sum was specific to a pretext stop – facial recognition is a pretext "suspect" label attachment.
- There are tons of articles out there on the issue – search Google and find them.
  - A black man was falsely arrested for a Sun Glass Hut robbery due to a facial recognition match to one of his "open source" photos the law enforcement database system stole from somewhere then misidentified. While in custody, held because a high bail was of course imposed <insert racially charged, stereotypical DPA's "violent black man" rhetoric bail argument here>, this innocent black man was sexually assaulted. He is now suing.
  - I don't recall which state that was and thank you KRS for sending me that article for my battle tonight with Benton County Sheriff's Office, but as attorneys we know what the response will be...
    - Your honor, on behalf of our client, myself and my 63 other associate attorneys here at Bendim, Over, And Howe, move for Summary Judgment your honor, my client, a good respectable police officer, who only has 1511 use of force complaints, all of which returned unfounded after an investigation was put down that it had been completed on paper, and although he is on the Brady list for 25 different reports, he has only changed jobs 23 of those times and none of those incidents have ever been admitted in Court your honor. The real issue here is that he is covered under immunity. He was acting within the scope of his job. His agency provided him a tool, which he used. It isn't his fault there was an

error, errors occur, I mean the photo of the suspect looked like the petitioner to a mathematical certainty, that is what the program found your honor. Who are we to question it. My client made no racial decisions, implicitly biased or otherwise, and a computer program just cannot be racially biased, it is purely objective, it has no feelings. <Because a white person did not write the mathematical program that runs the facial recognition program, right? Some programs they have found up to a 40% error rate on people of color, with the darker the skin tone, the higher the error rate; or the darker/poorer quality of the photo/video, the higher the error rate. Hmmm, how many indigent defense attorneys have seen surveillance video from just about any store? Dark, grainy, poor quality video?? Sometimes I can't tell the gender expression, height, clothing, much less MAKE OUT A FACE to match 80 nodes to!> But, your honor, it did look like him. Further, it isn't as though you can assume something bad would happen to an individual while being held in jail pretrial <speechless, ME...>...i.e., he was doing what he was trained to do your honor, and therefore has immunity.



**TO THINK ABOUT:**

- 1) Agencies, commercial businesses and rich private individuals in other countries all have access to this database, which also provides them the URL link to where Clearview AI obtained the images.
  - Does that not mean this program can and is likely being used to surveil people? Because you just follow the URL or geotags to find out where the person is or has been, right? I mean it doesn't take a forensic specialist to figure that out. Get a picture, get the URL which takes you to their gym, their grocery store, the park across the street from their house, their apartment building.
  - HOW is law enforcement arguing this is NOT surveillance?
  - There is not one photo of each person, they have multiple photos they claim – **so this goes with the above argument – use of this technology IS SURVEILLANCE**

- 2) Clearview AI alleges they have photographs of every person on the planet. How is that possible if they have only used open source photos?
  - Believe it or not, there are people who do not have social media, have never been on the news or in a newspaper.
  - That means, they must have, for adults in non-third world countries, potentially purchased or stolen, from grocery stores perhaps, images from the self-check out stations for some images.
  - What about children?
  - I have articles proving they stole images and other information from Apple – biometrics and other things. Everyone said your fingerprints, face scan, whatever is all safe with Apple. Well, now Clearview AI has it and they have provided it to third world countries and individuals who should not have it, and it is not safe. **They have also been hacked, and who knows who has it now and what has been done with it to perhaps compromise your identity to comingle that with an individual who is not as innocent in conduct. Oh, another argument.**
  - But what about third world countries and babies and children – which they have successfully identified missing children and such?!
    - Is that not proof they did not merely gather “open source” photos from the internet? I’m just saying they are surveilling people, taking photos without notice, knowledge, or consent, taking people’s biometric data without notice, knowledge, or consent, enrolling it into their database without notice, knowledge, or consent – this is what the ACLU sued them for in Illinois in 2021. Illinois however has stronger laws than what WA put in place here in 2017. WA, unlike most of the laws, gave all of the rights to law enforcement and commercial businesses when it came to the biometrics.
    - Those two laws need amended!! RCW 19.375 & RCW 40.26

### 3. Free Crimes Aggravating Factor (RCW 9.94A.535(2)(c))

Trial court may impose an exceptional sentence under the free crimes aggravator when the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished; in other words, if the number of current offenses results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then the court may impose an exceptional sentence. West's RCWA 9.94A.535(2)(c).

*State v. France*, 176 Wn. App. 463, 308 P.3d 812 (2013).

1. So, this case states when a person comes in with a score of 9, and has multiple offenses, the standard range for each offense is already maxed out, there is no further step up to try to further prevent future criminal behavior. However, in your factual case, HC has jumped from a score of 7 to a score of 9 and is being punished with a multiplier of 2 steps in the deterrent sentencing scale. RCW 9.94A.535(2)(c) does not apply to your facts. In fact, the analysis of France matches mine exactly. See below. The distinguisher in France was the client there had 9 counts. Three were punished, getting the score to 9, but 6 were not. The client wanted the exceptional sentence to only apply to those 6 counts. The higher court held the sentence could apply to all counts. The




distinguishing fact in your case is that the 3 charges in your case *just make it TO 9, it is not AT 9*. It is the next case, if any, where crimes begin to go unpunished so to speak “AT 9 or more.”

### I. *Free Crimes Aggravator*

A defendant's standard range sentence reaches its maximum limit at an offender score of “9 or more.” RCW 9.94A.510. An offender score is computed based on both prior and current convictions. RCW 9.94A.525(1). For the purposes of calculating an offender score when imposing an exceptional sentence, current offenses are treated as prior convictions. *State v. Newlun*, 142 Wash.App. 730, 742, 176 P.3d 529 (2008). **Where a defendant has multiple current offenses that result in an offender score greater than nine**, further increases in the offender score do not increase the standard sentence range. See *State v. Alvarado*, 164 Wash.2d 556, 561–63, 192 P.3d 345 (2008). However, a trial court may impose an exceptional sentence under the free crimes aggravator when “[t]he defendant has committed multiple current offenses and the defendant's high offender score **results in some of the current offenses going unpunished.**” RCW 9.94A.535(2)(c). In other words, if the number of current offenses results in the legal conclusion that the **defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses**, then the court may impose an exceptional sentence. *Newlun*, 142 Wn. App. at 743, 176 P.3d 529.

*State v. France*, 176 Wn. App. 463, 468–69, 308 P.3d 812, 815–16 (2013)

2. The standard has not been met.

In *Stephens*, the defendant committed eight counts of second degree burglary.  116 Wash.2d at 239, 803 P.2d 319 (1991). Because of his high offender score, his presumptive sentence would be the same had he committed only two burglaries instead of the eight. *Id.* at 241–42, 803 P.2d 319. The six “free” burglaries justified an exceptional sentence of eight concurrent 96–month sentences. *Id.* at 239, 246, 803 P.2d 319. The Washington Supreme Court upheld the sentence, reasoning that “although the crimes were counted in calculating the offender score, most of them had no effect on the sentence because Stephens' score was ‘9 or more’ already. Thus, Stephens would not be penalized twice if the multiple crimes were considered toward an exceptional sentence.” 472 *Id.* at 244, 803 P.2d 319.

*State v. France*, 176 Wn. App. 463, 471–72, 308 P.3d 812, 817 (2013) – Note that Stephens was overruled but later “clarified” in another case in 2008 as being overruled in error, i.e. it is good law per the clarified law in *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011); *State v. Alvarado*, 164 Wn.2d 556, 192 P.3d 345 (2008).

3. Distinguish the case the court relies upon, Smith from 2019, the score was 21 and he only had 2 charges! Obviously, in those facts there were unpunished crimes. Totally different circumstances in your case.

It is an aggravating factor that the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

§ 47:36. Factors found by court—Multiple offense policy, 13B Wash. Prac., Criminal Law § 47:36 (3d)(citing [RCWA 9.94A.535\(2\)\(c\)](#).)

The first situation involved defendants who had multiple current offenses that resulted in an offender score greater than nine. Since the top column of the offender score table is for scores of “9 or more,” further increases in the offender score did not increase the standard range.<sup>3</sup> This situation fits the language of the current statute: the defendant's high offender score resulted in some current offenses going unpunished.<sup>4</sup> Even if only a single current offense would go unpunished, the aggravating factor is applicable.

§ 47:36. Factors found by court—Multiple offense policy, 13B Wash. Prac., Criminal Law § 47:36 (3d)

4. Distinguish in your case, NO OFFENSE GOES UNPUNISHED

Stated differently in *Newlun*, “**If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed.**” 142 Wn. App. at 743.

**State v. Mittlestadt, No. 39504-9-III, 2023 WL 5367704, at \*5 (Wash. Ct. App. Aug. 22, 2023)** REVIEW THIS CASE ???

Do the math for the judge and prove him/her/they/them wrong.

**4. Did you know there is a new Arson Expert in the WDA Expert Bank?**

**Arson Investigator Marc Fennell is located here with a few others:**

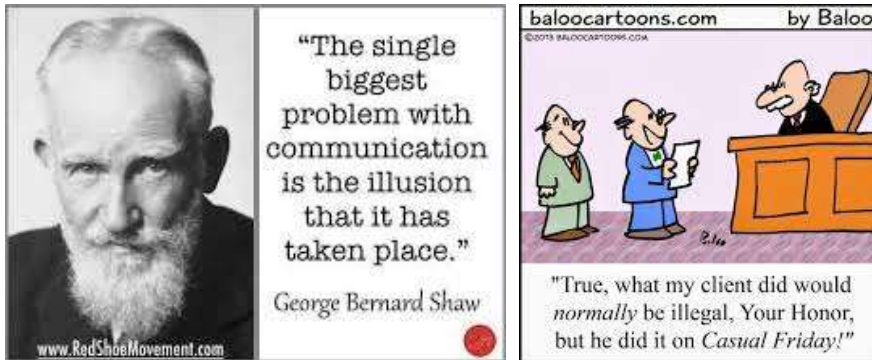
**<https://defensenet.org/resource-category/arson-investigators/>**

- a. **Remember that WDA does not vet experts and attorneys should do that individually, checking references.**
- b. I am highlighting him here for a few reasons however:
  - i. Within the last 8-10 months there were several requests for a new Arson Investigator that would accept OPD Rates, he does.
  - ii. Mr. Fennell also asked me to let our members know that he does not charge for travel expenses or travel time.
  - iii. Also, I don't know if it is on his resume, but he indicated that both Pierce and King County have vetted him as an expert witness. He has active cases in Pierce currently and has testified in Pierce County if anyone wants to check his references with Pierce County Dept. of Assigned Counsel.

**5. Are you aware when negotiating even a small sentence that apparently aggregate sentences of 5 years is grounds for removal from the United States?**

This includes misdemeanors and apparently all kinds of charges if I understand it correctly. Who knew all of those questions the WDA Immigration Project asks you about have a reason 😊 I did, but I didn't know this was one of them! Thanks Stacy!

Be careful when you are negotiating deals for your clients, 5 days does matter, 2 days matters. When your client is close to 5 years, 1 day can matter!!!!



Have a great weekend everyone. If you are near Benton County please come to the Benton County Sheriff's Office's Facial Recognition Policy and Accountability Meeting for public input at the County Admin. Building at 7pm, I think it is room 303 in Kennewick – same campus as the County Jail, County Courthouse, Prosecutor's Office, Health Dept. etc. – those buildings, this is the new one I think.

## Sheri

Sheri's Sidebar Editions are archived here: <https://defensenet.org/resource-category/sheris-sidebar/>