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The View From Here: OCDLA Comes of Age
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State v. Jennifer Maplethorpe
The Attorney as Juror
And More . . .

Quotable

“Unless someone like you cares a whole awful lot, nothing is going to get better. It’s not.”

— The Lorax by Dr. Seuss.
OCDLA Board Meetings

Friday, March 13, 2009
8:30 a.m. – Noon
Salem Conference Center

Friday, May 1, 2009
9:30 a.m. – 1:00 p.m.
Hallmark Resort, Newport

Public Defense Services Commission Meetings

Thursday, Jan. 22, 2009
9:00 a.m.
Marion County Courthouse, Salem

Thursday, March 12, 2009
Location TBA

Exact times and locations are TBA. For information about Public Defense Services Commission meetings contact Laura Anson, Office of Public Defense Services, (503) 378-2355, Laura.J.Anson@opds.state.or.us.

Calendars

CLE / EVENT CALENDAR

January 24, 2009
New Lawyers Seminar
World Trade Center, Portland

February 6–7, 2009
OCDLA Trial Skills College
University of Oregon Law School, Eugene

February 15–20, 2009
Spanish Language, Law and Diversity
Se Habla...La Paz Spanish Language School, La Paz, Baja, Mexico

March 5, 2009
Legislative Drive-In
The Capitol, Salem

March 6–7, 2009
The Magic of Motions: Before, After and Way After Trial
Salem Conference Center, Salem

April 17–18, 2009
Juvenile Law Seminar
Agate Beach Inn, Newport

May 1–2, 2009
Investigation and Trial Preparation Seminar
Hallmark Resort, Newport

June 18–20, 2009
Annual Conference / OCDLA 30th Anniversary
Seventh Mountain Resort, Bend

September 12–13, 2009
All Things Cannabis
Portland

October 15–16, 2009
Public Defense Management
Mt. Bachelor Village, Bend

October 16–17, 2009
Death Penalty Defense
Mt. Bachelor Village, Bend

December 4–5, 2009
Winter Conference
The Benson Hotel, Portland

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OCDLA would like to thank Tony Bornstein for providing us with our cover quotations each issue.
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OCDLA Comes of Age
by Greg Hazarabedian

2009 marks the 30th anniversary of OCDLA. Let's pause for a minute and reflect on where we've been and where we are now.

Thirty years ago a small group of Oregon public defenders came together and “founded” what was to become OCDLA. Bob Larson of Eugene and Jim Hennings of Portland were key players in establishing the organization. And with the help of a little seed money from the Law Enforcement Assistance Administration our first executive director, John Potter, was hired. Under the direction of a five-member board, the new association embarked on sponsoring it’s first “Annual Conference” and membership drive.

We enter our 30th year with over 1300 members, a far cry from the less than 30 of 30 years ago. We remain the largest voluntary organization of lawyers in Oregon, and our ranks include many nonlawyer criminal defense professional members as well.

We are far and away the premiere provider of CLEs for the criminal defense practitioner in Oregon. We will offer thirteen different educational opportunities in our 30th year, many more than just a few years ago. The fact that we are nationally known as a high-quality CLE provider is largely due to the dedicated members who have served on the Education Committee over the years. We have also been fortunate in having a series of excellent Education Committee Chairs, including Ryan Scott, Laurie Schertz, David McDonald, Michelle Burrows, Bob Thuemmel, Tony Bornstein, Lane Borg, and Ed Jones.


Our most difficult educational task is, of course, trying to educate our elected representatives in Salem. We have worked hard for many years to establish ourselves as a major player in “the building,” and are the “go to” group for many legislators with questions relating to criminal or juvenile law.

We began this effort in 1981 with a group of volunteer members to “lobby” issues in the legislature. Much of our time then was spent just tracking bills and staying abreast of the legislative process. This year we are fortunate enough to have Gail Meyer as our full-time substantive issues lobbyist on a 24-month contract – a first for OCDLA. We are also well represented by Mark Nelson as our fiscal issues lobbyist, helping us secure funding for public defense in Oregon.

While a lot has changed, we still rely on a core group of volunteers to review legislation and provide policy guidance – a special thanks to the hardworking members of the OCDLA Legislative Committee.

Your Board of Directors has decided to recognize OCDLA’s coming of age by leaving the youth of renting for the adulthood of property ownership. We are in the process of creating a permanent home for OCDLA in downtown Eugene. More on this later.

Congratulations to all of us as we enter OCDLA’s 30th anniversary year. Please make an extra effort to attend this year’s Annual Conference in Bend June 18–20—should be quite a party!
THANK YOU
OCDLA VOLUNTEERS

OCDLA extends a sincere thank you to all of the individuals who have donated their time and energy to help making the Association the success that it is. We couldn’t do it without you —

Board Members
Committee Chairs
Committee Members
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Newsletter Writers
Laminated Guide Editors
Amicus Curiae Brief Writers
Seminar Program Coordinators
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Seminar Speakers and Moderators

OCDLA thanks JAMES D. LANG, Portland, for making a contribution to the OCDLA membership scholarship fund.

Dive into the Pond!
Interested in key parts of State v. Ice?
Need an expert referral?
Researching former jeopardy?
OCDLA’s members’-only listserve.

See the article in the “Briefly” section.
Gail Meyer
Hired as OCDLA Substantive Issues Lobbyist

OCDLA is pleased to announce that Portland lawyer Gail Meyer has been hired as OCDLA’s lobbyist for the 2009 legislative session and subsequent interim session. Gail’s association with OCDLA goes back to 1981 and includes service on the Board, Education and Amicus committees. For the first time the OCDLA Board has committed the organization to full-time lobbyist representation for both regular and interim sessions.

Gail received her J.D. from Wayne State University and practiced law from 1978 to 2006. From 2007 to 2008 she was the Director of Special Projects for the Oregon Academy of Family Physicians.

Gail replaces long-time OCDLA advocate Ann Christian, who has accepted a position as Indigent Defense Director for Clark County, Washington.

Pond Listserv
Subscribe and Unsubscribe

To subscribe to the Pond listserv, visit http://list.ocdla.org/mailman/listinfo/ocdlapond and follow the directions. You may also unsubscribe at the same location by following the directions toward the bottom under the heading “OCDLAp Pond Subscribers.” There may be a delay in subscribing or resubscribing to the list as your email address will have to be verified by OCDLA for current membership status. If you would like to join the discussion on the Pond for the first time, send an email to info@ocdla.org with Subscribe or Unsubscribe in the subject line.

Be a Court Tour Guide

Would you like a good excuse to hang out in the courthouse and observe judges and other attorneys practice their craft? Can you spare one morning a month? Would you like to tell students about what goes on in the Multnomah County Courthouse and Justice Center? Then being a Classroom Law Project Court Tour Guide is perfect for you!

Court tours begin in early October each year. Nearly 6,000 students, grades 5–12, visit the courthouse annually. Guides are needed to show them around. Qualifications:

- willingness to work with 30–50 students, parent chaperones, and teachers
- one morning (8:30–noon) or one afternoon (12:15–3:00) a month
- basic knowledge of court system and willingness to learn more.

New guides will shadow experienced ones to help them feel comfortable before guiding tours on their own or in pairs. Guides are responsible for:

- contacting the teacher two weeks in advance of their tour (scheduling is done by Classroom Law Project) to go over details of the day
- calling judges’ chambers on the morning of the tour to update the docket
- doing a brief orientation with the school group in the Gus Solomon Courthouse (the former federal courthouse where Classroom Law Project’s office is located)
- leading the group to the Justice Center and then to the county courthouse, and answering questions along the way.

The Classroom Law Project provides training for guides plus the docket, a phone, a courtroom for orientation, and contact info for teachers.

Many court tour guides are former teachers or other civic-minded adults interested in sharing our judicial system with students. Being an attorney is not required though obviously very helpful. If you have friends who may be interested, please pass this along.

For more information or to sign up, contact Classroom Law Project (www.classroomlaw.org) at: office@classroomlaw.org, or 503-224-4424.

OCDLA welcomes submissions to Briefly. Email your announcement to jpotter@ocdla.org.
Daniel Allen York
1945–2008

by Mike Seidel

Oregon Criminal Defense Lawyers Association member Dan York of Prineville died in a car crash on Highway 97 between Bend and Redmond on Monday, December 1, 2008. He and his wife, Madge, were killed instantly in a head-on collision with another car that left its lane of travel.

Dan joined OCDLA in 1993. He retired from the practice of law in 2004. He was born April 8, 1945, in Providence, Rhode Island, but grew up in Wisconsin. He graduated from high school in Milwaukee. He joined the Marine Corps and served with honor for four years. He was honorably discharged in 1968.

Dan and Madge were married in May 1970 and had 38 years together. They had no children. Soon after their marriage they moved to Prineville, Oregon. Dan experienced life as a mill worker at the Clear Pine Mill. That experience gave him knowledge about his clients’ lives and struggles. Madge worked full time as a speech therapist at Cecil Sly Elementary School for 32 years before retirement.

In 1979 Dan went to the University of Oregon where he obtained a degree in psychology. He then attended Willamette University and obtained his law degree. He returned to Prineville and practiced law for a year before being hired in 1987 by Gary Thompson, then Crook County District Attorney.

Dan’s career as a deputy district attorney was marked by his compassion for victims and for defendants. He was reasonable in his plea offers, reasonable in sentencing, and he treated everybody with respect—especially those who didn’t deserve it. Dan was always pleasant and affable. He was scrupulously honest, and his word could be trusted without question.

In 1993 Dan left the Crook County District Attorney’s Office and went back to private practice. He represented those accused of crimes and people in juvenile court and practiced family law as well. His was a typical small-town practice where he saw his clients every day: in court, in the street, at their best and at their worst. He was respected by the judges, other attorneys and his clients. He was a regular attendee at OCDLA conferences.

After his retirement in 2004, Dan volunteered as a CASA and as Teen Court judge. He was active with the Crook County High School Mock Court Team and in the Knights of Columbus, and he was a member of the St. Thomas Catholic Church in Redmond.

Dan was a firearms expert and a knife collector. He testified in court and was qualified as an expert with a knife. He was unrelentingly proud of that fact. Dan was also an avid reader and a benefactor of the Crook County Library. Donations may be made in Dan’s memory to the Crook County Library in Prineville, Oregon (175 NW Meadow Lakes Dr., Prineville, OR, 97754).

Dan never argued a case before the Supreme Court. He never obtained a multimillion-dollar judgment. But he was a decent and honorable man. He touched those around him and he made a difference in his community. He will be missed.
The Attorney as Juror

By Joe Maier

As an attorney I have many ways to sharpen my skills and increase my knowledge. I can go to seminars, read publications on subjects written by wonderful attorneys, and interact on the “pond”. All of which can be accomplished by being a member of this great organization we call the Oregon Criminal Defense Lawyers Association. There, now I feel like the guy at the football game with ESPN painted on his chest trying to get the television shot.

So what kind of information or knowledge do I possess that I can pass on to people involved with criminal defense? There is probably nothing unique to my knowledge and skills that would be of any great use to the majority of readers. I am also a very busy and lazy man. So what do I have to offer is this: I learned a great deal about being a more effective attorney from my stint as a juror. I know some of you are thinking, Maier, you have hauled out this dog and pony show before, isn’t this just a rehash of your lecture at a regional CLE a few years ago? Yes it is, except this time it is in print. Did I mention I am a busy and lazy man?

Anyway, I had the enlightening experience of being a juror on a criminal case (assault, menacing) and on a multi-day civil case, which was effectively a criminal case because the alleged victim in a rape acquittal was now suing for money, à la O.J.. What I learned from this experience caused me to rethink some of my trial strategies.

One of the most startling things I learned was that I, as a juror, was more persuaded by my fellow jurors than by any of the attorneys. This was very humbling—because I am an attorney, and none of the attorneys who appeared in front of me were ineffective. My fellow jurors were just “regular” people, and I found myself being swayed by these people whom I had become acquainted with, who had seen and been through the same things that I had. For instance, in the rape case I truly entered the deliberation stage with a blank slate. After several hours of deliberation I found myself listening particularly to the women in regards to the credibility of the testimony we had heard. By that point in my relationship with my fellow jurors I trusted them and gave much credence to their perspectives. Something to keep in mind, particularly in lengthy trials where jurors can get pretty chummy with each other.

While I only sat on two trials till the end, I sat through many jury selections. Voir dire can be very boring and counter productive or it can make you and your case. An effective defense lawyer can and should take advantage of going first. It’s a huge advantage. Ask “fun” questions, questions that get people involved and interested. Ask provocative questions. Don’t be afraid of pushing the envelope. Let the sour puss prosecutor object to your fun questions, jurors will remember that when he asks his stupid prosecutor questions. Do not neglect reasonable doubt, innocent unless and until proven guilty, and burdens. They don’t have to be boring—get people involved and make it interesting. Remember, as a criminal defense attorney these are the biggest guns you have. Do not worry about offending those jurors that want off the jury—as long as they don’t make the panel. Chances are the rest of us jurors don’t like those whiners either. We all have lives and better places to be and respect the attorney who appreciates that. In that same vein, keep in mind the whole jury process is tedious, and even the most boring testimony is better than being sent back to the jury room for something. Try to limit the “send outs,” and if the jury is sent out try and make it look like the other lawyer’s fault.

Openings: The most important aspect of opening statement is to tell us, the jury, what you want us to do and why. Don’t just give the obligatory ending—“And at the end of this trial I will be asking you to find Mr. Doe not guilty”—without any explanation of the charges. It sounds hollow and like just an add-on. Jurors don’t know what “assault or menacing” means, or for that matter any criminal charge. Tell them. Spell out the charges and why they don’t fit. Don’t wait till closings to piece it together.

Jurors dig cross-examination. They all watch TV and movies and they expect much more than is generally delivered. Quite simply put, if you don’t
I, as a juror, was more persuaded by my fellow jurors than by any of the attorneys.

deliver on cross examination or at least pretend you did in closing argument, you lose. Don’t go easy on anyone you think is going to be likable to the jury and is going to kill your case (kids, grandmothers). We as jurors understand it can get ugly, and you can explain your role and the need for uncomfortable cross-examination in your closing. Cross-examination is where jurors see the chinks in someone’s story.

Exhibits: We jurors like those too, especially photos. We love to pass all the exhibits around and find things in them no one noticed. Like, “Look at this photo. Aren’t those men’s shoes, and isn’t that his brand of beer? Didn’t she say he just stopped by for a second?”

Closings: The most important part of closing argument to a juror is direction. We jurors are going to be sent out to deliberate after listening to the judge drone on about stuff that doesn’t sound remotely applicable to the case we just heard. Take your time and explain the charges and instructions. Give us something to write down. Pretend you are the teacher and you want us to take notes. We will. The first thing out of the mouth of one of my fellow jurors in the assault and menacing trial was, “Well, I can tell why they charged menacing, that guy would totally scare me.” Focus on some tidbit we might not have thought of—if it’s obvious, chances are we picked up on it and your argument will be apparent to us and maybe a little uninspiring.

We jurors love to be detectives and you need to give us something to put in our reasonable doubt quivers. Harp on reasonable doubt, make us feel guilty for finding Mr. Doe guilty. Create allies, remind us individually or as a group how we agreed in jury selection with what you’re telling us now. Be spirited—remember, it’s an argument. Tell stories—they are fun to listen to and it humanizes you and maybe even your client. If the jury likes your client and thinks he has suffered enough or is rehabilitated, it will greatly enhance your chances of an acquittal. Therefore, try to intertwine anything you can into the case that will bring out the positive aspects of your client and case.

Even though you’re an attorney you don’t have to act like one. Always try your case with the jury in mind. Ask the questions you know the jury wants to hear. Remember, the audience is your jury—entertain them and they may just return with a positive review. 

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What Goes Up Must Come Down: Appellate Review

By Rebecca Duncan

What goes up must come down. And when you’re talking about Oregon Court of Appeals decisions that have gone up to the Oregon Supreme Court for review, when they come down the law as we know it can change. In Oregon, any criminal defendant can appeal a trial court’s judgment against him to the Court of Appeals; the appeal is a matter of statutory right. However, the defendant is not so entitled with respect to the [Oregon] Supreme Court. Supreme court review is discretionary; the court allows review in only those cases of public importance that involve a significant issue of law, such as the interpretation of a constitutional or statutory provision.

Knowing what cases the OSC has decided to review will help you know what issues the court is interested in and may give you an idea about what areas of the law may either change or be solidified in the near future. If you’re relying on a COA opinion which supreme court has decided to review, you may want to make arguments in addition to those that the COA relied on. If, on the other hand, your opponent is relying on a COA decision the supreme court has decided to review, you will want to make the opposing argument, despite the COA decision, so that your client will be able to benefit (if not at trial, then on appeal) from any change in the law the supreme court makes.

So you know what’s gone up, here’s a summary of some of the Oregon Supreme Court cases relevant to criminal law that are pending as of December 15, 2008.

Confrontation/Right to Present a Defense

State v. Viranond (S056338)

Questions presented: Whether a detective who was present during trial may testify about whether the testimony of several state witnesses was consistent with what those witnesses told the detective before trial. Whether a trial court violates a defendant’s state and federal confrontation rights when it prevents him from presenting evidence showing that the state’s principal witness testified favorably for the state in order to curry favor and limit her own criminal culpability. Whether a trial court impedes a defendant’s ability to present his defense when it prohibits a defense witness from testifying to the actions of another witness that would have tended to show that the other witness, and defendant, was the person involved in the crime.

Firearms

State v. Briney (S055567)

Relevant to: Cases in which defendant is charged with a firearm offense, but the firearm cannot readily be made usable.

Question presented: What does the phrase “readily capable of use as a weapon” mean, as used in the definition of “firearm” in former ORS 166.210(2) (2003), renumbered as ORS 166.210(3)?

Kidnapping

State v. Parkins (S056356)

Question presented: Whether under ORS 163.225(1)(b), an alleged kidnapping victim is confined in a place “not likely to be found” when another person knows where the victim is during the pertinent time.

Continued on next page.

1 A complete list of pending cases is listed in the Advance Sheets. Many of the pending cases are being litigated by attorneys at the Office of Public Defense Services – Appellate Division. If you would like copies of the briefs in the cases, please contact me, rebecca.a.duncan@opds.state.or.us.
APPENDIX PERSPECTIVE: Continued from previous page.

State v. Walch (S055830)

**Question presented:** Whether moving a victim 15 feet in an attempt to place in trunk of car is movement sufficient to satisfy the asportation element of kidnapping in the first degree under ORS 163.235(1)(c).

Possession
State v. Casey (S055674)

**Relevant to:** Cases in which defendant is charged with possession of a firearm (or contraband) in his house or car, even though the firearm (or contraband) belongs to someone else.

**Question presented:** What is required to “possess” a firearm under ORS 161.015(9)?

Search and Seizure – General
State v. Heckathorne (S056073)

**Relevant to:** Cases in which the police seize and search a container, without a warrant, based on the fact that a police officer with special training believed that he knew what the contents of the container were.

**Questions presented:** Whether, for purposes of the plain-view exception to the warrant requirement, an opaque, closed container must announce its contents unequivocally and to the world at large, and not only to those with special expertise derived from training or experience, before the container may be opened and its contents confirmed or tested. Whether the determination that an opaque, closed container does or does not announce its contents must be made independent of the context in which the container was found.

State v. Luman (S056470)

**Relevant to:** Cases in which a private citizen tells the police that a closed container holds contraband, and the police then search the container without a warrant.

**Questions presented:** Do the legal principles which apply to containers that “announce their contents” also apply to closed containers when police are told by a private person what is in the container? Does a person have a cognizable privacy interest in the contents of a container under Article I, section 9, when a private person tells the police what the contents are? When the police lawfully seize an item, or when an item is given to them, must they obtain a warrant before opening it?

Search and Seizure – Terry Stops and Traffic Stops
State v. Kirkeby (S056237) and State v. Rodgers (S056239)

**Relevant to:** Cases in which an officer stops a driver for a traffic violation and asks questions unrelated to the reason for the stop, including questions about the presence of contraband and requests to search.

**Question presented:** Whether Article I, section 9, of the Oregon Constitution prohibits a police officer from pausing while conducting a traffic stop, either to pose a limited number of questions about circumstances observed during the stop or to ask for the driver’s consent to search, where the questions are not related to the traffic violation that was the basis for the stop, and the officer lacks reasonable suspicion to act based upon the officer’s observations during the stop.

**Consider:** Thus far, the Oregon Court of Appeals has held that Article I, section 9, of the Oregon Constitution prohibits a police officer from extending the duration of a stop, but does not prevent an officer from questioning a driver (or other stopped person) during an “unavoidable lull” in the stop. *Kirkeby* and *Rodgers* raise the issue of whether an officer can ever question a stopped person about unrelated matters, even during an unavoidable lull. The argument is that there is a “subject matter” limitation to traffic stops.

State v. Rider (S055827)

**Relevant to:** Cases in which defendant seeks to argue that he was stopped because the police ran a warrant check.

**Questions presented:** Whether a person is stopped for Article I, section 9, purposes when the person is aware that he is the subject of a warrant check. Whether an officer stops a person when the officer asks another office to “run” the person’s name “on the radio.”

**Consider:** The COA has recently issued a number of cases holding that a police officer stopped a defendant by running a records check. The state is arguing that running a records check is not necessarily a stop, and has been eliciting testimony from its officers to establish that the defendant was not aware of the records check. To establish a stop, put on evidence to secure a finding that your client was aware of the stop. Also, do not rely on the warrant check alone to establish the stop. Create a record about other circumstances of the encounter: the number of officers, the location of any police cars and use of police lights, any implicit or explicit obstruction of your client’s exit (car or room door), any indication that the officer was investigating a crime, any evidence that your client felt like he had to cooperate with the officer or remain where he was, any evidence that your client changed his location or movements in response to the officer’s directions or requests, etc.

Sexual Abuse Cases
State ex rel Juvenile Dep’t of Multnomah County v. S.P. (S056089)

**Relevant to:** Cases in which the state seeks to admit hearsay statements given during an examination at a child abuse assessment center, in this case, CARES.

**Question presented:** Whether a victim’s statements made during an assessment at CARES or a similar medical...
facility are testimonial, and what factors determine whether such statements are testimonial. Whether the purpose of the questioner or the declarant, or both, is most important when determining if the statements are testimonial.

Consider: If you have a case in which the state seeks to admit statements made during a CARES-type examination, rely on the existing opinions State v. Mack, State v. S.P, State v. Pitt, and State v. Norby to argue that such statements are testimonial. At the same time, develop the factual record in your case to establish the links between CARES and the government, particularly the police. Establish that the police rely on CARES to examine the alleged victim, i.e., that they are using CARES as an agent. Why didn’t the police interview the alleged victim? Are they trained to or do they rely on CARES to conduct the specialized training? Put on evidence about how CARES is funded, how they work with police, how officers observe the examinations and interviews and participate in the CARES team’s evaluation. Also establish how the alleged victim came to CARES, i.e., who was involved in the referral and how the police learned of the examination so that they could attend. Find out what DHS’s role was as well, as they are government actors, and it may prove to be important to establish that a statement was made to a government actor (or agent thereof) in order to establish that statements are testimonial.

Also establish how formal and structured the interview was, and what the child and his guardian were told about the interview. Was the child aware that the interview was important, that he should tell the truth, and that its purpose was to determine if he had been harmed and to help keep him safe? Was it explained to the child and guardian that the interview would or could be used in a prosecution? Establish that the CARES personnel were fully aware that the results of their questions were going to be available to the police.

State v. Parkins (S056356)

Relevant to: Sex abuse cases where the state seeks to introduce evidence to explain the alleged victim’s delay in reporting the abuse.

Question presented: Whether evidence pertaining to the phenomenon known as “delayed disclosure” in child sexual abuse cases is relevant under OEC 401 and satisfies the foundational requirements for admitting scientific evidence under OEC 702, State v. Brown, State v. Okey, and Daubert.

State v. Southard (S055463)

Relevant to: Cases in which the state seeks to introduce a diagnosis of sexual abuse absent any physical indications of abuse.

Questions presented: Whether a medical diagnosis of child sexual abuse based on a child’s claim of abuse and behavior, without confirming physical evidence, is scientifically valid under State v. Brown and State v. O’Key. Whether such a diagnosis is unfairly prejudicial. Whether such a diagnosis based on an evaluator’s detailed explanation as to why the child’s statement is truthful is an impermissible comment on the credibility of the alleged victim.

Sentencing
State v. Buck (S055721), State v. Rodriguez (S055720)

Relevant to: Cases in which defendant is convicted of a Measure 11 offense for conduct that is among the least serious for the crime of conviction and for Measure 11.

Questions presented: What are the criteria for determining whether a sentence would violate Article I, section 16, of the Oregon Constitution as applied to a particular criminal defendant? What methodology should an appellate court apply when reviewing a sentencing court’s determination that the imposition of a mandatory sentence would violate Article I, section 16, in a particular case? Should the court reconsider the standard of review for a motion for judgment of acquittal?

State v. Parkins (S056356)

Question presented: Whether separate convictions for first-degree sexual abuse should be merged when they involve a single act committed against a single victim but rest on different legal theories.

State v. White (S055672)

Questions presented: Whether a prior juvenile conviction should be included in the calculation of a defendant’s criminal history score. Whether a prior adjudication excludes eligibility for ORS 137.712’s exception to Measure 11. Whether two counts of robbery II based on the same conduct against a single victim should merge, when the two counts alleged that defendant represented that he was armed with a dangerous or deadly weapon (ORS 164.405(1)(a)) and that he was aided by another actually present (ORS 164.405(1)(b)).

Tampering with a Witness
State v. Bailey (S056152), State v. Berg (S056367)

Relevant to: Cases in which defendant is charged with tampering with a witness.

Question presented: Whether verbal threats, which are reasonably intended to deter an individual from reporting a crime, constitute tampering with a witness under ORS 162.285. Whether verbal threats made after a crime has been reported to police but before commencement of prosecution, which are reasonably intended to deter an individual from further cooperating with law enforcement, constitute tampering with a witness under ORS 162.285.

Consider: Despite the current Oregon Court of Appeals case law, continue to argue that tampering with a witness cannot occur before commencement of a prosecution.
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May You Live In Interesting Times

By The Honorable Linda Bergman

When I began as a legal assistant at the Multnomah County DA's office in 1972, there were two women attorneys, one of those was Kim Frankel, until Karl Haas came in and hired a group of women like Jean Maurer, Judy Snyder, Marilyn Curry. When I graduated from law school in 1974, I only applied two places, the district attorney's office and Multnomah Public defenders. Metro was only a few years old and didn't have any women yet on staff. Jim hired me, and I was soon joined by the likes of Lois Portnoy, Susan Mandiberg, Linda Eyerman, Julie Frantz—to name just a few of the women who then joined the office. In 1979 I was ready for a job change and David Slader called me and wanted to know if he could put my name in for an appointment to the district court. Vic Atiyeh was the Governor at that time, and, at least in Multnomah County, no public defender had ever been appointed to the bench. There were six other women who were judges at the time in the state at all levels. With help from people who understood the appointment process, I was appointed. I laughed when David called and asked if he could put my name in. I had...really truly...been considering a job as a waitress, and I probably could have supported my children as well doing that as I did when I was at the public defender's office, but instead I got appointed to the bench. The Governor's office at that time didn't do any interviews, and I often wondered if Vic Atiyeh knew that he had appointed a 34-year-old Democrat single mother public defender. And that launched my 27-year judicial career. I retired nearly two years ago, and was quite content not working, until Steve Houze called this spring and offered me a job. I wasn't looking for a job, but who could possibly have turned down the chance to again be part of the criminal defense bar, even if it was only for a short time as a placeholder while

Continued on next page.
Jim Hennings retired and before Lane Borg was hired. Again being a part of the firm I was so proud to have come from, seeing the dedication and enthusiasm of the lawyers who line up to make very little money, earn too little respect, and represent people so outside of their usual experience. Lawyers who, like all of you, will go on to being respected members of the larger Bar. I thank OCDLA for its recognition of my career and for this award, but even more for existing, and for offering the camaraderie, personal and legal support that you all need to do this work.

As I thought about this honor and these remarks, I realized how much I need to thank each one of you who practices criminal defense. As a judge, and as an individual, I’ve needed you. We talk about the critical role the defense plays in protecting constitutional rights and in testing the use of power by the government, but our society needs you for something different than that, something more than that. Since I became a judge in 1980, sentencing has radically changed. Judges used to have a real discretion to fashion a sentence that fit the individual standing next to you. It was an attempt to consider the past, the now and the future…and that’s gone. Now I can do an entire docket of sentencing and know nothing about each defendant except the grid box. Knowing that, I could do what I’m supposed to do—impose a presumptive sentence and call the next case—but for the fact there’s a defense attorney standing at the table. You remind me that I have an individual in front of me, who came from somewhere and isn’t really like anybody else. You remind me that we’re all shaped by forces outside our control, things we can’t be blamed for or take credit for. Some of us have just been luckier than others. And you keep arguing that people can change, and I believe that. But the people we all hear about so often are the ones who don’t. You restore hope. Hope that clients can change, hope that each of us can change, and that’s what our society seems to have forgotten, but that’s what sustains us in our work, that’s what sustains us in life as individuals. Society is indebted to you, I am proud to have been one of you, and I thank all of you for being here. Thank you.

Banquet Fundraising a Success

Although no auction was held at the Friday Night Banquet, following a short video clip of Senator Floyd Prozanski on the importance of participating in the legislative process, guests donated $8,350 in the Special Appeal made by OCDLA President and emcee Greg Hazarabedian. The donors are shown at right. OCDLA thanks the donors at the Benson banquet for their generosity.

So Who Won the Car?

And the winner of the SMART CAR is…Dan Bennett of Portland, congratulations! He bought his ticket from his representative on the board, Ryan O’Connor at OPDS, and this marks another year in the last several raffles in which the winning ticket has been sold by a board member (read: support your board member when they approach you with raffle tickets!). The 2008 SMART CAR raffle was a success for OCDLA’s fundraising efforts: over $6400 raised to support the 2009 legislative work with our new lobbyist, Gail Meyer. OCDLA’s Board of Directors and staff sold tickets right up until the drawing held at 8:00 p.m. on December 5, but major kudos to Board Member Tahra Sinks who sold over 60 tickets—way to go, Tahra! The total number of tickets sold was 711 of the 999 available, and OCDLA thanks everyone for their support.
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Rebecca Duncan refers to the Cat In the Hat during her talk entitled, “The Cat’s in the Hat, But What’s in His Head? Which Elements Require Which Mental States.”

Dawn Andrews, wearing a Cat In the Hat hat, emphasizes a point during “Oh, Say Can You Say Reporting Child Abuse,” which she co-presented with Michael Rees.

Carolyn Bys dedicated her presentation, “Hunches and Benches: Search and Seizure Appellate Update” to Dr. Seuss.

Dr. Richard Kolbell discussed testing and interviews in “Oh, the Thinks You Can Think! Evidence-Based Psychology: The Advantages of Testing Over Interviews.”

Peter Offenbecher closed the conference on Saturday with an ethics presentation that entertained with tv and movie clips.

Dr. Seuss Theme Inspires Winter Conference Speakers

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Ensuring Federal Review of Wrongful Convictions: The Exhaustion of Remedies Requirement

by Tony Bornstein

I.

A recent Ninth Circuit opinion illustrates the necessity to properly raise federal constitutional claims in the state courts. In *Castillo v. McFadden*, 399 F.3d 993 (9th Cir. 2005), Armando Castillo was on trial for second-degree murder and child abuse. The charges stemmed from an incident in which Castillo cared for his girlfriend’s two-year-old son. “The child was sick with flu-like [sic] symptoms and slept most of the day.” According to the prosecution, Castillo shook the child, and, in doing so, caused his death.

Castillo was tried by jury in…State Court…. The trial judge allowed the jury to view a videotape of the police interrogating Castillo that he argues was highly prejudicial. The videotape showed Castillo invoking his right to counsel and the interrogating detective making, according to Castillo, “numerous false and highly prejudicial misstatements of the evidence.” On the videotape…the detective asserted that the autopsy “scientifically proved” that only Castillo could have killed the two-year-old, and repeatedly accused Castillo of lying and causing the child’s death. Castillo repeatedly denied the detective’s accusations.

Outside the jury’s presence and before the videotape was shown, defense counsel argued that the court should exclude the videotape…. The trial judge said that he would hold a hearing to view the videotape and directed the attorneys not to mention it until after the hearing. He never held the promised hearing.

At trial, the prosecutor and defense counsel again argued whether the court should permit the videotape into evidence. Castillo objected…. The court overruled Castillo’s objection and allowed the videotape to be shown.

…After the prosecution showed the videotape and outside of the jury’s presence…the trial judge frankly confessed his misgivings about the decision to admit the videotape and expressed concern about its potentially prejudicial effect. “In my 19 years on the trial bench, I have never ever admitted a tape like that in evidence. I’m really concerned about it.” The court then opined that its decision would “never hold up if there is any appeal, never in a million years.

*Castillo v. McFadden*, 399 F.3d 993, 996–997 (9th Cir. 2005). Despite his own concern, the judge merely gave a “curative instruction” and the trial resumed. The jury convicted Castillo and he was sentenced to twenty years in an Arizona prison. The trial court denied his motion for a new trial and the appellate court affirmed.

Castillo then sought a writ of federal habeas corpus. He argued that the admission of the videotape deprived him of a fair trial in violation of the Fourteenth Amendment. Unfortunately, the Ninth Circuit never reached the merits. It denied relief on the ground that Castillo had not fairly presented his due process claim to the state courts. The court wrote:

Castillo argues that his appellate briefing exhausted his Fourteenth Amendment due process claim concerning the admission

Continued on next page.
of the videotape. At best, counsel’s briefing merely hinted at the existence of any federal due process claim. . . . Castillo presented the following question to the Arizona Court of Appeals:  

III. Whether the trial court committed fundamental error by allowing the jury to view highly prejudicial videotapes of Appellant’s interrogation and arrest and in failing to grant the subsequent motions for a new trial or the motion for reconsideration?

...Castillo’s statement of that issue and its corresponding argument heading were entirely silent as to any federal due process claim. Castillo neither mentioned in relation to that claim the source of his claimed right, viz., the Fourteenth Amendment Due Process Clause, nor asserted any federal due process violation.

Similarly, the argument section of Castillo’s briefing was all but devoid of any language presenting his federal due process argument to the Arizona Court of Appeals. . . . Nowhere in the argument concerning the videotape, until the penultimate sentence, did Castillo even refer to the U.S. Constitution. Finally, at the end of his argument, Castillo claimed that “[b]ecause this improper evidence was admitted, Appellant was denied a fair trial in violation of the United States and the Arizona Constitutions.”

That general appeal to a “fair trial” right, however, failed to exhaust Castillo’s claim. It did not reference, as we require, any specific provision of the U.S. Constitution on which he rested his claim. Neither did Castillo cite relevant state or federal cases that might have alerted the Arizona court to his claim.

* * *

The conclusion of Castillo’s brief did no better in fairly presenting a federal due process claim to the Arizona Court of Appeals. The brief’s parting sentence asserted that “[t]he gross violations of Appellant’s Fifth, Sixth, and Fourteenth Amendment rights requires [sic] that his convictions and sentences be reversed and that he be granted a new trial consistent with due process of law.” This conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory, was the first time Castillo’s brief used the words “due process” or “Fifth Amendment.”

* * *

Continued on next page.
Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.

Id. at 1000–01. Judge Hawkins dissented. He would have found the claim exhausted. He also believed that “Castillo has a viable claim that admission of the videotape violated his right to due process under the Fourteenth Amendment. . . . I would grant the writ and remand for a new trial. The evidence that was admitted was so prejudicial that despite the limiting instructions, the evidence still had a substantial and injurious effect or influence in determining the jury’s verdict, particularly considering there was scant other evidence presented of Castillo’s alleged guilt.” Id. at 1009–10.

II.

Castillo illustrates the client’s worst-case scenario: A federal claim that could secure relief is rejected on procedural grounds because of the failure to include specific language. Fortunately, it is relatively simple to avoid this grossly unjust outcome. To ensure federal habeas review, counsel should make the federal nature of the claim explicit. (1) Include a statement of the facts that entitle the petitioner to relief, and (2) cite the specific provision of the United States Constitution or pertinent federal constitutional case law in the argument section of the brief.

Put differently, to “fairly present” a federal claim to the state courts the petitioner has to alert the state courts to the fact that he is asserting a claim under the United States Constitution. It is important to be precise, as a “naked reference to ‘due process’ is insufficient to state a federal claim.” Shumway v. Payne, 223 F.3d 982, 987 (9th Cir. 2000).

Preferably, the federal constitutional argument will be explicitly raised in the trial court. Yet even if the federal argument was not made below it should be raised on appeal anyway.

The final step is to raise the same federal issue in the Petition for Review in the Oregon Supreme Court. To exhaust, it is unnecessary that the court grant review. However, under O’Sullivan v. Boerckel, 526 U.S. 838 (1999), the petitioner must present the claim to the state supreme court. 

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- **Defenses: Mental State** / Alex Bassos, Metropolitan Public Defenders Office, Portland
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State v. Jennifer Maplethorpe

By Susan Elizabeth Reese

Case: State v. Jennifer Maplethorpe
Defense Counsel: Tara Herivel
Trial Dates: November 18–26, 2008
Court: Washington County Circuit Court
Judge: The Hon. Nancy Campbell, Senior Judge
Prosecutor: Washington County Deputy District Attorney
Charges: Thirty-six counts of animal abuse and neglect, three additional counts of criminal mistreatment
Verdict: Not guilty on all animal counts; mistrial on the three other counts

Jennifer Maplethorpe, a respected mother of three children, moved into the Gaston home of her mother, Carolyn Ohlhauser, after her father died. Ms. Ohlhauser, a well-known Chihuahua breeder, had fallen into deep grief after losing her husband of 31 years. As her depression worsened, she lost control of the many tasks required in a dog-breeding business involving over 140 animals. As the business went out of control Ms. Maplethorpe did her best to help, but the tasks quickly grew overwhelming. She had her own three boys, all under six, to manage in the home. She also tried to help out with her 31-year-old autistic brother who shared the residence with Ms. Ohlhauser. In April, a tip led officers to the residence. After a search by consent and a subsequent warrant, law enforcement seized 160 animals on the premises. In addition to the Chihuahuas there were other dogs, as well as horses and chickens. Alleging three counts of criminal mistreatment involving the boys, authorities also took Ms. Maplethorpe’s sons into protective foster care. They were returned to her after about a month.

The prosecutor charged Ms. Ohlhauser with 60 counts of animal neglect and abuse. Ms. Maplethorpe faced 36 counts of animal abuse and the three charges involving her sons. Both women were charged with 36 counts in common and then separate indictments with separate allegations. All four cases were then consolidated for trial.

The state’s theory was that Ms. Maplethorpe was her mother’s “right-hand gal,” deeply involved in the breeding business and, as a result, liable for both the abuse and the neglect of the animals. The only offer was a plea to 15 counts of animal abuse and neglect as well as the three counts of criminal mistreatment. For the defendants, there was really no choice but a trial—seven months later.

In pretrial preparation, defense counsel Herivel subpoenaed voluminous records from the Humane Society. She was able to challenge the claims of medical treatment the animals were alleged to have needed. With the help of Dr. Ken Genova of the Tigard Animal Hospital, she established that often the treatment needs claimed did not match any treatment provided. Indeed, at times the case numbers did not even correspond to the animal described. As a result of these efforts to point out the disparities, the court granted judgments of acquittal on several counts during the trial. Other counts were dismissed because of the prosecutor’s clerical errors, and a total of 11 counts were removed from the jury’s consideration.

Witnesses at trial included doctors, veterinarians, animal control officers, police officers, representatives from the American Kennel Club, friends, family and puppy buyers. Often the state’s witnesses were also favorable to the defense.

All the officers testified that Ms. Maplethorpe had a separate apartment in the home, and that she cared for her children there. They admitted that she kept it clean. In addition, they acknowledged that she was not the dogs’ owner. The defense established that she would not have been her mother’s business partner if she’d wanted to because her husband was often away on business and her own family kept her too busy with her own concerns.

The state made no effort to rebut the defense contentions, but simply relied on the allegations of abuse and inflammatory photographs of injured animals.

After 7 trial days and 13 hours of deliberations, the jury returned beautiful words for Ms. Maplethorpe on all of the animal abuse counts. Unfortunately, the jury deadlocked on the three charges involving the children, so they remain for decision on another day.

Ms. Ohlhauser was convicted of about twenty counts and received a probationary sentence.

OCDLA Life Member Susan Elizabeth Reese practices law in Portland. She serves on OCDLA’s Education Committee.
OCDLA member Tara Herivel practices law in Hillsboro.
If you have an item for “Beautiful Words” or “Reese’s Pieces” submit it to Susan Elizabeth Reese at aquit@aol.com.
The Magic of Motions
Before, After and Way After Trial

March 6-7, 2009
Salem Conference Center

Friday, March 6

Noon  Registration
1:00  Proportionality Challenges Before and After Trial  Speaker TBA
2:00  Applying Capital Voir Dire Techniques to Non-Capital Cases  Matt Rubenstein, Portland
3:00  Break/Door Prizes
3:15  The New Property and Drug Crime Sentencing Rules  David McDonald, Portland
4:15  Adjourn for day

Saturday, March 7

8:30  Continental Breakfast (included)
9:00  Federal Search and Seizure Update  Lynne Morgan, Portland
10:00  Pre-Trial Challenges to the Enhancement Notice  Barry Engle, Portland
10:45  Break/Door Prizes
11:00  ICEBERG: When Oregon v. Ice meets State v. Hagberg  Ernest Lannet
Noon  Lunch (included)
1:00  Closing Arguments in Sentencing Proceedings  Matt Rubenstein
2:00  It Ain't Over Till the Final Judgment Sings: Resentencing Years Later Under ORS 138.083  Robin Jones
2:45  Break/Door Prizes
3:00  The New PCR Performance Requirements  Dennis Balske, Portland
3:45  Adjourn

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