Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble.”

— United States v. Reilly, 76 F3d 1271, 1280 (2d Cir. 1996)
Calendars

**EVENTS, MEETINGS, & CLE**

### 2012

**New Lawyers Seminar**
**January 28**
World Trade Center, Portland

**Trial Skills College**
**February 3-4**
University of Oregon Law School, Eugene

**Investigator’s Training**
**March 9**
Oregon Garden, Silverton

**DUII Defense Seminar: Science, Doubt and Success Plus — a half-day Trial Practice Skills Workshop**
**March 9-10**
Oregon Garden, Silverton

**Juvenile Law Seminar**
**April 20-21**
Hallmark Resort, Newport

**PowerPoint Seminar**
**April 27-28**
Portland, Location TBA

**Annual Conference**
**June 14-16**
Seventh Mountain Resort, Bend

**September Seminar**
**September 14-15**
Agate Beach Inn, Newport

**Juvenile Law Training Academy**
**October 15-16**
Valley River Inn, Eugene

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**BOARD MEETINGS**

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Visit ocdla.org for a complete calendar of meetings.

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**PUBLIC DEFENSE SERVICES COMMISSION**

**Thursday, January 26**
Retreat
Location: TBA

**Thursday, March 22**
10:00 am –3:00 pm
Location: OPDS Office, 1175 Court Street, NE, Salem

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**Board Members**

**President**: Robert S. Raschio | District 1, The Dalles  
**Vice President**: John B. Lamborn | At-Large, Burns  
**Secretary**: Karen M. Stenard | District 2, Eugene  
**Dave Audet** | District 4, Portland  
**C. Lane Borg** | Metropolitan Public Defenders Office, Portland  
**Tony Bornstein** | Federal Public Defenders Office, Portland  
**Marie B. Desmond** | Public Defender Services of Lane Cty, Eugene  
**Megan L. Jacquot** | District 3, Coos Bay  
**Eric R. Johansen** | Office of Public Defense Services, Salem  
**Gordon Mallon** | District 6, Silverton  
**David T. McDonald** | District 5, Portland  
**Kelly Ravassipour** | Southern Oregon Public Defender, Inc., Medford  
**Brook Reinhard** | Umpqua Valley Public Defender, Roseburg  
**Keith Rogers** | Multnomah Defenders, Portland

Visit ocdla.org for a map of board districts.
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OCDLA thanks Tony Bornstein for providing us with cover quotations each issue.

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The View From Here

Provisional Missions

by Rob Raschio

“To champion justice, to promote individual rights and to support the legal defense community through education and advocacy.”

Our mission. Well, our provisional mission. The board decided at the Winter Conference—after a two-meeting debate on what our mission statement should be as an organization—to provisionally adopt the language quoted above. The discussion was led by Lane Borg. Lane did a great job of getting the board to think about what the OCDLA means, what principles should guide us in the future, and how to distill those principles into our educational and legislative efforts.

To Champion Justice

Missionstatements.com (that’s right, a mission statement dot com) states that a mission statement for a non-profit “summarizes the good that the organization hopes to bring to the world.” The question for the board, and to you as a member, is: what is the good we bring to the world?

Justice. Yes, we strive for justice for our clients every day. Certainly justice is a loaded concept that carries with it a number of connotations. Our board struggled with the phrase “to champion justice.” When I typed in the phrase “champion justice” on the web the first hit I got was government is good—government is the champion of justice. However, from the debate on the board I heard the general sense that we as defenders of liberty are dedicated to justice. We are dedicated to being the weight on the scales of justice balancing the individual against the mighty weight of the state. Without us, the criminal defense attorneys, there can be no justice.

Think about it, today, December 14, 2011, Marc Brown of the state public defenders office won State v. Moore, the court of appeals adhered to and readopted its opinion in Machuca stating that any “consent” after reading the detailed threats in the implied consent form is not consent at all but coerced evidence by the state. If exigency cannot be proven, then police must get a warrant. Drug recognition experts will likely not be able to articulate the exigency in most cases. The just result prevails again. Obtain a warrant. The Fourth Amendment and Article I, section 9, require it, and it is the best practice. Marc stands as an example of our function protecting justice. Justice requires that an individual not be coerced into giving evidence against their interest unless the Constitution is adhered to.

The OCDLA continues to educate its members through continuing legal education, publications, the Pond listserv and now the Library of Defense. We continue to focus on the most current status of the law and how to create the very best defense for an individual charged with crimes. Additionally, our legislative agenda centers around procedural fairness in the courtroom core and fundamental to justice.

To Promote Individual Rights

OCDLA demonstrates our role in promoting an individual’s rights to be free of government interference by the protections guaranteed by the Bill of Rights and the Oregon Constitution through the same activities as stated above. We, along with a short list of other organizations in Oregon, focus our efforts promoting individual liberties.

To Support the Legal Defense Community Through Education and Advocacy

The clearest portion of the mission statement to me, as an individual board member, is the third prong of our mission statement: to support the legal defense community through education and advocacy. Obviously, with numerous CLEs and the Pond, this prong is core to what the OCDLA is.

Also clear is the Winter Conference at the Benson (which was fantastic this year from start to finish), the Annual Conference in Bend, and all other CLEs are times for us to come together as a community. To meet with each other, to trade war stories, to commiserate over cases gone wrong, to learn new ideas and approaches, and to share a meal or just a smile. To not feel the need to explain what we do so much as how we do it. Our community is

Continued on next page

“Without us, the criminal defense attorneys, there can be no justice.”

OCDLA Board President Rob Raschio is with Morris Olson Smith Starns Raschio in The Dalles. He serves on the Legislative and PAC committees.
Securing the Future

The board has been working very hard all year to secure the OCDLA's future. As you know, we have been creating a new online community for you in the form of the Library of Defense. The board saw a mockup of the site in December. I will brag for us by saying it is amazing. Alex Bassos and the team brought together by John Potter have done a fantastic job of creating the website. The formal roll-out is at the end of January. Watch for the announcement. The site alone will be worth the price of membership. Remember, the Library of Defense needs editors and writers to maintain excellence. Alex can do a lot, but he can't do it all. Volunteer.

Our new Legislative Committee is formed, see sidebar. Remember, each member needs other individuals to help them research and write position papers and remain on top of the current law. Those who volunteered will be contacted soon by those on the committee. If you are interested, feel free to contact the listed members about assisting them in their work. There was an amazing show of support for our legislative efforts. The board is excited to see how this new committee will work.

February is around the corner, have you had coffee with your legislator yet? I have, and it went very well. There are tools available to you through PDSC to help you with that part of your conversation.

My partner John A. Olson has been appointed by Governor Kitzhaber to replace Judge Don Hull here in the Seventh Judicial District. John is a fine trial advocate, compassionate counselor and a deeply intelligent man. I am both elated for him and sad for the loss to my practice. John and I tried great cases together. Some chemistry is unexplainable and irreplaceable. If I keep going I might make it sound like he's dead, which he isn't. Just "elevated."

So, there is a job opening in lovely The Dalles/Hood River area working with my office led by Jack Morris, former OCDLA president. Great place to live and work. Check out the OCDLA website (select Jobs from the menu) for more information about the application process.

Happy 2012 everyone. The ongoing commitment you have to your work and this organization is inspired. Stay involved. My sincere wish is 2012 is successful and profitable for each of you.

---

OCDLA Legislative Committee

Co-Chair: Robert Homan, Eugene, homan@lanepds.org
Co-Chair: Katherine Berger, Portland, k.o.berger@comcast.net
Board Liaison: Rob Raschio, The Dalles, rraschio@gorge.net
OCDLA Legislative Representative: Gail Meyer, Portland, glmlobby@nwlink.com

Committee Members:
- DeAnna Horne, Portland, dhorne@mpdlaw.com
- Amy Margolis, Portland, aelkanich@hotmail.com
- Shawn Wiley, Salem, shawn.e.wiley@opds.state.or.us
- MacDaniel Reynolds, danreyoldslawfirm-nw.com
- Tom Sermak, Salem, sermak@pdmarion.org
- Shawn Wiley, Salem, shawn.e.wiley@opds.state.or.us

Read the Legislative Committee bylaws, visit the Legislative Committee web page.

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Earned Time Reduction on Oregon Prison Sentences

Letter from Oregon Department of Corrections —

Per the legislative changes over the past few years, the Oregon Department of Corrections (DOC) will occasionally need to request charging documents and plea petitions to determine if an inmate's conviction is eligible for 20% or 30% earned time reductions. This is because some crimes are limited to 20% earned time only if certain qualifiers are met (e.g., Supply Contraband if crime seriousness level 6 or 7). [Please refer to ORS 475.930 (2008), House Bill 3508 (2009), and Senate Bill 1007 (2010).]

It would be helpful if the judgments routinely include additional detail as that can resolve some issues without the need to request additional documentation:

- The sentencing guidelines grid score;
- For the crime of Burglary, indicate if it involved an occupied dwelling, or if the defendant caused/threatened physical injury to the victim, was armed with a deadly weapon, or committed the Burglary with the intent to commit an offense listed in ORS 181.594(5); and
- For drug crimes, information about the quantity of the drug (e.g., 50 grams or more, 100 grams or more).

Often the SGL grid score is provided, but not always. Also, because we see a lot of Burglary and drug offenses in DOC, simply adding this detail to the judgments when possible can reduce our contacts to the courts seeking clarification of the crime.

If you have any questions or would like to discuss this further, please do not hesitate to contact me. Thank you for your time.

— Bethany Smith, Administrator, 503-570-6900, Bethany.B.Smith@doc.state.or.us
“The wicked accuse, the godly defend.”

Editor’s Note: The following are some of the remarks made at the presentation of the Ken Morrow Lifetime Achievement Award to John Henry Hingson, III, at the Benson Hotel December 2.

Jeff Weiner
“I used to remember clever people, now I remember kind people.”

Cynthia Hamilton
“The lifetime achievement award fits John Henry well. But if you look around this room, it is filled with high achievers... He’s a man whose clients trusted him, not only for superior representation, but they knew that he cared deeply about them as human beings. Never, ever, ever, not once did he ever refer to any one of his many DUII clients as a drunk. Not one. Not ever.

I asked Suzy what she admired most about her husband.... She said, ‘He is as committed and passionate about his family as he is about his clients, our friends, and those in need. He’ll stop in the middle of his busy workday and visit somebody from our church who is in the hospital.... He truly cares about people.’ ”

Jim McHugh, a law clerk/investigator in 1987 for John Henry
“‘Integrity has the need of no rules.’ Albert Camus. ‘Rules cannot take the place of character.’ Alan Greenspan.... If anyone deserves this award, it is you, mi amigo.... We put up a great fight. Peace, brother.”

Chief Justice Paul De Muniz
“John Henry has appeared on the brief or argued on 105 cases in Oregon’s appellate courts – 23 of them in the Oregon Supreme Court, and 82 of them in the Oregon Court of Appeals.... Simply put, few lawyers are blessed with the combination of intellectual power and analytical skills that are the hallmark of John Henry Hingson, III.”

“‘It’s not enough that one is called upon to stand in the midst of his or her peers and speak warmly on behalf of a treasured friend. And when I say peers, I say that to all of you. You are my peers, and I congratulate you.”

Language of the Ken Morrow Lifetime Achievement Award Presented to John Henry Hingson, III:
“For his pioneering work in helping to establish OCDLA,
For his commitment to the principals framed by the Oregon and United States constitutions, and
For his legendary work protecting Oregon citizens against the overreaching power of the state.”

John Henry’s Remarks
“For the criminal defense lawyers here, and for their spouses and loved ones, you don’t need to be told what I’m gonna tell ya — this is a tough job. But you can just get kicked and hit below the belt so many times, when you go home, and you got Suzy ... I can’t believe it. And the pain that you get when you and your client get treated unfairly, when politics infects the courtroom, when you represent someone who’s hated, when you see the hatred in the eyes of the clerk and the cop and the job, and your client gets treated unfairly, it hurts....

Before I met Suzy I would travel four times a year to visit my other family, the National Association of Criminal Defense Lawyers Board of Directors. And when we gathered together, we shared that ache and that pain of our clients and us being treated unfairly. And that helped us to know that other people were in the same boat, suffering the same slings and arrows of injustice. And it made it easier to deal with it. But throughout all that journey, there was another thing that helped me, and that was my faith.

Sometimes you either have courage or insanity that drives you to do what you do. It’s not easy sometimes to proceed with courage. I want to share with you something that [my mom] gave me that helped me....

‘To be an effective criminal defense counsel an attorney must be prepared to be demanding, outrageous, irreverent, blasphemous, a rogue, a renegade and a hated isolated man. And a lonely person. Few love a spokesman for the despised and the damned.’

Continued on next page
AWARD Continued from previous page.

Well, you all are spokespersons for the despised and the damned. And I’m telling you: I LOVE YOU! Put your hand on my heart you know I’m telling you the truth, right into my core. And I want to thank you all for bestowing upon me the most humbling recognition I’ve had in my professional career. And, perhaps when it hurts, these words will help you go on, dust it off and stand up and keep fighting. In Proverbs 12:6 of the living Bible it says, ‘The wicked accuse, the godly defend.’ Criminal defense is the Lord’s work. Keep it up, my brothers and sisters.”

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Photographs by Susan Elizabeth Reese. Thank you!

Cynthia Hamilton and Oregon Supreme Court Justice Paul De Muniz.

Cynthia Hamilton and Rich Wolfe.

John Henry Hingon, III.

Jim McHugh and David McDonald.

Oregon Supreme Court Justice Paul De Muniz and John Henry.

More photos of this event and the Winter Conference on our Facebook page.
Forrest “Joe” Rieke
1952–2011

by Dave Audet

Forrest “Joe” Rieke, a prominent Portland criminal defense attorney and OCDLA member, died of a heart attack on August 29, 2011. Joe was 69 years old.

Joe grew up in Portland and graduated from Wilson High School in 1960. His mother, Mary Rieke, was a well-known member of the Portland School Board, and Mary Rieke Elementary School is named for her. Joe followed in his mother’s footsteps, serving on the Portland School Board for 15 years.

Joe was passionate about representing those who did not have a voice. It did not matter whether they were underprivileged children or indigent criminal defendants. As many of us know, Joe did have a voice, a big one. But even though he could come on strong, he also knew how to listen and adjust to the situation.

Joe was active in sports at Wilson and played football at Stanford University, and he helped preserve school sports programs while on the school board. Joe, a strong advocate for good public schools, was also instrumental in introducing school health clinics. On the national level, he fought for federal funding for urban schools as a leader in the Council of the Great City Schools.

Joe began his 40-year legal career as a prosecutor in the Multnomah County District Attorney’s Office. At the DA’s office, Joe established lasting relationships with well-known members of the bench and bar, such as current Multnomah County District Attorney Mike Schrunk and retired Judge Kim Frankel. He spent most of his career as a criminal defense attorney. He was a pioneer in establishing a law firm that competently combined indigent defense and private criminal defense with general civil legal work. He fostered an atmosphere that attracted and supported a diverse group of advocates. During the last few years, Joe focused on representing people facing the death penalty. In every case, he managed to avoid the death penalty for his clients.

Despite the many hours Joe devoted to the school board and practicing law, his priority was his family. His wife, Donna, their daughter Maryjane and their son Abe were always present in his life. Joe coached his children’s sports teams, and enjoyed whitewater rafting and snow skiing with his family. The Rieke family and friends spent many good times at their lovely Mt. Hood cabin. Joe also included the families of his coworkers in many office functions. Christmas parties at the Multnomah Athletic Club were especially memorable for adults and children.

Joe’s passing is clearly a loss for us all, but he has left an enduring legacy.

OCDLA Member Dave Audet practices law in Hillsboro. He serves on the association’s Board of Directors, and the Legislative and Education committees.
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**Mental Health and Criminal Defense**

Member Endorsements:

“The bottom line, with the criminal-justice system, is criminal practice is mental-health practice. If you don’t have a good foundation in mental health, you’re not doing your job as a lawyer.” —W. Keith Goody, Washington, as quoted by The Bulletin, August/September 2011

“Dear Pond: Just got back from court on a contested civil commitment hearing. ... total victory, and my client was released by the judge to go home with her parents. In representing my client, I extensively used the OCDLA Mental Health and Criminal Defense manual written by Alex Bassos.... Chapter 5 is all about civil commitment hearings. These materials were crucial in drafting my trial memorandum. My discussion of the law convinced the judge that there was no basis for commitment. My ability to represent my client effectively was a direct result of this excellent resource. Hats off to you, Alex, and OCDLA for these excellent materials.” —Michael W. Seidel, Bend

Alex Bassos, Metropolitan Public Defenders, with Keith I Linn, PsyD
I. The Automobile Exception

The automobile exception to the Oregon Constitution is an oxymoron—it is a “per se exigency.” In other words, a permanent emergency. Any time the police stop a car and believe that it contains either evidence of a crime or contraband, courts will assume that there is no way that the officers can obtain a warrant and will allow a warrantless search without considering the specific circumstances. Adopted in 1986 over a sharply worded dissent from Justice Linde, it is past time for Oregon’s automobile exception to drive off into the sunset.

The Oregon Supreme Court announced its adoption of the automobile exception to Article I, section 9, of the Oregon Constitution in State v. Brown, 301 Or 268, 721 P2d 1357 (1986). Under Brown, police do not need a warrant to search an automobile if 1) the vehicle is “mobile” when it is stopped by police, and 2) the police have probable cause that the vehicle contains evidence of a crime or contraband.

The court explained that, for the exception to apply, a vehicle must be mobile at the time it is stopped, and that this is “the key to the automobile exception.”

The automobile exception is an “exigency” exception to the warrant requirement. But unlike other exigencies, which require a trial court to carefully weigh whether a warrantless search is truly necessary and unavoidable, it is a per se exigency that applies any time police officers have probable cause to believe that a vehicle that was mobile when stopped contains evidence of a crime or contraband.

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The court felt it necessary to provide police with “clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts regarding the time, location and manner of highway stops.” Brown, 301 Or at 277.

Although Brown created a broad new exception, the court explained that it was not confronted with the issue of whether a warrant was required to search a parked vehicle, and it was not deciding that issue. In State v. Kock, 302 Or 29, 725 P2d 1357 (1986), the court made it clear that the automobile exception did not apply to vehicles that were “parked, immobile, and unoccupied at the time the police first encountered” them. That case involved police watching a parking lot in which defendant’s car was parked. They watched the defendant, an employee of a nearby store, come out early in the morning and place an item in his parked car before going back in to work. The police opened his car door to check if the item was stolen merchandise, determined that it was, and arrested the defendant.

This was too far for the Oregon Supreme Court. The defendant’s car in Kock was parked when the police spotted it, it was parked when it was searched, and it never moved from the same spot during the investigation. Although a large warrant exception was created in Brown, the court was not willing to expand it to parked cars based on a theoretical danger that they might be driven away sometime later.

II. The Expanding Concept of “Mobility”

After Brown and Kock, the automobile exception allowed a police officer to search a vehicle that was mobile at the time it was stopped without a warrant, but not one that was parked and immobile when first encountered. However, that backstop eroded in the ensuing years, leading Judge Armstrong to note in one opinion that the court’s fluid definition of “mobility” had transformed Brown’s per se exigency rule into a series of “case-by-case judgments about likely mobility.” State v. Burr, 136 Or App 140, 157, 901 P2d 873 (1995) (Armstrong, J., dissenting). In State v. Meharry, 342 Or 173, 149 P3d 1155 (2006), for example, the Supreme Court held that a car can remain mobile even if it is boxed in by a police car and its driver has been arrested.

This trend may have reached its high (or low) point in the Court of Appeals’ decision in State v. Kurokawa-Lasciak, 237 Or App 492, 239 P3d 1046 (2010). The defendant in that case had been seen buying a large number of chips at the Seven Feathers Casino and quickly cashing them. After several transactions, the casino asked him for his ID, which he refused to provide. This prompted the casino to print out copies of his photograph and distribute it to the cashiers. Mr. Kurokawa-Lasciak later spotted his picture in the cashier’s cage, grabbed it, and walked away. One of the cashiers alerted a state trooper.
Mr. Kurokawa-Lasciak went out to the parking lot and drove off in his van. He then returned, parked his van, and walked towards the casino. When he had gotten about 30 feet away, another officer stopped and detained. The state trooper then arrived and questioned him about his transactions at the casino. The officers asked for consent to search the van, and Kurokawa-Lasciak refused and asked to speak to a lawyer. He was, of course, arrested.

At some point during the encounter, Kurokawa-Lasciak asked his girlfriend, Campbell, to lock up the van and wait for him. She locked it and waited in a nearby restaurant. The trooper went into the restaurant and interrupted Campbell's breakfast to ask if there was any money or drugs in the van. She ultimately admitted that there was marijuana in the van and, after repeated badgering and threats, consented to a search. The officers found drugs, scales, and $48,000 in cash.

The trial court suppressed the evidence found in the van, holding that the consent to search was involuntary and that the automobile exception did not apply. The Court of Appeals reversed, noting that the trooper “focused his attention on the van almost immediately after he arrived on the scene, when he asked for (and was denied) consent to search it.” The court then held that the van was “mobile” even though it was parked, the driver was thirty feet away when he was encountered by the police, he had been arrested, he had given the keys to another person, and he had been transported away from the scene. The court specifically noted that the van was still “operable.”

The Oregon Supreme Court, however, took review and reversed the Court of Appeals. 351 Or 179, 263 P3d 336 (2011). The Supreme Court reaffirmed that “the ‘automobile exception’ to the warrant requirement of Article I, section 9, of the Oregon Constitution, does not permit a warrantless search of a defendant’s vehicle when the vehicle is parked, immobile, and unoccupied at the time that the police encounter it in connection with a crime. It rejected the new, expansive concept of mobility and held that it would “adhere, as the court did in Meharry, to the line that the court drew in Brown and Kock.” It pointed out that those cases had rejected applying the exception to “operable” vehicles and required actual “mobility.”

**III. Arguments to Raise in Automobile Exception Cases**

Attorneys should challenge searches based on the automobile exception. First, at the very least, do not let the state get away with using the exception to authorize searches when it cannot establish that a vehicle was actually mobile when the police came in contact with it. If the police have broken and reestablished contact with the vehicle, or come upon parked car or truck, defense attorneys should cite the Supreme Court’s Kurokawa-Lasciak decision and challenge the mobility of the vehicle at the time of search.

There is a second argument suggested by Kurokawa-Lasciak that should be made in all automobile exception cases: it is past time for the automobile exception to go. The Oregon Supreme Court included in Kurokawa-Lasciak a lengthy excerpt from Brown that predicted that the automobile exception to the Oregon Constitution would be short-lived. Brown included the following in a footnote:

> In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. All that would be needed in this state would be a central facility with magistrates on duty and available 24 hours a day. All police in the state could call in by telephone or other electronic device to the central facility where the facts, given under oath, constituting the purported probable cause for search and seizure would be recorded. The magistrates would evaluate those facts and, if deemed sufficient to justify a search and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed. The warrant could either be retained in the central facility or electronically recorded in any city or county in the state. Thus, the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches.

Brown, 301 Or at 278 n 6. This prediction of the “near future” demise of the exception was written more than 26 years ago. We should be making and preserving the argument that enough time has passed for police departments to implement such a system. When Brown was issued the court balanced the existence of a per se exigency against a strict requirement that a vehicle be mobile and noted that the exception would no longer be needed in the future. Instead, courts spent the next two and a half decades broadening the applicability of the exception. Kurokawa-Lasciak suggests that the Oregon Supreme Court is willing to curtail that expansion. We should go further, and argue that the exception has long since served whatever purpose it had and that police should once again be required to request warrants.
The scene: The judge’s oral ruling at a 2006 post-conviction hearing in which the petitioner challenged his conviction for murder.

“The claims ‘A’ through ‘I’ basically are all claims which either an expert witness needs to testify or you need an affidavit from an expert witness or lay witnesses to come in and show what if anything they would have said, how things would have been different, what the failure was of the attorney here.

You can’t win this case on jawbone. And that’s what this is, it’s all jawbone. There are no experts, there are no affidavits. There is nothing to support any of the claims down through ‘I’. There’s just no evidence to support any of this.”

Representation of clients in state post-conviction cases requires investigation. It means getting out there and shaking the trees. Maybe not shaking every tree and turning over every stone, although 282 DNA exonerations nationwide and counting suggest that some cases may necessitate just that. It means, at least, turning over the important stones.

Accordingly, if your client maintains that he had an alibi or other witnesses who would have given exculpatory testimony, you need to do two things. First, find out if trial counsel knew about the witnesses and interviewed them. Second, whether or not trial counsel knew about them, you need to interview them. Sometimes the client is right and the exculpatory evidence can get your client a new trial or a lesser sentence.

The case of *Lichau v. Baldwin*, 333 Or 350, 39 P3d 851 (2003), powerfully illustrates this very point. In *Lichau*, the petitioner had been convicted of sexual offenses against his niece. He sought post-conviction relief based on his trial counsel’s decision to withdraw the alibi defense without adequately investigating it. Specifically, Lichau was in the military at the time of the alleged crime, and was stationed on the other side of the country. While Lichau couldn’t be sure, he did not believe he had visited Oregon at the alleged time. He therefore told his trial attorney that his military records would confirm whether he had taken leave. Yet, counsel failed to obtain those critical records and also failed to interview military personnel who could have supported his alibi.

At the post-conviction hearing, PCR counsel introduced substantial evidence to support the claim of inadequate assistance of trial counsel. First, he introduced the affidavit of Lichau’s platoon commander who provided key evidence supporting the alibi. He also submitted affidavits from other persons at Camp Lejeune who corroborated the commander’s affidavit. PCR counsel further introduced Lichau’s marine unit diary which contained an important entry that would have bolstered the alibi. He also called lay witnesses, including Lichau’s brother, and he introduced bank statements which suggested that Lichau could not have purchased a plane ticket from North Carolina to Oregon during the relevant timeframe. Based on this collective body of evidence, the Oregon Supreme Court affirmed the grant of post-conviction relief. The court held that “Petitioner was denied adequate assistance of counsel in violation of . . . the Oregon Constitution.”

As this case demonstrates, PCR investigation must go beyond the record of the trial and the appeal. Most importantly, PCR counsel plays the essential role investigating, identifying and pursuing the evidentiary support for such claims. This point is best made by Professors James Liebman and Randy Hertz in their treatise on habeas corpus:

Investigating a post-conviction case to discover meritorious federal claims often demands more lawyerly imagination and perspicacity than any other aspect of the litigation. It stands to reason – and the experience of skilled habeas corpus practitioners bears out – that the most blatant injustices ultimately revealed by habeas corpus are often the most difficult to discover. It is precisely “where the record is unclear or the errors are hidden” that the most pressing need for zealous advocacy

Continued on next page

**OCDLA Member Tony Bornstein** is a Federal Public Defender in Portland. He serves on the association’s Board of Directors, the Law School Outreach Committee and is the Board Liaison to the Education Committee.
arises. The number of instances in which habeas corpus petitioners and attorneys uncover abuses belies any pre-investigative assumption that the actors and events in the criminal process leading to a client’s conviction and sentence are beyond constitutional reproach simply because the paper record looks clean.

So, what do you do? First, get the Liebman and Hertz treatise on habeas corpus and read Chapter 11 on claim identification and investigation. Review CLE materials from OCDLA on post-conviction practice. There are great materials on this topic from Steve Wax, Wendy Willis, Marc Sussman and many others. While a comprehensive recap of those manuals is beyond the scope of this article, here are some ideas that exemplify effective tree-shaking and stone-turning:

*Brady* violations can be subtle. So, let’s say the criminal case involved cooperating prosecution witnesses. If so, head over to the courthouse and sift through their case files. Examine the OJINs. Obtain transcripts of the co-defendants’ pleas and sentencing hearings. You’ll need to know if there were hidden or implicit deals for favorable testimony. Perhaps there was an unexplained delay in charging followed by an oddly lenient sentence. If no transcript was produced from those hearings, request funds for transcription.

If something’s fishy, call one or more of the actors from the criminal case and ask questions. On this subject, I always think of that wonderful scene in *All the President’s Men* where Bob Woodward (played by Robert Redford) calls the White House and asks the official why his name was in the address book seized from one of the Watergate burglars. Startled, the official exclaims “Oh shit!” and hangs up.

In every case, it is crucial to obtain trial counsel’s file and carefully review it. Only then can you determine whether the case was adequately investigated. The United States Supreme Court has said as much. In *Strickland*, the Court explained that “inquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions. . . .” 466 U.S. at 691. In this vein, take an active role in interviewing trial counsel. Don’t wait for the Attorney General’s Office to contact trial counsel and then prepare counsel’s “I did everything right” affidavit.

One case I worked on illustrates the need to get trial counsel’s file. The petitioner had been convicted of murder. From day one in the criminal case he protested his innocence to his lawyer, emphasizing that he didn’t stab the victim. Friction developed because defense counsel firmly believed that an innocence-based defense was unrealistic given the strong evidence pointing to the client’s actions and guilt. Ultimately, the lawyer unilaterally chose a guilt-based diminished-capacity defense over the client’s protestation of factual innocence. Because his client did not testify in his defense, only with the file could PCR counsel prove that trial counsel had overridden his client’s role in electing to stand on his plea of innocence. The contents of the file, when juxtaposed with the diminished capacity defense presented at trial, would establish a constructive denial of the Sixth Amendment right to counsel. Yet, without counsel’s file, there was no way to prove the claim.

In many instances, to find out what investigation is necessary during the collateral attack, you’ll need to consult an attorney who specializes in the type of charges your client was convicted of. For example, let’s say you have little familiarity with child sex abuse cases or so-called “shaken baby” cases. In such a circumstance, to effectively challenge the conviction in PCR, you’ll need the same level of sophistication as someone with real experience in defending such cases. Only then will you know what to look for.

And remember, because these are civil cases in which the rules of civil discovery apply, you can request depositions and serve interrogatories and requests for admissions. Where necessary, ask for examination of trial exhibits or evidence. Of course, the facts and needs of every case will be different, but the core principle – and point – is the same: don’t just rely on the client or the record. Go deeper. Get the full story. Investigate.
State v. Josh Lee Shaddon
by Susan Elizabeth Reese

Case: State v. Josh Lee Shaddon
Defense Counsel: Karen Johnson Zorn and Clark Willes
Investigator: Bernard Brown and David Campbell, with assistance by Tammy Hesberg
Court: Linn County Circuit Court
Judge: The Honorable Thomas McHill
Prosecutor: Heidi Sternhagen
Date: November 30–December 7, 2011
Charges: Murder [Gerlene Thorne]; Attempted Murder [Michael Thorne]
Verdict: Guilty But Insane verdict after a trial to the court; no contest plea to Attempted Assault in the First Degree

Josh Shaddon was born to his mother, Gerlene Thorne, when she was a teenager. Until recent years, he had no relationship with his biological father. He was raised by his mother and her husband, Josh's stepfather, Michael Thorne.

Growing up, Josh always had some mental difficulties and appeared to be “different.” He managed to graduate from high school but he was, for the most part, in special education classes. He had worked in construction and other various jobs, the last one with his stepfather. Defense expert Dr. Stephen Scherr suggested at trial that Josh took drugs to deal with his loneliness, his lack of friends, and his being different. Nevertheless, he was able to marry and have children. After he and his wife separated, she remained supportive of him.

In the months before his arrest, Josh was living in Washington with his girlfriend and the two children, ages 4 and 7, whom they had had together. In the middle or latter part of September, 2009, he took the two children out “to get a soda.” Instead, he drove to Oregon, vaguely intending to “get help” for his problems. Once he arrived at his mother’s home, his girlfriend allowed him to stay, knowing the children would be safe there.

Within days, while in the woods target shooting with his stepfather, Josh aimed a gun at him. Fortunately, when Josh pulled the trigger it didn’t fire. The family decided not to report the incident, fearing that if law enforcement were involved, Josh would be unable to receive the help that he needed.

Several mental health professionals testified and confirmed Josh’s efforts to get help for his drug problems and his mental illness.

Josh had begun using drugs as a teenager. He had been a heavy methamphetamine user since he was 16, had stopped for a few years and then returned to the habit. For quite some time, he had been seeking help for his mental difficulties and his drug problems. His mother diligently tried to find assistance for him. In July of 2009 when Josh’s paranoia was overwhelming, he had stopped using meth, but relatives said at trial that they continued to be concerned about his strange behavior and his delusional remarks.

On October 23, 2009, for reasons still unclear to everyone, Josh brutally stabbed his mother to death at her home. Three days before, Josh had visited a mental health counselor who said Josh recognized that he had problems and wanted to get inpatient help. She described him then as “extremely paranoid and [he] felt persecuted.”

After he was arrested, he was briefly found unable to aid and assist in his defense. Dr. Scherr saw him within a week and noted that Josh was quite paranoid, unable to understand why he needed a lawyer or what Dr. Scherr could do for him. Over a period of months in the secure environment of the jail, needing to make no decisions and feeling less overwhelmed, Josh’s symptoms improved, and he was determined fit to proceed and able to assist in his defense.

After the stabbing, Michael Thorne reported the events which had occurred earlier in the woods, and Josh was charged with Attempted Murder because of that incident. He eventually settled that part of the case with a plea of no contest to an attempted assault. Sentencing was deferred until after a resolution on the murder case.

Continued on next page
In a six-day trial to the court, both sides acknowledged that Josh was mentally ill. The state claimed that he acted rationally and intentionally in stabbing his mother. The prosecutor claimed that he had killed her because he was tired of her “ragging” on him and “she was driving [him] nuts.” The state pointed out that before the killing, Josh had methodically placed his children in his mother’s green Tahoe parked outside, fastened them into their seats, and then, claiming he had forgotten the car keys, went back into the house and stabbed his mother. She suffered numerous wounds, including defensive wounds. The medical examiner testified that stab wounds through her carotid artery and jugular vein were the cause of death. A wound in her back had punctured her lung. The prosecutor argued that the personal nature of the attack further showed Josh’s intent.

Prosecution expert Dr. Richard Hulteng curiously acknowledged that Josh had been guilty but insane at the time of the assault on his stepfather, because he “heard voices.” Dr. Hulteng testified, nevertheless, that he believed Josh was capable of an intentional murder when he killed his mother because of the degree of deliberation he used in strapping his children into the car seats and then returning to the home to commit the stabbing. Josh had also remarked to Hulteng that he always buckled his children in—“It was the law”—which supposedly indicated that he could conform his actions to the dictates of law. Hulteng said he believed Josh had a mixed personality disorder and described him as narcissistic, antisocial, and lacking in empathy. He did admit that Josh suffered from a psychotic disorder.

The defense called numerous witnesses to establish the nature and extent of Josh’s mental illness. Dr. Robert Julien described the dynamics of methamphetamine-induced psychosis and its chemical basis. He noted that many of Josh’s symptoms, including agitation, anxiety, nervousness

Continued on next page
and paranoia, could be the result of drug use. Dr. Steven Scherr saw Josh right after his arrest and conducted a lengthy evaluation some months later. He could describe the severity of his schizophrenia right after the incident and noted the progression of his illness over the two years he was in custody.

Several mental health professionals testified and confirmed Josh’s efforts to get help for his drug problems and his mental illness. His mother had persistently been trying to help. On the morning of her death, text messages from Josh’s girlfriend to his mother indicated his deteriorating mental state. He reportedly had called his girlfriend and told her he was “losing it.” He told one psychologist before the stabbing that he thought his stepfather was hurting his mother and said if anyone hurt her, he would kill that person. At the time of the attack, as pieced together by the defense experts, Josh apparently felt somehow that his mother was a danger to his kids and he needed to do something about it. Following his arrest, however, he did not understand that his mother was dead; he was incapable of believing that he had been responsible for her death.

Evidence at trial indicated that Josh’s primary diagnosis was schizophrenia but with indications of drug-induced psychosis. In finding Josh guilty but insane on December 7, the court cited evidence that Josh’s mental state had deteriorated dramatically from the end of September at the incident with his stepfather until the time he stabbed his mother. Even after the verdict, Josh seemed unable to comprehend what had occurred. At one point during his police interrogation he had said, “I couldn’t have killed my mother. Who in their right mind could kill their mother?”

On Monday, December 19, Judge McHill sentenced Josh to a lifetime of supervision by the State Psychiatric Security Review Board. He also sentenced Josh to 16 months in prison for the assault on Mike Thorne, but with credit for time in the jail pretrial, that time has been served.

At the sentencing hearing, the judge referred to the case as “a tragedy for everyone who knew Gerlene Thorne” and said he hoped the sentence could provide some finality for the family.

Josh will go to the state hospital in Salem indefinitely. Although, as defense attorney Zorn says, Josh still has difficulty believing he killed his mother, he does know that he should now receive the treatment that his mother tried so hard to find for him. Eventually, if he is found no longer to be a danger to himself or others, he could be released to a different, less secure facility or to some form of community placement under supervision.

Editor’s Note: Clark Willes deserves special acknowledgement for his excellent work as co-counsel and his particularly skillful cross-examinination of Dr. Richard Hulteng.
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<td>Christopher Edward Burris</td>
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<td>Leeon F. Aller</td>
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### OCDLA's Keep Me Current plan

OCDLA's Keep Me Current plan allows owners of the Search and Seizure and Felony Sentencing in Oregon manuals to receive twice-a-year updates automatically. We bill you yearly for the updates, and you no longer need to wonder if your manuals are out of date. Call OCDLA to sign up, or visit ocdla.org to order the Keep Me Current plan for either Search and Seizure or Felony Sentencing in Oregon.

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