2019 FALL/WINTER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

CRIMINAL DEFENSE EVIDENCE ISSUE

False Confessions / Genetic Testing / Electronic Evidence
Juvenile Records / And More!

CONTENTS

MISSION STATEMENT

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

BENEFITS OF THE OACDL

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

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

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

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

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

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

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

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

LETTER FROM THE PRESIDENT

SHAWN DOMINY

President, OACDL

It is an honor to lead the Ohio Association of Criminal Defense Lawyers. It's said that good leaders make it easy for people to succeed. The same is true for good organizations. This organization strives to make it easier for members to succeed in zealously representing their clients.

One tool with which the OACDL is doing that is the new website. The new site is intended to be an information center. Not only does the revamped website have information about upcoming seminars and other OACDL events, the 'members only' section also contains charts and outlines, as well as an increasingly robust bank of briefs, motions and transcripts. I encourage you to take advantage of this fantastic resource.

In conjunction with the revamped website, the OACDL is increasing its social media presence. Unless you live in a cave with only a landline, you can follow the OACDL on Facebook, Twitter, and Instagram. The posts are interesting, sometimes humorous, and informative. Following @OACDL will keep you informed of developments with the criminal justice world, make you laugh, and let you know what the OACDL committees are doing.

The OACDL committees are doing a lot. The CLE Committee is planning seminars for 2020: a list of upcoming seminars can be found in this magazine. One seminar I'm excited about is the Sunshine Seminar. For the past three years, this seminar has been held in Myrtle beach in the month of May. This year, the seminar is moving to Puerto Rico on President's Day weekend in February: more of a tropical escape from the inclement Ohio weather. Look for seminar details in the upcoming weeks.

The Technology Committee is researching options for providing online CLE, and the Amicus Committee is involved in multiple cases before the Ohio Supreme Court. The Board of Directors adopted a resolution to support increased reimbursement rates for appointed counsel. The resolution was delivered to the County Commissioners of Ohio, and the executive committee is investigating methods for further voicing OACDL's support of increased pay for court-appointed attorneys (stay tuned).

The Public Policy Committee is tracking Ohio criminal legislation and providing testimony on key bills before the House and Senate. Weekly reports from this committee are posted in the "Members Only" section of the OACDL website, and a summary of significant legislative developments is presented in this Vindicator.

This *Vindicator* also features some other outstanding articles. **Charles M. Rittgers and Charles H. Rittgers** discuss false confessions and the Skylar Richardson case, and **Holly Cline** explores constitutional concerns with private DNA databases. There are also articles about immigration consequences of convictions, hash oil prosecutions, false confessions, and electronic evidence in the courtroom. The Vindicator is one way the OACDL is promoting success for Ohio's criminal defense bar.

To continue promoting criminal defense success, the OACDL needs your help. This is an organization run by criminal defense attorneys for criminal defense attorneys. If you have a brief or motion that just nailed it, or if you have a transcript from a successful hearing or trial, email it to me (shawn@dominylaw.com), and we'll upload it to the website to share with the membership. If you have an idea for a great Vindicator article, contact Publications Committee chair **Wes Buchanan** (wes@wesblaw.com). If you are interested in joining a committee or the Board of Directors, email me (shawn@dominylaw.com), and I'll get you plugged-in with a committee or the Board.

Jim Rohn said, "A good objective of leadership is to help those who are doing poorly to do well and to help those who are doing well to do even better." The Ohio defense bar is doing well, and the leadership of the OACDL is committed to helping the defense bar do even better. As President, I follow in the footsteps of Immediate Past President **Michael Streng**. I'm grateful to Mike for his dedication and his principled vision for the OACDL. I intend to continue that dedication and principled leadership during my term as president.

Shawn R. Dominy
President, OACDL
Dominy Law Firm, LLC
1900 Polaris Parkway,
Suite 450-037
Columbus, Ohio 43240
Phone: (614) 717-1177
Email: shawn@dominylaw.com
https://www.dominylaw.com/

LETTER FROM THE PRESIDENT-ELECT

MEREDITH O'BRIEN

President-Elect, OACDL

"It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat."

Theodore Roosevelt
The Man in the Arena

"Criminal defense is easy." – said no one, ever.

Private practice requires excessive travel from court to court in different counties and tenacious dedication to the mastery of each tribunal's unique ecosystem of judges, bailiffs, probation officers, clerks, and prosecutors in order to effectively seek justice for our clients.

Indigent defense requires the acceptance of the extraordinary emotional toll that comes with high volume caseloads. These cases include people who are the most susceptible to the unfair magnitude of government power and resources.

As if the physical exhaustion coupled with the enormous emotional cargo wasn't enough, our profession also requires us to take a good look inward and embrace ourselves for who we are. To define personal convictions, to master and act with courage despite our fear, to learn the true dedication it takes to rise day after day, trial after trial, and to be effervescent enough do it all over again as advocates for the next client, the next case, the next person whose freedom is in our hands.

This is a profession of selfless devotion. It's a calling. It is the highest honor I know, on par with being a parent. There is truly nothing more fulfilling, no greater satisfaction, no better reward, than to stand up for someone who cannot stand up for him or herself and say "you're going to have to get through me first."

And when the natural and expected moments of self-doubt and fear inevitably arise, please remember that we have each other. The Ohio Association of Criminal Defense Lawyers welcomes all its members to call on one another for support, for assistance, and for comradery. We are all in this together. We strive to do the deeds, with greatest of devotions, for the worthiest of the causes; and we are those who dare to step into the arena, reminding ourselves every time it is not the critic who counts – even when that critic is ourselves.

Criminal defense is most definitely not easy. Criminal defense is hard -- and it should be. Because there shouldn't be anything easy about the government in its attempts to take away a person's life or liberty. Embrace the hard. Get used to it. Live it. Dare yourself to relish the fear, the self-doubt, and the exhaustion that comes with our profession. I formally invite you and hope you take advantage of the OACDL community and all that it has to offer. OACDL is here to support you, to be here for you, to serve you as you muster the courage to dare to step into the arena brave enough to know both the victory and the defeat.

Meredith A. O'Brien, Esq.
President-Elect, OACDL
Bailey Legal Group
220 West Market Street
Sandusky, Ohio 44870
Phone: (419) 625-6740
Email: Meredith@Bailey.pro
www.Bailey.pro

EXECUTIVE COMMITTEE

Michael J. Streng
Immediate Past President
Bridges, Jillisky, Streng
Weller & Gullifer, LLC
302 S. Main St.
Marysville, OH 43040
michaelstreng@cfbjs.com
(937) 644-9125

Shawn Dominy
President
Dominy Law Firm
1900 Polaris Parkway
Suite 450
Columbus, OH 43240
shawn@dominylaw.com
(614) 717-1177

Meredith O'Brien
President-Elect
President-Elect
Bailey Legal Group
220 W. Market St.
Sandusky, OH 44871
Meredith@bailey.pro
(419) 625-6740

Gerald G. Simmons
Secretary
536 S. High Street
Columbus, OH 43215

Joseph Humpolick
Treasurer
Retired Assistant Public
Defender, Euclid, OH
jhumpolick@gmail.com
(440) 361-1686

Blaise Katter
Public Policy Director
Law office of
D. Timothy Huey
3240 W. Henderson Road
Columbus, OH 43220
blaisekatterlaw@gmail.com
(614) 487.8667

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Amicus Committee
Russ Bensing (Cleveland)
(216) 241-6650

CLE Committee
T. Douglas Clifford
(Norwalk)
(419) 677-6347
and
Brad Wolfe (Cleveland)
(216) 928-7700

Ethics Committee
Jay Milano (Rocky River)
(330) 444-3036

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Ken Bailey (Sandusky)
(419) 625-6740
and
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(740) 363-3900

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(614) 300-5088
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Joe Patituce (N. Olmsted)
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513.587.2887

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614.444.3036

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(Columbus)
614.717.1177

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(Gallipolis)
740.446.3334

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(Cleveland)
216.928.7700

Jeffrey M. Gamso
(Cleveland)
216.443.7583

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937.854.4900

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440.413.6949

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440.544.2000

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(Columbus)
614.487.8667

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740.363.3900

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614.487.8667

Elizabeth Kelley
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509.991.7058

William F. Kluge
(Lima)
419.225.5706

Dennis A. Lieberman
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937.223.5200

Jefferson E. Liston
(Columbus)
614.407.9630

Sean H. Maxfield
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614.445.8287

Zach Mayo
(Columbus)
614.537.9504

Jay Milano
(Rocky River)
440.356.2828

Meredith O'Brien
(Sandusky)
419.625.6740

Joseph C. Patituce
(North Olmstead)
440.471.7784

John D. Poley
(Dayton)
973.223.9790

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740.393.9510

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614.228.7771

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440.245.2274

John H. Rion
(Dayton)
937.223.9133

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937.223.9133

Charles H. Rittgers
(Lebanon)
513.932.2115

Charles M. Rittgers
(Lebanon)
513.932.2115

Daniel J. Sabol
(Columbus)
614.300.5088

Jon J. Saia
(Columbus)
614.444.3036

Brock A. Schoenlein
(Dayton)
937.976.0829

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614.221.6327

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(Columbus)
614.365.7444

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937.454.5544

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(Rocky River)
800.641.1970

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(Columbus)
614.358.6525

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(Columbus)
614.469.2999

Andrew H. Stevenson
(Lancaster)
740.653.0961

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937.644.9125

David H. Thomas
(Columbus)
614.334.6199

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(Columbus)
614.443.6581

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216.928.7700

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DIRECTOR'S DIALOGUE

SUSAN CARR
EXECUTIVE DIRECTOR, OACDL

I want to thank **Mike Streng** for his phenomenal work as President of this organization last year. In his opening remarks as President of OACDL last October, Mike said he was proud to serve as president, and would "not let the family down". He did not let us down. Mike worked on or assigned people to represent the OACDL on many Ohio Supreme Court committees. These committees ranged from Bail Reform and the revision of Criminal Rule 46; Ad Hoc Drug Workshop Committee; and Ethics Committee. He executed a contract with the Ohio State Bar Association for lobbying. Our representative, **Maggie Ostrowski**, works closely with the OACDL Public Policy Chair, **Blaise Katter**. Maggie supplies us with weekly reports that you can find on the website, under the Members Only section. Mike also worked closely with the CLE Committee and Membership Committee to make 2018-19 one of our most successful years in both seminars and membership numbers. We are not letting him get away! Mike has promised to remain active on these committees to maintain continuity. Thank you for your wonderful leadership, Mike!

And, welcome to OACDL President **Shawn Dominy**. He started his year off with a BANG! If you missed the Rock Stars of Criminal Defense party and seminar—you missed a GREAT time! **Zach Mayo** and his band, Willie Nelson Mandela, played at the dinner dance at the Ivory Room. They were fabulous! And, as a surprise Shawn's band, Justice, played a set also! Many people told me this party was so much fun! And the dinner by Cameron Mitchell—WOW! We truly celebrated OACDL!
As of this writing, we are working on a weekend stay in Puerto Rico! We are looking at February 13-17, 2020. What a nice Valentine's Day present! Watch your email for information on this. This trip would take the place of the Myrtle Beach trip. While Myrtle Beach was wonderful—we had to go in May. It's nice in Ohio in May. February? Not so nice!

Brian Jones has joined our Technology Committee. Brian has a social media content plan that is second to none! Watch for us (or like/follow us) on Facebook, Instagram, Twitter, etc. If you have some content you would like to see out there, please let Brian know.

Dues notices will be going out the end of November and are due January 1, 2020. You can pay by mail or online at oacdl.org. Just click on the join/renew tab. The renew form is at the bottom of the page. If you would like to renew before we send out the renewal notices, you can save some paperwork!

As always, if there is anything I can do for you, please do not hesitate to call.

Susan

Susan Carr
Executive Director, OACDL
713 South Front Street
Columbus, Ohio 43206
Phone: (740) 654-3568
Email: susan@oacdl.org

2020 SEMINAR SCHEDULE

January 20, 2020
Current Issues in Criminal Law
Cincinnati

March 12-14, 2020
Advanced OVI Seminar
Columbus

April TBA
Retirement Seminar
Columbus

May TBA
New Lawyer Training
Columbus

June TBA
OVI Seminar
Northeast Ohio

September TBA
Tools for the Criminal Defense Toolbox
Toledo

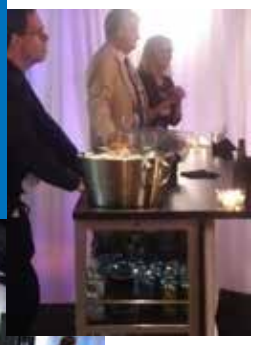
The above are the annual seminars sponsored by YOUR association. Other seminars are being scheduled around the state. Brochures will be mailed 6-8 weeks prior to each seminar. All seminar information is posted on our website, www.oacdl.org.
The OACDL Seminars are organized by volunteers of the association. 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.



OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Superstar 2019 Seminar and party!








PUBLIC POLICY COMMITTEE UPDATE

BLAISE KATTER
PUBLIC POLICY COMMITTEE CHAIR, OACDL

The General Assembly is in full swing, and the Public Policy Committee has been busy reviewing legislation and working with the General Assembly to help improve the laws relating to criminal justice in Ohio. There are several good bills pending now, as well as a few not-so-great bills that we are closely monitoring.

There are three noteworthy bills pending that I wanted to call attention to—a drug and sentencing reform bill, a bill improving intervention in lieu and sealing of records, plus a bill that would increase penalties for committing drug trafficking around community addiction service providers.

First, **Senate Bill 3**, the drug sentencing reform bill, is a major overhaul of Ohio's drug laws. It is a priority bill in the Senate and seems to have strong support. Most excitingly, the bill would lower most of the current F5 and F4 drug possession charges to unclassified misdemeanors. One year of jail would be the maximum penalty for those newly classified offenses, and there would generally be a presumption of treatment before incarceration. The OACDL is supporting this bill as it heads towards final passage in the Senate.

Next, **House Bill 1** is a modest bill that seeks to make Intervention in Lieu of Conviction more accessible to eligible offenders. It makes a hearing on ILC mandatory and creates a presumption that ILC is appropriate for the offender. The trial court is required to issue a written ruling explaining its reasoning if the court denies ILC. This bill also reduces the waiting period to seal a fourth-or-fifth-degree felony from three years to one year. These modest improvements to the ILC and sealing of records statute also has the OACDL's full support.

Finally, we have been hard at work trying to improve the language of certain bills that seek to increase penalties on certain drug dealers. As many of you already know, there are several examples of laws that increase the penalty for drug trafficking if it is within 1000 feet of a school or juvenile. Those geographic limitations are unfortunately favored by the general assembly, often without any acceptable mens rea requirement. The Legislature is about to give final approval to a bill that would also increase penalties for a person who recklessly commits a drug trafficking offense within 1000 feet of an addiction services provider. The OACDL is continuing to testify and work with relevant Members to eliminate the geographic limitation and make such targeted language more effective.

As always, this is YOUR Public Policy Committee. Please do not hesitate to contact us at publicpolicy@oacdl.org with any legislative concerns.

Blaise Katter
OACDL Public Policy Committee Chair
Huey Defense Firm
3240 West Henderson Road
Suite B
Columbus, Ohio 43220
Phone: (614) 487-8667
publicpolicy@oacdl.org
https://hueydefensefirm.com

AMICUS REPORT

RUSSELL BENSING
AMICUS COMMITTEE CHAIR, OACDL

AMICUS CASES

State v. Owens, 2019-0980 - Reckless homicide is a lesser-included offense of Felony Murder. A criminal defendant who has been charged with Felony Murder is denied due process, the right to trial by jury, and a fair trial when the jury is not provided with an instruction on reckless homicide, as a lesser included offense of Felony Murder, under facts and circumstances which warrant that instruction, in violation of the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution.

State v. Price, 2019-0822 - "Whether the 'but-for causality' rationale of Burrage v. United-States, 571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), applies to the 'cause serious physical harm to [another]' element of R.C. 2925.02(A)(3)."

State v. Willingham, 2019-0659, consolidated with 2019-0900 – pre-indictment delay

Russell Bensing
OACDL Amicus Committee Chair
1350 Ontario Street
Cleveland, Ohio 44113
Phone: (216) 241-6650
Email: rbensing@ameritech.net

FALSE CONFESSIONS & THE SKYLAR RICHARDSON CASE

Charles M. Rittgers &
Charles H. Rittgers

I. HISTORY OF FALSE CONFESSIONS

There are few issues in the world of criminal law that are more of an enigma than the issue of false confessions. While false confessions are in no way a new phenomenon, the study and understanding of why they happen began only a few decades ago. Throughout the twentieth century, there have been numerous cases of criminal defendants confessing to things that they did not do. Defendants who make false confessions range in age from young children to grown adults. The idea, that an individual would admit to something that could lead to life in prison, puzzles most jurors and judges who preside over a case. The doubt and uncertainty surrounding false confessions is still present in our judicial system. Discussion of such confessions and testimony from false confession experts is routinely limited or ruled inadmissible altogether.

In recent years, the research and analysis of false confessions has become much more prevalent. During the 1990s, social scientists and legal scholars began studying false confessions on a more in-depth basis. By analyzing false confessions, scientists and scholars sought to better understand how and why these confessions occur. The findings and major developments in this area have been greatly aided by the prevalence of DNA testing. The increased amount of DNA testing helped demonstrate the prevalence of false confessions. In recent decades, DNA testing helped exonerate hundreds of innocent people who were wrongfully convicted. This testing has also demonstrated the frequency of false confessions. Roughly one-fourth of the individuals exonerated through DNA evidence confessed to committing the crime. Hundreds of proven false confessions have been documented, yet individuals who study this phenomenon agree that these documented cases represent only a fraction of false confession cases. As many of these DNA exonerations have been resolved, it is time for the legal community to be aware of the frequency of false confessions and apply this knowledge to all cases in which a criminal defendant confesses his alleged guilt.

It is important to note the change in the public's perception of false confessions. This change in public perception surrounding false confessions has greatly aided the public's willingness to accept that these confessions occur. In recent years, society's perception has shifted from one of denial and dismissal, to a willingness to accept and understand that these confessions are more frequent than the justice system would like to believe. This change is due in large part to things like the Innocence Movement, podcasts such as Serial, and documentaries such as Making a Murderer. These sources of information show the public that false confessions can come from anyone, no matter the amount of experience an individual has with the justice system. As attorneys, we should use this increased awareness and acceptance of false confessions to benefit the people we represent.

II. OHIO LAW LIMITING EXPERT TESTIMONY RE: FALSE CONFESSIONS

The Supreme Court of the United States recognized that while a trial court has the duty to determine whether a confession is voluntary, a jury has the duty to assess its reliability. *Crane v. Kentucky*, 476 U.S. 683 (1986). The Ohio Supreme Court in *State v. Loza* has also addressed whether psychological testimony concern-

ing the voluntariness of a confession should have been admitted during the defendant's trial. 71 Ohio St. 3d 61 (1994). *Loza*, however, narrowly defined the issue before it as whether "psychological testimony concerning the voluntariness of confession should have been admitted." It did not consider the issue of presenting expert testimony to assist the jury in assessing the reliability or credibility of his confession. Although *Loza* held that excluding the psychological testing was not an abuse of discretion, it left the door open to allow defendants to present expert testimony regarding reliability or credibility of the confession.

Utilizing this distinction, the Second District Court of Appeals found that the trial court's exclusion of expert testimony addressing the reliability or credibility of the defendant's confession violated the defendant's constitutional right to present a defense. *State v. Stringman*, 2d Dist. Miami No. 2002-CA-9, 2003 WL 950957 (March 7, 2003). Additionally, The Twelfth District has found that the trial court did not abuse its discretion when it sustained the State's objection to defense counsel's question to his expert psychologist. *State v. Williams*, 12th Dist. Butler No. CA2007-04-087, 2008-Ohio-3729 (July 28, 2008). In finding no abuse of discretion, the Twelfth District noted that the exclusion of the expert's response did not "[foreclose appellant's] efforts to introduce testimony about the environment in which the police secured his confession" or otherwise prevent appellant from presenting "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *See id.*

III. TYPES OF FALSE CONFESSIONS

While the knowledge and understanding of false confessions has increased exponentially, there are still obstacles for attorneys seeking to argue that their client falsely confessed. Jurors and judges alike struggle to believe that a person would admit to something they truly did not do. Most people struggle to see why a person would lie to get in to trouble when most people lie to get out of trouble. To help jurors and judges understand why these confessions occur, an attorney must understand what type of false confession their client gave to law enforcement.

To better understand false confessions, it is important to know that there are three main types of false confessions. First, a voluntary false confession occurs when an individual comes forward and confesses outside of an interrogative situation and without any significant interrogative pressures. Secondly, a coerced-complaint false confession is given by someone who knows they are innocent, but under interrogative pressure, concludes that they are better off confessing in order to escape the consequences of their accused actions. Finally, the internalized false confession occurs when an individual, at the time of their confession, believes that they are guilty. Distinguishing what type of false confession your client gave is instrumental in how you present it to the jury and prove that the confession was false.

IV. INTERROGATIONS AND THE REID TECHNIQUE

The most common false confession occurs when an individual is subject to some sort of interrogation by law enforcement. Looking at the types of false confessions, this would be a coerced-complaint confession. The interrogation approach used most often by law enforcement is referred to as the Reid Technique. Critical to this technique is subjecting the suspect to confrontation and minimization. The use of these tactics and their correlation with false confessions is extensively documented and proven to be related.

The Reid Technique uses confrontation and minimization to break down individuals subject to an interrogation. Confrontation occurs when interrogators express certainty of the suspect's guilt and aggressively thwart their denials. Interrogators will then proceed to confront the suspect with evidence, sometimes exaggerated or fabricated, that allegedly establishes the suspect's guilt. After this confrontation stage, law enforcement will minimize the severity of the crime or the suspect's involvement or culpability. During this minimization stage, law enforcement will introduce themes to the suspect that are designed to minimize the severity of the situation. Common themes include that the crime was accidental, that the suspect was provoked, or that the suspect was justified in his actions. Taken together, confrontation frightens the suspect and brings about a sense of hopelessness while minimization supplies the suspect with a way out with seemingly little or no consequences. When analyzing whether a person's confession was a product of the Reid Technique, it is im-

portant to note that certain individuals are more suggestible than others. Young and naïve suspects (often with little exposure to the criminal justice system) are proven to be more suggestible and the Reid Technique is used to break down these individuals.

V. APPLICATION: *STATE OF OHIO vs. RICHARDSON*

The case of Brooke Skylar Richardson provides a recent example of how the Reid Technique was used to obtain a false confession. People across the country watched this case play out over the course of two years and saw how a young girl admitted to things that were not only false, but scientifically impossible.

Ms. Richardson's characteristics and personality made her particularly suggestible to the Reid Technique. As stated above, it is proven that certain characteristics make an individual more likely to falsely confess when confronted by law enforcement. In the present case, Ms. Richardson was a young girl, eighteen years old at the time, when she was interrogated by the police. Ms. Richardson was subject to two separate interrogations, both of which lasted for lengthy periods of time and without the company of a lawyer. It is noteworthy that Ms. Richardson had never interacted with law enforcement, nor had any experience in the criminal justice system. She was a young girl who had been raised by her parents to respect the police and taught that law enforcement was there to protect and serve. Ms. Richardson was a perfect example of a suspect who is young, naïve, and had no idea the techniques that police were using on her to obtain information. While no threats were made during these interrogations, the use of confrontation and minimization by interrogators displayed a classic use of the Reid Technique. Dr. Stuart Bassman, a local psychologist who was asked by us to examine Ms. Richardson regarding her psychological traits and especially a trait for susceptibility, and Professor Alan Hirsch, who is an expert on false confessions and the Reid Method testified effectively regarding Ms. Richardson's susceptibility to comply and submit to the perceived expectations of those in authority and how the Reid Technique exploited this vulnerability resulting in a false confession.

During the interrogations of Ms. Richardson, law enforcement utilized standard confrontation techniques to obtain information. The use of the Reid Technique can be seen most aggressively in the July 20th interrogation. When detectives brought Ms. Richardson back in for questioning, interrogators stated that "they just had a few more questions to clear some things up." Interrogators then went on to tell Ms. Richardson that "they knew she was not honest with them during the first interrogation," and that they "knew she had lied to them." Interrogators made it clear that they had evidence that established these alleged lies and that they knew this with "medical and scientific certainty." Throughout the second interrogation of Ms. Richardson, law enforcement expressed unwavering certainty that they knew the baby was born alive. This use of confrontation against a suspect is classic Reid Technique. Detective Faine and Detective Carter continually expressed their certainty of Ms. Richardson's guilt and refused to accept the upwards of thirty denials Ms. Richardson provided. Further, confrontation by law enforcement can be seen when Detectives Faine and Carter informed Ms. Richardson of exaggerated or fabricated evidence. The detectives told Ms. Richardson that they possessed evidence that proved she had lied. Ms. Richardson was confronted with this "medically and scientifically" proven evidence of something she did not do. Being a suggestible individual, she provided interrogators with false information that she believed they wanted to hear. This level of confrontation by interrogators proves a successful first step of the Reid Technique.

After successfully confronting Ms. Richardson, interrogators resorted to extensive minimization techniques. Throughout the entire second interrogation, Detectives Faine and Carter continually stated that they were simply here to clear some things up and put her baby to rest. Detectives Faine and Carter repeatedly insisted that the purpose of the interrogation was for a proper burial for her baby and that "they just wanted the truth" so that they could reunite baby Annabelle with her mother. These types of questions and statements by interrogators show classic minimization. Both Detectives Faine and Carter introduced a theme to Ms. Richardson in order to obtain information. To Ms. Richardson, the purpose of the interaction was not to investigate or interrogate. Instead, the theme was to bring her baby home and to get a proper burial for her daughter. As the interrogation progressed, detectives continued to minimize Ms. Richardson and lead her to believe that there would be little or no consequences if she confessed. Detective

Faine told Ms. Richardson that he knew she did not kill her baby and that they were just trying to get to the "truth." During the course of the interrogation, this certainty that Ms. Richardson did not kill her baby slowly changed to telling her that they knew she didn't "deliberately harm" her baby. Perhaps the biggest point of minimization came from two statements, one by Detective Carter and one by Detective Faine. Detective Carter emphasized to Ms. Richardson that she needed to "tell us everything that happened and then we can just move on." This was followed by Detective Faine saying that "we're never going to, like, all of a sudden judge you or jump up and say you're going to jail." These types of statements minimized the situation and implied to Ms. Richardson that there would be no punishment if she simply told law enforcement what they wanted to hear. Interrogators had successfully minimized the situation after confronting Ms. Richardson. While there were no threats made by detectives, a false confession was obtained through the use of classic Reid methods.

In the face of interrogative pressures, Ms. Richardson made inculpatory false statements including statements indicating that she saw her child move and heard her cry; most importantly, that she burned her baby. It is very rare in the realm of false confessions to be able to prove that a confession is false. Ms. Richardson's case is unique in this regard. It is perhaps this proof that helped the jury see that Ms. Richardson's statements were a product of a false confession. When Ms. Richardson stated that she had touched her child's foot with a lighter to burn the child and cremate her, this was a product of her interrogators feeding her information. When Ms. Richardson was first asked about this alleged fire, her reaction was one of shock, disbelief, and absolute denial. However, as the interrogation progressed and Ms. Richardson was broken down, she eventually told Detectives Faine and Carter that she had tried to cremate her daughter and that the flames came to a chest high level on the child. This theme of cremation came directly from the detectives as they assured Ms. Richardson that "cremation sounds a lot better than throwing a baby in a fire." When examining Ms. Richardson's statements more carefully, we knew them to be false. It is scientifically impossible to touch a human foot with a lighter and have that individual burst into flames. However, because of the Reid Technique and feeding Ms. Richardson information, interrogators were eventually able to obtain the "confession" they desired. At trial, the jury was able to see and hear how Ms. Richardson admitted to something that was scientifically impossible. Knowing that Ms. Richardson had falsely confessed, called into question all of the statements Ms. Richardson made during the July 20th interrogation, including the statements regarding signs of life and harming her child. Thus, through the testimony of our expert witness, we were able to call into question the reliability and credibility of her false confession.

Ms. Richardson's case was rare because we could conclusively prove that part of the confession was false. Presenting this information to the jury was crucial in her defense and establishing her innocence. Every criminal lawyer should be aware of the frequency and common causes of false confessions. Learning the signs and methods of the Reid Technique and making the jury aware of these methods is critical to assisting the jury in accepting a false confession.

Charles H. Rittgers, Esq.

Charles M. Rittgers, Esq.
Rittgers & Rittgers
12 East Warren Street
Lebanon, Ohio 45036
Phone: (513) 932-2115
https://www.rittgers.com/

About the Authors

Rittgers & Rittgers is a family-owned law firm with offices throughout Southwest Ohio and into Kentucky. Charles and Charles both practice criminal defense and personal injury law.

GENETIC TESTING and the FOURTH AMENDMENT

HOLLY B. CLINE
PUBLICATIONS COMMITTEE CO-CHAIR, OACDL

JAMES P. TYACK

It is estimated that more than 7 million Americans have taken a direct-to-consumer (DTC) genetic DNA test offered by companies such as Ancestry.com and 23andMe.[1] Upon purchasing a DNA kit, consumers are able to directly send DNA samples - usually saliva - to the company, where the sample is tested to provide insights about ancestry, wellness, and the likelihood of developing certain types of disease.[2] However, once these third-party companies obtain this very sensitive information, it does not remain private.

The proliferation of DTC genetic testing has created a lucrative market for public genealogy databases such as GEDmatch which allow people to anonymously upload their genetic testing results for further ancestry research and evaluation.[3] Indeed, to solve the Golden State Killer case, investigators created a fake profile on GEDmatch, and using DNA from the crime scene, searched the database for relatives, built a family tree, and were able to locate a 72-year-old retiree living near Sacramento. Investigators conducted surveillance on the suspect, ultimately matching the DNA from the crime scene to the DNA found on an item investigators recovered from a trash pull outside of the suspect's home.[4]

What is GEDmatch?

GEDmatch.com is a free 3rd party site of tools where you can upload your DNA test results and compare them with those from people who have tested at other companies.

GEDmatch processes autosomal DNA data files from different testing companies and other sources to enable effective comparisons between DNA kits. The DNA file output (data and format) may differ slightly from different sources, so GEDmatch facilitates the direct comparison of all uploaded DNA kits.

After using a direct-to-consumer website such as AncestryDNA, 23andme, Family Tree DNA, MyHeritage DNA, or Living DNA, an individual can download a copy of their autosomal raw DNA data file from the testing company and then upload that file to GEDmatch. GEDmatch then processes that file and adds it to a large database; it does allow GEDmatch users to select whether they would like to keep their uploaded data private or allow it to be public. When a user uploads his or her data to GEDmatch, the user is assigned a "kit number." If a user has allowed his or her kit to be public, then any person with the kit number for that user can access the same information as the user who uploaded the data file.

After a DNA kit is uploaded, GEDmatch provides a range of matching and comparison reports as well as DNA tools. Specifically, GEDmatch offers tools to compare and analyze DNA shared with others, including the "one-to-many DNA comparison," "one-to-one DNA comparison, and "X-DNA comparison." GEDmatch also provide email addresses for the person who uploaded the raw DNA file to allow for contact between potential relatives.

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Law Enforcement Use of GEDmatch

While GEDmatch was originally created for genealogical research, it is also used by law enforcement. Forensic kits from crime scenes, cold cases, John & Jane Does, and unidentified human remains are also uploaded by law enforcement into GEDmatch. Law enforcement officers can send the forensic DNA collected to a genetic lab and request that the lab create a raw DNA file from that DNA. Once that raw DNA file is uploaded into GEDmatch, law enforcement is able to locate potential relatives or other persons who share DNA with the unidentified DNA source. Law enforcement will look for long portions or large numbers of centiMorgans (abbreciated cM) between the uploaded DNA kit and the DNA kits available for comparisons on GEDmatch. A centiMorgan is a unit for measure genetic linkage.

On May 18, 2019, a new setting was implemented by GEDmatch to enable users to opt-in/opt-out of visibility to law enforcement matching (LEM). All kids were opted-out by default.

This is a sample of the GEDmatch dashboard:

Fourth Amendment Concerns

When a person voluntarily submits his or her DNA sample to a DTC genetic testing company, there are very few regulations protecting the privacy interests of these customers.[5] In the context of the Fourth Amendment to the federal Constitution, customers are generally deemed to waive their Fourth Amendment protections against warrantless searches and seizures when they willingly share their DNA material with DTC genetic testing companies or public genealogy websites.[6] This is because, under third-party doctrine, law enforcement officers do not need a warrant to search genetic databases like GEDmatch, as the individual has voluntarily provided information to a third-party entity that publicly shares the information provided.[7] On the other hand, law enforcement officers would likely need to obtain a warrant to search a genetic testing company's records, as these records are not publicly available.[8]

Notably, the 2018 Supreme Court decision in Carpenter v. United States, 138 S. Ct. 2206 (2018)—which prohibited the warrantless searches of cellphone location data provided to third-party cellphone network providers on the grounds of Fourth Amendment privacy concerns—may be applicable in this context. Indeed, it is likely the Carpenter ruling will apply to extremely sensitive information—such as genetic data—notwithstanding the fact that such information was voluntarily provided to a third-party entity.[9]

Some genealogy database companies are now explicitly offering to conduct forensic searches for law enforcement.[10] Moreover, Ancestry.com's expressly states that it will use your genetic information for "conducting scientific, statistical, and historical research."[11] It cautions: "We use other companies to help us provide the Services to you. As a result, these partner companies will have some of your information in their systems. Our partners are subject to contractual obligations governing data security and confidentiality consistent with this Privacy Statement and applicable laws. These processing partners include our: Laboratory partners; DNA test shipping providers; Payment processors; Cloud services infrastructure providers; Biological sample storage facilities; Vendors that assist us in marketing; analytics, and fraud prevention; and, Some Member Services functions."[12]

While understanding who your ancestors may have been and collecting information regarding your personal health profile may be incredibly valuable, the use of DNA databases to identify individuals who have not consented to sharing their genetic information with third-party companies raises serious genetic privacy and Fourth Amendment concerns.

Holly B. Cline, Esq., *Co-Chair of OACDL's Publications Committee*

James P. Tyack, Esq.

The Tyack Law Firm Co., L.P.A.
536 South High Street
Columbus, Ohio 43215
Phone: (614) 221-1342
Email: holly@tyacklaw.com
Email: james@tyacklaw.com
www.tyacklaw.com

1. Jamie Ducharme, *Millions of Americans Could Be Identified Using Consumer Genetic Databases—Even If They've Never Taken a DNA Test,* Time (Oct. 12, 2018), http://time.com/5423170/dna-test-identify-millions/.
2. *Id.*
3. *Id. See also* Nsikan Akpan, *DNA Ancestry Searches Can Now Identify Most White Americans. Here's Why That's Legally Questionable*, PBS News Hour (Oct. 12, 2018), https://www.pbs.org/newshour/science/dna-ancestry-searches-can-now-identify-most-white-americans-heres-why-thats-legally-questionable.
4. *See* Akpan, *supra* note 3.
Id
5. *See id.*
6. Natalie Ram, Christi J. Guerrini, & Amy L. McGuire, *Genealogy Databases and the Future of Criminal Investigation*, Science Mag. (June 8, 2018), https://science.sciencemag.org/content/360/6393/1078.
7. *See* Akpan, *supra* note 3.
8. *Id.*
9. *Id.*, discussing Ram, Guerrini, & McGuire, *supra* note 6.
10. *See* Akpan, *supra* note 3.
11. *Your Privacy*, Ancestry, https://www.ancestry.com/cs/legal/privacystatement (last visited May 8, 2019).
12. *Id.*

DEFENDANT'S MOTION FOR COURT TO ORDER RELEASE OF JUVENILE RECORDS OF STATE'S WITNESS

CRAIG NEWBURGER

There are times Defendants should consider moving Courts to determine their right of access to school disciplinary, Juvenile Court, children's services and any other relevant records pertaining to State's witnesses, including alleged victims. The Defendant must show a particularized need for said records and that access to these records (and subsequent admissibility), following an in-camera review by the Court, is well grounded in law.

The law is well settled that the State must provide a defendant with evidence in its possession that is both favorable to the defense and material to guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963).

In State v. Cox, 42 Ohio St. 2d 200, 71 O.O.2d 186, 327 N.E.2d 639 (1975), the Supreme Court of Ohio stated: "Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense." *Id.* The Supreme Court of the United States has held that the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable. P*ennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987), citing *United States v. Abel*, 469 U.S. 45, 50 (1984). In *Ritchie*, a man was accused of sexual offenses against his daughter, who was thirteen years old. The State Department of Children and Youth Services investigated the case. The defendant attempted to obtain these records on the grounds that they contained the names of favorable witnesses for the defense and exculpatory evidence. The trial court refused the defendant access to these records. The Supreme Court overruled this decision and held that the defendant was entitled to have the Children and Youth Services file reviewed by the trial court to determine whether it contained information necessary for the defense. *Id.* at 58.

This ruling was followed in *State v. Black*, 75 Ohio App. 3d 667, 600 N.E.2d 389 (1st Dist. No. 1991). There, the defendant was charged with contributing to the unruliness of a child by engaging in sexual acts with her. Defendant was a teacher at Millcreek Psychiatric Center for Children and the child was a thirteen-year-old girl who was a patient at the facility. Black sought access to the girl's chart from Millcreek to determine if it contained any material relevant to the defendant's guilt. The Court of Appeals reversed defendant's conviction and ordered that the trial court hold an in-camera inspection of the records to determine if anything contained therein would have been useful to the defense. *Id.* at 673. On retrial, the trial court reviewed the records but refused to provide them to the defendant claiming he found nothing useful to the

defense in them. *State v. Black*, 85 Ohio App. 3d 771, 621 N.E.2d 484 (1st. Dist. 1993). The records were proffered for appeal and the appellate court found information contained therein was useful to the defense and reversed the conviction again. *Id.* at 778.

THREE PART TEST: *In re L.E.N.*, 12th Dist. Clinton No. CA2009-03-002, 2009-Ohio-6175

In denying father's objection to a magistrate's refusal to conduct an in-camera inspection of stepfather's juvenile records, the juvenile court found that stepfather's juvenile records were not admissible, so in camera review of the records was properly denied. The juvenile court based its decision on Evid.R. 609(D) which governs admittance of juvenile records for impeachment purposes, and R.C. 3109.04(F)(1)(h) which requires courts to look at convictions or guilty pleas for certain offenses by a parent or household member. Because delinquency adjudications are not convictions, nor does a delinquent plead "guilty" to an offense, the juvenile court reasoned that stepfather's juvenile records would be inadmissible, and therefore unreviewable.

The appellate court held "The primary concern in a child custody case is the child's best interest." *Seibert v. Seibert*, 66 Ohio App. 3d 342, 344, 584 N.E.2d 41 (12th Dist. 1990), citing *Miller v. Miller,* 37 Ohio St. 3d 71, 523 N.E.2d 846 (1988). "The child's best interest is to be determined by considering all relevant factors, including those enunciated in R.C. 3109.04[F]." *Seibert*, 66 Ohio App. 3d at 344, citing *Birch v. Birch*, 11 Ohio St. 3d 85, 11 Ohio B. 327, 463 N.E.2d 1254 (1984). However, R.C. 3109.04(F) "does not contain an exhaustive list of factors." *Seibert*, 66 Ohio App. 3d at 345. Because "all relevant factors" must be considered, R.C. 3109.04(F)(1) clearly contemplates a court must consider anything that has bearing on the best interest of the child. See *Bonar v. Boggs*, 7th Dist. Jefferson No. 01 JE 33, 2002-Ohio-7173, ¶ 30 (considering testimony of both parents use of illegal drugs, alcohol and tobacco pursuant to the "catch-all" provision of R.C. 3109.04[F][1]).

The appellate court opined that it was unable to determine whether stepfather's juvenile adjudication was relevant in determining L.E.N.'s best interest, because the juvenile court refused to review the records. By foreclosing any inquiry into stepfather's juvenile adjudication, solely because it found the records inadmissible, the juvenile court failed to ensure that it considered all possible factors that may be relevant in a best interest determination. See R.C. 3109.04(F)(1). The court opined:

> Although admissibility is certainly a concern, the first inquiry, in a case of this nature, must be whether the records are relevant to the best interest determination. Indeed, as we stated in *Grantz v. Discovery for Youth*, 12th Dist. Butler Nos. CA2004-09-216, CA2004-09-217, 2005-Ohio-680, "[t]he proper procedure for determining the discoverability of confidential juvenile records requires the trial court to conduct an in camera inspection to determine: 1) whether the records are necessary and relevant to the pending action; 2) whether good cause has been shown by the person seeking disclosure; and 3) whether their admission outweighs the confidentiality considerations set forth in R.C. 5153 and R.C. 2151." Id. at ¶ 19, citing *Johnson v. Johnson*, 134 Ohio App. 3d 579, 585, 731 N.E.2d 1144 (3d Dist. 1999) (emphasis added).

Although L.E.N. essentially related to the admissibility of juvenile records in custody proceedings, the appellate court opined that the reasoning in *Grantz and Johnson* is sound by requiring a court to conduct an in-camera inspection of the records prior to making them available for either purpose. The same in camera review has been required by criminal courts.

When Defendants move Courts to determine their right of access to school disciplinary, Juvenile Court, children's services and any other relevant records pertaining to State's witnesses, including alleged victims, Defendants should provide the courts with a prepared entry for the court to order the keeper of the requested records (school, juvenile court, children's services, clinic, etc.) to deliver the records to the court by a specific date. A corresponding subpoena should be prepared and a cover letter explaining both the court Order and subpoena should, correspondingly, be prepared. Attorneys may want to deliver said materials in person, as the record keepers (schools) are generally unaccustomed to receiving such orders.

Craig A. Newburger, Esq.
9435 Waterstone Blvd., Suite 140
Cincinnati, Ohio 45249
Phone: (513) 494-0278
www.newburgerlaw.com

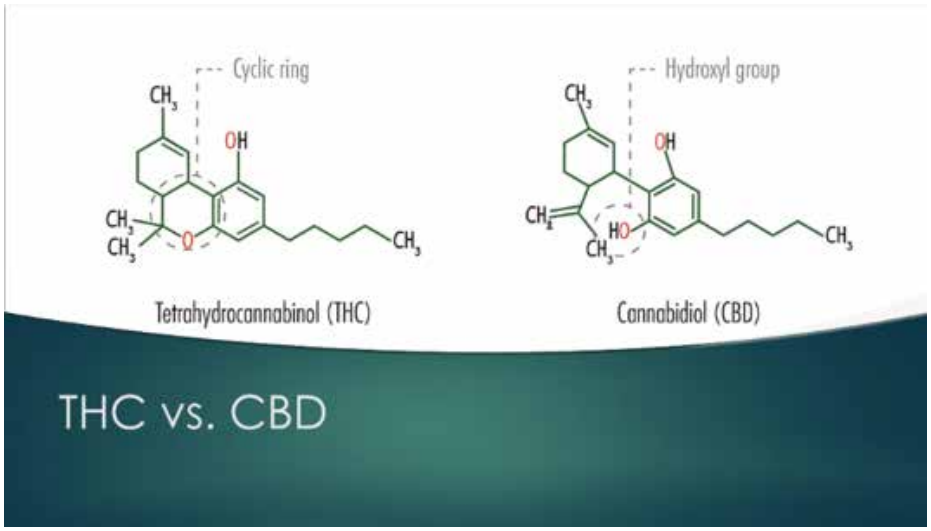
PROSECUTION OF MARIJUANA AFTER SENATE BILL 57

JOSEPH C. PATITUCE

The landscape surrounding the prosecution and defense of hash oil, and all marijuana cases, in the State of Ohio has taken an unexpected turn following the passage of Senate Bill 57. Senate Bill 57 established R.C. 924.212 which has had a cascade effect across the prosecution and defense of cases involving marijuana making it incredibly difficult for the prosecution to secure a guilty verdict in a marijuana case post-Senate Bill 57. Revised Code § 924.212 is essentially the foundation for the legalization of hemp in Ohio. Revised Code § 928.01 then goes further and defines cannabidiol (CBD) as a compound that contains less than three-tenths (.3%) THC, making CBD perfectly legal in the State.

A number of bedrock legal precedents are now at jeopardy of being pushed by the wayside in cases from OVI case to trafficking. State labs are unable to detect the actual quantity of delta-9-tetrahydrocannabinol (THC), which is the active psychoactive substance in marijuana. Additionally, it is well accepted that most forensic testing is unable to differentiate between CBD and THC.[1] Beyond this normal "plain smell" and "plain sight" doctrines are now meaningless as hemp and marijuana smell and look identical.

Historically, the State of Ohio has argued that its labs are not equipped, or accredited, to perform purity or quantitative analysis of drugs. *State v. Gonzales*, 150 Ohio St. 3d 261, 2016-Ohio-8319, 81 N.E.3d 405. In 2016, the State argued, as did its supporting amici, that it would take a substantial amount of time and money for State labs to become accredited in order to be able to perform quantitative, or purity, testing on cocaine. *Id.* at ¶ 14. In the time following their argument State labs still remain unable to perform this testing and as a result multiple counties have enacted a temporary moratorium on the prosecution of these cases while the State determines what to do, or until a private lab can be contacted to perform the testing.



Cases involving a comparison between CBD and THC are unique because unlike in traditional purity, or quantity, testing—in which a lab is asked to establish the purity of cocaine versus any filler content, or how pure crystal meth is against the materials used to "cook" it—the chemical structures between THC and CBD is almost entirely identical making the quantitative analysis virtually impossible, and prone to false positives.[2]

As mentioned above, THC and CBD are both structurally very similar. In fact, both substances have twenty-one carbon, thirty hydrogen, and two oxygen atoms.[3] THC and CBD are structural isomers, meaning that they share an identical chemical composition but the manner in which their atoms are arranged is different. Labs have increased difficulty in separating out the differences between THC and CBD because not only are they structural isomers, but they are very similar cyclic compounds. A cyclic compound is a compound that has a ring, or rings, of atoms. THC's cyclic ring is a closed ring that is a member of the ester group, where CBD's cyclic ring is an open ring with a hydroxyl and alkene group.

These apparently minor structural differences in the arrangement of the atoms produces tremendous differences in the way the human body reacts to the substances following ingestion. The body has a system called the endocannabinoid system that, for our purposes, has two relevant receptors: CB1 and CB2. These cannabinoid receptors respond differently to both substances. THC has a high affinity for the CB1 receptor, THC also has a lower affinity to the CB2 receptor.[4] CBD has a very low affinity for the CB1 receptor and functions as an indirect antagonist of the cannabinoid receptors.[5]

Senate Bill 57's implementation impacts multiple areas of both sides of the criminal practice. Consider the standard allegation of R.C. 4511.19(A)(1)(a) where the officer alleges that he suspects that the driver is impaired by marijuana because he smells the odor of the substance. Hemp and Marijuana are both derived from the same plant with people just using different names for the same genus and species. There is no difference in appearance or smell between hemp and marijuana.[6] States such as North Carolina, as recently as 2015, have reported significant difficulties in the prosecution of marijuana crimes following the passage of their own hemp and CBD laws.[7]

North Carolina's State Bureau of Investigation (NCSBI) writes that "There is no easy way for law enforcement to distinguish between industrial hemp and marijuana. *There is currently no field test which distinguishes the difference."*[8] NCSBI goes further in explaining the problems that law enforcement in the field have when it comes to developing probable cause to search, or arrest, a suspect:

> "Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant. In order for a law enforcement officer to seize an item to have it analyzed, the officer must have probable cause that the item being seized is evidence of a crime. The proposed legislation makes possession of hemp in any form legal. Therefore, in the future when a law enforcement officer encounters plant material that looks and smells like marijuana, he/she will no longer have probable cause to seize and analyze the item because the probable cause to believe it is evidence of a crime will no longer exist since the item could be legal hemp."[9]

The concerns raised by NCSBI go further when it comes to a law enforcement tool that we often see on the major interstates here in Ohio: K-9 drug detection dogs are not able to tell the difference between hemp and marijuana.

"Police narcotics K-9's cannot tell the difference between hemp and marijuana because the K-9's are trained to detect THC which is present in both plants."[10]

The application of NCSBI's concerns to our cases in Ohio is incredibly useful, especially in the area where officers often relied heavily in the past on the "smell of raw marijuana" or the "burnt odor of marijuana." This also impacts "Drug Recognition Experts" (DRE) who will want to form an opinion that the suspect consumed marijuana, there is no method for a DRE to be able testify that the substance an individual consumed contained more than 0.3% THC.

Senate Bill 57 all but eliminates the ability of law enforcement to remove an individual from their vehicle in many of the common traffic stop search scenarios. Hemp and marijuana look the same, they smell the same, there is no manner for an officer to honestly testify that based on his observation of the odor and even the observance of the plant like material that the substance is marijuana. This issue combined with the current inability of state labs to test the quantity of THC in a substance creates a series of hurdles that are incredibly difficult for the state to overcome at this time.

The impact of Senate Bill 57 is going to be litigated over the course of the next several months, and years, unless the legislature decides to make a change to the law. It is difficult though to predict what change can be effectively made that both legalizes hemp and CBD—but keeps marijuana illegal.

Joseph C. Patituce, Esq.
Patituce & Associates, LLC
600 Superior Avenue East, Suite 1358
Cleveland, OH 44114
Phone: (440) 709-8088
Email: jpatituce@patitucelaw.com
www.patitucelaw.com

About the Author

Joseph is a criminal, federal, and OVI defense attorney who practices in Cleveland and Toledo, Ohio and surrounding areas.

1. Rebecca Andrews, Sue Paterson, *Production of Identical Retention Times and Mass Spectra for Δ⁹-Tetrahydrocannabinol and Cannabidiol Following Derivatization with Trifluoracetic Anhydride with 1,1,1,3,3,3-Hexafluoroisopropanol*, 36 J. Analytical Toxicology 61, 61-65 (Jan./Feb. 2012), *available at* https://doi.org/10.1093/jat/bkr017.

2. *Cannabidiol*, PubChem Database, Nat'l Inst. Health, https://pubchem.ncbi.nlm.nih.gov/compound/Cannabidiol (last visited Oct. 29, 2019). PubChem is an open chemistry database at the National Institutes of Health, and is a key chemical information resource for scientists, students, and the general public.

3. *Id.*; *delta9-Tetrahydrocannabinol*, PubChem Database, Nat'l Inst. Health, https://pubchem.ncbi.nlm.nih.gov/compound/Cannabidiol (last visited Oct. 29, 2019).

4. Pál Pacher, Sándor, Bátkai & George Kunos, *The Endocannabinoid System as an Emerging Target of Pharmacotherapy*, 58 Pharmacol Rev. 389, 389–462 (Sept. 2006), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2241751/.

5. Shenglong Zou & Ujendra Kumar, *Cannabinoid Receptors and the Endocannabinoid System: Signaling and Function in the Central Nervous System*, 19 Int'l J. Molecular Sci. 833 (Mar. 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5877694/.

6. *Industrial Hemp/CBD Issues*, North Carolina State Bureau of Investigation (2015), *available at* https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf (last visited Oct. 29, 2019). In 2015, the N.C. General Assembly passed Senate Bill 313 which created the Industrial Hemp Commission to oversee the licensing and regulation of hemp farmers and initiated a pilot program to study the feasibility of industrial hemp as a crop in North Carolina. Since the creation of the Commission, industrial hemp production has boomed, with 634 licensed farmers currently growing on over 8000 acres and 3.4 million square feet of greenhouse space. Katharine Batchelor, *"Take the Marijuana Out of It; It's Not Marijuana:" Law Enforcement, Farmers, Smokable Hemp, and Probable Cause in North Carolina*, Wake Forest L. Rev. (Sept. 20, 2019), http://wakeforestlawreview.com/2019/09/take-the-marijuana-out-of-it-its-not-marijuana-law-enforcement-farmers-smokable-hemp-and-probable-cause-in-north-carolina/#_ftn5.

7. *Industrial Hemp/CBD Issues*, North Carolina State Bureau of Investigation (2015), *available at* https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf (last visited Oct. 29, 2019).

8. *Id.* (emphasis added).

9. *Id.*

10. *Id.*

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

CURRENT APPLICATIONS AND CAPABILITIES OF ELECTRONIC EVIDENCE

BRAD WOLFE

Advances in technology require the modern defense attorney to identify, acquire, and analyze varieties of electronic evidence. "Digital" or "electronic" evidence has been defined as "any probative information stored or transmitted in digital form that a party to a court case may use at trial."[1] While the Internet, computers, and mobile phones have undoubtedly standardized the use of text messages, emails, social media posts, multimedia, basic geographic information, and surveillance video, today's practitioner must stay current on the continuous innovations and applications of electronic evidence to effectively represent his or her client.

COMPUTERS

The computer may be the most apparent source of electronic evidence as it contains a wide variety of digital data (e.g. messages, emails, pictures, videos, documents, geographic information, search history, social media information, and metadata of the aforementioned). An independent forensic examination of a computer's data can be critical to challenge inconsistencies, missing information, and the government's testing methodologies. A very real issue with any electronic evidence generated from a computer is the emergence of "deepfakes". Similar to "Photoshopping", or the act of intentionally creating false representations, deepfakes are the result of combining and superimposing images and videos by using artificial intelligence.[2] Courts have begun to appreciate the seriousness of deepfakes[3] and some states recently passed legislation criminalizing their creation and distribution.[4][5] For informative (and entertaining) examples of deepfake technology, please visit the YouTube channel of "Ctrl Shift Face."[6]

CELLULAR PHONES & MOBILE DEVICES

Cell phones and mobile devices share similar types of electronic evidence with computers. A primary difference between the two sources is a phone's cell-site location information ("CSLI") generated by cell towers. In June of 2018, the Supreme Court held in Carpenter that a court order to a third-party wireless carrier for a defendant's CSLI constituted a search and required a warrant supported by probable cause.[7] Since then, lower federal courts and state courts have mostly found Carpenter to have minimal change to traditional applications of the Fourth Amendment, although, the case has impacted other privacy issues. In Naperville Smart Meter Awareness v. City of Naperville, the Seventh Circuit held that the Fourth Amendment protects energy-consumption data collected by smart meters which would otherwise be unavailable to the government without a physical search.[8] Additionally, the State of Utah relied on Carpenter when it recently enacted one of the nation's strongest data privacy laws which "requires law enforcement to obtain a warrant with probable cause in order to access any electronic data held by a third party, at least in most cases."[9] Although the narrow holding of Carpenter, albeit extremely important, has affected similar cases as expected, its influence has proven to be powerful in the legislative forum and thought-provoking in the judicial system.

SOCIAL MEDIA

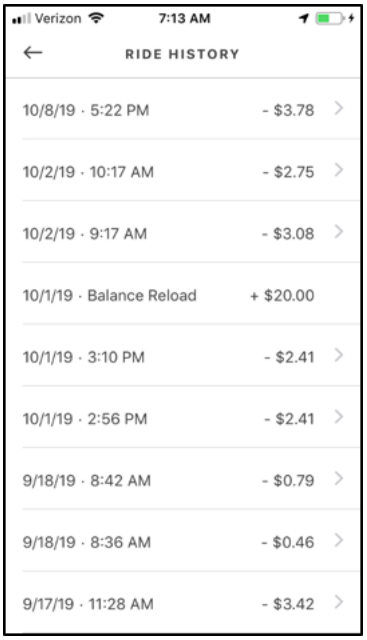
Social applications and websites designed for sharing content and communications have been preva-

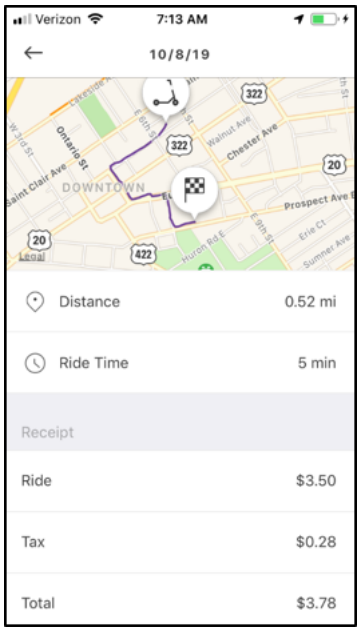
lent sources of electronic evidence for years. Facebook, WhatsApp, Instagram, Twitter, LinkedIn, Reddit, and YouTube are among the most popular platforms and share many of the same evidentiary features (e.g. message preservation, communication logs, multimedia, and geographic information). Snapchat, however, known for its "disappearing messages and content" has unique evidentiary value and challenges. As a preliminary matter, Snapchat's Law Enforcement Guide indicates that a "Snap" (of multimedia content) or a "Chat" (of text communication) automatically deletes from its servers once opened.[10] A Snap or Chat will remain on Snapchat's servers when it is saved to the user's "Memories" or "My Eyes Only" section, regardless of whether it is opened or even sent to another user.[11] Snapchat only provides basic subscriber information in response to a subpoena or court order but will produce available content and location information if presented with a search warrant.[12] Most law enforcement agencies are now issuing search warrants for this reason and others that are unfamiliar with the process have collaborated with counsel and welcomed guidance.

An alternative method of obtaining data created or stored on Snapchat is by independent forensic examination of the associated phone or mobile device's hard drive. Courts can be assured that this process is minimally invasive to the owner of the device as many forensic companies will travel to a court's location, create a mirror image of the hard drive on-sight, and return the phone to the owner within a relatively short period of time. The company then conducts its analyses and, if required, will present its findings directly to the court for in camera review.

GEOGRAPHIC AND MOBILITY INFORMATION

It may be difficult to believe that ride-sharing applications such as Uber and Lyft, and their troves of geographic data, have been available for nearly ten years.[13] Yet, relatively new to major cities and universities across Ohio are electric scooters which can be operated for a small fee and "parked" wherever the operator chooses upon completion. Bird, Lime, and Spin are the more popular brands of electric scooters and each offers electronic evidentiary value in similar formats.[14] Consistent with Uber, for example, Bird's mobile app provides logs of Ride History and a detailed summary of the exact route, time, and cost of a prior ride.





ACTIVITY TRACKERS

Courts have recognized the biometric data associated with wearable products such as Fitbit since 2014.[15] In October of 2018, a California man, 90 years of age, was charged for the murder of his stepdaughter.[16] Investigators utilized the deceased's Fitbit data to determine that on September 8, 2018, her heart rate spiked at 3:20 p.m. before completely stopping at 3:28 p.m.[17] This data corresponded with video surveillance showing the defendant at her home on the same date.[18] The defendant passed away in custody this past September before the case was brought to trial, but investigators found the data reliable and supportive of criminal charges.[19]

Biometric data has also proven to be exonerating. In 2016, a man charged with murder in Wisconsin claimed that another individual was the true suspect.[20] That individual was wearing a Fitbit and argued he was sleeping at the accepted time of the incident.[21] At the defendant's trial, the prosecution presented evidence of the framed individual's Fitbit data to show the nominal amount of steps he took during the relevant timeframe.[22] The judge admitted that data and the defendant was ultimately found guilty of first degree homicide.[23]

CONCLUSION

The role of technology and electronic evidence continues to expand throughout the judicial system. The International Association of Chiefs of Police recognizes that "[t]here is a digital component to nearly every crime. Today's judge should have an understanding and insight of technology used in criminal cases involving digital evidence from computers, mobile devices, the cloud and other sources."[24] The reality is that tomorrow's novel or creative applications of technology quickly become the methods of yesterday. As defense attorneys, we must maintain awareness and fully utilize the seemingly endless capabilities of electronic evidence.

Brad. S. Wolfe, Esq.
Friedman & Nemecek, L.L.C.
1360 E. 9th Street, Suite 650
Cleveland, Ohio 44114
Phone: (216) 928-7700
Email: bsw@fanlegal.com
www.fanlegal.com

About the Author

Brad Wolfe is an associate at Friedman & Nemecek, L.L.C., a Cleveland-based criminal defense law firm. Brad is a Co-Chair of OACDL's CLE Committee, and the Programming Director of the Cleveland Metropolitan Bar Association's Cyber Security, Data Privacy & Emerging Technologies Section.

1. Eoghan Casey, Digital Evidence and Computer Crime (2d ed. 2004).

2. Oscar Schwartz, *You Thought Fake News Was Bad? Deep Fakes Are Where Truth Goes To Die*, The Guardian (Nov. 18, 2018), https://www.theguardian.com/technology/2018/nov/12/deep-fakes-fake-news-truth.

3. David Notowitz, *Deepfakes and the Growing Trend of Fabricated Video Evidence*, Law.com (May 2, 2019), https://www.law.com/therecorder/2019/05/02/deep-fakes-and-the-growing-trend-of-fabricated-video-evidence/?slreturn=20191004095041.

4. Kari Paul, *California Makes 'Deepfake' Videos Illegal, But Law May Be Hard To Enforce*, The Guardian (Oct. 7, 2019), https://www.theguardian.com/us-news/2019/oct/07/california-makes-deepfake-videos-illegal-but-law-may-be-hard-to-enforce.

5. Kenneth Artz, *Texas Outlaws 'Deepfakes'—but the Legal System May Not Be Able to Stop Them,* Law.com (Oct. 11, 2019), https://www.law.com/texaslawyer/2019/10/11/texas-outlaws-deepfakes-but-the-legal-system-may-not-be-able-to-stop-them/.

6. *See Ctrl Shift Face*, YouTube, *available at* https://www.youtube.com/channel/UCKpH0CKltc73e4wh0_pgL3g (last visited Nov. 4, 2019).

7. *Carpenter v. United States*, 138 S. Ct. 2206, 585 U.S. ____, 201 L.Ed.2d 507 (2018).

8. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018) (holding that the public utility's collection of city residents' energy consumption at 15-minute intervals constituted a search under both U.S. Const. amend. IV and Ill. Const. art. I, § 6; however, the search was reasonable because the government's interest in smart meters was significant, the smart meters allowed utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability, the search was minimally invasive, and the search presented little risk of corollary criminal consequences).

9. Molly Davis, *Utah Just Became a Leader in Digital Privacy*, Wired (Mar. 22, 2019), https://www.wired.com/story/utah-digital-privacy-legislation/.

10. *See Information for Law Enforcement,* Snap Inc., https://www.snap.com/en-US/safety/safety-enforcement/ (last visited Nov. 4, 2019).

11. *See id.*

12. *See id.*

13. James Bacon, *Innovation Uber Alles: Personal-Driver Service Can Revolutionize Transportation Services*, The Washington Times (Feb. 2, 2012), https://www.washingtontimes.com/news/2012/feb/2/innovation-uber-alles/.

14. Melia Robinson, *A Startup in the West Coast Scooter Sharing Craze Is Already Worth $1 Billion — Here's What It's Like To Ride A Bird Scooter*, Business Insider. (Apr. 14, 2018), https://www.businessinsider.com.au/bird-electric-scooter-review-2018-4.

15. Parmy Olson, *Fitbit Data Now Being Used In The Courtroom*, Forbes (Nov. 16, 2014), https://www.forbes.com/sites/parmyolson/2014/11/16/fitbit-data-court-room-personal-injury-claim/#436294267379.

16. Christine Hauser, *Police Use Fitbit Data to Charge 90-Year-Old Man in Stepdaughter's Killing*, The New York Times (Oct. 3, 2018), https://www.nytimes.com/2018/10/03/us/fitbit-murder-arrest.html.

17. *Id.*

18. *Id.*

19. Dorian Geiger, *91-Year-Old California Man, Tied To Stepdaughter's Murder By A Fitbit, Dies*, Oxygen (Sept. 13, 2019), https://www.oxygen.com/crime-time/anthony-aiello-linked-to-stepdaughter-karen-navarras-killing-by-fitbit-dies.

20. Erin Moriarity, *21st Century Technology Used to Help Solve Wisconsin Mom's Murder*, CBS News (Oct. 20, 2018), https://www.cbsnews.com/news/the-fitbit-alibi-21st-century-technology-used-to-help-solve-wisconsin-moms-murder/.

21. *Id.*

22. *See id.* (it should be noted that the judge barred evidence of "sleeping data" due to reports of unreliability).

23. *Id.*

24. *See Digital Evidence for Judges (DEJ)*, Int'l Assoc. of Chiefs of Police, https://www.iacpcybercenter.org/training_conferences/digital-evidence-judges-dej/ (last visited Nov. 4, 2019).

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STRICKLAND FOR THE DEFENSE

JEFFREY M. GASMO

"There is," the Sixth District explained in *State v. Wernet*, "a synergistic relationship between the degree of the error and the quantum of other evidence against the defendant when applying a harmless error analysis."[1] In *Strickland v. Washington*, the U.S. Supreme Court put it in simpler terms. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[2] Which is all well and good but rather beside the point when the question is the actual standard to use in determining whether error is harmful.

It's no surprise that we want the best standard of review we can get. Structural error is great because the error alone wins the day.[3] Review for abuse of discretion is terrible because we have to show not merely that the court was wrong but that its decision was "unreasonable, arbitrary or unconscionable."[4] But the worst? That's a standard that says we lose unless we can show that the error actually changed the outcome.[5] We never want that. And yet:

> The test for determining whether a defendant was denied the effective assistance of counsel, as required by the Sixth and Fourteenth Amendments. is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington* 466 U.S. 668, 686 (1984). The defendant must show that but for the counsel's mistake the result of the trial would have been different. *Id.* at 689.

That's not from a court, though it is the standard the Eighth District uses. Rather, it's from a brief recently filed by a criminal defense lawyer on behalf of his client. Another criminal defense lawyer recently put this in his client's brief in the Sixth District:

> To prevail on a claim of ineffective assistance of counsel, an appellant must establish that: (1) his counsel's performance was deficient to the extent that 'counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment": and (2) but for his counsel's deficient performance, the result of the trial would have been different.

That's actually a quote from a Ninth District decision citing *Strickland*, a Ninth District decision that, by the way, has never been cited - even within the Ninth District. Oh, and it's wrong.

They're both wrong. That's something like the standard for plain-error review where the defense must show that "but for the error the outcome of the trial clearly would have been otherwise."[6] But it specifically is not the standard for showing prejudice from ineffective assistance of counsel. Of course, it's necessary for a defendant claiming ineffective assistance of counsel to show that counsel's error's "actually had an adverse effect on the defense."[7] But just how adverse must it be? And why in the world would you tell the court it has to be really really really adverse – even if you mistakenly think it must be. Sometimes it's best just to be quiet. Other times you might try actually urging something better. But when the court is wrong and the error hurts your client, you have an affirmative obligation to try to disabuse the court of its mistaken view.

Strickland tells us that although an "outcome-determinative standard has several strengths," it "is not quite appropriate."[8]

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[9]

So, it's not simple "victory but for" test. It's "a reasonable probability, . . . a probability sufficient to undermine confidence in the outcome." That's better, certainly, than the "result would have been different" test counsel unwisely and inaccurately advocated. But it's still not terribly clear. When, after all, is confidence undermined? It can't just be any old time, *Strickland* said. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," to have "impaired the presentation of the defense."[10] Any failure by counsel would do that, but not everything can be "sufficiently serious to warrant setting aside the outcome of the proceeding."[11] No, it has to be something that gets at "a reasonable probability," that "undermine[s] confidence."

And so, *Strickland* offers this: "[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."[12] In Bradley, the Ohio Supreme Court held that the standard of review for an ineffective-assistance claim under the Ohio Constitution is "essentially the same as the one enunciated" in Strickland.[13] And in State v. Murphy Justice Cook wrote separately to make clear that the proper measure of prejudice in an ineffective assistance claim is not the same as, is far better than, the measure for plain-error.[14]

But *Strickland* "prejudice" is different. In fact, the Strickland court expressly rejected an outcome-determinative standard for prejudice in the context of ineffective assistance of counsel claims, describing such a standard as "not quite appropriate." *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697. The Strickland court explained:

> We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.
>
> The appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.[15]

So, the standard is less than a preponderance. Not even 51%. Not probably. Call it "probably not." And sell it.

Jeffrey M. Gamso, Esq.
Assistant Cuyahoga County Public Defender, Appeals Division
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113 Phone: (216) 443-7583
http://gamso-forthedefense.blogspot.com/

About the Author

Jeffrey is a former president of OACDL and former Legal Director of the ACLU of Ohio

1. *State v. Wernet*, 108 Ohio App.3d 737, 745, 671 N.E.2d 641 (6th Dist. 1996).

2. *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), quoted with approval in *State v. Bradley*, 42 Ohio St. 3d 136, 143, 538 N.E.2d 373 (1989).

3. See *State v. Drummond*, 111 Ohio St. 3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 50, quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991) ("A structural error is a 'defect affecting the framework within which the trial proceeds, rather than simply and error in the process itself.'")

4. *E.g., State v. Adams*, 62 Ohio St. 2d 151, 157, 404 N.E.2d 144 (1980) (citing cases).

5. Actually, the worst may be the federal standard for relief under AEDPA. See 28 U.S.C. § 2254(d).

6. *State v. Long*, 53 Ohio St. 2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus.

7. *Strickland*, 466 U.S. at 693.

8. *Id.* at 693–94.

9. *Id.* at 694.

10. *Id.* at 693.

11. *Id.*

12. *Id.* (emphasis added).

13. *Bradley*, 42 Ohio St. 3d at 142.

14. And that's one of the reasons that any appeal arguing plain error should also argue ineffective assistance.

15. *State v. Murphy*, 91 Ohio St. 3d 516, 559, 747 N.E.2d 765 (2001) (Cook, J., concurrin

DOUBLE JEOPARDY & REVISITING STATE CONSTITUTIONAL LAW

HOLLY B. CLINE

The Ohio Supreme Court ruled on October 31, 2019 in *State v. Soto*, 2019-Ohio-4430 that the dismissal of a charge pursuant to a plea agreement is not the equivalent of an acquittal under the Double Jeopardy Clauses of the United States Constitution and the Ohio Constitution.

Majority Opinion: Justice DeWine [Chief Justice O'Connor and Justices Kennedy, French, and Fischer concurring; Justice Stewart concurring in judgment only]

Dissenting Opinion: Justice Donnelly

LEGAL BACKGROUND

The **Fifth Amendment to the United States Constitution** provides that "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb * * *." This protection has been incorporated to State through the Fourteenth Amendment to the United States Constitution. *State v. Brown*, 119 Ohio St. 3d 447, 2008-Ohio-4569, ¶ 10, citing *Benton v. Maryland*, 395 U.S. 784, 786, 86 S. Ct. 2056 (1969).

Article I, Section 10 of the Ohio Constitution provides, in relevant part, that "No person shall be twice put in jeopardy for the same offense."

The Ohio Supreme Court has interpreted both double jeopardy clauses as protecting against three distinct wrongs: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gustafson*, 76 Ohio St. 3d 425, 432, 668 N.E.2d 435 (1996), citing *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989).

FACTUAL AND PROCEDURAL BACKGROUND OF CASE

The case began in 2006 when the two-year-old son of Travis Soto was killed. Soto initially told law enforcement officers that the death was caused by an all-terrain vehicle ("ATV") accident. Soto initially reported that he accidentally ran over his son while coming around the corner of a building on his property. However, he later told investigators that his son was riding on the ATV with him, fell off, and was struck by the ATV. After an autopsy was conducted by the Lucas County Coroner's Office, it was determined that the son's injuries were consistent with an ATV accident.

Based on this report and Soto's statements—albeit, inconsistent— to law enforcement, Soto was charged with child endangering under R.C. 2919.22(A) and involuntary manslaughter under R.C. 2903.04(A) in the Putnam County Court of Common Pleas. Ultimately, Soto and the prosecution negotiated a plea agreement to resolve the case: Soto would plead guilty to the child endangering offense in exchange for the State's dismissal of the involuntary manslaughter charge. Soto was sentenced to and served five years in prison.

Years after Soto served his sentence, he voluntarily confessed to Putnam County Sheriff's Office law enforcement officers in July 2016 that he had actually beaten his son to death and fabricated the ATV accident. A doctor reviewed the 2006 autopsy conducted by the Lucas County Coroner's Office and opined that the son's injuries were consistent with a child being beaten to death. According to the doctor, noticeably absent from the son's autopsy were bone fractures—which, the doctor claimed,

would normally be expected in an ATV accident.

In August 2016, Soto was indicted in the Putnam County Court of Common Pleas for aggravated murder, murder, felonious assault, kidnapping, and tampering with evidence. Soto moved the trial court to dismiss the aggravated murder and murder charges, arguing that involuntary manslaughter—which was dismissed by the State pursuant to a negotiated plea agreement in 2006—is a lesser included offense of murder and aggravated murder, and that the State is barred from prosecuting those charges under the Fifth Amendment's double jeopardy clause.

Judge Keith Schierloh denied that motion, concluding that because felonious assault, kidnapping, and tampering with evidence all require proof of an element not required by the original prosecution of child endangerment, Soto could not reasonably believe that his plea—based upon his false statements to law enforcement officers in 2006 about what happened—would bar future prosecutions.

Soto filed an interlocutory appeal of the trial court's motion to dismiss. **[Practice Note: The Ohio Supreme Court has held that an interlocutory appeal of a denial of a motion to dismiss on double jeopardy grounds is proper. See *State v. Anderson*, 138 Ohio St. 3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 26].** On appeal, the Third District Court of Appeals reversed the trial court's decision, holding that although Soto was not convicted of involuntary manslaughter, he was nonetheless in jeopardy of being tried and convicted for involuntary manslaughter up until he entered into the plea agreement with the State. The appellate court noted that involuntary manslaughter is a lesser included offense of aggravated murder and murder. Moreover, at the time of the plea, the State did not reserve the right to bring additional charges stemming from the son's death. Thus, the Third District Court of Appeals concluded that the double jeopardy protection against a second prosecution for the same offense following an acquittal was violated by treating the State's dismissal of the involuntary manslaughter charge—pursuant to the 2006 plea agreement—as an acquittal.

OHIO SUPREME COURT'S HOLDING

The Ohio Supreme Court reversed the appellate court's decision. Writing for the Court, Justice DeWine explained that because the involuntary manslaughter charge was dropped prior to the empaneling of a jury (or, for a bench trial, before evidence had been taken), jeopardy never attached to the involuntary manslaughter charge. *See* 2019-Ohio-4430, ¶ 16. Thus, the Court concluded that jeopardy only attached at to the child endangering charge to which Soto pled guilty.

Although not raised on appeal, the Court noted that the child endangering charge does not constitute the same offense as the murder or aggravated murder charges under the *Blockburger* test because "each of the murder offenses contains an element not found in the child endangering [offense,] and child endangering contains an element not found in the murder offense. See id. at ¶ 17. See generally *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932).

Since Soto did not seek an interlocutory appeal to the Third District Court of Appeals related to the content of his plea agreement, the Ohio Supreme Court dismissed as improvidently accepted the State's third assignment of error, which asserted that "[a] negotiated plea does not bar successive prosecutions where the defendant would not reasonably believe that his or her plea would bar further prosecutions for any greater offenses related to the same factual scenario." The Court went on to note that the Ohio Supreme Court has never addressed whether an interlocutory appeal of a denied motion to dismiss may be brought when the motion is based on a plea agreement. See 2019-Ohio-4430, ¶¶ 19–20.

DOUBLE JEOPARDY AND ALLIED OFFENSES OF SIMILAR IMPORT

Notably, the Ohio Supreme Court has recently held that Article I, Section 10 of the Ohio Constitution requires the merger of allied offense of similar import and therefore affords juveniles greater double jeopardy protections than those granted in the Fifth Amendment to the Federal Constitution. *In re* A.G., 148 Ohio St. 3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶¶ 11-13, citing *State v. Ruff*, 143 Ohio St. 3d 114, 2015-Ohio-995, 34 N.E.3d 892. In *Ruff*, the Court specifically focused on the Double Jeopardy Clause's protection against multiple punishments for the same offense. 2015-Ohio-995, ¶ 10. The Supreme Court of the United States has held that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cu-

mulative punishments in the absence of a clear indication of contrary legislative intent." Id., citing *Whalen v. United States*, 445 U.S. 684, 691–92, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980).

The Ohio General Assembly—in codifying double jeopardy protections—expressed its intent as to when multiple punishments can be imposed in R.C. 2941.25:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Thus, R.C. 2941.25(A) allows only a single conviction for conduct that constitutes "allied offenses of similar import." But under R.C. 2941.25(B), a defendant charged with multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus. *State v. Moss*, 69 Ohio St.2d 515, 519, 433 N.E.2d 181 (1982). And, because the prosecution selects the charges that may be brought based upon the criminal conduct of an accused and that conduct may potentially support convictions of multiple offenses, the judge must determine whether the conduct can be construed to constitute a single or more than one offense.

The *Ruff* Court instructed that, to determine whether two or more offenses are allied offense of similar import, "the analysis must focus on the defendant's conduct to determine whether one or more convictions may result, because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation." 2015-Ohio-995, ¶ 30. The Court specifically discouraged courts from "comparing the elements of the offenses," instead concluding that:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.
>
> Id. at ¶¶ 30–31.

In In *re A.G.*, the Ohio Supreme Court held that, "under the Ohio Constitution, a juvenile's double-jeopardy protections are violated when that juvenile is subjected to multiple terms of commitment for conduct constituting allied offenses of similar import." 2016-Ohio-3306, ¶ 12. "Just as a judge in adult court would do to determine if conduct constitutes allied offenses of similar import, a juvenile judge must evaluate three separate factors: the juvenile's conduct, the juvenile's animus, and the import of the offenses." Id. The Court therefore held that the *Ruff* test for allied offenses applies to juvenile delinquency proceedings. Id.

Notably, the *Soto* Court only examined the first double jeopardy protection: preventing a second prosecution for the same offense following an acquittal. 2019-Ohio-4430 at ¶ 13. This was because Soto argued to the Third District Court of Appeals that double jeopardy prohibited the State's aggravated murder and murder prosecution because his prior 2006 plea agreement disposed of a county of involuntary manslaughter, which is a lesser included offense of both murder and aggravated murder. Treating the dismissal of the involuntary manslaughter charge as an acquittal, the appellate court concluded that the murder and aggravated murder charges violated the double jeopardy protection preventing a second prosecution for the same offense following an acquittal. *See* id. at ¶ 13. Thus, to the extent applicable, criminal defense lawyers faced with double jeopardy issues would be wise, where such argument applies, to allege that a subsequent prosecution violates the third double jeopardy protection set forth in *Gustafson* because it would result in "multiple punishments for the same offense."

THE IMPORTANCE [AND OFTEN UNDERUTILIZATION] OF STATE CONSTITUTIONAL LAW

Citing to *Gustafson*, the Majority Opinion in Soto noted that the Ohio Supreme Court has treated the due process guarantee set forth in the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution as "coextensive." In that same footnote, however, the Court explained that "[b]ecause neither party has presented a contrary argument, we have no opportunity to revisit that determination today." 2019-Ohio-4430, ¶ 12, n.1.

Of course, this footnote is a reminder to all practicing attorneys to promulgate constitutional arguments based on the Federal Constitution ***and*** "comparable provisions of the Ohio Constitution." Ohio attorneys should realize the benefits of marking constitutional arguments based upon the history and precise language of the Ohio State Constitution.

Indeed, the Supreme Court of the United States has recognized on countless occasions the ability of states to recognize more comprehensive liberties in their own state constitutions than exist in the Federal Constitution. As explained by the Ohio Supreme Court: "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."[1]

While most state courts have chosen to walk in lockstep with federal courts on constitutional issues, the Ohio Constitution nonetheless offers an independent basis for the Ohio Supreme Court to conclude that the Ohio Constitution provides Ohio citizens with ***more expansive*** liberties than the Federal Constitution guarantees. Indeed, the Ohio Supreme Court has found greater protections nestled in the Ohio Constitution for a number of issues, including free exercise,[2] warrantless arrests for minor misdemeanors,[3] Miranda violations,[4] traffic stops made outside of an officer's statutory jurisdiction,[5] equal protection,[6] and eminent domain.[7]

Holly B. Cline, Esq., *Co-Chair of OACDL's Publications Committee*
The Tyack Law Firm Co., L.P.A.
536 South High Street
Columbus, Ohio 43215
Phone: (614) 221-1342
Email: holly@tyacklaw.com
www.tyacklaw.com

1. *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. In *Arnold*, the Court held that "Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. However, this right is not absolute." Id. at paragraph two of the syllabus. Notably, in interpreting the constitutionality of a Cleveland City Ordinance prohibiting the possession and sale of "assault weapons" in the city of Cleveland, the Court considered the historical basis for Article I, Section 4 of the Ohio Constitution and its textual differences from the Second Amendment to the Federal Constitution. *See* id. at 41–46. In 1993, the Second Amendment to the Federal Constitution had not yet been held applicable to the states. *See* id. at 41. This was not so held until 2008. *See District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

2. *Humphrey v. Lane*, 89 Ohio St. 3d 62, 2000-Ohio-435, 728 N.E.2d 1039, syllabus ("Under Article I, Section 7 of the Ohio Constitution, the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest.").

3. *State v. Brown*, 99 Ohio St. 3d 323, 2003-Ohio-3931, 792 N.E.2d 175, syllabus ("Section 14, Article I of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors.").

4. *State v. Farris*, 109 Ohio St. 3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 48 (holding that the Article I, Section 10 of the Ohio Constitution provides greater protection to criminal defendants that the Fifth Amendment to the United States Constitution, the Court concluded that evidence seized due to statements obtained in violation of *Miranda* is inadmissible. In contrast, the Fifth Amendment to the Federal Constitution does not mandate the exclusion of evidence seized due to inadmissible statements obtained in violation of *Miranda*.).

5. *State v. Brown*, 143 Ohio St. 3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 445 (affirming appellate court's judgment that the "traffic stop was unreasonable pursuant to Article I, Section 14 of the Ohio Constitution because the township officer lacked statutory authority to make a stop for a marked lane violation on an interstate highway, and it suppressed the evidence obtained from the search of [the defendant's] vehicle.").

6. *State v. Mole*, 149 Ohio St. 3d, 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 23 (holding that R.C. 2907.03(A)(13)—which prohibited sexual conduct when one person was a minor and the offender was a peace officer—was an arbitrarily disparate treatment of peace officers that facially violated equal protection under the Fourteenth Amendment to the Federal Constitution and Article I, Section 2 of the Ohio Constitution. "In so holding, [the Court made] clear that even if [it has] erred in [its] understanding of the federal Constitution's Equal Protection Clause, [the Court nonetheless found] that the guarantees of equal protection in the Ohio Constitution independently forbid the disparate treatment of peace officers through a legislative scheme that criminalizes their sexual conduct while removing virtually all of their due-process protections, such that an officer's conduct can constitute a criminal offense even when that conduct is not found to be illegal by a jury of the officer's peers.").

7. *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, paragraph one of the syllabus ("Although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution."). In contrast, the Supreme Court of the United States has held that economic benefits alone are a sufficient public use for a valid exercise of eminent domain under the Takings Clause of the Fifth Amendment to the Federal Constitution. *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) (State's taking of an individual's property and giving said property to another based solely on the economic gain afforded by the transfer—"to increase tax and other revenues, and to revitalize * * * [an] economically distressed city"—was held to qualify as "public use" within meaning of Takings Clause of Federal Constitution's Fifth Amendment.).

COMPETENCY TO WAIVE MIRANDA RIGHTS

CRAIG NEWBURGER

In 1998, William Garner filed a petition for a writ of habeas corpus in the federal district court raising 23 grounds for relief. The district court denied all of the claims and dismissed the petition. Garner raised four issues on appeal to the Sixth Circuit Court of Appeals, arguing that the federal district court erred in denying him habeas relief because: (1) he did not knowingly and intelligently waive his Miranda rights before speaking with police; (2) his state trial counsel was ineffective for failing to investigate and argue his Miranda claim; (3) the state trial court erred by not providing him with experts to assist with his Miranda claim; and (4) the process by which the jury list was selected discriminated against African Americans.

In *Garner v. Mitchell*, 502 F.3d 394 (6th Cir. 2007), the U.S. Court of Appeals for the Sixth Circuit reversed Garner's convictions and death sentence after concluding that the inmate did not knowingly and intelligently waive his *Miranda* rights. The court granted the inmate a conditional writ of habeas corpus and remanded the case to district court with instructions that the inmate be released from custody unless a new trial commenced within 180 days of the court's judgment. In rendering its opinion, the court discussed the matter of intelligent and knowing waivers of Miranda rights and the use of related assessment instruments.

The Sixth Circuit concluded that Mr. Garner did not knowingly and intelligently waive his Miranda rights before speaking with police, and thus, admission of his statement at trial was unconstitutional. Because the court granted habeas relief on his Miranda claim, the other three claims were not addressed.

COMPETENCY TO WAIVE MIRANDA RIGHTS ASSESSMENT

Thomas Grisso's Instruments for Assessing Understanding and Appreciation of Miranda Rights—developed in the 1970s—offer four specialized instruments to assist clinicians in assessing defendants' capacities to understand and appreciate the "Miranda warnings" that they waived at the time of police interrogation. "Three instruments allow the clinician to employ a multi-method approach to assessing understanding of the Miranda warnings, and a fourth examines the defendant's capacities to appreciate the significance of the rights in the context of police questioning, the attorney–client relationship, and court proceedings."[1]

Many defendants are found competent to stand trial because they are able to understand the character and consequences of the proceedings against them and are able to properly to assist in their defense. Some of the same defendants, however, suffer from a mental deficiency that materially prevents them from understanding their Miranda rights and corresponding waiver.

Once defendants are clinically found incompetent to understand their Miranda warnings, state courts commonly require said defendants to file a motion to suppress the statements. Many of the courts ignore the holding in Garner and, instead, rely on *Colorado v. Connelly,* 479 U.S. 157 (1986). The *Connelly* court required evidence of police coerciveness before defendants' related incompetency would result in their statements being suppressed.

The facts of *Connelly* are summarized below:

> Respondent approached a Denver police officer and stated that he had murdered someone and wanted to talk about it. The officer advised respondent of his Miranda rights, and respondent said that he understood those rights, but still wanted to talk about the murder. Shortly thereafter, a detective arrived and again advised respondent of his rights. After respondent answered that he had come all the way from Boston to confess to the murder, he was taken to police headquarters. He then openly detailed his story to the police and subsequently pointed out the exact location of the murder.
>
> He was held overnight, and the next day he became visibly disoriented during an interview with the public defender's office and was sent to a state hospital for evaluation. Interviews with a psychiatrist revealed that respondent was following the "voice of God" in confessing to the murder. On the basis of the psychiatrist's testimony that respondent suffered from a psychosis that interfered with his ability to make free and rational choices and, although not preventing him from understanding his rights, motivated his confession, the trial court suppressed respondent's initial statements and custodial confession because they were "involuntary," notwithstanding the fact that the police had done nothing wrong or coercive in securing the confession. The court also found that respondent's mental state vitiated his attempted waiver of the right to counsel and the privilege against self-incrimination.

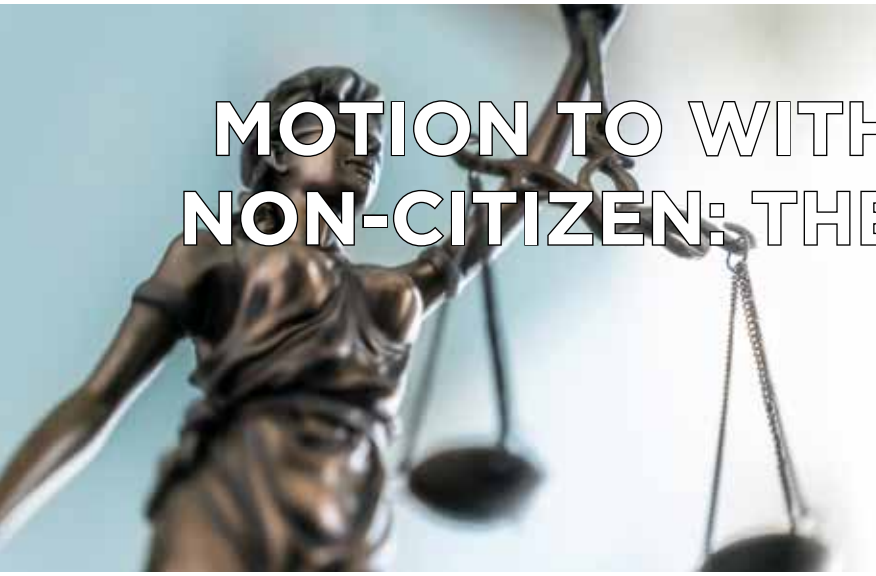
The Colorado Supreme Court affirmed, holding that the Federal Constitution requires a court to suppress a confession when the defendant's mental state, at the time he confessed, interfered with his "rational intellect" and his "free will," the very admission of the evidence in a court of law being sufficient state action to implicate the Due Process Clause of the Fourteenth Amendment. The court further held that respondent's mental condition precluded his ability to make a valid waiver of his Miranda rights, and that the State had not met its burden of proving a waiver by "clear and convincing evidence."

The Court in *Connelly,* ultimately, held that coercive police activity is a necessary predicate finding that a confession is not "voluntary" within the meaning of the Due Process Clause. In Connelly, the taking of respondent's statements and their admission into evidence constituted no violation of that Clause. The Court opined that while a defendant's mental condition may be a "significant" factor in the "voluntariness" calculus, this does not justify a conclusion that his mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness." *Connelly*, 479 U.S. at 163–67.

State courts relying on *Connelly* are ignoring a material irrefutable fact available to the *Garner* court. The Grisso Instruments for Assessing Understanding and Appreciation of Miranda were published in 1998—twelve years ***after*** Connelly was decided.

Craig A. Newburger, Esq.
9435 Waterstone Blvd., Suite 140
Cincinnati, Ohio 45249
Phone: (513) 494-0278
http://www.newburgerlaw.com/

1. Thomas Grisso, *Instruments for Assessing, Understanding & Appreciation of* Miranda *Rights* (1998).



MOTION TO WITHDRAW PLEA OF NON-CITIZEN: THE COURT'S DUTY AND YOURS

MADISON MACKAY

Criminal representation of non-United States citizens presents complicated challenges to practitioners and court systems given the many complex consequences non-citizens may face. Many non-citizens are represented by defense attorneys and processed by courts, unaware of the multitude of possible immigration consequences as a result of pleading guilty or no contest. Nevertheless, Ohio provides post-conviction relief in certain scenarios, when these non-citizens fall through the cracks of the legal system.

O.R.C. § 2943.031

Under O.R.C. § 2943.031(D), a defendant may later withdraw his guilty plea if he does not affirmatively state he is a U.S. citizen, and the court fails to provide him the immigration advisement required under O.R.C. § 2943.031(A). Unlike Criminal Rule 32.1, the defendant need not enter this motion before sentencing or demonstrate manifest injustice.

Instead, the defendant must only show he did not affirmatively state he was a U.S. citizen to the court and before accepting his guilty plea or no contest plea, the court failed to state: **"If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."**[1]

Interpreting this statute, the Tenth District Court of Appeals clearly articulated that under the plain and unequivocal language of O.R.C. §2943.031, a trial court *shall* set aside a conviction and allow the defendant the withdraw a plea of guilty if **four** statutory requirements are established: (1) the court failed to provide the advisement described in the statute, (2) the advisement was required to be given, (3) the defendant is not a citizen of the United States, and (4) the offense to which the defendant pled may result in the defendant being subject to deportation, exclusion, or denial of naturalization under federal immigration laws.[2] A majority of District Courts of Appeals has followed the standard delineated in *Weber*.[3]

RECORD OF PERSONAL ADDRESS

Additionally, the statute presents a deferential burden of proof to defendants. Absent a record, typically in the form of a transcript of the plea acceptance, that the court provided the defendant with the advisement, it is presumed the defendant did not receive the advisement. Moreover, the statute requires that the court *personally* address each defendant who has not indicated he is a U.S. citizen, and provide the advisement.

However, what qualifies as a record of advisement varies throughout the courts of appeals. For example, multiple courts have found that a signed written advisement by the defendant absent a transcript reflecting that the court personally and orally addressed the defendant to provide the advisement is insufficient.[4]

Moreover, at least one court has found that the requirement that the court personally address the defendant before accepting his plea renders any pre-hearing or en masse colloquy made by the court insufficient.[5]

SUBSTANTIAL COMPLIANCE

It is important to note, however, that the Ohio Supreme Court has held that the court need not give a verbatim recital of the statutory language, but must determine whether there was substantial compliance.[6] To determine substantial compliance, courts must utilize the "totality of the circumstances" test to decide whether the plea would have been otherwise made. *Id.*

Nevertheless, substantial compliance requires distinction between the three separate possible immigration consequences of a guilty or no contest plea by a non-citizen.[7] Specifically, the mention of deportation alone, does qualify as substantial compliance, as it fails to "recognize the distinction between, or the severity of, each consequences that might result from a guilty plea: 1) deportation; 2) exclusion from admission into the United States; and 3) denial of naturalization."[8]

Often times, these terms are conflated when discussing the possible consequences for a non-citizen, and each consequence pertains to specific populations of non-citizens dependent upon a multitude of factors. For example, deportability refers to a non-citizen permanent resident, or often called a green card holder. On the other hand, exclusion from admission to the United States applies to a non-citizen seeking "admission" to the United States typically through a petition for lawful status, even though the person is already physically present in the United States.

DUTY OF DEFENSE COUNSEL

Recently, the Ohio Supreme Court decided that the court's advisement of the possible immigration consequences does not negate counsel's duty to advise the defendant regarding the immigration consequences.[9] Instead, courts must utilize the *Strickland*[10] standard to determine an ineffective assistance of counsel claim regardless of whether the court complied with its own duty to advise the defendant.[11]

As criminal defense attorneys, we often encounter non-citizens without fully understanding the gravity of the results of their representation and adjudication on their status and ability to remain in the United States. For example, although marijuana has generally become decriminalized in many jurisdictions, it is still Federal Schedule I Controlled Substance.[12] As immigration is federal law, marijuana possession is both an ground of inadmissibility[13] and deportability.[14] A plea to minor misdemeanor marijuana possession, while in relatively inconsequential for most in Ohio, can be debilitating for a non-citizen. Immigration law utilizes many outdated and complex legal standards and it is imperative that defense attorneys seek outside assistance from competent immigration practitioners when dealing with non-citizens.

Madison Mackay, Esq.
The Tyack Law Firm Co., LPA
536 South High Street
Columbus, Ohio 43215
Phone: (614) 221-1342
Email: madison@tyacklaw.com
www.tyacklaw.com

1. O.R.C. §2943.031(A)

2. *State v. Weber*, 125 Ohio App.3d 120, 126, 707 N.E.2d 1178 (10th Dist.1997).

3. *E.g.*, *State v. Akhtar*, 5th Dist. Muskingum No. CT2016-0003, 2016-Ohio-7201, ¶ 12; *State v. Villavicencio*, 8th Dist. Cuyahoga No. 100367, 2014-Ohio-1522, ¶ 12; *State v. Duplessis*, 2d Dist. Clark No. 2009 CA 101, 2010-Ohio-4920, ¶ 7; *State v. Joseph*, 7th Dist. Mahoning No. 05-MA-82, 2006-Ohio-1057, ¶ 22; *State v. Abi-Aazar*, 154 Ohio App.3d 278, 2003-Ohio-4780, 797 N.E.2d 98, ¶ 9 (9th Dist.); *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076, 782 N.E.2d 146, ¶ 17 (1st Dist.);

4. *E.g.*, *State v. Rai*, 9th Dist. Summit No. 28643, 2017-Ohio-8655, ¶ 13; *State v. Velazquez*, 2016-Ohio-875, 111 N.E.3d 428, ¶ 16 (12th Dist.); *City of Mayfield Hts. v. Grigoryan*, 2015-Ohio-607, 27 N.E.3d 578, ¶ 21 (8th Dist.); *State v. Lucente*, 7th Dist. Mahoning No. 03 MA 216, 2005-Ohio-1657, ¶16; *State v. Yanez*, 150 Ohio App.3d 510, 2002-Ohio-7076, 782 N.E.2d 146, ¶ 47 (1st Dist.).

5. *State v. Zabala,* 5th Dist. Delaware No. 10CAC080059, 2011-Ohio-2947, ¶37.

6. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 48.

7. *E.g.*, *State v. Encarnacion*, 12th Dist. Butler No. CA2003-09-225, 2004-Ohio-7043, ¶ 23.

8. *Id.*

9. *E.g.*, *State v. Romero*, 156 Ohio St.3d 468, 2019-Ohio-1839, 129 N.E.3d 404, ¶ 21.

10. 1) Deficient performance by counsel, 2) resulting prejudice, in that but for the deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694-95 (1984).

11. *Romero*, 156 Ohio St.3d 468 at ¶ 22.

12. 21 USCS § 812

13. 8 USC § 1182(a)(2)(A)(i)(II)

14. 8 USC § 1227(a)(2)(B)(i)

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
713 South Front Street, Columbus, OH 43206
(614) 418-1824 or (800) 443-2626
fax: (740) 654-6097 email: info@oacdl.org

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