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A New Year’s Resolution for You

Call Your Legislators

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Preview of 2011 Legislative Session

State v. Jermaine Anderson

And More

Quotable

“To the criminal defense lawyers of this nation: who fearlessly tread into hostile courtrooms, armed only with their briefcases and their native wit; who turn the Bill of Rights from an abstraction into a reality; who protect the rights and privileges that keep us a free people . . . ; and who valiantly attempt to stem the steady erosion of our civil rights. . . .”

OCDLA Board Meetings

Friday, April 15
9:00 a.m.
Hallmark Resort, Newport

Friday, June 17
4:00 p.m.
Seventh Mountain Resort, Bend

Public Defense Services Commission Meetings

Thursday, March 3
10:00 a.m. – 2:00 p.m.
OPDS Office
1175 Court Street, NE
Salem, OR

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

2011

New Lawyers Seminar
January 29
World Trade Center, Portland

Trial Skills College
February 4–5
University of Oregon Law School, Eugene

Spanish Language, Law, and Diversity
February 13–18
La Paz, Baja, Mexico

Forensic Evidence
CSI: Eugene
March 4–5
Valley River Inn, Eugene

Juvenile Law Seminar
April 15–16
Hallmark Resort, Newport

Investigation and Trial Preparation Seminar
April 29–30
Hallmark Resort, Newport

Annual Conference
June 16–18
Seventh Mountain Resort, Bend

Sex Crimes
September 16–17
Agate Beach Inn, Newport

Juvenile Law Training Academy
October 17–18
Valley River Inn, Eugene

Public Defense Management
October 20–21
Wildhorse Resort Casino, Pendleton

Death Penalty Defense
October 21–22
Wildhorse Resort Casino, Pendleton

Sunny Climate Seminar
November 7
Sheraton Maui Resort and Spa, Maui

Winter Conference
December 2–3
Benson Hotel, Portland

Board of Directors

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OCDLA thanks Tony Bornstein for providing us with cover quotations each issue.
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The views expressed by authors are not necessarily the views of OCDLA, nor is the printing
of advertising meant to imply an endorsement of those services or products.
Happy New Year 2011. 2010 was a great year for OCDLA. We made real progress in establishing our organization as a force to be reckoned with in Oregon politics. In August, our lobby team—Gail Meyer and Jennifer Williamson, with the leadership and savvy of John Potter—made the Oregon Crime Victims United look like amateurs in front of the Oregon Citizen’s Initiative Review Panel. We proved that our message on sentencing issues, when explained, is powerful and rational.

Out of that victory we have had a very promising start to this year’s legislative session. At the Benson Winter Conference House Speaker Dave Hunt, Senator Chip Shields and Chief Justice De Muniz made appearances. Senator Shields presented a request to the Board of Directors for our organization to join his coalition on affordable health care for individuals and small businesses with up to 50 employees. I was surprised to learn even MDI qualifies for a small-business designation. Senator Shields’ Reasonable Insurance Premium Coalition will be introducing three bills to empower small businesses in their negotiations with the insurance giants. The board will vote in January on whether to join the coalition. As the vast majority of us are either employees or owners of small businesses, or individual providers, it is in the best interest of the membership that we are part of this coalition. Further, being a part of a large and varied coalition helps us be at the table. And being at the table is a critical part of our voice being heard.

Representative Hunt spoke at the lunch during the conference about the upcoming legislative session. The OCDLA, and myself personally, are grateful for his willingness to come to us. Getting in front of a large group of defense attorneys would make the average person crumple up in a corner. The takeaway messages of his talk are important for this organization’s continued growth as a player in Oregon politics.

The first of his messages is to remember that Oregon legislators are working under the framework of “Run, Govern, Run.” As civically-minded lawyers, this should come as no surprise—the point being that if you want to be heard, you need to find a way to be involved. The sideline is exactly that: you are sidelined. If our organization is to be successful protecting the Public Defense Services Commission budget, passing legislation requiring evidence retention of notes, recordings and physical evidence, and establishing credibility on our biggest role in the legislature (to wit: communicating what are horrible ideas in other legislation), then members need to be active in the political process.

The second takeaway message dovetails off the first: politics are local. Representative Hunt explained that our best strategy is for members to reach out to legislators in their districts. Invite a legislator to coffee, or even better, to court. Offer your sage advice on criminal justice issues. Let them know you are an employer/employee of a small business in their community. Let them know you are intimately familiar with treatment options, mental health issues, policing activities, court procedures and county expenses revolving around criminal justice issues. Let them know that your door is always open to them and if they have questions, you should be a person they call if for no other reason than to provide a counterpoint to the information they receive from your local district attorney. It works. My representative is gracious enough to call me when a significant vote...
is coming on a criminal justice issue, or if I have sent him some thoughts on a particular bill, even though his main focus is in other policy arenas. Turns out he generally votes the other way, but at least he listens and knows where OCDLA stands when he makes that decision. Representative Hunt was exactly right when he said in-district meetings are the most effective way to get your legislator’s attention.

We are the voice for rationality in Oregon’s criminal justice system. We demand constitutional principles be adhered to and strengthened through statute. We are able through our experiences in this system to identify where Oregon can save resources. We know the bottom line costs to individuals, families, communities and the state from prosecutorial decisions and sentencing requirements. We can help our representatives make better decisions and that is the goal of our lobbying efforts.

So each of you has a role to play by being involved in this effort. In the sidebar you will see the names of senators and representatives that will be playing a major role in this year’s OCDLA legislative efforts. Because of the 30-30 split, the House of Representatives has yet to make committee assignments at the time of this article. We will blast you an email with those representatives once we know who will be on the Judiciary Committee and the Ways and Means subcommittee for Public Safety. If the legislator is from your district, call them and invite them to coffee. Then contact Gail or Jennifer and they will assist you with talking points for your meeting. Please let OCDLA know you are in contact with your legislator so we can have a unified message from the organization and constituents in this next session. The effort does not take a great deal of time, and pays out significant dividends.

My mentor and friend, Gordon Mallon, taught me at an early stage in my career that a criminal defense attorney needs to “pick up the easy meat with your eyes closed.” Make that your New Year’s Resolution—pick up the easy meat with your eyes closed. Do not let opportunities that cost you very little in terms of time and effort but which pay dividends pass you by. The effort of identifying yourself to a legislator, taking a moment out to have coffee with a new person, and talking about issues that are important to your professional life is “easy meat.” The act makes our organization stronger, makes our voice resonate louder, and makes for better public policy. A New Year’s Resolution you can meet.

Happy New Year everyone. Keep fighting for justice. My sincere wish is that 2011 is successful and profitable for each of you.
So What Am I, Chopped Liver?
State Law May Require Unanimous Juries

by Jesse Wm. Barton

This article is a follow-up to Steve Sady's article in the September/October 2010 edition of The Oregon Defense Attorney, about the federal constitutional claim against Oregon law that allows convictions based on non-unanimous juries. Or Const Art I, § 11; ORS 136.450(1). This article isn't about correcting anything Mr. Sady said (except where he identified me as a “State Appellate Defender”—I haven’t worked in that office in over eight years). Instead, it’s to explain that under the so-called “first things first” principle, attorneys should not overlook the state law–based claim against non-unanimous juries. See, e.g., State v. Kennedy, 295 Or 260, 265-68, 666 P2d 1316 (1983) (claims should be based on available state law before relying on federal law).

In this situation, complying with the first things isn’t just a matter of form. The strength of the federal argument might motivate the Oregon Supreme Court to apply state law to invalidate Oregon’s non-unanimous jury authority. The court might do that to avoid the chance of the United States Supreme Court invalidating a state constitutional provision (and leave that sort of embarrassment to the State of Louisiana).

The state law claim is grounded on the fact that Ballot Measure 302-03 (1934), which amended Article I, section 11, to authorize non-unanimous juries, also authorized and regulated jury waivers. Because the measure carried two constitutional amendments, it implicates the separate-vote requirement of Article XVII, section 1, of the Oregon Constitution. The “separate-vote requirement, which applies to constitutional amendments proposed by initiative, as well as those proposed by the legislature,” provides: “When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.” The requirement prohibits placing more than one “substantive” constitutional amendment before the voters in a single ballot measure, unless the multiple amendments are “closely related.”

Although the amendments address the same section of the same article and involve jury trials, they “involve separate constitutional rights, granted to [two] different groups of persons.” Moreover, those two different groups want polar opposite things, specifically:

1. Persons who wish to waive their right to jury trials as a means of obtaining a fair trial.
2. Persons who, for the same reason, wish to assert their right to jury trials.

The fact that the two amendments affected two groups of persons who want polar opposite things establishes that the amendments are not “closely related,” and therefore that the measure violates the separate-vote requirement. The measure “is void in its entirety.” Armatta, 327 Or at 285. The original version of Article I, section 11, is still in effect and requires unanimous verdicts. Because the original version requires unanimous verdicts, ORS 136.450(1) is invalid to the extent it authorizes non-unanimous guilty verdicts.

Cases such as State v. Cobb, 224 Or App 594, 198 P3d 978 (2008), reject this argument. There the court said, “Defendant’s argument has already been considered and rejected by the Supreme Court. State v. Osbourne, 153 Or 484, 486, 57 P2d 1083 (1936) (upholding 1934 amendment against Article XVII, section 1, challenge).”

Continued on next page

“...the strength of the federal argument might motivate the Oregon Supreme Court to apply the state law to invalidate Oregon’s non-unanimous jury authority.”
To be sure, Osbourne did reject a claim based on Article XVII, section 1, against the 1934 measure. The court grounded its decision on a puzzling aspect of the measure: In 1932 the electorate approved a legislatively referred ballot measure (coincidentally numbered 302-03), that inserted at the end of section 11 the exact same jury waiver language found in the 1934 voters’ pamphlet. Essentially the Osbourne court concluded that, notwithstanding the 1934 measure containing the amendment, because the voters approved the jury-waiver amendment in 1932 they did not vote on that amendment again in 1934.

But Osbourne overlooks the fact that if the people had defeated the 1934 measure, that defeat might have overturned the 1932 amendment authorizing jury waivers.\(^\text{10}\) If so, then the vote on the 1934 measure was a vote on both amendments.

Osbourne also does not account for the principle from the court’s subsequent post-Armatta decision in Lehman v. Bradbury. That principle establishes that what matters is not what would be the legal effect of the people’s vote; instead, what matters is what the people were told would be the legal effect of their vote.\(^\text{11}\)

In 1934 the people were told they were voting on a constitutional amendment authorizing jury waivers, as well as non-unanimous juries. Even if the defeat of the 1934 measure would not have overturned the 1932 amendment, from what they were told the people might have thought otherwise. Out of concern that a vote against the 1934 measure might overturn the 1932 amendment, the people may have “held their noses” and voted for the 1934 measure not because they supported its non-unanimous verdicts provision, but because they wanted to retain the 1932 amendment’s jury-waiver provision.

Similarly, the people might have been confused by the appearance of the jury-waiver provision on the 1934 ballot and thought that somehow the 1932 measure failed after all. Again, the people may have “held their noses” and voted for the 1934 measure not because they supported its non-unanimous verdicts provision, but because they wanted to adopt the jury-waiver provision.

Again, it does not matter what the voters approved in 1932. What matters is what the voters were told they were being asked to approve in 1934. In 1934, the voters were told that the jury-waiver provision “was a part of the amendment that was submitted to” them along with the non-unanimous juries provision.\(^\text{12}\) Therefore, “if the combination of those two [provisions] offended Article XVII, section 1, it is of no moment that” the jury-waiver provision was already on the books “for some other reason.”\(^\text{13}\)

The Lehman principle did not exist when the court decided Osbourne, and Osbourne cannot be reconciled with Lehman. Lehman necessarily overruled Osbourne sub silentio. Neither Osbourne, nor Cobb’s and Jones’s Osbourne-based decisions, are stare decisis.\(^\text{14}\) Trial courts are free to give Osbourne, Cobb, and Jones whatever deference they think the cases are entitled, up to and including no deference at all.\(^\text{15}\)

In sum, the 1934 measure was created in violation of Article XVII, section 1, so the measure “is void in its entirety.”\(^\text{16}\) The measure did not amend Article I, section 11, so the section still requires unanimous juries. To the extent ORS 136.450(1 authorizes non-unanimous guilty verdicts, it is unconstitutional and unenforceable.\(^\text{17}\)

Endnotes


\(^{2}\) Id. at 277.

\(^{3}\) Id. at 283

\(^{4}\) Defendants move to waive jury primarily to ensure fair trials in cases involving highly technical defenses, considerable pre-trial publicity, crimes of a “revolting nature,” defendants with lengthy criminal records, and cases that could evoke racial prejudice. See Carroll T. Bond, The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries, 11 Am Bar Assoc Jour 699, 702 (1925).


\(^{6}\) By violating the separate-vote requirement, the method of the measure’s enactment also violated “Article I, section 21, of the Oregon Constitution, [which] provides that no law shall be passed, ‘the taking effect of which shall be made to depend upon any authority except as provided in the Constitution.’” State v. Long, 315 Or 95, 99, 843 P2d 420 (1992). Laws adopted “in violation of Article I, section 21, of the Oregon Constitution … are void and of no effect.” Strunk v. PERB, 338 Or 145, 238, 108 P3d 1058 (2005). See also Armatta, 327 Or at 285.


\(^{8}\) See, e.g., State v. Baker, 328 Or 355, 364, 976 P2d 1132 (1999). Because the legislature may provide the accused broader protections than does the constitution, see, e.g., State v. Valdez, 277 Or 621 n 4, 561 P2d 1006 (1977), ORS 136.450(1) should be constitutional to the extent it authorizes non-unanimous acquittals.

\(^{9}\) Cobb, 224 Or App at 592 (citing State v. Jones, 223 Or App 611, 623 n 4, 196 P3d 97 (2008)).

\(^{10}\) Cf. OrS 174.090.

\(^{11}\) See Lehman, 333 Or at 243 n 8.

\(^{12}\) Lehman, 333 Or at 243 n 8.

\(^{13}\) Id.


\(^{15}\) See State v. Follett, 115 Or App 672, 677, 840 P2d 1298 (1992) (en banc) (De Muniz, J.), rev den, 317 Or 163 (1993) (lower courts are not bound by a Supreme Court decision that does not qualify as stare decisis, and which is irreconcilable with other Supreme Court decisions).

\(^{16}\) Armatta, 327 Or at 285. See also Strunk, 338 Or at 238; Long, 315 Or at 99.

\(^{17}\) See, e.g., Baker, 328 Or at 364.
Defense Initiated Victim Outreach
by Laura Rittall and Rita Lapp

To address a question many have asked—“What is the difference between DIVO and DA Victim Advocates?”—sometimes describing something as case specific as DIVO is easier when starting with what it is not.

DIVO does not provide access to victim resources

The DA victim advocate refers victims to resources available to them through the courts. This is not something a DIVO specialist would do. A DIVO specialist would refer victims back to the DA victim advocate for those resources.

DIVO does not advocate a particular agenda

DA victim advocates are really members of the prosecutorial team and often support the prosecutor’s aims at involving victims in their strategy for court appearance, testimony, and cooperation, and do not maintain a confidential relationship with the victims. DIVO specialists, on the other hand, strive to remain objective and provide victim survivors empowerment through access to information, without a hidden agenda and with the understanding that communication is confidential. While it is unavoidable that the defense team hopes a positive outcome can be obtained by using DIVO, it is imperative to the integrity of the process that the DIVO specialist maintain separation from that aim and that the defense team honor this provision of support without strings attached.

DIVO provides access, as a liaison, for the victim to the defense team

The underpinning of DIVO is the recognition that an inextricable relationship exists between the defendant and the victim survivors because of the harm that was caused and the allegations and/or evidence that the defendant played a part in causing that harm. The defense represents the defendant and, as such, also becomes a part of that relationship with the victim survivors. The prosecution and its victim advocates do not have direct access to the defendant and are not part of that relationship. They cannot act as any sort of liaison should the victim survivor choose to engage with that relationship, but a DIVO specialist can. DA victim advocates cannot relay information back and forth from the defense, make introductions, ease tensions and anxieties, or facilitate answers to questions that victims may have of the defense team.

When utilizing the DIVO process, the defense recognizes that a relationship exists between the defendant, his or her team and the victims, regardless of any defense claims. DIVO provides a safe means (for the defense team, the defendant and victim survivors) to engage that relationship and provide choices which can assist victim survivors through the criminal proceedings. It is a humane, restorative approach of recognizing the relationship and an attempt to prevent the continuation of harm caused by ignoring, stifling and leaving victims without a voice or a choice in addressing the defense. DIVO reduces the inherent adversarial energy in the courtroom and allows for simple respect. While it is not the intent of the DIVO specialist to ensure this, it is often the natural result.

Personal Anecdote

Panel member Rita Lapp was unable to give her presentation due to time constraints. Her comments follow.

“When utilizing the DIVO process, the defense recognizes that a relationship exists between the defendant ... and the victim, regardless of any defense claims.”
DIVO Continued from previous page.

“...My first exposure to DIVO was listening to Richard Barr and Pamela Leonard at a national mitigation conference. I was intrigued. Anything that could help our clients and reduce the adversarial temperature of the courtroom sounded like a grand idea.

On the first day of DIVO training we were introduced to the phrase ‘victim-centered, victim-led.’ We learned that DIVO was not intended to advocate for the accused. It was designed to act as a bridge connecting victim survivors to the defense team, and therefore practitioners must remain neutral to the death penalty.... We were told that individuals from a defense background might struggle in the DIVO role. The concern was that we might be tempted to use our access to victim survivors to advocate for the accused, or in other subtle ways betray a personal bias against the death penalty. Neutrality was the name of the game. A DIVO specialist must avoid any action that could be interpreted as a manipulative tactic on behalf of the defense, an obvious sticking point for many prosecutors. Leonard said there could be no such agenda, though she acknowledged that life verdicts are often the natural by-product of victim outreach, which fits comfortably within the DIVO guiding principles of restorative justice.

Forced to abandon my early misconceptions, I learned to view DIVO work through a different lens.... I have a much clearer understanding of the power of DIVO and am confident that the interview training I received has crossover application to mitigation. We spent considerable time developing and honing skills in the artful practice of interviewing trauma survivors.

Fresh from training I was fortunate that Steve Gorham and Steve Krasik gave me an opportunity to cut my DIVO teeth under the tutelage of veteran LaVarr McBride. It’s been a positive experience under ideal circumstances. It is also one of the reasons I appreciate the efforts of Laura Rittall and others to establish a DIVO training center here in our backyard. DIVO work can mean a lonely seat in the courtroom. Each case will be unique and require a creative and thoughtful approach. Based on my experience working with LaVarr, it is clear that having a network of colleagues to consult with will enhance our efforts toward improving the capital defense process – a win for both sides of the aisle.”

We plan to continue to share information with you about DIVO in future newsletters, so please feel free to send any questions to Laura Rittall at lrittallpi@gmail.com.

The Essential Reference Tool

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Keep Your Next Probation Revocation Hearing from Turning into the Star Chamber

By Zachary Lovett Mazer

With the recent Court of Appeals opinion in State v. Wibbens, __ Or App __, __ P3d __ (November 17, 2010), and the Oregon Supreme Court's grant of review in State v. Caldwell, 235 Or App 380, 231 P3d 1191, rev allowed, 349 Or 171 (2010), arguments concerning the constitutional implications of admitting hearsay evidence in probation revocation proceedings are beginning to gain traction in the Oregon appellate courts. To be more precise, Oregon courts are beginning to recognize that a right to confrontation exists in revocation hearings, albeit in a more limited form than in a criminal trial. This article examines the balancing test employed by the Wibbens court and the federal circuit courts and provides arguments and authority against the admission of hearsay in a revocation hearing.

It would be impossible to forecast every potential scenario in which this issue may arise in a revocation hearing. Suffice it to say, in the context of probation revocation hearings the issue is most likely to arise when the state's only witness is a probation officer who will testify to what other people have told him or her, or to information he or she has learned from other sources. That example encompasses, in all likelihood, a large percentage of revocation hearings. If the person who made the statement to the probation officer (the hearsay declarant) is not in court to testify, there is a potential Fourteenth Amendment due process problem that practitioners should evaluate based on the legal sources discussed below. The hearsay declarant may be another probation officer, a police officer, a fellow probationer, a treatment provider, a member of the public, or any combination thereof (for example, a probation officer may testify that a police officer told him about a citizen report which implicated the defendant in new criminal activity (two layers of hearsay)).

Multilayer hearsay problems are also common. For instance, in State v. Dahl, 139 Wash 2d 678, 990 P2d 396, 401 (Wash 1999), two young girls told a police officer that the defendant engaged in inappropriate conduct—the police officer told the defendant's probation officer, who told the defendant's treatment provider, who wrote it down in a report that the state offered as evidence in his revocation hearing (four layers of hearsay).

The principles discussed below can be applied to every level of hearsay, and a reliability gap at any level could prove significant (consider, for example, a police officer's affidavit that includes an unsworn verbal statement from an anonymous citizen—although the affidavit itself is sworn and may be reliable, the underlying level of hearsay is an anonymous and unsworn verbal allegation, the least reliable form of hearsay).

The source of law and application of the right to confrontation in revocation proceedings differs in several key respects from criminal trials, and practitioners grappling with confrontation issues in the revocation context should be careful to distinguish between the two in both written and oral arguments.

To begin, the right to confrontation in revocation proceedings, with one exception, currently stems entirely from federal law. The state legislature codified a right to confrontation in parole revocation hearings, ORS 144.343(4), but no other state law source provides for a right to confrontation in other types of revocation proceedings. Article I, section 11, of the Oregon Constitution, which contains the state constitutional confrontation clause, applies only in "criminal prosecutions." Although the Oregon Supreme Court has not squarely addressed the question whether a probation revocation hearing is a "criminal prosecution" within the meaning of Article I, section 11, prior cases strongly suggest that the court's answer would be "no." Finally, the hearsay rules in the Oregon Evidence Code do not apply,
APPELLATE PERSPECTIVE Continued from previous page.

at least not in probation revocation hearings (although, as discussed below, the hearsay rules do come into play in the constitutional analysis).^5^ Thus practitioners must turn to federal constitutional law for revocation hearings other than parole. The critical distinction practitioners must draw at this juncture is that the right to confrontation in revocation hearings does not derive from the Sixth Amendment and is entirely independent from right of confrontation at trial. Thus, in this context, confrontation is a procedural right that stems from the Fourteenth Amendment Due Process Clause.^7^

The second critical distinction is that, unlike the criminal trial confrontation right which is an absolute right (at least as to testimonial evidence), the Fourteenth Amendment confrontation right in revocation hearings is conditional. In a revocation hearing, the court may admit even testimonial out-of-court statements over a confrontation objection if there is good cause to do so.8

Most federal circuit courts, including the Ninth Circuit, have developed a balancing test for determining whether hearsay evidence is admissible absent an opportunity for confrontation.9 The balancing test weighs the defendant's interest in confrontation versus the state's showing of good cause to deny confrontation.10 In State v. Johnson, 221 Or App 394, 401, 404, 190 P3d 455, rev den, 345 Or 418 (2008), the Oregon Court of Appeals adopted the balancing test for purposes of evaluating due process confrontation issues, and the issue is now before the Oregon Supreme Court in Caldwell.11

The Johnson court reduced the balancing test to a four-factor test evaluating (1) the importance of the evidence to the court's finding, (2) the defendant's opportunity to refute the evidence, (3) the difficulty and expense of obtaining the witness (the "good cause" prong of the analysis), and (4) the traditional indicia of reliability borne by the evidence. 221 Or App at 401. Although arguments will have to be couched in the Johnson formulation of the test (or whatever test is articulated in Caldwell), practitioners should focus on the federal balancing test, which, as discussed below, ultimately requires the state to show good cause even if the hearsay evidence is reliable.

On the "defendant's interest in confrontation" side of the scale, primary considerations include the importance of the evidence to the court's ultimate finding (in other words, is the hearsay evidence the only evidence offered by the state in support of a particular allegation?) and the nature of the facts to be proven by the hearsay evidence (is the hearsay evidence offering personal observations, or only ministerial facts such as the presence or absence of a record?). Comito, 177 F3d at 1171.12

However, those factors are not exclusive. Id. at 1171 n 7. The federal circuit courts also consider traditional "indicia of reliability" in assessing the defendant's interest in confrontation. Hall, 419 F3d at 987–88. "Indicia of reliability" include whether the hearsay is corroborated,13 id. at 987-88, whether the hearsay declarant's statements are consistent over time, id., whether the hearsay was given under oath, US v. Lloyd, 566 F3d 341, 345 (3rd Cir 2009), whether the hearsay evidence is "replete with detail," id., whether the hearsay declarant had "an adversarial relationship with the accused," id., whether the hearsay evidence includes "multiple layers of hearsay," id., whether the hearsay is written or oral, Wibbens, __ Or App at __ (slip op at 6), and whether the hearsay satisfies a longstanding exception to the hearsay rule.14 Valdivia, 599 F3d at 990. The overarching principle at this end of the scale is that "the more subject to question the accuracy and reliability of the proffered evidence, the greater the [defendant's] interest in testing it by exercising his right to confrontation." Comito, 177 F3d at 1171.

The "good cause" prong of the balancing test is somewhat more amorphous, and varies with the circumstances. Comito, 177 F3d at 1172. Whether the strength of the reason is sufficient to outweigh a defendant's interests in confrontation depends "on the strength of the reason in relation to the significance of the [defendant's] right." Id. The Ninth Circuit acknowledges that "[i]n some instances, [the] mere inconvenience or expense [of calling the hearsay declarant to testify] may be enough[,]" but in other cases, "much more will be required." Id. In a somewhat circular fashion, some Ninth Circuit cases appear to consider "indicia of reliability" again in determining good cause.15 The burden to show good cause falls on the state, Wibbens, __ Or App at __ (slip op at 3), and several courts treat the state's failure to show good cause as "fatal" to the admission of the hearsay evidence.16

Given the attention this issue is receiving in the appellate courts, defense practitioners should consider whether there is a potentially meritorious due process issue any time the state seeks to introduce hearsay evidence at a revocation hearing. An objection citing the federal due process principles discussed above may keep that hearsay evidence out of the hearing, resulting in a positive outcome for our clients, or, at a minimum, it will preserve an issue for appeal. While ultimately a defendant in revocation proceedings does not have as strong of a confrontation right as a criminal defendant, there are still obstacles the state must overcome before it may offer hearsay evidence without making the declarant available for cross-examination. 17

Endnotes

1 Review of Caldwell is still pending in the Oregon Supreme Court, but the state has filed a motion to dismiss the appeal, alleging that the defendant has absconded from supervision. See ORAP 8.05(3). Should the court dismiss in Caldwell, the Court of Appeals cases discussed herein will remain the governing law on this issue.

2 Although the case law developing in the Oregon appellate courts concerns probation revocation hearings, the same legal principles apply in other types of revocation hearings as well, such as parole or post-prison

Continued on next page
supervision revocation. Other potential applications include diversion revocation, release agreement revocation, drug court revocation, conditional discharge revocation, and any other type of hearing where a factfinder must make an evidentiary determination as to whether an individual is in compliance with certain conditions and where adverse consequences may result from a finding of noncompliance. The remainder of this article simply references “revocation” proceedings generally to represent those various applications, unless a specific type of hearing is specified.

Indeed, in Wibbens the Court of Appeals reversed a probation revocation in a case where the probation officer testified that a county sheriff's deputy told him that the defendant smelled of alcohol and appeared intoxicated. __ Or App at __ (slip op at 1). In Caldwell, the case currently on review in the Oregon Supreme Court, a probation officer recited a written police report into the record for the purposes of proving two alleged probation violations.

See State ex rel Jav Dep't v. Rogers, 314 Or 114, 120, 836 P2d 127 (1992) (probation violation proceedings are not “criminal prosecutions” but are “closely analogous”); State v. Donovan, 305 Or 332, 335, 751 P2d 1109 (1988) (probation violation proceedings are “not easily categorized as either criminal or civil”).

US v. Hall, 419 F3d 980, 985-86 (9th Cir 2005).


Morrissey, 408 US at 488-89; Valdivia v. Schwarzeneggar, 599 F3d 984, 991 (9th Cir 2010).

Some federal and state courts apply an alternative test that focuses only on whether the hearsay evidence is reliable. See Reyes v. State, 868 NE 2d 438, 441 (Ind 2007) (describing different tests). The Oregon Court of Appeals currently applies the balancing approach, and petitioner on review in Caldwell is urging the Oregon Supreme Court to follow suit. Thus, this article focuses on the balancing test. Should the Oregon Supreme Court depart and adopt the minority test, cases such as Reyes, US v. Williams, 443 F3d 35, 45 (2nd Cir 2006), and US v. Kelley, 446 F3d 688, 692 (7th Cir 2006) illustrate the application of that standard. However, there must also be good cause to admit even non-testimonial hearsay in revocation proceedings. In short, the due process standards apply to all hearsay—whether or not it is testimonial.

US v. Comito, 177 F3d 1166, 1170 (9th Cir 1999).

See also US v. McCormick, 54 F3d 214, 222 (5th Cir 1995) (defendant has a personal interest in confronting a witness as to “scientific facts” such as the results of a lab test); Wibbens, __ Or App at __ (slip op at __) (noting that a statement based on the declarant’s sensory perception is “subject to errors of judgment or interpretation”).

Significantly, the Ninth Circuit holds that when the state seeks to corroborate hearsay with other hearsay, the corroborative hearsay must also be subject to the balancing test. Valdivia, 599 F3d at 991-92.

Generally speaking, statements that satisfy an exception to the hearsay rule are admissible in a trial because they are deemed more reliable than statements that do not satisfy an exception. Valdivia, 599 F3d at 990. However, that is not to say that a defendant has no interest in confrontation when hearsay evidence satisfies an exception: “Simply because hearsay evidence bears some indicia of reliability does not render it admissible.” Id. (quoting Hall, 419 F3d at 988). The state must still show good cause to deny confrontation. Id.

US v. Martin, 984 F2d 308 312-13 (9th Cir 1993). The Third Circuit, unlike the Ninth, holds that “indicia of reliability” go to the defendant's interest in confrontation and should not be considered in the “good cause” analysis. Lloyd, 566 F3d at 345-46. This separation makes for a cleaner and easier-to-apply analysis, and defense practitioners should push this approach. If the various “indicia of reliability” do go to good cause, then it is conceivably possible for the state to outweigh a defendant’s interest in confrontation merely by offering sufficiently reliable evidence, because that alone could constitute sufficient “good cause” even if confrontation could be provided at little or no expense to the state and the defendant has an otherwise strong interest in confrontation.

See US v. Zentgraf, 20 F3d 906, 910 (8th Cir 1994) (due process violation where the hearsay evidence sufficiently reliable, but no good cause for failing to produce the witness); People ex rel McCabe v. Walters, 62 NY 2d 317, 323, 456 NE 2d 342 (1984) (“Indeed, the hearing officer made no specific finding of good cause to dispense with the production of the witness whose statements comprised the only evidence offered by the State. In the absence of such a specific finding, as is required by Morrissey, a due process violation must be presumed”).
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As we move into the 2011 legislative session, the OCDLA Legislative Committee and the lobby team consisting of myself and Jennifer Williamson are poised and ready to go. The committee devoted the past year to creating a long-term strategy for key legislative reforms; as part of that plan, the committee identified four bills to submit in the 2011 session.

This is a fewer number of bills than we have submitted in past sessions—a conscious and strategic choice of the committee. It is inevitable that we will devote the majority of our lobby resources to playing defense on bills submitted by others; hence, OCDLA's bills must be neat, clean and targeted to advance our long-term goals.

Moreover, every lobby organization is paring down their expectations and agenda for the same principled reason: this session will be about money, and only about money. With a projected $3.5 billion budget shortfall, there will be no time, energy, nor tolerance for epic warfare over policies that do not net the state cost savings.

It is anticipated that the budget shortfall will work to our benefit on matters of policy...it is expensive, after all, to get tough on crime.

In the process, we will be vigilant to assure there is no sacrifice of the OPDS budget or attempt to extract cost-savings by reducing compensation for indigent representation. It is more difficult to project whether the shift in political power to an evenly split House and a bare Democratic majority in the Senate will promote centric, consensus-based policies or will be a formula for stasis, political trading or, worse, political chaos.

The four bills sponsored by OCDLA are:

**Preservation of public records relevant to criminal investigation:** This bill imposes a duty on peace officers to preserve public records that are relevant to a criminal investigation: e.g., their handwritten notes, reports, audio/video recordings, etc., and to timely disclose the existence of those records to the district attorney as soon as practicable. The bill keeps the district attorney in charge of the disclosure process to the defense, and keeps the court in control of sanctions in the event duties are not fulfilled. This bill is designed to assure that public records relevant to a criminal investigation are preserved (think: TriMet platform video recordings), and to promote the timely and accurate performance of the DA’s Brady function.

**Timely notice of enhancement facts:** This bill is a legislative fix to State v. Roberts, 231 Or App 263 (2009). It requires the state to provide notice of its intent to rely upon enhancement sentencing factors within 35 days from date of arraignment. The parties may mutually agree to extend the timeframe, or the court may lengthen the time upon a showing of good cause.

**Possession of user quantities of controlled substances:** This bill allows offenders who possess small user quantities of controlled substances to avoid the consequences of a felony conviction. Two alternative bill versions are being offered: the second promotes greater cost-savings. One version makes possession of user quantities of Schedule I drugs a Class C felony; the other makes possession of user quantities of Class I and II drugs a Class A misdemeanor if the offender has no prior controlled substance convictions.

**Codification of State v. Turner at resentencing hearings:** This bill is a legislative fix to State v. Partain, (Or, 2010). It would codify the rule in State v. Turner, 247 Or 301 (1967), and forbid exceeding the original sentence after a successful appeal.

We have advance knowledge of other bills that will be of great interest to us and which we will want to support: a bill creating a task force to study the potential impact of requiring unanimous jury verdicts in Oregon; a number of bills limiting the manner in which aggravated murders are determined to be death-eligible; bills modifying the...
definition of “previous conviction” and “prior conviction” for certain criminal statutes; bills affecting proceedings before the Psychiatric Security Review Board; a bill establishing earned time at 15% for both guideline and Measure 11 offenses; and a bill extending the delay in implementation of Measure 57.

We have bill packets ready for distribution. If you are interested in meeting with your representative or senator between now and when the session begins the first of February, please contact me at glmlobby@nwlink.com. It will be a conversation worth having, and your contribution will make a difference.

It is my pleasure and honor to represent OCDLA's interest in the legislature. Thank you for the opportunity.

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Political interest groups are known for advancing the personal interests of their members. Thus, the NRA fights to preserve and protect the constitutional right of Americans to keep and bear arms. The AMA and ADA seek to advance the economic interests of doctors and dentists. The NEA can be relied on to advance the interests of teachers.

Against this backdrop, I would like to commend an organization that actually works contrary to the private economic interests of its members, in the pursuit of justice.

The organization I refer to is the Oregon Criminal Defense Lawyers Association, an organization of attorneys and others who devote their career toward the defense of persons who are accused of crimes.

Of course, OCDLA provides direct service to its members in its sponsorship of high quality seminars and publication of excellent legal materials that are used by attorneys, investigators, paralegals and others who work in the criminal defense field. But that is not the focus of this article.

What is noteworthy about this organization is that in its public advocacy activities, OCDLA has been a reliable advocate for restraint in sentencing policy. OCDLA has established a presence at the Oregon Legislature which is respected by Democrats and Republicans alike. Whenever there are debates on issues pertaining to sentencing policy, OCDLA can be depended upon to oppose harsh mandatory minimum sentencing schemes that have served to drastically increase Oregon’s prison population.

Since 1995 with the advent of Ballot Measure 11, Oregon has embarked on a costly prison expansion spree. Hundreds of millions of dollars have been diverted from education and human services toward the incarceration of an ever expanding prison population. Even as violent crime has diminished, the wild expansion of our prisons has proceeded unabated. Judges have been stripped of discretion and prosecutors have been empowered to call the shots.

Only OCDLA has provided a voice of sanity. Only OCDLA has pointed out that our State is harmed, not helped, when we divert scarce resources away from rehabilitation and into incarceration. Only OCDLA has emphasized that by empowering prosecutors and stripping judges of discretion, the delicate balances of our legal system are thrown out of order.

If OCDLA cared only for improving the economic lot of its members, it would not advocate strenuously for restraint in sentencing policies. Indeed, harsh sentencing laws actually bring financial benefits to those who defend clients facing the most serious of crimes. By supporting OCDLA, criminal defense attorneys show that they are motivated not merely to advance their own narrow economic interests. Instead, our support of OCDLA demonstrates that we care about those among us who are less fortunate, and that we truly seek a criminal justice system that is characterized by fairness and sanity.

OCDLA Sustaining Member Mark Cogan practices law in Portland. This piece originally appeared on Mark Cogan’s website.

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Majie Dodge, Chris Hansen, Janmarie Dielschneider and Lori Cokoulis smile during a break from the CLE which featured outstanding speakers Amy Baggio, Kelly Scribner and Colette Tvedt.

Karen Stenard, June Sedarbaun and Greg Hazarabedian smile during the welcoming reception.
Jermaine Anderson began living a nightmare when he walked into the Yamhill County Sheriff's Office in July 2009 and tried to turn himself in, supposedly for an attempt to kill his wife. At the time, his wife of 17 years had left him and taken their two children – a teenage boy and an 11-year-old girl – back to Ohio, from which they had moved some years earlier.

Detective Rich Geist sat down with Mr. Anderson and carefully explained that he had not been arrested and that he had the right to remain silent. He explained the balance of Mr. Anderson’s rights and made sure that he understood them. Insisting he wanted to talk, Mr. Anderson then told Detective Geist that while he was living in Lafayette with his wife, Roberta, and their children he had made several attempts to kill her. He said he would turn on the natural gas in a decorative gas fireplace just enough to release potentially deadly fumes and then leave the home. He said his children were sometimes present and absent at other times. Mr. Anderson told the officer that he was now a changed man and he needed to get this off his chest. He also said he was not in his right mind at the time but had come to his senses, even though his wife had moved back to Ohio without ever reporting any problems.

Because police had no corroboration for Mr. Anderson's statements, they were uncertain whether he had a mental health problem and perhaps thought erroneously that he had committed a crime and needed to “confess” to detectives. Geist eventually reached Roberta Anderson by telephone. She not only supported what her husband had said but added details about other attempts he had made to harm her between February of 2007 and June of 2008. She told Geist that she is deathly allergic to pepper; if she eats it, she claimed, her tongue could swell enough to cut off her breathing. She alleged that her husband admitted putting pepper on her food without her knowing it. She thought he might have “done something” to her car at one point. She added that he left “objects on the stairs” trying to trip her. Finally, she said he told her he would hide some of the medicines she needs on a daily basis.

Geist asked Roberta if she would agree to make a pretext telephone call to her husband, confronting him about his admissions. She consented, and police recorded her call. During that conversation, Jermaine Anderson said that he hoped to reunite with her. He said he had made some mistakes but was a changed person. When his wife asked him if he had turned on the gas in their home to try to kill her, he said he had “just lost it,” but averred that he had changed and would never do anything like that again.

In September, 2009, Mr. Anderson was indicted by a grand jury for attempted murder and the additional charges. He was arrested; when he was arraigned, he told the court that he had admitted to “all these things.”

At the outset, Mr. Anderson’s many statements to detectives seemed to guarantee a conviction. As Mr. Coran and his investigator, Mr. Mellow, dug more deeply into the case, however, they learned that things were certainly not as they appeared.

The Andersons had been married for 17 years, much of it stormy because of transgressions Jermaine had committed early in the relationship. When they lived in Ohio, Roberta became obsessed with a belief that her husband would again betray her. Her paranoia grew beyond worries about infidelity and into a certainty that he
would try to kill her. She refused to believe anything positive about him; try as he might, nothing he did could please her.

The couple moved from Ohio to Oregon, living in Sherwood for a time and then spending five years in Lafayette [where officers thought the crimes had occurred] before Roberta took the children and moved back to Ohio. All this time, Jermaine kept loving her and trying to win her back. Roberta was adamant in her obsession. She hounded and berated him, insisting, “You need to go to the police and admit it.” Mr. Anderson learned that his young son was so distraught – far away from his father in Ohio – that he tried to kill himself by throwing himself out of a moving vehicle. Finally, Mr. Anderson broke. Certain that he had to do something to win back his wife, he made the trip to the sheriff’s office.

At trial with no physical evidence, the state relied on Jermaine’s admissions and Roberta’s statements. The prosecutor argued, simply, that because Mr. Anderson had the “opportunity” to do the things with which he was charged, he must be guilty.

Mr. Anderson testified in his own defense, convincingly explaining that he had not done the things he told the police. He was merely making a desperate attempt to follow his wife’s instructions in a vain hope to reunite with her and restore his family. In what his attorney described as a convincing, sincere manner, he tearfully said he still loved his wife, but in her eyes he was incapable of doing anything right.

Mrs. Anderson had made several trips to doctors, including one visit three days after the alleged “gas poisoning.” She had also sought counseling, and defense counsel secured those records. As a result, defense counsel Coran offered the testimony of a doctor who said Mrs. Anderson showed no signs of poisoning or any other injury from natural gas. She was described as suffering from nothing except “anxiety driven symptoms,” and her therapist noted that she was susceptible to a “somatotropic” disorder.

Mr. Mallow found a representative from the gas company who also testified. He explained that the design of the gas fireplace made it incapable of emitting enough gas to do any harm.

After a trial that lasted a week and a half, the jury awarded Mr. Anderson Beautiful Words on all counts.1 Jermaine Anderson was free after spending over a year of his life in jail for nothing more than a misguided and desperate effort to win back his wife.

1 After receiving the verdict, the shocked trial judge told Mr. Anderson that he had "gotten away with attempted murder."
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<td>Olcott Thompson</td>
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<td></td>
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<td>Forrest Rieke</td>
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<tr>
<td>$101–$300</td>
<td>Katherine Berger</td>
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<td></td>
<td>Rhonda Coats</td>
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<td>David McDonald</td>
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<td>James Rice</td>
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<td>Forrest Rieke</td>
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<tr>
<td>$26–$100</td>
<td>Aller, Morrison, Robertson, P.C.</td>
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<tr>
<td></td>
<td>Laurie Bender</td>
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<tr>
<td>$10,000</td>
<td>Chris and Suzanna Hansen</td>
</tr>
<tr>
<td>$500 or Greater</td>
<td>Hugh Duvall</td>
</tr>
<tr>
<td>$301–$499</td>
<td>Phillip Margolin</td>
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<td>Katherine Berger</td>
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<td>Aller, Morrison, Robertson, P.C.</td>
</tr>
<tr>
<td></td>
<td>Laurie Bender</td>
</tr>
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</table>

**Scholarship Fund Donors**

<table>
<thead>
<tr>
<th>Category</th>
<th>Donors</th>
</tr>
</thead>
<tbody>
<tr>
<td>$250 or Greater</td>
<td>Joe Maier</td>
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<tr>
<td>$1000</td>
<td>Ann Christian</td>
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<td></td>
<td>James Hennings</td>
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<tr>
<td>$10,000</td>
<td>Chris and Suzanna Hansen</td>
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<td>$250</td>
<td>Joe Maier</td>
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**Building Fund Donors**

<table>
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<tr>
<td>$101–$249</td>
<td>Katherine Berger</td>
</tr>
<tr>
<td></td>
<td>A portion of this donation is made on behalf of Greg Hazarabedian and</td>
</tr>
<tr>
<td></td>
<td>June Sedarbaun, in celebration of their new marriage.</td>
</tr>
<tr>
<td>Up to $100</td>
<td>Janet Boytano</td>
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<td></td>
<td>James Lang</td>
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<tr>
<td></td>
<td>John Tyner</td>
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<td></td>
<td>Brian Zanotelli</td>
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**General Fund Donors**

<table>
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<tr>
<td>$250 or Greater</td>
<td>Kevin Hashizume</td>
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<tr>
<td>$1000</td>
<td>Ann Christian</td>
</tr>
<tr>
<td></td>
<td>James Hennings</td>
</tr>
</tbody>
</table>
Legislative Advocacy Fund Donors

$750 or Greater
Janet Hoffman
David McDonald

$500
James Hennings
Duane McCabe
Shaun McCrea
John Neidig
John Powers

$350
Gordon Mallon
John Potter

$250
Alyssa R. Bartholomew
Kara L. Beus
Peter De Muniz
Laura Graser
Ronald H. Hoevet
Kenneth Lerner
Evelyn A. Oldenkamp
Nicolas Ortiz
Robert S. Raschio

$101–$200
Kelly W. Ravassipour
Ross M. Shepard
Steven J. Sherlag
Ingrid Swenson
Anthony Bornstein
Elizabeth N. Wakefield
Deborah K. Cumming
Michael P. Bertholf
Meghan S. Bishop
Daniel M. Carroll
Mike De Muniz
Jeffrey E. Ellis
Peter J. Gorn
Mark A. Heslinga
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Julie A. Krull
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