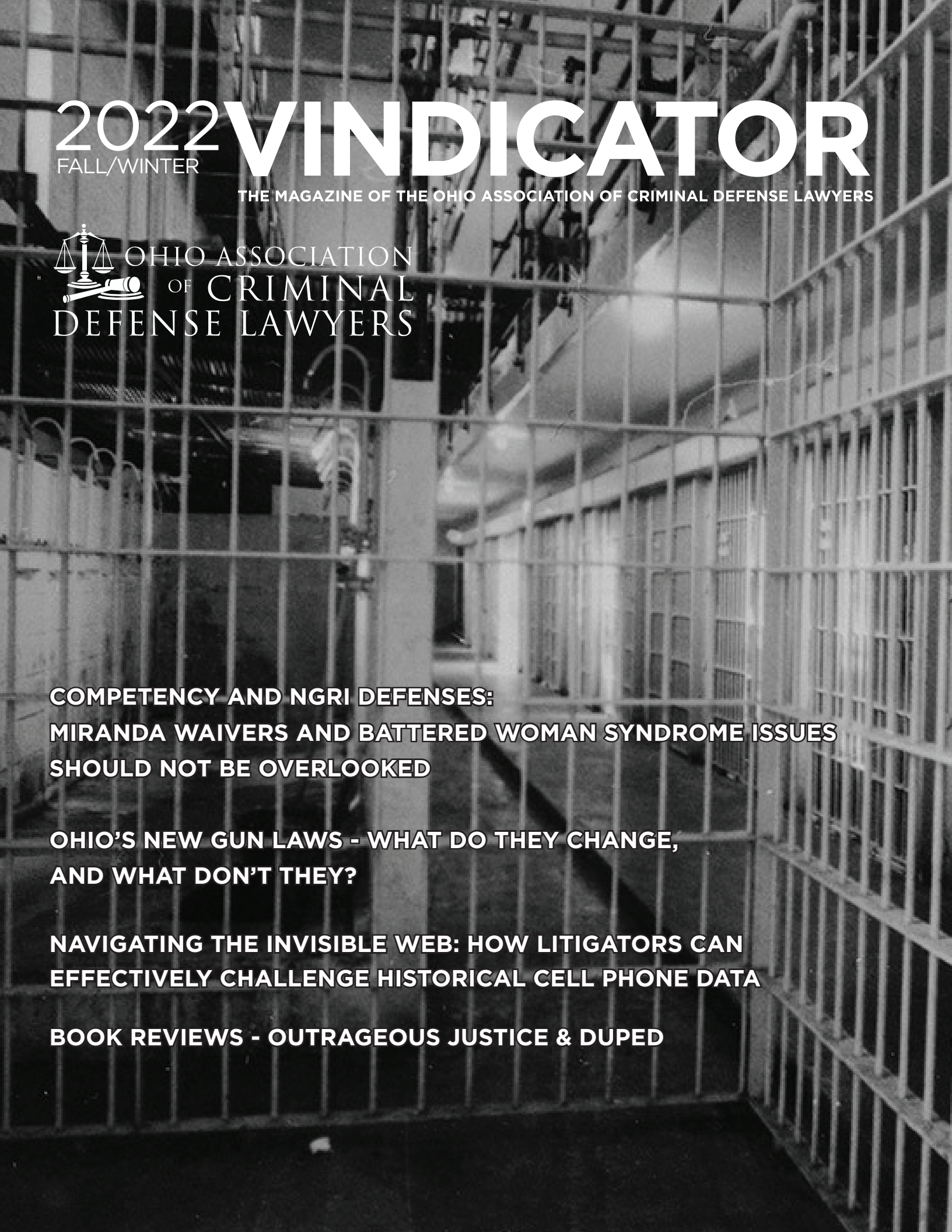

2022 FALL/WINTER

VINDICATOR

THE MAGAZINE OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

COMPETENCY AND NGRI DEFENSES: MIRANDA WAIVERS AND BATTERED WOMAN SYNDROME ISSUES SHOULD NOT BE OVERLOOKED

OHIO'S NEW GUN LAWS - WHAT DO THEY CHANGE, AND WHAT DON'T THEY?

NAVIGATING THE INVISIBLE WEB: HOW LITIGATORS CAN EFFECTIVELY CHALLENGE HISTORICAL CELL PHONE DATA

BOOK REVIEWS - OUTRAGEOUS JUSTICE & DUPED

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MISSION STATEMENT

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

BENEFITS OF THE OACDL

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

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

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

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

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

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

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

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

LETTER FROM THE PRESIDENT

DAN J. SABOL

President, OACDL

In my first criminal law class, my professor displayed the iconic picture of an anonymous man blocking the path of four tanks in Tiananmen Square. This, we were told, is the plight of the criminal defense attorney: standing as the lone barrier between our client and the full force of the government. Ours is a sublime existence; it can also be a solitary one.

This is the why the OACDL was formed. I have had the pleasure of working with Immediate Past-President Jerry Simmons and enjoyed his recounting of our organization's roots. He, along with others reminiscing about the genesis of our group, fondly recalled a collective desire to pool resources and build a cohesive community. Individually we are vulnerable, but together we cannot be stopped. Within this spirit, we are focusing on the following goals for the upcoming year:

Creating a robust motion, transcript, and brief bank: None of us left the womb with an understanding of how to cross a cop or talk to prospective jurors. Our technology and publications committee members are coming together to collect, redact, and then post our members' best work to create a valuable reservoir of information for new and veteran members alike. If you would like to submit any documents, please send them to our publications chair Alonda Bush at abush@portageco.com.

An on-demand CLE library: The Supreme Court of Ohio has waived the previous cap on self-study CLE hours, and attorneys may now fulfill their 24-hour requirement entirely with on-demand content. The advent of the pandemic led to OACDL providing virtual options, and we have recorded dozens of presentations. We are currently editing and submitting them to the Supreme Court for approval and will make them available to our membership as soon as possible. Further, CLE chair Ashley Jones has done an exceptional job in recruiting compelling speakers for one-to-three-hour seminars which may be enjoyed over a lunch hour or accessed as need arises—look forward to these convenient and pertinent presentations being offered throughout the year and then cataloged on our website.

Regular legislation updates: There is nothing worse than being the only one in the courtroom not aware of a recent change in the law. We will continually update our members on any new laws so you will not have to sweat relying on outdated information. Further, over the past few years OACDL has made great progress in communicating with lawmakers and sharing our perspective and testimony on proposed legislation—we will also be sharing what we learn and what may be coming in the future.

The creation of a wellness committee: Protecting the accused from prosecution is noble and glorious; it can also be damn difficult. Too many of us suffer in silence—Eric Allen was kind enough to propose the idea of a wellness committee to provide an avenue to assist those of our brethren in need. This is a new committee, and we welcome any ideas in how we can serve those in need—but at a minimum, the committee will be assisting in professional conduct CLEs, providing resources, and exploring having a contact members may call anonymously when they simply need a friend to listen.

These upcoming advancements are done with one goal: providing resources to raise our collective skill while alleviating the inherent stress of criminal defense work. Becoming better lawyers and making life more enjoyable—together.

Finally, this year brings a bittersweet transition with Susan Carr's retirement after 29 years of steadily leading our organization. Susan has been our constant. We are thankful for her friendship, and her effort and dedication have unquestionably raised Ohio's criminal defense bar. Fortunately, Amy Nicol has agreed step up and assert the mantle of leadership Susan has passed to her. Amy has been working with Susan for over a year and has clearly shown she has the prowess to lead our next generation. The future is bright.

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LETTER FROM THE IMMEDIATE PAST PRESIDENT

JERRY SIMMONS

OACDL

It has been my great honor to be President of this organization for the past year. As my term has come to an end I would like to reflect on where OACDL is now.

In observing the day-to-day and month-to-month operation of our group of around 700+ criminal defense attorneys from all over Ohio I have been impressed with the dedication, enthusiasm and particularly the skills of our membership. There are a lot of good lawyers defending the criminally accused in this state.

As to our strengths, our Vindicator is actually read and admired, not only by our members, but increasingly so, amongst Judges and criminal law professionals. That has not always been so. We have come a long way since that first issue.

Our seminars are widely attended and respected, more so than I can ever remember. I personally wish I could have attended them all this past year but time did not permit. And our bank accounts have never been so flush. The hard work of our CLE committee who put on our seminars are responsible for a lot of that.

Our Amicus, Ethics, Membership, Strike Force and Technology committees are all performing at a high level and have never in all the years of our existence been so effective as they are now. We have added a committee this year-the Diversity and Inclusion committee-have been reaching out to attorneys from underserved communities and encouraging them to join for our mutual benefit.

All of this has come about due to our committee chairs. They have taken on the responsibilities of their areas and they and their members have effectively carried them out.

It is my opinion, confirmed over the past year, that together with Susan Carr and now also with Amy Nicole, the committee chairs are the main reason OACDL has become so successful. It has not always been so.

We have new, young, charismatic and hard-working leadership. If we continue to work together and continue to work effectively as I have seen more and more of in recent years we can and will become even better.

That in the end means that the criminal defense component of our criminal justice system will become stronger to the benefit of all the people of Ohio.
I commend you all and urge you to keep up the good fight.

Jerry Simmons
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2023 CLE SCHEDULE

November 17-18, 2022
Death Penalty
Lewis Center, OH

December 9, 2022
Hot Topics with 2 Hours of Professional Conduct
Columbus, OH

January, 2023
Current Issues in Criminal Law
TBD

February, 2023
TBD

March 9-11, 2023
Advanced DUI Seminar
Columbus, OH

LETTER FROM THE PRESIDENT - ELECT

JOSEPH HADA
OACDL

When I was a young public defender, I tried an aggravated robbery as a second chair. In closing, the prosecution used a PowerPoint presentation to supplement their argument. This was the first time I had witnessed the effect of appropriately using technology in front of a jury. I had a better background in technology than most lawyers, having worked in IT, and a PowerPoint presentation isn't exactly futuristic. Still, the prosecutor used it well and specifically incorporated video of our client. On one particular slide, with the press of a button, the prosecutor could play a video of our client shortly after the robbery, looking quite guilty. The video had been shown in its entirety during the trial, but it was long and not as interesting or attention-grabbing at the time. We were hoping that other factors in the case would be more interesting. However, when the help of simple editing software to zoom in and replay a short clip, the prosecutor was able to make a significant impact on the jury. He probably only played the short clip two or three times during closing, but it felt like fifty.

After that trial, I decided that I would never be outdone by someone else's employment of technology again and that I would learn to use similar tools myself to the benefit of my clients. I remember Mark Gardner visiting the office and recommending to me the first video editing software I had ever used, and I started to learn what I needed to develop a better skill set as an attorney.
OACDL has upheld a strong commitment to each other to help share knowledge, so we are all as ready to stand next to our client as the best attorney we can be. This does not just apply to technology. It may be a new technique in jury selection, wording a closing argument just right, having that new caselaw on hand, or any of the myriad of factors that goes into the practice of law. We have a wealth of knowledge, experience, and expertise in this organization, and we want to make it as accessible to everyone in the organization as possible.

OACDL makes this type of information available through the regularly scheduled first-rate CLE events that the CLE Committee prepares and produces. However, for the most part, if you want to see these events, you have to be available on the day they are offered for live or in-person attendance. Our on-demand CLE library is growing, and many people have been able to earn CLE credit at a time convenient for them, and I know it is a goal of Dan, and I to grow this even further, especially as the Supreme Court allows for lawyers to complete as much of their CLE requirements through self-study as they wish. I look forward to working with Dan and the rest of the OACDL leadership to get these projects started immediately to bring more information and content to the membership through member-only benefits.

I have attended countless seminars thinking that if I could just pick up one or two critical concepts or techniques, then it was worth it. Sometimes an all-day seminar can feel like drinking from a firehose. It would be helpful if you could go back to what you need when you need it and get only the information pertinent to your current case or a particular issue. It is a shame to have that information lost or forgotten after being presented one time years ago in a city that you couldn't make it to.

Hopefully, having a wealth of information available to members through an online bank of motions, transcripts, briefs, and videos, we can find what we need and perhaps even find something we didn't know we needed. This plan includes providing all seminar content for members in the members-only section for review at any time, although not for CLE credit, by way of videos and in an audio-only format. The Supreme Court requires that CLE presentations be of a certain length to earn credit but there are many short topics we can now include in this section that can be very helpful you might not otherwise have. This can provide the quick tip someone might need in a pinch while also giving our contributing members a professional video they can use in their own marketing. One of the best learning experiences I have ever had was listening to a recording of Tim Huey, and Andy Bucher try an OVI case while driving a few hours to and from court. With our highly skilled attorneys in this organization, we'd like to provide actual recordings of our excellent attorneys at work.

We have incredibly talented and knowledgeable people in this organization, and everyone is happy to help each other in working towards the same goal. The help of mentoring attorneys from OACDL is why I am a memeber, and I sincerely hope we can find as many ways as possible to pay it forward.

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DIRECTOR'S DIALOGUE

AMY NICOL

EXECUTIVE DIRECTOR, OACDL

Dear Readers & Membership:

As many of you know, Susan Carr is retiring after 29 years of dedicated and tireless service to OACDL. As she transitions out of her role, I am excited and humbled to continue her legacy and assume the position of Executive Director. I am grateful for this opportunity to serve our membership and support this great organization.

OACDL and the CLE committee work diligently to provide relevant and educational seminars. Rounding out this year, we have the Death Penalty seminar in November followed by Hot Topics with Professional Conduct hours in December. January brings a new year and numerous learning opportunities - some tried and true like our Advanced DUI seminar in March and also new topics to keep attendees informed and current in the ever-evolving legal landscape. We have plans to grow membership, to diversify with the assistance of our newly formed Diversity, Inclusion and Justice committee, and to always be seeking ways to assist you, our members.

As we wrap up 2022 and look toward a new year, there is also much to look back upon with gratitude and pride. We dedicated an award in honor of Brian Jones and his inspiring courage, we recognized Jeff Gamso and his illustrious career by bestowing him with the Lawyer of the Year award, we thanked our Immediate Past President Jerry Simmons for his leadership, we celebrated our new president, Dan Sabol, and the Executive Committee that will help guide us through 2023. OACDL provided hundreds of hours of Continuing Legal Education to fellow attorneys, stood united on important legislative issues, and quite a few war stories and laughs were shared, too.

It does not take long to see what an amazing group of people OACDL is comprised of – the passion, dedication and knowledge is impressive, but the unique camaraderie and bond this membership shares is downright inspiring. I have had the opportunity to meet many of you in person, and even greater number of you 'virtually' - however we have connected, I am so glad to have done so and look forward to meeting many more you over the coming weeks. I am honored to be even a small part of an organization that is so impactful and so important.

Thank you all for welcoming me so warmly and a huge thank you to my predecessor and mentor, Susan. The notion of following in her footsteps is daunting, but I am confident we can all agree when I say, "I learned from the absolute best."

Gratefully, *Amy Nicol*

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Jennifer Mullins Holmes Cincinnati
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Megan Patituce Strongsville
Kyle Stoller Columbus
Lucas A. Thompson Circleville
Breezy Warner Delaware
Lauren Wazevich Strongsville
Justin Withrow Cleveland

PAST PRESIDENTS OF THE OACDL

1986-88	**Jay Milano,** Rocky River
1988-89	**John H. Rion,** Dayton
1889-90	**Thomas Miller** (deceased), Cincinnati
1990-91	**Max Kravitz** (deceased), Columbus
1991-92	**James Kura** (deceased), Columbus
1992-93	**William F. Kluge,** Lima
1993-94	**Mark R. DeVan,** Cleveland
1994-95	**Samuel B. Weiner,** Columbus
1995-96	**K. Ronald Bailey,** Sandusky
1996-97	**Paris K. Ellis,** Middletown
1997-98	**Harry R. Reinhart,** Columbus
1998-99	**Cathy Cook,** Cincinnati
1999-00	**Mary Ann Torian,** Columbus
2000-01	**Herman A. Carson,** Athens
2001-02	**Jefferson E. Liston,** Columbus
2002 -03	**Clayton G. Napier** (deceased), Hamilton
2003-04	**Charles H. Rittgers,** Lebanon
2004-05	**Paul Skendelas,** Columbus
2005-06	**R. Daniel Hannon,** Batavia
2006-07	**Barry W. Wilford,** Columbus
2007-08	**Donald Schumacher** (deceased), Columbus
2008-09	**Ian N. Friedman,** Cleveland
2009-10	**Andrew H. Stevenson,** Lancaster
2010-11	**David Stebbins,** Columbus
2011-12	**D. Timothy Huey,** Columbus
2012-13	**Jon Paul Rion,** Dayton
2013-14	**J. Anthony Rich,** Lorain
2014-15	**Jeffrey M. Gamso,** Cleveland
2015-16	**S. Michael Lear,** Cleveland
2016-17	**Jon J. Saia,** Columbus
2017-18	**Kenneth R. Bailey,** Sandusky
2018-19	**Michael J. Streng,** Marysville
2019-20	**Shawn Dominy,** Columbus
2020-21	**Meredith O'Brien,** Cleveland
2021-22	**Jerry Simmons,** Columbus

Brian Jones selected as OACDL's Inaugural Courage Award winner!

JOSEPH A. HUMPOLICK, Awards Committee Chairman

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
COURAGE AWARD

In 2007 when he was an assistant public defender in Portage County Brian Jones refused to take a case to trial after having been assigned to it less than a day before. He felt he needed more time to talk to witnesses and explore whether his client had an alibi defense and prepare the case as he would want a lawyer to do for him were he on trial. The judge who sat in judgment of him wasn't willing to listen to reason and he was held in contempt and sentenced to jail. His case was taken up by the OACDL and ultimately justice prevailed for him.

Since then Brian went on to have an outstanding record of criminal defense advocacy and service to others in our association as others were for him so many years ago. Unfortunately time and circumstance has not been of justice to him. So rather than wait for a day that may not be there for him because of serious health problems the awards committee of the OACDL decided to present Brian a special recognition award that honors him for his career's work.

Accordingly on Friday, October 28th Brian was given this award at his home in Delaware, Ohio. Present was his wife and fellow OACDL member Elizabeth Osorio, OACDL president Dan Sabol, immediate past president Jerry Simmons and his wife Kathy Koch, president elect Joseph Hada, Harry Reinhart, membership and close friend Zach Mayo, and Executive Director Susan Carr, as well as his spiritual adviser, his hospice nurse and two of his daughters Sydnie and Taylor. His dog also made a cameo appearance.

Brian at first thought that we all came to say goodbye, but discovered instead that we all came to say hello and to honor him for his career's work. It brought tears to his eyes. He then told the story of that consequential day in 2007 when he found the courage to stand up to a very intimidating judge and do what he felt was in the best interests of his client and in the best interests of justice. He felt so anxious and alone on that day but discovered soon enough that he had lots of friends and allies that he never knew existed.

In the future the awards committee will present a special recognition award from time to time to a deserving member who has had a special profile in courage moment in a courtroom or an accomplishment worthy of honor. On Friday, October 28th Brian Jones was told before we all left his company that in the future these awards will be named after him so every recipient of them will know who he is and why these are so prestigious given who the first recipient was.

Jeffrey Gamso selected as OACDL's 2022 Lawyer of the Year

JOSEPH A. HUMPOLICK, Awards Committee Chairman

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

LAWYER of the YEAR

The Lawyer of the Year award is an award given by us to one of us who stands out from us all for living up to the highest aspirations of our association. Every year for several years a committee composed largely of pervious recipients of this award solicit nominations from our membership for this prestigious honor and from the nominations we receive we select a worthy member in good standing to present it to.

This year we received many outstanding nominations for this award and from them one stood out from them all and that was Jeffrey Gamso. Jeff was presented his award at the annual of our association on October 14th.

Jeff received his award for his many years of professional and widely respected advocacy. He has also been a mentor to many in our association. In addition he has also been a frequent contributor to the list serve. He has been of service to many over the years who have needed assistance in developing difficult issues in their cases. He has kept us informed on developments in the appellate courts. And on top of all that he was a past president of our organization.

In other words Jeff has been the criminal defense advocate and servant to our profession that all of us should be. It is an honor to belong to a profession and an association that has him in it. His work on behalf of his clients and his colleagues is why our association can be very proud of him. And that is also why he received this year's Lawyer of the Year award.

His name is now on a master plaque that has the names of all who have won this award before that you can see at any and all of our seminars. He will also be on the committee that will chose a recipient of next year's honor.

By the way, it is not too early to submit the name of someone you feel is deserving that award. If you have somebody in mind feel free to send a nomination to Amy Nicol at amy@oacdl.org.

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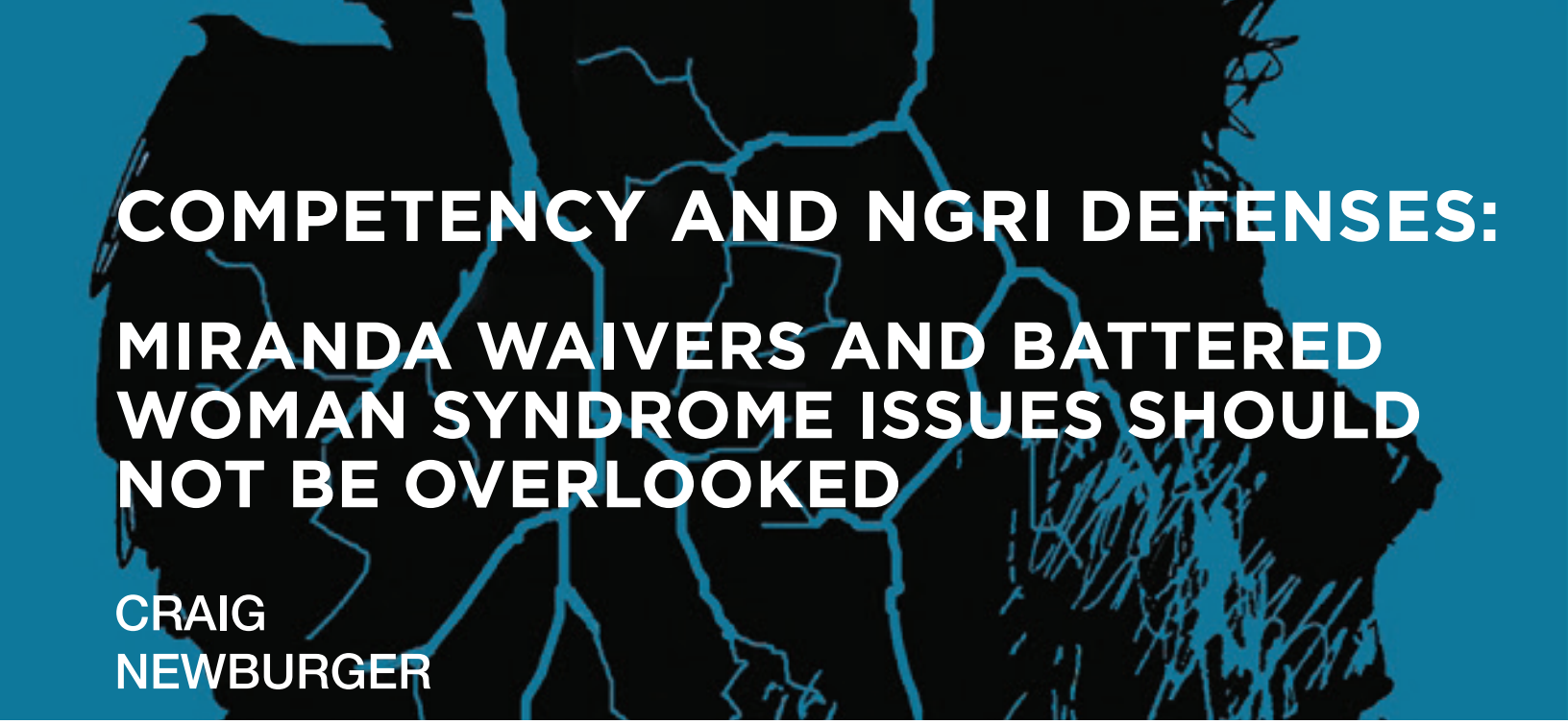

COMPETENCY AND NGRI DEFENSES:

MIRANDA WAIVERS AND BATTERED WOMAN SYNDROME ISSUES SHOULD NOT BE OVERLOOKED

CRAIG
NEWBURGER

Defense attorneys have long raised the issue of Defendants' competence to stand trial (ORC 2945.38) and whether Defendants are entitled to an acquittal by reason of insanity (ORC 2925.40).

Competency and Miranda Waivers

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

Expert psychological assessments finding Defendants incompetent to waive their Miranda Rights may offer that Defendants were diagnosed with an Intellectual Disability; appear to be intellectually limited and tend to try to mask her difficulties; and, that their attention and concentration levels were particularly poor during interrogation. Such assessments often further offer that Defendants' deficits affecting their ability to understand and appreciate Miranda warnings are unlikely to change over time and are unlikely to change despite the Defendants' optimal or less than optimal assessment performance. Defendants' competency to stand trial and competency to understand their Miranda rights are like different sandboxes on different playgrounds.

Unlike leaving comparison of handwriting samples or voice identification to the trier of fact, Defendants competency to understand and make voluntary, knowing and intelligent waivers of their Miranda rights involves their constitutional rights and are subject to a motion to suppress.
In a suppression hearing the State will most likely rely on Colorado v. Connelly (1986), 479 U.S. 157. The Court in Connelly held that coercive police activity is a necessary predicate finding that a confession is not "voluntary" within the meaning of the Due Process Clause. In Connelly, the taking of respondent's statements and their admission into evidence constituted no violation of that Clause. The Court opined that while a defendant's mental condition may be a "significant" factor in the "voluntariness" calculus, this does not justify a conclusion that his mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness." Pp. 479 U. S. 163-167.

To prevail in a motion to suppress grounded in incompetence to understand Miranda rights Defendants must meet two tests. First, psychological expert testimony must be introduced that said Defendants are incompetent to understand their Miranda rights as detailed above. Second, Defendants must show that law enforcement had actual knowledge, or should have known that Defendants had a mental history.

Law enforcement must be shown at the suppression hearing to have possessed, at the time of interrogation, an apparent lay per-

son awareness that Defendants showed overt signs of mental impairment or that law enforcement had actual or constructive knowledge that Defendants were or had been provided counseling, treatment or care from a mental services provider. As frequently as law enforcement receives special training in interview techniques, they often have no training or protocols for interviewing mentally disabled suspects.

NGRI and the "Battered Woman Syndrome"

A Defendant is "not guilty by reason of insanity (NGRI)" relative to a charge of an offense only if the person proves that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts. (R.C. 2901.01(A)(14). The "battered woman syndrome" is codified, as part and parcel of some NGRI assessments (and may be alternatively considered as relevant to a self defense claim):

R.C. 2945.392 -- Battered woman syndrome testimony or evidence of impairment of reason -- If plea of not guilty by reason of insanity is entered, syndrome may be advanced as requisite impairment of defendant 's reason.

R.C. 2901.06 -- Battered woman syndrome testimony as evidence relevant to claim of self-defense.

(A) The general assembly hereby declares that it recognizes both of the following, in relation to the "battered woman syndrome:"

(1) That the syndrome currently is a matter of commonly accepted scientific knowledge;

(2) That the subject matter and details of the syndrome are not within the general understanding or experience of a person who is a member of the general populace and are not within the field of common knowledge.

(B) If a person is charged with an offense involving the use of force against another and the person, as a defense to the offense charged, raises the affirmative defense of self-defense [no longer an affirmative defense], the person may introduce expert testimony of the "battered woman syndrome" and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm that is necessary, as an element of the affirmative defense, to justify the person's use of the force in question. The introduction of any expert testimony under this division shall be in accordance with the Ohio Rules of Evidence.

Although self-defense is no longer an affirmative defense, evidence of "battered woman syndrome" requires the Defendant to introduce expert testimony and, as such, the burden is on the Defendant.

Battered Person Syndrome

The "battered person syndrome" was adopted by the Supreme Court of Ohio in State v. Koss, 49 Ohio St.3d 323 (1990), and subsequently codified in R.C. 2901.06 as the "battered woman syndrome." Notwithstanding the statutory title, it is not limited to a woman, but applies to any family member suffering from the syndrome as established by the evidence. See State v. Nemeth, 82 Ohio St.3d 202 (1998); State v. Stowers, 81 Ohio St.3d 260 (1998) (permitting expert testimony on "battered child syndrome"). There is no reason to treat women and children, similarly situated, in a different manner. State v. Nemeth, 7th. Dist. Jefferson No.95-JE-32 (Jan. 30, 1997), motion for reconsideration overruled (Mar. 19, 1997). Courts in other states have also applied the "battered person syndrome" based upon the relationship of the persons and any pattern of abuse, regardless of the sex of the person asserting the "battered person syndrome." State v. Curley, 250 So.3d 236 (La.2018); State v. Doe, 421 S.C. 490, 808 S.E.2d 807 (2017).

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Ohio's New Gun Laws - What Do They Change, and What Don't They?

ROBERT B. McCALEB

As of June 13, 2022—the effective date of S.B. 215—it is no longer required to obtain a permit to carry a concealed weapon in Ohio.

Ohio law previously required a person complete a training course, undergo a background check, obtain a license in order to carry a concealed firearm, and renew their license every five years. Additionally, the law required a person carrying a concealed weapon under permit "promptly" to disclose that fact to police during an involuntary police encounter.

S.B. 215 preserves the training-and-official-permit system, particularly useful for those who wish to concealed carry in states that do require a permit (such as Pennsylvania, and Michigan). "But," as Attorney General Yost put it in the most recent version of the CCW Handbook, "for the first time in Ohio history, the law also authorizes concealed carry without a permit." In the parlance of the law itself, "[a] person who is a qualifying adult shall not be required to obtain a concealed handgun license in order to carry in this state . . . a concealed handgun that is not a restricted firearm." S.B. 215 also eliminates the former police disclosure requirement.

Permit-holders and non-permit-holders are treated the same in virtually all circumstances, the major exception being that permit-holders may concealed carry in their vehicles in "school safety zones"—basically, buses, schools themselves, and school activities like football games—whereas non-permit-holders are forbidden from doing so and may face felony charges for violating this prohibition. Aside from a few other minor differences (such as that permit-holders do not need to go through another background check when purchasing a firearm, while non-permit-holders do) the law treats the two classes the same.

So much for the basics. But a few additional clarifications, and a few open questions, are in order.

S.B. 215 does not affect the law prohibiting having weapons while under a disability.

As noted, S.B. 215 only allows "qualifying adult[s]" to concealed carry. Thus, those who are "disabled" under Ohio or federal law (see R.C. 2923.13 and 18 U.S.C. § 922) still cannot carry, or indeed even "have" firearms of any kind. Note, however, that the U.S. Supreme Court's recent decision in New York State Rifle Association v. Bruen, No. 20-843, may change this over the next few years as the implication of that decision spread. Justice Barrett, for instance, has questioned (before joining the Supreme Court) whether it is constitutional to impose a blanket lifetime ban on felons possessing firearms, while the Ohio Supreme Court is considering (as of this writing on October 4, 2022) the impact Bruen has on Ohio's ban on possession of firearms by mere indictees. State v. Delvonte Philpotts, OSC No. 2019-1215. The point here is that things are in flux, but for now, nothing has changed with regards to HWWUD. The door is certainly open for vigorous litigation int his area, and I urge readers to do their part.

S.B. 215's relationship to R.C. 2923.16, "Improperly handling firearms in a motor vehicle," is… odd.

After S.B. 215, R.C. 2923.111(B) states, in pertinent part, that "[n]otwithstanding any other Revised Code section to the contrary . . . [t]he right of a person who is a qualifying adult to carry a concealed handgun . . . is the same right as is granted to a person who has been issued a concealed handgun license[.]" This means that the previous restriction against non-licensees carrying concealed handguns in their cars no longer obtains. What's a little odd here is that S.B. 215 reincorporates the previously existing prohibition in R.C. 2923.16(B) against "knowingly transport[ing] or hav[ing] a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle."

A few thoughts on this. First of all, there's really no question that non-licensees can concealed carry in their cars, at least so long as they otherwise meet the "qualifying adult" standard (over 21, not otherwise disabled). Hence, the most recent CCW Handbook states that "[y]ou may transport a loaded concealed handgun in a motor vehicle but are not permitted to do so if you are under the influence of drugs or alcohol." Note the last clause—nobody, licensed or not licensed, can carry a concealed weapon in their car while intoxicated. This remains a crime. Note as well that the preexisting requirements governing "long guns" (that is, rifles and shotguns) in motor vehicles remain the same as before S.B. 215. Finally, it is worth noting again that after Bruen, everything is open to challenge. Although this is not an article on Bruen, in brief practitioners should consider whether any given firearm crime has a long historical basis in this country. If not, it may well be unconstitutional under Bruen. Keep an eye out for opportunities to protect your clients by pushing the reasoning in Bruen to its logical ends. The U.S. Supreme Court left a lot of room to maneuver. ***Take advantage of it!***

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Navigating The Invisible Web:

How Litigators Can Effectively Challenge Historical Cell Phone Data

ASHLEY STEBBINS

Phone, wallet, keys – the trifecta check people perform daily before leaving the house. Our habits create a massive web that we unknowingly leave behind on a daily basis with each call, text, picture and use of an application on our phone. The map we leave behind is often the invisible footprint that law enforcement seeks to uncover when building a case. Phone, wallet, keys.

Litigating cases involving historical cell phone data analysis requires an understanding of how cell phone towers work and the general premise behind what information the historical cell phone data sets can provide. This knowledge will help attorneys develop a thorough cross examination for the witness presenting the results of the data analysis and mapping software product. When litigators have the right questions, they prevent such witnesses from overselling what the data means. Further, knowing the tests and analyses that can be done with tower data illuminates the fact that, without the additional testing, general direction is all that data tells us.

With each use of our cellphone, we leave behind a nugget of information – the specific cell phone tower utilized. Surprisingly, obtaining that information is relatively easy, even if you don't have the physical phone. If the only information sought is a log of historical cell phone tower data, possessing the actual phone is unnecessary. The tower information, commonly called historical cell phone data, tower data, or historical cell phone data, can be obtained with a simple subpoena the service provider. The subpoena must be addressed to the service provider, include the target phone number, a list of requested data and a date range. Depending on the requested information the service providert can provide a log of incoming/outgoing phone calls, record of text message logs (no content), record of phone numbers dialed, the direction the call hit off from the cell phone tower, whether the call used multiple towers and address of the tower(s) used. Historical cell phone tower information can also help develop calling patterns between parties, or movement patterns, which can link a subject to a group of people who are constantly seen in data sets. A lot of information can be gleaned from a simple subpoena to a service provider.

The next step for analyzing the historical cell phone data is entering the data into mapping software. There are a variety of programs that can do this. This map is then typically presented by the creator at trial, and this witness attempts to explain the pie shaped icons commonly seen on these maps as coverage areas of cell phone towers. These pie shaped icons are then used by the presenting party in relation to a specific location and date and time, in an attempt to link a particular party to an alleged crime. This entire presentation is riddled with evidentiary and objectionable information, and both the witness and their presentation need to be vigorously challenged to ensure the limitations of this data set are known to the jury. Litigators must aggressively fight this testimony and creatively challenge the use of mapping software that creates maps that can potentially be misleading to the jury and ripe with speculation.

Not only is it important to create a plan of attack for the witness who presents the data analysis and map, but the litigator must also think about challenging the software program the witness utilized to create a map of cell phone tower coverage area highlighting particular data sets.

To successfully mount an effective defense against potentially damning historical cell phone data mapping, litigators must understand the limitations of this data set. Historical cellphone data alone cannot identify with any precision a cell phone's location at any given time. Nor can it deliver the content of text messages. But most importantly, it cannot identify who is holding the phone at a precise time. These are limitations that litigators need to underscore to a fact finder. The bottom line here is that historical cell phone data can only provide a general area not a specific location of a phone at a particular time, and it is imperative the jury knows the limits as well.

Historical cell phone tower data is not GPS (global positioning system) locator. Obtaining GPS data does require the physical phone. If a phone has a GPS feature enabled on an application or in an application, a full extraction may be performed to elicit precise GPS coordinate data at a given time. The two types of data are often times confused by litigators, and it is important to know the difference between GPS and historical cell phone data Both provide information but the upward limits of each data analysis are very different. GPS data affords a much more precise location of a phone during a specific time. Historical cell phone data can only provide information about the phone's

general direction – which itself could be affected by a variety of factors. It is imperative that the jury know that beyond general direction, historical cell phone data cannot provide much more information without requisite testing that is often not performed. This is because the analysts get the cases months if not years after an alleged crime, and these tests to determine actual coverage of a particular tower need to be done close in time to an alleged crime to be accurate. The specific test to determine a precise actual measurement of a particular cell phone tower's coverage area is called a drive test. The drive test entails a person using special receivers and driving the area to determine the actual coverage area of a particular tower to get a measurement. This is another angle for litigators to challenge the software mapping and the map provided by an opposing party. It is essential that challenges surrounding definitive tower coverage data be challenged by a litigator because without the proper testing, there can be no definitive coverage area determined.

When a litigator wants to obtain historical cell phone data on their own as part of their investigation there are a few things to remember. The subpoena should request subscriber information, incoming and outgoing calls, incoming and outgoing text messages (SMS and MMS), and cell phone tower location from the date range in question. In responding to the subpoena, the provider will also send a key to decipher the columns of information and a set of data reflecting the subpoena request.

Once you received the data, it is easy to get overwhelmed. The data often times is delivered in a voluminous spreadsheet with a key to help decipher the multi column data set. A cell phone expert can readily seek out patterns in phone numbers, locations, or other points of interest. But if counsel knows what to look for, they can

quickly look at the data to get an overview of issues the client will face. This quick and dirty assessment requires figuring out if the data came in UTC (Coordinated Universal Time) and then determine the time zone the data fall in to complete the conversion. Annual time changes (e.g. daylight savings) complicates the analysis as well. The conversion can be completed by doing the conversions by hand, or finding conversion assistance online.

After making any necessary time conversions, litigators could find the relevant dates and times. A location search can be undertaken quickly by finding the data column commonly labeled "tower location." It will include a street address and latitude / longitude. This information is easily plotted using an online mapping program. The second data point to consider is the azimuth – the direction the antenna on the cell tower is facing. The data and key provided will help determine how to orient the azimuth. With that counsel will be able to determine the tower and direction the phone use came from for a quick analysis. Providing this information to an expert can verify your quick assessment, and the expert can use more sophisticated software to perform a thorough mapping of all the data provided from the subpoena.

It is important to note that historical cell phone records alone cannot tell the distance a particular cell phone tower covers in its range. This can only be determined with a "drive test" where the actual coverage of a single tower is mapped, as mentioned previously. Therefore, without this test, there is no way to definitively say what distance a cell phone tower covers. Litigators should be on the lookout for maps with closed circles, or definitive coverage areas, as these can be misleading and should be called into question by pre-trial motion practice. The drive test line of questioning is a great cross examination topic for the testifying analyst, because without this test the witness cannot state the exact area the tower covers. Once again, any definitive coverage area based solely on the historical cell phone data set needs to be challenged before the jury would see the proposed map. It is important to remember as a litigator that creative evidentiary challenges should focus on each stage of the map creation, from the data input to the software to any type of interpretation that the witness purported to complete on the data.

Cross- examination should stress that the call data records cannot say how far away a phone was from a tower. It can only provide a general direction, and without the proper testing the actual coverage area of a particular tower cannot be determined. No averages or estimations should be made, because towers can vary and other factors mentioned above could affect what tower was selected by a particular phone. Cross – examination should stress that the records do not say who was holding the phone at a particular time. Ensure the testimony stays within the boundaries of what the data can actually reveal.

Another key thing to look for in a map based off historical cell phone data provided in discovery, is whether or not numerous cell phone towers are displayed on the map. Often times the maps created depict a background display of cell phone towers, but the testifying witness needs to be thoroughly cross examined on whether or not they determined if any of those towers were in service or out of service during the time in question. Often times the maps depict every tower in an area, without any indication that a tower is in or out of service. For example, a tower that may be in closer proximity to your data point of interest may have been out of order, but still included on the map. This can be misleading to a juror. It can create confusion, especially if your set of alleged facts may have occurred in close proximity to where a cell phone "pinged" on a certain time and location. By asking these questions, litigants can call into question the inclusion of a variety of cell phone towers on a map during litigation and help call into question the accuracy of the map. Continuing to challenge these maps all stages of litigation is crucial to effective defense litigation.

It is important to note that the analysis of how cell phones work or how a cell phones connects to a cell phone tower requires an expert opinion. Often times the lines are blurred between the mapping of the historical cell phone data and the actual analysis of why a particular phone connected to a particular tower. Case law helps provide guidance on this issue, and provides litigants an outline of how to challenge a particular witness' testimony boundaries. A common line of questioning can go towards the notion that a cell phone does not always connect to the closest tower, but connects to the strongest clearest signal instead. Litigants should be alert to this analysis, as it ventures into expert territory. It is arguable that

any analysis performed on the data or any interpretation made by the testifying witness about any of the historical cell phone data could venture into expert testimony territory, and mounting a challenge to that is worth the pre trial battle to exclude it if possible.

If testimony veers into why a particular phone chose a particular tower, litigants should be prepared to cross examine on fundamental principles regarding cell phone towers, including principles of radio frequency engineering principles, radio frequency design, transmission systems, and the fact that historical cell phone tower data is retained to optimize profits not for law enforcement purposes . For example, a topographic maps will depict any geographic barriers that might obstruct a particular tower. Such barriers might also explain why a phone would use a particular tower – a building or geographic barrier could block a close tower and a tower further away with no barriers could be selected by a phone. By exploring this area in conjunction with the map of actual cell phone towers in service at the particular time in question, a litigator can thoroughly question an analyst's true ability to say why a particular tower was used over another. This would require an expert opinion, but it is important for litigants to know areas to explore on cross examination if a witness is deemed an expert or if the testimony touches this analysis.

While all these considerations are important when litigating cell phone data cases, sometimes testifying witnesses rarely account for them when they present historical call data records evidence. A witness presenting this evidence could easily testify that because the records show a phone was used a particular tower in an area, they were close to a certain address in question and thus a person committed an alleged crime. But that conclusion is riddled with holes that a proper cross-examination can highlight for the jury – thereby placing reasonable doubt into a fact finder's calculus.

Arguably interpreting historical cell phone data constitutes expert testimony, thus subjecting it to a plethora of evidentiary challenges. Mounting challenges to a witness who states they only used the mapping software and know nothing more, but then provide testimony about what certain data means is essential to limit the ability of these lay witnesses to attempt to inundate the jury with information outside their purview. Continuing the fight to exclude this testimony is difficult, but often times a case may hinge on the definitive shaded pie area icon on a cell phone map – and keeping out potentially misleading information is essential to a vigorous and effective defense.

Phone, wallet, keys. The invisible web everyone leaves behind is becoming increasingly more prevalent in the prosecution of cases. When presented with information that cell phone records link a client to a particular crime, counsel should get ready to roll their sleeves up and figure out how to attack the data head on. The use of experts in this area is wonderful, and they can help digest the volumes of data cases often come with. But counsel's own understanding of the issue, and a general feel for tower locations in relation to a particular crime scene, will help counsel to accurately display the evidence to the factfinder. It will also empower the litigator to feel comfortable cross-examining a state's witness regarding cell phone tower data and provide an effective and vigorous defense for a client.

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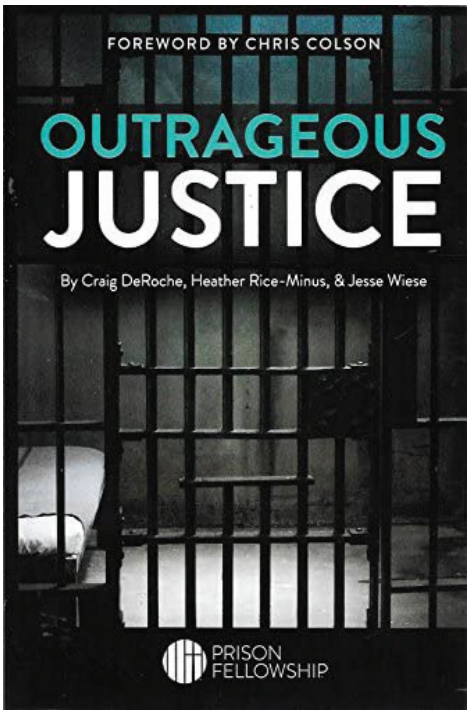
Book Review: OUTRAGEOUS JUSTICE



RON BAILEY

In 1974 Charles Colson plead guilty to a charge of obstruction of justice. He served 7 months in prison. In 1976 he established the Prison Fellowship.

A few years ago the Prison Fellowship published a book titled "Outrageous Justice," a very revealing book of facts related to the criminal justice system in America. A brief summary of what has become of the "land of the free" is listed on the back cover of the book. It states as follows:

"Today the 'Land of the Free' has become the world's leader in incarceration. Our criminal justice system, rife with injustice, is now in an outrageous state."

- 2.2 million Americans behind bars
- 2.7 million children with an incarcerated parent
- Approximately 70 million adults with a criminal record."

The book is broken down into 9 chapters:

1. Outrageous Justice
2. Justice that Respects: What is "Just Process" and Why Does it Matter?
3. Justice That Harms: How Did We Get Off Track?
4. Justice That Restores: Why Do We Punish Crime?
5. Justice That Fits: What is Proportional Punishment?
6. Justice That Listens: What Do Victims Need?
7. Justice That Transforms: Why Do We Need A Constructive Prison Culture?
8. Justice That Redeems: How Can We Unlock the 'Second Prison?'
9. Justice That Responds:

The Foreword of this book was written by Christian Colson, the son of Charles Colson. He ends the foreword with something, as criminal defense lawyers we are very aware of: "Yes, the challenges are many, but together we can bring about meaningful reform. Consider this your personal invitation to join the movement my dad started more than 40 years ago - the movement for justice that reforms."

I have about 25 copies of this book and I would be happy to send you one for free. If you want a copy, please email me at ron@bailey.pro.

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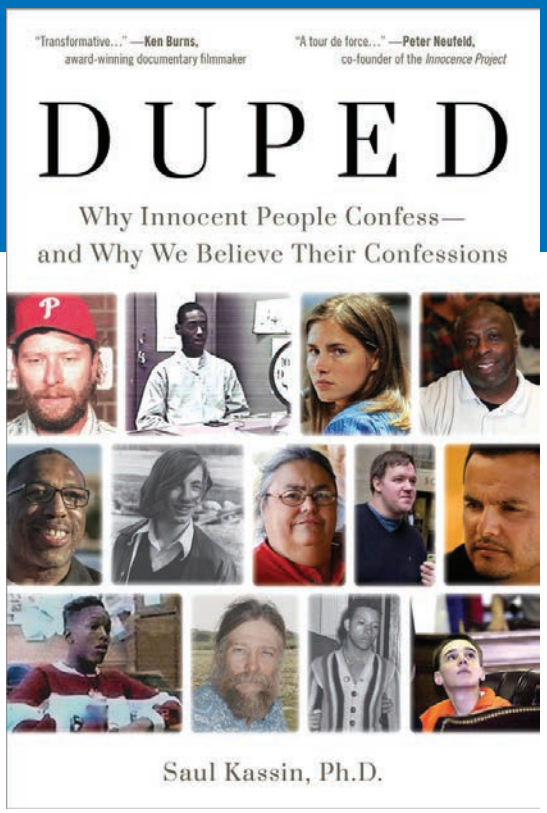
Book Review: DUPED: WHY INNOCENT PEOPLE CONFESS – AND WHY WE BELIEVE THEIR CONFESSIONS

JEFFREY M. GAMSO



The cop told him he'd failed the voice stress analyzer. Still, he wouldn't fess up to having stuck his finger in the baby's anus as the ER doctor said he must have. So the cop worked with him. *Come on*, he said, *surely when you were changing the diaper sometimes your hand slipped. I've done that. We've all done that.* Well, no, of course we haven't. I never did. I doubt the cop had either. And, as it happened, neither had the guy being interrogated. But the guy, maybe thinking it had happened, maybe confused, maybe just worn down, conceded he'd done it. Bingo!

Except, as I said, it didn't happen. The coroner, one who'd usually find whatever the police wanted found, didn't buy it. Nope, never happened. The guy confessed to a crime that didn't occur. He was one of the lucky ones; despite his confession, the state didn't charge him with rape.

That's one story Saul Kassin, doesn't tell in his new book, *Duped: Why Innocent People Confess – and Why We Believe Their Confessions.* But the story is true. The guy who admitted to raping a ten-month old girl who wasn't raped, by him or anyone else, before he killed her even though he didn't rape her and she wasn't raped was my client. And if you've been doing criminal defense for a while, there's a fair chance he could have been one of yours.

Kassin, Distinguished Professor of Psychology at John Jay College of Criminal Justice and Professor Emeritus at Williams College, lays out in detail how that happens. He gives example after example of how police get confessions out of innocent folk and of what happens next. Some of those you probably know about: Amanda Knox and the Central Park Five, for instance. Others are less well known but just as horrific. Some, when the truth comes to light, are exonerated. Others, well, sure the DNA wasn't his, but he confessed so what does a DNA exclusion prove, anyway? Tell it to the judge and the jury. And then to the guy in the next cell.

What we don't know, maybe, is just how it's all done. Famously, and all-too-commonly, there's the Reid method of interrogation. It is, Kassin tells us, a terrific method of getting guilty people to confess, and he explains in detail how it works. Alas, it's also a terrific method for getting innocent people to confess. Not surprisingly, the people who teach the Reid method deny this. Joseph Buckley, president of John E. Reid & Associates, was asked "if he was concerned that his methods might at times cause innocent people to confess. His reply: 'No, because we don't interrogate innocent people.'"
Huh?

See, the method begins not with the interrogation but with a friendly get-to-know-you during which the detective can tell with his spidey sense, by looking at eye movement and body language and the like, whether the suspect is guilty. If not, no interrogation. If so, game on.

It's not just the techniques of the Reid method, of course. Juveniles, those with mental illness, the intellectually disabled, the hungry, the sleep deprived, the desperate are all more likely to confess to what they didn't do. And then there are the trusting.

Consider Jeffrey Deskovic. He was 16, a sophomore in high school, when he confessed to a rape he didn't commit. The cops, he said, told him they'd sent DNA to be tested. Cool!"Believing in the criminal justice system and being fearful for myself, I told them what they wanted to hear. I thought it was all going to be OK in the end." Indeed, it was. Except the end didn't come until he'd spent some 16 years in prison.

How it happens that the innocent confess is only part of the story. What happens after is the rest. Kassin reports on studies of exonerations that show how the fact of a confession leads to tunnel vision and confirmation bias by investigators and prosecutors, and how knowledge of it leads to sloppy and biased (even if unconsciously) forensics. And, of course, since judges and juries believe confessions, they lead to false convictions – often by pleas. As Kassin says, "What wrongful convictions have shown is that the confession become the foundation in a house of cards."

Kassin's a good storyteller. He's also a serious academic who's served as an expert witness and knows many of the innocent confessors whose stories he tells. Along with their stories, he writes about the studies, many that he conducted, that show how those false confessions happen, why police are so successful at getting those confessions, and what happens as a consequence.

Duped wasn't primarily written for criminal defense lawyers. The outlines of what Kassin reports aren't new to us. Still, it's well worth the read. It provides a helpful reminder of just how broad the problem of innocence is. And much of the detail will likely be new – and useful as we file motions and briefs and cross examine. Kassin's real audience is the police and prosecutors and judges and jurors, and especially the policy makers who can change their attitudes, question their certainties, and adopt the reforms he urges. His clarity and knowledge could help convince them that this is a real problem. And that's a necessary step toward helping to eliminate it.

1. Is it ever not? Kassin doesn't say.
2. They are, Kassin writes in rare understatement, "brutally potent in court."

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