

2024 VINDICATOR

SPRING/SUMMER

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



OHIO ASSOCIATION
OF CRIMINAL
DEFENSE LAWYERS

Clemency and Pardon

**Editorial - Exonerees Left in the Lurch:
The Overlooked Struggle After Wrongful Convictions**

The High Value and Low Cost of Mock Trial Focus Groups

Book Review - Little, Crazy Children: A True Crime Tragedy

Not Offered For The Truth: Flipping The Script

Reverse 404(B) Evidence; Bully With A Badge

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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.

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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

**JOSEPH
HADA**
PRESIDENT, OACDL

I want to express my sincere gratitude to the publications committee and Alonda Bush for their exceptional work in crafting yet another outstanding edition of the Vindicator. As you peruse the articles and materials within, my hope is that you discover valuable insights to aid you and your clients, igniting a renewed determination as you step through the courtroom doors in 2024.

Being a part of the OACDL leadership is truly an honor, and I am privileged to collaborate with a team of individuals who exemplify dedication and generosity with their time to propel our organization forward. Leadership, in essence, is the ability to transform vision into reality, and I am proud to contribute to the direction we are heading. This journey is made possible by the hardworking members of our board, the committee chairs and their teams, and the executive committee. Though we've taken on substantial tasks this year, the completion of our to-do list will undoubtedly enhance the organization's benefits for years to come.

In the upcoming year, our focus is on passing new organizational bylaws and corresponding board resolutions, providing a lasting

framework for OACDL's restructuring and streamlining of committees. Noteworthy efforts by Ashley Jones in planning our robust CLE schedule and Blaise Katter's collaboration with key figures at the Statehouse in the process of drafting legislation showcase our commitment to progress. We're also expanding our library of on-line CLE content and enriching our Exclusive Content page for members. Initiatives like revamping our online store and enhancing our social media presence are in full swing. However, I am continually reminded of the intrinsic value of individuals who invest their time in bettering our organization. Volunteering time and sharing expertise in an organization is essential for collective growth and success. The diversity of skills and perspectives contributed by volunteers not only enriches the organization but also fosters a collaborative environment where everyone benefits from collective knowledge and dedication.

Thank you for your ongoing support and commitment to OACDL. Together, we are shaping a brighter future for our organization.

Sincerely,

Joe Hada

Joseph Hada

President, OACDL

1392 SOM Center Road
Mayfield Heights, Ohio 44124

Office: 440-202-9414

Cell: 440-413-6949

Fax: 440-443-1969

joe@hada-law.com

DIRECTOR'S DIALOGUE

AMY NICOL

EXECUTIVE DIRECTOR, OACDL

Dear OACDL Members and Associates,

Spring has arrived, bringing with it some exciting updates and positive developments that I am thrilled to share with all of you. From CLEs to membership, we have been quite busy!

Our 2024 seminar lineup promises to be exceptional! We started the year with the popular February Forensics webinar series and followed up with our Advanced DUI seminar in March. Moving ahead, we will continue to offer CLE staples like Defense Toolbox and Death Penalty, as well as introduce fresh and relevant topics

to our agenda. Our primary goal is to stay ahead of the curve by providing timely and informative courses. However, the most anticipated seminar on our calendar is the annual Beach Bash! Once again, we are heading to the Hilton Myrtle Beach from May 17 - 19 for a learning experience under the South Carolina sunshine. This event presents a fantastic opportunity for networking, learning, and enjoying the warmer weather together. Beach Bash not only ensures valuable insights and updates but also serves as a platform for us to connect and build stronger relationships within our association. For more details, including the link to the OACDL room block, please visit www.oacdl.org/seminars. For the full lineup of the CLE calendar so far, refer to the 2024 CLE schedule below.

Additionally, I am delighted to announce the success of our recent membership campaign, which has attracted a significant number of

new members to our association. As highlighted in the New (and Returning) Members section of this issue, we have welcomed 46 new members, showcasing the value and benefits that our organization offers to legal professionals like you.

Together, we are fostering a vibrant and supportive community that empowers its members to excel in their careers. I appreciate your continued support and look forward to seeing you at the Beach Bash seminar!

Amy Nicol

Amy Nicol

Executive Director, OACDL

713 South Front Street

Columbus, Ohio 43206

Phone: (614) 362-6414

Email: amy@oacdl.org

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Email Amy directly for current rate information

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2024 CLE SCHEDULE

February 2024

February Forensics

March 7-9, 2024

Advanced DUI Seminar

Columbus, OH

April 26, 2024

Sex in the Spring 2.0

TBD

May 17-19, 2024

Beach Bash

Myrtle Beach, SC

June 7, 2024

Nuts and Bolts of DUI Defense

Independence, OH

August 16, 2024

Senior Sponsored Seminar

TBD

September 2024

Toolbox

TBD

November 2024

Death Penalty

TBD

December 2024

**Hot Topics with Professional
Conduct Hours**

TBD

**We are always adding timely applicable webinars so
check www.oacdl.org/seminars often!**

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Joe Hada President

1392 SOM Center Road
Mayfield Heights, Ohio
44124
440-202-9414
hadalaw@gmail.com

Blaise Katter President-Elect & Public Policy Director

Law office of
D. Timothy Huey
3240 W. Henderson Road
Columbus, OH 43220
(614) 487-8667
blaisekatterlaw@gmail.com

Dan J. Sabol Immediate Past-President

Sabol Mallory, LLC
743 S. Front Street
Columbus, OH 43206
(614) 300-5088
dan@sabolmallory.com

Kate Pruchnicki Treasurer

Cleveland, OH
440-258-1282
katepruchnicki@gmail.com

Ashley Jones Secretary

AJ LJ Law
1220 W. 6th St.
Suite 303
Cleveland, OH 44111
(216) 736-8551
aj@aj@ajljlaw.com

COMMITTEE CHAIRS

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(216) 241-6650

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Publications

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(440) 915-7312

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(614) 443-4840

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Youngstown
(330) 423-0409

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Sandusky
(419) 625-6740

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Sandusky
(419) 625-6740

Matthew C. Bangerter
Willoughby
(440) 340-1740

E. C. Bates
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(419) 782-9500

Robert J. Beck, Jr.
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(614) 397-1637

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(216) 241-6650

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(614) 717-1177

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(614) 487-8667

Joseph A. Humpolick
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(440) 361-1686

Ashley Jones
Cleveland
(216) 736-8551

Jeffrey C. Kakish
Willoughby
(216) 245-2215

Blaise C. Katter
Columbus
(614) 487-8667

Elizabeth Kelley
Spokane
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(614) 884-1100

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(440) 356-2828

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(513) 850-1778

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Columbus
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Columbus
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(937) 454-5544

Brian J. Smith
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(800) 641-1970

David C. Stebbins
Columbus
(614) 214-1781

Andrew H. Stevenson
Lancaster
(740) 653-0961

Timothy F. Sweeney
Cleveland
(216) 241-5003

Samuel B. Weiner
Columbus
(614) 443-6581

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Cleveland
(216) 815-6000

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OACDL BEACH BASH!

May 17 - 19, 2024

I thoroughly enjoyed the seminar, reconnecting with old friends while expanding my network!

The location is top-notch and the insights shared are invaluable!

CLE, sunlight, and conversations with colleagues in an excellent location.





Editorial Submission

Exonerees Left in the Lurch: The Overlooked Struggle After Wrongful Convictions

BART KEYES

In a stark revelation from the National Registry of Exonerations, a staggering 3,442 individuals in the U.S. have been wrongfully convicted since 1989 through the end of 2023. As of today, these exonerees collectively tally over 31,000 lost years behind bars – a shocking reality that demands closer inspection.

While individual exoneration stories may captivate headlines, what happens to these individuals after the fact often slips through the cracks. Astonishingly, when a wrongful conviction is overturned, those released into society generally find themselves without even the limited help provided to their convicted counterparts.

In states that do offer compensation or benefits, the road to reintegration is paved with bu-

reaucratic obstacles. Exonerees often must file claims or lawsuits for damages, enduring months or even years of waiting for approval. Meanwhile, the system that wrongfully imprisoned them offers them no support services—a process that stands in stark contrast to the more streamlined support systems in place for parolees.

Take Ohio, for instance, where individuals released on parole benefit from government-operated programs to facilitate their reintegration into society. Parolees may qualify for pre-release transition programs and basic employment and housing assistance systems. The federal government goes a step further, offering tax credits to incentivize employers to hire released felons.

This glaring disparity becomes

even more pronounced considering the significant strides made in recognizing and rectifying wrongful convictions. It's undeniable that exonerees, upon regaining their freedom, are left to rely on personal resources, familial and friendly networks, and the limited assistance provided by private charitable organizations.

I've seen several real-life examples of how the criminal justice system lets exonerees down. Most of my firm's wrongful conviction clients have been released from prison with nowhere to go because the state doesn't offer transition housing for exonerees. They must live with family or friends until they can put together the resources to find housing. These same exonerees are on their own to find jobs, often struggling because of the stigma of their time in prison

and the lack of tax or other government incentives for employers to hire exonerees. One client was even repeatedly denied jobs and housing because even though the record of their wrongful conviction had been sealed, some of the background check companies had not updated their records. We had to contact these companies to tell them that they were unlawfully reporting a criminal charge that had been overturned and sealed. If this exoneree didn't have lawyers in their corner to make these background check companies update the records, they may have run into this wall repeatedly when trying to find a job or housing.

The question that demands an answer is clear: Why does the government fail to guarantee any lev-

el of assistance for those whose convictions have been overturned? As our society addresses the pervasive issue of wrongful convictions, the lack of transitional support for exonerees becomes a critical oversight. It's an injustice compounded when the same government that wrongly convicted them denies them assistance and delays or denies compensation altogether.

In our pursuit of justice, dismantling the barriers preventing exonerees from seamlessly reintegrating into society is a non-negotiable step. Only then can we claim to have a legal system that not only corrects its errors but ensures that those who suffered those errors are granted the necessary support to rebuild their lives.



Bart Keyes

Attorney

Cooper Elliott

305 W. Nationwide Blvd.

Columbus, OH 43215

(614) 481-6000

bartk@cooperelliott.com

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The High Value and Low Cost of Mock Trial Focus Groups

JOE HADA, Esq.
BRAD WOLFE, Esq.

Recently, we served as co-counsel in a felonious assault matter out of Cuyahoga County. Given the case's unique facts, we decided to organize a mock trial focus group in our office's conference room. The endeavor proved cost-effective, straightforward to prepare, and of significant value. We aim to share our experience and why this exercise should be utilized more in our profession.

Why Conduct a Mock Trial Focus Group?

Traditionally associated with civil litigation, criminal defense attorneys increasingly use mock trial focus groups. They offer multiple benefits, including raw insight into juror behavior, identification of expected (and unexpected) weaknesses, witness preparation, refinement of arguments, and valuable feedback from a variety of "jurors."

One of the most compelling aspects of a mock trial focus group is affordability concerning finances, time, and energy. Facilitating a mock trial focus group can be inexpensive and does not require a jury consultant. In our case, other than our time, the expenses included a pre-paid VISA gift card to each participant and the cost of coffee and donuts.

As for the preparation, doing so was manageable and meaningful. In a matter of hours, we had developed the plan and script for all aspects of the "trial," drafted necessary paperwork for the participants, and ironed out other logistics for what ultimately was a 4.5-hour event. These relatively low "costs" ultimately helped to reduce an originally indicted felonious assault with severe injury to the victim to a low-level, non-violent felony resolution and a sentence of probation.

The Participants

Recruiting the right people for any mock trial focus group is essential for gaining valuable feedback and insight into your case. The jurors must believe and understand that their involvement will have a real impact. The makeup of our six (6) participants were friends of friends, colleagues, and distant family members. Fortunately, our "jury" was diverse in age, race, ethnicity, gender, occupation, and educational background. Had we desired a larger pool of participants, we would have utilized personal and professional networks, social media ads, and recruitment/temp agencies. Interestingly, we know of an attorney in another state who regularly issues a public records request for the list of jurors who recently completed jury service in that county. Then he sends them mail solicitation.

ing their service for his mock trial focus group.

Regarding presenting the case, Joe served as the prosecutor, and Brad was the defense attorney. This assignment of roles was important for consistency in reading the prepared opening statements and closing arguments. When presenting the case to a mock trial focus group, the goal must be to present the State's case in the strongest possible light with equal persuasive power. It is essential to present the most effective opposition arguments you can think of, including those you fear most. Using a second attorney is optimal for avoiding confusion within the panel and helping to replicate the conditions of the trial as much as possible.

The Plan

To ensure a smooth and effective experience, we developed a "script" for the mock trial focus group. In the interest of time, we presented a modified trial of sorts to focus on what we believed were the most critical components of our case. The function of the script listed below was to provide order for when to elicit written responses after each phase, watch deliberations, and debrief the panel afterward:

1. Give Brief Intro & Welcoming Remarks
2. Distribute and Receive Confidentiality Agreement
3. Deliver Openings Statements; Distribute and Receive Corresponding Jury Form
4. Read the Investigating Officer's Testimony, Show Video of the Incident; Distribute and Receive the Corresponding Jury Form
5. Read Bystander's Testimony; Distribute and Receive Corresponding Jury Form

6. Play Previously Recorded Direct and Cross of Defendant/Client; Distribute and Receive Corresponding Jury Form
7. Read Closings; Distribute and Receive Corresponding Jury Form
8. Read Jury Instructions
9. Deliberations; Distribute and Receive the Corresponding Jury Form
10. Debrief with Jury

Between nearly every step listed above, we asked the panel to complete written surveys of their thoughts on the case individually. The jurors were also given notepads that were collected afterward. (Extra tip: Provide pens to the panel for taking notes that make an audible clicking sound. Regardless of what note they take, if a piece of information comes out and you hear the room erupt in clicks, you know that they found it to be significant.) You can also divide the panel for deliberations and during the case presentation if you want to account for different theories, whether certain evidence will be admitted, multiple jury instructions, or other variables.

Except for our client, and in the interest of time, we did not perform direct and cross-examinations of any witness with this particular mock trial focus group. Instead, we typed up "testimonial witness statements," which we read directly to the participants. Also, our client's testimony was not live but previously recorded because he lived out of state and could not attend. With that in mind, there is likely benefit to your client not attending the mock trial so that your attention can be given entirely to the task at hand and to avoid jurors feeling potentially uncomfortable or influenced.

The Paperwork

Before commencing our mock trial focus group, creating a confidentiality agreement and comprehensive feedback forms was imperative. We tailored these forms to capture the participants' perceptions, reactions, and opinions concerning various aspects of the case, evidence, and arguments. We had our panel individually complete unique forms after each stage of the mock trial presentation without discussion amongst the group until it was time for deliberations. We are happy to provide these documents in full, and our contact information is below.

Delving into Deliberations

By way of the Honorable Kenneth A. Bossin, full jury instructions were eventually read to the jury. The most valuable aspect of our mock trial focus group was the observation of the deliberations which followed. For nearly an hour, we watched (from a separate room) how our jurors interpreted the evidence, applied legal principles, debated the jury instructions, and interacted with one another. They were fully engaged and stayed almost 45 minutes longer than we initially estimated their commitment would be. There were passionate arguments, "not guilty's" that were flipped, and ultimately a 4-2 hung jury in favor of the prosecution.

Recording these discussions was critical. We used a Meeting Owl camera with recording software and watched live via Zoom. However, a simple laptop camera or webcam with basic recording functions works fine. To help facilitate natural conversation, efforts should be made to avoid the jurors feeling as if they have a camera directly in their faces. Included in the confidentiality agreement was a clause giving the participant an option to agree to be recorded.

Responses to [REDACTED] "Testimony"

Name: _____

You just heard the "testimony" of the [REDACTED] in this case. How did you react to what you heard?

How did this testimony affect your thinking of the case?

Please list three words or phrases that describe the kind of person he seems to be:

If you could ask any questions, what would they be?

Do you find [REDACTED] testimony truthful? Please explain:

What made his testimony helpful to the State?

What made his testimony helpful to the Defense?

If the trial were to end now, is Mr. [REDACTED] Guilty of Felonious Assault?

Absolutely Yes

Probably Yes

Probably Not

Absolutely Not

Is there anything else you would like to comment about what you just heard and saw?



Joseph Hada
 OACDL President
HADA-LAW.COM
 1392 SOM Center Road
 Mayfield Heights, Ohio 44124
 Office: 440-202-9414
 Cell: 440-413-6949
 Fax: 440-443-1969
 joe@hada-law.com

Confidentiality Agreement

Dear Participant,

Today you will help decide the potential outcome of a real case. Because it is real, it is important to listen carefully and to arrive at a fair verdict.

To protect all parties involved, please sign the confidentiality agreement below. This agreement also requires us to hold in confidence all information you provide us about yourself.

Thank you for participating.

In re: State of Ohio v. [REDACTED]

In return for financial compensation, I agree to participate in deciding the above-referenced matter.

I agree to be videotaped.

I agree to hold everything about this case in strictest confidence. I will not talk about this case to anyone after I leave here. In return, I understand that all information I provide about me will be held in strictest confidence.

I understand that this case is real. Therefore, I will do my best to arrive at an honest and fair decision.

Signature: _____ Date: _____

Please print your name: _____

Responses to Opening Statements

Name: _____

Based on what you have heard so far today, how would you rate the **State's** case?

Probably Strong

Probably Weak

Please explain: _____

Based on what you have heard so far today, how would you rate the **Defense's** case?

Probably Strong

Probably Weak

Please explain: _____

In most cases like this, which side do you think is usually right, and why? Please explain:

Based on what you have heard so far, what are the two most important pieces of information you would need in order to make a final decision in this case?



Brad Wolfe
 Brad Wolfe Law, L.L.C.
 1392 SOM Center Rd.
 Mayfield Heights, Ohio 44124
 (216) 815-6000
 brad@bradwolfelaw.com

Rewatching deliberations was also particularly helpful for actual trial preparation several weeks later. This information was instrumental in anticipating potential challenges and tailoring our case accordingly. Overall, we learned what aspects needed to be addressed as soon as possible in voir dire and opening. We also observed which witnesses were liked and disliked by the jurors and found to be credible or not credible. It was helpful to watch what life experiences the jurors pulled from when weighing the evidence. Perhaps most importantly, we received feedback on the information the participants wished they knew.

Conclusion

In a legal landscape where every advantage counts, mock trial focus groups are a transformative and cost-effective tool. Their ease of preparation, ability to provide critical feedback, and potential to identify case strengths and weaknesses make them an asset in the arsenal of any criminal defense attorney. For those looking to elevate their practice, including mock trial focus groups is an endeavor worth embracing.

CLEMENCY AND PARDON

CSU|LAW PARDON, CLEMENCY + REENTRY CLINIC

GRANTED 5 PARDONS IN 2023

KHALIDA SIMS JACKSON, Director

The CSU|LAW Pardon, Clemency + Reentry Clinic (PCR Clinic) launched in 2022 to help individuals in Northeast Ohio continue to redefine themselves and their futures after a criminal conviction. In its first full year of operation in 2023, the Clinic experienced numerous successful outcomes. That includes five pardons issued by Ohio Governor Mike DeWine.

“The impact of receiving the pardons is amazing but it is all about the clients and their hard work,” explained Clinic Director Khalida Sims Jackson. “It is fulfilling as a lawyer and an educator to have students see first-hand various impacts of the criminal justice system on a person’s life.”

Jalina Lockhart became the first PCR client to be granted a pardon in February 2023. Lockhart was a member of the Ohio Army National Guard but struggled as a young, single mother and ultimately was arrested on a drug offense, and later gun possession and obstruction of justice due to an unfortunate set of circumstances. After spending a year in prison, Lockhart went on to earn her bachelor’s degree from Cleveland State University. She went on to receive a master’s degree and was hired at Cleveland EMS. Part of the reason Lockhart sought clemency was so she could reenroll in the Army National Guard.

CSU|LAW 3L student Justin Daniels Dawes worked

diligently with CSU|LAW Professor Robert Triozzi to best prepare Lockhart for her hearing. They had mock hearings and several meetings to ensure Lockhart was prepared for her hearing.

Judith Amicone also received a pardon as a PCR client. Amicone currently serves as the Supervisor of Addiction Services for The Centers for Families and Children and is a licensed chemical dependency counselor. She went through a long and inspiring journey to sobriety after severely injuring a woman while driving under the influence. Her current occupation was inspired by the offense, for which she has been pardoned.

CSU|LAW 3L student Maggie Weaver assisted on Amicone’s case and led a mock hearing with her.

“The CSU|LAW team was a tremendous help throughout the process,” said Amicone. “I felt 100% prepared for the hearing and the preparation really helped ease my nerves about the whole thing. I can’t thank the CSU|LAW Clinic enough.”

The PCR Clinic is a service provider for the Ohio Governor’s Expedited Pardon Project. Students in the Clinic, under the Supervision of the Director Jackson and Assistant Director (previously interim Director) Kate Pruchnicki ’16, represent individual clients seeking pardon or clemency from the Ohio governor, represent individuals seeking expunge-



Pictured: Pardoned clients Judith Amicone and Jalina Lockhart; Clinic Director Khalida Sims Jackson and Co-director Kate Pruchnicki '16

ment of prior convictions, and/or assist in petitions for other post-conviction relief. They engage in each phase of representation, from client interviews, to determining case strategies, to drafting motions, petitions, and applications before various municipal and county venues.”

“The clinic is here to support and advocate for the clients while best preparing students to be great lawyers,” said Jackson. “It is important that the clinic gives learning opportunities to the students while supporting a structure of advocacy and professionalism.”



Khalida Sims Jackson
Staff Attorney & Director,
Post-Conviction Clinic
 Cleveland State University
 1801 Euclid Avenue
 Cleveland, OH 44115

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**REVERSE 404(B) EVIDENCE;
BULLY WITH A BADGE**



CRAIG NEWBURGER, Esq.

An inmate was charged with felony assault on a jail corrections officer (CO). The video of the alleged assault showed the CO entering the cell of the inmate. The inmate was laying on his bunk mat on the floor of his cell reading a book. The CO entered the cell to inquire why the cell door was open. The inmate told the CO his cellmate was a pod cleaner doing his chores. Arguably, inmates would often lay on their bunk mats on cell floors and pod cleaners' cell doors were left open while they were out doing their chores.

The CO told the inmate to put his mat back on his bunk and closed the cell door. The inmate shouted "Dumb Ass!" The CO, without backup, re-entered the cell and bent over the inmate who was still laying on his floor mat. The inmate started to get up and the CO pushed the inmate to create a "safe distance" between the two. The video showed the inmate and the CO coming out of the cell exchanging blows. To be fair, the inmate appeared to go ninja on the CO, beating the CO down a corridor until the two were on the floor. The inmate who had vanquished the CO got up and walked away and got on his

knees and put his hands on his head when ordered by other COs to get down.

At first glance, the above scenario appeared to show an inmate assaulting a CO. The attorney of the inmate, now Defendant, requested a Use of Control Report, as incidents involving COs' use of force with inmates are reviewed by a board comprised of three sergeants and their findings and recommendations are reviewed through the jail chain of command. The Use of Control Report for this incident revealed the CO re-entered the inmate's cell because, as the CO admitted to two of his on duty supervisors, he was "pissed" and the review board found such re-entry was unjustified. Counseling/corrective training for the CO was recommended.

The attorney then obtained the CO's personnel records and found that another Use Of Control Report was generated for this CO around eighteen months earlier. The attorney obtained a copy of the earlier report, which revealed that the CO, working as a control booth officer, left the control booth to lock down a belligerent inmate who had been cussing at the CO through a communications

box. Routine jail procedure would have involved the CO requesting one of the two female pod rovers to lock down the inmate.

The CO ended up locking down the inmate in his cell by kicking him in the waist/leg area and then entering the inmate's cell, rather than closing the door. Again, the initial review board of three sergeants found that the CO's actions were unjustified and that excessive force was used by the CO. (The "excessive force" finding was reversed by superior authority as the report went up the chain of command.) The CO was recommended to receive counseling.

Is the Earlier Use of Control Report Admissible at a Trial Where the Defendant is Asserting He Acted in Self Defense?

Pursuant to *Whitley v. Albers*, 475 U. S. 312 (1986), 320-321, the self defense assertion of the above Defendant would beg the question whether the CO's use of force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Essentially, the Defendant would have to show

the CO behaved as a “Bully with a Badge.” To introduce the older Use of Control Report at trial, the Defendant had to convince the court that the earlier incident showed that State’s victim made no mistake or accidental response and he intended to act on his motive to bully the Defendant. [Evid. R. 404(B).]

The Defendant filed a notice of intent to use other acts testimony pursuant to Evid.R. 404(B), informing the court of his desire to introduce evidence of the CO’s prior conduct involving another inmate, in order to demonstrate that the incident giving rise to the State’s indictment was similar to the facts of the prior case and thus admissible to show motive, intent, absence of mistake and lack of an accident.

The trial court relied on the analysis set out in *State v. Sepeda*, 2020-Ohio-4167. The court in *Sepeda* opined: “that in the typical scenario, Evid.R. 404(B) is applied in cases in which the State seeks to introduce evidence of a Defendant’s prior acts in order to establish the Defendant’s criminal conduct. However, this was not the ordinary case. Here, the Defendant would seek to introduce other acts evidence in order to exonerate himself.

This type of evidence has been referred to as ‘reverse 404(B)’ evidence. *State v. Gillispie*, 2012-Ohio-2942, 985 N.E.2d 145, ¶ 25 (2d Dist.), cit-

ing *State v. Clifford*, 121 P.3d 489 (Mont.2005). While reverse 404(B) evidence is rarely used, its use is not unprecedented.

In Ohio, only a few courts have examined the admissibility of such evidence. Most notably, the Second District Court of Appeals in *Gillispie* considered the applicability of Evid.R. 404(B) in a case involving a Defendant’s use of reverse 404(B) evidence. There, the court looked to the way in which the United States Circuit Courts of Appeals have addressed this issue under the Federal Rules of Evidence, which are similar to Ohio’s Rules of Evidence, and concluded that a majority of federal circuits permit reverse 404(B) evidence so long as its probative value is not substantially outweighed by considerations contained in the federal counterpart to Evid.R. 403. *Id.* at ¶ 19, citing *U.S. v. Stevens*, 935 F.2d 1380 (3d Cir.1991). The court followed the approach of the majority of federal circuit courts, and held that other acts evidence offered by a Defendant to support his defense should be evaluated using a balancing approach under Evid.R. 403, not Evid.R. 404(B). *Id.* at ¶ 20. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”

The court found that the balanc-

ing analysis of 403(A) weighed in favor of the admission of the CO’s prior conduct and law enforcement witnesses from both Use of Control Reports testified at trial. The number of witnesses who testified included six sergeants, a Lieutenant and a Chief Deputy (called by the State as a rebuttal witness). Before closing arguments, the Defendant chose to plead to a misdemeanor and was sentenced to community control.

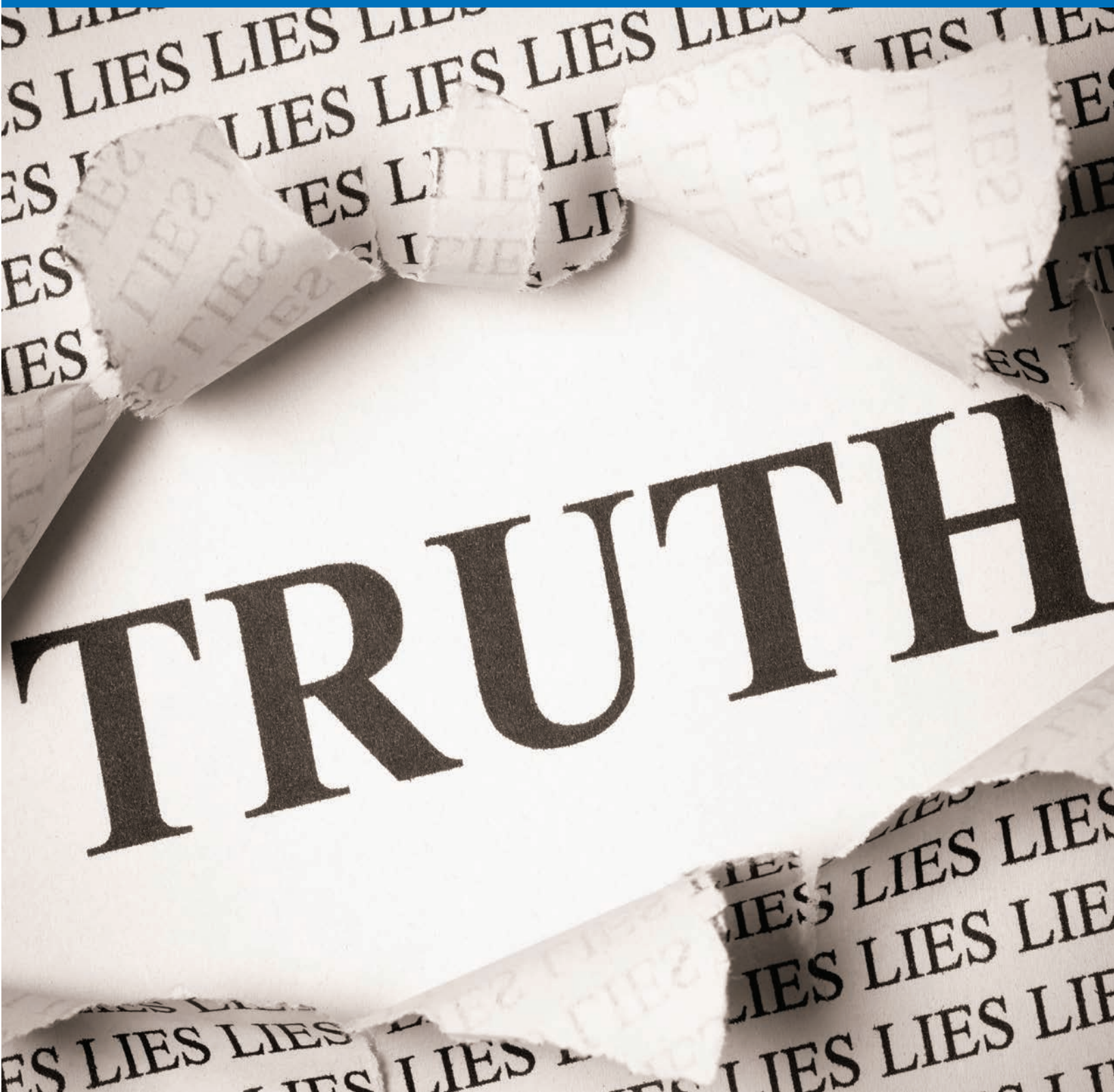


Craig A. Newburger, Esq.

Newburger Law
9435 Waterstone Blvd.
Suite 140
Cincinnati, Ohio 45249
(513) 850-1778
www.newburgerlaw.com

NOT OFFERED FOR THE TRUTH: FLIPPING THE SCRIPT

CRAIG NEWBURGER, Esq.



A declarant's statement is not excluded as hearsay under Rule 801 if it is not being offered for the truth of the matter asserted (i.e., "the defendant did X"), but rather for some other permissible purpose. The State often seeks to introduce a law enforcement witness' otherwise hearsay testimony to explain the subsequent investigative activities of the witness, while arguing that such testimony is not offered for the truth of the matter.

Confrontation Clause?

There is no confrontation clause issue when statements are admitted under the "not for the truth of the matter" rationale, because by their very nature these statements are not considered testimonial, therefore, they fall outside the scope of what is protected by the clause. See *State v. Steele*, 260 N.C. App. 315 (2018); *State v. Leyva*, 181 N.C. App. 491 (2007).

See also:

[Gilbert v. State, 954 N.E.2d 515, 518-19 \(Ind. Ct. App. 2011\) \(citations to the record omitted\)](#)

"Officer Decker's testimony regarding Detective Wilkerson's statements was not hearsay, inasmuch as it was not offered for its substantive truth. More particularly, Officer Decker's testimony that Detective Wilkerson stated to [the defendant] that 'he wanted some h[ea]d' was not offered to prove that Detective Wilkerson,

in fact, wanted to receive oral sex. Rather, the statement was introduced to show that it was made, and, more importantly, provided context for [the defendant's] response, which was to ask how much money they had."

[State v. Duncan, 154 Ohio App.3d 254, 2003-Ohio-4695.](#)

The State's reliance on this hearsay exception is not immune to appellate reversal. In *State v. Duncan*, the First District Court of Appeals opined it is true that a witness may sometimes testify to explain the subsequent investigative activities of the witness, and that such testimony is not offered for the truth of the matter. **"But it is a very narrow exception to the hearsay and relevance rules—except seemingly in Hamilton County."** The *Duncan* trial court did give a cautionary instruction to the jury stating that it should not consider the truth of what Dunn claimed Duncan said, but should only consider how it explained Dunn's subsequent investigative activities. The First District Court of Appeals opined that the disputed testimony was inadmissible hearsay, reversed Duncan's convictions and remanded his case for a new trial. Emphasis added. Citations to the record omitted.

Flipping The Script

In *State v. William Morris* (Warren County Common Pleas, 07CR24084, unreported), the Defendant was indicted for charges of Rape, F-1, and Domestic Violence, F-4. During the jury tri-

al, the defense counsel attempted to question State's lead Detective about Defendant's seven requests for a lie detector test and/or truth serum during the Detective's mirandized interview (prior to Defendant being appointed counsel). The State's objection was sustained and the defense counsel requested to approach. The Court granted the request, whereupon the defense counsel informed the Court that following Defendant's seventh request, the Detective stated that he was certified in administering truth verification tests and that he would check with the prosecutor about Defendant's request. Counsel further explained that no truth verification tests were ever administered. The Defense counsel offered a copy of the DVD recording and a certified copy of the transcript of the recording of the interview to the Court. Defense counsel then argued that Defendant was not seeking to introduce his seven requests for the truth of his innocence, but, merely sought to question the Detective regarding his subsequent related investigative activities.

Following a brief recess the Court allowed the line of questioning. The Detective could not recall Defendant's seven requests or his statement regarding being certified to administer truth verification tests or that he would check with the prosecutor. The defense counsel was permitted to approach State's witness and provide him with a certified copy of the transcript of the interview for the purpose of refreshing his recollection. The defense counsel went page by page through all seven requests and the De-

tective's certification claim. The Detective, after properly authenticating the transcript, repeatedly answered, "I don't recall, but, it's obviously here, so I don't dispute it." The State objected to each defense question until the Court, having overruled several related objections, instructed that the State's objection would be continuing in nature.

In closing, the defense counsel stated that Mr. Morris wanted to testify, but, the defense counsel told him, "Why bother? Nobody is listening. You begged seven times..." The State interrupted with an objection that was overruled, with the Court stating, "This is argument." Mr. Morris was acquitted.



Craig A. Newburger, Esq.

Newburger Law
9435 Waterstone Blvd.
Suite 140
Cincinnati, Ohio 45249
(513) 850-1778
www.newburgerlaw.com

Book Review: *Little, Crazy Children: A True Crime Tragedy*

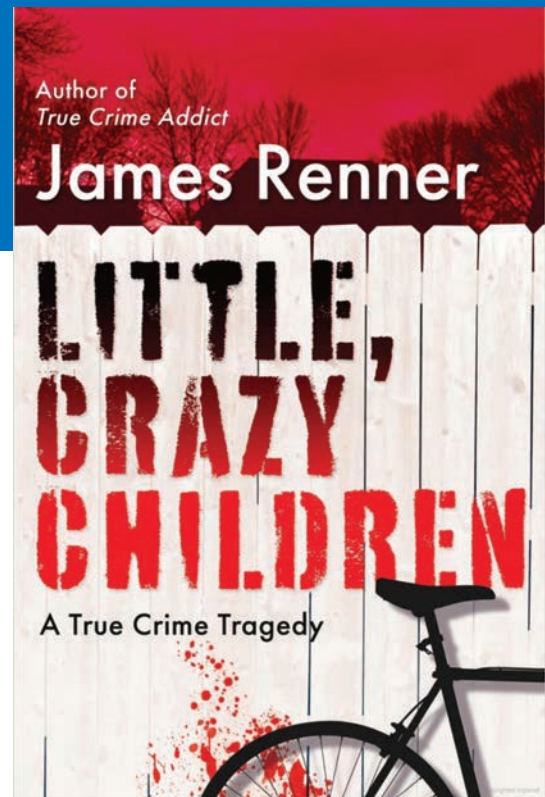
JEFFREY M. GAMSO

Lisa Pruett was 16 that September night in 1990 when she slipped out of her house in Shaker Heights just outside Cleveland and bicycled over to her boyfriend's place. She didn't quite make it. Some 30 feet before his house, she was killed – stabbed repeatedly and nearly sliced open. What happened afterwards, police investigation, trial, speculation, is the subject of James Renner's *Little, Crazy Children: A True Crime Tragedy*.

The obvious suspect was Lisa's boyfriend, Daniel Dreifort. He'd been released that day after thirty days in a psych ward; his behavior that night was, at the least, curious; a possible murder weapon was in his bedroom; he'd written repeatedly of hating Lisa and of wanting to kill and maim women, and he'd lied some to the cops. But Dan and Lisa's classmates at Shaker Heights High kept telling police about another classmate they didn't particularly like or trust: Kevin Young. He was weird, anti-social. You just knew he maybe could. And while he said his father would give him an alibi, "[W]hat father wouldn't cover for his son? And his dad was a lawyer, after all." So police and prosecutors focused on

Young, charged him with aggravated murder, and brought him to trial. Even though there wasn't really any concrete evidence against him, we know that innuendo and possibility – and hey, there's that stereotype Renner, or maybe the police he's channeling, and that maybe the jury too. You know, the one, that all lawyers are liars – so really an alibi from an alibi should really be taken as evidence of guilt.

I could carry on at length here about Renner's often tedious and heavy-handed prose. I could talk about how the first two-thirds or so of the book consist largely of transcripts from police



interviews and trial testimony. I could talk about how the relentless quoting is often mere padding.¹ We're criminal defense lawyers. We've sat through trials. We've listened to recordings of "interviews" and interrogations. Nothing new there.

But what I want to tell you instead is that the hero here isn't the police or the prosecutor. It's the young lawyer trying what Renner makes very clear was the biggest case of his life to that point and getting a two-word verdict. That lawyer, who a few years later became president of OACDL and was recently honored as Lawyer of the Year, was Mark DeVan.

It's heady stuff. There's no shortage of true crime books, but most detail the crackerjack police work, the whip-smart detectives, the brilliant prosecutor obtaining justice for the grateful family of the victims. Not enough of them crackle with a not guilty verdict. And there sure aren't all that many books written about one of our own colleagues winning a big case.

But that verdict's not the end of *Little Crazy Children*. Young walked. What happened next? It's years later before Renner talks it up, follows up with the kids and the cops. What became of them after the verdict? And what did they think? Because while the not guilty may mean that the crime remains legally unsolved, lots of people still thought Kevin Young did it. That DeVan kid must have pulled a rabbit out of his hat. The jury didn't pay attention; they just got it wrong. Others, though, they figured the unknown killer was still out there. Renner reports on all that, tracking down those former Shaker Heights kids to interview them himself, reviewing decades-old police reports.

The real kick is, of course, the revelation. Lisa Pruett was killed in 1990. It was pushing thirty years by the time Renner got caught up in the whodunit. And so, naturally, he's the one who turns up and makes a case for the guy he believes was the actual killer, one David Branagan, who conveniently died in 2017 and can't defend

himself. He'd been looked at back in the day, but, you know, the cops were focused on Kevin Young. So, did Branagan do it? Or was it Daniel Dreifort? Or maybe it really was Kevin Young? Or all of them acting together in some grand crime-fiction conspiracy? (I made that last option up.). There's no definitive answer.

There's a good story, maybe not a book's worth, but a good story in *Little, Crazy Children*. And it's local and has one of our own as something of a hero. That's no small thing.

1. E.g., "Judge Sweeney addressed the jury. 'Ladies and gentlemen, I'm going to send you to lunch,' he said. 'Be downstairs at one-thirty. We'll get you up here as soon as we can.'"



Jeffrey M. Gamso,
OACDL Life Member
 Former Assistant Cuyahoga County Public Defender
jeff.gamso@gmail.com

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