2020 SPRING/SUMMER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Smoke on the Water -
Roadside Testing of THC in Oral Fluid

Experience at the Trial Lawyers College / Immigration Consequences
Changes to Criminal Rule 46 / and more!

CONTENTS

MISSION STATEMENT

- To defend the rights secured by law of persons accused of the commission of a criminal offense;
- To educate and promote research in the field of criminal defense law and the related areas;
- To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;
- To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;
- To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;
- To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

BENEFITS OF THE OACDL

LISTSERV - The OACDL listserv is our most popular member benefit. This on-line forum joins over 500 members from around the state. If you have a question, post it on the listserv and usually within minutes you have responses from some of the most experienced legal minds in Ohio.

AMICUS BRIEF - OACDL members provide amicus support for criminal cases.

CLE SEMINARS - The most up-to-date topics presented by nationally-recognized experts are available at incredible savings to OACDL members - including the annual Death Penalty and Superstar Seminars.

STRIKE FORCE - With OACDL, you never stand alone. OACDL members are here to aid.

LOBBYING - The OACDL actively lobbies state government by providing testimony on pending bills and working with other organizations with similar interests.

LEGISLATION - The OACDL monitors pending legislation and government activities that affect the criminal defense profession.

MENTOR AND RESEARCH PROGRAMS - OACDL offers a mentor program for new attorneys and resource telephone access for the assistance of all members.

NETWORKING - Networking functions allow current OACDL members and prospective members to interact. These functions are not only entertaining, but very valuable for old and new members alike.

LETTER FROM THE PRESIDENT

SHAWN DOMINY

President, OACDL

Human beings need three basic things in order to be content: they need to feel competent at what they do; they need to feel authentic in their lives; and they need to feel connected to others. These values are considered "intrinsic" to human happiness and far outweigh "extrinsic" values such as beauty, money and status. - Sebastian Junger, Tribe: On Homecoming and Belonging

I recently read a trio of books which discuss tribes. In *Tribe: On Homecoming and Belonging*, Sebastian Younger compares modern society to tribal societies and evaluates the impact of modern culture on our collective well-being. In *Talking to Strangers*, Malcom Gladwell explains how and why we misunderstand strangers (those who are outside our tribe). It includes a provocative analysis of judges making bail decisions. In *Moral Tribes*, Joshua Greene explores how we make moral decisions and the effects resulting from whether we view a person as inside our tribe or outside our tribe. I highly recommend all three books, as their insights can advance our understanding of juries, judges, opposing counsel, and ourselves.

The OACDL is a tribe. We work cooperatively to improve our effectiveness as criminal defense attorneys. Working together with a common goal helps us feel competent at what we do, feel authentic, and feel connected to others. Doing so also encourages the integrity of our legal system and ultimately benefits everyone in our larger tribe who is protected by that system. Our mission is "to instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities". We carry out that mission together: attorneys helping attorneys.

One benefit of belonging to a tribe is learning from the experience of others. There is no need to re-invent the wheel or a motion to suppress evidence from a traffic stop. We regularly learn from each other informally, we periodically learn from each other at CLE seminars, and we also learn from each other in publications like this edition of the *Vindicator*. This edition has some instructive articles on relevant topics, including developments from the Ohio Supreme Court's bail reform task force and the delicate intersection of criminal law and immigration law.

Since the last edition of the *Vindicator*, there have been at least three visible developments in our tribe. First, we formed an ad-hoc committee on appointed counsel pay which is now providing members with resources to seek increased pay rates from their county commissioners. If you would like to champion increased rates in your county, feel free to email me directly (shawn@dominylaw.com). Second, the new website is now populated with useful content, including weekly legislative reports, weekly analyses of recent appellate cases, and weekly summaries of criminal justice news. Third, we have investigated live-streaming and on-demand methods of providing CLE courses, and we hope to have those options available in the second half of 2020.

In addition to the visible developments in our tribe, there have been some less visible developments. Much of the work of our organization is done in committees, and the committees are comprised of volunteer attorneys distributed throughout the state rather than a centralized paid staff. That arrangement, over time, creates challenges in uniformity of operation processes. We have worked to increase the organization, standardization, and efficiency of the committees. Those efforts will improve committee performance and encourage organizational continuity.

The continuity of our organization is important. The work of criminal defense lawyers is difficult and not expected to get easier, so it is crucial for practitioners to be part a tribe of like-minded colleagues working cooperatively toward the same goals. Therefore, it is critical to the defense bar to maintain the vitality of the OACDL.

The future vitality of our organization is promising. My successor, Meredith O'Brien, is prepared, qualified, and excited to lead the organization. With her talent, character, and enthusiasm, our tribe will thrive.

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LETTER FROM THE PRESIDENT-ELECT

MEREDITH O'BRIEN

President-Elect, OACDL

"A nation's greatness is measured by how it treats its weakest members." – Mahatma Ghandi.

The message I take from health officials as I draft motions to continue "non-essential" hearings from home every day is really a warning: this is just the beginning of COVID-19 in Ohio; if we do not act promptly and correctly, we can expect the unimaginable; and, the *health* and *safety* of our society is in our extremely sanitized hands if we just practice *social distancing*.

However, if that's true (and I believe it is), I can't imagine it's so easy to protect yourself by socially distancing when you are incarcerated. And to that degree, social distancing is a privilege.

I have the liberty to keep myself and my loved ones safe. I don't have to interact with large groups of people, in fact, I don't even have to leave the house if I don't want to, thanks to DoorDash. But, I'm not currently charged with a crime under pre-trial release conditions, or, on probation with compliance orders. COVID-19 came on us fast, but we can adjust the reigns appropriately as the epidemic requires a calibration check on the scale used to weigh public safety interests against the interests of individuals charged with criminal offenses.

I respectfully move all of us to creatively test the current convention of pre-trial incarceration and community-based bond conditions. The proposed challenge is based, if nothing else, on grounds of common sense, mercy, and humanity. The wake of COVID-19 creates a large class of individuals who are wholly unable to protect themselves by virtue of the loss or limits on personal liberty. Criminal Rule 46, ORC 2929.11, and ORC 2929.21 have started a support group to deal with their respective concerns, anxiety, and fears. They told me.

Currently, there are approximately 18,000 individuals working in Ohio's correctional institutions, including staff, correctional officers, and parole officers in addition to the approximate 50,000 individuals currently serving sentences of incarceration. In 2019, DRC reported approximately 9,000 incarcerated persons in prison with chronic cardiac conditions, approximately 2,700 with asthma, and about 1,000 with COPD. An estimated additional 19,000 individuals are currently incarcerated in local jails. I could not find statistical data relative to medical issues for individuals incarcerated in local jails.

As of March 26th, 2020, DRC suspended inmate visitation; suspended volunteer opportunities; limited facility access to mission critical contractors; implemented health screenings for staff, contractors, and attorneys; limited inmate workers to state grounds; limited inmate transfers to reception, medical, and security; and, limited in-service trainings. Judicial leaders in Cuyahoga County in Hamilton County conducted special hearings and issued orders releasing individuals charged with low-level, non-violent crimes from local jails.

We can do more.

The Ohio Association of Criminal Defense Lawyers has called on Ohio government officials to meet this extraordinary time with extraordinary measures. Individuals charged with misdemeanor offenses as well as children, and those charged with non-violent felonies should be released from pre-trial incarceration and/or not subject to confinement upon the issuance of a complaint or indictment. Pre-trial incarceration such as this creates risk for too many individuals. This is not a time to rely on convention; it is a time for compassion; for sensibility; and, for structured altruism. No procedural precedent should trump basic humanity right now – particularly within a society where human rights reign supreme by declaration.

The issuance of arrest warrants for individuals who fail to appear at court during the COVID-19 state of emergency is contrary to principles of fundamental fairness and basic societal dignity. The sustained incarceration of medically fragile individuals, children, and those charged with misdemeanors and non-violent offenses, is devoid of basic decency and contrary to common sense. The unceasing imposition of jail and prison sanctions on individuals, without a finding by clear and convincing evidence that community control sanctions would create a substantial risk of harm to the public, is an impediment to our united effort to promote health and wellness, and, is contrary to the health and safety of *all* Ohioans.

OACDL encourages Ohio judicial leaders to offer extensions on court-ordered classes and/or treatment deadlines so individuals on community control do not have to risk their health, or the health of others, out of fear of the loss of liberty. We encourage telephonic probation and pre-trial services, to limit unnecessary COVID-19 exposure. We encourage courts to postpone probation violation hearings when probable cause for the violation is not based on a new criminal charge, so the health and safety interests of other incarcerated individuals is not outweighed by a desire, however reasonable, to reduce a docket. OACDL encourages the issuance of summons over arrest so individuals, merely accused of a crime, enjoy the privilege of protecting themselves and their loved ones.

Health officials around the world warn: if we do not adjust to the extraordinary contagious reality of COVID-19, we should expect to see its wrath. A wrath of mass sickness; of collateral pain; and, apparently of astonishing death. As a society, we cannot be satisfied when our conventional and convenient construct fails to protect individuals who cannot protect themselves. With all due respect to the already tremendous burden courts have in weighing societal interests against the rights of the accused, the COVID-19 epidemic, by all accounts, has earned its name in relevant analysis.

COVID-19 demands a creative and fast development to bond factor analysis and principles of sentencing. Which side of history do you want to be on? During a time of global crisis and state emergency, I choose the side where *everyone* is treated as if actually human and therefore deserving of health, safety, fairness, and humanity – in both right and in privilege.

Special thanks to Shawn Dominy and Kimberly Kendall Corral

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DIRECTOR'S DIALOGUE

SUSAN CARR
EXECUTIVE DIRECTOR, OACDL

Welcome to 2020!
The OACDL is on high energy. The Supreme Court has asked us to participate in a number of different task forces. Immediate Past President Mike Streng and President Shawn Dominy have contributed quite a bit in the name of OACDL. Thank you both!

Elizabeth Osorio is the OACDL representative to OJAAC. OJAAC is the Ohio Justice Alliance for Community Corrections, of which the OACDL is a trustee organization. Elizabeth is a member of the OJACC Newsletter Committee. They would welcome articles that are broad in scope in the area of criminal law for the quarterly newsletter. Please send articles to Elizabeth.

Puerto Rico – if you missed this trip – you missed a GREAT time. We had a small, but very fun group. The weather was perfect, the beach was gorgeous, the food was fabulous, and oh, the CLE was good too! Thanks to President Shawn Dominy for suggesting our Sunshine Seminar be held on this beautiful island. Be sure to check out the pictures!

CLE Doug Clifford, Brad Wolfe, and Brock Shoenlein have worked hard to bring you the best, most up-to-date information in criminal law at our seminars. Evaluation forms show their hard work has paid off. Many of you have requested speakers or topics – and for that, we thank you.

We are getting some great feedback on the Vindicator. A big THANKS to those of you who filled out the survey. It was very enlightening! The Publications Committee received some really good suggestions. You all have some great ideas! Watch for your suggestions in the near future.

Have you had a chance to check out the new website? Brian Jones and Ken Bailey did some major changes to bring us into 2020. On the website, under the Resources – check out the Brief Bank/Motions Bank. We are always taking new briefs/motions to add! Send us your best and we will share. Charts and Outlines – having trouble finding Judge Weiler's OVI Chart? It's on there! We also have a store with some really cool shirts. The weekly legislative reports from Maggie Ostrowski, and electronic versions of the Vindicator. Along with all of this, you can also register for seminars and change your profile (add your picture!)

If you are on social media, follow OACDL! Brian Jones is a master at putting out information on Facebook, Twitter and Instagram. Feel free to like and share what we post.
Thank you for renewing your membership for 2020. With a motto of "Strength in Numbers", we are getting stronger every year! If you know of anyone who should be a member, contact me and I will get them information. The membership committee has been having mixers with the law school students over the past few years. If you are active with a law school in your area, and are willing to help us set up a mixer, please let me know. It is a nice, low-key social event. We usually have it at a local restaurant, have a few snacks and drinks. We have some OACDL literature and magazines around for the students to take, but no pressure sales. All of the students are invited, but it's usually the 3L's that attend. It's always great conversation and fun!

I also want to give a huge thank you to all the members on our listserv. The support you show each other on there is very touching.

As always, if there is anything I can do for you, please give me a call.

Susan

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2020 SEMINAR SCHEDULE

June 7, 2020
DUI Seminar
Holiday Inn, Independence

July TBA, 2020
New Lawyer Training
ODOT Auditorium, Columbus

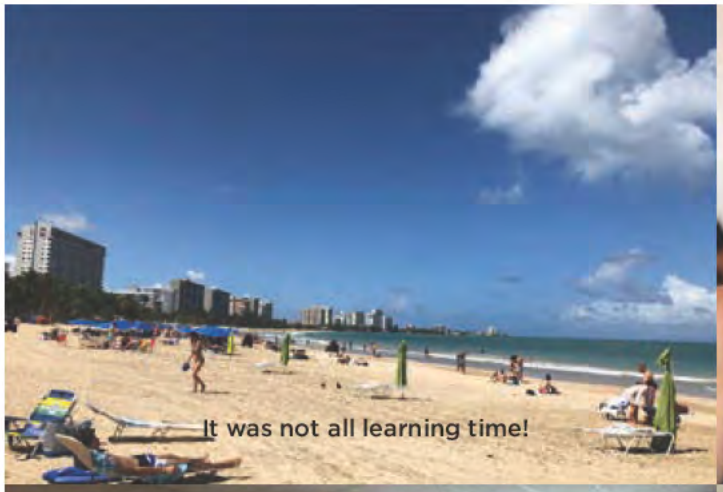
September 18, 2020
Tools for the Criminal Defense Toolbox
University of Toledo Law School, in coordination with the Maumee Valley Criminal Defense Lawyers Association

October 8, 2020
Annual Membership Meeting and Superstar Party
Holiday Inn, Independence

October 9, 2020
Annual Superstar Seminar
Holiday Inn, Independence

November 18-20, 2020
Annual Death Penalty Seminar
Nationwide Conference Center, Columbus

December TBA, 2020
Hot Topics in Criminal Law, with Professional Conduct Hours (also good for New Lawyer Training) Columbus


It was not all learning time!


Beau and Jeanine Cross in Puerto Rico


David Doughten, Meredith O'Brien, Beau Cross, Jon Saia and Blaise Katter


Doug Clifford wore his OACDL finest in Puerto Rico! He found it at the oacdl online store


Shawn and Lara Dominy, Jon Saia and Joel Spitzer at the Rain Forest entrance


Jon Saia and Lara Dominy kicking off the welcome party in Puerto Rico


Jon Saia, Joel Spitzer, Jeanine Cross, Beau Cross, David Doughten, Lara Dominy, Blaise Katter, Doug Clifford


Lunchtime learnin' in Puerto Rico! Beau Cross, Joel Spitzer, Doug Clifford, David Doughten, Brock Schoenlein, Blaise Katter


The rain forest in San Juan

Blaise Katter, Steve Carr


The lunch time view in Puerto Rico

Joe Hada, OACDL President Shawn Dominy, Jon Saia, and Blaise Katter at Old San Juan, Puerto Rico


Rooftop view


the other half of the group learnin'
Jon Saia, Meredith O'Brien, Chris Baer, Shawn Dominy, Lara Dominy, Joe Hada, Beau Cross


Some of the architechure in Old San Juan, Puerto Rico

PUBLIC POLICY COMMITTEE UPDATE

BLAISE KATTER
PUBLIC POLICY COMMITTEE CHAIR, OACDL

In an ever-changing world, the OACDL is at the forefront of the action, helping to make sure that our voices continue to be heard at all levels of government. We have been hard at work doing our best to address, communicate, and alleviate our member's concerns as we all adapt to this new (and hopefully temporary) public-health reality.

While our State and local courts continue to react to the current crisis, the OACDL has been busy behind the scenes. From communication with the Governor's office to urgent work with the General Assembly, below is a summary of the work we have been doing on your behalf.

• Communicating with the Executive Branch to ensure that the Governor is aware of the crucial and essential work that each of us continues to do to maintain the critical rights of the Accused during this crisis. Check out the OACDL letter to Governor DeWine on our website!

• Ensuring the General Assembly does not overlook its duty to preserve and protect the rights of the criminally accused during this epidemic, especially our incarcerated clients for whom speedy trial is essential. OACDL intervened early in the negotiations on legislatively tolling speedy trial to ensure that our priorities were heard and considered.

• Monitoring changes to Court operations and practices, again to ensure that no shortcuts are taken to limit important constitutional rights for our clients. See the OACDL press release on our website!

• Taking every opportunity to ensure that our priorities and concerns are not lost amid the cacophony of noise during these trying times, so that we remain just as essential as the Framers intended when they drafted the Sixth Amendment.

Rest assured we have not forgotten or overlooked our other long-term goals, such as bringing much-needed changes to our drug laws and continuing the fight against bills that would unduly expand criminal law or add unnecessary and unwarranted penalties for citizens accused of a crime. Together, we can be a powerful voice for our clients, thanks to the collective experience and wisdom of our membership.

Friends, during this difficult time in our lives and law practices, our actions on behalf of our clients carry with them a special significance. In times of public crisis, the Sixth Amendment (and indeed all constitutional provisions) simply carry more weight, especially in the face of efforts to limit or weaken them. Collectively, our work matters now as much as ever, and we will continue to unabashedly stand up for our membership and our clients during these trying times. Thank you for being on the front lines of this fight – I appreciate all the work each of you are doing to advance the cause of justice!

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A KIND WARRIOR
Experience at the Trial Lawyers College

Brian Jones

I. HATE. HER. She's the physical manifestation of my deepest frustration, annoyance, and disgust in humanity. She blames those around her for the problems in her life. She's a liar. She's entitled. She's fake—wearing a cloak of victimhood to hide her true motivation. Worst of all, She's got police and prosecutors eating out of the palm of her hand. She's the accuser in my rape case and I have the honor of defending my client against her false accusations and my sword is cross examination.

There was a time when I'd line up all the inconsistencies, the biases, the character attacks on her vain and vapid existence; I'd bring the receipts; prior statements; time-stamped video and audio recordings; and, every scrap of evidence needed to gut her credibility like a fish.

However, at Gerry Spence's Trial Lawyers College, ("The Ranch"), there's an arch spanning the road in and out of Thunderhead Ranch. On the way in, the sign hanging from the arch announces the name of the place you're arriving, "Trial Lawyers College." On the back side of that sign is a reminder of the insight you gain at the ranch, "It all begins with you."

Trial Lawyers College is not a tear 'em down to build 'em up program. It's a mirror. I use a mirror every day. When I stand in front of a mirror, it's most often for a superficial purpose: trimming my beard, combing my hair, straightening my tie. I struggle standing in front of that mirror and seeing into the person looking back at me. Not looking at the reflection; contemplating what that person's purpose, ethic, strengths, and weaknesses are. When you're stuck on a ranch in the backcountry of Wyoming for three weeks with no cell service, no wi-fi, and no television, it's hard to avoid soul-searching.

Every human has issues. Even lawyers. Self-doubt. Excessive ego. Prejudice. Despite the outward projection that we, as trial lawyers, set those issues aside when we analyze a case, do we really? Our issues are not a necklace that can be put into a jewelry box when the occasion calls for subtlety. Our issues are lenses through which every interaction, every thought, every statement is filtered. Ignoring the issues doesn't make them go away; it only leads to projection, misunderstanding, and distrust. The mirror of the Trial Lawyers College stands ready to allow each attorney who attends and participates the opportunity to peer into themselves; look back into history, identify issues honestly, and, sometimes, heal from the harm that spawned the issues in the first place. It all begins with you.

The Trial Lawyers College sends a packet of required readings to all and instructs us to bring a case with us to the ranch. The instructions tell us to bring a case they feel confident will go to trial, to have discovery and investigation largely complete, and to understand the case to a level that trial preparation can occur during the three weeks on the ranch.

I took Wes's case to the ranch. Wes was accused of rape, kidnapping, and felonious assault. I didn't know exactly what to expect at the ranch, but I felt I could use the three weeks to prepare the case even if the methods weren't applicable. The case work involved each phase of trial from voir dire to closing arguments. The days we worked on cross examination; I knew which witness I would work on: Her.

I ran my cross examination. The attorney playing her did well. She

had prepared with her behavior, her written statements, and background information about the case. I sliced and diced her with her prior inconsistent statements. I did everything but get her to admit she lied outright. When it was over, I turned triumphantly to the jury and instructor, grinning like a sloth in a tree. However, over the next fifteen minutes I learned another point of view. I came off excessively aggressive, my jury didn't like me, and even worse that I made her look like even more the victim. Even worse, I learned that her story seemed believable; even though the jurors knew she was lying about each point I had impeached her on. They sympathized with her even though they fully believed my allegations of fabrication and bias.

My instructor for this session, Bill, who was a retired marine. Bill did not tolerate fooling around and had no time for attorney-students who didn't want to work the system.[1] Bill took me aside and gave the class a break. As I stood there, staring at the floor, I don't know what I expected. No one had berated me at the ranch. Criticism had always been given constructively, with a clear example, and with reason to support the proposed modification.

I know my jury was genuine. No one was giving me a hard time to cut me down, ostracize me, or push a hidden agenda, so I knew the criticism from the jury needed to be accepted and changes made. With a hand on my shoulder, Bill, the most stoic person I'd seen at the ranch for certain and possibly the most stoic man I've never met, willed me to meet his gaze. He reached into my soul and brought out pain and fear that I hadn't known for decades. Bill knew I had been attacked and victimized by a woman similar to her. Bill knew I relished the opportunity to exact justice from her for the pain I'd endured so long ago. Bill knew all this without me ever saying a word.

We worked through my pain and previous experience. That's the real foundation and gift of Trial Lawyers College; because "It All Begins With You" isn't a slogan, it's the life of a TLC trained lawyer. When I came out the other side of that adventure, I had a perspective on the witness I never would have known without "doing the work."

"Do the work" is the slogan, the mantra if you will, at the ranch. "The Work," isn't reading transcripts and witness statements. It's not going to the scene and writing motions. "The Work," is: taking each witness; each moment; each story of your case; and, accepting it. Working it in by accepting your personal biases, fears, and issues with it, and coming to understand the universal human emotions that lay under the surface of each piece of the puzzle that is the trial.

After the break, I crossed her in that classroom again. This time, I was kind; empathetic; and, I told her I understood why she felt my client betrayed her in the end of their relationship. I told her I understood how embarrassed she felt when, like The Prodigal Son, she slunk back to her parents when their relationship ended for shelter and support. I told her I understood the guilt and shame she felt in that moment. How I understood why she'd accuse Wes of something he didn't do; because the reality, that she went back to him after all the pain he had caused her, was too much for her to bear.

At trial, she had already been told by the prosecutor that I was tenacious. In her preparation, she had been told I'd attack her on her inconsistencies; I'd shred her on her biases; I'd grandstand; and, revel in her ruination.

That day, I rose to meet her in the courtroom, she glared at me. She was ready for battle. She was ready to beat me. I started asking about the pain Wes had caused her; the confused look she gave me was second only to the confused looks she shot at the prosecutor's table. When I empathized with her about having overbearing parents; she agreed with me. She went on to admit her parents were difficult, that they had always been difficult, and, her parents had always hated Wes for a myriad of reasons. Finally, she admitted when she got caught spending time with Wes after their separation, she felt guilty.

For nearly an hour, each reason she had to lie about the rape was connected to something I could understand, empathize with, and ultimately accept. My voice was never raised. My tone never accusatory, only understanding. The jury understood why she lied. The jury understood that she felt like she had no choice. Her embarrassment of going back to Wes after all their turmoil was too much to bear. Her lie was too easy. The consequences of that lie too remote. The jury agreed and freed my client two days later.

The lessons I learned at the Ranch reach farther than the courtroom. I use my TLC training in my practice

every day with prosecutors, judges, clients, and accusers. More importantly, I use it with my parents, my wife, and my children. Attending the the Ranch made me a better person. I'm happier than I have ever been in my life. I accept and understand those at which I would, historically, rage. I teach the lessons I learned at the Ranch to my children through example and explicit discussion and I believe they are better people for it.

As defense lawyers, we are better as a community. We are stronger when we support one another. The work we do is hard, and we put our emotions, our strength, and our health on the line for our clients. We are not alone in this work. It's hard to make friends as an adult. It's even harder to make deep connections with other adults. There are people from my class that I call my best friends. There are people from my class who I can call at any time knowing they will pick up the phone, listen, and be the mirror I need in that moment. I am most grateful when I am able to be that mirror for one of my classmates.

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1. To be clear, Trial Lawyers College teaches the McCarthy-style cross. I am partial to the Posner-Dodd method. Regardless, a one fact at a time, yes-focused questioning style is employed. The "system" here is using emotion as the focal point of a story rich with detail.

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HOW TO AVOID NEGATIVE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

AMY BITTNER

ACCURATELY ADVISING YOUR FOREIGN NATIONAL CLIENT

As an immigration attorney licensed in the state of Ohio, I am regularly hired by foreign national clients for post-conviction relief, after they have entered a guilty plea to an offense when they were unaware of the severity adverse consequences the plea would have on their immigration status in the U.S. The ease of obtaining post-conviction relief throughout Ohio can vary widely; depending upon the level of offense involved; how much time has passed; and, the degree to which my client was denied due process by the Court or effective counsel by their criminal defense attorney.

The labyrinthine nature of the Immigration and Nationality Act (8 U.S.C. §1101 et seq.) is such that it is not a simple matter for trial counsel to accurately advise non-United States citizen criminal defendants of the immigration consequences of their criminal cases. However, since 2010, when the Supreme Court decided *Padilla v. Kentucky*, that is exactly the task that you are required to do. This is in order to render to effective assistance of counsel, as guaranteed by the Sixth Amendment of the Constitution of the United States. Through this article, I hope to encounter fewer future clients in need of post-condition relief by attempting to elucidate which types of criminal convictions are problematic for which types of non-United States citizen criminal defendants.

The necessary point of departure when figuring out how to correctly advise your foreign national defendant is determining what type of immigration status (if any!) your client has in the United States. This seems like it should be an easy determination. However, sometimes your clients themselves can misstate their status or be unaware of what their true immigration status is in the United States. I've had many cases where the individual believed they were a United States citizen, only to have a rude awakening by a visit from an ICE agent while they were serving prison time. The defendant's citizenship status should be cleared up early on during the criminal case, not at the post-conviction stage.

First, determine whether or not your client is a United States citizen. I recommend asking all clients where they were born. If they were born in the United States, then they have birthright citizenship. If they were not born in the United States, then obviously you must dig deeper. If your client was not born in this country but states that they are a United States citizen, you will be doing your clients a big favor to ask them to show you their United States citizen passport or certificate of naturalization or citizenship. If your clients don't have proof of United States citizenship to show you, they aren't going to have proof of it to show ICE either, and ICE enforcement has skyrocketed since the January 25, 2017, executive order, "Enhancing Public Safety in the Interior of the United States." This executive order cancelled out the prior administration's directives to DHS to direct its limited resources toward dangerous criminals and gives ICE wide authority to arrest and initiate removal proceedings against foreign nationals previously exempt from ICE enforcement.

If your clients are not United States citizens, you have to figure out what their immigration status is in this country in order to properly advise them. There are many different possible immigration statuses in the United States. If your client is not U.S citizens or legal permanent resident, you can ask to see their work permit to help determine their status. I will go through the most common immigration statuses that you may encounter and describe potentially adverse immigration consequences for them that

could stem from a criminal charge. Please keep in mind that sometimes this determination is extremely complicated and this article can only scratch the surface of this complex subject.

The point of this article is to advise you of potential immigration pitfalls for your foreign national criminal defendant so that if you are not able to properly advise them, you can seek an accurate particularized opinion from an attorney who specializes in immigration law. For court-appointed work, the fee of an expert opinion on the immigration consequences of criminal convictions should be paid by the Court.

LEGAL PERMANENT RESIDENTS

The next best thing to being a United States citizen is being a legal permanent resident. A legal permanent resident is a green card holder in the United States. Green cards are not green anymore but are a photo identification that says, "Permanent Resident" across the top. Legal permanent residents will know that they are legal permanent residents and will be able to show you their card of legal permanent residency. However, the status of legal permanent residents is not permanent, as they are still subject to being put in removal proceedings and being deported from the United States if they are convicted of certain crimes.

The criminal removal grounds for legal permanent residents are found at 8 U.S.C. §1228(a)(2). An OVI conviction will not cause a legal permanent resident to be deported from the United States, but it could cause denial of naturalization if accompanied by an additional negative factor. By and large, legal permanent residents are removable from the United States if convicted of crimes involving moral turpitude, aggravated felonies, high speed flight, failure to register as a sex offender, controlled substance violations (other than a one-time exception for possession of 30 grams or less of marijuana for one's own use), firearm offenses, espionage, sabotage, treason and sedition, violating a protection order, and domestic violence. This list of removable criminal convictions seems fairly straightforward. However, the situation is complicated because there must be a determination of whether an offense is a crime involving moral turpitude and/or an aggravated felony.

There is no statutory definition of what a crime involving moral turpitude is. This term is defined by case law and thus, varies across jurisdictions. As immigration enforcement is purely a federal affair, the various circuit court determinations of this issue control. An offense that may be a crime involving moral turpitude if committed in Texas may not be a crime involving moral turpitude if committed in California. However, the precedential decisions of the Board of Immigration Appeals are binding if there is not circuit court caselaw to the contrary.

Whether or not an offense constitutes a crime involving moral turpitude does not depend on the facts and circumstances of the individual case, but rather the "inherent nature of the crime as defined by statute and interpreted by the courts as limited and described by the record of conviction." *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Violating statutes that "merely license or regulate and impose criminal liability without regard to evil intent do not involve moral turpitude." *Matter of G-*, 7 I&N Dec. 114, 118 (BIA 1956). To be a crime involving moral turpitude, the offense must be per se morally reprehensible and intrinsically wrong, *malum in se*. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). The level of the offense and the sentence imposed are irrelevant to the determination of whether an offense is a crime involving moral turpitude. *Id.*

What does this Board of Immigration Appeals case law mean when you are trying to figure out whether an offense is a crime involving moral turpitude? Basically, it means that it doesn't matter at all what your client actually did. If you are trying to avoid having your client be convicted of a crime involving moral turpitude, you must read and analyze the criminal statute because the words of the statute are going to determine whether or not the offense is considered a crime involving moral turpitude.

First, look for the *mens rea*. In order to be a crime involving moral turpitude, there must be "some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n. 1 & 705 n.5 (AG 2008), *rev'd on other grounds, Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014). Generally speaking, crimes involving theft, fraud, harming others unless done negligently, and obstruction or other interference with law enforcement have been held to be crimes involving moral turpitude. If the statute of offense is divisible, the modified-categorical approach is applied.

The aggravated felony ground of removability for legal permanent residents is defined by statute, to some extent. 8 U.S.C. §1101(a)(43) contains an A to U list of offenses that are aggravated felonies. Some of the included aggravated felonies explicitly refer to specific federal offenses and thus require further interpretation, such as "an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom." *8 U.S.C. §1101(a)(43)(H).*

However, other provisions are more general, such as "murder, rape, or sexual abuse of a minor," which have spawned decades of case law concerning their application to a variety of state law offenses. *§1101(a)(43)(A)*. Then there is *§1101(a)(43)(F)*: "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year." As the phrase "crime of violence" is the same as in the Federal Sentencing Guidelines, there is a plethora of ever-evolving case law concerning the proper analysis of whether or not an offense is a crime of violence, and sometimes the modified categorical approach must also be employed.

EXTREMELY IMPORTANT GENERALLY APPLICABLE DEFINTIONS

The Immigration and Nationality Act applies some traditional concepts of criminal law to foreign nationals in ways completely contrary to their definitions and applications in criminal court. For example, if your client is not a United States citizen, generally a conviction for an attempt counts the same as the underlying conviction for immigration purposes. This holds true for aggravated felonies, as well as controlled substances offenses for both removability and inadmissibility purposes. *8 U.S.C. §§ 1101(a)(43)(U), 1181(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).* You are not doing your foreign national clients any favors by pleading them to an attempted version of the underlying offense.

Another similarly counterintuitive provision that has been the sinker for many legal permanent residents is the definition of "conviction" found at 8 U.S.C. §1101(a)(48)(A). For immigration purposes, any guilty plea or adjudication of guilt counts as a conviction. Period. This means that even if the criminal case is later dismissed in its entirety, the non-United States citizen criminal defendant still has a "conviction" for immigration purposes, as long as a guilty plea was entered prior to the dismissal. This occurs very frequently in low-level drug cases whereby the Court accepts the guilty plea for intervention in lieu of conviction purposes. It is still a conviction for immigration purposes.

The definition of "sentence" found at 8 U.S.C. §1101(a)(48)(B) also applies to the disfavor of your non-United States criminal defendant client. All of the sentence, whether suspended or not, counts as a sentence to jail or prison, when applying the immigration law. This is relevant in various provisions of the Immigration and Nationality Act, where a foreign national may be deportable or inadmissible as a consequence of receiving a sentence for a particular length.

DACA RECIPIENTS

If your non-United States citizen client has DACA (Deferred Action for Childhood Arrivals), they will have a work permit which indicates category "c33." DACA recipients will lose their status in the United States and be subject to deportation if they are convicted of an OVI; a felony punishable by a term exceeding one year; domestic violence; sex abuse or exploitation; burglary; firearms offenses; drug distributing or trafficking; any offense with a sentence of more than 90 days; or three or more misdemeanors that are not traffic offenses. Traffic offenses in general do not prejudice DACA recipients unless they are drug or alcohol related. These DACA guidelines are not statutory or regulatory but were created by executive order, and the future of this program depends upon the forthcoming decision of the Supreme Court of the United States deciding whether the President can lawfully cancel the program also by executive order.

It is extremely common that a former DACA recipient hires me for post-conviction relief upon losing his DACA status due to pleading to an OVI, when his defense counsel never warned him that an OVI plea would cause him to lose his status. DACA recipients are the immigrant group for which there is the most sympathy in the United States, as they are "Dreamers," who were brought here as children. It is not too difficult for the prosecution and Court to agree to treat DACA recipients with a slight bit of mercy, on his first-time OVI charge, so that the young person is not deported to a country that he cannot even remember. When I'm defending a DACA recipient on an OVI charge, I prefer the lesser offense of reckless operation to physical control, as there is no involvement of alcohol or drugs with reckless operation.

TEMPORARY PROTECTED STATUS

A significant number of foreign nationals in Ohio have Temporary Protected Status, or TPS. TPS is presently extended to qualifying foreign nationals from El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. Work permits issued pursuant to TPS are category a12 or c19. TPS status is extremely restrictive. A TPS holder will lose their status and be subject to deportation for conviction of a felony or just two or more misdemeanors, and for TPS traffic violations do count as convictions, unless they are unclassified misdemeanors.

STUDENT AND VISITOR VISAS

For F-1 student visa holders (the F-1 visa is contained in their foreign passport), any OVI charge or arrest will cause revocation of

their visa. This does not mean that they lose their status nor does it mean that they are placed in deportation proceedings. This does mean that once they do depart the United States, they will be required to re-apply for the student visa so that their subsequent admissibility to the United States can be evaluated. For those with a tourist or visitor visa, they similarly lose their status if they are incarcerated pursuant to a conviction or charged with a crime of violence or a felony.

UNDOCUMENTED FOREIGN NATIONALS

There is no legal definition of the term undocumented. I use it to refer to those who have never held a lawful immigration status in the United States. The restrictive nature of the definition of "inadmissible" of the Immigration and Nationality Act disqualifies millions of foreign nationals from obtaining legal status in the United States, despite their lengthy residency and family ties to this country. The removal statute that applies to undocumented foreign nationals is contained at 8 U.S.C. §1182. Undocumented individuals are subject to removal from the United States as a consequence of being here without authorization. However, certain criminal convictions are likely to trigger the initiation of removal proceedings against the undocumented, or render them ineligible for defenses from removal or inadmissible to the United States. Presently, OVI and DV convictions are extremely likely to cause ICE to detain an undocumented individual, and the Immigration Judge will likely deny them bond for the same reason. Convictions for crimes involving moral turpitude, aggravated felonies, or controlled substance offenses will most likely make them ineligible to apply to stay in this country, even if they have United States citizen spouses or minor children, and will probably also render them subject to mandatory detention by ICE pursuant to 8 U.S.C. §1226(c).

REFUGEES AND ASYLUM APPLICANTS

Refugees are subject to the same grounds of deportability as legal permanent residents, described above. Refugees will have a white I-94 card demonstrating their refugee status and may have a work permit with category a3 or a4. Asylum applicants are different than refugees because their status is still pending, and like the undocumented, they are subject to potential ICE arrest, detention, and initiation of removal proceedings for the same reasons. Asylum applicants' work permits will indicate category c8.

NATURALIZATION

To be eligible to transition from a legal permanent resident to a naturalized United States citizen, one must demonstrate having good moral character over a period of several years. There is no statutory definition of what constitutes good moral character. However, the term is defined in the negative at 8 U.S.C. §1101(f). This provision makes sure to inform us that the list of activities constituting a lack of good moral character is not exhaustive. As previously mentioned, one OVI does not equal a lack of good moral character. However, an OVI in the statutory period combined with another offense may. The determination of whether a naturalization applicant possesses good moral character is subjective. A conviction for a crime involving moral turpitude may disqualify the applicant or two or more non-regulatory offenses.

PARTING ADVICE

I want to leave you with some general suggestions regarding crafting a mutually agreeable plea bargain for your foreign national criminal defendant. Often times if the prosecutor is informed of the draconian immigration consequences that will befall your foreign national client, she will be willing to craft a plea that will avoid removal for your client while still rendering a fair punishment. For foreign national defendants, the wording of the statute controls so you may be able to persuade the prosecutor to offer a more benign offense by increasing the severity of the punishment. Negligence crimes are always better. Drug convictions or pleas are always very bad, unless it is thirty grams or less of marijuana indicated in the record of conviction. A state law misdemeanor offense may be an aggravated felony under the Immigration and Nationality Act so do not assume that misdemeanors won't cause problems. Pleading to an attempt is the same as pleading to the original charge, and do not forget that any admissions of guilt on the record count as convictions, even if the offense is later completely dismissed. Finally, when in doubt as to whether the foreign national criminal defendant may suffer adverse immigration consequences as a result of their criminal case, consult with an expert.

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OACDL CLE COMMITTEE

Provides Education Well Beyond The "Minimum" to Maintain a Thriving Criminal Defense Practice

T. DOUGLAS CLIFFORD & BRAD WOLFE
CLE COMMITTEE CO-CHAIRS

Foreword by: Doug Clifford

As I begin to write my part of this article, I am approximately 300 yards from the beach in San Juan, Puerto Rico for the 2020 annual OACDL Sunshine Seminar. Like many Members who attend and/or present at OACDL seminars, it's not about fulfilling the mandatory minimum of 12 hours every two years of CLEs. As OACDL Members, and criminal defense lawyers in Ohio, we simply want to be the best lawyers in our chosen field. In order to do that we must have the most amount of up-to-date knowledge on our complex area of legal practice. The following article discusses the events we've held over the last year and what to expect for 2020. It is our goal to put on the best seminars possible to educate Ohio lawyers on Ohio criminal defense topics.

Doug

Michael Streng, immediate past-President of the OACDL, put together an ambitious lineup of seminars in 2019. Highlights of the 2019 CLE year include the January 2019 Current Issues in Criminal Law seminar in which the OACDL, in coordination with the Greater Cincinnati Criminal Defense Lawyers Association, the Hamilton County Public Defender's Office and The College of Law Criminal Association, and, Friends to the Indigent, put on a seminar that educated Ohio lawyers on timely topics such as social media evidence, dealing with coroner's offices, and DNA Identification, amongst others.

Other highlights of 2019 include a seminar held at the Dayton Art Institute dealing entirely with issues related to defending drug cases. Topics included forfeiture, RICO charges, cell phone data mining, and updates on hemp legalization and reclassification of personal use of other substances.

Two seminar topics stand out as new areas for CLEs. Perhaps one of the most unique additions to the OACDL CLE lineup was the new topic area of "How to Plan for Retirement." Thanks to the inspiration and hard work of our treasurer, Joe Humpolick, issues related to financial and ethical considerations of closing or slowing down your practice were addressed to our membership. The OACDL began offering New Lawyer Training for the "Hot Topics Seminar" held in December 2019. A one-day seminar covered ethics hours for attorneys who have already been in practice, NLT hours for newer lawyers, and also up-and-coming substantive issues like the use of K-9's in search and seizure cases, specialized dockets, and updates in firearms law.

All of these seminars were *in addition* to the spectacular lineup of elite seminars that OACDL Members have come to rely on to craft their excellence in their practice. The annual "Advanced OVI Seminar" held in March every year coordinated by Tim Huey and Dan Sabol, who bring in the best OVI lawyers from all over the country and Ohio, the Annual Death Penalty Seminar, coordinated by Jeff Gamso and David Stebbins, the Super Stars Seminar, which features leaders in criminal trial law from across the country, and the one-day OVI Seminar in June coordinated by Meredith O'Brien, our President-Elect, with Ohio's best OVI defense lawyers to educate new, intermediate, and experienced OVI practitioners.

Our current President, Shawn Dominy, has put together an equally ambitious seminar sched-

ule, which began with the Rock Stars of Criminal Defense Seminar at the Grange Audubon Center in Columbus. This seminar featured numerous "rock star" attorneys, and their corresponding rock n' roll songs, as they presented on white collar defense, sex-based cases, juvenile matters, appellate issues, legislative developments, voir dire tactics, and winning mindsets.

Along with the various, annual seminars listed above, we are looking forward to a Senior Seminar in April at the Ohio Supreme Court, New Lawyer Training in July at the Ohio Department of Transportation, a Drug and Evidence Seminar in August, the Tool Box Seminar in September at the University of Toledo in coordination with the Maumee Valley Criminal Defense Lawyers Association, and, the Hot Topics in Criminal Law Seminar with Professional Conduct Hours in December.

New in 2020, and compliments of our President, is the use of a Catchbox – a throwable, foam microphone – to enhance audience engagement during presentations. This year, we are also working with the Technology Committee to develop potential "live streams" of a select number of seminars.

Afterword by: Brad Wolfe

As I conclude this article, I am approximately 1,500 yards from the shores of Lake Erie. It is 16 degrees Fahrenheit in Cleveland, but hopefully Doug and the other fortunate Members in San Juan will bring home some warmth. Regardless of the weather, the CLE Committee is encouraged by the number of attendees at recent events and we are optimistic for continued, strong turnouts in 2020. Your feedback is highly valued as future seminars are scheduled. As such, please do not hesitate to contact Doug (tdougattorney@yahoo.com) or me (bsw@fanlegal.com) with your suggestions or comments.

Brad

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T. Douglas Clifford is in private practice focusing on criminal and OVI/DUI defense. Doug is an Ohio Association of Criminal Defense Lawyers board member and CLE co-chair; founding member of the DUI Defense Lawyers Association; National College for DUI Defense member; associate member of the American Academy of Forensic Sciences and member of the American Chemical Society – Chemistry and Law Division. He has achieved ACS-CHAL's Forensic Lawyer-Scientist designation. And he has been trained in the NHTSA Standardized Field Sobriety Testing protocol. Doug received his JD from Case Western Law School in 2001.

Brad Wolfe is an associate at Friedman & Nemecek, L.L.C., which is a Cleveland-based criminal defense law firm. His practice is focused on criminal, cyber, and white-collar matters. He currently serves as a co-chair of the Ohio Association of Criminal Defense Lawyer's CLE Committee, and, the Programming Director of the Cleveland Metropolitan Bar Association's Cyber Security, Data Privacy & Emerging Technologies Section. Brad was recently selected by The National Trial Lawyers as a member of the "Top 40 Under 40" for Criminal Defense in Ohio.

Russ Bensing selected as OACDL's 2019 Lawyer of the Year

KATE PRUCHNICKI

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
LAWYER of the YEAR

Since 2011, OACDL's Lawyer of the Year Award has been given annually to an OACDL member in good standing who best lives up to the ideals and values of the association – leadership, advocacy, and character in criminal law and defense.

Each year's recipient is selected by an OACDL special awards committee based upon nominations submitted by the organization's membership – it is a yearly award given by you, to one of you.

The OACDL is proud to announce the recipient of its ninth annual Lawyer of the Year Award, which was presented at the Annual Superstar Seminar held in October of 2019 in Columbus, Ohio: lifelong criminal defense attorney and Chair of the OACDL's Amicus Committee, Russ Bensing.

Bensing is the founder of the Law Office of Russell Bensing in Cleveland, Ohio, where he has practiced criminal defense throughout his entire career – about 45 years. "Being a criminal defense lawyer is all I've ever really wanted to do," Bensing said.

Though he enjoys criminal trial practice, Bensing describes his appellate victories as the highlight(s) of his legal career. "Being able to point to cases you've won in the Supreme Court or the district court of appeals where you've managed to change the law – that's about as good as it gets," he said.

Bensing's most memorable case of 2019 involved a 66-year-old defendant charged with six counts of rape and one count of tampering with evidence. At trial, Bensing's client was acquitted of all rape counts but convicted of tampering, and (though he was in jail for nine months while awaiting trial) he was sentenced to three additional months in prison – on appeal, however, the conviction was reversed based on a finding of insufficient evidence.

Despite the difficulties inherent to a criminal defense practice, Bensing appreciates that every day is different from the last.

"I get up every morning knowing that something is going to happen, and maybe it's what I expected to happen and maybe it's not," Bensing said. "But [I know] it's going to be different from what happened the day before."

As for members of the Bar considering a practice in criminal defense, Bensing offers three key pieces of advice: first, learn the Rules of Evidence. "If you don't know how to get good evidence in and keep bad evidence out, you're going to lose cases you shouldn't," he advised.

Second, learn how to deal with people. That's what this is all about: dealing with clients, prosecutors, other lawyers, judges, even bailiffs," he said. "The stronger your interpersonal skills, the better you'll do."

And last, be honest and professional in your dealings, said Bensing.

"The main thing you've got is your reputation, and once you get a bad one, there's very little you're going to be able to do with it."

Brian Pierce (posthumously), Don Malarcik, and Joe Gorman selected as recipients of OACDL's 2019 Lifesaver Award

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
LIFESAVER AWARD

KATE PRUCHNICKI

Since 2007, the OACDL's Donald C. Schumacher Lifesaver Award for Excellence in Death Penalty Litigation has been presented annually to publicly recognize outstanding achievements in avoiding the imposition of the death penalty through trial excellence, mitigation investigation/presentation, and appellate/post-conviction litigation. The award recognizes significant achievement for a given year, as well as lifetime achievement in capital litigation.

The OACDL is proud to announce the 2019 recipients of the Lifesaver Award: Brian Pierce (posthumously), Don Malarcik, and Joe Gorman.

On October 25, 2019, well-known and cherished death penalty and defense lawyer Brian Pierce of Akron, Ohio passed away unexpectedly from a brain aneurysm at the age of 51. He was selected as a posthumous recipient of the OACDL's Lifesaver Award for calendar year 2019, as were his lifelong friends and partners in practice: Don Malarcik and Joe Gorman.

In 2001, Pierce, Malarcik, and Gorman founded the Akron law firm of Gorman, Malarcik & Pierce, where they collaborated as partners for nearly 20 years.

Don Malarcik, Joe Gorman, presenter David Stebbins

Malarcik describes capital litigation as the most difficult, but worthwhile, work. He recalled co-counseling a specific case with Pierce back in 2016 – their client had previously served a 13-year prison sentence following a juvenile conviction, and he was charged with aggravated murder shortly after his release. In conducting the mitigation investigation, Malarcik and Pierce discovered a significant history of abuse/neglect and egregious systemic failures – over 40 reports of abuse/neglect made to the Department of Children & Family Services throughout the defendant's childhood, but no history of actual intervention by the agency, Malarcik said.

"I don't think I've ever worked harder on a case," said Malarcik. "But there is no greater calling than trying to convince a jury to spare another human's life."

Pierce was a criminal defense attorney for over 20 years of his life, and he was considered as among the best by the capital litigation community. Throughout his career, Pierce handled over 100 felony jury trials, 11 of them having been death penalty cases that were tried to verdict, Malarcik said. *"Of the total 19 capital cases [Pierce] handled in both state and federal court, 18 defendants*

successfully received life sentences."

The 19th defendant was ultimately sentenced to death, Malarcik explained – but that verdict was later reversed on appeal.

Gorman met Pierce on their first day of law school together at the Akron School of Law in 1994. He describes working with Pierce to be the most rewarding thing he has ever done.

When asked about the case most memorable to him, Gorman recalled a case he co-counseled with Pierce in/around 2015. The same day as the guilty verdict (prior to the mitigation phase), Gorman said he and Pierce "fell into" significant mitigation evidence when a witness with knowledge of the defendant's troubled past reached out to them with new information.

"He worked hard, and quickly," said Gorman. "He used it to save [the client's] life."

Gorman and Malarcik stressed the importance of education and training in the area of death penalty defense. To that end, they both strongly recommended the OACDL's Annual Death Penalty Seminar to any attorney seeking to learn the practice of capital litigation. Malarcik first attended the OACDL's annual seminar in his second year of practice, and he said he continues to attend each year.

Gorman also emphasized the importance (and strength) of the community. *"You have to reach out to the network,"* Gorman said. *"The community of people who do this work are always willing to help."*

Gorman and Malarcik both said they were surprised – and humbled – to learn they had been selected as recipients of the OACDL's Lifesaver Award for calendar year 2019, alongside Pierce. "To receive this award with [Pierce] and [Malarcik] was an absolute honor," Gorman said.

"[Pierce] was my partner for two decades, and my best friend for three," said Malarcik. "I consider him the best trial lawyer of my generation."

The OACDL extends its deepest condolences to the friends, family, and loved ones of Brian Pierce during this most difficult time. We are proud to honor the significant contributions and lifetime achievements of Pierce (posthumously), Malarcik, and Gorman in the areas of trial and appellate/post-conviction excellence, mitigation investigation/presentation, and education in the field of death penalty defense.

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PRETRIAL RELEASE REFORM AND PROPOSED CHANGES TO CRIMINAL RULE 46

MICHAEL J. STRENG & BLAISE KATTER

If a person who is accused of a crime is incarcerated for just three days while waiting for their arraignment, they are thirty-nine percent more likely to be arrested on new criminal activity while on pretrial release than a person who only does one day in jail. Similarly, if a person who is accused of a crime is incarcerated for more than eight days while waiting for their arraignment, they are fifty percent more likely to be arrested on new criminal activity than a person who only does one day in jail. Christopher T. LowenKamp, Ph.D. Marie VanNostrand, Ph.D., and Alexander Holsinger, Ph.D., *The Hidden costs of Pretrial Detention*, (Houston TX: Laura and John Arnold Foundation, 2013), page 3. Additionally, longer pretrial detentions are associated with a likelihood of failing to appear at future hearings. Id. at 4.

This is not surprising. Incarceration before the accused is even convicted of any crime can be a major destabilizing event, leading to the loss of employment, which can then spiral, for some, to becoming homeless, the loss of a mailing address, the loss of a telephone, the loss of transportation, (which, ironically, creates problems for getting to court hearings, especially in rural areas), and the loss of other stability-inducing factors.

Many people accused of criminal offenses have limited financial resources, making cash bonds, even at ten percent, often challenging and difficult to make. Even if made, in some cases, cash bonds can contribute to the loss of housing, utilities, telephone and the other problems highlighted earlier.

The proposed changes to Rule 46 of the Ohio Rules of Criminal Procedure by the Ohio Supreme Court seek to modify Ohio's pretrial release standards, to address the problems cited above in a manner that will improve court appearances as well as reduce recidivism. It does this in several ways. First, the modifications provide a presumption of a summons or a personal recognizance during pretrial release. Second, the modifications provide that if a financial bond is to be made, the court shall make the bond the least costly to the defendant. Third, the modifications provide that if a person is held in jail, they be brought before the court within two business days for the purpose of consideration of bond.

These changes have the apparent intent to treat those charged with criminal offenses in a manner that is consistent with the presumption of innocence, reduce the rates of failing to appear and future recidivism by attempting to create a balanced approach between traditional purposes of bail but also recognizing the need to keep people employed, housed, and with their families.

The largest proposed modification to Criminal Rule 46 is the presumption of a non-financial conditioned release. Because there is a presumption for a non-financial conditioned release, the proposed rule allows the State to file a motion for pretrial detention to review an accused's situation on a case-by-case basis. The OACDL has advocated that this provision should contain more specific guidance as to the content of the state's motion and the procedure. Specifically, the OACDL has suggested that the particularity language from Criminal Rule 47 should govern the motion, so that defense counsel would have specific information with which to focus on during a hearing on the pretrial detention. The OACDL has also advocated that a hearing should be mandatory on such a motion, and that any specific findings be made on the record. Because pretrial detention can have a dramatic impact to the accused, this procedure must be properly limited to ensure only those who are a true danger to the community or a significant flight risk be detained pre-trial; this procedure

must remain the exception, not the rule, going forward.

When a financial bond is necessary given the facts of a particular case, the proposed changes to Rule 46 provide that courts should give consideration to the financial condition that is "least costly" to the defendant. The OACDL has advocated that, in conjunction with considering the least costly financial condition, courts should also consider each defendant's ability to pay when setting a financial condition of pretrial release. If this modification is adopted, defense counsel should be prepared to address factors surrounding a defendant's ability to pay a financial bond and the effect on the defendant and the defendant's family and/or dependents.

The proposed changes to Rule 46 provide various terms that a court may impose on a person while on pretrial release. One of the terms provides that a court can order a defendant to participate in, and complete, an alcohol and drug treatment protocol. While this has previously been a condition that could be imposed, it has been expanded. This provision of Rule 46 appears to work in conjunction with paragraph (F) that provides that "[s]tatements or admissions made by a defendant at the bail proceeding or in the course of compliance with a condition of ball shall not be received as substantive evidence in the trial of the case." The exclusion of possibly incriminating statements obtained during the course of compliance with a term of bond or treatment is a step in the right direction and critically important, given the vast amounts of confidential and potentially incriminating data that can be obtained from programs mandated by bond. However, if this provision is adopted as drafted, defense practitioners should be aware of the amount of potentially incriminating evidence that a court or the State could glean from a defendant's compelled compliance with this term of pretrial release that could potentially be used as potential impeachment evidence at a later hearing.

An additional term of pretrial release, new to Rule 46, is a provision that allows a court to "[r]equire compliance with alternatives to pretrial detention, including but not limited to diversion programs, day reporting or comparable alternative, to ensure the person's appearance at future court proceedings." This additional condition of pretrial release encourages alternative means to ensuring a person's appearance at future hearing and encourages pretrial diversion programs is a welcome addition to the rule in support of diversion opportunities.

In a previous draft of proposed modifications to Criminal Rule 46, the rule provided that a pretrial risk assessment tool could be considered by a court when considering pretrial release options. This created some concern about the type of pretrial risk assessment tool to be implemented, how the tool would be administered, would the tool be discriminatory in some manner, as well as what information would a defendant be required to provide, possibly without representation. It is noteworthy that the most recent version of the proposed does not contain a reference to pretrial risk assessment tools.

The proposed changes to Ohio's Pretrial Release Procedures set forth in Criminal Rule 46 are an important step towards promoting the presumption of innocence and attempting to avoid consequences associated with longer term pretrial incarceration. With these changes, there is hope that Ohio can begin working towards a pretrial release system that helps minimize the negative effects of pretrial detention, such as the potential loss of employment, housing, transportation, communication, in a manner that simultaneously reduces the likelihood of failing to appear for future court appearances and reduces recidivism rates. Although these changes to Criminal Rule 46 will not be a magic wand that completely solves these problems, it is an important step in the right direction.

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SMOKE ON THE WATER
Roadside Testing of THC in Oral Fluid

SHAWN DOMINY & BRYAN HAWKINS

Introduction

Ohio criminal defense attorneys who represent clients in marijuana OVI cases will likely soon encounter roadside THC testing. The government perceives a need for on-site testing, and device manufacturers are working to provide suitable products for this purpose. Some devices have already been implemented by law enforcement agencies in other parts of the United States. Those instruments, which use oral fluid (OF) collection and immunoassay testing, have limited utility. In fact, the United States government acknowledges point-of-arrest oral fluid THC testing has not been shown to be reliable. [1] Emerging technologies implemented in new roadside THC testers will be available as early as 2020. This article is intended to help Ohio criminal defense lawyers understand roadside THC testing so they can effectively challenge its use in marijuana OVI cases.

The Government's Need for THC Testing

Many people in the United States are now using marijuana legally, in addition to those using it illegally. Thirty-four states, the District of Columbia, Guam and Puerto Rico now have medical marijuana programs (including Ohio). Ten states permit recreational marijuana use[2]. In those states which have not yet legalized any form of marijuana use, there has been legislation proposed to legalize marijuana in some form. Clearly, the trend is toward legalization of marijuana use, and that trend results in more drivers using marijuana.

State legislatures perceive a legitimate need to prohibit operating vehicles under the influence of marijuana. In addition to attention-grabbing anecdotal stories about accidents caused by marijuana OVI, a 2013-2014 survey by the National Highway Traffic Safety Administration (NHTSA) found 22% of drivers tested positive for drugs, and THC was the most frequently used drug[3]. Although testing positive for THC does not indicate impaired driving ability, legislators can be persuaded by such findings. A subsequent NHTSA study suggests driving under the influence of drugs, including marijuana, is causing a significant increase in the numbers of crashes and fatalities. While the study acknowledges the role of marijuana use in vehicle crashes is unclear[4], such suggestions are likely persuasive to legislators.

In fact, every state legislature has passed a law addressing the issue of marijuana-impaired driving. Ohio treats marijuana OVI in the same it treats alcohol OVI: even if it is legal to consume, it is illegal to drive under its influence, and it is illegal to drive a prohibited concentration of it in the body. While most states require the prosecution to prove the driver was under the influence of marijuana, Ohio has a 'per se' law which prohibits operating a vehicle with a prohibited level of marijuana and/or its metabolites in the blood or urine[5].

As Ohio and other states prohibit marijuana OVI, they need ways to identify and quantify THC in a driver's system. The method of gas chromatography is now traditionally used to test samples of a driver's blood or urine obtained *after* the driver's arrest. Before the driver's arrest, however, it is impractical to obtain a blood or urine sample. Based on this impracticality and the increasing number of marijuana OVI investigations, states are increasingly interested in pre-arrest methods for THC testing.

Absorption - Distribution - Elimination of THC

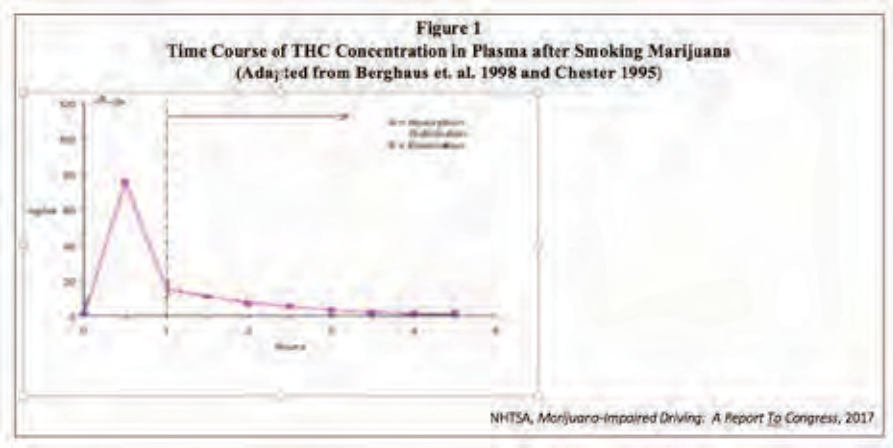
Before discussing pre-arrest methods for THC testing, it's important to have a basic understanding of marijuana's chemical properties, as well as its metabolism and excretion. The 2017 NHTSA report

to Congress about marijuana-impaired driving[6] is a good resource for lawyers on this topic. It provides explanations of THC metabolism which are understandable for non-scientists and surprisingly not harmful to OVI defendants. Additionally, government lawyers are unlikely to disagree with the findings of the NHTSA report, and judges may be inclined to accept the contents as true because the report was published by NHTSA. Accordingly, on the topics of THC metabolism and testing, it may be a good practice to reference this government publication.

The cannabis plant (cannabis sativa) contains hundreds of chemical compounds, and one of them is delta-9-tetrahydrocannabinal (THC). THC binds with receptors in the brain and causes the behavioral and cognitive effects of marijuana use, such as euphoria, relaxation, altered time perception, and lack of concentration. THC is metabolized to the psychoactive metabolite 11-hydroxy-delta 9 tetra hydrocannabinol ('Hydroxy THC') and then to the inactive metabolite 11-nor-9-carboxy-delta 9 tetra hydrocannabinol ('Carboxy THC').

THC is absorbed into the blood quickly. According to NHTSA, THC is detectable in blood within about one minute if marijuana is smoked. Detectability takes longer if marijuana is eaten. For smokers, the peak THC level in blood occurs when the smoking stops or soon thereafter.

The elimination rate of THC is not constant and depends on many variables. Generally, THC levels decrease rapidly. From the peak concentration, achieved shortly after smoking, THC levels decrease by 80 to 90 percent within 30 minutes, as demonstrated in Figure 1.



After a few hours, THC levels in blood are very low and may not be detectable. However, NHTSA's report states THC from a single ingestion of marijuana may be detectable in blood for over six hours, and THC has been detected in blood 30 days after ingestion[7]. For OF, one study reported THC was detected for up to 78 hours.[8] In urine, the inactive Carboxy THC metabolite may be present for up to five weeks[9] (for those states, like Ohio, which continue to use urine testing for OVI cases). Impairment from THC lasts only a few hours.[10]

Roadside (Pre-Arrest) THC Testing Devices

Pre-arrest THC testing will likely be used in Ohio to help officers make the 'correct arrest decision' and may ultimately be used in court. Nearly all Ohio officers making OVI arrests are trained on the NHTSA manual for *DWI Detection and Standardized Field Sobriety Testing*. The NHTSA manual recommends that officers administer a Preliminary Breath Test (PBT), after standardized field sobriety testing, to verify alcohol is the cause of the impairment[11]. Several companies have manufactured PBTs and made millions by selling them to law enforcement agencies, even though their reliability is questionable at best[12]. The admissibility of PBTs as evidence in court varies among the Ohio appellate districts.

We can expect roadside THC testing devices will be used like the PBT. Officers will administer a THC test, after standardized field sobriety testing, to verify THC is the cause of impairment and to assist officers in making the correct arrest decision. Depending on the upcoming changes to the Ohio Administrative Code and judicial decisions, prosecutors may seek to have the results of on-site THC tests admitted in court. This creates a market for companies to manufacture roadside THC testing devices, and the market has already been filled with several products. The following is a brief description of a few devices being used by law enforcement outside Ohio, as well as a couple devices expected to be available as early as 2020.

Drug Test 5000. An early entry into the market of mobile THC testing is Drager's Drug Test 5000. The Norwegian Company, which has been selling breath-testing machines for years, developed a portable system to sample OF for THC and other drugs of abuse. It is currently being used in multiple states, including Arizona, California, Nevada and New York.

To collect a sample with the Drug Test 5000, an officer collects OF by inserting a collection swab into the mouth of the suspect and repeatedly swiping the surface of the cheeks and tongue. The indicator cap on the tube turns blue when a sufficient sample volume

has been collected. The officer then inserts the tube into an analyzer, and the analyzer provides results. The results are stored in the machine and can also be printed.

Drager says this 'mini lab' combines biochemistry and optical mechanics but seems reluctant to provide non-law enforcement inquirers with details about the testing method. However, one conference paper makes clear the device utilizes an immunoassay testing method.[13] Immunoassay testing is discussed later in this article.

Drug Wipe S. The Drug Wipe S is manufactured by Alcohol Countermeasure Systems, makers of the Alcolock ignition interlock device and multiple portable breath-testers. Like most roadside drug testers, it analyzes oral fluid, and its unique selling proposition seems to be it requires the smallest volume of OF. This is apparently accomplished by using a liquid in the collection cartridge to aid transportation of the analyte drug particles to the test line. The collection cartridge is inserted into the separate *Wipealyser* device for analysis by immunoassay.

SoToxa Mobile Test System. This system is manufactured by Abbott and, as of 2019, is being marketed by Intoximeters. That company makes the Intox EC/IR breath tester, the Alco-Sensor and RBT IV portable breath testers. That company also now manufactures the DMT, after acquiring the Datamaster from Ohio's own National Patent Analytical Systems.

The SoToxa uses an OF collection procedure similar to that used by the Drug Test 5000. It also uses an immunoassay testing method, but it does so with an ultra-portable tester which weighs just over two pounds (the Drug Test 5000 weighs about ten pounds). The SoToxa is reportedly being used by law enforcement agencies in Canada, Europe, Alabama, Oklahoma and Michigan. With marketing help from Intoximeters, it is very likely to be purchased by additional agencies in the United States, possibly including agencies in Ohio.

MLife Device. The 'Device' is manufactured by MLife in the state of Texas. It is another OF tester which uses an immunoassay testing method. However, the collection method is unique: the 'Device' has two collection tubes, so it offers what these author calls a "split spit test". It appears some law enforcement agencies have at least tried this device, but it is unclear whether any law enforcement agencies are currently using it.

The Hound. The Hound, manufactured by Hound Labs in Oakland, CA, is unique because it simultaneously measures both THC and alcohol. It is also noteworthy because it tests for those substances in a person's breath, not OF. The Hound is not yet available, but press releases claim it will hit the market in 2020.

FAIMS Marijuana Breathalyzer. This breath tester is manufactured by Cannabix Technologies. FAIMS is an acronym for field asymmetric waveform ion mobility spectrometry. It is unique technology for detecting THC molecules based on separating gas-phase ions by how the ions behave in strong and week electric fields. The company, which has been developing this marijuana breath test for over a decade, is partnered with the University of Florida, and its stock is publicly traded on the Canadian Securities Exchange. With that R&D and capital, this THC tester is one to watch.

Problems With Current Roadside THC Testers

The devices currently used for THC testing in the field have limited utility. Those devices use oral fluid collection and immunoassay testing. As a result, they are considered to have limited reliability.

Oral Fluid THC is Not Correlated with Blood THC

One problem with oral testing for THC involves the method by which THC is distributed to OF. Oral fluid is produced by salivary glands, the gingival fold, and secretions from the nasal cavity and pharynx[14]. When marijuana smoke is inhaled, OF is 'contaminated'. Direct distribution of THC to the oral cavity is the primary source of THC in OF (it really is smoke on the water!). The contribution of THC from blood is minimal[15], which is why orally ingested (eaten) marijuana products result in de minimis THC levels in OF[16].

Because THC is directly distributed to OF and is not measurably transmitted from blood, the concentration of THC in OF is independent of the concentration of THC in blood. This is different than a breath alcohol level, which is dependent on the blood alcohol level. As blood alcohol is the primary contributor to breath alcohol, a breath alcohol level has a 'standard' (although very debatable) correlation of 2100:1 with a blood alcohol level[17]. An oral fluid THC level, on the other hand, has no 'standard' correlation with a blood THC level because blood THC is not a significant contributor to oral fluid THC.

Studies confirm the lack of correlation between blood THC and oral fluid THC. One forensic journal article summarizes the relevant studies and states the level of THC in OF after inhalation has a low correlation with the level of THC in blood. That article concludes, "All those studies observed a large inter-subject variability in cannabinoid concentrations, precluding direct prediction of blood concentrations from OF concentrations."[19]

Oral Fluid THC Levels do Not Reliably Predict Impairment

First, THC in OF does not cause impairment: impairment is caused by THC in blood which reaches receptors in the brain. Second, as described above, THC levels in OF are not correlated with blood. Third, even blood THC levels measured by gas chromatography with mass spectrometry do not correspond with impairment. According to the 2017 NHTSA study:

> *While fewer studies have examined the relationship between THC blood levels and degree of impairment, in those studies that have been conducted the consistent finding is that the level of THC in the blood and the degree of impairment do not appear to be closely related. Peak impairment does not occur when THC concentration in the blood is at or near peak levels. Peak THC level can occur when low impairment is measured, and high impairment can be measured when THC level is low. Thus, in contrast to the situation with alcohol, someone can show little or no impairment at a THC level at which someone else may show a greater degree of impairment.*[20]

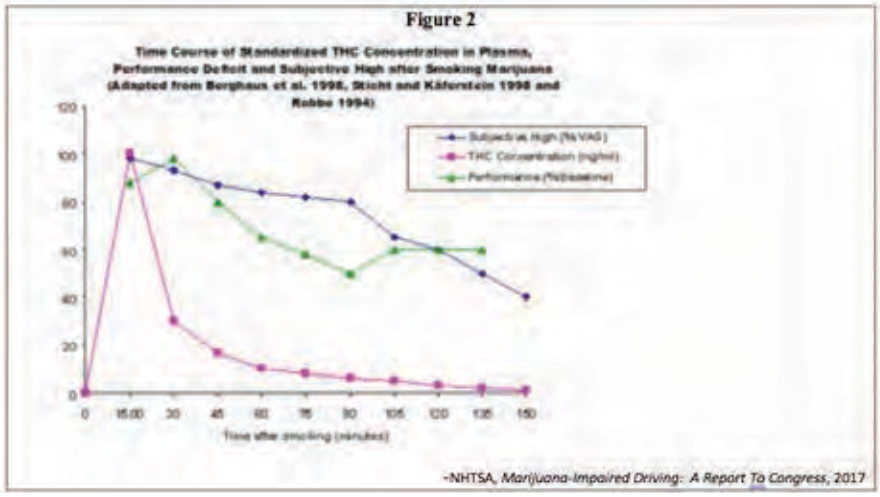
> *peak impairment occurs at 90 minutes after smoking while the THC level has declined over 80 percent from the peak level at that point in time. Notice also that the subjectively reported "high" also does not correspond well with blood plasma THC concentration.* [21]

Study participants reported feeling increased effects long after the peak blood THC level. This phenomenon is referred to as 'counter-clockwise hysteresis'.[22] The NHTSA report concludes by stating:

> *THC level in blood (or oral fluid) does not appear to be an accurate and reliable predictor of impairment from THC. Also, when low levels of THC are found in the blood, the presence of THC is not a reliable indicator of recent marijuana use.*[23]

A Driver May Have THC In Oral Fluid from Second-Hand Smoke

Research indicates individuals may have false positive oral fluid THC results from passive cannabis smoke exposure. In one study, four non-smokers sat in a van with four joint smokers. Immediately after smoking stopped, the mean THC level in the non-smokers was 5.3 µg/L (5.3 ng/mL).[24] In another study, five non-smokers were in a Dutch coffee shop with 4-16 marijuana smokers for three hours. All of the non-smokers had THC in their OF, with levels ranging from 0.5 to 6.8 µg/L (.5 to 6.8 ng/mL), and two of them were still THC-positive 22 hours after exposure[25]. In summarizing those studies, authors Lee & Huestis commented, "False positive results from passive environmental cannabis smoke are a major concern in OF drug testing because parent cannabinoids in drug-laden smoke deposit on the oral mucosa."[26] A OVI defendant who did not actively ingest marijuana may have THC concentrations in OF simply from being in the company of others who were smoking marijuana.



-NHTSA, *Marijuana-Impaired Driving: A Report To Congress*, 2017

The NHTSA repot goes on to say:

> *However, peak performance deficits are observed long after the peak THC level occurs. In fact,*

Current Roadside Testers Identify THC Presence, Not Quantity

The devices currently used for roadside THC testing use OF collection and some version of immunoassay testing. An immunoassay is designed to detect (and possibly quantify) a specific substance, the analyte (such as THC), using an antibody. An antibody is a protein produced by immune cells in response to stimulation by an antigen. In an immunoassay, when the antibody makes contact with a sample, the antibody will bind with the analyte. In the case of THC, an antibody known to bind with THC makes contact with the sample of OF. If the antibody reacts with THC, a signal is produced, often a color change on the test strip or pad.

The signal is qualitative (indicates the presence of THC) but not quantitative (does not measure the amount of THC). There are immunoassay-based devices which employ additional technologies to quantify the analyte based on the intensity of the reaction with the antibody. The devices currently used by law enforcement for roadside THC testing do not use those technologies. They only identify the presence of THC

and not the quantity. We can anticipate future devices will implement technologies to measure the quantity of THC also.

A 'Positive' Result Using Immunoassay Testing Is Unreliable

The forensic community generally agrees immunoassay tests are not reliable enough to be used in court. The 2017 NHTSA report makes this observation:

> *For marijuana, it is common to use an immunoassay test designed to detect cannabinoids. However, a positive screening test cannot be taken as evidence that the drug is present in the specimen, as these tests lack high specificity, are subject to cross-reactivity, and may on occasion produce a false positive result. Many of the THC immunoassay screening tests can give a positive response to the presence of THC metabolites, even though THC is not present in the sample.*[27]

The United States government declares this testing method, even for the limited purpose of identifying the presence of THC, is unreliable. Ohio administrative regulations currently require an immunoassay result to be confirmed by a dissimilar method, but regulations can change.

On-Site Oral Fluid Testing is Unreliable

In addition to commenting on immunoassay testing, the 2017 NHTSA report also opines specifically about OF testing. The report states:

> *The technology to rapidly, accurately and reliably collect oral fluid at the point of arrest is quickly evolving. Some companies market self-contained test kits that can be used by law enforcement; however, these point-of-arrest screening devices have not been shown to be completely accurate and reliable. Marijuana (THC) is readily detected in oral fluid, however, there are issues associated with distinguishing use versus environmental exposure, that have not been fully addressed.*[28]

The United States government, with its rich research resources, concludes roadside THC testers "have not been shown to be completely accurate and reliable".

One year after the 2017 NHTSA report, the Drug Test 5000 was the subject of a joint study conducted by the Oslo University Hospital and the Norwegian Mobile Police Service.[29] The study compared the results of the Drug Test 5000 to results of blood tests. According to that study, the Drug Test 5000 produced false positive results for 14.5% of the samples identified to be cannabis. For opiates, the rate of false positives was 65.9%. Nevertheless, the police indicated it was still a valuable tool "resulting in more than doubling the number of apprehended OVID offenders"[30].

Conclusion

Current roadside THC testing devices implementing oral fluid collection and immunoassay testing are unreliable. A driver's positive result on one of these devices merely indicates the driver may have been exposed to THC in the last couple days. These devices are the equivalent of an alcohol tester which can't differentiate between a driver who just drank a case of beer and a driver who had one drink of a friend's beer yesterday.

Emerging technologies will require ongoing analysis. The NHTSA conclusion regarding the unreliability of onsite oral THC testing was based on OF collection and immunoassay testing. Newer devices, expected to be available to law enforcement as early as 2020, use different technology for testing. *The Hound* measures THC in breath using 'fluorescence-based THC detection' in a chemical assay. The *FAIMS* marijuana breathalyzer detects THC molecules by separating gas-phase ions depending on how the ions behave in strong and week electric fields. Stevenson, et. al., claim they have developed an instrument capable of accurately measuring THC in saliva.[31] Their device utilizes an electrochemical biosensor with integrated electronics to detect a chemical reaction between an antibody and a THC biomarker. It then measures the signal output of the reaction and correlates it to the concentration of the biomarker, thereby correlating it to the level of THC.[32]

As these new devices, and likely others, are adopted by law enforcement, they will need to be subjected to peer review to determine if they are, in fact, more reliable than OF collection and immunoassay testing. In the meantime, if/when Ohio begins using roadside marijuana testers, defense counsel should challenge them. This paper has hopefully provided information which will assist the Ohio defense bar with making those challenges effectively.

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1. NHTSA, *Marijuana-Impaired Driving: A Report To Congress*, p. 14, 2017

2. National Conference of State Legislatures, https://www.ncsl.org/research/transportation

3. NHTSA, 2013-2014 *National Roadside Study of Alcohol and Drug Use by Drivers*, 2017

4. NHTSA, *Marijuana-Impaired Driving:* A Report To Congress, 2017

5. O.R.C. 4511.19(A)(1)(j); National Conference of State Legislatures, https://www.ncsl.org/research/transportation;

6. NHTSA, *Marijuana-Impaired Driving*: A Report To Congress, 2017

7. *Id.* at p. 4, citing Huestis (2007)

8. Odell et. al., *Residual Cannabis Levels in Blood, Urine and Oral Fluid Following Heavy Cannabis Use*, Forensic Science International, Volume 249, 2015

9. NHTSA, *Drugs and Human Performance Fact Sheets: Cannabis/Marijuana*

10. Various studies give different impairment durations. The 2017 NHTSA study says "mere hours".

11. NHTSA, *DWI Detection and Standardized Field Sobriety Testing*, Session VII, 2018

12. PBT limitations are acknowledged in Session VII of NHTSA's *DWI Detection manual*

13. Huestis et. al., *Evaluation of the On-Site Draeger Drug Test 5000 in Occasional and Chronic Frequent Smokers Following Controlled Cannabis Smoking, International Conference on Alcohol, Drugs and Traffic Safety*, August 28-28, 2013

14. Lee & Huestis, *Current Knowledge on Cannabinoids in Oral Fluid, Drug Test Anal.*, 2014

15. *Id.* at p. 6

16. *Id* at p. 10

17. See, e.g., Jones & Andersson, *Comparison of Ethanol Concentrations in Venous Blood and End-Expired Breath During a Controlled Drinking Study*, Forensic Science International, Volume 132, 2003

18. *Id.* at p. 6

19. *Id.* at p. 12

20. *Id.* at p. 12

21. NHTSA, *Marijuana-Impaired Driving: A Report To Congress, 2017*

22. Cone & Huestis, *Relating Blood Concentrations of Tetrahydrocannabinol and Metabolites to Pharmacologic Effects and Time of Marijuana Usage*, Ther. Drug Monit., Vol. 15, No. 6, 1993

23. *Id.* at pp. 12-13

24. Lee & Huestis, *Current Knowledge on Cannabinoids in Oral Fluid, Drug Test Anal.*, 2014, p. 20

25. *Id.*

26. *Id.*

27. NHTSA, *Marijuana-Impaired Driving: A Report To Congress*, p. 14, 2017

28. *Id.* at p. 15

29. Gjerde, Clausen, Andreassen & Furuhaugen, *Evaluation of Drager Drug Test 5000 in a Naturalistic Setting*, J. Anal. Toxicol., May, 2018

30. *Id.*

31. Stevenson et. al., *A Rapid Response Electromechanical Biosensor for Detecting THC in Saliva*, , Nature.com/Scientific Reports, September, 2019

32. *Id.*

Death Penalty Seminar

David Stebbins at the Death Penalty Seminar

STRIKE FORCE COMMITTEE

One Cannot be in Two Places at Once

DANIEL SABOL & JOE PATITUCE

Physicists believe particles have the ability to be in two places at once through a phenomenon called "quantum superposition." But until this paradox is replicated above an atomic level, defense lawyers will be forever haunted with an all too familiar dilemma—having two court dates set at the same time.

Fortunately, the Columbus Seven give us guidance as to which court has priority over your services though Rule 41 of the Rules of Superintendence. Contrary to the belief of some, it is not the date set first which controls - it is the date set *for trial* first. Pre-trials, motion hearings and all civil matters must bend the knee to the criminal trial.

If you do find yourself in this predicament, immediately send a motion to continue to the court without priority and attach a copy of the scheduling order which demonstrates your other case was set for trial previously. The rule requires the order be attached and that the motion be filed at least 30 days prior to the court date, though in the commentary, it is recognized that compliance with this rule may be impossible in certain circumstances.

It is important to bear in mind that the most important factor in deciding a continuance request in this situation is not the convenience or schedule of either the court or the defense attorney, but rather the protection of the defendant's right to counsel. Though courts have broad discretion in considering a motion to continue, it is important to remember that "the pursuit of fairness and due process" outweighs other factors, including frustration of the trial court's docket.[1] A denial of a continuance request due to an attorney being ordered into another court violates a defendant's Sixth Amendment right to counsel.[2] And this makes sense—after all, the pursuit of justice and protecting a defendant's constitutional rights is of paramount concern.

Of course, the best tactic to avoid conflict is an open and honest line of communication. Almost without fail, Strike Force involvement in a dispute over whether a continuance should be granted—or whether an attorney should be held in contempt for missing a date due to being before a different court—arises when there have been previous problems with attendance, lack of communication with the court, or both. A gracious call to the court, coupled with empathy regarding a crowded docket, works wonders. Better yet, when given the chance, clear the date with the court ahead of time to avoid the hassle—after all, the Rules of Superintendence do require a firm trial date be set at the time it is continued.[3] A smile coupled with a gracious conversation go a long way.

1. State v. Robson, 165 Ohio App.3d 621, 2006-Ohio-628, 847 N.E.2d 1233, ¶ 21 (4th Dist.)

2. State v. Brown, 163 Ohio App.3d 222, 2005-Ohio-4590, 837 N.E.2d 429, ¶ 6 (1st Dist.); Burton v. Burton, 132 Ohio App.3d 473, 477, 1999-Ohio-844, 725 N.E.2d 359 (3rd Dist.)

3. Ohio Sup. R. 41.

THE VIEW FROM THE BENCH IS DIFFERENT

JUDGE D'VARGA

As a former member and office holder of OACDL, I was approached to write an article about my transition to the bench of the Franklin County Municipal Court. For the past six weeks, I have been watching a courtroom from an entirely different viewpoint than I ever thought imaginable. I have had to refrain from calling the attorneys that are appearing in front of me by their first name and have had to correct myself when I refer to a defendant as a "client." I have worn out correction tape moving my name from the "Attorney of Record" line to the "Judge" line. My signature has been shortened to an illegible "JGD." I'm finally starting to turn around when people say "Judge" when I'm walking down the hall.

While it has not been an incredibly difficult transition (we can all recite a jury waiver in our sleep, right?), it has been an eye opening one carrying with it an entirely different type of stress. There are a few things that have stood out to me and I'd like to pass them along to the defense bar.

Many people who are standing in front of me don't trust me, or the system, or the attorney standing beside them. It is far more obvious when you are sitting behind the bench than when you are standing beside a client. While we are all used to the fast paced chaos that is a large municipal court, many of the people walking through our doors have never been in a courthouse before, much less because they have been charged with a criminal or traffic offense. We could all do a better job at ensuring that we are empathetic to everyone who has business with the court. I have tried to slow down, explain things in plain English, bring defendants up to the bench when I feel that they need a more personal interaction, say please and thank you, and always remain respectful even when it is not returned. We may not be hearing the most serious cases out there, but it is the most important case in a defendant's life. We can never forget that we are the faces of the justice system for the people who walk the halls of our courthouse, and as such, we should try our best to engender trust.

Don't try to pull one over on a judge, no matter how long they have been on the bench or how much longer you have been practicing. Your word is sometimes all you have in the courtroom and once it is broken, the dynamics will change. I have already had an attorney try to get me to release a car and grant driving privileges under false pretenses. Of all the things to try and slip by me, an OVI issue? Do better.

In the same vein, don't assume I know, or don't know, something. Putting on a robe doesn't mean that I have an encyclopedic knowledge of all things that may come up in my courtroom, and it doesn't mean that I don't understand the real life implications of my decisions. We are all just trying to do the right thing, and if you think you can educate me on a case so that I can do that, please don't hesitate to do so.

If you can't be on time, be polite. Your client may have been waiting in my courtroom since 8:30 when you arrive at 10 due to your schedule. He or she has

probably already asked the prosecutor and bailiff several times how much longer they will be waiting. Be kind and acknowledge your client immediately. I completely understand the demands put on our profession, but at the end of the day, it is not about you. When I took the bench, I promised to be fair and efficient, to ensure that everyone in my courtroom is treated with respect, not just the attorneys.

Setting a bond is difficult. I try to be consistent so that attorneys know what to expect, but one strange fact can completely change the way I view a case. When I get off the bench after setting bonds, I can agonize over whether I did the right thing.

Finally, and perhaps most importantly, the view from behind the bench gives me much hope and optimism for the future of our courts. We have hard working attorneys on both sides of the aisle that truly care about their respective positions. The public defenders are doing an exceptional job under less than optimal circumstances. Seasoned attorneys are mentoring young attorneys and young attorneys are taking the reins without fear of asking important questions. Cases that should be fully litigated are being litigated and plea resolutions are fair and appropriate. There are so many treatment and alternative sentencing options at my disposal that I truly feel like I can make a difference in someone's life. That is the best part of my job-and hopefully yours.

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Tim Huey is lead author of Ohio OVI Defense: The Law and Practice - Huey, Nesci and Adams

Blaise Katter is now a co-author of Ohio D.U.I. Law with Judge Jennifer Weiler and Attorney Kevin Weiler

AMICUS REPORT

RUSSELL BENSING
AMICUS COMMITTEE CHAIR, OACDL

What's Happened

Here are the cases we've worked on which have been decided by the Supreme Court since my last report:

State v. Gwynne. This case involved the propriety of a 65-year sentence for a 53-year-old first offender who had gone into the rooms of residents of assisted living facilities and nursing homes and stealing items. (No residents were present when that occurred.) The court of appeals found the sentence absurd, as would just about any sentient human being, and reduced it to fifteen years. The State sought review, and the Supreme Court accepted jurisdiction. We believed that this was a key case: it would determine the appropriate method of review of consecutive sentencing for courts of appeals.

The starting point, we argued, was 2953.08(G), which specifies that an appellate court can reverse, vacate, or modify a sentence if it "clearly and convincingly" finds that the sentence is unsupported by the record. We then argued that the court of appeals should look at that issue by following 2929.11 and 2929.12, and determine whether the sentence complied with the principles and purposes of sentencing. Our participation here was much more extensive than usual; I not only wrote the amicus brief, but I did all but two minutes of the oral argument.

The Court decided to reverse and remand the case back to the court of appeals. It found that the court of appeals should only consider 2953.08. How it would decide whether the sentence is unsupported by the record without considering the factors which go into the record continues to be somewhat of a mystery. In any event, we are participating as amicus counsel on the remand as well.

State v. Faggs. This came up as a jurisdictional appeal and a conflict case, and involves the question of who bears the burden of proof in domestic violence cases involving parental discipline on whether the discipline was "appropriate and reasonable." Although the Ohio Jury Instructions and many court decisions regard parental discipline as an affirmative defense, some courts have held otherwise. The facts of the case were about the worst possible for Faggs: he was just the boyfriend of the girl's mother, and the judge in a bench trial said that he would have convicted Faggs even if the State bore the burden of proof.

My brief resorted to the law school example of the defense of confession and avoidance. For example, the defendant admits he killed a human being, but tries to avoid culpability by claiming he acted in self-defense. That's the classic example of an affirmative defense. I argued that if the defendant bears the burden of proving that the discipline was "reasonable and necessary," that operates on the assumption that all corporal punishment is wrong, and it's up to the defendant to justify it, and the courts have consistently held that parents have a right to use corporal punishment to discipline their children. So impressed were the litigants and the justices with my argument that they spent precisely zero seconds discussing it in oral argument. Faggs' conviction was affirmed.

State v. Hartman. Hartman and a woman flirted at a party, and Hartman followed the girl to her room, where he placed his penis

in her mouth while she was sleeping. At trial, the State introduced the testimony of Hartman's stepdaughter, who told the jury that five years earlier, when she was twelve, Hartman came into her room at night, and, while she pretended to be asleep, fondled her. To no one's surprise, Hartman was convicted, but the 8th District reversed, finding that the evidence did not fall under 404(B), and that, at any rate, the probative value of the evidence was greatly outweighed by the prejudicial effect of essentially telling the jury that Hartman was a pedophile.

We submitted an amicus brief on the issue, and also assisted defense counsel in the preparation of his brief, and for oral argument. The oral argument was held on February 5, and from my observations, I have no idea in the world what the court is going to do; it was one of the least active courts, in terms of questioning, that I've ever seen.

State v. Jones, 2019-0395. Jones decided to represent himself, and appealed his inevitable conviction on the grounds that his standby counsel was absent for voir dire. It's tough to make error out of this, since the courts have pretty much universally concluded that a pro se defendant does not have a constitutional right to standby counsel.

Instead, we decided to present a policy argument: that the Court should hold that standby counsel is required any time a defendant decides to represent himself, for various policy reasons. (I've included a copy of the brief in this report.) Oral argument was held on February 25, and this time at least I wasn't shouting into a hole; defense counsel mentioned our brief on at least four occasions, and three of the justices did as well. I think there's a decent chance that the Court will announce guidelines on the use of standby counsel, defining and perhaps expanding their role.

What's Going to Happen

We've got two cases pending right now.

State v. Turner. This case comes up on both a jurisdictional appeal and a conflict. The precise issue is, "Whether an officer had reasonable and articulable suspicion that a violation of the law occurred when the officer observed a motorist drive on, but not over, a marked line." Although it seems a trivial issue, most defense lawyers can easily understand its importance: back when I was doing my blog, marked lane "violations" were so common they didn't even rate for my Bullshit Traffic Stop of the Week.™ This is just not in regard to DUI cases; many drug and gun cases result from traffic stops as well.

The brief on this is due on March 30. For those wondering about the paucity of cases currently in the pipeline, I'd note that this is the first criminal case the Court has accepted this year which isn't being held for decision in another case.

State v. Jones. This case is another sentencing appeal, but doesn't involve consecutive sentences. Jones and his wife were convicted of involuntary manslaughter for neglecting medical treatment for their 12-year-old child. The facts were brutal – there was testimony that when medical personnel arrived at the scene, they could smell rotting flesh on the girl – but the court of appeals decided that the judge's ten-year sentence for this was too much. It's a terrible opinion – it's really nothing more than the appellate panel (by a 2-1 vote) substituting its judgment for that of the trial judge -- but it deals with a sentencing, and I think we need to express some ideas on this.

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