36 CRIME

36 Crime Updates

Winter 2022-23

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Welcome to the 36 Crime Criminal Updates: Winter 2022-23

Christopher Donnellan K.C.

Head of 36 Crime

We live in chaotic times for the Criminal Justice system. There is pressure on all of us, including our clerks, trying to make sense of the listing of cases often very late in the day for the next morning, and broken fixtures, followed inevitably by the last minute failure of cases when there we get to Court and find there are insufficient Counsel who can be found to cover the cases. We can see these chaotic times continuing for some time to come. 'Midst the tsunami of last minute listing we are pleased to provide an oasis of thoughtful calm in the articles in our Winter Newsletter as we move into 2023.

Diana Wilson and **James Bruce** have provided a detailed case note and commentary on the current state of the defence available in "protest cases" the most prominent of which are HS2, Extinction Rebellion, and Just Stop Oil but follow a long line of such exercise of challenge to authority. For further commentary arising from protest issues may I recommend a further piece by our probationary tenant **Emma Fielding** in [2022] 10 Archbold Review 5-7. "Protest law update - the application of Ziegler and abuse arguments based on political interference by the Home Secretary". Our 36 Crime pupil, **Kate Jenkin**, has provided a neatly distilled summary and commentary on the latest observations of the Court of Appeal on the evidential use of images and comparison with the accused. As CCTV has expanded in use not just from Local Authorities, body worn and custody suite cameras but from so many security devices in and on business premises, as well as private premises, with the proliferation of doorbell cameras, it is timely to consider the primary principles of the use of such images for identification purposes. In a further article **Sebastian Walker** provides a reminder of the importance of the Court overlooking fundamental principles of our justice system for the sake of expediency, which, in R -v- Nguyen, we hope was unintentional but undermined a fundamental right to representation: put right by the Court of Appeal.

Our thanks to **Tom Parker** for bringing together the Newsletters for the last editions and through the (continuing) covid pandemic and to **Sebastian Walker** for stepping into those shoes. Since the last edition we are pleased to welcome **Elizabeth Muir** and **Laura Blackband** to 36 Crime.

And finally, since the last edition we congratulate **His Honour Judge William Harbage K.C.** (former Head of our Crime Team and joint Head of Chambers) on his appointment to the Circuit Bench.

Protest related criminal damage: are there any legal defences left?

Diana Wilson and James Bruce

Barristers

Numerous cases are coming before the courts where protesters have caused damage to property. The Court of Appeal judgment in *AG's Ref (No 1 of 2022)* [2022] EWCA Crim 1259, arising from the "Colston Four" case, effectively prevents Articles 9/10/11 ECHR being relied on as a lawful excuse for protest-related criminal damage, where the damage caused was to private property, was caused violently or was of significant value.

Background

On 05.01.22, four defendants were acquitted of criminal damage by a jury in Bristol for their part in toppling a statue of Edward Colston in June 2020, whilst an otherwise peaceful protest marched through the city and gathered at the base of the pedestal.

One defence left to the jury was proportionality, requiring the jury to assess whether a conviction would amount to a disproportionate interference with the defendants' Article 9 right to freedom of thought, Article 10 right to freedom of expression and Article 11 right to freedom of assembly. On appeal all agreed it was immaterial which of these convention rights were engaged. Following the acquittals, the Attorney General referred the matter to the Court of Appeal under s36(1) of the Criminal Justice Act 1972.

Analysis

The decision was delivered by the Lord Chief Justice (LCJ). It contained a thorough review of the European authorities which will not be fully set out here. This review included *Handzhiyski v Bulgaria* (2021) 73 ECHR 15 a case where the appellant had put a Santa hat and sack on a statue to protest against the government. He was convicted of "minor hooliganism". His actions were described by the LCJ as a "very modest" protest. The correct recourse - according to Strasbourg and adopted by the Court of Appeal - for citizens who object to a statue is through legal channels as opposed to inflicting damage.

Peaceful assembly is protected, not violence or acts which "reject the foundations of democratic society" (quoting *Kudrevicius v Lithuania* EctHR (Grand Chamber) 37553/05). A peaceful protestor does not lose their convention rights because someone else in the crowd attends with violence in mind or acts violently. The LCJ considered to the word "violence" in two paragraphs stating:

87. The ordinary meaning of violence includes "the exercise of physical force so as to cause injury or damage to a person, property, etc" (Shorter Oxford English Dictionary). Violence is not confined to assaults on the person but may include damage to property; and neither is the concept of "peaceful assembly" defined by an absence of violence to the person or property. Indeed, it is not difficult to envisage a demonstration at which no violence to the person or property occurs, but which could not be characterised as peaceful, not least if it is intimidatory or causes alarm or distress. There is relatively little Strasbourg authority on cases of physical damage caused during protest. There is none to which our attention has been drawn that demonstrates that all damage to property, however trivial, would result in the perpetrator losing the protection of the Convention. Most of the cases concern damage to public property incidental to a demonstration. Several of the decisions focus on whether the punishment was disproportionate rather than the issue with which we are concerned, namely the proportionality of a conviction in Convention terms.

88. Handzhiyski at [53], to which we have already referred, includes the Strasbourg Court's statement that the fate of a public monument must be resolved through "appropriate legal channels rather than by covert or violent means". In our view the nature of the conduct leading to such destruction or damage may often not properly be described as "peaceful" and so fall outside the protection of the Convention altogether. In any event, measures criminalising the destruction of or damage to such a statue or monument are proportionate. It is, at least in theory, possible to cause significant financial damage to property without being violent. Smashing something with a hammer would be violent but it would be possible to cause as much financial damage to many objects by quiet and calm action. Either way, conviction for the conduct would not offend the Convention rights of the perpetrator. If it was violent and not peaceful it would fall outside the protection of the Convention altogether. If significant damage were caused, even if "peacefully", it would not even be arguably disproportionate to prosecute and convict for criminal damage.

Therefore, many actions involving the toppling of statues, smashing of windows etc. will be ruled in law as violent. Further the above two paragraphs are of significance in <u>all</u> protest cases, since if a protest is not peaceful the convention rights will not amount to a defence in law.

The LCJ's review of authorities included the important distinction between public and private at paragraph 102:

"There is no "clear and constant" jurisprudence of the Strasbourg Court that suggests damaging private property during protest attracts the protection of the Convention in the first place or, in the second, that prosecution and conviction for damaging private property would be disproportionate even if it did."

Further at paragraph 121 the LCJ stated that '*we cannot conceive that the Convention could be used to protect from prosecution and conviction those who damage private property to any degree than is other than trivial*'.

The Convention rights do not extend to creating rights of entry to private property or even all government offices and ministries, as established in *Olga Kudrina v Russia* (App No 34313/06) where a hotel was the focus of an aerial protest by the appellant. There the conviction was upheld, though the sentence condemned as "grossly disproportionate". This is consistent with *Cuciurean* (below).

The protection of the Convention is not lost as soon as some minor piece of damage is caused, but a protestor who causes damage is not protected from prosecution and conviction.

The Court has subsequently declined to refer the matter to the Supreme Court and therefore this for now is the leading authority on this matter.

Other Defences

Most other defences to protest-related criminal damage have effectively been ruled unavailable.

Prevention of crime was considered in the leading case of *R v Jones and Milling et al*. [2005] 1 Cr App R 12 (Court of Appeal) and [2006] 2 Cr App R 9 (House of Lords) the court stated:

> *"91. In Hutchinson v Newbury Magistrates' Court (2000)122ILR499, where a protester sought to justify causing damage to a fence at Aldermaston on the ground that she was trying to halt the production of nuclear warheads, Buxton LJ said:*
> *"There was no immediate and instant need to act as Mrs Hutchinson acted, either [at] the time when she acted or at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable."*
> .....
> *94. The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required."*

With the defence unavailable, the trial cannot be derailed through the disclosure process and the defendants cannot use the court as an extension of their protest, to highlight their cause or to persuade persons to their cause by calling evidence in support of their views.

This reasoning was extended to other 'justification defences' (necessity, duress of circumstances, defence of another) in a ruling also delivered by the LCJ: *R v Thacker* [2021] EWCA Crim 97 at paragraphs 90-103.

The defence, under s5(2)(b) of the Criminal Damage Act, of protection of property isn't available when the act itself simply draws attention to the need to defend the property and of itself does not actually immediately defend the property: *R v Hunt* (1978) 66 Cr App R 105 and *DPP v Ditchfield* [2021] EWHC 1090 (Admin) (in particular paragraph 19) which related to an Extinction Rebellion protest.

In theory a defence under section 5(1)(a) of the Criminal Damage Act (genuine belief in consent if they knew the circumstances) might be available but is rarely credible when you are damaging the property of the persons that you are protesting against. There are, however, some nuances in relation to this that will need to be clarified by the appellate courts in due course.

So where does that leave disruptive protesters?

The Supreme Court case of *DPP v. Ziegler* [2022] AC 408 leaves open Article 9/10/11 defences to obstruction of the highway. This is the new chosen form of disruption by some. Further, the Attorney General's Reference leaves open the possibility of causing minor (i.e. well below the £5,000 statutory summary-only threshold) damage to public property in pursuance of convention rights. That said care should be taken in assuming that Ziegler will apply widely following *Cuciurean* [2022] EWHC 736 (Admin); [2022] 2 Cr. App. R. 8 which related to the offence of aggravated trespass. The LCJ held there that the statute was inherently compatible with Articles 10 and 11 and that therefore there was no need to read in an Article10/11 lawful excuse defence or proportionality exercise as under Ziegler.

In *Ref by the AG for Northern Ireland - Abortion Services (Safe Access Zones) (NI) Bill* [2022] UKSC 32 the Supreme Court has since considered the convention rights of anti-abortion protestors in relation to safe zones (exclusion areas) being proposed adjacent to premises where abortions take place. The Court directly referred to *Ziegler* and *Cuciurean* at paragraphs 20-67. Lord Reed's judgment ruled that:

a) there does not always need to be an assessment of proportionality;

b) an offence does not need to be interpreted as including the absence of reasonable or lawful excuse where it is not express;

c) the ingredients of an offence itself can ensure compatibility with convention rights;

d) proportionality is not a question of fact; and

e) subject to local (i.e. Scottish, Northern Irish or English and Welsh) rules the assessment of proportionally is not necessarily one for the tribunal of fact (obiter dictum).

The result? The Supreme Court has preferred *Cuciurean*'s more restrictive approach. Absent express consideration by the offence itself, e.g. in obstruction of the highway cases, the Courts will not read in proportionality as a factual issue to be proven in the trial.

Consistent since 2006

Perhaps the appellate court's view remains that enunciated by Lord Hoffman at paragraph 89 of Jones, namely:

> *"That civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law."*

Diana prosecutes (Grade 4) and defends in cases involving serious and organised crime or complex or novel legal issues. She has appeared as junior alone or leading junior in a number of recent cases raising legal issues relating to protest.

James has a criminal and regulatory practice, prosecuting (Grade 3) and defending. He has particular experience in local authority and trading standards cases, as well as cases involving violence and dishonesty. He was recently led by Diana in a large multi-handed trial raising legal issues relating to protest.

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Using video and photographs to identify defendants – R v Ozger [2022] EWCA Crim 1238

Kate Jenkin

Pupil Barrister

Link to judgment: ***https://www.bailii.org/ew/cases/EWCA/Crim/2022/1238.html***

Video footage and photographs are commonly used to support the identification of defendants in criminal trials. In *R v Ozger* [2022] EWCA Crim 1238, the Court of Appeal considered the use of disputed identification evidence and provided guidance on the circumstances in which a jury could be invited to conclude that a defendant committed an offence on the basis of film or a photographic image from the scene of the crime.

The appellant, Sinan Ozger, was found guilty and convicted of conspiracy to cause grievous bodily harm with intent and possession of a firearm with intent to endanger life. He appealed against his conviction on multiple grounds. Only one ground was granted leave by the Court: that the judge erred in directing the jury that they could properly make a comparison between the CCTV from the incident and pictures of the appellant taken on his arrest.

The Court dismissed the appeal. It was held that the judge was not wrong to allow the jury to use the CCTV footage for the purposes of identification, and the comparison between the footage and the custody photographs was a comparison which was legitimately left to the jury to make.

Facts

In the early hours of 28 October 2017, a number of individuals, said to have belonged to two rival gangs, gathered at the end of a road in East London. A gunfight ensued. Two bystanders, who were attending a private birthday party being held in a hall on the same road, received gunshot wounds as a result. Following a police investigation, Ozger was arrested in May 2018.

At trial, Ozger's defence was that he was not present at the scene when the gunfight took place. To prove that Ozger was present, the prosecution relied on CCTV evidence from the scene which highlighted an individual alleged to be the appellant. They also relied on photographs of the appellant taken upon his arrest.

Further evidence was said to place the appellant at the scene at the material time, including phone and cell site evidence, automatic number plate recognition and firearms analysis. A bag was also found at the appellant's home address which was said to be identical to one captured in the CCTV footage.

Law

The Court considered the decision in *Attorney General's Reference No 2 of 2002 [2003] 1 Cr App R 21*, which provides four circumstances in which a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime.

The four circumstances include [para 21]:

1. Comparison by the jury between a sufficiently clear photographic image and the defendant sitting in the dock.
2. Comparison by a witness who knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image.
3. Comparison between the photographic images and a reasonably contemporary photograph of the defendant, by a witness who did not know the defendant but had spent time viewing and analysing the photographic images from the scene, thereby acquiring special knowledge that the jury did not have.
4. Comparison of the same material by a suitably qualified expert witness in facial mapping provided the materials were available to the jury.

At trial, the judge deemed that only one of the four circumstances applied in Ozger's case: the comparison by the jury between a sufficiently clear photographic image and the defendant in the dock. He considered that the quality of the CCTV was sufficiently clear to leave to the jury to reach their own conclusion, guided by what he referred to as a 'quasi *Turnbull* direction' [para 15], emphasising the risks of mistaken identification.

The jury were directed that, in order to identify whether the person shown was the appellant, they could make a comparison between the CCTV footage and the photographs of the appellant taken on arrest. They could also make a comparison between the CCTV and the defendant in the dock.

Basis of the appeal

The single ground of appeal was that the conviction was unsafe because the judge erred in directing the jury that they could properly make a comparison between the CCTV from the scene and pictures of the appellant on his arrest, on the basis that this was not a comparison which came within the four circumstances identified in *Attorney General's Reference No 2*.

On appeal, however, the appellant argued that the real issue was whether the CCTV footage was of sufficient quality to permit any form of comparison, whether with a photograph or with the appellant in the dock [para 25]. The respondent submitted that it was of sufficiently high quality, and that the judge was right to leave the matter to the jury [para 27].

Decision

Having heard oral submissions from the parties, the Court of Appeal remarked that the majority, if not all, of the arguments raised on behalf of the appellant related to matters on which leave to appeal had been refused [para 28]. The argument, according to the Court, would have had to have been that, although the CCTV could properly by used by the jury for the purposes of identification, the process could not legitimately include a comparison with the photographs taken of the appellant on his arrest [para 29].

Despite not forming the basis of the prosecution's case at trial, or indeed part of the appellant's arguments on appeal, the Court's judgment heavily focused on this point.

Considering the decision in *Attorney General's Reference No 2*, the Court concluded that:

1. It is permissible for a witness who knew the defendant but was not present at the scene to give evidence of recognition, based on a film of the offence [para 31]; and
2. the four circumstances set out in that judgment are not exhaustive; it is not authority for the proposition that film or photographs from a crime scene cannot be used to support identification in any way other than the four identified in the judgment [paras 32-33].

The Court stated that they were unable to see any reason why a fact-finding tribunal should be prevented from concluding that a person shown on CCTV is the same individual as the person depicted in a still photograph. They also rejected the proposition that there was a fundamental difference between comparing CCTV with the defendant in court and comparing CCTV with images of the defendant captured outside court [para 34].

The Court recognised that there may be circumstances in which it would not be appropriate to reach a conclusion on identification on this basis, but said that there could not be any rigid rule and that it would depend on the facts of the case [para 34].

The Court further considered that it would not be difficult to imagine cases in which an image would provide a better comparator than studying the defendant in court, for example, where the trial happens years later and the defendant's appearance has changed [para 35].

The Court ultimately took the view that the comparison between the CCTV footage and the images of the appellant was legitimately left to the jury to make. The jury had been properly warned of the risks of identification, and importantly, there was other evidence which was capable of supporting the reliability of the identification evidence. The conviction was therefore not unsafe.

Comment

Video footage or photographs from a crime scene can be used to support identification in a number of ways – one being by comparing CCTV footage with photographs of the defendant from around the time of the offence.

The impact of the Court of Appeal's judgment may be particularly significant in relation to absconded defendants. If a tribunal of fact can safely draw conclusions about identification based on a comparison between CCTV and custody photographs of a defendant, the defendant's attendance at trial is not essential for identification to take place.

For the prosecution, this may be useful: it provides a method for the jury to identify the defendant when they are tried in their absence, and means that the Crown's case will be less disadvantaged by non-attendance of the defendant.

From a defence point of view, practitioners should be alive to the possibility of greater prejudice to defendants who do not attend their trials where identification is disputed. Comparing a still photograph of the defendant with CCTV for the purposes of identification may present a number of problems: the jury will be unable to assess important features such as a defendant's height, build or demeanour from a photograph. The accuracy of identification using this method may also be questioned if the CCTV evidence – as it often will – shows the defendant from a different angle or distance to the photograph.

The risks of mistaken identification should be emphasised to the jury in these circumstances. Indeed, the Court of Appeal confirmed that a 'Turnbull direction of sorts' [para 37] as to the risks of mistaken identification and the need to take care when making an identification from a two-dimensional video recording would be appropriate. Defence practitioners should seek a direction to this effect.

Ultimately, the Court of Appeal's conclusion that it is legitimate to invite the jury to compare CCTV film with photographs taken of the defendant for the purposes of identification is unsurprising, given that it is not so far removed from the situations envisaged in the *Attorney General's Ref No 2*. The conclusion is an extension to those principles, but does not extend them beyond recognition. Of course, this mode of identification will not always be appropriate, and practitioners will want to be alive to the risks, especially when the defendant is not present at court. However, with the appropriate directions, and the presence of other evidence to support such the identification, it may be that in certain circumstances, this form of identification is suitable. Given the current delays to criminal trials, the possibility of identification in this manner being preferable certainly seems realistic.

Kate is the current first six pupil at 36 Crime. She is supervised by Samuel Skinner. Kate graduated with a first class degree from Cardiff University and was awarded the Dean's Award for Excellence by the University of Law, where she studied for the Bar. Prior to coming to the Bar she worked as a paralegal at a large London firm her work including overseeing cases involving investigations by HSE and the Insolvency Service.

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Sentencing in the absence of a legal representative – R v Nguyen [2022] EWCA Crim 1444

Sebastian Walker

Barrister

Link to judgment: ***https://www.bailii.org/ew/cases/EWCA/Crim/2022/1444.html***

In September 2022, in the middle of days of action by the Criminal Bar Association which were at the time indefinite, HHJ Tomlinson at Southwark Crown Court was due to sentence four defendants for various money laundering offences. A prosecution note for sentence had been served months before in April, and all but one defendant (Nguyen) was represented before him. Counsel for the defendant who was unrepresented were both taking part in the action but had previously in May served a note for sentence on behalf of that defendant. Protracted efforts had been made to find a date which suited all counsel. The question for HHJ Tomlinson was whether he should proceed to sentence all defendants on that day, or as the prosecution had requested, proceed against those who were represented and to adjourn the sentence of the unrepresented defendant.

HHJ Tomlinson decided not only to proceed to sentence all defendants, despite the absence of counsel, but ultimately imposed a sentence of two years' imprisonment on Nguyen. Unsurprisingly an appeal followed.

The decision

The Court of Appeal held that on the facts of the case the decision to sentence her had been unlawful (albeit in re-sentencing Nguyen they ultimately upheld the term of two years' imprisonment, noting that the starting point ought to have been one of seven years').

Nguyen's lack of representation was not of her own choice or of her own making. She was still in receipt of a representation order at the time of the sentencing hearings, and though counsel declined to attend court, neither they nor her solicitors had declined to continue to represent her, and (excepting their absence due to the action) remained willing to act on her behalf.

She had received the assistance of her legal representatives, solicitors and counsel, at some time after being found guilty and before being sentenced: her representatives had filed written submissions on sentence. She was therefore considered to be "legally represented in that court" for the purpose of section 226 of the Sentencing Act 2020 (which prohibits the imposition of sentences of imprisonment on offenders who are not represented and have not previously received such sentences).

But that was not the end of the matter. She had a representation order, and had the right to be represented by her solicitors and counsel. Though she had been legally represented "at some time after being found guilty and before being sentenced" those words were not intended by Parliament to deprive someone in her position of legal assistance at a critical time. Instead, they were directed to give the court a measure of control in relation to an offender who dispenses with his legal representatives between plea and sentence, and who, but for those words, could impede the administration of justice. She was in no different position to that of someone whose counsel was ill on the day of the hearing or had been delayed by a rail strike. It was unlawful to sentence her unless and until, for proper reason, her representation order was revoked or withdrawn.

Commentary

The decision to sentence Nguyen in the absence of her counsel must have been a difficult one, no doubt coloured by the difficulties that finding an appropriate date had previously created. There are clear benefits in sentencing all defendants at once in a multi-handed case. Similarly, there are clear disadvantages to a defendant in not being represented by counsel at a sentencing hearing, even if they have provided notes in advance. Although the days of action taken by the Criminal Bar Association have now ceased we remain in an environment in which there are simply too few counsel to cater for the work that exists. There will continue to be difficulties in finding appropriate dates for defence counsel to attend sentence, and there will no doubt continue to be cases in which no counsel can be found to attend a listed hearing.

This case illustrates that provided a defendant has the benefit of a representation order, sentencing them in the absence of their representative will generally be unlawful. This is not a technical question of whether compliance with the words of section 226 of the Sentencing Act 2020 has been achieved, but a more fundamental question of fairness. As was put in R. v Wilson (1995) 16 Cr. App. R. (S.) 997 "A person who has been granted legal aid is entitled to be represented by solicitors and counsel whom he or she has selected and who are willing to act unless and until the legal aid order is withdrawn." The question is not just whether imprisonment will follow, but one of the interests of justice. It is an application of the underlying principal of our legal aid system: that it is in the interests of justice that a defendant's case be properly presented to the court.

Sebastian prosecutes (Grade 3) and defends, particularly in serious and complex crime. He is the author of a number of practitioner texts, including co-authoring Sentencing Principles, Procedure and Practice, the 3rd edition of which has recently been published, and the sentencing chapter in Archbold. His academic work has previously been cited and endorsed by the Court of Appeal (Criminal Division).

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With thanks to the 36 Crime Update

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