2019 SPRING

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO LEGISLATIVE UPDATES

House Bill 228: Burden Of Proof In (Some) Self-Defense Cases Shifted To State

Senate Bill 66: Eligibility For Sealing Of Criminal Conviction Records Expanded

SORN Reclassification, Modification, & Termination Summarized

PLUS: Verifying Text Messages / OVI Refusal Evidence Practice Tips / Criminal Case Law Update / And More!

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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.

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

MICHAEL STRENG

President, OACDL

"What you do makes a difference, and you have to decide what kind of difference you want to make."

- Jane Goodall.

As criminal defense lawyers, we have an opportunity to make a difference in a variety of ways. We have an opportunity to make a difference in the lives of our clients and their families. More broadly, our words and actions are able to impact—for better or for worse—how the public perceives criminal defense lawyers and lawyers in general, as well as the criminal justice system.

With the many obligations we all balance both in and out of the office, it is easy to lose sight of the fact that what we do—and how we do it—makes a difference to individuals, groups, and the community. We must therefore be intentional with what kind of difference we want to make.

Recently, I was reflecting on memorable moments I have had in my career as a lawyer. One of the events that kept coming to the forefront of my mind was a time a past client in his mid-forty's was waiting at the front door of my law office before we opened at 8:30 a.m. We did not have an appointment scheduled for that day, and it had been some time since I spoke with him. After opening the door and exchanging greetings, the client asked a favor. A family member had passed, and the client was heading to the funeral proceedings; however, he did not know how to tie a neck tie. The client asked me for assistance, as it was important to him to attend his family member's funeral with appropriate and respectful attire. Of course, I was happy to assist. His visit was brief, but the memory of this exchange remains strongly in my memory to this day. This strikes me as an example of the impact we can have on our clients that reaches beyond their legal situation and how they perceive us as their lawyers, advocates, advisors, and professional resources long after their case is over.

Part of the OACDL's mission is to help our members make a difference in our clients' lives by giving our members information, education, and training to provide the best legal representation to our clients. To achieve its mission, the OACDL has scheduled seminars covering a wide variety of topics spanning from New Lawyer Training to planning for retirement—and everything in between. The OACDL has increased its focus on helping our members deal with the unique stressors and challenges our vocation places on us and has incorporated additional "mental health in our profession" topics into these seminars. The OACDL has been actively involved in committees discussing bail reform and modifications to the Ohio Revised Code sections that govern drug related offenses and their consequences. The OACDL has also been actively tracking proposed legislation and aspires to keep our membership up-to-date on pending legislation and public policy that affects our clients and our practices. All the foregoing is available on the OACDL website, which will be receiving a facelift soon.

A story I think about often, which I believe has parallels to criminal defense work, is called The Star Thrower[1]. In the story, an older man walking along a beach comes upon a boy throwing starfish that have washed upon the shore back into the sea. Looking at the voluminous amount of starfish on the beach, the old man tells the boy: "You can't possibly make a difference." In response to the old man, the young boy throws a starfish back into the ocean and exclaims "it made a difference for that one!"

Isn't that the truth! Individually, we make a difference for each client, one case at a time. Collectively as a group, we make a difference for all citizens.

Robert Kennedy said: "Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance."

I encourage everyone to strive to make intentional differences in criminal defense and to their criminal defense clients—knowing that the OACDL and its members are throwing starfish back into the ocean with you.

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1 Originally written by Loren Eiseley (1907-1977), which has been adapted and retold over time.

LETTER FROM THE PRESIDENT ELECT

SHAWN DOMINY

President-Elect, OACDL

Ask not what your association can do for you, but what you can do for your association. When you apply President Kennedy's timeless inauguration statement to the OACDL, you actually should ask both questions. By asking "What can the OACDL do for me?", you will get the most value from the association. If you ask, "What can I do for the OACDL?" you will make the association more valuable.

What Can the OACDL Do for Me? The OACDL has some well-known benefits: outstanding CLE seminars, strategic amicus briefs, and supportive Strike Force assistance, as well as the Vindicator you are reading now. A lesser-known—but equally important—benefit is our active monitoring, shaping, and dissemination of proposed legislation related to criminal law. We also have representatives in the Ohio Supreme Court's bail reform committee, the General Assembly's sentencing commission, and the legislature's workgroup for drug law reform.

What the OACDL does for you is, in reality, done by your peers. The OACDL truly is an organization of the people, by the people and for the people: we are lawyers helping lawyers. We help each other on the listserv, where you can find assistance with all types of criminal defense issues. We help each other with a bank of briefs, motions and transcripts in the 'members only' section of the website. We help each other by developing comradery with like-minded lawyers who understand the challenges and rewards of being a criminal defense attorney. A great opportunity to do that is the OACDL retreat scheduled for May 16–18, 2019—and, it's at the beach!

What Can I Do for The OACDL? What you can do for the OACDL is participate. Help a colleague in need on the listserv. Post a successful brief, motion or transcript on the website. Write an article for the Vindicator. Volunteer on one of the OACDL committees:

- Legislation/Public Policy
- Strike Force
- Ethics
- Amicus
- Indigent Defense
- Technology
- Publications
- Continuing Education
- Membership
- Leadership

Operating these committees requires volunteers. With the exception of the executive director, the OACDL is run by volunteers. The problem with an association this large (around 700 lawyers) is the "bystander effect": everyone looks around and says "someone else will do it." The result is the 80/20 principle common to many organizations: 80% of the work is done by 20% (or less) of the people. We need a few good men and women (who can handle the truth and not strenuously object) to volunteer on these committees.

Volunteering with the OACDL is an opportunity to add value to an organization which provides valuable benefits to you. It is also one way to enrich the legal community. There are, of course, other avenues for serving our profession. As for me and my firm, we will serve the OACDL.

If you have any questions as to how you can get involved, please do not hesitate to contact me.

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2019 SEMINAR SCHEDULE

June 7, 2019
DUI Seminar
Kent State – Stark County Conference Center, Canton

June 28, 2019
Fail to Plan, Plan to Fail – A Retirement Plan for Lawyers
Ohio Supreme Court, Columbus

August 23, 2019
Drug and Felony Sentencing Seminar
Dayton Art Museum, Dayton

September 13, 2019
Tools for the Criminal Defense Toolbox
University of Toledo Law School, Toledo

October 4, 2019
Annual Superstar Seminar
Grange Audubon Society, Columbus

November 21-22, 2019
Death Penalty Seminar
Marriott Hotel at the Airport, Columbus

December 13, 2019
Hot Topics in Criminal Law with Professional Conduct Hours
Columbus

The above are the annual seminars sponsored by YOUR association. Other seminars are being scheduled around the state. Brochures will be mailed 6-8 weeks prior to each seminar. All seminar information is posted on our website, www.oacdl.org.
The OACDL Seminars are organized by volunteers of the association. They want to make sure you have the most up-to-date, cutting-edge informative seminars BY defense attorneys FOR defense attorneys in the state. The OACDL thanks you for your support of our continuing education seminars.

PAST PRESIDENTS OF THE OACDL

1986-88	**Jay Milano,** Rocky River
1988-89	**John H. Rion,** Dayton
1889-90	**Thomas Miller** (deceased), Cincinnati
1990-91	**Max Kravitz** (deceased), Columbus
1991-92	**James Kura** (deceased), Columbus
1992-93	**William F. Kluge,** Lima
1993-94	**Mark R. DeVan,** Cleveland
1994-95	**Samuel B. Weiner,** Columbus
1995-96	**K. Ronald Bailey,** Sandusky
1996-97	**Paris K. Ellis,** Middletown
1997-98	**Harry R. Reinhart,** Columbus
1998-99	**Cathy Cook,** Cincinnati
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2002 -03	**Clayton G. Napier** (deceased), Hamilton
2003-04	**Charles H. Rittgers,** Lebanon
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2006-07	**Barry W. Wilford,** Columbus
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2008-09	**Ian N. Friedman,** Cleveland
2009-10	**Andrew H. Stevenson,** Lancaster
2010-11	**David Stebbins,** Columbus
2011-12	**D. Timothy Huey,** Columbus
2012-13	**Jon Paul Rion,** Dayton
2013-14	**J. Anthony Rich,** Lorain
2014-15	**Jeffrey M. Gamso,** Cleveland
2015-16	**S. Michael Lear,** Cleveland
2016-17	**Jon J. Saia,** Columbus
2017-18	**Kenneth R. Bailey,** Sandusky

DIRECTOR'S DIALOGUE

SUSAN CARR
EXECUTIVE DIRECTOR, OACDL

Have you noticed our CLE schedule? It's packed! Do you know the good thing about having more seminars around the state? I get to meet more of our members! We have such a diverse group of people with so much to offer. It's always so nice to talk to members and hear you say "call me if there is anything I can do for OACDL." Your phone may be ringing soon!

I want to personally thank all who attended the Professionalism Luncheses sponsored by the Ohio Supreme Court Commission on Professionalism. We have hosted three Professionalism Lunches in total in three different counties: Franklin County, Cuyahoga County, and Montgomery County. I think Hamilton County is next on the list. The panels for the Professionalism Lunches have consisted of a criminal defense attorney, a prosecutor, and a judge. I am very pleased that at all three, the defense bar was very well represented! Jay Milano served on the panel in both Franklin and Hamilton Counties, and Jon Paul Rion took care of Montgomery. The discussions were sometimes a little heated, sometimes a little humorous, but ALWAYS interesting. We had tables of four with at least one judge, one prosecutor, and one defense attorney at each table. I know many of you have told us at seminars that what works for county A may not work in county B. We agree! But there was TALKING (even a little laughter)! If you would like to see one of these lunches in your county, please let me know. The Supreme Court of Ohio Commission on Professionalism, in partnership with the Ohio Prosecuting Attorneys Association and the Ohio Association of Criminal Defense Lawyers, is dedicated to promoting professionalism in the criminal justice system.

A big thank you to Joe Humpolick and members of the Senior Committee! They put together a GREAT seminar for those thinking of retirement, or thinking of thinking about it! The topics are very interesting and apply not just to criminal defense lawyers, but all attorneys reaching retirement (or thoughts thereof). If you know an attorney who is talking about retirement, let him or her know about this June 28, 2019 seminar to be held at the Supreme Court of Ohio. The seminar begins at 10:00 a.m. and ends at 3:30 p.m. The cost will be nominal for OACDL members, and the agenda and registration information can be found on OACDL's website. This is a first for us!

On August 23, 2019, we will be in Dayton for the Felony Sentencing and Drug Seminar. The agenda is being put together now. We will be covering some of the Reagan Tokes Law.

On September 13, 2019, we partner with the Maumee Valley Criminal Defense Lawyers for a day of Tools for the Criminal Defense Toolbox. A shout-out to the Toledo Law School for hosting us!

The Annual Membership Meeting will be October 3, 2019 (date, time, and location TBA). After the meeting, it's party time! Watch for more information soon.

Please make plans to attend the Superstar Seminar on October 4, 2019. We will be at the Grange Audubon Society, 505 W. Whittier Street in Columbus. This is a BEAUTIFUL park setting, right in downtown Columbus! President-Elect Shawn Dominy is working on the agenda.

I told you we have a packed year! If you would like to work on any of our committees, please let me know. There is plenty of work to do!

In this magazine, you will see an article from our new Public Policy Chair, Blaise Katter. On behalf of OACDL, I would like to say welcome aboard! Many of you have heard Blaise speak at seminars, and I'm pretty sure you thought the same thing I did, "Wow, this guy is amazing!" However, we will miss our outgoing chairs, Barry Wilford and Sarah Schregardus of Kura, Wilford & Schregardus Co., L.P.A. Barry has been the Chair of the Public Policy Committee for many years, but is now hanging up his hat as the Committee Chair, as he is retiring from the practice of law. Sarah worked with Barry for many, many years on the Public Policy Committee; she is now focused on taking over the practice and spending more time with her two adorable little boys. Sarah left the Public Policy Committee in good shape—and in good hands! Thank you Sarah and Barry!

Our technology chairs, Ken Baily and Brian Jones, are working on freshening up our website. That should be unveiled sometime late summer.

Thank you to all of our dedicated board members! Your efforts are paying off. President Michael Streng has been solicited by the Ohio Supreme Court to sit on various task forces and committees. OACDL is getting more and more media requests, and our membership is climbing.

I also want to give a huge thank you to all of the members on our listserv. The assistance, support, and encouragement you give each other on a daily basis is truly inspiring.

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

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PUBLIC POLICY COMMITTEE UPDATE

BLAISE KATTER
PUBLIC POLICY COMMITTEE CHAIR, OACDL

Welcome! I wanted to take this opportunity to introduce to you the newly-revamped OACDL Public Policy Committee. With many thanks to Michael Streng, our President, I have been appointed the Chair of the Public Policy Committee.

By way of background, I have been closely involved with the legislature since before I even started law school. My first experience with the legislature was as a staff member in the office of William G. Batchelder III, former Speaker of the Ohio House of Representatives (2011 to 2014) working on policy issues. I returned to the General Assembly in 2015 as a staff attorney for the Ohio Criminal Justice Recodification Committee, where I was one of two attorneys responsible for literally re-writing Ohio's entire criminal code (over 4,000 pages). Thankfully, through that job, I met and developed relationships with many of the major legislative players on the criminal justice side, which continue to this day.

I would also like to give a special thank you and shout out to our new lobbyist and point person on legislative issues, Maggie Ostrowski. In a word, she is incredible—both as the public face of the OACDL and in helping to advance our committee's interests. She prepares a weekly report for us when the legislature is in session, which I invite every member to check out on our website here: https://associationdatabase.com/aws/OACDL/pt/sp/members_public_policy. We are truly fortunate to have her advocating for us on a daily basis, and I ask you to join me in welcoming and thanking her for her work.

What the Public Policy Committee Wants To Do

The Public Policy committee has one overriding goal—to be an effective voice in the General Assembly for YOU, our membership. We want this committee to bring significant value to every member by advancing our top priorities and providing valuable feedback to those proposals that would cause further harm to our practices and clients.

This is one of the most exciting times ever for criminal justice issues in the Statehouse. The current leadership and committee chairs in the General Assembly are uniquely focused on taking real, concrete steps to correct some of the great injustices that are currently scattered throughout our criminal code.

Most excitingly, the OACDL is being recognized as a valued legislative partner. We have been able to bring our collective wisdom and experience to the forefront of the legislative process. In other words, our feedback matters – we are a 700-person strong organization dedicated to fighting the good fight for our clients every day, in the trenches. Our experiences and thoughts on issues can help shape new legislation and help ensure the General Assembly gets the real story of what is happening on a day-to-day basis and how their proposals would affect our ability to practice. See below for more information on providing our committee this your thoughts and valuable feedback.

Public Policy Committee in 2019

The Public Policy Committee has already been very active this year, testifying and providing feedback on some of the major criminal justice bills that have already been moving during this General Assembly.

The most exciting and important of these bills is Senate Bill 3, a major drug and sentencing reform bill that is currently under serious consideration in the Senate. Although complex, it would completely reform the drug offenses chapter and, most excitingly, move many of the current F5/F4 drug possession charges down to misdemeanors with a presumption of treatment. The OACDL has been invited by the sponsors of that bill to a seat at the table as discussions on perfecting the bill are ongoing, and we are so excited about what we might be able to achieve with this bill – a top priority of this committee.

We have also been in contact and testified on several other bills, including opposing a proposal to increase speedy trial time, and working on fixing language related to protection orders and increased penalties on drug traffickers who target addiction service providers. And, I can assure you, we are just getting started – we will be continuing to propose and advance reasonable criminal justice reform issues while opposing bills that seek to encroach on our membership's ability to practice effectively or our client's fundamental rights!

How You Can Help the Public Policy Committee

Get involved! The Public Policy Committee is designed to be the voice of the OACDL and, specifically, its members. We therefore invite you to get involved however you can in this process. We invite you to reach out to our committee with any issues, concerns, or ideas you may have. If there is a bill or particular issue that is near and dear to your heart, then I invite you to contact me and let me know. In fact, we would be thrilled for membership to reach out and want to engage on any pending bill, even to the point of testifying in front of the General Assembly!

We are a strong organization filled with many dedicated, passionate defense warriors fighting our battles on the front line every way. The OACDL has so much to offer the General Assembly. We can provide our experience and expertise to give critical feedback as to what is and is not working in day-to-day practice. We can identify major issues with the law, provide targeted suggestions to fix issues, and even more importantly, identify what works and what programs may need to be expanded.

That feedback means EVERYTHING to us. So please, we encourage you to contact us with your thoughts, concerns, criticisms, and positive stories. The Public Policy Committee is your voice – so use it!

I am so excited and optimistic about what we can accomplish in the General Assembly the next two years. From major drug reform, to abolishing the death penalty for mentally ill people, to expanding "smart on crime" initiatives—the possibilities are endless. Together with our legislative partners, we hope to bring effective change to our criminal laws. I personally invite each and every one of you along for the ride. Together, we can be a force for positive and lasting change in Ohio. You can directly contact me (and all members of our committee) at **publicpolicy@oacdl.org**.

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OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SENATE BILL 66 EXPANDS ELIGIBILITY FOR THE SEALING OF CRIMINAL CONVICTIONS

JESSICA D'VARGA
MEMBERSHIP COMMITTEE CHAIR, OACDL

I can't tell you how many calls I have received over the years from people asking if they could have a past conviction sealed. Many of them have gone years with no other legal troubles and were looking to advance in their jobs. Some were trying to apply to graduate school or for a technical program. Yet others had totally forgotten about that disorderly conduct charge they picked up on their twenty-first birthday until they were applying for a position that ran a background check. It is such a great feeling when you can advise those individuals that you can help them to erase their past indiscretions and get a fresh start. Thankfully, that response is becoming more frequent because the trend in recent years to expand eligibility requirements for the sealing of criminal convictions is continuing.[1]

Previously, an "eligible offender" was anyone with one felony conviction, not more than two misdemeanor convictions, or not more than one felony and one misdemeanor conviction.

S.B. 66, signed into law on July 30, 2018 and made effective on October 29, 2018, makes it possible for individuals convicted of any number of non-violent misdemeanor offenses and as many as five non-violent, non-sex felony offenses of the fourth and fifth degree to have their convictions sealed.

Misdemeanor Convictions

Those with a misdemeanor record are no longer limited to having only two eligible misdemeanor convictions sealed. The new law permits an unlimited number of misdemeanors to be sealed, as long as they do not fall under the list of convictions that are specifically excluded from eligibility. The waiting period for having a misdemeanor sealed is still one year from the date that the case is terminated. This means one year from the date that all jail time is served, fines are paid in full, and community control is terminated.

Felony Convictions

Under the new law, an individual may have up to five felony convictions sealed, if all five of the convictions are felonies of either the fourth or fifth degree. The waiting period for filing the application depends on the number of felonies to be sealed. For one felony conviction, the waiting period is still three years from the completion of the case. For two felony convictions, the waiting period is four years and for three to five convictions, the waiting period is five years:

1 Felony Conviction = 3-year wait

2 Felony Convictions = 4-year wait

3, 4, or 5. Felony Convictions = 5-year wait

If an individual is convicted of a felony of the first, second or third degree, or is convicted of the prohibited offenses set forth in R.C. 2953.36, then the old law applies. This means that they can have no more than one felony and one misdemeanor conviction in order to be eligible to have their record sealed. For example, if an individual has a third-degree felony conviction from 2012 and a fifth-degree conviction in 2014, they are ineligible to have either of the convictions sealed because they have exceeded the number of allowable felony convictions to be considered under the prior statute.

Multiple Convictions in One Case or as a Result of One Act

Pursuant to R.C. 2953.31, when two or more convictions result from or are connected with the same act or result from offenses

committed at the same time, they count as one conviction. In addition, two or three convictions that result from the same indictment, information or complaint, from the same plea of guilty, or from the same official proceedings, and result from related criminal acts that were committed within a three month period, are also counted as one conviction as long as a judge determines that it is in the public interest to do so.

Ineligible Offenses

S.B. 66 did not change the list of prohibited or ineligible offenses set forth in R.C. 2953.36. They include the following:

1. All first- and second-degree felonies;
2. Any conviction subject to a mandatory prison term;
3. Rape;
4. Sexual Battery;
5. Unlawful Sexual Conduct w/ Minor;
6. GSI/SI;
7. Pandering;
8. Illegal Use of Minor in Nudity Oriented Material;
9. Any Traffic Offense, including offenses under 4507, 4510, 4511, and 4549;
10. Any offense of violence that is an M1 or felony, other than Rioting, M1 Assault, Inciting Violence, or Inducing Panic;
11. Importuning if conviction is after Oct. 10, 2007;
12. Voyeurism, Public Indecency, Compelling/Promoting Prostitution, Disseminating/Displaying Matter Harmful to Juveniles, Pandering Obscenity if conviction is after Oct. 10, 2007 and victim is under the age of 18;
13. Convictions of any M1 or felony when the victim is under 18;
14. Traffic Bond Forfeitures.

Dismissals and Not Guilty Findings

For charges that have been dismissed or for which a finding of "not guilty" has been made, there is no waiting period to file an application to seal. If a No Bill is returned, there is a two year wait before an application may be filed. Most courts do not charge a fee for the filing of an application to seal record on a dismissal or not guilty finding.

Relevant Findings

Once an application is filed, a hearing will be set with the trial court. At that hearing, the Court must determine that (1) the petitioner is an eligible offender; (2) no criminal proceedings are pending against the petitioner; (3) the petitioner has been rehabilitated; and (4) the petitioner's interest in having the record sealed outweigh any legitimate governmental need to maintain the record.

Hopefully, this quick primer will help you help those clients who may not have previously been eligible to have their records sealed get it done, with one caveat: OVI's are still not eligible to be sealed. If I had I nickel for every time I received that phone call……

1. For instance, in *State v. Dye*, 2017-Ohio-7823, our Supreme Court found that, "pursuant to R.C. 2953.52(B)(4), a trial court may seal the records in a case dismissed without prejudice before the statute of limitations has expired." *Id.* at ¶ 2. Just this past July, the Eight District Court of Appeals, citing the Tenth District's decision in *In re S.F.M.*, 2014-Ohio-5869, found that R.C. 2953.32 allows, but does not require, a trial court to consider a previously sealed record in decided whether to seal a criminal conviction. *State v. B.H.*, 2018-Ohio-2649.

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HOUSE BILL 228:
REALLOCATING THE BURDEN OF PROOF TO THE STATE IN SELF-DEFENSE CASES & RETROACTIVE APPLICATION

HOLLY B. CLINE
PUBLICATIONS COMMITTEE CO-CHAIR, OACDL

On December 27, 2018, the Ohio General Assembly enacted House Bill 228 which, in relevant part, modified R.C. 2901.05 (effective March 28, 2019), by requiring the State to prove beyond a reasonable doubt that a person did not act in self-defense, defense of another, or defense of that person's residence when that person is attacked in their home or motor vehicle.[1]

House Bill 228 Amendments to R.C. 2901.05

The relevant modifications to R.C. 2901.05 are as follows (newly enacted text is underlined):

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense other than self-defense, defense of another, or defense of the accused's residence as described in division (B)(1) of this section, is upon the accused.

(B)(1) A person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be.[2]

Rep. Terry Johnson and Rep. Sarah LaTourette were the co-sponsors of House Bill 228. In his written testimony to the members of the Federalism and Interstate Relations Committee, Rep. Johnson described the amendments to R.C. 2901.05 proposed by House Bill 228 by noting that "America's founding fathers envisioned a justice system where the burden of proof laid on the accuser and not the accused."[3] Rep. Johnson proffered that Supreme Court of the United States' 1987 holding that state legislatures can shift the burden of proving self-defense by a preponderance of the evidence to the accused relied upon the conclusion that there was no constitutional right to "self-defense."[4] Rep. Johnson submitted, however, that following the Court's 2008 decision in District of Columbia v. Heller, "the inherent right of self-defense [is] central to the Second Amendment right."[5]

House Bill 228 Amendments to R.C. 9.68(A)

The Ohio General Assembly explained its reasons for enacting House Bill 228, in part, in its amendment to R.C. 9.68(A) (effective December 28, 2019) (newly enacted text is underlined):

The general assembly also finds and declares that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves or others.

Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, including by any ordinance, rule, regulation, resolution, practice, or other action or any threat of citation, prosecution, or other legal process, may own, possess, purchase, acquire, transport, store, carry, sell, transfer, manufacture, or keep any firearm * * *.

Any such further license, permission, restriction, delay, or process interferes with the fundamental individual right described in this division and unduly inhibits law-abiding people from protecting themselves, their families, and others from intruders and attackers and from other legitimate

uses of constitutionally protected firearms * * * and the state by this section preempts, supersedes, and declares null and void any such further license, permission, restriction, delay, or process.[6]

On March 19, 2019, the City of Columbus filed a civil suit against the State of Ohio in Franklin County Court of Common Pleas Case No. 19 CV 2281, requesting a preliminary injunction that would delay implementation of the entire law enacted by House Bill 228 until the lawsuit is resolved. In its complaint and motion for a preliminary injunction, the City took particular issue with the fact that House Bill 228's modifications to R.C. 9.68 (effective December 28, 2019) curtails the authority designated by Article XVIII of the Ohio Constitution to municipalities to set local regulations. Thus, the City has argued that R.C. 9.68 and Am.Sub. H.B. 228 violate the Home Rule Provisions of the Ohio Constitution, the Separation of Powers Doctrine, and Article II, Section 32 of the Ohio Constitution.

Retroactivity of House Bill 228's Amendments to R.C. 2901.05

It is unclear from the plain text of the bill as to whether House Bill 228's changes to R.C. 2901.05 were intended by the Ohio General Assembly to be retroactively applied to offenses that occurred before March 28, 2019 (when House Bill 228's changes to R.C. 2901.05 went into effect) but are tried after the March 28, 2019.

The introductory Comment to the Provisional Changes[7] made by the Ohio Jury Instructions Committee of the Ohio Judicial Conference to the relevant Ohio Jury Instructions (OJI) provisions reflects the uncertainty of the applicability of House Bill 228's changes to R.C. 2901.05.

The Provisional Changes to OJI CR 417.27 (Affirmative defense R.C. 2901.05(C) [Rev. 3/23/19]); OJI CR 421.19 (Self-defense against danger of bodily harm – use of non-deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 3/23/19]); OJI CR 421.191 (Defense of another – use of non-deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 3/23/19]); OJI CR 421.21 (Self-defense against danger of death or great bodily harm – use of deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 3/23/19]); OJI CR 421.211 (Defense of another against danger of death or great bodily harm – use of deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 3/23/19]); and OJI CR 425.03 (Affirmative defense [Rev. 3/23/19]) include the following Comment:

> Effective 3/28/19, R.C. 2901.05 shifted the burden of proof from the defendant having to prove self-defense, defense of another, or defense of a residence by the preponderance of the evidence to the state having to disprove the same beyond a reasonable doubt. The General Assembly did not express a clear intent whether HB 228, which shifted the burden of proof of self-defense, applies to offenses before 3/28/19. The court must decide as a threshold matter whether HB 228 is retroactive. If the court decides that it is not retroactive, see this Committee's prior instruction on the same subjects.

The uncertainty regarding the retroactive application of House Bill 228's changes to R.C. 2901.05 has already been seen in Ohio's lower courts. Members of OACDL's listserv have reported that while a Montgomery County Court of Common Pleas judge recently ruled that House Bill 228's changes are NOT retroactive, Wayne County judges seem to have taken opposite stance.

Article II, Section 28, of the Ohio Constitution proscribes the General Assembly from enacting retroactive laws. Pursuant to R.C. 1.48, a statute is presumed to be prospective in its operation unless it is expressly made retroactive. Notably, however, the Supreme Court of the United States has held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.[8]

From the testimony of Rep. Terry Johnson and House Bill 228's changes to R.C. 9.68(A) (albeit, effective later this year), one can arguably glean a legislative intent that House Bill 228's changes to R.C. 2901.05 be retroactively applied. Rep. Johnson explained in his written hearing testimony that:

> After this declaration of a right to self defense, state legislatures and judicial conferences around the country began to shift their burdens of proof back to the prosecution. Ohio, however, has steadfastly retained our model of guilty until proven innocent in cases of self defense despite the premise Martin now being out of date according to some legal scholars. This bill requires that a defendant still present evidence that they acted in self defense, however the burden of proof that the defendant is a criminal will be restored to the prosecution. * * * If the prosecutors are upset that they now have to prove someone is guilty before they throw them in jail, I can kindly show them some less civilized portions of the globe where the local despot will appreciate their brand of "justice."[9]

It is a basic principle of criminal law that the prosecution bears the burden of proving a defendant's guilt beyond a reasonable doubt.[10] The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a defendant in a criminal case against a conviction "* * * except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[11] The "due course

of law" clause of Section 16, Article I of the Ohio Constitution, has been considered the equivalent of the "due process of law" clause in the Fourteenth Amendment.[12]

The Supreme Court of the United States has recognized that the definitions of criminal offenses and affirmative defense, as well as the allocation of burdens of proof are primarily within the province of a state's legislature.[13] "[I]t is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[14]

Pursuant to its constitutional authority to allocate burdens of proof, the Ohio General Assembly expressly allocated the burden of proof in certain types cases involving self-defense by requiring that the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence in House Bill 228. Although House Bill 228 does not expressly state that its changes to R.C. 2901.05 are to be retroactively applied, the due process concerns reflected in the legislative history of House Bill 228 tend to suggest that revised R.C. 2901.05 must be retroactively applied to cases charging offenses that occurred prior to March 28, 2019 but were still pending after amended R.C. 2901.05 went into effect.

Indeed, as expressed by Rep. Johnson, the Ohio legislature's purpose in enacting House Bill 228 was "to make sure that any law abiding person in the state of Ohio has the right to defend themselves or others and that the justice system lives up to the mantra of 'innocent until proven guilty.'"[15] House Bill 228 purportedly "fixes what is clearly broken in the Ohio Revised Code when it comes to self defense in light of common sense and landmark judicial decisions * * *."[16]

Moreover, because House Bill 228's changes to R.C. 2901.05 reflect a new rule for the conduct of criminal prosecutions—to wit, the allocation of the burden of proof in certain types of cases—R.C. 2901.05 should be retroactively applied to all cases pending on direct review or not yet final, as the new rule constitutes a "clear break" with the past.

It follows, then, that if the Ohio General Assembly's purpose in enacting House Bill 228—as reflected by the statements of House Bill 228's sponsors—was, among other things, to provide further due process protections to criminal defendants and to "fix" a clearly broken law, amended R.C. 2901.05 should logically apply to all pending cases.

OJI Committee's Provisional Jury Instructions CR 425.03 and CR 421.19 are included at the end of this article for reference.

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1. *See* 2018 Am.Sub.H.B. No. 228, Sec. 1; R.C. 2901.05(A); R.C. 2901.05(B)(1).
2. *See id.*
3. *Hearing before the Committee on Federalism and Interstate Relations*, Ohio House, 132nd General Assembly (June 20, 2017) (Testimony of Rep. Terry Johnson), available at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-228.
4. *See id.*, discussing *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).
5. *Hearing before the Committee on Federalism and Interstate Relations*, Ohio House, 132nd General Assembly (June 20, 2017) (Testimony of Rep. Terry Johnson), available at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-228. *See District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), paragraph one of the syllabus ("The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.").
6. *See* 2018 Am.Sub.H.B. No. 228, Sec. 1; R.C. 9.68(A) (effective December 28, 2019).
7. *Jury Instructions*, Ohio Judicial Conference, http://www.ohiojudges.org/Committee/1267 (last visited May 3, 2019). The Ohio Jury Instructions (OJI) Committee drafts Ohio Jury Instructions for newly enacted legislation and updates existing instructions as needed and required by intervening legal opinions or events. The OJI Committee provides the provisional instructions formulated by the OJI committee on their website up until the revised instructions have been released for publication. As of May 3, 2019, the following jury instructions have been provisionally changed to reflect House Bill 228's modification to R.C. 2901.05: OJI CR 417.27, OJI CR 417.41, OJI CR 421.19, OJI CR 421.21, OJI CR 421.23, OJI CR 421.191, OJI CR 421.211, OJI 425.03.
8. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (holding that on direct review, a new constitutional rule must be applied retroactively "to all cases, state or federal"). *See also Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat. 304, 340-341, 344, 4 L.Ed. 97 (1816).
9. *Hearing before the Committee on Federalism and Interstate Relations*, Ohio House, 132nd General Assembly (June 20, 2017) (Testimony of Rep. Terry Johnson), available at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-228.
10. See U.S. CONST. amend XIV, § 1; OHIO CONST. art. I, § 10; OHIO CONST. art. I, § 16.
11. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
12. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544–45, 38 N.E.2d 70 (1941); Ohio Const. art. I, § 16; U.S. Const. amend XIV, § 1.
13. *See Patterson*, 432 U.S. at 201–02.
14. *Id.*, quoting *Speiser v. Randall*, 357 U.S. 513, 523, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958); *Leland v. Oregon*, 343 U.S. 790, 798, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *reversed on other grounds*.
15. *Hearing before the Committee on Federalism and Interstate Relations*, Ohio House, 132nd General Assembly (June 20, 2017) (Testimony of Rep. Terry Johnson), available at https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-228.
16. *Id.*

PROVISIONAL OJI CR 425.03 Affirmative defense [Rev. 3/23/19]

COMMENT: Effective 3/28/19, R.C. 2901.05 shifted the burden of proof from the defendant having to prove self-defense, defense of another, or defense of a residence by the preponderance of the evidence to the state having to disprove the same beyond a reasonable doubt. The General Assembly did not express a clear intent whether HB 228, which shifted the burden of proof of self-defense, applies to offenses before 3/28/19. The court must decide as a threshold matter whether HB 228 is retroactive. If the court decides that it is not retroactive, then this instruction should be used for self-defense, defense of another, or defense of a residence. If the court decides it is retroactive, then the conclusion set out in the applicable instruction for self-defense, defense of another, or defense of a residence should be used.

1. GUILTY. If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of (insert name of offense) and that the defendant failed to prove by a preponderance of the evidence the defense of (duress) (insanity) (insert applicable affirmative defense), your verdict must be guilty.

2. NOT GUILTY. If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of the offense of (insert name of offense) or if you find that the defendant proved by a preponderance of the evidence the defense of (duress) (insanity) (insert applicable affirmative defense), then you must find the defendant (not guilty) (not guilty by reason of insanity).

3. VERDICT.
(A) DURESS. OJI-CR 421.15, OJI-CR 425.33.
(B) INSANITY. OJI-CR 421.25, OJI-CR 421.27, OJI-CR 421.29.
(C) SELF-DEFENSE. OJI-CR 421.19, OJI-CR 421.191, OJI-CR 421.21, OJI-CR 421.211, OJI-CR 421.23.

From Jury Instructions, Ohio Judicial Conference, http://www.ohiojudges.org/Committee/1267 (last visited May 3, 2019) (format modified for publication).

PROVISIONAL OJI CR 421.19 Self-defense against danger of bodily harm - use of non-deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 3/23/19]

COMMENT: Effective 3/28/19, R.C. 2901.05 shifted the burden of proof from the defendant having to prove self-defense, defense of another, or defense of a residence by the preponderance of the evidence to the state having to disprove the same beyond a reasonable doubt. The General Assembly did not express a clear intent whether HB 228, which shifted the burden of proof of self-defense, applies to offenses before 3/28/19. The court must decide as a threshold matter whether HB 228 is retroactive. If the court decides that it is not retroactive, see this Committee's prior instruction on the same subjects.

This instruction applies only to cases involving the use of non-deadly force in defense of self or residence. For cases involving the use of non-deadly force in defense of another, see OJI-CR 421.191.

1. GENERAL. The defendant is allowed to use non-deadly force in (self-defense) (defense of his/her residence). If you find that evidence was presented that tends to support the finding that the defendant used the non-deadly force in (self-defense) (defense of his/her residence), the state must prove beyond a reasonable doubt that the defendant did not use non-deadly force in (self-defense) (defense of his/her residence).

2. SELF-DEFENSE. "Self-defense" means that (A) the defendant was not at fault in creating the situation giving rise to (describe the event in which the use of non-deadly force occurred); and

(B) that the defendant had reasonable grounds to believe and an honest belief, even if mistaken, that he/she was in (imminent) (immediate) danger of bodily harm.

COMMENT: If the evidence tends to support self-defense, evidence of prior instances of a victim's conduct cannot be introduced to prove that the victim was the initial aggressor. State v. Barnes, 94 Ohio St.3d 21, 2002-Ohio-68.

3. RESIDENCE. "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

COMMENT: R.C. 2901.05(D)(3).

4. DWELLING. "Dwelling" means a (building) (specify conveyance) of any kind that has a roof over it and that is designed to be occupied by people lodging in the (building) (specify conveyance) at night, regardless of whether the (building) (specify conveyance) is temporary or permanent or is mobile or immobile. (A [building] [specify conveyance] includes, but is not limited to, an attached porch, and a [building] [specify conveyance] with a roof over it includes, but is not limited to, a tent.)

COMMENT: Drawn from R.C. 2901.05(D)(2).

5. NO DUTY TO RETREAT – DEFENSE OF RESIDENCE OR VEHICLE (ADDITIONAL). A person who is lawfully (in his/her residence) (an occupant [of his/her vehicle] [of a vehicle owned by his/her immediate family member]) has no duty to retreat before using force in (self-defense) (defense of his/her residence).
COMMENT: Drawn from R.C. 2901.09.
6. VEHICLE. "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

COMMENT: R.C. 2901.05(D)(4).

7. IMMEDIATE FAMILY. "Immediate family" means a person's spouse, parents, brothers and sisters of the whole or the half blood, and children, including adopted children.

COMMENT: Drawn from R.C. 2905.21 and R.C. 2930.01.

8. TEST FOR REASONABLENESS. In deciding whether the defendant had reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of bodily harm, you must put yourself in the position of the defendant, with his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of (insert name of assailant) and decide whether his/her acts and words caused the defendant to reasonably and honestly believe that he/she was about to receive bodily harm.

9. EXCESSIVE FORCE. If the defendant used more force than reasonably necessary or if the force used is greatly disproportionate to the apparent danger, then the defense of self-defense is not available.

10. CONCLUSION. If you find that the state proved beyond a reasonable doubt all of the elements of (insert name of applicable offense[s]) and that the state proved beyond a reasonable doubt that self-defense does not apply, you must find the defendant guilty according to your findings.

If you find that the state failed to prove beyond a reasonable doubt any of the elements of (insert name of applicable offense[s]) or if you find that the state failed to prove beyond a reasonable doubt that self-defense does not apply, you must find the defendant not guilty according to your findings.

From Jury Instructions, Ohio Judicial Conference, http://www.ohiojudges.org/Committee/1267 (last visited May 3, 2019) (format modified for publication).

RECLASSIFICATION, MODIFICATION OR TERMINATION OF SORN DUTIES UNDER MEGAN'S LAW AND ADAM WALSH... *WHAT ARE THE RULES?*

BARBARA WRIGHT
FAMILIES AND INDIVIDUALS FOR REFORM (FAIR)

Sexual offender registration laws are some of the most complex laws lawyers have to deal with, as the legislature keeps "moving the goalposts" with changes that seem more suitable to muddying the waters than providing clarification. To make matters worse, Ohio is one of few jurisdictions with two separate sexual offender registration schemes. As a result, the availability of reclassification, modification or termination of sex offender registration and notification ("SORN") duties is dependent on the date the offense occurred and the statutory scheme in effect at the time of the offense.

Background

Ohio first adopted Megan's law in 1997[1] to provide for the collection and dissemination of information regarding sexual offenders for law enforcement purposes. Classification of sexual offenders was made at a hearing to determine whether an offender would be classified as one of three categories of offenders.[2] Information available to law enforcement was not disseminated publicly until amendments to Megan's law were made in 2003. Senate Bill 5, effective January 1, 2004,[3] eliminated the right of registrants labeled as sexual predators to petition for a reclassification hearing,[4] imposed residency restrictions, expanded community notification, and required the Attorney General to establish an Internet database, and modern-day SORN was born.

Megan's law required a court to hold a classification hearing to determine risk and classification of an offender as a "sexually oriented offender," "habitual offender," or "sexual predator."[5] Most registrants were labeled sexually oriented, and were required to register with the county sheriff annually for a period of ten years; repeat offenders were labeled habitual, and required to register twice a year for twenty years; and registrants who committed certain offenses against minors or were deemed high risk were labeled sexual predators and required to register quarterly for life. Information on the Internet database was limited to name, address and offense.[6] Megan's law existed until 2008, when Ohio adopted the Adam Walsh Act (the "AWA").[7] Senate Bill 10 became effective January 1, 2008, turning the tables and changing the rules of sexual offender registration. S.B. 10 classified offenders based upon offense, and imposed more stringent reporting requirements, enhanced community notification, and more.[8] The AWA is still in existence today. The problem is, so is Megan's law for registrants whose offenses pre-date 2008.

Senate Bill 10 attempted to require all registrants convicted prior to 2008 to register according to the new tier level classifications.[9] This included "Megan's Law" registrants serving time in prison and former registrants whose names had already been removed from the registry by time, resulting in thousands of legal challenges being filed.[10]

Although many challenges to Megan's' law had failed, the Ohio Supreme Court ruled that the new, more stringent requirements of S.B. 10 were punitive, and therefore violated the separation of powers doctrine and the prohibition against retroactive laws.[11]

Although these rulings led to the reclassification of thousands of registrants back to their pre-AWA classifications, courts continue to incorrectly classify registrants under S.B. 10 for offenses committed prior to 2008.

Reclassification under the law in effect at the time of commission of the offense

Given the changing landscape of SORN laws, it is imperative for defense counsel to ensure that the proper classification is made, especially given the more stringent reporting requirements of S.B. 10. Although new convictions for pre-2008 offenses are less prevalent, there are still thousands of inmates serving time in prison for the commission of a sexually oriented offense committed prior to 2008. It is incumbent upon defense counsel to determine whether classification is correct, and to set things right in the case of improper classification. Reclassification may be available in the following circumstances:

Reclassification for offenses committed prior to 2008

An offender who is convicted after 2008 for an offense committed prior to that date should be classified under the old law, but such is not always the case. With the average sentence for rape running 10-15 years,[12]some offenders are still being released from prison as tier level offenders, some with lifetime reporting, instead of receiving a classification hearing under Megan's law. In some cases, certain sexually oriented offenses against an adult may have been classified as a "presumptive registration exempt sexually oriented offense" under Megan's law.[13] In these cases, reclassification is critical.

In addition, it is generally desirable to correctly reclassify registrants under the reduced reporting requirements of Megan's law. However, given the capricious nature of courts and the broad discretion granted under Megan's law, it is wise for defense counsel to know the judge, and to become familiar with Megan's law designations. Otherwise, a Tier I registrant can be reclassified as habitual, or Tier I or II registrants reclassified as sexual predators, with longer registration requirements, maybe even life.

In order to determine the appropriate classification for an offense committed prior to 2008, it is necessary for defense counsel to consult the law in effect at that time. See Section 2950.01 of the Revised Code, as it existed on December 31, 2007.[14]

Reclassification for offenses committed 2008 or later

In most cases, it is not advisable for a registrant who has been improperly classified under Megan's law to be reclassified (properly) under S.B. 10. The registrant will be subject to enhanced reporting requirements under tier level designations. The only reason to request classification from "pre-AWA" designations would be if the registrant was registered as a sexual predator for life for an offense which would otherwise be a Tier I or Tier II offense, or as a habitual offender for a Tier I offense. Review the Ohio Offense Tiers chart for a determination which classification is required by S.B. 10 and subsequent legislation.

Modification or termination of registration duties

The duty to register under Megan's law terminates ten years after a sexually oriented offender commences to register, and twenty years after a habitual offender begins to register.[15] Although Megan's law originally allowed a registrant classified as a sexual predator to petition for reclassification, that right was removed in 2003.[16] The Sixth Circuit has ruled that the 2003 amendments eliminated the right to petition, without regard to the date of the offense.[17]

Under S.B. 10, the duty of Tier I registrants terminates fifteen years after the duty to register commences, with an opportunity for adults classified Tier I offenders to move for termination of SORN registration after ten years.[18] The duty of Tier II registrants terminates twenty-five years after the duty commences, while Tier III offenders must register for life.[19] No motion for termination of SORN duties is available for adults classified Tier II or Tier III offenders.

Children adjudicated as delinquent for the commission of a sexually oriented offense receive an automatic end-of-disposition hearing[20] to determine the effectiveness of rehabilitation, and whether it is in the best interest of the child and society to modify or terminate SORN duties. "Public registry-qualified" juveniles[21] are also eligible for the same termination proceeding as adults classified Tier I offenders.

Procedure for termination of registration for tier level offenders

Section 2950.15 of the Revised Code specifies that an adult "eligible offender" may make a motion to the court of common pleas, or a "public registry-qualified juvenile registrant" may make a motion to juvenile court, requesting termination of SORN duties. An eligible offender is defined as a Tier I offender or a child

who is or was adjudicated a delinquent child for committing a sexually oriented offense which is a Tier III offense.[22] The motion may be filed ten years after the duty to register commences in the case of an adult offender, and twenty-five years after the duty to register commences for a juvenile.[23]

The motion may be filed in the county in which the offender resides, or in the case of an eligible offender who is not a resident of the state, in any county in which the offender registers,[24] and must be served on the prosecutor who handled the case in which the eligible offender was required to register under SORN.[25] The prosecutor must notify the accuser of the filing of the motion, and the accuser may submit a written statement regarding " * * * any knowledge of the eligible offender's conduct while subject to the duties imposed by" SORN.[26]

An eligible offender must include the following with the motion:

- A certified copy of the judgment entry of the sentence;
- Documentation of the date of discharge from supervision or release;
- Evidence that the eligible offender has completed a sex offender therapy program;
- Evidence that the offender has not been convicted of any criminal offense, excluding a minor misdemeanor traffic offense; and
- Evidence that the eligible offender has paid any financial sanctions imposed.[27]

In addition, "* * * the court may consider any other evidence the court considers relevant, including, but not limited to * * *" whether any of the following aggravating or mitigating factors exist with regard to the eligible offender:

- Suspension of driver's license;
- Compliance with financial responsibility for a motor vehicle;
- Satisfaction of child support obligations;
- Payment of all government taxes;
- Results of sex offender therapy;
- Maintenance of a stable address;
- Continued employment or other source of financial support;
- Success of any drug therapy, if any;
- Letters of reference; and
- Evidence of community service.[28]

While this list is not all-inclusive, it nevertheless includes several overly broad factors which the court can use to disqualify an eligible offender's motion. Defense counsel would be wise to treat the motion like a pre-sentence investigation and address any aggravating factors with plausible evidence to counter the impact of such aggravating factors. For instance, an eligible offender who has not maintained a steady residence or steady employment due to residency restrictions or employment discrimination should produce convincing evidence of such discrimination.

In addition, defense counsel should supplement this list with as many mitigating factors as possible. At a minimum, this should include evidence of successful completion of the terms of supervision, without violation of any terms, if applicable; evidence of early release from incarceration, if any; evidence of a student's academic record, if any; character references from clergy members or other influential witnesses, if genuine references are available; letters of reference from employers, landlords, neighbors, family, and friends; the opinion of a trained professional in sex offender therapy; the results of an independent risk assessment performed by a qualified professional; and evidence of any special accommodations, recognition, rewards, or citations the eligible offender has received, if any.

The most persuasive argument will reference evidence-based practices for reducing recidivism;[29] and will consider the practices of other states,[30] any impact of the age and maturity of the registrant, whether of advanced age[31] or adolescence,[32] and evidence of the low recidivism rate of sexual offenders.[33]

The goal is to demonstrate that the eligible offender has been rehabilitated, no longer represents a risk to society, and is worthy of redemption. A successful motion for termination of SORN duties requires a convincing argument that termination is in the best interest of society. Courts and legislatures are increasingly looking at the collateral consequences on returning citizens, and the value of re-integrating into society, allowing returning citizens to become contributing members of society. The key is to apply the same reasoning to termination proceedings.

Other efforts to allow termination of SORN registration duties

Current law does not provide any additional opportunities to petition for modification or termination of registration duties. However, legislation is currently pending to allow a youthful offender be-

tween the ages of 18 to 20 when he/she had "consensual" sex with a minor to petition for modification or termination of his/ her duty to register.[34] And the Ohio Criminal Justice Recodification Committee (the "Recod" or "Recod Committee") recommended accelerating motions for modification or termination on the following schedule: Tier I, five years; Tier II, ten years; and Tier III, fifteen years.[35]

The Recod recommendations recognize the overwhelming evidence that SORN is costly, ineffective, and results in devastating consequences to the registrant and his family. Several states have adopted procedures similar to that proposed by the Recod Committee in recognition of the fact that a strong, limited register is a more effective law enforcement tool than one which is overburdened, leading to a false sense of security.[36]

With the exception of drug sentencing reform, the Recod recommendations have largely been overlooked by the Ohio General Assembly.

Classification of Out-of-State Offenses

One final consideration is the labeling of registrants who committed an offense in another state prior to moving to Ohio. Recent Federal District Court cases have raised due process questions about the constitutionality of classification under SORN without a hearing.[37] While courts have held that the sentencing hearing of an in-state offender is enough to satisfy due process, it is not as clear whether a classification hearing is necessary in an Ohio court for an out-of-state offender.

Section 2950.01 of the Revised Code generally defines tier level offenses to include "any existing or former * * * law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed * * *" in the appropriate subsection of Section 2950.01.[38]

Ohio law requires a two-prong test whether registration is required in Ohio for an out-of-state offense: 1) The offense must have required registration in the host state; and 2) the offense must be the substantial equivalent of an Ohio offense.[39]

The question which is not addressed by SORN statutes in many states, including Ohio, is how that determination of substantial equivalency is made. In many cases, it appears to be made by a sheriff's deputy or administrative staff, instead of by a court of law. Any incorrect classification, if any, is not typically discovered until the registrant violates his or her duty to register.

It is likely that litigation in this area will be forthcoming, the result of which may influence the need for risk assessments in years to come.

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About the Author

Barbara Wright is a full-time advocate for the rights of persons required to register under SORN for a conviction of a sexually oriented offense. Her primary focus is on lobbying for legislation which would allow an adolescent between the ages of 18 and 20 when he had "consensual" sex with a minor to become rehabilitated and petition for modification or termination of his duty to register under SORN.

Barb also writes and speaks about residency restrictions, housing and employment discrimination, and other collateral consequences to registrants and their families. She is also seeking plaintiffs for constitutional challenges to SORN laws, including residency restrictions and classification under SORN for out-of-state offenses.

Barb is also a director of Ohio Rational Sexual Offense Laws (OHRSOL) and a member of National Association for Rational Sexual Offense Laws (NARSOL), a member of OACDL, NACDL, and the Ohio Bar Association.

Please contact Barb if you are interested in referrals or if you or your client have a story or an unusual grievance that could help in reform efforts.

1. 1996 H.B. 180 (effective July 1, 1997). Formally titled "Ohio's Sex Offender Registration and Notification Law," House Bill 180 was also known as "Megan's Law."
2. R.C. 2950.09 as it existed from 1997 through 2003.
3. 2003 Am.Sub.S.B. No. 5 (effective Jan. 1, 2004) (amending R.C. Chapter 2950.).
4. R.C. 2950.09(C)(3) as it existed from 2004 through 2007, *available at* https://law.justia.com/codes/ohio/2006/orc/jd_295009-8891.html.
5. *Supra*, note 2.
6. *Supra,* note 3.
7. 2007 Am.Sub.S.B. No. 10 (effective Jan. 1, 2008) (amending R.C. Chapter 2950.).
8. *Supra.*
9. R.C. 2950.011, R.C. 2950.031, and R.C. 2950.032.
10. *See, e.g.*, Daniel J. Schubert, *Challenging Ohio's Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and Remedial Treatment of Sex Offenders*, 35 Dayton L. Rev. 277, 280–86 (Winter 2010).
11. *State v. Williams,* 129 Ohio St. 3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 (finding that provisions of S.B. 10 violated retroactivity prohibition of Ohio constitution); *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (finding that provisions of Senate Bill 10 violated the separation of powers doctrine).
12. *Profiles of Sex Offenders in Ohio Prisons*, Corr. Inst. Inspection Comm. (Sept. 23, 2015), *available at* http://www.ciic.state.oh.us/docs/Sex%20Offenders%202015.pdf.
13. R.C. 2950.01(P) in existence until 2007.
14. *See supra* note 2 for text.
15. R.C. 2950.07(B).
16. *Supra,* note 3, at R.C. 2950.09 as it existed until 2007..
17. *Doe v. DeWine,* 910 F.3d 842 (6th Cir. 2018).
18. R.C. 2950.15.
19. R.C. 2950.07(B).
20. R.C. 2152.84.
21. R.C. 2950.01(N).
22. R.C. 2950.15(A)..
23. R.C. 2950.15(C).
24. R.C. 2950.15(B).
25. R.C. 2950.15(E).
26. R.C. 2950.15(F).
27. R.C. 2950.15(D).
28. R.C. 2950.15(G).
29. Christopher Lobanov-Rostovsky, *Adult Sex Offender Management*, U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (July 2015), *available at* https://www.smart.gov/pdfs/AdultSexOffenderManagement.pdf; *Sex Offender Management Assessment and Planning Initiative*, U.S. Dep't of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (last updated March 2017), *available at* https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.
30. *50-State Comparison Relief from Sex Offender Registration Obligations*, Restoration of Rights Project (last updated Nov. 2017), *available at* https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/.
31. (Unpublished) statistics compiled from a public records search of the Offender Watch website indicate that nearly 86% of persons on the Ohio SORN are listed for a sexually oriented offense committed before they turned 50; 36% were age 35 or younger.
32. *Sex Offender Management Assessment and Planning Initiative*, U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (last updated March 2017), *available at* https://www.smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf; *Practice Profile: Juvenile Sex Offender Treatment*, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *available at* https://www.crimesolutions.gov/PracticeDetails.aspx?ID=36 (last visited Apr. 30, 2019).
33. Patrick A. Langan, Ph.D., Eric L. Schmitt, & Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics (Nov. 2003), *available at* https://www.bjs.gov/content/pub/pdf/rsorp94.pdf.
34. Senate Bill 47, "Allow certain sex offenders to petition for SORN reclassification," is currently pending in the 133rd General Assembly. *See* https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-47..
35. *Final Draft Proposal: Plain Language*, Ohio Criminal Justice Recodification Committee (June 15, 2017), *available at* http://ocjrc.legislature.ohio.gov/Assets/Files/final-plain-language-draft.pdf.
36. Melody Gutierrez, *State Legislature OKs Controversial Bills on Sanctuary and Sex Offenders*, SFGATE (last updated Sept. 16, 2017, 1:49 AM), *available at* https://www.sfgate.com/bayarea/article/Bills-on-sanctuary-sex-offenders-moving-to-12202512.php; Ida Lieszkovszky, *Sex Offender Registries Draw Criticism from Some Unlikely Sources*, Cleveland.com (Oct. 8, 2015), *available at* https://www.cleveland.com/court-justice/2015/10/advocates_on_both_sides_say_se.html.
37. *Meredith v. Stein,* 355 F. Supp. 3d 355 (E.D.N.C. 2018).
38. R.C. 2950.04(A)(4), R.C. 2950.041(A)(4), R.C. 2950.01(A)(12).
39. *State v. Lloyd*, 132 Ohio St.3d 135, 970 N.E.2d 870, 2012-Ohio-2015.

OHIO OFFENSE TIERS

Ohio Revised Code 2950.01

TIER I (15 years/ annual registration) 2950.01(E)	TIER II (25 years/ bi-annual registration) 2950.01(F)	TIER III (Life/ quarterly registration) 2950.01(G)
2907.04 Unlawful Sexual Conduct/ less than four years no consent/ no prior offenses	**2907.**21Compelling Prostitution	**2907.02** Rape
2907.05 (A)(1), (2), (3) or (5) Gross Sexual Imposition	**2907.321** Pandering Obscenity Involving a Minor	**2907.03** Sexual Battery
2907.06 Sexual Imposition	**2907.322** Pandering Sexually Oriented Material Involving a Minor	**2907.05(B)** Gross Sexual Imposition victim under the age of 12 with intent to abuse or harm
2907.07 Importuning	**2907.323(A)(1)or (2)** Illegal Use of a Minor in Nudity-Oriented Performance	**2903.01**Aggravated Murder with Sexual Motivation
2907.08 Voyeurism	**2907.04** Unlawful Sexual Conduct with a Minor/ more than four years or prior offenses	**2903.02** Murder with Sexual Motivation
2907.09(B)(4) *Public Indecency In Front Of A Minor/ Court Discretion less than 10 years older or no priors*	**2907.05(A)(4)** Gross Sexual Imposition/ victim under 13	**2903.03(B**) Voluntary Manslaughter with Sexual Motivation
2907.22 Promoting Prostitution	**2919.22(B)(5)** Child Endangering/ Sexually Oriented or Nudity Oriented	**2903.04(A)** Unlawful Death or Termination of Pregnancy as a result of committing a felony with sexual motivation
2907.32 Pandering Obscenity	**2907.24(A)(3)** Soliciting After Positive HIV Test	**2903.11** Felonious Assault with Sexual Motivation
2907.323(A)(3) or (4) Illegal Use of Minor in Nudity-Oriented Material	**2905.01(A)(1), (2),(3) or (5)** Kidnapping with Sexual Motivation	**2905.01(A)(4)** Kidnapping for Sexual Activity/ victim under 18
2903.211(A)(3) Menacing by Stalking with Sexual Motivation	**2905.01(A)(4)** Kidnapping for Sexual Activity/ victim over 18	**2905.01(B)** Kidnapping/ victim under 18/ not a parent
2905.03(B) Unlawful Restraint with Sexual Motivation	**2905.02(B)** Abduction with Sexual Motivation	**2971.03** Sexually violent predator classification
2905.05(B) Child Enticement with Sexual Motivation	**2905.32** Human Trafficking if 2950.01 (A)11)	Delinquent child for Tier III equivalent in another jurisdiction
Any of the following child-victim oriented offenses/ victim under 18/ not a parent: **2905.02(A), 2905.03(A),** 2**905.05(A)**; and **2905.01(A)(1),(2),(3) and (5)** *no Sexual Motivation*	Any sexual offense or child-victim oriented offense occurring after an offender has been classified as a Tier I offender.	Any sexual offense or child-victim oriented offense occurring after an offender has been classified as a Tier II or Tier III offender.
Delinquent Child classified Tier I pursuant to 2152.831	**Delinquent Child** classified Tier II pursuant to 2152.831	**Delinquent Child** classified Tier III pursuant to 2152.831 or public registry qualified juvenile

All offenses also include attempt, conspiracy or complicity to commit listed offense.

Violations of former laws of this state, any existing or former municipal ordinance or law of another state, military court, Indian tribe, or U.S. that is substantially equivalent to any of the listed offenses included in the equivalent tier.

HOW TO HANDLE EVIDENCE OF A TEST REFUSAL IN OVI CASES

BRYAN HAWKINS

One of the first questions any attorney gets asked when they mention they handle OVI cases is whether or not you should take a breath test if you get pulled over. The discussion that follows almost always focuses on the pros and cons of providing evidence to the prosecution in the form of a positive test result. Much less discussed, however, are the evidentiary consequences of refusing to take the test.

Under Ohio's implied consent law[1], anyone who operates a vehicle in the state implicitly consents to take a blood/breath/urine test for drugs and/or alcohol if arrested for OVI. Part of that statute requires the arresting officer to read a notice advising the defendant of the consequences of taking or refusing the test. In Ohio, the immediate consequence of refusing to submit to a test is a one-year suspension of the defendant's driver's license.[2]

This suspension is not the end of the potential consequences that can flow from a defendant's decision to refuse a breath test. In the 1984 case of South Dakota v. Neville,[3] the United States Supreme Court held that using evidence of an OVI defendant's refusal against them does not violate their right against self-incrimination, protected by the Fifth and Fourteenth Amendments to the United States Constitution. The Ohio Supreme Court has largely followed this line of reasoning and Ohio Jury Instructions explicitly allow jurors to consider evidence of a defendant's refusal when determining whether they were impaired.

A Difference of Opinion

However, not all states agree with this construct. Earlier this year, the Georgia Supreme Court struck down portions of that state's implied consent law for violating their state constitution. That case, Elliot v. Georgia,[4] focused on the inclusion of the sentence "Your refusal to submit to the required testing may be offered into evidence against you at trial" in that state's implied consent notice. The Georgia Supreme Court held their state protections against self-incrimination were more expansive than those found at the federal level, protecting not only compelled oral and written testimony, but also compelled actions, such as submitting to a breathalyzer test. Accordingly, the Court held using evidence of a test refusal against an OVI defendant at trial would act as an unconstitutional punishment for exercising their right against self-incrimination.

Considering the Ohio Constitution explicitly allows prosecutors to comment on a defendant's decision not to testify,[5] it seems unlikely the Ohio Supreme Court will follow their southern counterpart's lead in disallowing this type of evidence. In the light of the Elliot decision, however, it is still worthwhile to examine how Ohio has addressed this issue over time and determine the best strategies for handling cases involving refusals.

Conditional Refusals

The Ohio Supreme Court first took up this issue in the 1954 case City of Columbus v. Mullins.[6] There, the defendant stated he would not take a breathalyzer test, at the time a new technology, without his physician present. The prosecutor then attempted to use the defendant's refusal to test against him at trial. The Supreme Court conceded that, while this type of evidence would typically be admissible, the defendant did not refuse to submit to the test. Instead, he testified that he knew nothing about the accuracy of the then new breath tests and would only submit in the presence

of his physician. The prosecution produced no evidence showing the defendant's physician was unavailable. The Court found there was no absolute refusal to submit to the test, but a conditional refusal which was justifiable and reasonable given the circumstances. Under those circumstances, at the time, the prosecution would not be permitted to assert a conditional refusal as an admission of guilt.

Unequivocal Refusals

The Ohio Supreme Court next addressed the use of test refusal evidence at trial in City of Westerville v. Cunningham.[7] Unlike the defendant in Mullins, the defendant in Cunningham gave absolutely no reason as to why he refused to submit to the breath test. In distinguishing these facts from Mullins, the court held this type of unequivocal refusal, especially in the absence of a reason given by the defendant that indicates that the refusal had no relation to a consciousness of guilt, does have probative value as to whether a defendant was intoxicated at time. While this ruling allowed evidence of a refusal to be used against a defendant, it left open the possibility that explanations other than consciousness of guilt could impact that admissibility.

Bringing It All Together

In 1994, the Court brought these two types of refusals together and created the framework that is in place today. The defendant in Maumee v. Anistik[8] initially refused to submit to a breath test because she feared the medication she took would interfere with the results. After the officers explained that it wouldn't be an issue, she still refused without further reason. The prosecution used evidence of this refusal against her and the judge instructed the jury that they could consider the fact the defendant refused the test "because she believed she was under the influence of alcohol." The Ohio Supreme Court held that evidence of the defendant's refusal was admissible but found the instructions given by the judge improperly invaded the province of the jury. To rectify this error, the court created the refusal instructions still in place today.

Those instructions state that if the jury finds that a defendant refused to take a test "[they] may, but are not required to, consider this evidence along with all the facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol." These instructions allow the refusal to be used as evidence against the defendant while still allowing the defendant to offer explanations for that refusal that indicate that it was motivated by something other than the consciousness of guilt contemplated by the Court in Mullins and Cunningham.
Conclusion

Maybe Ohio will follow Georgia's lead in the years to come. In the meantime, what does this all mean when dealing with an OVI case in which the defendant refuses to submit to a chemical alcohol/drug test?

First, it underscores the importance of reviewing every piece of discovery. Did the defendant give any reasons for refusing the breath test outside of "I heard not to take it"? Do they have any medical conditions that could lead them to fear an inaccurate result? Is there other evidence inconsistent with the prosecution's "consciousness of guilt" argument

Second, the continued use of Ohio's refusal instruction emphasizes the importance of creative lawyering. The jury instructions leave only so much room to maneuver when dealing with test refusals, so defense lawyers need to effectively discuss refusals during voir dire and closing.

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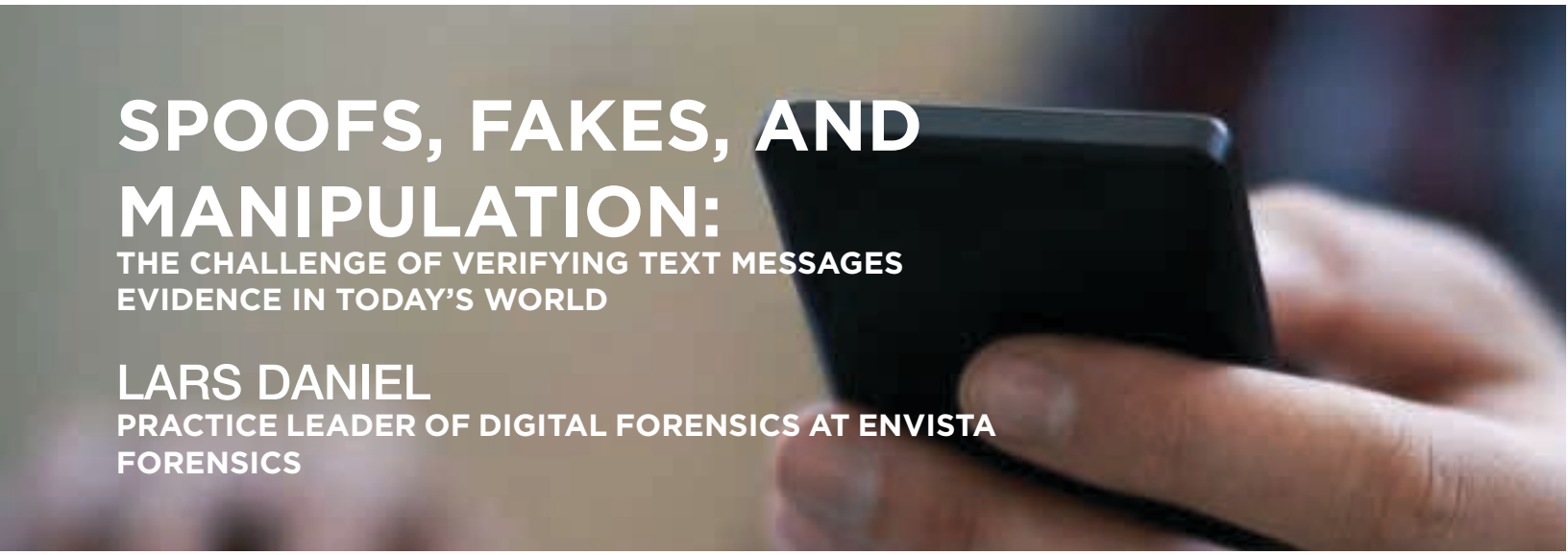
1. R.C. § 4511.191
2. The duration of this suspension increases for subsequent refusals within ten years. R.C. § 4511.191..
3. *South Dakota v. Neville*, 459 U.S. 553 (1983)..
4. *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019).
5. Ohio Const. art. 1, § 10.
6. *City of Columbus v. Mullins*, 162 Ohio St. 419 (1954).
7. *City of Westerville v. Cunningham*, 15 Ohio St.2d 121 (1968).
8. *Maumee v. Anistik*, 69 Ohio St.3d 339 (1994).



SPOOFS, FAKES, AND MANIPULATION:

THE CHALLENGE OF VERIFYING TEXT MESSAGES EVIDENCE IN TODAY'S WORLD

LARS DANIEL

PRACTICE LEADER OF DIGITAL FORENSICS AT ENVISTA FORENSICS

We would all like to believe that when we view a photo, the contents therein are a true and accurate representation of what they purport to be. Unfortunately, this is simply not the case. Widely available technology exists that allows for the manipulation of photos to create fakes that are convincingly real; sometimes so convincing that veracity cannot be determined by examining the photo with the naked eye alone.

While photo manipulation has been a rising problem for some time now, a more alarming trend that this article will detail in depth is in the manipulation and faking, or spoofing of text messages. Make no mistake: text message communications can be altered, and alterations can be done with a low level of technical sophistication and with relative ease.

When a cell phone is forensically imaged or copied with cell phone forensics software and hardware, there are safeguards in place that assist a digital forensic examiner in determining the truthfulness of the evidence contained on the cell phone. With a very high degree of certainty, an examiner can determine when a text message was sent or received, or if it was in the inbox, sent messages, or still a draft.

In our experience handling hundreds of mobile devices, text messages are often collected as evidence by law enforcement, complaining parties, or counsel themselves. This evidence is presented as pictures of messages taken using a camera, or by making a screenshot of the message itself using the cell phone. While using a separate camera is better, a screenshot is never appropriate as it is a manipulation of the original evidence item (i.e. the cell phone) and can cause permanent destruction or manipulation of data.

As a quick example, imagine you have a cell phone and there is a need to document only a few messages. If you take that cell phone, select the text messages, and then make a screenshot, you have potentially permanently altered the state of the message. If the message was "unread", and you selected it to take the screenshot, it will now show as "read". Due to the manipulation of the text message, knowledge of the contents of that message are now attributed to the custodian of the phone even though there is no evidence they ever saw or otherwise interacted with the message.

The methods by which messages can be collected using a camera will be covered, simply because it is not always practical or pertinent to have a full forensic examination performed on a cell phone only to capture a small amount of relevant data. This is called a manual examination. Because instances of fake, spoofed and/or manipulated text messages are on the rise, it is important to more fully detail how each scenario is accomplished.

Faked Messages

Methods of Creating Fake iMessage and Text Message Conversations

It is possible to modify text message conversations on an iPhone using only the iPhone itself. It is also possible to create completely fake iMessage and text message conversations using only the iPhone as well.

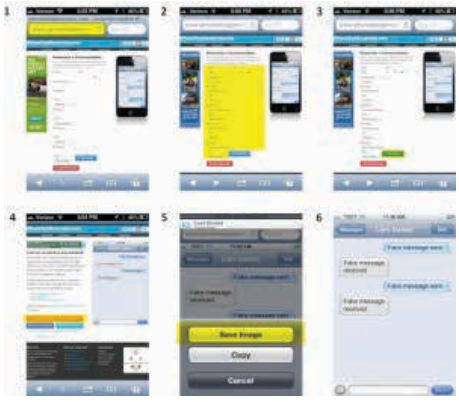
Fake Message Generators

Websites and applications exist that allow for the creation of fake text message conversations. Using the following website, iphonetextgenerator.com, I was able to produce a completely fake iMessage conversation that looks the same as an iPhone screenshot of an iMessage/Text Message conversation.

It is a simple and fast process to create a fake iMessage/Text Message conversation using this website, as described below:
1. Go to the website http://iphonefaketext.com/
2. Fill out the form.
3. Click the "sent" button.
4. Click the "download as image" button.
6. Save the image to the iPhone.

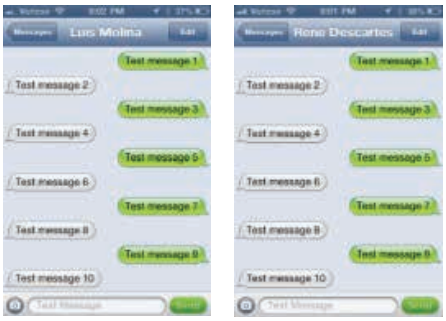
A fake text message conversation is now completed that looks exactly like a screenshot.

The lengthy conversation below was generated using a different fake message site that is now defunct.



Changing the Contact Names Before Screenshot/Photo

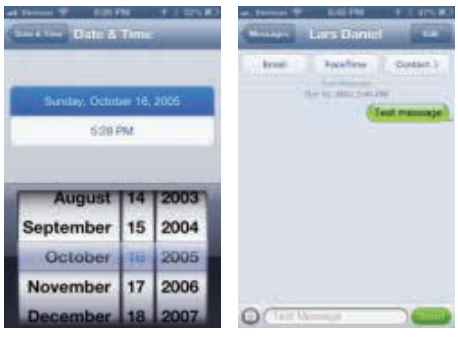
Screenshots of an iMessage/Text Message conversation or of any text message conversation cannot be used to verify the actual identity of a person. The contact name can be changed at any time, and



the phone numbers of the sender or recipient are not recorded in the actual conversation itself in any way. For example, a person could change the contact on their phone named "Rene Descartes" to "Luis Molina" by only editing the contact information. Henceforth, all the messages that were sent between the person and Rene Descartes would now appear to be between the person and Luis Molina.

Back Dating an iPhone

It is possible to back-date an iPhone and to create text messages with fake dates and times. This



can be done by going to the "Settings" application, selecting "General" from the menu, and then selecting "Date & Time." From the "Date & Time" menu, turn off "Set Automatically." From there, click the menu option "Set Date & Time" and now the date and time can be set to anything. I can then send a text message that will show any date and time I select.

iMessage Conversation Between Email and Phone Number

It is possible to create completely faked text message conversations by using only a single iPhone. In the following images, I sent a text message to my own cell phone number (19196219335) to a contact I named after myself (Lars Daniel) under my email address lars.daniel@envistaforensics.com. This created a text message conversation with "19196219335." I then renamed my own cell phone number contact information to "Fake Contact." I proceeded to have a conversation with myself under a faked contact name. Couple this with the previous example of backdating, it would be possible to create months or even years of faked text messages in an afternoon, and from whoever's name you used in place of "Fake Contact".

These examples are only a handful of the methods that can be utilized to create fake messages that look exactly the same as a real messages. Therefore, a picture or screenshot of text messages alone is not sufficient in and of itself to verify the evidence.

From an actual case example, it is also possible to use applications

such as WhatsApp to create fake messages. When you create an account with me these applications they assign your phone number. All you need to do is send and receive messages to yourself between your true cell phone number and your WhatsApp number, name the WhatsApp number in your contact list as the person you want to incriminate, and then take pictures or screenshots of the messages and submit them as evidence.

Manual Examinations

We've seen the challenges posed when collecting cell phone evidence without using cell phone forensics software and hardware that allow for foolproof forensic authentication. However, these challenges are surmountable. Sometimes it is not practical or pertinent to forensically image in attire cell phone to go to the whole process. Because of this, forensic examiners sometimes perform manual examinations of cell phones.

A manual examination is where photos of the actual content of the cell phone are taken with a camera. For instance, as you scroll through all the text messages in a particular conversation you would use a camera to take pictures of the messages to document the contents.

But these pictures are not enough. In order to comply with digital forensic best practices a video camera also needs to be set up that records the entire process of the manual examination. This video would begin upon taking cell phone out of secure storage, to the entire examination process, to the device being powered off and placed back in a secure storage. This is your verification that nothing has been changed on the cell phone intentionally or unintentionally.

If you have a case where all you have is photos or screenshots of text messages and there is concern about authenticity, the method by which the evidence was collected and preserved can be challenged.

Cross Examination Examples

When performing a manual examination there are two critical components. One, the phone needs to be isolated from cellular and wireless networks. If you're looking at photos of text messages and you see that there are Wi-Fi or cellular bars, you know that the phone was not isolated from the networks. Likewise, if the airplane mode icon can be seen in the photos that allows you to know that the cell phone was isolated from the networks. Isolated device prevents remote deletion of data and the incoming or outgoing of data on the phone. The goal is always to preserve the evidence is a snapshot in time of exactly how the evidence existed when it was received into custody.

The other critical component, as previously discussed, is the continuous video footage of the examination of the cell phone wherein photos of the contents such as text messages or emails for verification.

Documentation from the National Institute of Standards and Technology, or NIST, is an excellent resource for cross-examining experts, or whomever documented messages via photo or screenshot. In the following short example, we will utilize NIST documentation as exhibits to show the need for video verification. We will assume for the purpose of our example that no video was taken when the manual examination took place.

Q: Are you familiar with the National Institute of Standards and Technology?
A: Yes

Q: Would you consider NIST to be a reliable source for information concerning cell phone forensics?
A: Yes

Q: Would you consider NIST to be an authority in the digital forensics community on how digital evidence should be handled?
A: Yes
INTRODUCE EXHIBIT: NIST Special Publication 800-101 Revision 1 Guidelines on Mobile Device Forensics

Q: Please read the second to last paragraph on page 51.
A: "Invariably, not all relevant data viewable on a mobile device using the available menus may be acquired and decoded through a logical acquisition. Manually scrutinizing the contents via the device interface menus while video recording the process not only allows such items to be captured and reported, but also confirms that the contents reported by the tool are consistent with observable data. Manual extraction must always be done with care, preserving the integrity of the device in case further, more elaborate acquisitions are necessary."

Q: What exactly is a manual examination of a cell phone?
A: Manual examination is where you take pictures of the contents from the phone, such as pictures of the text messages or emails.

Q: And that is what NIST is talking about in that paragraph, is that correct?
A: Yes

Q: Did you video record your manual examination?
A: No

Q: Is there a reason you chose not to videotape the examination?
A: I didn't think I needed to since I was documenting the text messages with photos.

Q: Since the examination was not videotaped is there any way you can prove if any of the text messages on the phone were deleted UNINTENTIONALLY during the manual examination?
A: No

Q: Since the examination was not videotaped is there any way you can prove if any of the text messages on the phone were deleted INTENTIONALLY during the manual examination?
A: No

Q: Since the examination was not videotaped is there any way you can prove if any of the text messages on the phone were modified UNINTENTIONALLY during the manual examination?
A: No

Q: Since the examination was not videotaped is there any way you can prove if the text messages on the phone were modified INTENTIONALLY during the manual examination?
A: No

Q: Since the examination was not videotaped is there any way you can prove if the text messages on the phone were created UNINTENTIONALLY during the manual examination?
A: No

Q: Since the examination was not videotaped is there any way you can prove if the text messages on the phone were created INTENTIONALLY during the manual examination?
A: No

Q: If you had video recorded your examination you could provide proof that there was no intentional or unintentional manipulation of the cell phone, is that correct?
A: Yes

It is not hard to imagine this line of questioning being long and arduous for the witness, all because they skipped a simple step of video recording the process of their examination. Having testified as an expert witness on issues related to evidence verification and the authenticity of photos or screenshots of text messages, I can tell you that this is a common scenario.

More often than not in the experience of our examiners and myself basic forensic procedures are not followed, video recordings are not made of manual examinations, and many questions are left unanswered as to how the pictures of text messages made it to court.

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AMICUS REPORT

RUSSELL BENSING
AMICUS COMMITTEE CHAIR, OACDL

It's hard to muster any sympathy for Susan Gwynne, but a judge in Delaware County might have done the trick.

Working or posing as a nurse over an eight-year period, Gwynne went into the rooms of people in nursing homes and assisted living facilities and stole items to feed her drug habit. For that, she was indicted on 31 counts of burglary, 43 counts of theft, 15 of receiving stolen property, and another 12 of possessing criminal tools. The burglary counts were second-degree felonies; although Gwynne made sure to do her deeds while the rooms were empty, there's that pesky "likely to be present" element. She wound up pleading out to about half the counts.

So what should her sentence be? I ran that scenario past five Cuyahoga County prosecutors during a slow morning in court a few months back. Everybody (including me) agreed she had to do time. One said twelve years; he was the only one who got into double figures.

The Delaware County prosecutor asked for 43 years. The judge gave her 65.

The 5th District cut that down to 15 years, and the Supreme Court accepted jurisdiction on the State's appeal, so here we are.

We filed an amicus brief on the case, and I did most of the oral argument. The case is probably going to be one of the most significant decisions on sentencing, revolving around a single question: what can an appellate court do when a judge goes rogue and imposes a sentence that is grossly excessive?

Our argument was simple: Follow the law. R.C. 2929.11 gives the principles and purposes of sentencing, and one of them is to use the minimum sanctions necessary to achieve the other goals. R.C. 2929.12 guides the court in gauging the seriousness of the offense and the likelihood of the offender recidivating. R.C. 2953.08 allows an appellate court to reverse, vacate, or modify a sentence if it determines clearly and convincingly that the sentence is not supported by the record. Gwynne was 55 years old, and it didn't seem to make much sense to keep her incarcerated until she was 120 for crimes which involved no physical harm.

The problem is that judges have historically been granted a wide measure of discretion in fashioning a sentence. Most courts have held that the trial court's determinations of the R.C. 2929.12 factors are unreviewable. Lengthy, and arguably excessive, sentences have been routinely upheld.

But if Gwynne loses, that will essentially eliminate any appellate review of sentences, at least as to their length. If a court can sentence a first offender to die in prison for a series of non-violent crimes, it's hard to see any limit to what a judge can do.

There's another issue in Gwynne: her plea agreement included a waiver of appeal. The 5th District sloughed that off, because there was no agreement as to sentencing. That's a correct decision; I've found no case, Federal or state, where an appeal waiver was upheld in the absence of some showing that it was given in consideration for some specific sentencing reduction. But the Supreme Court might use that as an excuse to get rid of the case without deciding the sentencing issue. The case was argued at the beginning of January, so you can expect a decision any day now, which, if past performance is any

indication, means sometime in the next year or so.

After trying—to no avail—countless methods of "modern parental discipline" (boot camp, hug-outs, and rewards for good behavior, to name a few) in response to the bad behavior of his live-in girlfriend's son, Clinton Faggs resorted to old-school corporal punishment when his girlfriend's son broke the school's computer and was sent home early the second time that week. Faggs—who played the role of the family disciplinarian—eschewed that New Age time-out routine and instead spanked the son with an X-box controller cord to inculcate discipline to the son. That earned him a conviction of domestic violence and assault in Delaware County Court of Common Pleas.

The only time the Ohio Supreme Court has addressed the issue of parental discipline vis-à-vis the domestic violence statute was in 1991, in State v. Suchomski. In that case, the defendant argued it was unconstitutional for the State to ever charge a parent with domestic violence of his or her own child—irrespective of whether the parent was unequivocally administering corporal punishment or, as was the case in Suchomski, had drunkenly struck a child for no apparent reason whatsoever. Suchomski therefore moved the trial court to dismiss the indictment on the grounds that R.C. 2919.25(A) was unconstitutionally vague and overbroad on its face because charging him under the statute could bring about the punishment of a parent who lawfully uses reasonable corporal punishment to discipline a child. The trial court granted his motion, and the appellate court affirmed. Reviewing the facts set forth in the State's memorandum in opposition to the defendant's motion to dismiss the indictment, the Ohio Supreme Court concluded that the factual allegations were "sufficient to meet all the elements of an R.C. 2919.25(A) charge for domestic violence," reversed the judgment of the court of appeals, and reinstated the indictment. Notably, The Court held that a "child does not have any legally protected interest which is invaded by proper and reasonable parental discipline."

But who bears the burden of proving that the discipline was "(im)proper and (un)reasonable" in the context of a domestic violence prosecution of a parent (or person acting in loco parentis) who has administered corporal punishment to a child? Most appellate courts have followed the Ohio Jury Instructions and held that "reasonable parental discipline" is an affirmative defense to a domestic violence charge. A few other appellate courts have found the contrary—that is, that "unreasonable parental discipline" is a component of the physical harm element of the offense with which the State is tasked of proving beyond a reasonable doubt. And that's why Clinton Faggs's case is up in the Ohio Supreme Court.

OACDL filed an amicus brief in that one, too. Our argument is a relatively simple one, based on what we learned in law school about affirmative defenses being essentially in the nature of "confession and avoidance": I committed the elements of the offense, but I'm not guilty because there was some justification or excuse for my actions—self-defense, insanity, duress, entrapment, and the like. If you place the burden of proof on the defendant to show that the discipline was "proper and reasonable," you're proceeding from the assumption that any corporal punishment is wrong, and that it's up to the defendant to show that it wasn't. That conflicts not only with Suchomski, but with the long history of cases upholding the fundamental right of the parent to raise his or her child, which includes the method of disciplining the child.

That's a big issue in these cases; there are few things more outcome-determinative in a case than who bears the burden of proof. Although Faggs was not a parent, there was no dispute that he was acting in loco parentis when he administered corporal punishment to the child. More significantly, the Delaware County Court of Common Pleas Judge said in his oral decision following the bench trial that he would have found Faggs guilty of domestic violence regardless of who had the burden of proof. Nonetheless, the Fifth District Court of Appeals certified the conflict between its decision in that case, and a 2013 decision by the Seventh District Court of Appeals. Still, that might go to whether any error was harmless; hopefully, it won't prevent the Court from deciding the issue.

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SPLINTERED DECISION UPHEAVES OUR UNDERSTANDING OF "VOLUNTARINESS"

PAUL GIORGIANNI

Under R.C. 2901.21(A)(1), is voluntariness of action an offense ele-ment, or is involuntariness an affirmative defense?

Does the State bear the burden of persuading the jury that the criminal act was "voluntary" within the meaning of R.C. 2901.21(A)(1)? Or instead does the accused bear the burden of persuading the jury that the act was involuntary? That was the question presented to the Supreme Court of Ohio in ***State v. Ireland***, Slip Op. No. 2018-Ohio-4494 (Nov. 8, 2018). Mr. Ireland argued that his act was "involuntary" because it was performed unconsciously, or automatistically, in a PTSD-induced dissociative state. A five-justice majority reinstated Mr. Ireland's felonious-assault conviction. But the court, splintered into four factions, was unable to answer the question presented—or any other question. No more than two justices agreed on any one of the three opinions:

- Justice DeGenaro, joined by Justice French, voted to uphold Mr. Ireland's conviction. They opined that Mr. Ireland's "alleged altered state of consciousness due to a dissociative episode" constituted "diminished capacity"—a defense that Ohio law does not recognize.

- Justice Fischer, joined by Justice O'Donnell, also voted to uphold the conviction, opining that Mr. Ireland's defense was an affirmative defense, for which he bore the burden of persuasion.

- Chief Justice O'Connor concurred in the judgment without opinion.

- Justice Kennedy, joined by Justice DeWine, dissented, opining that the jury was wrongly instructed that Mr. Ireland bore the burden of persuading the jury that he was "unconscious." They approved the defense argument that automatism is not an affirmative defense but a "failure of proof" defense that seeks to negate the State's proof of the requisite, R.C. 2901.21(A)(1) "voluntary" act.

With no position attracting more than two of the seven votes, a cloud now hangs over the import of the word "voluntary" in R.C. 2901.21(A)(1).

A Wounded Warrior Attacks

Beloved by his wife and his fellow veterans, Darin Ireland's life touched the lives of those close to him in the familiar ways. But Darin's path crossed that of several people in horrible ways, too. Darin killed in military combat. He beat a man nearly to death in a bar two decades later. And those episodes may have killed him. Darin died unexpectedly of acute heart failure on December 17, 2018, six weeks after the supreme court reinstated his conviction.

In the Iraq War, Darin served as a combat-zone mechanic in a unit that was attacked in the field. Darin used a grenade launcher to kill a squad of Iraqi soldiers. Upon investigation, Darin discovered to his horror that the bodies at the kill site included two captured U.S. soldiers. Moments later, one of the wounded Iraqis attacked Darin, cutting him with a knife. Darin killed him with his bayonet.

Darin looked older than his 52 years. He worked as the bus fleet director for the Columbus City School District and was an active member of the Combat Veterans Motorcycle Association. But he was an alcoholic and suffered from combat-induced, post-traumatic stress disorder. Expert testimony at trial indicated that Darin's symptoms included dissociative-state, automatistic episodes.

On October 19, 2013, a stranger, an excessively drunk young man, was in a bar where the Combat Veterans Motorcycle Association was meeting. Darin and his wife were there. On his way out of the bar, the stranger touched Darin's wife inappropriately. Darin did not see it. But another CVMA member did, placed the stranger in a headlock, and took him to the ground. Darin and the bar owner intervened to separate them. Darin then heard that the stranger had touched his wife. Darin began beating the man, continuing to do so even after the man was unconscious. The man survived but suffered permanent injuries.

Contradictory Jury Instructions

Darin was tried on one count of felonious assault. The only issue for the jury was whether Darin was not guilty on the ground that he attacked the man during a dissociative-state, automatistic episode. The defense expert, psychologist James Reardon, Ph.D., testified that a person's action during dissociation is "unconscious" and "by definition is not volitional." Over the State's objection, the judge gave OJI 417.07:

> Where a person commits an act while unconscious as in a blackout due to disease or injury, such an act is not a criminal offense even though it would be a crime if such act were the product of a person's volition. If you have a reasonable doubt whether the defendant was conscious at the time of such act, you must find that he is not guilty.

The prosecutor requested an instruction that Darin's defense is an affirmative defense, for which he bears the burden of persuasion. To no avail, defense counsel (OACDL president-elect **Shawn R. Dominy**) argued that such an instruction contradicts OJI 417.07. After giving OJI 417.07, the judge instructed the jury that Darin bore the burden of proving "unconsciousness" by a preponderance of the evidence.

The jury found Darin guilty. The judge sentenced Darin to six years incarceration but allowed him to remain free pending appeal. The Tenth District Court of Appeals, by a 2-1 vote, ordered a new trial, ruling that placing a burden of persuasion upon Darin was improper because his defense sought to negate the "voluntary" element of the offense that the State was required to prove. 2017-Ohio-263. The Franklin County prosecutor appealed to the Supreme Court of Ohio. Attorney General DeWine later filed a friend-of-the-court brief in support of the appeal.

Uncertainty Reigns

R.C. 2901.21(A)(1) makes "a voluntary act"—actus reus at common law—an element of every criminal offense. In the actus reus context, "voluntary" requires only conscious awareness and willfulness. Colloquially, a person is said to be not acting voluntarily when the act is performed under duress. But in the context of actus reus, the actor under duress acts voluntarily, choosing to commit the criminal offense rather than accept the threatened consequence. Darin had "acted." The question, from the defense perspective, was whether his act was "voluntary" within the meaning of R.C. 2901.21(A)(1). That his evidence, if believed, proved that his act was not "voluntary" is supported by both most of the academic scholarship (LaFave, Dressler, Whitlock, Schopp) and most of the judicial precedents, including unanimous decisions of the high courts of California, Texas, Indiana, and West Virginia and dicta of the high courts of Mississippi and Kansas.

Uncertainty permeates the Ireland decision. Justice Fischer's opinion opens with the conclusion that Darin's purported dissociative episode constituted a "blackout" and leaves open the question of whether action during "blackout" constitutes automatism. Despite the fact that the prosecutor's proposition of law under review acknowledged that "blackout" and "automatism" are synonymous, Justice Fischer opined that "[t]o the extent that an automatism defense is distinct from the blackout defense, arguments regarding an automatism defense are not properly before us" because the parties did not use the word "automatism" in the trial court. (¶ 13).

Justices Fischer and O'Donnell concluded (¶¶ 24-26) that "blackout" is "not a failure-of-proof challenge" but rather an affirmative defense, because it falls within the R.C. 2901.05(D)(1)(b) definition of an affirmative defense—"a defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." The defense perspective is that Ohio's definition of "affirmative defense" is irrelevant: all that matters is how Ohio defines the offense, because "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Patterson v. New York*, 432 U.S. 197, 204 (1977) (quoting *In re Winship*, 397

U.S. 358, 364 (1970)). The Fischer/O'Donnell opinion rejects that perspective, based upon the dubious proposition that both of the following are true:

- R.C. 2901.21(A) clearly and unambiguously makes "a voluntary act" an element of every criminal offense (¶ 31), and

- "Voluntariness is not an essential element of the offense . . . ; rather, a challenge to voluntariness is a defense" (¶ 33).

Dissenting justices Kennedy and DeWine accused Fischer and O'Donnell of "want[ing] it both ways." To the dissenters, the analysis "begins and ends with the elements of the offense: once it is determined that voluntariness—and therefore consciousness—is an element of felonious assault, the state retains the burden of proving it beyond a reasonable doubt regardless of whether lack of consciousness is characterized—or asserted—as a 'blackout' defense." (¶ 69.)

The Fischer/O'Donnell opinion seems to be construing the Revised Code as meaning that an "element" of every criminal offense in Ohio is an absence of the affirmative defense of involuntariness. But the U.S. Supreme Court already rejected such semantic attempts to get around *Patterson* and *Winship*. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held that a government cannot avoid its Due-Process-mandated burden of proving an offense ingredient by wording a statute so as to impose upon the accused the burden of proving the non-existence of that ingredient. (In *Mullaney*, the Court ruled unconstitutional a Maine murder statute that placed upon the accused the burden of proving the non-existence of "malice aforethought.")

Even setting aside the constitutional considerations, the Fischer/O'Donnell statutory construction is remarkable in that (1) R.C. 2901.21(A) does not contain the word "defense," and (2) R.C. 2901.21(A) presents the "voluntary act" provision in parallel with the "culpable mental state" (mens rea) provision—a provision that no one would take for a defense. The opinion is also remarkable for adopting such an adventurous construction of the criminal code without once referencing Ohio's Rule of Lenity, R.C. 2901.04(A).

Justice DeGenaro, joined by Justice French, opined that the evidence of automatism should not have been admitted at all, because PTSD-induced automatism is a form of the prohibited "diminished capacity" defense. The DeGenaro/French perspective is that "Ireland's case did not actually involve an unconsciousness claim under R.C. 2921.21. (¶ 51.) In other words, notwithstanding Dr. Reardon's expert testimony that dissociation deprives the actor of volition (actus reus), the law should deem dissociation as a condition that diminishes the actor's capacity to form the culpable mental state (mens rea).

Picking up the Pieces

Conceding that Ireland has no precedential value because there is no majority opinion, the most remarkable aspect of Ireland remains the sheer scope of its implications. There are many causes of unconscious involuntary action (as opposed to conscious involuntary action, as when a gun is triggered because someone bumped the arm of the accused holding the gun). There is total unconsciousness, such as the states of sleep, coma, and being under general anesthesia; and there is mere mental unconsciousness, which can be caused by emotional disorders such as PTSD and by physical disorders such as brain tumor, concussion, psychomotor epilepsy, and metabolic disorders. Although it would be a stretch to read such distinctions into the Revised Code, those distinctions could have been a basis for limiting the two opinions that created the Ireland majority. But instead, the two majority opinions seem to stand for remarkably broad, pro-prosecution propositions.

The Fischer/O'Donnell perspective seems to be that in every case, (1) the State bears no burden—neither of production nor of persuasion—to prove that the accused's act was voluntary; (2) the accused bears the burden of persuasion that the act was involuntary; and (3) a jury instruction on voluntariness/involuntariness is warranted only if there is evidence of involuntariness.

The DeGenaro/French opinion would take the law down an arguably darker path—not even allowing the accused to present evidence of unconsciousness. The DeGenaro/French view is that Darin Ireland acted "voluntarily" even if automatistically. By characterizing Darin's PTSD-induced automatism as "insanity-related" (evidence of which is inadmissible to prove diminished capacity to achieve the culpable mental state), the opinion raises the specter of other causes of automatism being ruled irrelevant and thus never being presented to a jury. Brain science increasingly is teaching

us that the traditional distinction between "physical" and "mental" etiologies is more a matter of semantics and lay perception than it is of scientific reality. Trial judges swayed by the DeGenaro/French opinion will consider excluding evidence of unconsciousness and automatism on the ground that they are "insanity-related."

Trial tactics arising from Ireland:

1. Defense attorneys rarely ask for an instruction that the jury must find beyond a reasonable doubt that the accused acted voluntarily. But in the wake of Ireland, defense counsel in every case should consider requesting such an instruction. An accused has a constitutional due-process right to have the jury decide whether the court-of-appeals panel persuaded by the Kennedy/DeWine dissent might order a new trial in State proved every offense element. A any case in which a trial judge refuses a defense request for an R.C. 2901.21(A)(1) "voluntariness" instruction.

2. In the rare case in which there is evidence of automatism, defense counsel should, on the record, characterize the defense with as many terms as might apply: "automatism," "involuntariness," "unconsciousness," "dissociation," "blackout," etc.).

Denouement

Darin Ireland died while his motion for reconsideration was pending. The supreme court, without opinion, denied reconsideration by the same 5-2 vote. The court overruled a motion to dismiss the State's appeal under the doctrine of abatement (which dismissal would have left intact the court of appeals' judgment vacating the conviction) and substituted Darin's appellate counsel (the author) as the party defendant. As of this writing, the case remains pending in the court of appeals for adjudication of assignments of error that the court of appeals had found moot.

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CARPENTER V. U.S.:

THE U.S. SUPREME COURT TELLS THE DATA DEVOURING BEAST TO MIND ITS MANNERS AND SAY, "PLEASE" - PRIOR TO ANY FURTHER HELPINGS

RHYS B. CARTWRIGHT-JONES

The year was 2005, I was a newly minted assistant prosecutor, iPhones were being drawn on some far-off drawing board in Palo Alto, George W. Bush had just won some "political capital," and law and order had a swagger. That Fall, I attended a seminar at which a senior colleague bounded in with a large white poster board, drawn on which were crude oil derrick shapes, poking through which were red Christmas lights. "Cell towers!" he announced exuberantly of what looked like a science fair project. "The defendant claimed that he was on the phone with his brother during the time of the MURDER. But we got his location data from cell towers. Sure enough he was on the phone with his brother—driving to commit a M U R D E R!" The senior prosecutor then demonstrated the full dramatic effect of the Christmas-lighted poster board, lighting up each cell tower with a red light, en route to said M U R D E R scene. I raised an eyebrow and looked suspiciously at my sexy new MOTO RAZR. How dare something so cool be an object of such data betrayal?

At that, the beginning of the fourteen years that elapsed between then and the June 22, 2018 decision by the Supreme Court of the United States in Carpenter v. United States,138 S. Ct. 2206 (2018), folks who thought the government was "looking at" them, you'd find anxiously folding tinfoil hats for themselves. Now, folks who don't know beyond a reasonable doubt that the government is "looking at" them must lay in vegetative states. In those intervening years, this slavering maw, this insatiable gullet of governmental data grabbing, devoured petabyte after petabyte of civilian data with, pursuant to legal doctrine of the time, little more than a permission slip from a judge, if even that. In the Spring 2018 issue of the Vindicator, Kenneth R. Bailey described the legal landscape leading up to Carpenter in "4th Amendment and Electronic Devices." And, in the Fall 2018 issue of the *Vindicator*, **Kenneth R. Bailey** summarized the Court's *Carpenter* decision in "Keeping Your Client's GPS Data from their Cell Phone Private."

While criminal defense attorneys across the country rejoiced the Court's decision in *Carpenter*, as a practical matter, it is important to understand when and how *Carpenter* applies.

The Fourth Amendment's Application to Cell Phones and Other Digital Evidence

In the 21st century, individuals began carrying around digital "containers," such as cell phones, which carry inside of them substantially more information than one could ever fit into a largest wallet or handbag. At the same time, technological developments—such as GPS tracking devices and cell site location information (CSLI)—offered to law enforcement an entirely new way of conducting surveillance and investigations. Courts gradually began to recognize that cellphones and other digital devices constituted a sui generis category that justified an entirely different standard in the context of warrantless searches and seizures. The first case addressing this issue reached the Supreme Court of the United States in 2012 in ***United States v. Jones***, 565 U.S. 400 (2012), and again in 2014 in *Riley v. California,* 573 U.S. 373 (2014).

The Supreme Court unanimously held in *Riley* that police must have and produce a warrant in order to search cellular phones, even when those cellular phone devices are seized from a search incident to

lawful arrest. Chief Justice John Roberts, who authored the majority opinion of the Court, unequivocally rejected the United States' attempt to analogize a cell phone search to a wallet search, which he stated would be "like saying a ride on horseback is materially indistinguishable from a flight to the moon."

The Court recognized that cell phones—and digital evidence more broadly—are fundamentally different from physical evidence that one may be carrying on his person. Indeed, the Court observed that the vast breadth of data available on cell phones exposed too much information to law enforcement. Among other things, the Court noted that the "average smart phone user has installed 33 apps, which together form a revealing montage of the user's life." The *Riley* decision echoed many of the arguments raised in the concurring opinions of Justice Sotomayor and Justice Alito in *Jones*, wherein the United States Supreme Court held that the warrantless use of a tracking device on a person's vehicle to monitor the vehicle's movements on public streets violated a person's Fourth Amendment rights.

So, what's on your phone? I suspect that Chief Justice Robert's answer would be, appropriately, "None of your (insert expletive of choice here) business!"

Post-*Carpenter* Application

A first concern of mine is what happens to all the objections pending during the litigation of *Carpenter*. I'm doing an appeal right now in a case in which a couple of our OACDL fellows raised, prior to the Carpenter decision, the issue of whether cell site location data could be seized without a warrant. *Carpenter* came down while I had an extension pending, and—YAY!

However, although not yet addressed by the Ohio Supreme Court, case law following Carpenter quite plainly indicates that it will be difficult—if not impossible—for persons charged with and/or convicted of criminal offenses before and after Carpenter was decided to argue that his or her cell phone records were unconstitutionally obtained without a warrant and that the resulting evidence should be (or should have been) suppressed at trial under the exclusionary rule.

First, persons convicted of criminal offenses before *Carpenter* was decided should have preserved the cell site location information issue for appeal by moving the trial court to suppress this evidence. For example, the Second District Court of Appeals in *State v. Kennedy,* 2d Dist. Clark No. 2017-CA-100, 2018-Ohio-4997 noted that "[t]he issue of whether the cell phone location data used at Kennedy's trial was obtained in violation of Kennedy's Fourth Amendment rights was never argued before the trial court, as Kennedy never moved to suppress the data." *Id.* at ¶ 26. It explained that "[w]hile *Carpenter* was decided after Kennedy's conviction, there was nothing prohibiting Kennedy from moving the trial court to suppress the cell phone location data on Fourth Amendment grounds." *Id.*

Second, many courts have held that, despite the *Carpenter* decision, and notwithstanding the fact that a motion to suppress the CSLI evidence was filed prior to *Carpenter*, law enforcement officers acting under pre-*Carpenter* law will receive the benefit of the good faith exception to the search warrant requirement. The examples tend to read about like this:

> While *Carpenter* is obviously controlling going forward, it can have no effect on [Appellant's] case. The exclusionary rule's sole purpose . . . is to deter future Fourth Amendment violations. Thus, when investigators act with an objectively "reasonable good-faith belief" that their conduct is lawful, the exclusionary rule will not apply. Objectively reasonable good faith includes searches conducted in reasonable reliance on subsequently invalidated statutes. [Appellant] does not, and cannot, deny that investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here.

United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018) (internal quotations and citations omitted). In *United States v. Williams*, No. 2:17-cr-20758-VAR-DRG, 2018 U.S. Dist. LEXIS 129639 (E.D. Mich. 2018), the United States District Court for the Eastern District of Michigan, Southern Division held that "*Carpenter* creates new law that, going forward, will require investigators to have probable cause to obtain CSLI. However, because the Government had objective good faith belief that its conduct under the Stored Communications Act (18 U.S.C. § 2703(d)) was lawful, the CSLI is not subject to the *Carpenter* pronouncement."

However, there may be some limitation to the good faith exception to the exclusionary rule. After the Supreme Court of the United States held in *Jones* that attaching a GPS tracking device to an individual's vehicle is a search within the meaning of the Fourth Amendment, the Ohio Supreme Court ruled in *State v. Johnson*, 141 Ohio St. 3d 136, 2014-Ohio-5021, 22 N.E.3d 1061, that the good-faith exception to the exclusionary rule should apply to evidence obtained or derived from warrantless GPS searches conducted before *Jones* was decided. *See, e.g.*, *State v. Sullivan*, 10th Dist. Franklin No. 15AP-809, 2016-Ohio-218. Thus, by way of analogy, the good faith exception should only apply to evidence obtained or derived from warrantless CSLI searches under the Stored Communications Act that were conducted before *Carpenter* was decided.

Third, it is likely appellate courts will hold that even if the cell phone location data was obtained without a warrant in violation of a defendant's Fourth Amendment rights, such an error would be harmless beyond a reasonable doubt because, even without the cell phone location data, there was overwhelming evidence to convict the defendant of the offense(s) in question. *See, e.g., Kennedy,* 2018-Ohio-4997 at ¶ 27. Thus, any sufficiency of the evidence and/or manifest weight of the evidence appeals by defendants relying on *Carpenter* will likely be unsuccessful.

Moreover, as a practical matter, it is not going to be that much harder for the government to obtain a search warrant instead of an order under the Stored Communications Act. Granted, a probable cause affidavit and review by a neutral and detached magistrate are required to obtain a search warrant. This is certainly a ratcheted standard in comparison to the Stored Communications Act, which required a magistrate to issue an order to wireless carriers ordering them to provide cell phone records to law enforcement officers upon a showing that the officer has "reasonable grounds" for believing that the records sought are "relevant and material to an ongoing investigation, pursuant to 18 U.S.C. § 2703(d). But, given the practical application of *Carpenter*, it's hardly time for celebration. Basically, *Carpenter* told the data-gorging beast to mind its table manners and say grace.

So, the last question is, where do we find ourselves as lawyers in all this? The data gathering machine is the claws and the mouth; the courts and lawyers are the brain and the conscience. Of course, as defense attorneys, we need to be advocates of privacy and constitutional exclusion of private data wherever possible. But we also need to be instruments of public consciousness as far as keeping the public aware of what we share on our smartphones and what the government can do with it. Without the tools of law, subpoenas, warrants, suppression hearings, and judicial decisions, as far as concerns its public impact, data is just an inert and non-threatening pile of "1s" and "0s."

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OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

NOTEWORTHY CRIMINAL LAW DECISIONS

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Supreme Court of the United States Holds that Eighth Amendment's Ban on Excessive Fines Applies to the States in *Timbs v. Indiana*

The Supreme Court ruled unanimously on February 20, 2019 in *Timbs v. Indiana, 586 U.S. ___ (2019)* that the Constitution's ban on excessive fines—as set forth in the Eighth Amendment—applies to state and local governments. This ruling strengthens individuals' property rights by limiting the ability of states and municipalities to impose fines and seize property.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." While the prohibition on bail and cruel and unusual punishments have both been held to apply to state and local governments, the ban on excessive fines had not been expressly held to apply to the states prior to the Supreme Court's decision in *Timbs*.

The case began in 2015 when Tyson Timbs was arrested after selling heroin to an undercover police officer. Upon his arrest, the police seized a Land Rover SUV Timbs had purchased with the proceeds of his father's life insurance policy. After Timbs pled guilty to drug charges, the state sought civil forfeiture of Timbs's vehicle, alleging that he had used to vehicle to transport the drugs for which he was convicted.

The trial court denied the state's civil forfeiture request, observing that Timbs had recently purchased the vehicle for more than four times the maximum $10,000 monetary fine assessable against him for the drug conviction. Thus, the trial court concluded that forfeiture of said vehicle would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. On appeal, the Indiana Court of Appeals affirmed the trial court's decision.

However, the Indiana Supreme Court reversed the lower courts' decisions on the grounds that the Supreme Court of the United States has never specifically held that the United States Constitution's ban on excessive fines contained in the Eighth Amendment—which is part of the Bill of Rights—applies to the states. When the Bill of Rights—the first ten amendments to the United States Constitution—was ratified, it was originally interpreted as only applying to the federal government. After the Civil War, the Fourteenth Amendment to the United States Constitution was ratified, which bars states from depriving anyone "of life, liberty, or property, without due process of law."

The Supreme Court of the United States concluded in *Timbs* that the ban on excessive fines applied to the states through the Fourteenth Amendment to the United States Constitution. Notably, Indiana did not seriously challenge whether the ban on excessive fines applies to the states. Instead, it argued that the ban applies only to payments imposed as punishment. Thus, Indiana argued that the constitutional ban on excessive fines did not apply in the case before the Court, as Timbs's case involved the civil forfeiture of property used to violate the law—a procedure not traditionally regarded as a fine. However, noting that Indiana did not make that argument in the Indiana Supreme Court, the United States Supreme Court declined to consider that argument. The Court went on to explain that whether the ban on excessive forfeitures of property was traditionally regarded as fundamental is irrelevant; what matters instead is that the broader right to be protected from excessive fines has been regarded that way.

Judge Ruth Bader Ginsburg announced the Court's decision:

"For good reason, the protection

against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties * * * Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies * * * Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence."

Although the United States Supreme Court held that states are barred from imposing excessive fines, it did not rule on whether seizing Timbs's Land Rover qualified — instead sending the case back down to the lower courts to apply its incorporation of the Eighth Amendment.

Practically speaking, then, this ruling may limit the ability of states and local governments to seize an individual's property through civil forfeiture proceedings. Under civil forfeiture laws, state and municipal law enforcement officers can seize a person's property without first proving the person was guilty of a crime. The officers only need to establish that they have probable cause to believe the assets seized were used as part or in furtherance of criminal activity—typically drug trafficking. Once civil forfeiture has been successfully effectuated, the seizing law enforcement departments are permitted to absorb the value of the property seized or the proceeds derived from selling the seized property.

6th U.S. Circuit Court of Appeals Holds Chalking Tires is a Search Under the Fourth Amendment

The United States Court of Appeals for the Sixth Circuit recently held in *Taylor v. City of Saginaw,* No. 17-2126, 2019 U.S. App. LEXIS 12412 (2019), that the Michigan city's policy of chalking tires to keep track of parked cars is an unreasonable search and has no role in maintaining public safety. The decision by the appellate created a new legal precedent in Michigan, Ohio, Kentucky, and Tennessee.

The case was brought by Alison Taylor, a Michigan woman who had received 15 parking tickets in the span of a few years. All of Taylor's parking tickets had been issued by the same parking enforcement officer in the City of Saginaw, who Taylor alleged in her lawsuit was a "prolific" chalker.

Taylor filed a 42 U.S.C. § 1983 action against the City, alleging defendants violated her Fourth Amendment right against unreasonable searches by placing chalk marks on her tires without her consent or a valid search warrant. Taylor also sued the parking enforcement officer in her individual capacity. The defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that chalking was not a search within the meaning of the Fourth Amendment, or alternatively, if it was a search, it was reasonable under the community caretaker exception.

In rendering its decision, the appellate court relied on the decision of the Supreme Court of the United States in *United States v. Jones,* 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), wherein the Court held that the government's trespass upon an effect—the vehicle—to obtain information related to the car's movement was a search. Thus, despite the low-tech nature of the investigative technique, the practice of marking the tires of parked vehicles with chalk was deemed an attempt to obtain information under Jones by both the United States District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeals.

At issue, then, was whether the search was reasonable. Defense counsel argued at the trial court level that the search was unreasonable because the City failed to establish an exception to the warrant requirement. Finding the search to be reasonable, the District Court Judge conclude that the chalking practice fell within the police's exercise of "community caretaking," an exception to the warrant requirement. On appeal, the Sixth Circuit Court disagreed, concluding instead that the chalking practice was a regulatory means of raising revenue for the city—which does not fall within the community caretaking exception. The Sixth Circuit Court also rejected the City's argument that the warrantless search was reasonable because there is a lesser expectation of privacy with automobiles.

Thus, the Sixth Circuit Court concluded that "[t]aking the allegations in [the] complaint as true, we hold that chalking is a search under the Fourth Amendment, specifically under the Supreme Court's decision in *Jones*. This does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that two exceptions to the warrant requirement—the 'community caretaking' exception and the motor-vehicle exception—do not apply here. Our holding extends no further than this."

Ohio's Tenth District Court of Appeals Holds Statement Made by Defense Counsel at Bond Hearing Can Be Used to Impeach Defendant

In *State v. Parham*, 10th Dist. Franklin No. 16AP-826, 2019-Ohio-358, the Tenth District Court of Appeals held that a statement made by defense counsel at a bond hearing could be used by the prosecution to impeach the defendant's testimony at trial.

The defendant, Clemon D. Parham, was charged with (1) the robbery and beating death of Victim 1, and (2) the kidnapping and shooting death of Victim 2 in the Franklin County Court of Common Pleas.

Approximately fourth months after the trial court set the defendant's appearance bond at $1.5 million, the defendant's attorney moved for a reduction in the bond amount on the basis that the facts did not support a charge of premeditated murder. At the bond hearing, defense counsel represented to the trial court on record that, while Parham was present when the alleged robbery and beating of Victim 1 occurred—and that Parham did nothing to prevent it—he did not participate in the beating of Victim 1, which ultimately lead the Victim 1's death.

Parham immediately fired his defense counsel after the bond hearing on the issue of bond reduction and obtained different representation.

At trial, Parham testified that he was *not present* when the alleged robbery and beating death of Victim 1 occurred. Over defense counsel's objection, the state was permitted to cross-examine the defendant regarding the statement that his former attorney had made during the bond hearing on the grounds that the statement fell within the exception to hearsay contained in Evid.R. 801(D)(2) (party-opponent admission).

After hearing all the evidence, the jury found Parham guilty of the offenses arising out of the robbery and death of Victim 1; it found Parham not guilty of the offenses arising out of the kidnapping and death of Victim 2.

On appeal, defendant-appellant argued, in part, that the trial court erred when it permitted the state to place in evidence, as admissions of a party-opponent, the unauthorized and inaccurate hearsay statements made by Mr. Parham's prior attorney during his bond hearing. In evaluating this assignment of error, the Tenth District Court of Appeals recognized that: (1) Attorneys are agents for their clients. *State v. Waddy*, 10th Dist. Franklin No. 15AP-397, 2016-Ohio-4911, ¶ 56; *Boddie v. Van Steyn*, 10th Dist. No. 13AP-623, 2014-Ohio-1069, ¶ 13; (2) under Evid.R. 801(D)(2)(d), "statements made by an attorney concerning a matter within the employment may be admissible against the party retaining the attorney." *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555 (6th Cir. 1986) (quotations omitted); and (3) a trial court may admit pretrial statements made by counsel, which have been added to the record in the course of pretrial proceedings, under Evid.R. 801(D)(2)(d). *United States v. Butler*, 496 Fed. Appx. 158, 160-61 (3d Cir. 2012).

The appellate court concluded that the statement made by Parham's former defense counsel at the bond hearing was a statement by the defendant-appellant's agent concerning a matter within the scope of the agency and made during the existence of the agency relationship. Thus, the Tenth District Court of Appeals held that the trial court did not err in permitting the prosecution to cross-examine the defendant regarding his former defense counsel's statement at the bond hearing.

Significantly, the appellate court recognized that, for a statement to qualify as an admission under Evid.R. 801(D)(2)(d), "the principal need not impart specific authorization to make the damaging statement; it need only authorize the agent to take action regarding the matter to which the statement relates." *Parham*, 2019-Ohio-358 at ¶ 54. Parham had authorized his former defense attorney to represent him at the bond hearing and to advocate for a lower bail amount. The disputed statement—i.e., that Parham was present at the time the murder was committed—was made by Parham's former defense attorney as a means of trying to convince the trial court to reduce Parham's bail. Thus, because the factual statements made by Parham's former defense attorney were within the scope of the actions authorized by Parham, the statements are exempted from the hearsay prohibition under Evid.R. 801(D)(2)(d).

The appellate court also rejected the argument that the disputed statement was protected by the attorney-client privilege.

The key takeaway here is that defense attorney must be extremely careful when making representations to the prosecutors and/or the court regarding their client's conduct in pretrial proceedings such as bond hearings.

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SPECIALIZED COURT DOCKET SPOTLIGHT: FRANKLIN COUNTY MUNICIPAL COURT VETERANS COURT

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The Supreme Court of Ohio requires all Specialized Court Docket programs to become fully certified.[1] Sup.R. 36.20(A) defines a specialized docket as "a particular session of court that offers a therapeutically oriented judicial approach to providing court supervision and appropriate treatment to individuals * * *."[2]

Under the certification amendments, courts operating specialized dockets are required to submit an application, undergo a site visit, and submit specific program materials to the Specialized Docket Section as part of the certification process.[3] As of March 27, 2019, there are currently 249 specialized court dockets in Ohio that are either currently certified or are active in the certification process.[4] A complete listing of these courts is available on the Ohio Supreme Court's website.[5]

Specialized Court Docket Types in the Certification Process (Initial Review; Initial Certification; or Certified)	
Child Support	1
Domestic Violence	6
Drug	112
Family Dependency	31
Human Trafficking	4
Juvenile Treatment	7
Mental Health	42
OVI	8
Re-Entry	11
SAMI (Substance Abuse Mental Illness)	2
Sex Offender	1
Truancy	1
Veterans	23

In Franklin County, the Ohio Supreme Court has certified eight specialized dockets:

Franklin County Common Pleas Court: General Division	**Drug:** Treatment is Essential to Success (TIES)
Franklin County Common Pleas Court: Juvenile Division	**Drug*:** Juvenile Recovery Court *(*Initial Certification)*
	Family Dependency: Family Recovery Court
Franklin County Municipal Court	**Drug (Poly-Substance)**: Recovery Court
	Drug (Opiate-Specific): Helping Achieve Recovery Together (HART)
	Mental Health: Learning to Identify and Navigate Change (LINC)
	Human Trafficking: Changing Actions to Change Habits (CATCH)
	Veterans Treatment: Military and Veterans Services (MAVS)

This article focuses specifically on the Veterans Treatment Specialized Docket in Franklin County, while touching on the basic of all Veterans Treatment programs in Ohio and the United States.

Veterans Treatment Specialized Court Dockets

Justice for Vets—a national association of drug court professionals—approximates that there are around 181,000 military veterans incarcerated in jails or prisons across the county.[6] Justice for Vets acknowledges that many veterans suffer from substance abuse disorders, mental health conditions (such as PTSD), and trauma (such as a traumatic brain injury).[7] Coupled with the loss of structure, difficulty adjusting to the civilian world, and/or a loss of camaraderie found in the military, research has suggested that there is a link between substance use disorder and service-related mental illness.[8] Moreover, 81% of justice-involved veterans were found to have a substance use disorder prior to incarceration, and 25% were identified as mentally ill.[9] It is estimated that half of veterans who have PTSD do not receive treatment.[10] 1 in 5 veterans have symptoms of a mental health disorder, while 1 in 6 Iraq and Afghanistan Veterans suffer with a substance use disorder.[11]

In 2015, The Community Mental Health Journal released the first published study on veterans treatment courts, which revealed that 89.5% of veterans with PTSD who participated in a veterans treatment courts remained arrest-free.[12]

Veterans Court Docket in Franklin County Municipal Court

The Military & Veteran Services ("MAVS") docket was originated in 2012 in Franklin County's Municipal Court. The mission of MAVS is to promote effective treatment as an alternative to incarceration, to improve the quality of life, and to increase the safety of the community by providing court oversight and linking participants with appropriate treatment and service providers. Defendants participating in MAVS have pled to a misdemeanor offense and exhibit symptoms of mental health and/or substance abuse disorders following enlistment in any branch of the United States Armed Services.

The MAVS docket consists of a multi-disciplinary treatment team that forms a safety net of resources, linkage, and support around each veteran to encourage them to be successful. The MAVS staff is trained and experienced in aiding Veterans confronting substance abuse, Post-Traumatic Stress, Traumatic Brain Injury, and Military Sexual Trauma or problems. MAVS staff interacts with the Veterans Health Administration, Veteran Benefits Administration, and other community veteran service organizations on a daily basis.

The Franklin County MAVS docket has four unique and distinct phases: Realize, Stabilize, Actualize, and Emphasis. Each phase represents different benchmarks a participant must achieve before moving onto the next phase. Participants work with their treatment team to tailor a plan for their individual needs and factors. "Phase" is a term used to classi-

fy the stage a participant is in at any given time in their court program. They describe the basic expectations and appropriate goals for the average participant in the course of the program. Phases are based on the recommendations of the Substance Abuse and Mental Health Services Administration (SAMSHA) and clinically appropriate expectations of improvement within the understanding of the individual's capacity, abilities, and time spent in their redevelopment of positive behaviors and mindsets while in the MAVS program.

MAVS utilize phase assignments based on the five Stages of Change that ask questions to measure progress and insight. Frequency of attendance at court is dependent on the participant's phase in the program. MAVS is intensive, two-year program, requiring the veterans in the program to regularly report to court to talk about their progress. Participants in the specialized docket program must regularly attend Narcotics/Alcoholics Anonymous meetings, comply with drug and alcohol tests, make their Veterans Affairs (VA) counseling appointments, and stay out of trouble. Participants in Phase I are required to attend weekly status review hearings; participants in Phase II must attend status review hearings every other week; Phase III participants must attend status review hearings once every three weeks; and Phase IV participants must attend once a month. By attending status review hearings, participants have the opportunity for direct discussion and connection with the MAVS judge and staff. Frequent attendance also establishes and reinforces the program's policies and provides an environment that fosters supportive relationships among all participants.

93% of Franklin County veterans in MAVS remained arrest free over the last two years.[13] In the current make up of participant's in MAVS, 70% of participants entered pleas to OVI or other criminal charges (like Theft) to enter the program while 30% of the cases are for Domestic Violence.[14] Of the individuals involved in the court who are diagnosed with a substance use disorder, 90% of those also have a mental health issue and are dual diagnosis.[15] Over 10% have been homeless at some point during the program, and the successful completion rate is above 79%.[16] More than 90% of participants over the last three years have received at least initial treatment for their mental health and/or substance abuse.[17] Over the same last three years, of the veterans participating in MAVS for Domestic Violence cases, less than a third of those participants have reoffended or had their probation revoked because of returning to violence. While twenty-two veterans die a day by suicide across the United States, there has not been a single death by suicide by a participant in the MAVS docket in its entire five-year history.

Since 2015, sixty-seven (67) participants have successfully graduated from Franklin County Municipal Court's Veterans Court, providing for many of its graduates the opportunity to have their charges dismissed and records sealed. Thirty-seven (37) veterans currently are at some phase of the program.[18]

Veterans Treatment Specialized Dockets: Practical Application for Attorneys

The basics of a plea into a veterans treatment court specialized docket are similar to the way in which a defendant enters into any Ohio specialized court docket. The client must plead guilty to a negotiated charge. Upon successful completion of the specialized docket program, the judge may vacate the guilty plea and dismiss the complaint. A determination as to whether the specialized docket program has been successfully completed is made by the judge.

Veterans treatment courts are a powerful negotiating tool for defense attorneys representing qualified clients. Amongst all specialized dockets, a veterans treatment specialized court docket may be best equipped for opening a dialogue with even the most hardened prosecutor or judge. Qualification for acceptance into the Franklin County MAVS specialized docket may be minimally satisfied by a dishonorably discharged client who only participated in—but failed to graduate— basic training in any United States' military branch. To be accepted into any specialized court docket in the Franklin County Municipal Court, a client must have a new, active case. However, many people are able to enter the Franklin County Municipal veterans court specialized docket with both new cases and additional probation cases that were already assigned to another judge.

Clients in need of a veterans treatment court specialized docket are likely to have alcohol—and/or increasingly opiates—as a principal

element of their charged offense. Often, the alcohol or illicit drug is a masking, self-medicating substance for the client's actual psychological problem either created or exacerbated during some point of the client's military service. Prosecutors and judges are very receptive to the idea that a veteran or military service member who otherwise would not be entangled in the criminal justice system but for self-medicating behavior through drugs or alcohol is worthy of a desirable plea deal to entice the client's participation in a program mandating two years of sobriety. Coupled with the appeal to patriotism a defense attorney can make to a prosecutor or judge, requiring two years of enforced sobriety from your client can often draw a plea agreement that makes a veterans court plea and probation desirable and beneficial to a criminal defendant client who has long struggled with alcohol and/or substance abuse issues.

A defense attorney with a client who qualifies for acceptance into the MAVS specialized court docket negotiates a plea deal with the prosecutor assigned to the original charge. In cases involving offenses committed against another person, the prosecutor will consult with the victim to explain the specialized docket program and make sure the victim is amenable to a plea agreement allowing the defendant to enter into the veterans treatment specialized court docket program. Often times, because the victim wants to see the defendant be held accountable over an extended period of time in order to address the defendant's mental health, substance abuse, alcohol abuse, and/or other persisting issues leading to the defendant's criminal behavior, it is the victim who requests that the defendant be transferred to the veterans treatment specialized docket program.

After negotiating the terms of a plea, the client has to be screened by staff of the veterans court, who determine whether the defendant is a good candidate for acceptance into the MAVS specialty docket. This determination is often made during the MAVS staffing meeting, which the defense attorney may be invited to attend in order to advocate on behalf of his client.

After the MAVS staff—including the judge who presides over the veterans treatment specialized docket—agrees to accept the client into the MAVS docket, the defendant and defense attorney must execute a Veterans Court Specialized Docket Agreement. This is a document outlining the rules and regulations of the veterans court and emphasizing the understanding from the client of the voluntariness to participation in a veterans court. The Specialized Dockets Section of the Supreme Court of Ohio requires all specialized court dockets in Ohio to ensure the constitution rights of its participants and to avoid engaging in practices that infringe upon those rights.[19] Indeed, at the time of sentencing into the veterans treatment court specialized docket, the judge will add an "understanding of the veterans court agreement" to the sentencing colloquy (similar to the "knowingly and voluntarily executing a jury waiver" given by the court during a regular criminal plea hearing).

The defendant must also complete a Specialized Docket Transfer Form, wherein the basic participation requirements of any specialized docket are laid out. The prosecutor must indicate on this Form as to whether they are willing to allow the plea to be vacated and original charge dismissed upon successful completion of the veterans treatment court specialized docket as part of the plea deal. The original assigned judge over the case must also sign the Specialized Docket Transfer Form to effectuate the release of the case to the veterans treatment court specialized docket. Staff from MAVS must also indicate on the Specialized Docket Transfer Form the date on which the plea into the veterans treatment specialized court docket will be entered.

Despite being a municipal court specialized docket program, the Franklin County veterans treatment court specialized docket also has accepted defendants facing felony charges or felony probation through a number of legal avenues. Defendants have pled to amended misdemeanors from unindicted new felony charges—a common practice in Franklin County Municipal Court's drug and human trafficking specialized court dockets. Defendants have also pled guilty to newly filed misdemeanor charges with an agreement from county prosecutors to dismiss the pending felony charge against that client in the common pleas court. Lastly, defendants have entered veterans court on misdemeanor cases that are open at the time additional felony cases are also being resolved, where the resolution of the felony case include participation in MAVS as a condition of the defendant's felony probation.

Veterans treatment courts throughout Ohio offer a powerful tool to criminal defense attorneys seeking desirable case resolutions for their clients. Statistics increasingly show that veterans treatment courts also offer the optimal path of legal oversight for decreasing recidivism and criminal behavior among military veteran criminal defendants. Defense attorneys should be mindful of current or past military service by their clients, and at least include participation in a veterans treatment court as a negotiating tactic where possible. Even if a client is not interested in participating in a treatment court, being aware of military service and the issues it can create—as outlined in this article—can help an attorney seek out appropriate trial defense strategies for clients. In counties or courts where military veteran defendants do not have the option of participating in a specific treatment court, defense attorneys should also be pressing the appropriate authorities to create treatment avenues to continue to grow the therapeutic and criminality benefits that veterans treatment courts are demonstrating across Ohio.

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MY FIFTEEN MINUTES OF FAME

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The fulfillment of my destiny as an Andy Warhol cliché began with me being assigned the case of Anna Hendricks. (I don't need to say that's not her real name, do I?) Anna's crime had happened in a bar, and the bar had a surveillance camera. I got the video in discovery. It showed Anna and a friend sitting at the bar, and a man keeps coming by and patting Anna on the ass. Anna finally gets off the stool and confronts him, whereupon some other woman comes over and gets in Anna's face. The two go at it, Anna gets knocked to the floor, and things go seriously south: the other woman's friend comes over and deliberately stomps Anna while she's on the floor. Anna finally struggles to her feet, flailing around, and lands one on the cop's face as he's approaching. She gets indicted for assaulting a police officer.

So let's digress a minute and talk about women lawyers, because the prosecutor on Anna's case was one. Jennifer was young, late 20's or early 30's, and I hadn't had any dealings with her before. From what I heard, she was a pretty good attorney.

Criminal law, especially, is a paternalistic and somewhat misogynistic system: simply put, a lot of the defense bar is comprised of older white men, and they have trouble dealing with young women lawyers as equals.

And sometimes women come to expect that, which is sort of what happened with me and Jennifer. Here's how it went down at the first pretrial.

That's one of five pre-trials I have that day, and since Anna's out on bond, I stop up on her floor first. The prosecutors sit at a table at the back of the hallway, there's only one of the five prosecutors there yet. I check in the back, and neither the judge nor the bailiff is in. I head down the hall toward the elevators when I see Jennifer coming the other way. This is what I said: "Oh, just the person I need to see." This is what she heard: "So you finally decided to show up, you lazy bitch." (or something like that). At any rate, things quickly deteriorated into the worst exchange I've had with a prosecutor in twenty years.

Shortly after that, another woman appeared: Sarah Koenig, the reporter for the podcast Serial. This was their third season: the first had been spent covering a murder trial in Baltimore, which gained the podcast national recognition. The second had focused on the Bowe Bergdahl trial, and now it was time to take on the Justice Center in Cuyahoga County.

Sarah chose Cuyahoga County, she said, because of the free access she had to the courts, judges, and lawyers. As if. While some judges even allowed her to record courtroom proceedings, other lawyers, judges, and especially bailiffs treated her appearance with the tape recorder and boom mike as if she were Patient Zero for the next pandemic.

Sarah wanted to talk to me about Anna's case. Why did I want to talk with her? Good question. My interactions with the press have been somewhat uneven; after I was quoted in a newspaper article many years ago, one of my good friends assured me that he didn't believe the quote because nobody would say something that stupid.

But there were factors which overcome my reluctance. First, I generally don't have any reluctance to talk, to anybody about anything. Second, I had no idea what Serial was; I figured it was something that Sarah put together in her basement, with a listenership in the triple digits.

And Sarah was a very good interviewer, easy to talk to. I never told her anything Anna had told me, and I never allowed her to sit in on my meetings with Anna. But I talked about my strategy and my interactions with the prosecutor

and other players. Mostly I talked about my observations of the criminal justice system. Oh, was that fun.

So let's get back to the case. By the second pretrial, Jennifer and I were still in an Ice Age. I told her I'd like to have the State dismiss the case. Fifteen minutes later, she announced to the bailiff and a crowd of a dozen lawyers that I'd made a "laughable" plea request. "Laughable." Nothing like a prosecutor who'd been in the felony division three whole years telling a bunch of lawyers that I just piled out of a clown car.

The third pretrial she came back with what I thought she would: drop the cop spec, and it's simple assault, a first degree misdemeanor.

So let's talk about how this fits in with some of my observations about the criminal justice system. As a judge once told me, "In this county, innocence is a misdemeanor."

I had a case once, a bullshit aggravated robbery, where I learned two things: (1) If the prosecutor calls you up three days before trial and asks you if you know where the victim is, that's a good sign, and (2) If on the day of trial the prosecutor comes out in the lobby and calls the victim's name, and nobody stands up, that's an even better sign. Even then, they only offered me a misdemeanor. I said no, they came back with a dismissal, I told my client what happened, and he eagerly offered that he would have pled to the misdemeanor. Glad to see I'm more interested in making sure you don't have a criminal record than you are, Sparky.

Now, here's the problem for the lawyer. There are 34 judges in Cuyahoga County, and all have dockets of about 90 to 100 cases pending at any one time. There is huge pressure, on everyone, to whittle that number down. Some judges will go to extraordinary lengths to do so; one judge was recently reversed because he had made his own plea bargain from the bench, and elicited a plea from the defendant, without any participation by the prosecutor.

But if you're telling a judge that you're going to make her try a case because your client won't take a misdemeanor, that's not going to go over well. Word gets around among the judges; if you get a reputation for being difficult, the judge assigning attorneys in the arraignment room might take that into consideration. That's pressure on a lawyer to go along.

I could get away with it, because I'm old and there's nothing the legal system reveres more than age. (And if somebody tells you that there's no such thing as white privilege, a day spent in a felony courtroom will disabuse them of that notion.) So I countered Jennifer's offer: Anna will plead to disorderly conduct.

I'm not sure why I rejected the plea offer. This wasn't Anna's first rodeo; she'd pled out to a theft the week before I'd gotten her case. I'm not sure if it would have mattered to her if she'd copped to a simple assault.

But assault is considered a violent crime, and she didn't have any of those. If she did plead to the assault, anybody who took the time to read the docket would figure that she hit a policeman, and had a shyster plead it down.

And she hadn't done anything. That was really it.

So why did I offer to plead her guilty, even to disorderly conduct? As the comics say, know your room. The judge was a former prosecutor, and was fairly heavy with the stick on sentencing. She wasn't totally enamored with me, which might have had something to do with me getting her reversed three times on the same case, with one of those reversals affirmed by the Supreme Court. And as any lawyer who's practiced more than six months knows, the one truth about jury trials is that You Never Know. There's always a five percent chance of anything happening, and if Anna was convicted, I could see her getting some prison time.

I'd be happy to tell you that the case was resolved on that basis. I'd be wrong, though. Jennifer sent me an email the following day telling me her supervisor had rejected my offer, and Anna had to plead to the misdemeanor assault. I called the supervisor and left a voicemail asking to talk to her. That produced another email from Jennifer confirming that it was either plead to the assault or go to the box.

So three weeks later, I headed over to court for trial. I had a case a while back, a rape, and there was surveillance video of that, too. Not of the actual sex act, just of the two going back to the area where the deed was done, and of the two coming out. It would have fit as a scene in a romcom: in contrast to the girl's testimony about being in fear of her life… My favorite scene was of them coming out and walking down the street, while the girl grabs a cigarette pack out of her purse, deftly pokes out a cigarette, and lights it in a smooth, easy motion. I used that in closing, and when the prosecutor did his, the backdrop was a still frame where Ms. Victim was casually strolling along, the cigarette dangling from her hand, betraying not a care in the world. The jury was back in an hour with a not guilty.

I figured the trial in Anna's case would conclude with Jennifer railing for conviction with the frame of Anna being stomped frozen in the background.

But it was not to be. Jennifer was in trial in another case, and Anna's had been taken over by another prosecutor, Jonathan. He and I were good friends. In fact, he'd been present at the first disastrous pretrial, and had done his best afterwards to assure Jennifer that I was not the spawn of Satan. The first thing he told me was that I'd got my plea to disorderly conduct. It turned out that Jennifer had never shown the video to her supervisor. Jonathan did, and that was that.

The officer who Anna had viciously assaulted—and if you're wondering what damage a glancing blow thrown by a 5'1", 110-pound woman would do to a 6'2", 210 pound man, the answer is "none"—wasn't there for the sentencing. His sergeant was, and seemed to be embarrassed by the whole thing. He acknowledged that the four days that Anna had been in jail before making the $5,000 bond was probably sufficient punishment. Not to the judge, though; she threw in a $200 fine on top of court costs.

So with the fine, court costs, and the $560 she shelled out to the bondsman, Anna was out just a bit north of a grand. Then there's the four days in the County Jail. It's hard to put a money value on that, but if you can, it's a lot: I've had people plead guilty to crimes they probably didn't commit just to go to prison and get out of that hellhole.

I second-guessed myself about not trying the case, but second-guessing goes with the territory. I second-guess myself about cases I've won, let alone lost. Not unusual; most lawyers will tell you that their most penetrating cross-exams, their most persuasive arguments, are the ones they make on the way back to their office.

Sarah had some mopping up to do. She wanted to interview Jonathan, but he told me that the message had come down from on high that keeping his job was dependent upon keeping his mouth shut. Sarah did interview Jennifer, who dismissed the whole thing by calling the difference between a misdemeanor assault and disorderly conduct "negligible." Who knows, perhaps even "laughable." I'm sure if she were presented the choice of copping to either of the two, she'd have to spend a lot of time agonizing over it before making the call.

Life goes on. I submitted my fee bill, and added $800 to my already-overflowing retirement fund. I talked with Sarah a few times after that, mostly to give my take on another case she was looking at. I had another case with Jennifer, where there was some initial resistance, but we worked it out to my satisfaction. I saw Anna a couple of other times, both in the county jail, visiting her boyfriend, who was charged with domestic violence. Against her. She asked me to represent him, but I've grown fond of my law license, so I had to politely decline.

Several months later, I got an email from Sarah, telling me that Season Three was going up in a few weeks, with the first episode on Anna's case. My first thought was, "Jeez, I hope I don't wind up sounding like a dick." So was my second and third.

You can make that call yourself; you can watch the episode at serialpodcast.org. But I think Andy smiled on me. I got very favorable feedback, even from prosecutors. I got a call from a guy in London, and one in California. A friend of mine told me he was bringing two of his kids from California, and they asked him if he knew me. As a result of the massive exposure, I had to hire ten associates and open up two satellite offices. One of these statements is false, and you can guess which one it is.

In physics there's something called the Observer Effect, which is the theory that observing an object changes it. I think that was true here: I became a different lawyer for that case, simply because I spent a lot more time on it than I otherwise would have. I can more readily understand the reluctance to allow cameras in the courtrooms. Believe me, you act differently when you know people are watching or listening to you.

But then again, we might round this up with an even older observation: the whole thing was a puff-up of my ego, but that and $4.75 will get me a café latte mocha at Starbucks.

You can listen to Russell Bensing on Episode 1 of Serial's Season 3 Podcast on your mobile device's podcast application or online here: https://serialpodcast.org/season-three/1/a-bar-fight-walks-into-the-justice-center.

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