2020 FALL/WINTER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Science of the Law

The Legal Definition of Penetration / Considerations for Voir Dire

Counselor, Don't Just Stand There / Next Generation

Criminal Defense Attorneys and Secondary Traumatic Stress / DNA

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MISSION STATEMENT

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

BENEFITS OF THE OACDL

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

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

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

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

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

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

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

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

DIRECTOR'S DIALOGUE

SUSAN CARR

EXECUTIVE DIRECTOR, OACDL

I want to thank Shawn Dominy for his phenomenal work as President of this organization last year. And what a year it has been. It started off with a bang with his Rock Star seminar and party, continued with successful CLE's, a fabulous CLE in Puerto Rico, and then…BAM the coronavirus hit in March. He was able to get us through that and get our seminars available via live-streaming. Shawn is a great leader. In fact, not only did we survive, we actually thrived under his leadership! The OACDL will be forever grateful for your strong leadership.

And, welcome to OACDL President Meredith O'Brien. Meredith has some great ideas for continuing on Shawn's path, and some new ideas on diversity that should increase our value as an organization. With a motto of "Strength in Numbers", Meredith has plans to make us VERY strong!
We are still in the process of adding Briefs and Motions to our website. Thank you to all who contributed to this effort! If you have a brief or motion you think would be valuable to our members, please send it to me. This will be an on-going endeavor, and your participation is needed and appreciated.

The CLE Committee, headed by Doug Clifford and Ashley Jones, are working hard to create a fantastic year of live-streamed seminars. Joe Hada is our producer of these. The June and August webinars were well-attended and well-received. Joe is working on some of the "bugs" that popped up at those, and all should be good now. Thank you, Joe!

A quick heads-up for those who normally attend the March DUI Seminar - we have postponed that until June, 2021. Hopefully, the COVID-19 orders will be lifted by then and we can have more than 10 people in a room. I miss seeing you all!
Speaking of CLE's, my email has been full of webinar offers from organizations I didn't even know existed! I'm sure yours has been too. One of the strongest aspects of our organization, I feel, is the quality of our seminars. We know you have so many choices, and thank you for supporting your organization.

Dues notices will be going out the end of November and are due January 1. 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

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2021 SCHEDULE OF EVENTS

December 11, 2020
Hot Topics in Criminal Law with Professional Conduct Hours (6.5 hours) Virtual Live-Stream

January 18, 2021
Current Issues in Criminal Law (3 hours) Virtual Live-Stream

February 19, 2021
Crimigration with Alex Cuic (1 hour) Virtual Live-Stream

March, 2021
DUI – what you need to know (6 hours) Virtual Live-Stream

June, 2021
Advanced DUI Seminar and Workshop (hours TBD) planning on LIVE-IN PERSON

October 8, 2021
Annual Superstar Seminar (6 hours) planning on LIVE-IN PERSON

November 18-19, 2021
Annual Death Penalty Seminar
Nationwide Conference Center

The CLE committee is planning on virtual seminars until June. They may add more to make sure you have the most current, up-to-date information possible to advance your trial skills! The DUI Committee changed the March DUI to June, in hopes of being able to meet in-person again. Keep an eye on your email for announcements.

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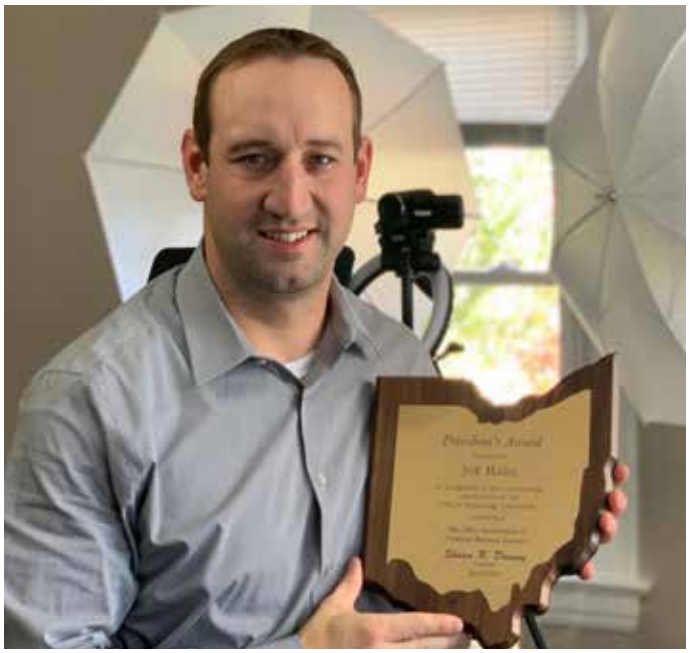
Joe Hada receives OACDL's 2020 President's Award

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

PRESIDENT'S AWARD

This year's recipient of the OACDL President's award is Joe Hada. At the beginning of the year, Joe joined the Technology Committee. He possesses tech knowledge, curiosity and a drive to make things work.



In March of 2020, COVID-19 cancelled OACDL's two-day DUI seminar at the end of the first day. The presentations for day two were recorded without attendees present. Joe developed a method for combining the speakers' recorded presentations with an overlay of their powerpoints. The process required innovation and dozens of hours of work. Joe's hard work paid off, as the impressive final product was provided to the attendees online so they could benefit from the presentations and obtain CLE credit.

Joe improved on that method for the DUI seminar in June, which was streamed but pre-recorded. As it became apparent live-streamed seminars were the trend of the present, Joe and CLE co-chair Brad Wolfe implemented a system combining software and hardware to produce an outstanding online CLE experience, on par with any in the nation.

Joe selflessly donated time and talent to developing this amazing webinar system. For this reason, Joe is the recipient of the 2020 OACDL President's Award.

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mark DeVan selected as OACDL's 2020 Lawyer of the Year

IAN FRIEDMAN

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
LAWYER of the YEAR

It is my honor to nominate Mark DeVan for OACDL Lawyer of the Year. His service to this organization has spanned approximately 30 years. He was OACDL President from 1993-94. As with many organizations, involvement by leaders unfortunately tapers off over time. Such has not been the case with Mark. He remains just as relevant today as he did years ago. My personal experiences with Mark, which serve as the basis for this nomination, include, but are not limited to:

Participation and valuable assistance on the Ohio Criminal Rule 16 "Open Discovery" initiative 2007-2010;

His participation and involvement in the matter of In Re: Contempt of Brian Jones. As you may recall, Public Defender Jones was held in contempt in Kent Municipal Court for not proceeding to trail per court order as he had just been assigned and did not have time to adequately prepare the case. Mark was present during the hearing with a bond motion prepared if Brian's counsel was also held in contempt during the hearing. As I was counsel, I have always been grateful to him for his willingness to back up a lawyer when needed. Mark remained active in the case effort which yielded a reversal of the contempt finding in the Eleventh District Court of Appeals; and

His continued investment and activity within and on behalf of OACDL and the legal professional organizations that serve our community. Moreover, Mark consistently travels to honor our members as he views fellow criminal defense lawyers and organizations staff as more than simple colleagues.

He traveled to the Ashland County Court of Common Pleas to represent OACDL member Adam Stone, pro bono, when Attorney Stone was compelled to proceed to trial amid the COVID-19 pandemic.

He made significant contributions on behalf of the OACDL to the COVID-19 Legal Task Force, Committee Recommendations, which was requested by Chief Justice Maureen O'Connor. As the Committee Chairperson, I submit that Mark dedicated an inordinate amount of time and counsel to this project. That report has now been distributed to every Ohio Court and has been used as a model in several other states.

Mark DeVan is the quintessential "Lawyer's Lawyer". He is selfless with his time and is always there for a lawyer or an issue in need of professional assistance. One would be hard-pressed to find anyone that has a bad word to say about Mark. He continues to accept and to effective try difficult cases and serve the profession. Any member of our organization who is familiar with our history and carefully observes the members that are actually representing our people and/or causes, must recognize Mark's tireless effort. After four decades of dedication, it is time to honor this fitting candidate.

PREPARED TO VINDICATE

GEOFFREY SPALL

11 months into practice, I am incredibly lucky to have a prospering solo practice in a time that is so unsure and unstable for so many other Americans. I am set up as a solo practitioner, but it is almost disingenuous because of how much guidance I continue to receive from mentors, peers, and the OACDL as I learn and grow in my practice.

Honestly, when I started law school, I did not see myself being a public defender or even practicing criminal law. I had preconceived notions of it being difficult and often times underpaid. Now I know that it is true…but in all seriousness, I have since come to understand that representing the accused is perhaps the most noble and important constitutional safeguard of personal liberty. To me, it means serving as a shield in the frontline against government intrusion and overreach. It means holding the system accountable and speaking for those whose voices would otherwise be unheard or disregarded by mechanical state authorities.

To vindicate means "to show or prove to be right, reasonable, or justified." As defense attorneys, this is our aim with every client's case. When asked "how do you represent guilty people all the time?" I generally respond that I have a duty to do everything my client would do to help themself if they had my training and experience; you would want the same if accused of something you did not do…and they are not all guilty. However, it often feels daunting as a new attorney. I find it is easy to hold yourself to a seemingly unattainable standard after observing experienced attorneys surmount the odds at trials or otherwise. In the first year, it is easy to fall into the trap of thinking you should be "rookie of the year." Too many times, have I left court and come home thinking, I should have done or said something differently or maybe things would have turned out better. But I realize that this feeling probably never goes away no matter how skilled or experienced the attorney.

Rather than aspiring to be "rookie of the year," I think that the first year of practice is more about finding what your strong suits are and developing them. It is about learning to be comfortable with yourself so that you can relax and better represent your client. The better you become at being yourself, the better you will communicate to clients, courts, and peers. Judges and juries can sense when you are unsure or off balance, rushed or unrehearsed.

Before law school, I played rock and roll with a few bands with moderate success. I learned that some people never needed to rehearse and that it was obvious when others needed to. This is true with the practice of law in the courtroom. I was never the best musician in the world, nor was I trying to be. If someone was impressed with my performance and asked about it, I would usually respond with "I'm really only good at one thing: doing me." And that was the truth. What I mean here is, when you are comfortable and passionate, others take notice and respect it. I think this marks success more than money or fame ever will.

It is also true that no matter what, you will make mistakes. One of my first unforgettable rookie mistakes was about a week after I was sworn in when I walked into the courtroom of the late-great Judge Pollitt forgetting that there were sunglasses on my head. Judge noticed right away, quickly and discretely signaled me with his hand to remove them. Needless to say, I was pretty embarrassed by the mistake but also very grateful he was so polite and cool about it. To this day, I have this weird feeling I have sunglasses on my head every time I walk into a courtroom and you may even catch me checking my head for them at times.

I strive to become a great trial attorney. I strive to help those that need helped the most. I strive to be a great communicator to clients English speaking and not, young and old. I hope to never lose sight of how important and meaningful the late evening jail visits, the early morning case reviews, the extra-long interpreted meetings and emails can be to the so often frightened, disadvantaged, disenchanted, or even uncooperative clients.

Being new to practice, I cannot express how privileged I have been to have set second chair with incredibly talented attorneys in several trials (some as an intern, prior to being sworn in). These experiences are some that I will never forget and have shaped my understanding of trial practice and strategy.

I am extremely honored to have been selected to submit this article by OACDL. They continue to be a constant and abundant source of information for all in the defense world. Shout outs to just a few of the people who have given me special guidance and opportunities as a young attorney: Dominic Mango, Adam Chaudry, Michael Cox, and Michael Hoague. I am grateful for the hand up from them and from the OACDL community. Peace, love, and minimal government.

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CERTIFIABLE: THE MEANING OF "PENETRATION" FOR PURPOSES OF SEX OFFENSES UNDER THE OHIO REVISED CODE

PAUL GIORGIANNI

Synopsis: A sometimes overlooked change in the Ohio Revised Code in 2006 altered the definition of the "penetration" element of "sexual conduct." Prior to 2006, most or all Ohio courts construed the definition of "sexual conduct" (an element of rape) as including the act of separating the labia. But that interpretation was superseded by House Bill 95, effective August 3, 2006, such that separating the labia no longer fits the definition of "penetration."

Before H.B. 95, Ohio appellate courts construed "vaginal intercourse" and "penetration of the vaginal cavity" in R.C. 2907.01(A) to mean penetration of the vestibule (the space exterior to the introitus).

Currently, and since H.B. 95 became effective August 3, 2006, "sexual conduct" has been defined in R.C. 2907.01(A) as follows:

> "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(A), H.B. 95 (eff. Aug. 3, 2006) (emphasis added).

As originally enacted in 1974, as part of an overhaul of the criminal code, R.C. 2907.01(A) pro-vided:

> "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

H.B. 511, 134 Ohio Laws, Part II, 1866, 1906 (eff. Jan. 1, 1974). In 1996, the General Assembly added the "insertion/cavity clause" thusly:

> "Sexual conduct" means vaginal intercourse between a male and female, and; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

H.B. 445, 146 Ohio Laws, Part III, 4965, 5001 (eff. Sept. 3, 1996). In 1998, the General Assembly added "without privilege to do so":

> "Sexual conduct" means vaginal intercourse between a male and female; anal in-tercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal inter-course.

H.B. 32, 147 Ohio Laws, Part I, 263, 263 (eff. Mar. 10, 1998).

The medical term for a portal into the body is "introitus." The portal into the vaginal canal is the vag-

inal introitus. The labia are exterior to the vaginal introitus. The space exterior to the introitus and bounded by the labia minora is called the vaginal vestibule. Stedman's Medical Dictionary 887, 1021, 1935, 1954 (26th ed. 1995); Larry J. Copeland, Textbook of Gynecology 22 (2nd ed. 2000). Because the plain, everyday meaning of the term "vaginal cavity" is the cavity interior to the introitus, a layman reading former R.C. 2907.01(A), might have expected "penetration of the vaginal cavity" to mean penetration of the introitus. Thus, a layman might have expected

- that sexual conduct (and thus rape) by means of "penetration of the vaginal cavity" would require penetration of the introitus, and

- that penetration of merely the vestibule (the space exterior to the introitus and bounded by the labia minora) would be only "sexual contact" (gross sexual imposition, not rape).

But apparently all the Ohio appellate courts presented with the question in the days before H.B. 95 construed "vaginal intercourse" and "penetration of the vaginal cavity" to mean penetration of the vestibule—the space exterior to the introitus. Thus, a perpetrator was guilty of "sexual conduct" and thus rape if the perpetrator merely moved the labia minora laterally—but not if the perpetrator moved the labia minora medially.

For example, in *State v. Gilbert*, 10th Dist. No. 04AP-933, 2005-Ohio-5536, the perpetrator Gilbert had penetrated the victim's vestibule but not penetrated the introitus. *Id.* at ¶ 6. Mr. Gilbert argued that he therefore could be convicted of gross sexual imposition ("sexual contact") but not rape ("sexual conduct"). *Id.* at ¶ 26. The court of appeals rejected that argument:

> [D]efendant inserted his fingers inside the lips of her vagina far enough to reach her clitoris (a part of the vulva), an action that undoubtedly caused the labia majora to spread. [¶] [T]he instant evidence is legally sufficient to establish vaginal penetration, and sexual conduct . . . .

Id. at ¶¶ 35–36. *See id.* at ¶¶ 32-34 (citing cases); *State v. Arnold,* 10th Dist. No. 07AP-789, 2008-Ohio-3471, ¶¶ 40–46, affirmed in part and reversed in part on other grounds, 126 Ohio St.3d 290, 2010-Ohio-2742; *State v. Farr,* 3rd Dist. No. 13-06-16, 2007-Ohio-3136, ¶¶ 12-17 (citing cases); *State v. Schuster,* 6th Dist. No. L-05-1365, 2007-Ohio-3463, ¶¶ 63–68.

H.B. 95 substituted "opening" for "cavity" and thereby superseded these precedents.

The court in *Gilbert* acknowledged that Mr. Gilbert's argument was correct to some extent:

> Defendant raises a valid point that the code could be susceptible to a tighter interpretation. Nevertheless, the overwhelming majority of the appellate courts in this state which have addressed this point have declined to accept his interpretation.

Gilbert ¶ 27. The court in *Gilbert* questioned its own ruling and invited legislative review:

> Nevertheless, despite the abundance of case law, both precedential and advisory, we are concerned. As it stands now, touching a single labia on the [lateral] side away from the vaginal cavity is sexual contact, touching the opposite [medial] side would be sexual conduct. That seems a bit esoteric and is a clear example of "hard facts making bad law." Nevertheless, we will not reverse, based on the existing case law from this district and the state.
>
> The issues raised in this appeal, specifically the difference between "sexual contact" and "sexual conduct" as those terms relate to digital contact with the vagina or vaginal cavity are worthy of further consideration by the legislature or the Supreme Court of Ohio.

Id. at ¶¶ 37-38.[1]

The General Assembly heeded *Gilbert's* call. H.B. 95, effective August 3, 2006, changed only one word in R.C. 2907.01—replacing "cavity" in Division (A) with "opening":

> "Sexual conduct" means vaginal intercourse between a male and female; anal in-tercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity open-ing of another. Penetration, however slight, is sufficient to com-

plete vaginal or anal intercourse.

The General Assembly thereby superseded *Gilbert* such that now "vaginal penetration" within the meaning of R.C. 2907.01(A) is penetration of the opening—the introitus—and not merely penetration of the vestibule.

In *State v. Murphy,* 5th Dist. No. 2015CA00024, 2015-Ohio-5108, ¶¶ 12–25, the court vacated a rape conviction because there was no evidence of penetration of the introitus, even though there was extensive evidence of touching of the exterior genitalia. The court did not call out the H.B. 95 substitution of "opening" for "cavity." The court merely relied upon the plain meaning of "vaginal opening."

In *State v. D.H.*, 10th Dist. No. 16AP-501, 2018-Ohio-559, ¶¶ 30-63, the court did call out the H.B. 95 substitution of "opening" for "cavity" and ruled that "due to the H.B. No. 95 amendment to R.C. 2907.01(A), appellant's conduct of rubbing his penis between the lips of S.M.'s vagina could only constitute sexual conduct if it occurred prior to August 3, 2006." Id. at ¶ 60.

The post-2006 decisions applying the old interpretation mostly overlook H.B. 95

There are appellate cases in which H.B. 95 was applicable but was not applied This happened mostly because the defendants failed to point out H.B. 95, thereby leaving the courts oblivious to the fact that H.B. 95 substituted "opening" for "cavity."

In *State v. Carroll*, 10th Dist. No. 15AP-409, 2015-Ohio-5577, ¶¶ 34, 37-38, the court quoted and applied the new, H.B.-95 version of R.C. 2907.01(A) but cited *Gilbert*, a pre-H.B. 95, "cavity" case, for the proposition that "the vaginal opening includes the labia majora." Id. at ¶ 34 (emphasis added). The Court obviously was unaware that H.B. 95 had substituted "opening" for "cavity" in R.C. 2907.01(A).

Similarly, the court in *State v. Meador,* 12th Dist. No. CA2008-03-042, 2009-Ohio-6548, ¶ 9, was oblivious to the fact that H.B. 95 substituted "opening" for "cavity," and relied upon only pre-H.B. 95 decisions. (The court's statements to the effect that penetration of the vestibule constitutes "sexual conduct" is also *dicta*, because the court ruled that Mr. Meador inserted his fingers into the victim's vagina, *id.* at ¶ 16.)

In *State v. Stacey*, 3rd Dist. No. 13-08-44, 2009-Ohio-3816, the court followed the old rule but was oblivious to the fact that H.B. 95 substituted "opening" for "cavity," and relied upon pre-H.B. 95 decisions. (The court's statements to the effect that penetration of the vestibule constitutes "sexual conduct" is also *dicta*, because the court ruled that "Stacey inserted his penis into her vagina," *id.* at ¶ 2).

In *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, ¶¶ 6-14, the court quoted the H.B. 95 version of R.C. 2907.01(A), which indeed was the version applicable in that case, but the court was oblivious to the fact that H.B. 95 substituted "opening" for "cavity." The court used the words "opening" and "cavity" interchangeably and indiscriminately, and the court cited only pre-H.B.-95 cases.

The Ninth District Court of Appeals perpetuated its *Melendez* mistake in *In re T.L.*, 186 Ohio App.3d 42, 2010-Ohio-402 (9th Dist.), vacated on other grounds, 127 Ohio St.3d 9, 2010-Ohio-4936. In *T.L.*, a 16-year-old was adjudicated delinquent for raping a five-year-old. The court, oblivious to H.B. 95, cited only *Melendez*. *Id.* at ¶ 21.

The Ninth District Court of Appeals cited *Melendez* and *T.L.* with approval in *State v. Nieves*, 9th Dist. No. 12CA010255, 2013-Ohio-4093, ¶¶ 9, 12. The *Nieves* opinion does not reveal the offense date, so it is unclear which version of R.C. 2907.01(A) should have applied. What is clear is that both the trial court and the court of appeals applied only the pre-H.B.-95, "cavity" version: the opinion uses only the term "cavity" and never the term "opening" (except in paragraph 8, where the court of appeals defines "introitus").

In State v. Grether, 9th Dist. No. 28977, 2019-Ohio-4243, ¶¶ 30-35, the defendant cited *State v. D.H.* But the court said that "Grether has not convinced us that we should revisit our case law." *Id.* at ¶ 34. They provided no explanation other than the fact that "in *Melendez*, this Court cited to the current definition of sexual conduct." *Id.* That is true. But what is also true is that the court in *Melendez* (1) was oblivious to the fact that H.B. 95 substituted "opening" for "cavity;" (2) cited only pre-H.B.-95 cases; and (3) used the words "opening" and "cavity" interchangeably and indiscriminately, effectively holding that the two words are synonymous in the context of R.C. 2907.01(A), which cannot *possibly* be true,

because H.B. 95 did nothing to that statute except substitute "opening" for cavity."

The issue is poised for Supreme Court review

The decision that sets up a certifiable conflict is State v. Grether, 9th Dist. No. 28977, 2019-Ohio-4243—probably not coincidently a decision of the Ninth District Court of Appeals.

Mr. Grether was charged based upon a single instance of sexually assaulting a 12-year-old girl with whom he was in loco parentis. He was charged with both R.C. 2907.02(A)(1)(b) rape (sexual conduct with a person less than 13 years of age) and R.C. 2907.05(A)(4) gross sexual imposition (sexual contact with a person less than 13 years of age).

*1. A trial judge in Lorain County was more vehement, refusing to defy the statute's plain meaning and refusing to adhere to the controlling authority that "cavity" in former R.C. 2907.01(A) meant the vestibule. State v. Nieves, 9th Dist. No. 12CA010255, 2013-Ohio-4093, ¶ 9. The court of ap-peals reversed, chastising the judge for "such an expressed disregard for the precedent of this higher court." Id. See also State v. Childers, 10th Dist. No. 96APA05-640, 1996 Ohio App. LEXIS 5761, *38-40, 1996 WL 729877 (Dec. 19, 1996) (Close, J., dissenting and opining that the vestibule is not the "vaginal cavity").*

Certifiable: Did a 2006 amendment affect R.C. 2907.01's definition of "sexual conduct"?

Synopsis: Before 2006, R.C. 2907.01(A) defined "sexual conduct" as including "penetration of the vaginal cavity"—a phrase that courts construed as separation of the vaginal labia, as opposed to penetration of the vaginal introitus. A 2006 amendment replaced the word "cavity" with the word "opening." The Tenth District Court of Appeals has held that the amendment means that separation of the labia no longer constitutes "sexual conduct" but rather constitutes only "sexual contact." The Second District Court of Appeals disagrees. A certifiable question will arise the next time a court of appeals decides this question either way.

Before House Bill 95 became effective in 2006, R.C. 2907.01(A) defined "sexual conduct" as including "penetration of the vaginal cavity"—a phrase that courts construed as separation of the vaginal labia.

The medical term for a portal into the body is "introitus." The space exterior to the vaginal introitus and bounded by the labia is called the vaginal vestibule. As originally enacted in 1974, as part of an overhaul of the criminal code, R.C. 2907.01(A) defined "sexual conduct" without any specific anatomical reference. The 1974 version provided:

> "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

H.B. 511, 134 Ohio Laws, Part II, 1866, 1906 (eff. Jan. 1, 1974). In 1996, the General Assembly made the definition more precise by adding references to the vaginal and anal "cavities":

> "Sexual conduct" means vaginal intercourse between a male and female, and; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

H.B. 445, 146 Ohio Laws, Part III, 4965, 5001 (eff. Sept. 3, 1996). In 1998, the General Assembly added the phrase "without privilege to do so":

> "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however, slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

H.B. 32, 147 Ohio Laws, Part I, 263, 263 (eff. Mar. 10, 1998).

A non-lawyer reading former R.C. 2907.01(A), might have expected "penetration of the vaginal cavity" to mean penetration of the introitus. To say the least, it is not obvious that penetration of the "vaginal cavity" means penetration of the vestibule—separation of the labia—as opposed to penetration of the introitus. Nevertheless, apparently all the Ohio appellate courts presented with the question construed the pre-2006, "cavity" version of the statute

as meaning penetration of the vestibule. Thus, an offender perpetrated "sexual conduct" by moving the labia laterally but only "sexual contact" by moving the labia medially.

For example, in *State v. Gilbert*, 10th Dist. No. 04AP-933, 2005-Ohio-5536, the perpetrator Gilbert had penetrated the victim's vestibule but not the introitus. Id. at ¶ 6. Mr. Gilbert argued that he could be convicted of gross sexual imposition ("sexual contact") but not rape ("sexual conduct"). Id. at ¶ 26. The court of appeals rejected that argument:

> [D]efendant inserted his fingers inside the lips of her vagina far enough to reach her clitoris (a part of the vulva), an action that undoubtedly caused the labia majora to spread. [¶] [T]he instant evidence is legally sufficient to establish vaginal penetration, and sexual conduct . . . .

Id. at ¶¶ 35–36. That, apparently, was the unanimous view of Ohio's courts of appeals. See *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391, ¶ 62; *State v. Brewer*, 2nd Dist. No. 03CA0074, 2004-Ohio-3572, ¶¶ 25-34; *State v. Farr,* 3rd Dist. No. 13-06-16, 2007-Ohio-3136, ¶¶ 12-17; *State v. Schuster*, 6th Dist. No. L-05-1365, 2007-Ohio-3463, ¶ 67; *State v. Falkenstein*, 8th Dist. No. 83316, 2004-Ohio-2561, ¶ 16.

This interpretation of the pre-2006, "cavity" version of the statute had its critics. Nine years before *Gilbert*, one Tenth District judge dissented from the majority's interpretation and opined that the vestibule is not the "vaginal cavity." *State v. Childers*, 10th Dist. No. 96APA05-640, 1996 Ohio App. LEXIS 5761, *38-40, 1996 WL 729877, 96-LW-5606 (Dec. 19, 1996) (Close, J., dissenting). In *Gilbert*, Judge Bryant and Visiting Judge Christley questioned the implications of their own ruling:

> Defendant raises a valid point that the code could be susceptible to a tighter interpretation. Nevertheless, the overwhelming majority of the appellate courts in this state which have addressed this point have declined to accept his interpretation.
>
> Nevertheless, despite the abundance of case law, both precedential and advisory, we are concerned. As it stands now, touching a single labia on the [lateral] side away from the vaginal cavity is sexual contact, touching the opposite [medial] side would be sexual conduct. That seems a bit esoteric and is a clear example of "hard facts making bad law." Nevertheless, we will not reverse, based on the existing case law from this district and the state.

Gilbert ¶¶ 27, 37-38.

Does House Bill 95's substitution of "opening" for "cavity" have any implications for trying allegations of *anal* penetration?

Given the basic facts of anatomy, we might be inclined to think that the 2006 substitution of the word "opening" for the word "cavity" is immaterial to allegations of *anal* penetration. I am unaware of any case in which a court construed the phrase "insertion . . . into the . . . anal [cavity/opening]" in R.C. 2907.01(A) as meaning separation of the buttocks. But I have heard from one Ohio lawyer who cited *D.H.* in winning acquittal on a charge of anal rape. In cases in which the evidence is equivocal as to whether there was anal penetration, defense counsel should cite *D.H.* by way of analogy and secure a jury instruction that separation of the buttocks is not "insertion into the anal opening" and thus cannot be "sexual conduct."

The issues raised in this appeal, specifically the difference between "sexual contact" and "sexual conduct" as those terms relate to digital contact with the vagina or vaginal cavity are worthy of further consideration by the legislatureor the Supreme Court of Ohio.

House Bill 95 replaced the word "cavity" with the word "opening."

In House Bill 95, effective August 3, 2006, the General Assembly changed only one word in R.C. 2907.01—replacing the word "cavity" with the word "opening":

> "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or

> any instrument, apparatus, or other object into the vaginal or anal cavity opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

R.C. 2907.01(A), H.B. 95 (eff. Aug. 3, 2006).

"[A] change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia and Bryan A. Garner, READING LAW 256 (2012). Under Ohio law, that rule of statutory construction is articulated as: "In enacting a statute, it is presumed that [t]he entire statute is intended to be effective." R.C. 1.47(B). See also *Rogers v. Helmes*, 69 Ohio St.2d 323, 329 (1982).

So how did the 2006 amendment affect R.C. 2907.01's definition of "sexual conduct"? Not at all, according to some court of appeals decisions. But the Tenth District Court of Appeals provided a more plausible answer, expressly holding that the amendment means that penetration of the vestibule no longer constitutes "sexual conduct." *State v. D.H.*, 10th Dist. No. 16AP-501, 2018-Ohio-559, ¶¶ 30-63, esp. ¶ 60. Two decisions of the Fifth District Court of Appeals stand for the same proposition—although the court's opinions did not refer to the 2006 amendment. In *State v. Murphy*, 5th Dist. No. 2015CA00024, 2015-Ohio-5108, ¶¶ 12-25, and *State v. Jackson*, 5th Dist. No. 2019-CA-00049, 2020-Ohio-1125, ¶¶ 14-25, the court vacated convictions for rape and sexual battery, respectively, because there was no evidence of penetration of the introitus, even though there was sufficient evidence of penetration of the vestibule.

But there is contrary authority. In between its *Murphy* and *Jackson* decisions, the Fifth District Court of Appeals affirmed a rape conviction on the ground that separation of the labia constitutes "sexual conduct." *State v. Williams*, 5th Dist. No. 2017-CA-00078, 2018-Ohio-1992, ¶¶ 18, 30. *Williams* cited the 2006 amendment as support for that proposition. *Williams* did not mention *Murphy* or *Jackson*, and the only case it cited was a pre-amendment case. *Id.* at ¶ 18 & n. 3.

As the Fifth District court did in *Williams*, the First District Court of Appeals cited the 2006 amendment while still holding that separation of the labia constitutes "sexual conduct." *State v. Strong*, 1st Dist. No. C-100484, 2011-Ohio-4947, ¶¶ 50-57, 68-71.

Only the Ninth District Court of Appeals has expressly held that the 2006 amendment effected no change. In *State v. Grether*, 9th Dist. No. 28977, 2019-Ohio-4243, the trial judge, over defense objection, instructed the jury that separation of the labia constitutes "sexual conduct." *Id.* at ¶¶ 30-32. The jury convicted on rape and the court of appeals affirmed. The court expressly rejected the Tenth District's decision in D.H. and stated that its own *Melendez* and *Nieves* decisions did "take the current statutory language into account." Id. at ¶ 34.

But "taking the current statutory language into account" is not the same thing as reckoning with the 2006 amendment. And the Ninth District's *Melendez* and *Nieves* decisions were weak precedents to begin with.

In *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, the court affirmed a rape conviction. The evidence was equivocal but seemed to be sufficient to prove penetration of the introitus. *Id.* at ¶¶ 15-31. The opinion quoted the post-amendment statute. But the court seemingly was oblivious to the fact that the 2006 amendment substituted "opening" for "cavity." The court used the words "opening" and "cavity" interchangeably and indiscriminately, and the court cited only pre-amendment cases. *Id.* at ¶¶ 6-14.

The court perpetuated *Melendez* in *In re T.L.*, 186 Ohio App.3d 42, 2010-Ohio-402 (9th Dist.), vacated on other grounds, 127 Ohio St.3d 9, 2010-Ohio-4936. In T.L., the court affirmed an adjudication of juvenile delinquency based on rape. The evidence was equivocal but seemed to be sufficient to prove penetration of the introitus. *Id.* at ¶¶ 22-34. The court cited Melendez with approval and did not mention the 2006 amendment. *Id.* at ¶ 21.

In *State v. Nieves*, 9th Dist. No. 12CA010255, 2013-Ohio-4093, the evidence proved separation of the labia but not penetration of the introitus. On that basis, the trial judge, sitting as the finder of fact, convicted on gross sexual imposition and acquitted on rape. (The court of appeals opinion did not reveal the offense date, but the same court in *Grether* stated that *Nieves* involved the amended version of the statute.) The State appealed, and the court of appeals reversed, chastising the trial judge for failing to adhere to *Melendez* and *T.L.* Fortunately for Mr. Nieves, his double-jeopardy protection precluded retrial.

In at least four other cases, the 2006 amendment

was overlooked entirely, even though the offense occurred after the effective date of the amendment. All four decisions went against the defendant. In *State v. Carroll*, 10th Dist. No. 15AP-409, 2015-Ohio-5577, ¶¶ 34, 37-38 (decided before *D.H.*) the court quoted the amended statute but cited *Gilbert*, a pre-amendment case, for the proposition that "the vaginal opening includes the labia majora." *Id.* at ¶ 34. The court in *State v. Stacey*, 3rd Dist. No. 13-08-44, 2009-Ohio-3816, relied upon only pre-amendment cases. (The court's statements to the effect that penetration of the vestibule constitutes "sexual conduct" is also *dicta*, because the court ruled that "Stacey inserted his penis into her vagina," *id.* at ¶ 2). The court in *State v. Meador,* 12th Dist. No. CA2008-03-042, 2009-Ohio-6548, ¶ 9, relied upon only pre-amendment cases. (The court's statements to the effect that penetration of the vestibule constitutes "sexual conduct" is also dicta, because the court ruled that Mr. Meador inserted his fingers into the victim's vagina, *id.* at ¶ 16.) In *State v. McNeal*, 2nd Dist. No. 28123, 2019-Ohio-2941, ¶ 72, the court quoted the amended statute but cited only pre-amendment cases.

The issue is poised for Supreme Court review.

The Ohio Constitution provides for mandatory certification of "conflict cases" to the Supreme Court:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judge shall certify the record of the case to the Supreme Court for review and final determination.

Ohio Const., Art. IV, § 3(B)(4). (The Rules of Practice of the Supreme Court of Ohio provide that the Supreme Court is the final arbiter of whether a conflict actually exists and that the court is required to review certified cases involving actual conflict. S.Ct. Prac.R. 8.02.)

It would seem that *D.H.* (10th Dist.) and *Murphy* and *Jackson* (5th Dist.) conflict with *Grether, Melendez,* and *Nieves* (2nd Dist.), *Strong* (1st Dist.), and *Williams* (5th Dist.). Even under a narrower conception of "conflict," *D.H.* and *Grether* conflict. With different courts of appeals having answered this question differently, it would seem that any future court of appeals decision turning upon the significance of the 2006 amendment will constitute a conflict requiring certification to the Supreme Court.

As for the merits, it appears the Tenth District Court of Appeals in D.H. got it right. Even if one were to concede that the words "cavity" and "opening" are otherwise synonymous, the courts must presume that the General Assembly intended to change the law when it replaced the word "cavity" with the word "opening." The pre-2006 judicial construction apparently was unanimous: "vaginal cavity" meant the vestibule outside the introitus. Moreover, the timing of the 2006 amendment hints that it was a response to Gilbert's call for review. There is an awkward silence in paragraph 34 of the Grether opinion, where one would expect an explanation of the significance of the 2006 amendment. Indeed, no judicial opinion except D.H. offers any explanation of the 2006 amendment. Combine all this with the Rule of Lenity, R.C. 29091.04(A) (providing that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused"), and it would seem that prosecutors will be on their heels if this issues reaches the Supreme Court.

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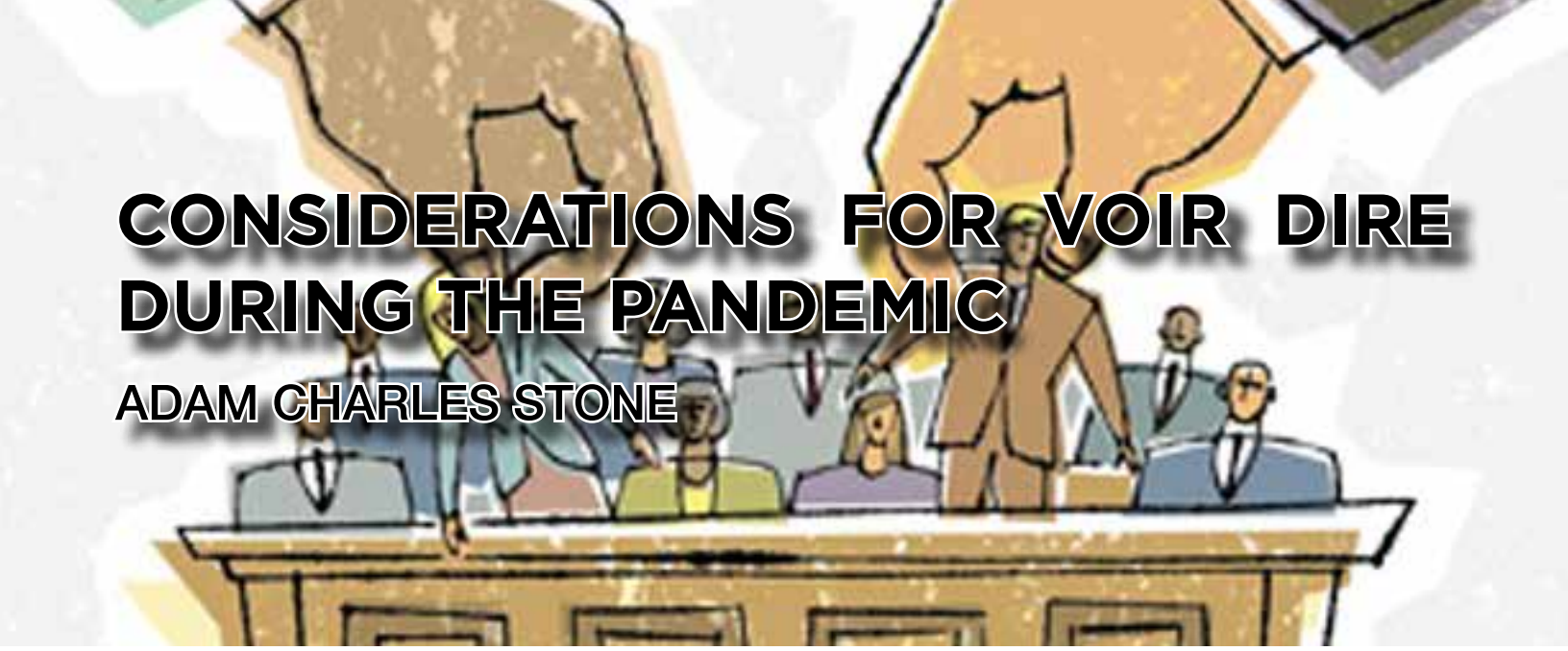

CONSIDERATIONS FOR VOIR DIRE DURING THE PANDEMIC

ADAM CHARLES STONE

"What the f—k is going on!?!?"

For the better part of a day and a half in late April 2020, this was the persisting question in my mind as I attempted to voir dire a jury in Ashland County Common Pleas Court at the height of the State and Federal government response to the coronavirus pandemic. Schools were closed. Businesses were shut down. The Governor issued a very strict "stay-at-home" order.

However, there was an exception made for court proceedings and jury trials that were considered essential under the law.

Despite, filing a Motion to Continue a few weeks prior to the scheduled jury trial, citing the public health crisis, followed by a Motion to Reconsider, the Court denied the requests and was set to have this trial – the first to proceed in Ohio since the shutdown.

The Court made accommodations for social distancing, the wearing of masks, and disinfecting of the courtroom persistently throughout the process. There would be two rounds of voir dire to ensure social distancing. The witness box was moved to the center of the courtroom. To the Court's credit, I believed that the Judge had done all he could to make his courtroom as compliant as possible to the precautions necessary to proceed.

I was not convinced that it was enough to ensure that the Defendant would get a fair trial. Having waived speedy trial, moved to continued, and requesting that the Court reconsider my request to continue – noting that this trial was not essential since my client waived speedy trial and the Supreme Court was not pushing local dockets in its normal fashion, my last option was to file a Writ of Mandamus or in the Alternative a Writ of Prohibition with a request for an Emergency Stay of the Proceedings.

It was so bad, in fact, that the day I filed my Writ, I received a call from a local attorney asking me what the hell was going on up there? He was hired to represent multiple jurors who were fearful for their safety if called to jury duty. This was an issue that I brought to the OSC's attention in an amended Writ that I filed shortly after that telephone conversation, adding that conversation and the very real fear that the community was demonstrating by taking the extraordinary step of retaining private counsel to protect themselves.

I had never filed anything like this Writ before and, admittedly, was nervous as hell. I filed the Writ approximately a week prior to the start of trial. The State responded on behalf of the Court, asking that the matter be dismissed. During that time, another client came to the office and we had a consult in my conference room. I was unaware that he was positive for coronavirus. The Friday before the trial was to start and with the Ohio Supreme Court's decision looming over the proceedings, I received a call that I may have been exposed to the virus.

My primary care physician recommended a fourteen-day quarantine. Within hours, the Ohio Supreme Court issued its decision, conditionally dismissing my Writ and request for emergency stay. The conditions of the dismissal read as follows:

It is further ordered to the extent that existing court orders do not already so provide, respondent shall ensure that appropriate social distancing is maintained throughout the trial both inside and outside of the courtroom and ensure that no individual entering the courtroom is exhibiting symptoms of COVID—l9, including a temperature of 100 degrees or higher. Further, respondent shall excuse any potential juror who is concerned that participation in the trial will jeopardize his or her health or safety.

Adam Charles Stone, Esq. v. The Honorable Judge Ronald Forsthoefel, Case No. 2020-0547.

Considering my exposure and, after conferring with my client, I renewed my Motion to Continue, citing the OSC condition that no one be permitted in the courtroom exhibiting symptoms of COVID-19. That Motion included an exhibit/ letter from my physician ordering me to quarantine for 14 days.

That request was also denied.

With my mask and gloves on (notably excellent sartorial accessories to any suit) and my client donning the same PPEs, we came to Court and prepared to voir dire the two sections of venire that was called to the Court for jury duty.

The turnout was impressive. Jurors appeared, despite legitimate fears for their safety and the safety of their loved ones. The State wore no gloves, no masks and persisted that our ongoing objections and requests for continuance was nothing more than a delay tactic. A position that the Court, without saying so, seemed to adopt as well.

The two shifts of voir dire were painfully long. The State took 2 hours per group of talking at the jury in the traditional governmental lecture style of jury "questioning." Jurors were visibly scared. One juror, in particular, was visibly shaking in the courtroom. Several of our elderly jurors voiced sincere concerns.

Despite, the OSC's order that anyone showing concern for their safety and health be excused for cause, the trial judge attempted to determine the validity of the conviction of each individual who claimed to be fearful for his or her safety or the safety of his or her family member. I was forced to object. Tension was growing in the courtroom.

During a break in the proceedings, my client, my paralegal, and myself, socially distanced in the courthouse's law library and I looked down at my phone and saw a text from my friend and mentor, Ian Friedman. To say he was pissed, would be an understatement of epic proportions.

In the process of adapting to my surroundings – trying to excuse as many jurors for cause under the OSC's judicially created "coronavirus excuse"- actually voir diring the jury with my theory and themes of my case in defense of my client – and trying to protect myself, my client, my staff member, and the jurors from potential exposure, I missed the fact that we were violating some of the most basic tenants of my client's constitutional rights. I immediately called Ian and he quickly began to explain what he was seeing in the courtroom and all that I missed.

I relayed this to my staff and my client. My client was terrified. He was not used to the masks. He had never even been in a courtroom before this case. He was a kid in his mid-twenties with no prior record being forced into an extraordinary situation.

After my brief conversation, we proceeded back into the courtroom, armed with our objections direct from Attorney Friedman. Unfortunately, as I began to voir dire the second panel of jurors, my client's breathing went from unsteady to completely out of control. He began sweating profusely, tugging at his necktie, and I interrupted my questioning and told him to pull off the mask.

My paralegal, Ryan and I proceeded to carry my client out of the courtroom on our shoulders. An emergency room squad was called, and it was determined that his temperature was 99.8 degrees. By the time he reached a local hospital his temperature spiked, and he was showing signs of coronavirus. An initial test came back negative, but he was now ordered to quarantine for seven days until confirmation testing could determine whether the validity of that test. The court was adjourned for the day, and I was instructed to immediately inform the Court of my client's condition.

Despite the fact that now both my client and I were under quarantine orders from medical professionals, the Judge ordered us to return to Court the next morning for trial.

Behind the scenes of this dramatic back and forth between public safety concerns, the Court's desire to move forward with the case, and the protection of constitution-

al rights, Ian contacted OACDL's strike force. By the time, I finished walking my dog after returning from Court that evening, I was on the phone with OACDL President Shawn Dominy, President-Elect Meredith O'Brien, Member and 2020 OACDL Attorney of the Year Winner Mark Devan, and Strike Force Representative Dan Sabol.

For hours we discussed the matter and I concluded that I was not going to put my client in the position of going forward. It was not right and it was not fair. His right to a fair trial was compromised. His health was compromised. And if he brought the coronavirus into his home, his mother – a cancer survivor – might suffer even graver consequences. I spoke with my client and told him to be at the courthouse but to remain in his car. I explained that I planned to refuse to bring him into the courthouse against a doctor's orders, and that I may be charged with contempt of court.

Mark Devan, Ian Friedman, and Dan Sabol agreed to meet me at the courthouse the next morning. Mark and Ian would represent me if the Court charged me with contempt and took me into custody. Dan remained vigilant as a representative of the task force.

Literally overnight, a second Writ of Mandamus, or in the Alternative Writ of Prohibition was being prepared on my behalf by Mark Devan and Dan Sabol. Attorney Friedman and I were on local, state and national media outlets discussing the difficulties of trial under these conditions and the sacrificing of constitutional rights at the altar of "moving forward."

The next day, I appeared in Court. On my 45-minute drive from Bucyrus to Ashland, Meredith O'Brien called me and offered me words of comfort. I was informed that Ian was already at the courthouse and had been there for more than an hour looking for an opportunity to speak with the Court. As I pulled into my parking space in front of the courthouse, Mark Devan met me there and we proceeded to the same law library where less than 24 hours prior Ian texted me and this process began.

I gave my paralegal my wallet, my car keys, my phone with my password and the names of two people to call should this go as badly as I was thinking it would, and I gave him my watch, as well. I prepared to go into custody. Ian and Mark briefed me on how to proceed and how/ when they planned to intercede on my behalf.

The Court refused to see either or both Ian and/or Mark prior to pretrial discussions on the record. So, I went into jury room – which was being used for sidebar discussion – and was met by the judge and prosecutor. We sat silently for a short time. The Court asked me to produce my client. I refused.

I told him that my client was waiting outside but was ordered to be quarantined and that I was not willing to sacrifice his health and safety for these proceedings. The judge very calmly but sternly stood up and came over to where I was sitting. He stood over me with his hands on his hips and informed me that if I did not immediately produce my client, he would violate his bond and take him into custody.

Faced with that dilemma, I decided to bring my guy into the courthouse. I would rather take my chances with objecting like crazy to the proceedings and being held in contempt than sending this poor kid to jail while he was under a quarantine order.

Once he entered the room and sat down, I proceeded to be accused of potentially violating ethical duties and of violating Court orders until it became overwhelmingly obvious that my presence was prejudicing my client. The Court eventually conceded that the trial needed to be continued. First, we only had twelve jurors left after preemptory challenges. Second, the government moved for a mistrial.

As the Court ordered the trial continued until the day that my quarantine and my client's quarantine ended, Strike Force and Mark Devan filed my second Writ with the Ohio Supreme Court citing the plethora of constitutional violations and considerations of effective assistance of counsel compromised by proceeding in the fashion that we faced in Ashland County Common Pleas Court.

So, since then we have had jury trials. At this point, some courts are not even trying cases in courtrooms to meet health and safety standards. Plexiglass surrounds judges and witnesses and separates lawyers from their clients. What was it all for? Does it even matter today?

Yes.

Despite the reinstitution of jury trials under some interesting circumstances and in some strange environments, I have noticed that the defense bar is fairing very well. Our success is no doubt a func-

tion of our ability to adapt. Even before the pandemic, the criminal defense attorney has been forced to adapt to constantly changing circumstances of cases, facts, prosecutors, judges, and just the simple demographics and socio-economics of the different venues we encounter.

From conducting voir dire on stage to speaking to staggered prospective jurors in the gallery to "business as usual", normal voir dire, there seems to be 88 different takes – at least one in each county – on how best to proceed in this situation.

From my encounter in Ashland County last April, I have learned to tread lightly right now. The course I took was necessary and it is my hope that we are able to learn from the situation and take away at least two important considerations: (1) the coronavirus is still important and still impedes our client's right to a fair trial; and (2) regardless, we still have to make due, adapt, and voir dire our juries both to the strange normal of the current environment and to our theory and themes. Remember, we did not go to trial to lose or to make a great record for appeal. We came to win.

First, know your battleground. Look to the Court's special coronavirus orders and determine if and to what extent those orders impede your ability to provide effective assistance of counsel at all stages of the proceedings, as well as to what extent do the orders impress upon your client's constitutional rights.

If you feel that you cannot provide effective assistance of counsel and/or that your client's rights are being ignored such that he or she cannot get a fair trial, start with a simple Motion to Continue. If denied, file a Motion to Reconsider. If that is denied, be very careful about taking that extraordinary step of filing a Writ of Mandamus. It will likely burn a bridge with your judge and your prosecutor, and it may even result in unwanted prejudice toward your client.

If you are forced to go forward, consider making a strong record with the following objections to the extent they apply:

(1) Defendant cannot receive a fair trial and cannot enjoy the effective assistance of counsel, guaranteed to him by the United States and Ohio Constitutions, neither the State nor the Defendant can receive a fair trial in the current pandemic climate.

(2) Specifically, the Defendant's right to a fair trial is compromised by the following:

a. Requiring jurors to appear during a pandemic in which the Ohio Governor and Ohio Department of Health have issued "stay-at-home" orders;

b. Putting a Defendant in the position where he has to wear a mask and gloves and maintain social distancing, even from his lawyer, throughout the jury trial proceedings and in front of the jury in order to protect his physical health;

c. The Defendant is incapable of having private, confidential discussions at counsel table with his attorney and staff without breaking social distancing mandates; and

d. Defendant's counsel and his staff are required to wear a mask and gloves and maintain social distancing throughout the jury trial proceedings and in front of the jury in order to protect their physical health.

(3) Individually and collectively, these points – (a) through (d) - deny Defendant a fair trial as

a. jurors who are anxious, stressed, or fearful will not be able to focus on the evidence they are asked to consider, which is crucial in the Defendant receiving a fair trial; and

b. the Defendant and his attorney will not be able to reasonably communicate during any part of the trial – including but not limited to voir dire – while both wearing masks, which creates an impossible position for Defendant's attorney in jury selection and witness examination, thereby denying the Defendant a fair trial.

(4) Furthermore, the Defendant's right to effective assistance of counsel is severely compromised if the Defendant is forced to proceed.

(5) Neither the Defendant, nor their counsel can observe or otherwise interprets jurors' facial expressions and facial responses during jury selection, nor can the Defendant and Counsel see, observe, otherwise interpret the jury's facial expressions during opening statements, witness examination, and closing arguments.

Some of the foregoing considerations may not apply to you, your client, your case, or your courtroom, but these are meant to get your mind thinking critically about the courtroom layout and the special procedures. Most of all, these are meant to get you critically

thinking about the effect of those orders and that courtroom on your client's right to a fair trial and effective assistance of counsel.

To further that critical thinking, we can all agree that a fair trial constitutes at least the following:

(1) The Defendant's ability to communicate with the Defendant and/or his staff during the course of voir dire and the jury trial without breaking mandated social distancing rules or otherwise putting himself, the Defendant, and his staff at risk of contracting and spreading COVID-19;

(2) The Defendant's ability to aid in his own defense because he cannot communicate with his attorney and staff during the course of voir dire and the jury trial without breaking mandated social distancing rules or otherwise putting himself, and his staff at risk of contracting and spreading COVID-19;

(3) The opportunity for the Defendant's Counsel to directly confront and cross-examine the witnesses who testify against Defendant where those witnesses are wearing protective masks and neither counsel nor his staff nor the Defendant can see, interpret or otherwise observe the witness' expressions and facial responses to questioning;

(4) The opportunity for the Defendant's Counsel the ability to approach the witness, personally hand the witness documents, and otherwise engage in the normally acceptable techniques of trial and cross-examination that test the veracity and credibility of a witness' statement is entirely prohibited by social distancing, the wearing of protective masks, and the other special procedures ordered by the Court in this matter; and

(5) For the Defendant and his Counsel to effectively and easily hear and understand matters in the courtroom, including but not limited to: witness testimony, Court rulings, jury questions, etc.

Again, this "checklist" is meant to help you proactively consider whether to raise these issues during trial and specifically prior to voir dire.

If you feel the coronavirus is an important consideration for your client, his or her family, and or your potential jurors, you need to confront it right away in voir dire and use the OSC's new "coronavirus fear" challenge for cause provided for in Adam Charles Stone, Esq. v. The Honorable Judge Ronald Forsthoefel, Case No. 2020-0547.

I know that many judges are trying to handle that issue themselves in voir dire but do not be afraid to express your own concerns, to share your own stories, your client's stories and to connect to those jurors in the venire to gauge their feelings about having to sit there in an uncomfortable mask, maybe for several days, surrounded by strangers, in a place that may not even be the courthouse, even potentially taking the virus home to their loved ones.

I expect that if you choose this route, your judge will not be pleased. But do not cower, do not quit, do not run from the importance of that conversation. The jury will sense your fear. Endure and have the courage to make your record and to engage your jury in this relevant discussion.

During my experience, it became so contentious that I admittedly was exploiting that palpable fear in many of my prospective jurors within the bounds of the Rules of Professional Conduct to try to excuse enough of them to force a mistrial. That may be a strategy for your situation based upon your client's needs and the other considerations I have outlined above.

Finally, do not count on the courts to go along with any of these arguments. Judges want to move their dockets again and they are tired of us complaining about, you know, "fairness" and "effective assistance of counsel." Be prepared to voir dire your jury. Know your battlefield. Go look at the new courtroom layouts. Ask the judge questions. Review the coronavirus orders. And prepare to weave your coronavirus inquiry into your voir dire discussion.

Prior to writing this article, I was speaking with a long-time prosecutor who lamented over and over about voir dire. It was as though he was learning something completely different than that which we are taught. At OACDL and NACDL we are taught to engage with our jurors in discussions geared to the themes and to the theories of cases. We are taught to use our own experiences to relate to the jurors to begin right there to allow them to see the case from our perspective.

The prosecutors seem to be taught to just read or talk to the jury. We have to engage in conversations with the jury. Focus on your open-ended questions. Tell stories about your own life. You cannot expect anyone in the venire to open up to you if you will not first open up to them.

Remember, you are there to win

My last thought is more geared to the younger attorneys reading this article. You will never learn how to voir dire a jury by doing CLEs or by watching other lawyers. Join OACDL if you have not already. The CLEs are the best you will find, the organization, Ian Friedmand, Mark Devan, and Strike Force probably saved me from incarceration and a bar complaint.

Most of all, get out from behind counsel table and start trying cases. Learn by doing. Do not be afraid to make mistakes and to listen to the great trial lawyers around you. Speak with your own voice from your own experience and get your ass in that courtroom and defend your client.

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Counselor, Don't Just Stand There

DEREK S. WELT

My father David Welt practices criminal defense in Cincinnati, so the fact that I ended up doing the same thing as him maybe isn't that surprising. However, when I was growing up, what I was going to do for work as an adult was a topic that I never considered as much as I probably should have. As a high school and then undergraduate student besieged with inquiries about my future, choosing to follow in my father's footsteps was an easy answer. I said it enough, and eventually it became true. All that being said, after almost a year of practice, I am confident I made the right career decision.

My first year as a lawyer has gone about as smoothly as it could have, all things considered. I accepted an associate position at the firm I had clerked at all through law school. It is a small firm. Just myself, my boss, and one law clerk. The small firm environment has allowed me work closely with my boss to ask him questions and pick up on how to do the job.

It is true that law school will not actually teach you how to be a lawyer. As a law clerk, in my first time going to court with my boss, I immediately realized that I was completely clueless. Knowing the law and being able to apply it is essential, but that knowledge is useless if you don't know where to stand, when to stand there, and what to say. I picked up the basics clerking, but I still had a lot to learn after I was sworn in.

Although I work closely with my boss, he does a good job of making me figure things out on my own rather than just telling me how to do everything. At times it has felt a bit like a baptism by fire, but I'm yet to find myself in a situation that I could not handle. That's not to say that it isn't stressful at times, but to my boss' credit, I've gotten used to being in new situations and I've become comfortable figuring things out on the fly. The best thing that it has done is taught me to flexible. Flexibility is a characteristic which I have discovered does not come naturally to me but is one that is required to be successful in this field.

I like to know what's going to happen and why it will. However, no matter how much I try to control everything something pops up that causes me to have to change the plan. Whether it is a defendant's amnesia wearing off in the middle of a trial, a client waiting until we are walking into the courtroom to tell me about his new OVI charge, or something more routine like different counties having different rules, being flexible and being able to adapt to new circumstances is just something that is required.

After about three months of practice I felt like I had started to get into a groove. I knew where to stand, when to stand there, and what to say. Then Covid happened. Two months of doing basically nothing caused me to forget much of what I had learned. Not that it mattered, because when I came back so much had changed, I had to learn new procedures.

My new found flexibility allowed me to adapt to the changes brought on by Covid more easily than I expected. Fortunately, even though Covid has changed how the court room looks and the nature of the work, what I truly enjoy has remained the same.

The social aspect of being a defense attorney has always been one of my favorite parts of the job. Even with masks and social distancing, the comradery between private attorney, public defenders, and prose-

cutors still remains.

Something else I really enjoy that I wasn't expecting is the variety of each case. Before working as a law clerk, and eventually as an attorney, I had an idea in my head that most of the cases I would work on would be look alike. The reality, of course, is that the opposite is true. There are four very experienced attorneys in our building and everyday someone has a story about something going on that is novel to everyone. The diversity of circumstances in every case keeps me on my toes and really makes the job exciting in a way that I wasn't expecting.

I didn't have a concrete vision of what my inaugural year of practice would look like. I planned to roll with the punches and learn as I went. Even with a loose vision I would never have imagined that the majority of my first year would involve masks, plexiglass, and social distancing. Despite all of that, the job remains the same. Although, I've learned to become flexible, I still welcome certainty. I feel secure and confident knowing that no matter what circumstances exist in the rest of the world, the real substance of this job will not change. I'm excited to see where I will stand, when I'll stand there, and what I'll say in the future.

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DNA BASICS for LAWYERS

MATTHEW BANGERTER

Many of us have seen DNA[1] lab reports claiming that a match between our client and a sample of DNA is "5.46 nonillion[2] times more probable" than coincidence. We've seen charts and data discussing alleles and Y-STR analysis and CODIS hits and lab results from a forensic perspective. This article is not going to discuss the forensic issues involved in defending a DNA case. Rather, this will be a short primer on what DNA itself is to begin with – a topic that can fill thousands of pages condensed into 1000 words.

You may remember back in high school learning about 19th-century monk Gregor Mendel breeding peas that were yellow or green, wrinkly or smooth. Our high school teachers told us that DNA contains genes – a plant might have the gene for yellow peas or the gene for green peas, or it might have both but one of the two is "dominant" and so controls the color. But DNA is so much more than that.

DNA Structure

DNA is a very large, highly complex and infinitely fascinating molecule. Its basic shape is the famous "double helix," which essentially looks like a twisted ladder. Four molecules known as *nucleotide bases*, abbreviated A, C, G and T[3], each pair with a specific matching partner – A pairs with T, and C pairs with G. These four bases are the entire alphabet of DNA. Every bit of information encoded by DNA is spelled out by this alphabet of four letters in different combinations. The A-T and C-G *base-pairs* form the rungs of the ladder.

Each nucleotide base is attached to a sugar called *deoxyribose* and a compound known as a *phosphate group*. Each of these sugar-phosphate groups "stacks" on its neighbor, creating a long chain known as the sugar-phosphate backbone. Two of these chains make the rails of the ladder, attached to each other by the base-pair rungs. The chains are *antiparallel* – that is, the sugar-phosphate groups are stacked in opposite directions.

Stretched end to end, all the strands of DNA in a single cell – about six billion base-pairs - would measure about three meters long[4]. In order to store all that DNA in a cell only a few millionths as long, the DNA needs to be tightly packed. Proteins known as *histones* provide this packed

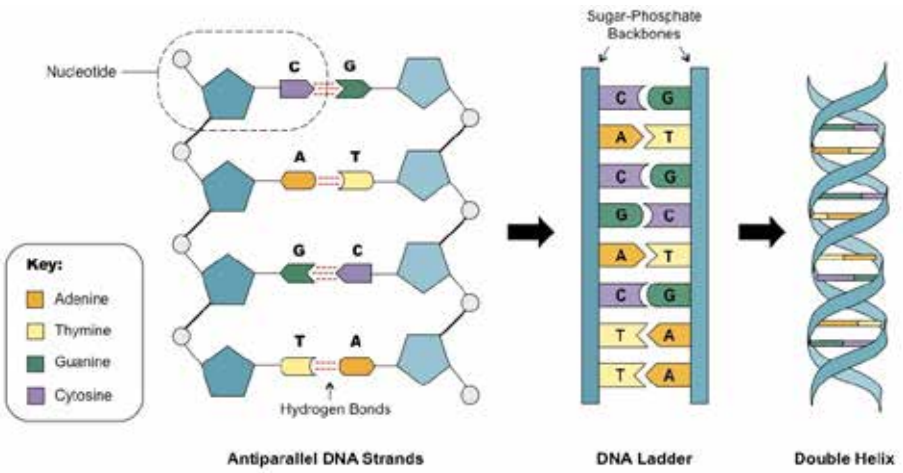

Figure 1. A representation of the structure of complimentary base-pairs and the sugar-phosphate backbone combining to form a double-helix DNA molecule. Cornell, B. 2016. *Referencing DNA Structure*. Available at: http://ib.bioninja.com.au. [Accessed Sep. 14, 2020].

structure. The DNA strand wraps itself around histones, forming a structure that is often compared to beads on a string. This structure in turn coils itself again, forming a denser protein mass known as *chromatin*.

When a cell is ready to divide to create two new cells, chromatin will condense further into a familiar structure known as a *chromosome*[5]. Although one of the more well-known terms in genetics, chromosomes are only present during cell division.

Functions of DNA

Physical expression: DNA does, of course, control what a person (or plant, animal, or organism) looks like. Every physical trait you possess is written in your genes. Every gene comes in pairs, one inherited from your mother and one from your father[6]. Each member of that pair is called an *allele*, a term you may recognize from your DNA lab reports. Each one of your individual physical traits will be determined by the combination of genes you get from each parent. Take eye color, for example – if your mother and father both have blue eyes and you inherit the blue-eyed allele from both, you will have blue eyes. But if your father has brown eyes, you may end up with a pair of mismatched *alleles*. In that case one of the alleles may be dominant and override the other[7]. Observable physical characteristics expressed by genes are known as the *phenotype*. The genes themselves are known as the *genotype*.

Biological function and development: The alphabet of DNA can be broken down into three-letter "words" known as *codons*. Each codon is exactly three base-pairs long, and each combination of three letters specifies the creation of one of 20 specific *amino acids*. These amino acids, in turn, combine in various combinations to form the hundreds of thousands of *proteins* the human body requires. These proteins drive the countless biological functions the body constantly performs or they are used to build or repair the body itself.

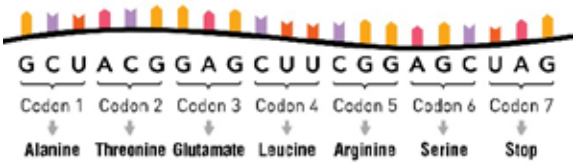

Figure 2. Each group of three bases specifies a particular amino acid. These amino acids are the building blocks of other necessary proteins. Note that in this diagram, for reasons far outside the scope of this article, 'U' (Uracil) substitutes for T (Thymine). Splettstoesser, T., 2015. Available at https://commons.wikimedia.org/wiki/File:RNA-codons-aminoacids.svg under the Creative Commons License.

Gene regulation: Proteins created by DNA can be used to "switch" other genes on or off. In a sense, this is DNA acting as its own metadata.

Self-replication and repair: In order for cells to divide, for an organism to develop, or for a person to grow, DNA must be able to copy itself for every newly-created cell. DNA can even repair itself. Because a length of DNA is made of up two complementary strands, an undamaged strand can be used as a template to repair a damaged strand. Each individual cell suffers and repairs DNA damage tens of thousands of times every day, making DNA an incredibly robust method of information storage.

DNA Analysis

When our clients submit a DNA sample, whether by blood, cheek swab, saliva or other method, the cells collected need to be broken down and the DNA inside extracted. The amount available from the few cells in the sample is too small to analyze. That small amount must be repeatedly copied through a process known as the *Polymerase Chain Reaction or PCR*[8] to make enough DNA to test. The PCR process, in essence, separates the DNA ladder into two separate single strands. Those two single strands of DNA are each copied, yielding two full strands. This process is repeated, two full strands yielding four, then four strands yielding eight, and so on.

The actual comparison is done using *short tandem repeats (STR)*. STRs are sequences of several base-pairs that repeat between a

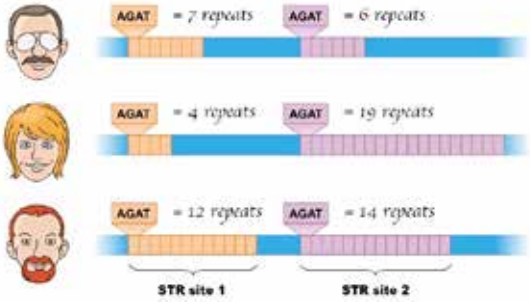

Figure 3. Three different donors exhibit different numbers of repeats at different genetic loci. Cornell, B. 2016. *Referencing DNA Profiling*. Available at: http://ib.bioninja.com.au. [Sep. 14, 2020].

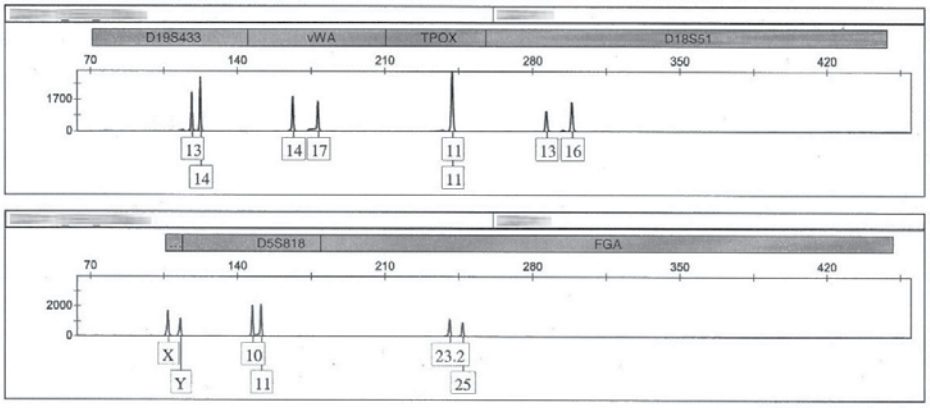

Figure 4. A partial human STR profile. This graph is called an *electropherogram*. By Sekiyu at the English language Wikipedia, CC BY-SA 3.0, https://commons.wikimedia.org/w/index.php?curid=5769328

few and a few dozen times. Every individual has a unique "fingerprint" comprised of a different number of repeats at specific locations (loci) in the genome. The more of these loci examined, the more statistically accurate the test. This process is sometimes called *Y-STR* when the analysis is restricted to the Y (male-only) chromosome.

The trouble for our clients often begins when their DNA is compared with a sample from the crime scene or victim, or with the FBI's CODIS database. Figure 4 is an example of a STR profile known as an *electropherogram*. Examining just the top half for brevity, we see different loci named D19S433, vWA, TPOX, D18S51. The length of each bit of DNA is given by the scale on the Y axis, with 0 base pairs (bp) and 1700 bp noted on the scale. For this example, we would say that the subject's genotype is 13, 14 at locus D19S433; 14, 17 at locus vWA; 11, 11 at TPOX; 13, 16 at D18S51; etc. A locus with two numbers (e.g. 13, 14) indicates that the source inherited one of each allele from each parent. A locus with one number (e.g. 11, 11) shows that the individual inherited the same allele from each parent.

This genotype is then compared with the target sample. Because the frequency that each allele appears in a general population is also known, every matching locus increases the statistical confidence that the subject and target are the same person. Using the population frequency of each allele, the tester can calculate the chance that each of those alleles will all appear together in a random member of the population. This number is known as *random match possibility or RMP*. In the example used at the beginning of this article, 24 separate loci were compared, yielding the result that a match in that case is 5.46 nonillion times more probable than coincidence.

Of course, these results get vastly more complicated. In many cases a DNA sample may have a mix of multiple contributors, making both physical and statistical analysis much more complicated. Sometimes, due to degraded or insufficient samples, an allele may be missing from the data leaving only a partial profile. The graphs themselves may be corrupted or obscured by artifacts, background noise, defects in either equipment or procedures, air bubbles, extremely small (or too much!) DNA sample amounts, simple interpretation bias, and more. On top of that, the Government loves to make hay about the giant numbers[9,10], and try to claim that the tests say more than they actually do. DNA evidence, while compelling and probably one of the most accurate and reliable of the forensic tests, is still not infallible. As with any forensic result – when in doubt, get an expert!

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1. Deoxyribonucleic acid
2. That's 30 zeros, or in this example from an actual case, 1 in 5,460,000,000,000,000,000,000,000,000,000. For comparison, there have only been about 400 or so quadrillion (400,000,000,000,000) seconds since the birth of the universe. You have a 1 in 292,000,000 chance of winning the Powerball jackpot.
3. Adenosine, Cytosine, Guanine and Thymine
4. To impart a sense of just how efficiently DNA is packed into the cell: all the DNA in your body stretched out would be 10 billion miles long. That's a bit more than the distance from Earth to Pluto and back.
5. Humans have 23 pairs of chromosomes, for a total of 46.
6. With some exceptions such as mitochondrial DNA (mtDNA), which are beyond the small scope of this article.
7. In the case of eyes, the brown-eyed gene is dominant so a person with one blue and one brown allele will have brown eyes. Some alleles are semi-dominant and result in a mixed physical trait. For example, a plant with red flowers and a plant with white flowers may breed a plant with pink flowers.
8. PCR was invented by biochemist and LSD aficionado Kary Mullis in 1983, for which he won the Nobel Prize.
9. The random match possibility is actually the probability that the suspect has the same DNA genotype and is not the source of the sample. Beware the transposition fallacy, aka "prosecutor's fallacy": a 1 in 5.46 nonillion chance that the suspect would match if he is not the source is not always the same as saying 5.46 nonillion-to-1 that the suspect is the source.
10. There is also a "defendant's fallacy," which goes something like: with a random match possibility of one in a million, there could be three unrelated matches in a city with a population of three million, therefore there is a two in three chance the defendant is not the source.

Family Law and Criminal Defense

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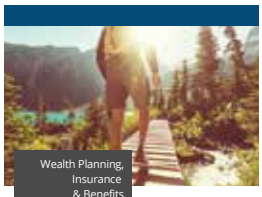

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CRIMINAL DEFENSE ATTORNEYS and SECONDARY TRAUMATIC STRESS: WHAT TO DO

SCOTT R. MOTE, Esq.,
Executive Director of the Ohio Lawyers Assistance Program

Being a criminal defense attorney is not easy, and it comes with stress. In addition to high caseloads, criminal defense attorneys have a front row seat to the uglier side of life. They see murder weapons, rape victims, and photos of mangled people who were injured or killed. They hear about domestic violence, and victims of traffic accidents. They read victim impact statements, and reports about their clients' horribly dysfunctional upbringing. Criminal defense attorneys are repeatedly exposed to traumatic events that have affected other people. Being exposed to this type of imagery can cause what some refer to as secondary traumatic stress, compassion fatigue, vicarious trauma or indirect trauma.

The danger of stress is that some lawyers might not recognize the symptoms, and some might fear the inappropriate stigma that comes with mental health disorders, which means they are less likely to get proper treatment. It is a lawyer's job to provide competent representation to clients, but an undiagnosed mental disorder could affect the way he or she practices law. It is important that attorneys seek help if they experience any of the following signs of secondary trauma:

- Constantly tired, to the point of exhaustion;
- Lack of sleep;
- Anger;
- Irritability;
- Guilt;
- Hopelessness;
- Losing faith in humanity;
- Recurring thoughts and/or dreams about traumatic events.

If you or another criminal defense attorney you know is suffering from compassion fatigue, stress or secondary trauma, here are some things you can do:

Set and keep boundaries

Let your work stay at the office. Make a commitment to refrain from working or thinking about work when you are off the clock. When you are home, focus on your family, your hobbies, your pets--the things that make you happy.

Exercise

Exercise releases endorphins, which help you relieve stress and relax. It will also help you sleep better. Try to get at least 30 minutes of exercise a day. Take a walk around the office on your lunch break, hit the gym before you go home, workout at home, do yoga--these all help you get your mind off of the disturbing part of your job.

Keep hobbies

What is the one thing you love to do? Is it taking pictures, listening to music, reading, visiting historical monuments, playing tennis, playing cards? Whatever it is, make sure you set aside time to do what you love. This takes your mind away from the trauma you witness, and it also makes you happier since you are spending your time on something that makes you feel good.

Find balance

How do people find balance? It is different for everyone. For attorneys, it is especially challenging since they might be required to stay after hours at times. First, find the good in your job. Criminal defense attorneys provide counsel to defendants who feel hopeless and have the state's unlimited resourc-

es directed at them. You guide them, support them and give them hope. Without you, people could be wrongfully convicted. Remember your cause, and this will help you deal with stress.
Always have something to look forward to. This could be as simple as a home-cooked meal to as grandeur as a European cruise. This helps you see that you have fun things planned in the future, and you will look forward to them to help you through your work day.

Call OLAP for confidential guidance

The Ohio Legal Assistance Program confidentially helps attorneys learn how to cope with the secondary traumatic stress. OLAP will help you find appropriate professional help and will work with you to implement your treatment plan. Call OLAP at (800) 348-4343.

What happens when you contact OLAP?

The Ohio Lawyers Assistance Program receives about 62 calls per quarter from legal professionals who could use some help. The calls come from the legal professional who is concerned for himself/herself, and we also receive calls from individuals who are concerned about a colleague. Some examples include:

- A law student struggling with depression
- A concerned daughter trying to help her aging mother
- An overwhelmed judge suffering from secondary trauma
- A young lawyer plagued with an eating disorder
- A mother who is raising a disabled child
- A father in danger of losing custody of his children
- A big law firm lawyer having trouble controlling her alcohol intake
- A lawyer who notices that her colleague has been missing deadlines and just doesn't seem to be herself

If you are concerned about your own mental well-being and you call OLAP, we will meet with you to conduct a full confidential assessment.

After the assessment, our staff gives recommendations to you to help you head in a better direction. We are trying to find out what is going on (diagnosis), and what needs to be done (drug/alcohol treatment, medical evaluation, psychiatric evaluation, psychological therapy, etc.).

If you are concerned about another person

OLAP receives calls/referrals from colleagues, judges, disciplinary counsel, certified grievance committees, admissions committees, defense counsel, spouses, children, law school administrators and professors. We generally require corroborating information on a new client before doing anything. If we do not obtain corroboration, we do not move forward.

OLAP is confidential

If you contact OLAP about yourself or about an attorney colleague, you can rest assured that your call and anything you discuss with OLAP will be protected by strong rules of confidentiality:

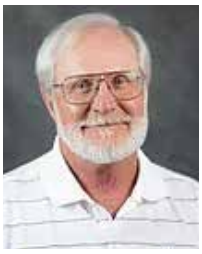
- Prof. Cond. Rule 8.3 provides an exemption from the duty to report knowledge of ethical violations when that knowledge was obtained during OLAP's work.

- Code of Judicial Conduct Rule 2.14 provides that information obtained by a member or agent of a bar of judicial association shall be privileged.

- R.C. § 2305.28 provides qualified immunity from civil liability for OLAP staff (B and C) and for anyone who provides information to OLAP (D).

If you or someone you know is having problems with substance abuse, alcohol abuse, addiction, or mental health, don't let fears about the disciplinary consequences prevent you from contacting us. ***No potential disciplinary situation will be made worse by contacting OLAP.***

Contact the Ohio Lawyers Assistance Program confidentially at ohiolap.org, bendslow@ohiolap.org or (800) 348-4343.



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THE NEWEST GENERATION

AN INTERVIEW WITH ANDREA LAWSON

BY HEIDI STEINKE MEADE

With the passing of RBG, I began to turn my attention to the young attorneys I was beginning to know through my work here at this criminal defense firm. I met Andrea Lawson, "Andi" when she was mid-way through law school at Capital. Buzzy, quirky, and quick with a laugh, she was an immediate fit into our small practice of 2 attorneys. Short of a month, we realized she also grew up in the flatlands of northwest Ohio, where systematic racism in the criminal justice system is often seen as an urban legend. And yet, here is Andi, pursuing a career in criminal defense, seeking justice, equity, and a challenge.

When we met her, she had already served as a legal intern at the Franklin County Public Defender's Office in the Common Pleas Division. She mentioned, "I spent my time there working felony arraignments, interviewing clients, and researching for the staff. I found myself surrounded by passionate, smart, and driven attorneys. After a few months, I was hooked."

She jokes that criminal law was her least favorite class during her first semester of law school.

She also clerked for the Federal Capital Habeas Unit for the Southern District of Ohio and volunteered for the Wrongful Conviction Project at the Ohio Public Defender's Office. When she worked for us, she experienced drafting appellate briefs for indigent clients.

Andi was with us for just over two years and then in January of 2020, she returned to the Franklin County Public Defender's Office as an attorney.

"My first year of practice as a criminal defense lawyer has come with unique challenges. I trained under several experienced public defenders for the first few months of 2020. However, the COVID-19 pandemic hit and we were sent home for a few months during the shut-down. We returned to a world marred with uncertainty and constant change. I have been fortunate enough to be surrounded by an excellent support system in and out of the courthouse. We have established a "new normal" and we are moving forward."

She told me, "I am a criminal defense attorney because I believe in the dignity of each and every human being. I believe that we deserve compassion irrespective of where we come from, or what we have been accused of. I believe that, as legal professionals, we have a responsibility to challenge unjust institutions and policies wherever we find them. Criminal defense attorneys are in the trenches everyday working tirelessly to protect Constitutional rights and ensure equal justice, even in the face of a global pandemic. I do not lack for inspiration. I do not lack for mentorship. The criminal defense attorneys I have met enthusiastically provide guidance and pass on their wisdom to the next generation at every opportunity."

But being married to a criminal defense attorney who served for decades as a prosecutor, I know that it is heart-breaking work. She admits, "At times, I am exhausted and frustrated by the system and the circumstances by which my clients come into contact with it. However, I have also learned through this work that no victory is too small. I have seen the joy on a single mother's face when she becomes a valid driver for the first time in her life. I have witnessed gratitude on the face of an incarcerated client who simply wanted one person to be in his corner and to wish him a happy birthday. And of course, there is no greater feeling than securing a dismissal for a client."

Andi was with our firm for too short a time, and I am excited to see where this woman lands. It gives me so much hope for our cultural future.

Heidi Meade, Office Manager for (and wife to) Attorney Darren Meade

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