Nov/Dec/Jan 2012-13 • Vol. XXXIII, No. 5

Championing justice, promoting individual rights and supporting the legal defense community through education and advocacy.

The Oregon Defense Attorney

A journal published by the Oregon Criminal Defense Lawyers Association

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Thoughts on *Lawson*, the New Eyewitness ID Case

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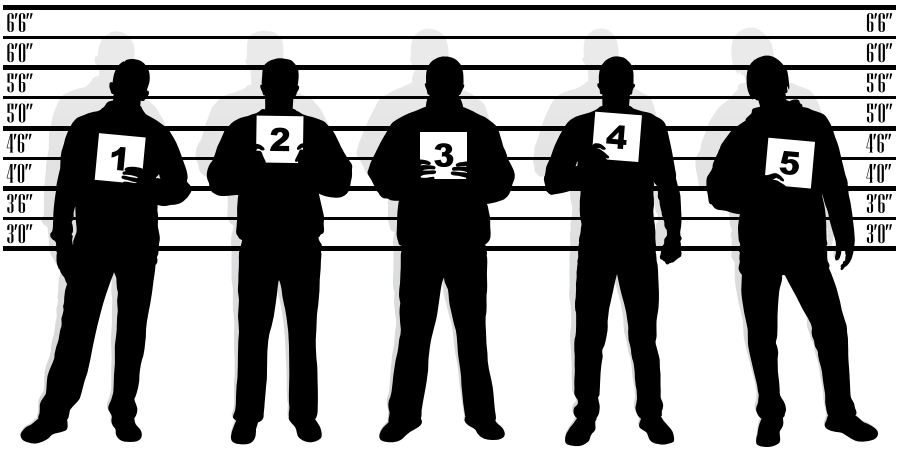

QUOTABLE

Our lives no longer belong to us alone; they belong to all those who need us desperately.

— Elie Wiesel, accepting the Nobel Peace Price in 1986

Upcoming CLEs

January 26
New Lawyers Seminar

February 1-2
Trial Skills College

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Calendars

EVENTS, MEETINGS, & CLEs

Online summary of seminars and events

2013

New Lawyers Seminar
January 26
World Trade Center, Portland

Trial Skills College
February 1–2
University of Oregon Law School, Eugene

Post-Conviction Relief
March 8
Eugene Hilton

Sentencing Seminar
March 8–9
Eugene Hilton

Legislative Drive-In
March 18
State Capitol, Salem

Juvenile Law Seminar
April 12–13
Hallmark Resort, Newport

Investigation Seminar
April 27
World Trade Center, Portland

Annual Conference
June 13–15
Seventh Mountain Resort, Bend

September Seminar
September 20–21
Agate Beach Inn, Newport

Juvenile Law Training Academy
October 14–15
Eugene Hilton

Public Defense Management
October 24–25
Salishan, Gleneden Beach

Death Penalty Defense
October 25–26
Salishan, Gleneden Beach

Sunny Climate Seminar
November 10–14 (targeted date)
Big Island, HI

Winter Conference
December 6–7
Benson Hotel, Portland

BOARD MEETINGS

January 26, 9:00 a.m. – noon, World Trade Center, Portland
March 8, 9:00 a.m. – noon, Eugene Hilton
April 27, Tentative, World Trade Center, Portland
June 14, 3:30 p.m. – 5:00 p.m., Seventh Mountain Resort, Bend

Visit ocdla.org for a complete calendar of meetings.

PUBLIC DEFENSE SERVICES COMMISSION

Friday, December 14, 9:00 a.m.–2:00 p.m.
Linn County Circuit Court, Room 200
300 Fourth Avenue, SW, Albany, OR 97321

Wednesday, January 23, 10:00 a.m.–2:00 p.m.
Office of Public Defense Services
1175 Court Street NE, Salem, OR 97301

For information about PDSC meetings contact Laura Anson, 503-378-2355, Laura.J.Anson@opds.state.or.us.

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February/March 2013
(Special Gideon *Issue)*.....Jan 15
April/May 2013.....Mar 15
June/July 2013.....May 1

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In This Issue

OCDLA thanks Tony Bornstein for providing the cover quote for this issue.
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Beyond the Sun

by Lane Borg

> To fulfill the promise of *Gideon* we must push our comfort levels so we continue to be skillful advocates for our clients.

As the suntan fades and the head clears, not so much from the mai tais as the cold I picked up in paradise, I would make some observations about the November Sunny Climate Seminar.

First, it was a great event. We had 135 attendees from 13 states; the program was a success (more on that later); and the good will generated by the OCDLA staff to our sister state members was tremendous. As I interacted with attendees over the course of the conference the common themes were great location and, more importantly, great presentations. For those who know OCDLA, it confirmed our good reputation, but for the first-time attendees, comment after comment was made about how good the conference was and, oh by the way, isn't it nice to be in Hawaii.

The presentations were from Colette Tvedt, Jeff Robinson, and Cynthia Roseberry, all top presenters and colleagues at the National Defense College in Macon, GA. By design, the three coalesced in a mesmerizing syncopation. All three presenters stayed on stage all day, and they commented on each other's material to enhance and amplify the message. As the day went on this also had the effect of engaging the audience into comments and participation rarely seen at a large conference. The lesson the Education Committee can take away is let's do more of that—that being teamed presenters working together to raise the bar through synergy and cooperation. In talking to the presenters before and after, they were a bit daunted as they knew the audience was a little more experienced than the average group of defense lawyers, and they knew they were performing in front of each other, always a little intimidating. But, they embraced the task and rose to the challenge.

Now to the topic, which was being a better trial attorney and a better storyteller. They covered topics from voir dire to closing argument. They gave us memorable moments, such as when Cynthia held up a glass of water that purported to represent the state's case, clean and transparent, then added one drop of toilet water as the impurity of a snitch's testimony and asked who would drink now. Great stuff. And Jeff's deconstruction of a damning video that turned an all too familiar interaction between a young black male and nervous, armed officers into a story of restraint and responsibility (by the young man). Sobering stuff. And, finally, Colette's stirring call to action on behalf of our clients who are themselves victims of sexual abuse; this was so appealing it compelled a retired judge (and former prosecutor) in the audience to call for more judicial discretion in sentencing. Powerful stuff.

We who attended can take away that, even though on average we are more experienced attorneys, we can learn new tricks. We need to push ourselves to be better storytellers. The road to perdition is complacency and comfortable living. If we are to fulfill the promise of *Gideon* we must grow and push our comfort levels so we continue to be skillful advocates for our clients.

The work we do is hard, it always has been and that is how it should be. We do not say criminals should not be punished but, rather, you need to work damn hard to put that label on my client. But to do that we need to stay vigilant, competent, and relevant.

For those who could not attend, mark your calendar for our target date of November 10–14, 2013. You'll reward yourself both educationally and emotionally.

SAVE THE DATE

November 10–14, 2013 (targeted date)
Sunny Climate Seminar
Big Island, Hawaii

Order and download the 2012 Sunny Climate Seminar material (PDF & MP3 files, eligible for 6.5 general credits) from the CLE Archive at ocdla.org.

*OCDLA Board President **Lane Borg** is director of the Metropolitan Public Defender in Portland. He serves on the Education and Legislative committees.*

OPDS Update

Thank You!

By Nancy Cozine, Executive Director, Office of Public Defense Services

Thank you to everyone who attended and participated in the 2012 Public Defense Management Conference and Juvenile Law Training Academy. It was wonderful to see so many familiar faces, to have a chance to talk with Oregon providers, to learn about the work being done in other jurisdictions, and to hear about what might be ahead for Oregon. As always, we will take your evaluation comments into consideration as we build the agendas for next year. In the meantime, if you have suggestions, please send them to me at nancy.cozine@opds.state.or.us.

Budget News

At the September Emergency Board meeting, PDSC received $2 million from the special purpose appropriation to fund contract services. We believe this amount will cover all contract expenses billed during the current biennium, but PDSC will return to the legislature to request additional funds to cover expenses incurred in this biennium yet billed after June 2013.

The PDSC has submitted three policy option packages with the agency's budget request. If funded,

- Policy Option Package (POP) 100 will provide additional resources for reducing dependency caseloads.
- POP 101 will enable OPDS to offer appellate division lawyers a small increase in compensation, only partially reducing the gap between the appellate division and DOJ lawyers.
- POP 102 will provide funding to attract and retain qualified attorneys in nonprofit, public defender organizations, primarily in Deschutes, Jackson, Lane, Multnomah, and Washington counties, increase hourly rates paid to attorneys who provide legal representation in public defense cases on an hourly basis, and increase hourly rates paid to investigators who accept work on public defense cases.

2013 and Beyond

The December revenue forecast should give us a better picture of potential funding in the next biennium. OPDS continues to communicate with legislators and the Legislative Fiscal Office regarding the important work of public defenders in Oregon.

To My Pack

by Eve Oldenkamp

> *We fight for everyone's freedom.*

"I have lived my life, and I have fought my battles, not against the weak and the poor – anyone can do that – but against power, against injustice, against oppression, and I have asked no odds from them and I never shall." – Clarence Darrow

I read this, and other quotes, whenever I feel what I do matters not. Sometimes this reading occurs frequently. I feel exhausted. Beaten and battered and getting no respect, let alone results. The gray hat I usually don proudly begins to slide to black. The angst spawned by yet another asinine query, "How CAN you do what you do?" is not whetted by the flippant response, "Hey, I figured out how to get paid by the Man to fight the Man!" That answer just makes me feel hollow. More isolated.

As defenders of the public, we fight in the trenches, the dirt and mud. We stand for justice. We fight for everyone's freedom. Most people, whose lives never wander to the other side of the tracks, do not care to acknowledge that our work is the essence of the Social Contract. What we do keeps liberty. Liberty keeps society civil. Benjamin Franklin said it best, "Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote." We arm that "lamb." Our clients. Those whose cases test the patience and tolerance of society, but who ultimately are the firewall for liberty and freedom.

And they are not angels, most. More like porcupines than lambs. But we embrace and touch our clients' lives, and their stories touch ours. We practice empathy. We may be the first, or only, person who treats them with respect. Who listens to them. Who fights for them. And we carry a bit of their stories, their traumas, their tragedies, with us. Sometimes, this empathy invokes but rage from them, an understood result of being trapped in the cycle of powerlessness they have known their entire lives. And we weather the weight of this rage. Turn it and aim it so as to preserve fundamental fairness. We know, in the words of Martin Luther King Jr., "There comes a time when silence is consent." We face that time weekly, if not daily, and we do not remain silent. It is a vigilance we maintain always.

No kudos from the mainstream. Hands bitten by those I attempt to feed. I feel a void suck within at times. I chase the nectar of the gods to lull me. But that does not inspire, only dull. So, I turn toward various quotes. Or I view overplayed DVDs: *Hurricane*, *Twelve Angry Men*, *My Cousin Vinny*. Or I grab a book that tethers my whimpering gremlin of self-pity. Say, *A Long Way Gone* by Ishmael Beah. Struggle is relative, mine minute relative to his. Or *Life After Death* by Damien Echols (one of the West Memphis Three). Again, relativeness. And I am inspired.

Then I turn to history and I am awed. By the work of defense attorneys gone before. Their hallowed spirits run in the bones of our constitutional scholarship. They often risked life and limb to further Justice. Against the odds, they believed our Constitution, a living document, whose cases must be changed to fulfill justice. They hammered against the chains of precedent, against the odds most said, e.g. until *Plessy v. Ferguson*, and all its inhumanity, became *Brown v. the Board of Education*. Current colleagues do the same, e.g. insisting that a right to confront means what it says. *Crawford v. Washington*. (Who would've thought I'd ever want to kiss Scalia!!)

The other place I revive myself is with you all. My pack. We are a social animal after all. Conferences are the cantina rising from the desert of Juarez. We share tactics, swap stories and commiserate. We celebrate why we do what we do. Because it is right. I hone my swords over the fire of righteous indignation, held by all of you, and rush forth, revived! The battle rages again. I desire to fight.

Now a quiet moment. The defense bar lost a few warriors this year. Ken Dunleavey and Paul Arritola, two investigators with passionate devotion to justice, whose great humor and hearts touched and inspired many. We also lost Myron Gitnes. Phil Studenberg, El Presidente Muerte, opined, "One of the best trial attorneys in the day." I knew naught of the many battles won by him against the odds until his life celebration. The Highwaymen sing, "Your heroes will help you find good in yourself, your friends won't forsake you for somebody else, they'll both stand together through thick and through thin, and that's how it is with heroes and friends." All three of these men were both heroes and friends.

OCDLA represents heroes and friends. We stand together through thick and thin. I opine we need each other. I need you. You are my heroes and friends. Thanks for inspiring me. It's what a pack does for each other.

*OCDLA Board Member **Eve Oldenkamp** is with Klamath Defender Services in Klamath Falls. She serves on the Drug Policy Committee.*

SAVE THE DATE

Monday, March 18
Legislative Drive-In
State Capitol
Salem

Hearing Room 50,
8:00 a.m. – 3:00 p.m.

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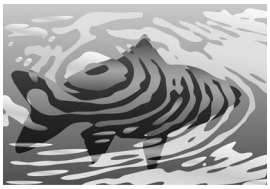

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TRIBUTE

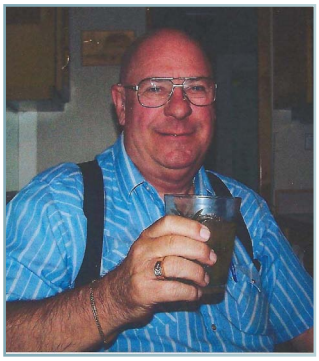
Mitch Howe

by Laura Fine Moro

Editor's Note: When this piece was written, we had not yet received the news that Mitch Howe had been diagnosed with lung cancer. Laura reports that Mitch in good spirits. Our hearts are with him and his family.

On August 24, 2012, our friend and co-worker, Mitch Howe, officially hung up his spurs as a defense investigator, after a productive career working murder and aggravated murder cases.

Born in 1943 in Temple, Texas, Mitch was an army brat and moved around the country. A majority of time was spent in Oregon, primarily in Madras and Central Oregon. After high school, Mitch briefly attended Willamette University and then moved on to numerous other jobs, including four years in the Air Force. He used the computer skills taught to him by the military to run computers for numerous national corporations over the ensuing years.



Mitch married his wife Eve in 1982. At that time, she managed the Crooked River Ranch Saloon. The first time he met her, Mitch had literally just walked off his job and into the bar. She took one look at him and said, "You just quit your job today." Mitch replied, "Yep." She said, "What are you going to do?" He said, "Have this drink!"

Shortly after they married, Mitch was asked by an attorney friend to act as an investigator on a criminal case. He did so and enjoyed it. The next case offered, though, was to tail a wife for a suspicious husband. Mitch was not inclined to do that type of work and tried to price himself out of reach, but when the client was willing to pay him $30 an hour, he decided he was in no position to decline. Eve told him he could play around at being an investigator for one year, but if it did not work out he was going to have to "get a real job!"

Fifteen years and dozens of murder and aggravated murder trials later, Mitch reports he is glad he stayed the course of being an investigator. I and the legion of attorneys Mitch has worked for thank him for his energy, enthusiasm and interest in the defense of the accused.

*OCDLA Life Member **Laura Fine Moro** practices law in Eugene. She serves on the Education Committee.*

Thoughts on *Lawson*, the New Eyewitness ID Case

by Bronson James

Ed. Note: This article originally appeared in the online Library of Defense, December 3, 2012.

“Under this new paradigm, you can expect the state to make more use of memory experts — people who were the province of the defense bar before.”

So, what do we make of *State v. Lawson* (to download the case, see the online version of this article), the Oregon Supreme Court's landmark eyewitness ID case? Here are a few initial thoughts. The only caveat I would offer is that the opinion is lengthy and I'm still digesting it. So these opinions may change over time.

First, I think it is critical for anyone facing witness ID issues to do two things. You must read all of the 82 pages of *Lawson*, all of them, including the appendix and footnotes. Second, you absolutely must read *State v. Classen*, *Manson v. Brathwaite*, and *Perry v. New Hampshire*. Why? Because *Lawson* exists within a body of caselaw (*sic*) on eyewitness ID, and you cannot recognize the uniqueness of *Lawson*, nor explain that uniqueness to a court, without understanding the legal landscape that defines *Lawson*'s differences.

Key among those differences is *Lawson*'s grounding in the Oregon Evidence Code. By placing reliable eyewitness IDs in the OEC, as opposed to federal due process or the Oregon Constitution, *Lawson* accomplishes two critical things: (1) it protects against tainted IDs regardless of source, and (2) it shifts the initial burden of establishing ID reliability to the state.

Prior to *Lawson*, and still in effect under federal law, only suggestive police procedures result in suppression of a tainted out-of-court ID. But now, if the witness saw the photo on pdxmugshots.com, or busted.com on their own time and without police involvement, you can still suppress that ID. This is huge.

With regard to the burden, basically anytime there's an eyewitness ID the defense should be filing a motion in limine asking for exclusion of the evidence. That motion should be based on OEC 602, 701, and 403. Under both 602 and 701, the state bears the burden of persuasion. The state must show that the ID is based on perception (not suggestive influence), and the resulting 701 lay opinion is “rationally based.”

Under this new paradigm, you can expect the state to make more use of memory experts — people who were the province of the defense bar before. Take note: Dan Reisberg, famed memory expert at Reed College in Portland, has always said that he will advise any side, and is non-partisan. But the fact is, he has never been called as a state witness. Expect that to change. You may find yourself, like in certain civil cases, in a race to lock up the best experts in a case before the other side can contact them. So identify ID issues early, and get your calls into the expert ASAP.

So what are the nuts and bolts of an ID hearing now? Well, *Lawson* splits the issues into two categories: estimator variables, and system variables. Under estimator variables, the state must show that the witness had sufficient opportunity to view [the suspect], the nature of the observation, comparative race factors, time and light factors, etc. All of this goes toward the 602 analysis. So the state will have to call the witness.

Then, the state will have to call anyone involved in assisting with the ID to discuss system variables. How was the throwdown conducted? Was it sequential? What instructions were given? Was there post-ID feedback? Etc. This goes to both the 602 and 701 considerations.

And if those lines of inquiry do not result in suppression, then the burden shifts to the defense, and the court must engage in a 403 analysis. Here, the defense will put on its own expert to discuss how certain estimator variables, combined with systemic choices, reduce both the probative value of the ID and its accuracy. For this, you can pretty much use *Lawson* as a checklist, particularly the appendix which lays out many system variables and the science surrounding them.

A few other things to recognize about *Lawson*: First, the opinion contemplates the limited admissibility of witness testimony. So always be prepared to have a fallback position short of full exclusion that just excludes particularly problematic portions of the ID. Second, the opinion favorably cites cases that have made use of special jury instructions on eyewitness ID. If any portion of the ID comes in, you need to start asking for instructions. Remember, an instruction must be correct in all respects to make a failure to

Continued on next page

*OCDLA Member **Bronson James** practices law in Portland. He serves on the Legislative and PAC committees.*

LAWSON Continued from previous page.

give it error. So err on the side of shorter instructions that get right to the point without excess verbiage.

Here is a handy defense checklist for ID issues and how to challenge them:

Eyewitness ID Checklist

1. Identify the ID issue immediately and secure your expert.
2. File a motion in limine challenging the ID. Specifically call out the estimator and system variables you plan on discussing at the hearing. Ask for a pretrial hearing.
3. Issue your own subpoena on the eyewitness, plus everyone involved in the ID system variables.
4. Have your expert in the courtroom to hear the testimony of the witnesses.
5. At the end of the state's presentation, move for a ruling under 602 and 701. If that fails, then call your own expert to the stand.
6. Have your expert talk about all the 602 and 701 information already brought forth by the state, but then focus on the 403 problems with the procedures.
7. Move for exclusion under 403.
8. If complete exclusion fails, ask for partial exclusion.
9. Use the hearing to craft limiting jury instructions; tell the court at the hearing that you will be requesting special instructions.
10. Get a transcript of the hearing and immediately give it to your expert. You now have prior testimony of both the witness and the system variable persons (this is called pretrial discovery, a concept largely forgotten in Oregon. Enjoy a taste of how the rest of the world operates). Use this to keep them honest at trial if part or all of the ID is admitted. If anything changes, use that to renew your evidentiary objections, plus use the changes to further your direct of the expert about the significance of those changes.

Is Your Message Landing With the Jury?

Three Skills to Make It Stick

by Sari de la Motte

> We can get a fairly good read on emotion, but body language can't tell us what thoughts people are having.

Ed. Note: This is Part 2 of a 5-part series.

Years ago, I watched a videotape of myself delivering a keynote. Presentations are a big part of my job; I expected to find some room for improvement, but also thought I had gotten rid of all my weird nonverbal quirks. Imagine my horror as I watched myself sweep my hair off my forehead *every five seconds for the entire 45 minutes.*

I began growing my bangs out immediately.

Perhaps you tug nervously at your sleeve, shake your foot uncontrollably or pace from side to side. As anyone who's been videotaped can attest, most of us have no idea what we're communicating nonverbally. Yet we seem to have a pretty good idea of what others are communicating, especially the people we're close to.

Why are we so in tune with the body language and voice patterns of others but completely oblivious to our own? Simple: We can *see* other people, but—outside of being videotaped—we can't see ourselves. We're hardwired to understand and interpret nonverbal cues. As babies, we scan the faces of our mothers looking for reassurance and love, and later we do the same with our friends, lovers, and eventual spouses.

And yet, when we attempt to read others we often get it wrong. Recently, an attorney relayed this story. Starting with voir dire and continuing throughout trial, he noticed that a specific juror was exhibiting what he called "negative body language." The juror scowled, slouched down in his seat, and folded his arms across his chest. The body language was so pronounced, in fact, that the attorney became *obsessed* with it. He kept thinking, "This juror doesn't like me," and worried as the jury began deliberations. The jury came back: 11–1. As he walked down the hall afterwards, this very same juror approached him and said, "I just want you to know that I think you should have won. In fact," he said, "I was the lone person in your favor."

Because we're so in tune with other people's body language (take, for example, how you automatically turn and look over your shoulder if the person you're talking to looks in that direction), we believe we can use nonverbal communication to ferret out what people are thinking. This is a grave mistake.

We can get a fairly good read on emotion, but body language can't tell us what thoughts people are having. For example, I can get a sense, after walking into a courtroom, if opposing counsel is agitated or tense by observing nonverbal behavior. But I can't know *why* they're tense: perhaps their star witness went missing, or maybe they feel unprepared, or perhaps they just received bad news about their ailing grandmother.

In other words, we don't increase our nonverbal intelligence in an attempt to read the thoughts of other people. We increase our nonverbal awareness to ensure that good communication happens.

Every message includes three parts. First, there's the content: *What* you say. Then there's the delivery: *How* you say it. Third, there's the reception: Did the listener *receive* your intended message? An effective message requires all three parts.

Here are some tips to help you increase your facility in each area:

Content. Are you using 30 words when 15 would do? Jurors tune out when there are too many words.

Cut back any and all extraneous verbiage. For example, many lawyers "announce" what they're about to do in opening, such as, "Now allow me to show you…" or "Next, I'm going to tell you about…" Avoid this. Just show and tell. No need to announce.

In addition, once you've made your point, *leave* it. Resist the urge to repeat yourself or continually add on to what was previously a strong point. Jurors bore easily.

Continued on next page

***Sari de la Motte** is a trial consultant and CEO of FORTE, a Portland, Oregon communications consulting firm. She works with attorneys on trial communication, witness preparation, and jury selection.*

Delivery. Once you've pared down your message, deliver it powerfully. Increase awareness of your own nonverbal communication to help jurors trust you and your message. We communicate credibility by using *authoritative* body language and voice pattern. To do this:

- Stand straight with weight over both feet.
- Turn the palms of your hands downward.
- Keep your head still—this results in a flat, smooth voice.
- Curl your voice downward at the ends of statements (Think James Bond: "Bond, James Bond.")
- Breathe, so you sound definitive instead of angry or impatient.

Other times, you'll want to communicate that you're open, friendly and want to engage with jurors. (Voir dire, for example.) This requires *approachable* body language and voice pattern. To do this:

- Stand with your weight over to one side.
- Turn the palms of your hands upward.
- Bob the head slightly—this results in a rhythmic, lively voice.
- Curl the voice upward at the ends of statements. (Think Mr. Rogers: "Won't you be my neighbor?")
- Breathe, so you sound friendly and open, not tentative or lacking in confidence.

Reception. Finally, watch how people respond to your messages. Ignore meaningless body language cues like crossed arms (the juror could be cold), frowning (the juror could have a stomach ache), and the like. Instead, focus on breathing. You can pick up on breathing cues by watching nonverbal behavior. Have the jurors jerked their heads back? Are their shoulders pulled up? Do they appear "frozen"? Breathing is the only reliable indicator of receptivity. When your listener has stopped breathing, you've lost receptivity. Try something else. (Click here to watch me demonstrate how to gauge receptivity.)

We can't use body language to read the thoughts of others, but we can use nonverbal communication to effectively gauge receptivity and communicate our messages. In fact, we must. Words just don't get the job done.

What are you communicating nonverbally? Perhaps it's time to get the video camera out.

Next time: What if your message isn't landing? How to adapt in the moment.

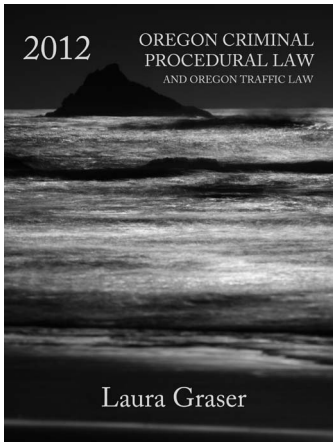
Questions? Email sari@nonverbalforte.com. For more reading on nonverbal communication, sign up for my newsletter at www.nonverbalforte.com.

VIDEO CLIP

How to Gauge Receptivity

Sari de la Motte, FORTE, Portland

Video Clip URL: http://nonverbalforte.com/services/how-to-videos/



Oregon Criminal Procedural Law
by Laura Graser

The indispensable manual on Oregon criminal procedural law and Oregon traffic law is completely revised and updated.

The 2012 edition is now available in hard copy, or in electronic form for Kindles and iPads, and the text is fully searchable. Available at Amazon.com.

Laura Graser has been practicing law in Oregon since 1979, both as a prosecutor and as defense counsel. Her practice focuses on criminal and family law cases in the appellate courts, and on legal strategy in capital cases in the trial courts.

APPELLATE PERSPECTIVE

Sex Offender Failure to Report Cases

Raising Venue Challenges and How the 2011 Amendments Might Benefit Your Clients

by Alice Newlin-Cushing

> It is possible for our clients to benefit from both the added clarity the amendments provide and from the recent appellate case law on venue.

In 2011, after successful venue-based challenges to convictions under Oregon's failure to report as a sex offender statute, the Oregon Legislature modified the sex offender reporting scheme to clarify where a person is required to register and report. The new statute seeks to avoid the problem of establishing venue for criminal prosecutions for failure to report, and to provide clearer instruction to our clients who are required to report. However, the statutory changes arguably fail to address the venue issues that plagued the statutory scheme previously. The purpose of this article is to explain the appellate case law on venue for crimes due to failure to report as a sex offender, and to lay out a strategy for continuing to raise successful venue challenges under the 2012 reporting scheme.

The sex offender reporting statutory scheme sets out various requirements: a person must register as a sex offender, then report within ten days of any change of residence, school or employment, and within ten days of the person's birthday each year.[1] The 2010 version of the statute did not specify *where* a person was required to report, except that the report was required to be made to "the Department of State Police, a city police department or a county sheriff's office, or, if the person is under supervision, to the supervising agency.[2]

Because the scheme did not specify where a person must report, prosecutors charged our clients with failing to report in any or all the counties they had contact with: the counties where they lived or worked, or the counties where they were simply found by police and determined to have missed a required report. The Court of Appeals firmly established, however, that the venue is proper in failure to report cases only where the crime itself is committed. And, most importantly, the court held that the crime of failure to report as a sex offender is committed in the place where the person *is* at the moment their lawful reporting period closes. The crime of failing to report occurs "literally at midnight on the tenth day" of the ten-day reporting window.[3]

That holding is critical, because it is the state's burden to prove venue, and rarely, if ever, does the state introduce evidence of where the defendant was located at midnight on the last day that the defendant could have lawfully reported.[4] Failure to report as a sex offender is *not* an ongoing crime; a person does not commit multiple offenses "simply by being present in multiple counties after having failed to register."[5] The state can only meet its burden by introducing evidence of the defendant's location at the crucial moment, and circumstantial evidence—such as a defendant's previous address in a particular county coupled with his presence in that county within weeks of the reporting window—is *insufficient* to meet that burden.[6]

The amendments enacted in Oregon Laws 2011, chapter 675, §1-4, establish that sex offenders required to report under ORS 181.595 (reporting after incarceration) or 181.596 (reporting when on probation) must initially report "in the county to which the person was discharged, paroled or released or in which the person was otherwise placed," or in the "county to which the person was discharged or released or in which the person was placed on probation." After the initial report, the amendments require the person to make subsequent reports "in the county of the person's last reported residence." A person required to report by ORS 181.597 (reporting by those convicted in other jurisdictions) must initially report in Marion County, and subsequently report in the "county of the person's last reported residence," or for out-of-state residents in the Oregon "county in which the school or place of work is located."

Those changes are helpful to our clients in that they provide instruction on where to report. But establishing a default county of reporting for an offender does not change the state's burden to prove venue under Court of Appeals case law interpreting the Oregon Constitution. The Court of Appeals clearly and repeatedly held that the crime of failure to report occurs in the moment that the 10-day reporting window closes and in the place where the person is located in that moment because that is where the crime was "committed" under Article 1, section 11. That constitutional provision guarantees

Continued on next page

*OCDLA Member **Alice Newlin-Cushing** is a Deputy Defender, Appellate Division, Office of Public Defense Services.*

"the right to trial by an impartial jury in the county in which the offense shall have been committed," and though there are statutory exceptions to that constitutional rule—ORS 131.305, and others—the analysis of where a crime of omission is "committed" under the Oregon Constitution remains the same.

The fact that the person is obligated to report in a particular county under the new scheme does not affect the state's burden to show that the crime was committed in the county where it was charged. The state must do so by proving that defendant was present in the county where the crime is charged at the moment the crime occurred, regardless of whether the defendant was obligated to report there or not. Indeed, the statutory scheme itself establishes an affirmative defense if the person reports in another county; so a person could avoid criminal liability by reporting in whatever county they happen to be in on the last reporting day. Therefore, the crime still occurs at midnight on that day, wherever the defendant is located at that moment.

The Court of Appeals has not addressed the new versions of the reporting scheme. The most recent case on this issue, *Thompson,* notes that the scheme was amended in response to *Massei* and *Depeche,* and restricts its holding to the 2010 versions of the statutes. 251 Or App at 600, n 7. Accordingly, it is an open question whether the legislature was successful in addressing the venue "problem" by specifying a county in which to report.

It is in our clients' interests to continue to raise this issue. At trial, move for judgment of acquittal if the state has not introduced sufficient evidence that the defendant was present in the charging county at the moment he or she failed to report. Hold the state to its burden to prove venue. The state's burden is not very high, but prosecutors often fail to meet it because they do not realize what is required. If we continue to raise this issue under the new reporting scheme, it is possible for our clients to benefit from both the added clarity the amendments provide and from the recent appellate case law on venue.

Endnotes

1 ORS 181.5595(3)(a); ORS 181597(4)(a); ORS 181.597(1).
2 ORS 181.596(4)(a) *amended by* Or Laws 2011 Ch 675 §3 (2011).
3 *State v. Depeche*, 242 Or App 147, 163, 255 P3d 502 (2011).
4 The state may also proceed in the defendant's county of residence if it can prove *beyond a reasonable doubt* that "it cannot be readily determined where crime was committed." ORS 131.325; *Massei*, 247 Or App at 37, citing *State v. Rose*, 117 Or App 270, 274, 843 P2d 1005 (1992).
5 *State v. Massei*, 247 Or App 30, 34, 236 P3d 774 (2011).
6 *State v. Thompson*, 251 Or App 595, 600, 284 P3d 559 (2012).

Being Atticus Finch

by Lane Borg

> Bad lawyering is bad for the system.

Editor's Note: This article appears in advance of a special Oregon Defense Attorney celebrating the 50th anniversary of Gideon, to be published in February/March.

This last summer Ryan Scott wrote a piece that should call all of us to look within ourselves and make sure we are being the best we can be. In "No Good Defense Attorney is an Island," (Library of Defense, July 6, 2012), Ryan challenged us all to think about how we prepare for our cases and to call our colleagues on bad lawyering.

Now, it is true that by being plugged in enough to have read the posting, you are likely not one of the folks to which he was referring. But we all know attorneys who go into court every week and represent folks despite having not attended any recent CLEs or bothered to keep up on such new innovations as the Sentencing Guidelines and Ballot Measure 11.

It is our defense attorney nature to forever forgive and excuse. After all, any defense attorney worth their salt could turn a pig's ear into a silk purse. But on issues of quality of representation or even just a floor of minimum standards we must police ourselves because, frankly, no one else will. Yes, there is PCR and Federal Habeas but it is a poor instrument of quality control. The remedy is never to sanction a lawyer, and the clients often spend years under the cloud of a conviction.

Often in the Bar discipline process the nuances of criminal defense are lost on the trial panels that may or may not have any criminal law experience. I once saw an accused attorney defend an allegation of statutory rape on the claim that neither he (a part-time criminal lawyer) nor his partner (a full-time criminal defense lawyer) knew the age of consent in Oregon. That claim passed without question by the trial panel. Finally, and most outrageously, factual guilt is a defense to malpractice claims; in fact, clients do not have standing to sue until they have attained exoneration. This literally means that guilty clients are owed a lower standard of representation because they cannot sue their malfeasant lawyer unless the charges are dismissed or they are acquitted.

This is why I ask, if not us, then who will police our conduct? Let alone push for aspirational goals that raise the bar. I am not calling for a witch hunt or some kind of OCDLA Inquisition, and part of me gets and wants to have a world like Ronald Reagan's credo of "Thou shall speak no ill of…" well, defense attorneys anyway. But we cannot because it is our clients that suffer and pay the price.

So what are we to do? How can we find a balance between policing ourselves and avoiding a McCarthy-like witch hunt? I will not pretend to have all the answers, but I think I have some. First, we need to be vigilant without being judgmental or preachy. To me that means do not criticize without also having a solution, even one you're willing to help with. It might be offering to go to a CLE with that lawyer or even just having lunch and talking about how you stay current with changes in the law.

Second, without beating up on other attorneys, let judges know how bad lawyering is bad for the system. Judges hate challenges that undo all their work, so point out how inefficient poor lawyering is and that it creates ineffective assistance of counsel claims.

Finally, be willing to speak the truth to power or popularity. If you are called on to review or testify in a PCR case, do it. Do not dismiss it as disloyal to the fraternity that is defense lawyers. Be fair and truthful, but be willing to help out our PCR lawyers.

And, okay, one more "finally"—be a good example, stay up on the law, log in to the Library of Defense, and strive every day to be Atticus Finch.

*OCDLA Board President **Lane Borg** is director of the Metropolitan Public Defender in Portland. He serves on the Education and Legislative committees.*

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A 2012 Trial Skills College participant during a small group exercise.

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"...These are a few of my favorite apps..."

By Marc Brown

This is an interesting time in the world of tablets. As the holiday season fast approaches, Google, Amazon, Samsung, and even Microsoft are trying to unseat Apple as king of the tablets. Even Apple is producing a smaller and less expensive iPad. I predict that at this time next year, the mobile computing market will have changed significantly. That said, we are still in a world where the iPad dominates the mobile computing market.

This periodic column began about a year ago as an effort to provide a bit of guidance in the ever-multiplying world of applications ("apps") for the iPad. Since that time, the use of tablets and other mobile computing devices has soared. As a result, here is a quick list of my five favorite (at least this week) productivity apps (as opposed to non-productivity apps, *see* Angry Birds).

iAnnotate: This is one of the first apps I used and it is still the app I use most. iAnnotate is a reader for Adobe Acrobat (.pdf) files. As an appellate attorney, I read large transcripts and do that reading entirely on iAnnotate. This app allows the user to highlight passages, underline, make notes, and search the document, and it can create a hypertext index of the annotations. This app is also handy to file cases for quick access. $9.99 for the iPad app, not yet available for other mobile devices. http://www.branchfire.com/iannotate/.

QuickOffice: Microsoft is rumored to be coming out with an office suite app but thus far it has not. However, with the QuickOffice app, a user can read Word, Excel, and PowerPoint documents. Additionally this app allows the user to write and edit documents. Unlike Apple's word processing app, Pages, QuickOffice retains all the coding from Word. Recent improvements have added a spellchecker and other features but QuickOffice still does not read footnotes. $19.99 for iPad and Android apps. http://www.quickoffice.com/.

Dropbox: This is a "cloud" server, meaning that it provides a location to store digital files outside of your network. There are many to choose from but, for me, Dropbox has worked well. It also allows the user to access documents from multiple devices. I can save a document from my work computer in Dropbox and access it later on my home computer or my iPad. Security is always a concern with remote servers. However, these companies live or die on security, and one security breach will send customers fleeing to other companies. Additionally, how secure is your own server? Free and compatible with Windows, Mac, and Linux operating systems and available for iPad, Android, Kindle Fire, and Blackberry mobile devices. https://www.dropbox.com/

Keynote: For many years, I was a PowerPoint user. Without a PowerPoint app, I began to work with Apple's Keynote app. This app is a stripped-down version of Apple's Keynote program but has the features needed to put together a clean and professional presentation. $9.99, available for iPad, iPhone, and iPod Touch only. https://www.apple.com/apps/keynote/

LogMeIn: I have tried to figure out how this app functions but it is still a mystery to me. By downloading LogMeIn on a desktop and a mobile device, the user can obtain full access to his or her desktop. Free, available for iPad and Android mobile devices and compatible with Windows and Mac operating systems. https://secure.logmein.com/welcome/products/

*OCDLA Member **Marc Brown** is an attorney with the Office of Public Defense Services in Salem.*

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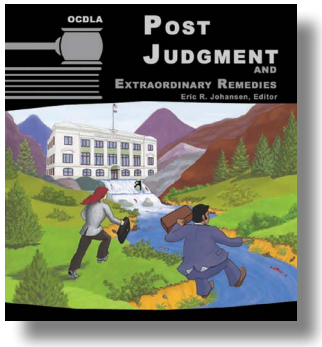

Post Judgment and Extraordinary Remedies

Edited by Eric R. Johansen, OPDS

A manual that analyzes post-judgment proceedings and those that seek extraordinary remedies, such as mandamus and habeas corpus in the circuit courts and the Oregon Supreme Court. Comes with the *Preservation of Legal Issues* guide. Bookmarked and hyperlinked PDF version or traditional binder with mylar tabs. Original artwork by Rich Jeffries. Published by the Oregon Criminal Defense Lawyers Association.

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DID YOU KNOW?

Expander App Needed on Tablet, Mobile Device

To unzip zipped files (such as OCDLA's seminar material downloads) on your iPad you will need an expander app installed on your device. Izip.com is an example of a free expander app. There are others in the App Store.

Even if you use DropBox to transfer a zip file to your tablet you will still need an expander app installed on the tablet to open the zipped file once it is on your tablet. After you click on the zipped file in DropBox, you should be prompted to unzip it with the expander app(s) you have installed. Don't be afraid to click a button to find out what happens when you do.

"Irrebuttable"

Justice Paul De Muniz

Over 200 guests came out on a wet wintry Portland evening to honor one of Oregon's most esteemed jurists with the OCDLA Ken Morrow Lifetime Achievement Award — Justice Paul J. De Muniz.

Justice De Muniz is the ninth recipient of this prestigious award, joining John Henry Hingson, III, Bert Putney, Judge Linda Bergman, Jim Hennings, Duane McCabe, Ralph Smith, and Bob McCrea. Created in 2000 following the death of Oregon's legendary criminal defense attorney Ken Morrow, the Ken Morrow Lifetime Achievement Award recognizes the lifelong commitment and significant achievements of attorneys who have worked in the defense community and those who have made significant contribution to the administration of justice. Representatives Wayne Krieger and Wally Hicks attended to honor the retiring Chief Justice, as did judges from the Oregon Court of Appeals and new Chief Justice Thomas Balmer.

A portion of the evening is dedicated to fundraising for OCDLA's ongoing legislative work. OCDLA raised over $26,000—a new record. OCDLA President and Master of Ceremonies Lane Borg introduced Salem attorney and Life Member Jason Thompson who gave an impassioned pitch for funding the work of lobbyist Gail Meyer as he described a recent case—a Jessica's Law case that resulted in a not guilty verdict. [See "Beautiful Words," March/April, 2012.] This result came about when he was able to show the jury a recording of the defendant's "confession" — a recording that would never have taken place if it weren't for the work of Gail Meyer and OCDLA's Legislative Committee in getting the custodial recording bill through the Oregon Legislative Assembly in 2009. But, in addition to his story, he brought his client and his client's grandmother up to the stage to meet Gail in an emotional surprise to everyone present. Not too many eyes remained dry at that point, and the pledges came in quickly.

Peter Gartlan, Chief Defender, Appellate Division, Office of Public Defense Services

"As a law clerk [at the state public defender's office in the seventies, Paul] argued and won the reversal of a client's homicide conviction, probably the first and perhaps the only time a clerk has argued—much less won—a homicide case on behalf of a criminal defendant in the Oregon appellate courts."

Mick Gillette

"Watching from the Supreme Court where I was serving at the time, I always knew that a petition for review on one of Paul's opinions was very likely not well taken. Paul just didn't make mistakes. Or if we were going to disagree it was because he'd followed what we'd said before and we better change our mind. And once or twice we did...but, he was sort of...irrebuttable."

Pete De Muniz

"He has been the best father anybody could ask for..."

Mike De Muniz

"To us he was dad but he was also a criminal defense attorney—and to be honored by his peers is really important...."

Justice Paul De Muniz

"It was with many of you in this room tonight that I first experienced the joys in the courtroom of winning, and the very raw and ragged emotions of losing. My most important thoughts tonight center on all of you and the important work that you do."

"Any words I could say tonight likely would not express the immense thank you I have for receiving this honor. It's a privilege, but it's also a very, very humbling experience, to be associated with an award named after Ken Morrow, someone I greatly admired and tried to emulate as a young lawyer, and in addition to those people in the audience who have won this award in the past."

WINTER CONFERENCE / LIFETIME ACHIEVEMENT AWARD

Photos by John Henry Hingson, III.

Ken Morrow Lifetime Achievement Award recipients: John Henry Hingson, III; James Hennings; Justice Paul De Muniz; Duane McCabe.

Justice Paul De Muniz, his wife Mary, and son Pete.

Carla French-Ferder and her husband, Life Member Paul Ferder.

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Riley Jones
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Elizabeth Wakefield
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Lee Berger

Visit OCDLA on Facebook for more photos of the Award dinner.

AUCTION DONORS

OCDLA thanks the following individuals for donating auction items to the Winter Conference:

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DOOR PRIZES

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Life Member Jason Thompson reminds attendees of the vital role OCDLA plays in Salem.

OCDLA Board Member Tony Bornstein; Ellen Pitcher in background.

Chris and Suzanna Hansen.

Setting the Stage

by Gail Meyer

With the November election now behind us, the 30 senators and 60 representatives have turned their sights to the 2013 legislative session which begins in earnest February 4. The Democrats continue to hold a 16–14 majority in the Senate, while the House shifted from its historic 30–30 split to a 34-seat majority for the Democrats. Committee assignments will be established during organizational days in the middle of January.

OCDLA Legislative Agenda

OCDLA has introduced four bills this session, two of which are identified as reform bills, two as "technical fixes." The OCDLA Legislative Committee selected these four concepts in consideration of a balanced profile of workload, as well as our strategic long-term legislative goals:

- **Eyewitness identification:** Our bill requires law enforcement agencies to maintain written standards and protocols on eyewitness identification procedures that comport with established evidence-based best practices such as sequential administration, blind administrator, instructions to the witness, obtaining of confidence statements, recording of the procedure and preservation of results, regardless of outcome.
- **Codification of *Brady* and *Kyles*:** Our bill codifies *Brady v. Maryland* and *Kyles v. Whitley* and authorizes a court to award attorney fees for breach of duty to disclose favorable evidence. The bill mirrors the "Fairness in Disclosure of Evidence Act of 2012," Senate Bill S. 219 introduced by NACDL in Congress.
- **DUII diversion ignition interlock exemptions:** Our bill authorizes the court to exempt a DUII diversion applicant from installing ignition interlock devices if they satisfy the employer-vehicle exemption or the medical exemption.
- **Crime classification of marijuana crimes:** Our bill makes PCS/Marijuana a Class C felony and MCS/Marijuana a Class B felony in order to be consistent with crime classification level of other Schedule II controlled substances.

March 18: Legislative Lobby Day

Mark your calendars now! Monday March 18 is the 50th anniversary of the *Gideon v. Wainwright* decision, and will be OCDLA's Legislative Drive-In. We have been assured a hearing on our *Brady/Kyles* bill before the Senate Judiciary Committee, and we hope to secure assurances of a hearing on our eyewitness identification reform bill before the House Judiciary Committee. Representatives from the Innocence Project will be on-hand to provide supportive testimony. Please let us know you are coming and we will arrange for meetings with your representative and senator.

Commission on Public Safety

OCDLA member Larry Matasar continues to serve as the defense bar's representative on the commission. Through technical assistance provided by the Public Safety Performance Project of the Pew Charitable Trust, the commission has been examining the fiscal impact of various sentence reforms on the DOC's budget. Proposals under consideration include adjustments to the second-degree crimes in Measure 11, increased judicial discretion for certain Measure 57 crimes, increased earned time, second-look for juveniles on Measure 11 crimes, among others. The district attorney representative on the Commission, Clackamas County District Attorney John Foote, has resisted any significant adjustments in these areas and has raised the spectre of a ballot measure should any of them pass.

Legislative work-groups

During the interim period stakeholder organizations are convened in work-groups to discuss, analyze and negotiate proposals for eventual introduction as bills. In 2013 there will be bills that: rewrite the expungement laws, tier the sex offender registry according to risk, alter the aid and assist statutes, either legalize recreational use of marijuana or establish a regulated supply system for marijuana, authorize a protective order for an unwanted sexual assault, establish mitigating factor for active military service, and yes, its back . . . eliminate the statute of limitations for sex crimes against minors.

Continued on next page

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*OCDLA member **Gail Meyer** is the association's legislative advocate.*

LEGISLATIVE UPDATE Continued from previous page.

Outreach to legislators

To those members who have supplied OCDLA with their home address, I say thank you! I have "deputized" a number of you to contact your representative and/or senator to discuss the OCDLA legislative agenda; by all accounts, those meetings have gone well. If you would like to assist with this venture, please contact me and we'll talk further. I have a packet of information and talking points ready to go!

Please contact me with your thoughts, your concerns, and your stories at glmlobby@nwlink.com.

SAVE THE DATE

Monday, March 18

Legislative Drive-In

State Capitol, Salem

Hearing Room 50,
8:00 a.m. – 3:00 p.m.

OCDLA Legislative Committee

Co-Chairs:
Katherine Berger, Portland, k.o.berger@comcast.net
Robert Homan, Eugene, homan@lanepds.org

Board Liaison:
Lane Borg, Portland, l.borg@mpdlaw.com

OCDLA Legislative Representative:
Gail Meyer, Portland, glmlobby@nwlink.com

Committee Members:
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Bronson James, Portland, bj@jdlattorneys.com
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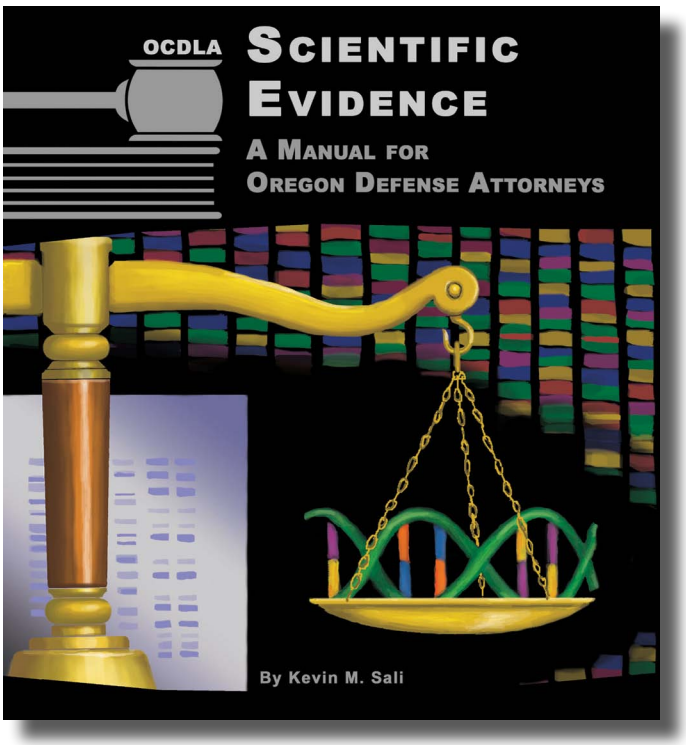
Scientific Evidence:

A Manual for Oregon Defense Attorneys

by Kevin M. Sali



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State v. Angelica Swartout / State v. David Paul Handy

by Susan Elizabeth Reese

Case: *State v. Angelica Swartout*
Court: Lane County Circuit Court
Judge: The Honorable Suzanne Chanti
Prosecutor: Lane County District Attorney Alex Gardner, Deputy District Attorney Robert Lane
Defense Counsel: Gordon Mallon and Eve Oldenkamp
Defense Team: Investigator Rich Hursey, Mitigation specialists Andrea Titus and Laura Rittall, Drs. Linda Grounds, Linda Harris, Dan Reisberg and Richard Leo, Computer specialist Verlin Cross, Forensic specialist Mike Howard
Date: First trial: January 18 – February 8, 2012
Second trial: April 30 – May 31, 2012
Charges: One count of Aggravated Murder charging an intentional homicide against a person under the age of 14 years.
Verdict: First trial: after three weeks of trial and five days of deliberation, the jury deadlocked at a vote of 11-1 for conviction; the judge declared a mistrial.
Second trial: on May 31, after a five-week trial, the jurors took about 45 minutes to reach a verdict of "not guilty."

Angie Swartout is the oldest of three children who were born to a teenage mother and placed for adoption with the Swartouts. The family has 64 other adopted children and young adults and has been showcased in a local newspaper. Naturally, Angie's responsibilities in this understandably dysfunctional unit included care for some of the infants and other children. Her childhood was largely void of normal parental bonding and affection.

In early 2010, Angie was 23 years old and estranged from her adopted mother and sisters. When she thought she might be pregnant, she performed a home pregnancy test. The results appeared positive. Angie reported this news to her extensive family, and her stepmother and sisters responded joyfully. As she puts it, she was enveloped in love.[1] Her stepmother called her daily, and her sisters demonstrated a whole new interest in her. One sister, Jewell, told Angie she could move back to her apartment to live with her, so Angie moved from Washington State to Eugene and found work as a clerk in a Springfield motel.

On March 31, 2010, Jewell took Angie to the local Planned Parenthood clinic to receive an official confirmation of her pregnancy so that she could receive state services. That test, however, showed that she was ***not*** pregnant. Not wanting to lose the attention and love she was receiving from her family, Angie kept the results to herself.

Throughout the summer, Angie enjoyed the affection and the concern of her family. Privately, she kept trying to become pregnant. At her job, and with family members who were not particularly close to her, however, she did not mention being pregnant.

On the evening of October 18, 2010, Angie was working an evening shift at the motel. At one point she sent a text message to Jewell that she was leaving work early to go to the doctor. She sent a later text indicating that "there was no heartbeat" and that "they" were going to "induce her." Neither Jewell nor any other family member went to Angie or to "the hospital." Later that evening, when a friend reached Angie – at work – to inquire about her, Angie reported that she had "lost her baby boy." The friend then came by the motel with flowers and candy for Angie.

Over the next few weeks, Jewell and another sister, Lilliann, kept pressing Angie to have a funeral and a "proper burial" for the infant. They searched Angie's apartment and found information about stillborn pregnancies that Angie had researched on the Internet. They called the hospital and could get no information about a birth. They called the coroner's office, again with negative results. Finally, on December 6, they contacted police.

That night, Springfield Police officers confronted Angie at work. She broke down and told them she may have had a miscarriage earlier and flushed the results down the toilet.

Angie left work that evening and spent the night sleepless and without food, drinking and smoking and miserable. The following morning, Sgt. David Lewis arrested Angie on a two-

Continued on next page

[1] Statements attributed to Angie – whether paraphrased or directly quoted – are comments she provided to OCDLA when speaking at the recent Death Penalty Defense Seminar in Silverton.

*OCDLA Life Member **Susan Elizabeth Reese** practices law in Portland. She serves on OCDLA's Education Committee.*
*OCDLA Life Member **Gordon Mallon** practices law in Silverton. He is a member of the Board of Directors and serves on the Education Committee.*
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***Dr. Linda Harris** is an OB/GYN in Medford.*
***Dr. Dan Reiseberg** is is a professor of psychology at Reed College.*
***Dr. Richard Leo** is a preeminent false confessions expert at the University of San Francisco School of Law.*
***Verlin Cross** is a computer specialist in Medford.*
*OCDLA Member **Mike Howard** is a forensic specialist in La Grande.*

BEAUTIFUL WORDS Continued from previous page.

year- old municipal court warrant charging harassment. In spite of her distressed state, Angie agreed to take a polygraph. Oregon State Police Officer Rebecca Martin noted in her report that Angie suffered from three factors which invalidated the test's reliability, but she gave it anyway. In violation of state law, Officer Martin did not videotape the examination.

Although state law also dictates that a subject be told the results of the test, Officer Martin did not admit to Angie that the exam had been inconclusive. Instead, Springfield Police Detective George Crolly told Angie, "Would it surprise you if I told you that you did not pass the test?" Although technically the question was correct, it was designed to mislead. After more questioning, Angie said she had given birth to a stillborn infant at the motel. Using a modified Reid technique for interrogation, Crolly quickly received admissions from Angie that "yes" she had smothered the child, and "yes," she had placed the infant in a Dumpster. Crolly videotaped this interview, and the state offered it in its entirety during Angie's trial.

Angie recalls now that she would rather have had her family believe that she had lost the baby and concealed it than that she had made up the story of her pregnancy. She thought, then, that police officers had "bullshit detectors" which would enable them to know that she was manufacturing a story. She thought, surely, after looking in the hotel Dumpster and conducting an independent investigation, the officers would recognize that there had been no baby, and she would be free to leave.

Instead, she remained in jail for sixteen months, charged with the aggravated murder of the baby she never bore.[2]

In a bizarre show of "support," Jewell and stepmom Ruth staged an elaborate funeral for the infant they believed had been stillborn.[3]

After Lane County appointed Gordon Mallon to represent Angie, he quickly called in Eve Oldenkamp as co-counsel and engaged the defense team named above.

The state had spent three days looking through the local dump for evidence of a body, but investigators found nothing. They waited seven weeks to examine the motel bathroom, "because," one officer testified, "they already knew what had happened." Again, they found nothing. They made no effort to track Angie's work activities and movements at the motel that evening in October.

At the beginning of the defense preparation, Angie maintained her story about the miscarriage, although mostly she avoided talking about it with her defenders. By late December, the defense received the results of the Planned Parenthood test which showed that, as of March 31, Angie was not pregnant. They shared this information with the prosecutors. Instead of using this scientific evidence to question their theories, the prosecution claimed that the Planned Parenthood test was flawed.

[2] Prosecutors kept the death penalty as an option for several months before agreeing to withdraw it.

[3] Jewell and Lilliann had tattoos placed on their bodies with the word "Lucius," the name they gave to the fictitious baby.

Continued on next page

BEAUTIFUL WORDS Continued from previous page.

As the defense investigation progressed, forensic specialist Mike Howard examined the motel bathroom in which Angie told police she had given birth. He noted it had not been cleaned thoroughly for a very long time, and he concluded that even if an effort had been made to remove blood and tissue, some residue would have remained. He found none.

In July, 2011, Circuit Judge Eric Bergstrom from Multnomah County presided over a settlement conference. At one point during that process, Angie says that "reality set in." In a private session with defense counsel Oldenkamp, she admitted she had made up the story of the pregnancy and delivery. Her explanation was so moving that the deputy standing guard in the corner had tears streaming down her face.

After this revelation, Angie completed a defense exam with Albany polygrapher Ken Anderson. She passed the test. When the defense reported these results to the prosecution, they were simply accused of grandstanding and delaying tactics.

After the settlement conference, the state asked for and received an order allowing Melissa Edwards, the state's forensic physician, to subject Angie to a gynecological examination. Dr. Edwards reported that she could not say "beyond a reasonable doubt" that Angie had experienced a vaginal delivery. This led defense counsel again to request Angie's release from custody, a request that was again denied.

On the eve of trial and in terrible weather, Dr. Linda Harris, an obstetrician from Medford, drove to Eugene to examine Angie for the defense. She simply could not accept that any doctor, after seeing Angie's cervical pictures, could conclude that Angie had given birth to "a reasonable degree of medical probability." Two gynecological examinations in lockup.

The case was first tried over several weeks in January and February, 2012. The state offered testimony from Angie's sisters that she had "looked pregnant." Cell phone photos suggested a bulge in her abdominal area about three months before her alleged due date. Dr. Edwards testified that it was possible for Angie to have been pregnant and to have had a "quick" delivery. Angie's statements, of course, were prominent features of the prosecution's case.

Dr. Linda Grounds had examined Angie for the defense. As a psychologist, she concluded that her testing showed Angie as someone vulnerable to making a false confession. Supporting that position, Dr. Dan Reisberg also testified for the defense, describing concepts of suggestibility and the Reid method of interrogation. Computer expert Verlin Cross testified that Angie's timesheets and telephone records at work established that she had less than 10 minutes to perform the acts to which she had "confessed": going to the bathroom and giving birth, holding the baby, possibly smothering it, wrapping it in a sheet and disposing it, cleaning up the mess, and returning to the front desk.

Continued on next page

Defense evidence also showed that several Springfield police officers, on one of their regular stops at the motel, neither saw, heard or smelled anything unusual that evening.

After five days of deliberation the jury deadlocked 11-1 for conviction. George Bruce, the juror who refused to be swayed, was tearful as the verdict was read. Later, he contacted the defense team to report that the jury's initial votes had been sharply divided. Over the days of deliberation, he said, the foreman had taken control, insisting that they review Angie's videotaped statement, time and again. Eventually, only Mr. Bruce refused to change his vote.[4]

Defense counsel Mallon described his team as "tired, weary, but not worn out." The state, buttressed by the jury's vote at the first trial, increased its demands at a second settlement conference. This time, Angie was stronger. She says, "I was given a second chance for a reason," and she rejected the state's suggestions.

At Dr. Reisberg's suggestion, Dr. Richard Leo took his place at the second trial. He had actually encountered another case involving a false claim of pregnancy. Angie testified on her own behalf, as she had during the first trial. The defense team was more cautious in selecting a jury, this time exercising all of the available challenges. At various points local defense attorneys Hugh Duvall, Brian Cox, and Rosalind Lee, the Lane County Public Defender's office, and Oregon Capital Resource Center Director Jeff Ellis offered support, both general and specific.

After a five-week trial, the jury swiftly awarded Angie Beautiful Words. One of the jurors told the press that even before the defense experts challenged Angie's "confession," they felt that the statements Angie made were simply "more of her agreeing to statements suggested to her" than an actual admission of a crime. The first secret ballot yielded a tally of 10-2 for acquittal, and the additional jurors quickly conceded that there were reasonable doubts. One juror said they actually spent about five minutes reaching a verdict; the balance of the time they spent ordering and enjoying lunch.

The judge, apparently stunned by the jury's verdict, insisted that Angie remain in custody, return to jail, and be released through the jail's processes rather than walking out of the courtroom a free woman. Nonetheless, within the hour, after her long ordeal, she was free.

During the recent OCDLA Death Penalty Defense Seminar at the Oregon Garden, Angie spoke eloquently about her experience. Although most of her adopted family has remained hostile to her, she reports that she has "a new family" – her defense team. Most of them were present that afternoon, and they joined her onstage to the music that was Gordon Mallon's metaphor for the case,

"Lend your voices only to sounds of freedom
No longer lend our strength to that which you wish to be free from
Fill your lives with love and bravery
And you shall lead a life uncommon….."[5]

[4] When he returned to his job at the University of Oregon, his co-workers, who had followed the case in the media, gave him a standing ovation.

[5] "Life Uncommon," by Jewel [J. Kilcher]

Case: *State v. David Paul Handy*
Defense Counsel: Guy Greco with Kristina Kayl
Defense Expert: Dr. Robert Julien
Court: Lincoln County Circuit Court
Judge: The Honorable Sheryl Bachart
Prosecutors: Kylie Andrisa, Deputy District Attorney
Alice Vachss, Special Asst. District Attorney
Date: July 10–13, 2012
Charges: Sodomy in the first degree (two counts), rape in the first degree (two counts), sexual abuse in the first degree (four counts), sexual abuse in the third degree (two counts), furnishing alcohol to a person under 21 (one count)
Verdict: Dismissal of all sexual abuse counts at the end of the state's case upon motion of the state. Not guilty on all other counts, except the furnishing alcohol to a minor count, which Mr. Handy had admitted.

Thirty-five-year-old David Handy, a student at Oregon Coast Community College in South Beach, received a solicitation in December of last year on his page posted to OkCupid, an internet dating site. The writer was "Vicki"[1], a twenty-year-old woman[2] who had recently ended an 18-month relationship with another man. Lonely and looking for companionship, Vicki seemed to "click" after Mr. Handy responded to her inquiry, and they began texting and calling one another.

After about a week, Vicki accepted Mr. Handy's invitation to meet him at his residence in a Newport trailer park complex. She arrived on the afternoon of December 30. They responded well to each other and spent the balance of the day together at the residence. After a few cocktails, Vicki chose to stay the night at Mr. Handy's home, and they had a consensual sexual encounter.

They also spent the next day, New Year's Eve day, together. Most of that time they watched a "zombie marathon" on television: twelve hours of non-stop "zombie" programming. They took a walk and got cigarettes. According to Mr. Handy, they were having a great time.

About midnight on New Year's Eve, Mr. Handy made each of them a cocktail. At that point, Vicki's version and Mr. Handy's description of events diverged dramatically.

Vicki testified at trial that she took only a few sips of the drink on New Year's Eve. She said she told Mr. Handy she was feeling strange and probably shouldn't finish the cocktail. She claimed she passed out in the kitchen. She testified that the next thing she remembered was Mr. Handy on top of her in the bedroom having sex with her. She said she told him, "What's going on? Stop." She also testified that Mr. Handy replied, "What are you talking about?" She said she passed out again. She awoke later and claimed that Mr. Handy asked her to have oral sex. She again said she passed out, and she did not awake until morning.

[1] A pseudonym.

[2] She was actually 20 years and 8 months old at the time of trial, a "minor" for the purposes of the statute prohibiting use of alcohol.

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BEAUTIFUL WORDS Continued from previous page.

On New Year's Day, Vicki asked Mr. Handy if they had had sex during the night. He said he answered in surprise, "You don't remember?" They parted amicably, and Vicki returned to the home in which she had been living with her father. Her father noted that she seemed "depressed and withdrawn." Two weeks later, in response to probing by her family, Vicki said that she believed she had been raped and sexually assaulted while she was unconscious. Her father, a juvenile probation officer for Lincoln County, immediately reported the event. The criminal investigation began on January 16, 2012.

Newport Police Detective Brent Gainer took the lead in the investigation. He interviewed Vicki on January 17th. In the course of that conversation, Gainer asked Vicki to send Mr. Handy a series of "pretext" text messages in an effort to get an admission of criminal wrongdoing. Mr. Handy's only response to these messages was to question Vicki's motive and to express concern that he was being "set up."

On February 24, more than a month later, a grand jury indicted Mr. Handy on the multiple counts of rape, sodomy and sexual abuse. The same day, Detective Gainer arrested Mr. Handy and took a recorded statement from him. In that recording, Mr. Handy fully described his version of events during his two days with Vicki. He told the officer that she had been awake during the entire time of their interactions on New Year's Eve and that all of their sexual conduct had been consensual. Despite his cooperation, Mr. Handy remained in the Lincoln County Jail for 143 days.

During the trial, the state's theory was either that on New Year's Eve Mr. Handy had sexually assaulted Vicki while she was incapacitated from the combination of alcohol and drugs, or that he had sexually assaulted her while – for the same reasons – she was physically helpless. Both sides agreed that the events of the prior day, including the sexual interactions, were consensual. Nevertheless, defense counsel Greco filed a motion under OEC 412 to ensure that these events, considered the "prior sexual conduct" of an alleged victim, could be discussed at trial. The state conceded the motion.

All the alleged crimes involved the claims that Vicki was either mentally incapacitated as a result of the drugs and alcohol and/or physically helpless and therefore unable to consent to the sexual conduct on New Year's Eve. Before trial, Mr. Greco filed several motions challenging the definitions of mentally incapacitated and physically helpless. He also argued that the affirmative defense in ORS 163.325(3) amounted to an unconstitutional shifting of the burden of proof to a defendant.[3] The trial court rejected all of these arguments.

In her interview with Detective Gainer, Vicki acknowledged that she had been using a long list of medications for anxiety and depression. At trial, the evidence showed that Vicki had prescriptions for Prozac, Abilify, Ambien, Clonazapam, and Amitriptyline. She testified that she was required to take Prozac, Abilify and Clonazapam in the morning, then Ambien, Clonazapam and Amitriptyline at night before bed. The evidence also showed that Vicki had attempted suicide three weeks before the incident with Mr. Handy. Once her father testified that Vicki had seemed "depressed and withdrawn" after her encounter with

[3] The statute provides that it is an affirmative defense if a defendant "did not know of the facts or conditions that were responsible for the victim's incapacity to consent."

Mr. Handy, defense counsel cross examined him about the suicide attempt as an alternative explanation for her appearing depressed and withdrawn.

At trial, Vicki testified that after the sexual encounter during the night of December 30, she told Mr. Handy that she had made a mistake and "it wasn't going to happen again." She did not report this statement to Detective Gainer, and it was not incorporated into his report. She testified that she took her pills the night of the 30th after she had had sex with Mr. Handy. She claimed that the next night she had consumed Ambien, Clonazapam and Amitriptyline before Mr. Handy offered her a cocktail at midnight. But she admitted that she took her medications in the bathroom, and she had not told Mr. Handy that she was taking these pills. She also acknowledged that she frequently drank alcohol after or about the same time that she was taking all these medications.

When cross-examined, Vicki also admitted that she had not told Detective Gainer about asking Mr. Handy to "stop" between her several incidents of passing out on New Year's Eve.

At trial, the state played the recording of Mr. Handy's statement and description of events in its entirety.

The defense also called Dr. Robert Julien of Lake Oswego to review Vicki's statements and Mr. Handy's descriptions to the police and to offer an opinion about whether Vicki had been conscious or unconscious while under the influence of the medication she had taken. Dr. Julien described each of the drugs, its effects and side effects. He noted that Ambien, in particular, is well known for a side effect known as "sleep driving." The defense introduced the FDA-approved product guide to Ambien which warned patients that while using it one might engage in sexual relations and not remember the event the following day. Dr. Julien testified that the sedative effect of the Ambien would be intensified by the other two drugs she consumed that night. He finally testified that, to a reasonable medical probability, Vicki was wide awake when she had had sex with Mr. Handy on New Year's Eve.

The court sustained the state's objection to Dr. Julien's opinion that Vicki had suffered from amnesia on New Year's Day. But on cross-examination, the state asked him whether she had suffered amnesia or a blackout or had no memory as a result of these drugs, and he testified that she had likely suffered from such effects.

Mr. Greco recalled Vicki to the stand as part of his case. She admitted that when she left Mr. Handy's residence on New Year's Day, the parting was amicable. She admitted that he had done nothing aggressive. She also acknowledged that several days later she sent him a text message in which she said she had enjoyed "the anal." She also indicated that if he "wanted to be her boyfriend," she could "go away from it" [the accusations].

After 90 minutes of deliberation, the jury provided beautiful words for Mr. Handy on all of the counts involving sexual conduct, finding him guilty only of providing the alcohol to Vicki, the count which he freely had admitted.

David Handy was finally released, after enduring months in the county jail. One juror later remarked that the entire case was "sad," and she wondered why the state had spent so much money and time pursuing the charges.

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*OCDLA Member **Guy Greco** practices law in Newport.*

*OCDLA Member **Kristina Kayl** practices law in Newport.*

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