Eyewitness Identification

Description “Accuracy” as an Index of Eyewitness Reliability

Dan Reisberg, PhD — Page 14

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   by Emily Elison

And More

QUOTABLE

“While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.”

Calendars

EVENTS, MEETINGS, & CLEs

2015

Juvenile Training Immersion Program
April 16–17
Hallmark Resort, Newport

Juvenile Law Seminar
April 17–18
Hallmark Resort, Newport

Annual Conference
June 18–20
Mt. Bachelor Village, Bend

September Seminar
September 18–19
Ashland Hills, Ashland

Juvenile Law Training Academy
October 19–20
Oregon Garden, Silverton

Public Defense Management Seminar
October 22–23
Sunriver Resort, OR

Death Penalty Defense Seminar
October 23–24
Sunriver Resort, OR

Sunny Climate Seminar
November 8–12
Grand Hyatt, Kauai, HI

Winter Conference
December 4–5
The Benson Hotel, Portland

B O A R D  M E E T I N G S

April 18, 9:00 a.m.–12:00 p.m., Hallmark Resort, Newport
June 19, 3:30–5:00 p.m., Mt. Bachelor Village, Bend
Visit ocdla.org for a complete calendar of meetings.

P U B L I C  D E F E N S E  S E R V I C E S COMMISSION MEETINGS

NEXT MEETING
Thursday, June 18, Mt. Bachelor Village Resort, Bend,
9:00 a.m. – 12:30 p.m.
Check the PDSC Meeting schedule online for updated meeting information, or contact Laura Anson, 503-378-2355,
Laura.J.Anson@opds.state.or.us.

Board Members

President: Eve Oldenkamp | District 1, Klamath Falls......................... eoldenkamp@aol.com
Vice President: Edward Kroll | District 4, Hillsboro .................. ekroll.law@gmail.com
Secretary: Gordon Mallon | District 6, Silverton .................. gormallon@gmail.com
Russell S. Barnett, III | At-large, Portland .................... BarnettLaw@me.com
Alison Clark | Federal Public Defenders Office, Portland .......... texclark@gmail.com
Sara J. Collins | Southern Oregon Public Defender, Medford .......... sara@sopd.net
Dave Ferry | Office of Public Defense Services, Salem .......... david.o.terry@opds.state.or.us
Celia Howes | District 5, Portland .................. chowes@hoevet-boise.com
Megan Jacquot | District 3, Coos Bay .................. meganjacquot@hotmail.com
Robert Kaiser | Public Defender Services of Lane Cty, Eugene .......... rkaiser@lanepds.org
Bradley Kalbaugh | Multnomah Defenders, Portland ............ bkalbaugh@multnomahdefenders.org
Greg Scholl | Metropolitan Public Defenders, Hillsboro .......... gscholl@mpdlaw.com
Alex Spinks | Umpqua Valley Public Defender, Roseburg .......... alexspinks@gmail.com
Terri Wood | District 2, Eugene .................. twood@callatg.com

Visit ocdla.org to view board members or a map of board districts.

OCDLA thanks Tony Bornstein for providing the cover quote for each issue.

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.
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Submissions & Deadlines
OCDLA welcomes articles from qualified professionals. Submit articles by email attachment to jpotter@ocdla.org. OCDLA will also consider articles which have appeared elsewhere. OCDLA reserves the right to select and edit material for publication. Articles, announcements, classified and display advertising and other items for publication should be submitted by email to jpotter@ocdla.org by these dates.
June/July .................................................................May 1
August/September ..................................................July 15

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Delivered to over 1300 OCDLA members, The Oregon Defense Attorney accepts commercial display advertising. Deadlines are the same as publication deadlines. Call OCDLA at 541-686-8716 for information.
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Not Done Yet, But Looking Back

by Eve Oldenkamp

Colleagues, I am rounding the last corner in my journey as OCDLA president. While I enjoy the position, I look forward to sliding back into the role of regular Board member following the Annual Conference in June.

I enjoy my time with the Board. The work is rewarding, and the sense of camaraderie and kinship revived me many times. It is a volunteer opportunity you should all contemplate seriously (see “Bored — Run for a Board Seat” on page 10). Even if the Board seems too formal, we have many committees with which you can get involved. You see passion and dedication to criminal and juvenile defense representation from all corners of our great state. Well worth the effort to get involved.

As I contemplated what to write I was stymied. So, I glanced back — “if you don’t know where you are, go back to the beginning.” Turns out, my last two “views” were angsty. It reminded me how thoroughly exhausting our work can be. Not physically, obviously. But this exhaustion set the tone of my past posts. I am no longer there. In what I write, I hope you can see why that tone existed and why it now wanes.

More oft than I care to accept, I have entered and left the office in the dim light of dawn and dusk. As the curtain falls upon one of those days I feel catatonic, as if I’ve been hibernating. A strange sensation envelops me as I realize an entire day in the outside world has spun by without my observation. It is a rather empty sensation. So I pause. Try to counter the emptiness. I remember that the work I did in the shadows is profound for those whose lives hang in the balance. I observe it to be essential, the contribution spinning into the web of governance that prevents our society from toppling to chaos or tyranny. And my logic, sitting at the big old dusty desk of my prefrontal cortex, pulls off her glasses, tiredly wipes her eyes and nods contemplatively in agreement. It is, it just is.

This exhaustion – whether you deem it emotional, psychological, mental or other – is very real. Sometimes it rides longer than an evening, a week, a month. At times it is suffocating. Our profession is not heralded by others as the work of champions. But it is. It is peered upon by most with disdain, characterized as freakish, morbid, even unfeeling. But feel we do. Empathize we must. Our effectiveness as advocates demands it. It is our clients’ flags we pick up from the mud, the dirt, the blood of their lives’ battles and carry forth. We see and hear and feel the collateral damage from the desperate acts of broken humans.

We must be cautious with our passion and our dedication lest the collateral damage becomes our lives and relationships. The parade of horribles that we see and attempt to resolve wears one down over time. Our empathy causes us to suffer from this melancholy gloom. It can drain us and suck us dry.

I want to share some insight I gained recently. I hope it shows you how to maintain sanity, preserve yourself and remain in and improve your “game.” The passion that inspires you and drives you, the battle cry that sings in your heart, your soul and your mind must not consume you. You must put it away, let it rest on a regular basis. Recognize what sustains you and make it part of your routine.

It is too easy to overwork in our profession. The adversarial system created by the founding fathers demands it at times. But the actions that will feed your heart and your soul, keep you human, are not extra hours at the office. It is a riverside stroll watching brilliant autumn leaves fall while holding the hand of your love; it is the play session in the driveway, watching your son make his first basket; it is the laughter and teasing as you try to go roller skating together for the first time in decades, or watching your daughter make it up and around the ring; it is the anticipation of “date night” where you get to watch again the strange way your husband seems to cook like Chef from the Muppets; it is the smell of the bubble bath your wife uses on the evenings you go out to dinner and see a local band; it is all of these things that must be protected. And by so doing you make yourself stronger, better at what you do, because the joy and pleasure you preserve makes it easier for your spirit to shoulder the melancholy nature of our work. You see, I notice that when I do not routinely engage in quality time with my husband, my mother, my father or my siblings, I

Continued on page 24
Criminal Appellate Review — New Member Benefit

OCDLA has begun to offer a new member benefit, the Criminal Appellate Review (CAR), a weekly email digest of appellate court criminal and juvenile cases. The synopsis contains a direct link to expanded text in the Library of Defense, all of which has been prepared by Alex Bassos and Francis Gieringer of Metropolitan Public Defender. In order to encourage maximum utilization we have not password protected this portal.

In addition, the Library of Defense also contains 2015 Case Summaries by Topic (password protected). Consult this page for the latest cases, organized and all in one place.

OCDLA to Honor Two Pillars of the Defense Community

2015 Ross M. Shepard Award for Lifetime Service to OCDLA Recipient — Chris Hansen

OCDLA Life Member Chris Hansen is the recipient of the first Ross Shepard Award for Lifetime Service to OCDLA which was created in 2014 to recognize members who have made a significant difference to the association. Chris has been a public defender at Public Defender Services of Lane County in Eugene since 1977 and retired this March. He is a founding member of OCDLA and was instrumental in OCDLA’s purchase of its new office building. Chris has been hailed as one of the last gentleman defense lawyers in Lane County. The Ross Shepard Award will be presented at the 2015 Annual Conference, June 18–20, Mt. Bachelor Village, Bend. See back cover.

2015 Ken Morrow Lifetime Achievement Award Recipient — Peter Gartlan

Peter Gartlan will be the recipient of the 2015 Ken Morrow Lifetime Achievement Award, created in 2000 to recognize the lifelong commitment and significant achievements of attorneys who have worked in the defense community and those who have made important contributions to the administration of justice. Peter served as the Chief Defender for the Appellate Division of the Office of Public Defense Services in Salem and retired last month. Peter has served the state and citizens of Oregon for 27 years. The 2015 Ken Morrow Lifetime Achievement Award will be presented at the 2015 Winter Conference, December 4, Benson Hotel, Portland.

DO OR PR I ZES

OCDLA thanks these Eugene businesses for donating door prizes to the March Defenses Seminar:

• Café Yumm!
• Claim 52 Brewing
• Cornbread Cafe
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• Pegasus Smokehouse Pizza
• Sweet Life Patisserie
• Valley River Inn
• Wild Duck Cafe

Save $25 on CLE registration when you register online during April.
OPDS UPDATE

by Nancy Cozine, Executive Director, OPDS

Despite a few unexpected political changes in Salem, legislators have remained focused on creating a new budget for the next biennium. While the former governor had recommended a 2% reduction in the PDSC 2015–17 budget, the co-chairs of Ways and Means restored the cut in their proposed budget. While this was an important step in the right direction, OPDS and other supporters continue to actively encourage the legislature to fund “policy option package” requests to bring additional critical resources to public defense providers.

The PDSC made its budget presentation to the Joint Ways and Means Subcommittee on Public Safety on March 10, 11, and 12. Chief Justice Balmer and PDSC Chair Barnes Ellis provided an excellent introduction, and we were also very fortunate to have the support of Attorney General Rosenblum, the Oregon District Attorneys Association, judges, the Oregon State Bar, and a CASA. Clients and providers both offered compelling testimony about the need for defense services and the importance of adequate funding. While we are off to a great start there is still a long way to go, with “phase two” of budget hearings and a final budget bill still to come.

If you have an interest in talking to your legislator, or if you are interested in presenting information to the PDSC, please contact Nancy Cozine (nancy.cozine@opds.state.or.us), OPDS Executive Director, or John Potter (jpotter@ocdla.org), OCDLA Executive Director and Commission member.

Request for Proposals Sought

OPDS will formally issue a Request For Proposals in early May for two-year legal services contracts beginning January 1, 2016. A draft of the RFP is available in the March 19 Commission meeting materials which can be found on the OCDLA website (click “Resources,” “Public Defense”).

As always, please contact OPDS if you have any questions.

PDSC Meeting Dates

Upcoming PDSC meeting dates are listed below; changes are posted online at: www.oregon.gov/OPDS

- June 18
- July 30
- September 17
- October 23
- December 17

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OCDLA's Learning Center Available for Your Meetings

OCDLA’s home office boasts a spacious room designed to host meetings, small CLEs and other events. The Learning Center comfortably holds 25 people and is equipped with a 65-inch HD “smart” television, donated by Walter Todd. HDMI cables connect your PC or Mac allowing PowerPoint presentations or online demonstrations. This space is available to all members. Contact OCDLA staff to reserve. Conveniently located at 101 E. 14th Ave, Eugene, OR 97401.

2015

Repeat Property Offender Guide

Edited by Brook Reinhard and Brian Walker

An OCDLA quick guide —

- snapshots a client’s prison exposure based on their prior convictions and current crimes
- helps calculate how much time your client will receive if convicted
- includes mergers & concurrent/consecutive sentences
- chart for offenses committed before M57 went into effect January 1, 2012
- handy EXCEL spreadsheet to calculate repeat property sentences on your computer or mobile device

$20 each, members

Order online.

OCDLA Member Nancy Cozine is the Executive Director of the Office of Public Defense Services. She serves on the Legislative and Juvenile Law committees.
STAY IN THE DAILY LOOP — Library of Defense

“Trial yesterday (not guilty), motion to suppress today (granted), both thanks to the Library of Defense. It is a wonderful resource and a real asset to the defense community. Thanks!”

— Brian Starns, OCDLA Member in Hood River

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Y’All Better Like Each Other
by Russell Barnett, III

I spent the mid to late 1980’s working for the City of Austin, Texas Emergency Medical Services. I was a Senior Paramedic and Chief Flight Medic. It was a pretty cool gig. I got to see and do a lot of really interesting things. I did well in the system and I promoted rapidly. From all accounts, I did a pretty good job.

But the true secret to my success was a guy named Tim — Tim Boswell. Boz was my partner at EMS for more than five years. Our department worked a 24/48 schedule—24 hours on, 48 hours off. Boz and I were together every third day for 24 hours, and we were never more than 15 seconds away from one another at work. We relied on one another and trusted each other to a level that you have to experience to understand.

We also were aware of the various personality quirks of each other, and we used that knowledge either to comfort or annoy one another. Boz has a wonderful Southern-mixed-with-Texas drawl, so even when he was picking on me it was hard not to laugh. “Jeezus Pecos, jist ’cause yew think like that don’t mean you gotta share it wit folks.” He could insult me and make me laugh at the same time—it is hard to be mad at someone who sounds so much like a good ol’ boy. We learned to adapt to one another and support each other in the moments when nothing in the world seems normal.

One day while doing my managerial/supervisory paperwork, I was complaining about a particular crew I was responsible for and the lack of initiative they showed. I was blathering on about how I wanted to figure out a way to transfer that crew out of my command. I assumed Boz was just ignoring me and reading his book (a technique we both developed for dealing with each other’s moods), but he put his book aside and asked the quintessential Boz-type question: “Well, Pecos, whatcha’ doin’ to make ‘em better?” I had no response.

Later, I thanked Boz for his sage advice, and although it was hard to hear, he was right to make me realize I was not doing my job to the fullest. I said, “It must have been hard for you to say that to me.” His reply was priceless: “Naw, you’re always doin’ stupid shit. It’s fun to point it out.” Then he said something I will always remember: “Pecos, we’re the best at what we do, and that makes some people hate us ’cause we make ‘em look bad. We gotta take care of each other, ’cause if we don’t no one’s gonna take the time to do it for us. And we have to help others get to our level—then they won’t give us grief.” Yes, Pecos may have been “the smart one,” but Boz was “the wise one.”

The reason I mention all of this is because I recently witnessed a chain of events that confused me, and made me sad. Actually, dispirited is the word.

Not long ago, after reading the Wednesday Court of Appeals criminal cases, I put a message on the Pond. I was trying to capture the voice of baseball announcers of days gone by when I wrote, “For those fans keeping score, today’s COA opinions include 6 criminal cases—3 were from WACO. WACO’s record for February 25, 2015—2 were reversals and one was a partial reversal. Yes, WACO (Where Hope Goes to Die) is the 9th Circuit of Oregon (but for the opposite reason)—you can be pretty sure it’ll be reversed when others get a look at it.”

I intended nothing controversial with the missive. I did not intend to attack anyone (other than WaCo courts, in a manner of speaking). I was merely commenting on what many of us know or think — “There sure are a lot of reversal coming out of that county.” To say the aftermath of the post surprised me is as much of an understatement as saying, “On November 22, 1963, John Kennedy and his wife went on a car ride in Dallas, Texas, and it turned out poorly.” My little message turned into what we call back home in Texas a “Sh*t-Storm!”

I intended nothing controversial with the missive. I did not intend to attack anyone (other than WaCo courts, in a manner of speaking). I was merely commenting on what many of us know or think — “There sure are a lot of reversal coming out of that county.” To say the aftermath of the post surprised me is as much of an understatement as saying, “On November 22, 1963, John Kennedy and his wife went on a car ride in Dallas, Texas, and it turned out poorly.” My little message turned into what we call back home in Texas a “Sh*t-Storm!”

The Pond posts that followed devolved into accusations of poor lawyering, of ineptitude, of chest beating, and a couple of comments that were “just plain ol’ mean.” I was stunned. It certainly was not my intent—not by a long shot.

Continued on next page.

OCDLA Board Member Russell Barnett, III, practices law in Portland. He serves on the Web Governance Committee.
Our community of Pond Dwellers turned on itself. Some felt as if comments suggested WaCo defense lawyers were not standing up for their clients. Others took offense at this view. Yet more commented about “how we used to do it.” Those comments spurred further retorts and accusations. We were attacking each other! It really made me sad.

So in this frame of mind I think of my partner Boz. I think he would say something like (in his wonderful Texas/Southern drawl): “Y’all are defense lawyers. Nobody likes you, so y’all better like each other. You do very important work that our society could not get along without. But still, nobody likes you. The better you are, even fewer people will like you—both in your group and outside your group. When you see someone doing something not as well as you do it, you need to ask yourself, ‘What can I do to help them?’, not think about how their shortcomings make you look relatively better. Fighting among yourselves is like putting a rattlesnake in your pocket. You really shouldn’t do it. If y’all don’t take care of yourselves, and have each other’s backs, no one else will do it for you, and if you don’t do it for others, you don’t deserve protection either. So quit squabbling and be nice to each other.” And then he would go take a nap. Did I mention he can be one of the laziest people I know?

So, from the old crew of Medic-4, B-Shift, we salute each of you—you do good and important work. We can have our philosophical differences, but remember to support one another—not attack or demean. Because if you don’t support each other, no one will.

Be of good cheer!

Pecos

Endnotes
1 As a rookie EMT I was christened “Pecos Russ” and throughout my career I was known as Pecos.
2 Other notable Boz-isms include describing seizure patients as either “flopping like a landed bass” or “shakin’ like a dawg shittin’ a peach pit.” A hyperventilating person had “the vapors,” a prolonged resuscitation was “pulling out the $9.95 Oral Roberts prayer cloth.” People did not bleed; to Boz they were either “leaking” or “squirtin’,” and my favorite was his reference to vomiting: “a rainbow spill.” (He said, “All the colors are there, you just have to look closely.”) Whenever I said to a patient “I’m going to take your blood pressure,” he always followed with, “But don’t worry, he’ll give ’em back—he only looks crooked.”
3 Boz always called me “the smart one.” It was because I wore glasses and I graduated from college one term ahead of him. By the time we both left EMS we each had advanced degrees—me in physics, he in history. In turn, Boz could be anything the context called for: “The Other One,” “The Sleeping One,” etc., but my favorite was “The One Who Keeps Pecos in Check.”

2011 edition edited by Michael Rose

Highlights:
- over 500 criminal law forms, contributed by your colleagues, downloaded to your desktop in minutes
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- forms updated with case law through July 2011
- revamped sections on post-conviction relief, appeals and juvenile law
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OCDLA THE CRIMINAL LAW FORMBOOK

Michael Rose, Editor
2011 edition

The Oregon Defense Attorney
9 April/May 2015
Bored? — Run for a Board Seat

The Mantle of Leadership

OCDLA seeks strong, dynamic leaders with energy and a passion for helping the Association maximize its potential as the best organization of its kind in the nation. Consider yourself a perfect candidate if you have a long-term vision for the Association and a willingness to “roll up your sleeves” and engage in policy development and substantial fundraising roles.

OCDLA History

OCDLA was incorporated in 1979 by a group of dedicated criminal defense lawyers committed to improving the quality of defense services, and protecting the constitutional and legal rights of Oregon citizens.

OCDLA’s membership has grown from 27 members in 1979 to 1,300. No similar organization in the nation can match these membership numbers on a per-capita basis. OCDLA’s growth is due to the work of dedicated Board members past and present, a talented staff and the unrelenting quest for excellence driven by the Association’s members. In Fiscal Year 1979/80, OCDLA’s first full year of operation, eighty percent of the $40,000 operating budget came from federal grant funds. That funding source dried up in less than two years. Today’s budget is over one million dollars with ninety-nine percent coming directly from the membership.

Capital Campaign

After 34 years of leasing space, two years ago OCDLA purchased its own home located in the heart of Eugene. Now remodeled and occupied for the past 22 months, it is slated to serve the organization well into the future. The ongoing Capital Campaign Charter Donor phase has already achieved 95 percent of its fundraising goal. A Donor Recognition Wall is being designed and will be installed in the lobby to commemorate the members who have brought us this far. Board members will continue to assist the Building Committee in raising money to help pay down the mortgage and permanently secure a major milestone for the organization.

Election Eligibility

OCDLA will elect members to the Board of Directors for Districts 3, 5, and 6 during the 2015 Annual Conference at the Mt. Bachelor Village in Bend. There are 14 Directors on the Board.

If you are a private attorney and you work in Districts 3, 5, or 6, you are eligible to run for one of the district positions. (See the OCDLA Bylaws for more information.)

Candidates / Districts Up for Election

• District 3 (Coos, Curry, Douglas, Jackson, Josephine): No candidate presently. Currently held by Megan Jacquot, who is ineligible to run as she has served two consecutive terms.
• District 5 (Multnomah): Currently held by Celia Howes, Portland, who has declared her candidacy for a second term.
• District 6 (Clackamas, Linn, Marion): Olcott Thompson, Salem, has declared his candidacy for this seat currently held by Gordon Mallon. Gordon is ineligible to run as he has served two consecutive terms.

Continued on next page
Important Dates

May 1 — Deadline to submit candidate statement and photo to have them included in the next issue of The Oregon Defense Attorney.

June 15 — Deadline to declare and appear on the printed ballot.

June 19 — Candidate statements and voting at Annual Conference.

Visit OCDLA.org for election information.

East 14th Avenue, Eugene, OR 97401 by June 15. You may also telephone your nominations to OCDLA Executive Director John Potter at (541) 686-8716 or email jpotter@ocdla.org by June 15.

Ballots are distributed to qualified voting members at the June 18–20 Annual Conference. Candidates will present statements to attendees on June 19 and voting takes place directly after.

---

2015 OCDLA Board of Directors Nomination Form

☐ I want to nominate myself for an OCDLA Board seat in District #: ☐ 3 ☐ 5 ☐ 6

☐ I want to nominate the following private bar member(s) for an OCDLA Board seat.
(You may nominate more than one person.)

Nominee
Name: ________________________ District #: ☐ 3 ☐ 5 ☐ 6

Nominee
Name: ________________________ District #: ☐ 3 ☐ 5 ☐ 6

Nominee
Name: ________________________ District #: ☐ 3 ☐ 5 ☐ 6

CANDIDATE STATEMENT AND PHOTO Candidate statements (500 word maximum) and photos received by May 1 will be included in the June/July issue of the Oregon Defense Attorney, published prior to the Annual Conference. Subjects to consider for your candidate statement: why you wish to serve on the OCDLA board, relevant board experience, fundraising experience, articles or writings published relating to substantive or procedural criminal law, speaking engagements relating to substantive or procedural criminal law, and how you think OCDLA could better serve its members.

DEADLINES Nominations must be made by 5 p.m. on Monday, June 15, 2015, to be included on the printed ballot which is distributed to qualified voting members at the June 18–20 Annual Conference. Voting takes place on Friday, June 19.

RETURN NOMINATION FORM TO OCDLA, 101 East 14th Avenue, Eugene, OR 97401. You may also phone your nominations to OCDLA Executive Director John Potter at (541) 686-8716 or email jpotter@ocdla.org by June 15.
Legislative Update

OCDLA Bills On the Move
by Gail Meyer

We are two months into the 2015 legislative session and all four of OCDLA's bills are alive. Here is the rundown:

**SB 822: Recorded grand juries.** OCDLA first introduced a bill requiring verbatim recordation of grand jury proceedings in 1985. This year, thanks to recent national events and the dogged determination of Representative Jennifer Williamson, we are hopeful the bill may actually cross the finish line. The initial hearing was held on Tuesday, March 31, and by all accounts, OCDLA won the day. The hearing began with testimony from the five legislative co-sponsors: Rep. Williamson (D-Portland), Rep. Krieger (R-Gold Beach), Sen. Jeff Kruse (R-Roseburg), Sen. Brian Boquist (R-Dallas) and Sen. Sara Gelser (R-Corvallis). Next up were OCDLA members Per Ramfjord, Steven Wax, Jason Short, Christopher Missiaen, Gary Berlant, Katherine Kahl, Brad Kalbaugh and Mark Cogan, who testified in their capacities as former district attorneys, former grand jurors, as well as current defenders. The hearing convinced the Oregon District Attorneys Association to see the light and start negotiating on specifics of the bill. The bill will go down to the Ways & Means Subcommittee on Public Safety once it is voted out of Senate Judiciary. When the bill finally starts to move through Ways & Means and onto the House and Senate floor, we will ask you to contact your legislators for an “aye” vote. That time will come near the end of session.

**SB 391: Prohibition of warrantless bail seizure.** SB 391 prohibits law enforcement from seizing money deposited as bail, or attempted to be deposited as bail, without a judicial warrant based on probable cause. It had an easy time sailing out of the Senate Judiciary Committee; it should be voted on the Senate floor during the week of April 6, and from there will head over to the House.

**SB 364: Retroactivity fix to 2013 SB 40.** It’s a long story, but things got screwed up when 2013 SB 40 was amended a bunch of times to create misdemeanor-level marijuana possession crimes. SB 364 fixes the mishaps so people with old marijuana convictions can set them aside based on marijuana’s current classification as a Schedule II drug, even though the convictions were entered when marijuana was a Schedule I drug. SB 364 will also reinstate language allowing a court to reduce an old Class B felony possession of marijuana charge to a misdemeanor.

**SB 363: Prohibits expungement “processing fees.”** Did you realize some county district attorney offices are imposing a “processing fee” for petitions to set aside a record of arrest or conviction? These fees range from $60 to $100 and are payable to the district attorney office, not to the court. It’s hard to believe anyone would think it permissible to impose a fee that is not authorized by statute, but SB 363 would explicitly disallow such a fee. It receives its first hearing on Tuesday April 7 before the Senate Judiciary Committee.

There is a host of ongoing discussions in the areas of police body cameras, domestic violence, firearms, ignition interlock devices, civil commitment, officer-involved shootings and privacy. As per usual, things are very fluid until they aren’t, at which point bills emerge and flow with amazing speed. A lot can happen between now and the deadline of April 21 when bills must be voted out of the committee of the first chamber of origin. For a review of bills OCDLA is tracking and their current status, go to the Library of Defense and click on the “2015 Session” link.

Finally, be prepared for an extension of the statute of limitations for first degree sex crimes. The press attention to Brenda Tracey’s account of a gang rape by four OSU male students in 1998 has captured the hearts of the entire legislature with a desire to “do something.” While media attention on grand juries is working to our favor this session, media attention of delayed reports of sex assault is not.

Finally, a big shout-out to the practitioners on the DUII list-serve and to the Pond dwellers. Your responses to my queries have proven invaluable. I couldn’t do this job without your in-put!

Feel free to contact me at glmlobby@nwlink.com. It’s always great to hear from you.

OCDLA Member Gail Meyer is the association’s substantive issues lobbyist.
Hotel & Travel: $999 ppo from Portland

**November 8-12, 2015**

- per person, double occupancy
- roundtrip from Portland, other departure cities available, see below

**Package Includes:**
- Roundtrip air travel from Portland
- Four nights, Grand Hyatt Kauai, HI
- Free internet
- Free parking
- State-of-the-art 24-hour gym
- Wellness and yoga classes
- Camp Hyatt for kids

Add extra days to the package for even more savings. Hotel & travel package is open to all family & friends of CLE attendees. See [ocdra.org](http://ocdra.org).

**Continuing Legal Education: $395**

**SAVE $25 when you register online during April, and pay only $370.**

**November 10, 2015**

($450 after October 12)

**CLE Registration Includes:**
- Seminar admission
- Written material emailed in advance
- Lunch, refreshments, CLE credit

**Who May Attend**
The CLE is open to defense lawyers and professionals or law students directly involved in the defense function.

**Register for the CLE ONLINE at [ocdra.org](http://ocdra.org).**

To register for the CLE (book travel package separately), visit [http://www.ocdra.org/seminars/shop-seminar-index.shtml](http://www.ocdra.org/seminars/shop-seminar-index.shtml). Choose “Sunny Climate Seminar.” You may also call 541-686-8716 to register by phone. A minimum of one CLE registration is required per travel package.

**Cancellation:** Seminar cancellations made by October 30 will receive a refund less a $50 cancellation fee. Cancellations made after Oct 30 — after material download link has been emailed, will receive a refund less a $150 cancellation/written material fee. No-shows will be sent the MP3 audio download link.

**Other departure cities & prices:** Contact Tom Cronkrite, [Tom@tomtravel.net](mailto:Tom@tomtravel.net) or 1-866-611-3785, for package pricing from other cities.

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### 2015 Sunny Climate Seminar

#### Kauai: Hotel & Travel Package Registration Form

#### Print Legibly

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**Deposit & Payment**

Full payment due **September 7, 2015.** Reserve early; limited space.

I/We plan to leave from this city: ____________________.

Name(s) of additional people staying in room (i.e., spouse, partner, children, friends, etc.):

1. _____________________________________  2. _____________________________________
3. ____________________________________    4. _____________________________________

**Travel Payment**

**by Check** (payable to TravelPro)

- ☐ _____ people x $250 per person deposit = $ ________ enclosed.
- ☐ I am paying for travel in full: _____ people x $ ______ each = $_______ enclosed.

**by Credit Card**

- ☐ Charge my credit card in the amount of $250 deposit x ____ people = $ ____.
- ☐ I am paying for travel in full: ____ people x $ ____ each = $______ enclosed.

VISA/MC/AmEx/Disc Card no.: __ __ __ __   __ __ __ __   __ __ __ __   __ __ __ __  
Name on Card: _______________________________________________CVC#_____

Exp. Date: ___________________ Billing Zip Code ____________________________

Complete **billing address** if different than above:

____________________________________________________________________________

**Options — Add extra days**

☐ Contact me about arriving early and/or staying longer.

**Travel Cancellation/Fee** The airline portion of the travel package is nonrefundable. In addition, any cancellation after September 7, 2015, will be assessed a $250 hotel cancellation fee. Airfare subject to change until travel paid in full.

**Total Enclosed $________**

Send this form and payment to: TravelPro, Attn: Tom Cronkrite, 11825 SW Greenburg Rd, Suite 215, Tigard, OR 97223, or via fax to: (503) 296-5886. For more info, email Tom Cronkrite at [tom@tomtravel.net](mailto:tom@tomtravel.net), or call 1-866-611-3785.

**VISIT [ocdra.org](http://ocdra.org)** for more details and to register for the CLE portion.

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*The Oregon Defense Attorney* April/May 2015
The description is accurate, therefore the witness got a good look, therefore the I.D. is reliable. Is this analysis valid?

Recently, I participated in a case in which the State hoped to present an in-court identification of the defendant. ("Yes, that is the man who attacked me.") The defense sought to exclude this identification on the grounds that the witness had little opportunity to view the assailant during the crime, and so did not have a reliable basis for an identification. The judge ruled that an in-court I.D. would be allowed, noting that the witness had been able (with the help of a police artist) to create an "accurate sketch" of the perpetrator. Apparently, then, the witness must have gotten an adequate view of the perpetrator and therefore did have a basis for making an in-court identification.

As a close parallel, imagine a (more common) scenario in which a witness provides a verbal description instead of a composite, and imagine that a judge follows the same logic: the description is accurate, therefore the witness got a good look, therefore the I.D. is reliable. Is this analysis valid? The answer, for many reasons, is no.

Let's start with the fact that a claim of "accuracy" for a composite sketch (or a description) is subjective. In the case that launched this essay, the judge seemed to be saying that the sketch resembled the defendant, but resemblance is in the eye of the beholder. Indeed, I showed the composite sketch from this case to a number of people, and also showed them a photomontage containing the defendant's picture. I asked: Which of these pictures most resembles the sketch? The majority of the people I asked (60%) selected a photo other than the defendant's, suggesting a need for caution regarding the judge's assessment that the drawing was "accurate."

In addition, there's a logical problem here. Let's say that the witness's sketch (or, in other cases, a description) is subjective. In the case that launched this essay, the judge seemed to be saying that the sketch resembled the defendant, but resemblance is in the eye of the beholder. Indeed, I showed the composite sketch from this case to a number of people, and also showed them a photomontage containing the defendant's picture. I asked: Which of these pictures most resembles the sketch? The majority of the people I asked (60%) selected a photo other than the defendant's, suggesting a need for caution regarding the judge's assessment that the drawing was "accurate."

In addition, there's a logical problem here. Let's say that the witness's sketch (or, in other cases, a description) does indeed match the defendant's appearance. This correspondence, however, does not indicate that the witness is accurate. An accurate witness is one whose description (or sketch) resembles the perpetrator, and – of course – we cannot assume at the start of a trial that the perpetrator and the defendant are one and the same person. On this basis, "match to defendant" cannot be understood in any straightforward way as indicating "accuracy."

To make this concrete, imagine a situation in which a witness mis-perceived or mis-remembers a perpetrator's appearance. Evidence from this witness might lead the police to arrest someone who is, in truth, factually innocent. In this setting, the witness description might be a near-perfect match to the defendant even though the description is entirely inaccurate as a description of the perpetrator.

I can, however, imagine a prosecutor scoffing at this argument. Is it mere coincidence, the prosecutor asks, that the sketch (or description) generated shortly after the crime now turns out, months later, to match the defendant's appearance? If (say) the witness had told police the perpetrator was red-haired and clean-shaven, shouldn't we take note that the defendant has the same traits?

The response to this point comes from psychologist Gary Wells, who reminds us that, with no role for mere coincidence, a witness sketch (or description) is likely to match the defendant even when the defendant is innocent. Wells notes, first, that witness descriptions are usually sparse, mentioning just a few attributes (perhaps: "white male, average height, short brown hair"). As a result, in many cases a "match-to-defendant" is easily achieved, and so we shouldn't be impressed by this "match."

In addition, Wells urges us to consider the dynamic of a police investigation. Imagine that a witness sees a perpetrator only from a distance, and so mistakenly describes the perpetrator, let's say, as having a thin face. The police may have no reason to question this (mis)information, and so are more likely to pursue thin-faced suspects than round-faced ones. As a result, the witness description will match the suspect's appearance — not because the description is accurate, but because the description guided the investigation.

In addition, many studies indicate that witnesses are more likely to select someone from a lineup if that person's appearance...
matches the witness’s pre-lineup description. Therefore, a witness who (mistakenly) described the perpetrator as thin-faced is more likely to choose someone thin-faced from a lineup. Again this point will often ensure that the description matches the lineup selection (and eventually, the defendant), whether or not the description is accurate.

For all of these reasons, we learn little from the degree of resemblance between a description (or sketch) and the defendant. Of course, this resemblance is likely if the witness did get a good view of the perpetrator and has provided accurate information. But, for the reasons just described, the dynamic of an investigation can create this correspondence even if the description is laced with errors.

Perhaps, though, we can take another tack. Setting aside issues of “resemblance” or “accuracy,” perhaps we can learn something by considering the completeness and level of detail in the witness’s description, or the fluency (perhaps assessed by a police artist?) with which the witness created the composite sketch. Thus, consider the (fictitious) witness mentioned earlier who tells police the robber was red-haired and clean-shaven; let’s assume the witness also mentions the robber’s sharp chin, small nose and narrow eyes. Shouldn’t we conclude that this witness was attentive and got a good view of the perpetrator? And on this basis shouldn’t we give more weight to the witness’s I.D.? (And, of course, the logic would be the same if the witness gave all of these details to a police artist, in constructing the composite.)

The law on this point is clear. In the Lawson ruling, the court noted, “Contrary to common misconception, there is little correlation between a witness’s ability to describe a person and the witness’s ability to later identify that person.” Thus, the completeness and detail of the description do not indicate that the I.D. deserves more weight.

On this issue (and many others), the Lawson ruling is fully in tune with the science: Research is clear that there is little correspondence between the quality of a witness’s description and the probability of the witness making an accurate I.D.
When Clients Want to File
by Emily Elison

Ed. Note: This article also appears in the online Library of Defense, March 27, 2015.

If clients haven’t heard or read about post-conviction relief prior to serving a custody sentence, they quickly hear about it once they’re in custody. They often call trial counsel to ask about filing for PCR. Although post-conviction is a complicated and strange hybrid of civil and criminal law and trial and appellate practice, many clients will be eligible for PCR counsel and will not have to handle the entire case pro se. The goal is to advise clients about how to file a timely and proper petition so that a PCR attorney can be appointed. The PCR attorney will file an amended petition after reviewing the case.

Is the filing deadline one year or two?
Clients need to file their PCR petition as soon as possible within one year of the date their judgment of conviction was entered (if there has been an appeal, within one year of the date the appeal is final; if SCOTUS cert was sought, within one year of the denial). It is helpful to remind clients that their conviction occurs—usually—at sentencing, not at a later probation violation hearing when they get revoked (unless there is a claim against PV counsel).

Many clients hear that the statute of limitations for state PCR is two years, which is correct. However, the statute of limitations for a federal habeas corpus action (taken after state post-conviction is complete) is only one year, and this federal SOL tolls when state PCR is filed. So, if longer than one year has passed, the client can still file for state PCR but will almost certainly not be able to later obtain federal relief. Filing within one year helps protect their ability to later get federal review.

Where should clients file PCR petitions?
Clients in DOC custody must file their PCR case in the county where they are incarcerated. The rare client incarcerated out of state files in Marion County. If the client is already released on parole, their case is filed in the county where they were previously incarcerated. All other out-of-custody clients file in the county court where they were convicted and sentenced.

Clients in ICE custody, unlike DOC clients, file in the county where they were convicted and sentenced.

What is included and how does a client file a petition?
The client must mail the original petition and all supporting documents, plus two copies, to the clerk of court in the county where they are filing. This has become more complicated due to mandatory e-filing in some counties, however, courts still appear to be accepting hard copies of pro se petitions. The client does not need to serve the defendant.

Who is the defendant?
In PCR, the client is the Plaintiff-Petitioner. Who the defendant is depends on the client’s custody status. For DOC-custody clients, the defendant is the superintendent of the prison where the client is incarcerated. The superintendent will be represented by the Oregon DOJ. For example, clients at SRCI would file a case against “Mark Nooth, Superintendent, Snake River Correctional Institution” and would file in Malheur County Circuit Court. For out-of-custody clients and clients in ICE custody, the State of Oregon is the defendant. The State is represented by the county DA’s office where the case is filed. Clients should not expect the defense to respond to their pro se petition if the court appoints PCR counsel. Defense counsel usually waits until PCR counsel is involved before filing a response to any pleadings.

What should the petition should say?
Unless a client can retain a PCR attorney, they will file their original petition pro se. For incarcerated clients, forms are available in the prison law library. Out-of-custody clients can find forms at the county courthouse in the civil department.

Most of these forms contain blanks to fill in procedural information about their underlying case (dates of conviction, charges, sentence, dates of appeal, etc.). The form will also have space for the client to explain their substantive claims. This petition does not need to include legal arguments or citations but should be specific about the issues it raises (attorney error, illegal sentence, constitutional violation, etc.). PCR counsel will file an amended petition after reviewing the case to add or modify issues.

The client must certify the petition before they file it, so they should make arrangements to sign it before a notary (available in prison libraries). The client needs to certify that the facts they have included that are within their personal knowledge are correct and that any documents they have attached are authentic.

Continued on page 23.
## Juvenile Law Seminar: Tips, Tricks, and Tools to Successfully Manage the Complex Practice

### April 17–18, 2015
Hallmark Resort

#### Who can attend?
OCDLA and WACDL members, other defense lawyers and those professionals and law students not involved in the prosecution function.

#### What’s included in the fee?
- Seminar admission
- Electronic material download
- CLE credit
- Breakfast and lunch on Saturday
- Refreshments at the breaks

#### Financial assistance?
Contact OCDLA by April 7 about scholarships, payment plans or creative payment arrangements.

#### Cancellations
Cancellations made **before April 10** will receive a refund less a $25 cancellation fee. Cancellations made **after April 10** — once material download link has been emailed — will receive a refund less a $100 cancellation/written material fee. No-shows will have been sent written materials electronically and will be provided the audio material in MP3 format.

#### Lodging
Hallmark Resort, Newport
541-265-2600
744 SW Elizabeth Street
Call the Hallmark to inquire about room availability. Our room block was released on March 16.
$104 Traditional 1-bed Queen
$109 Traditional 2-bed Queen
$129 Limited Edition King Spa
Mention OCDLA to receive these special rates, if available.

#### CLE Registration
ocdla.org
Phone: 541-686-8716
Fax: 541-686-2319
Mail: 101 East 14th Avenue
Eugene, OR 97401

#### CLE Credit for Seminar
Pending approval for 7.25 general, 2.5 ethics credits in Oregon; 9 general credits in WA. OCDLA certifies that the Juvenile Law Seminar has been approved for MCLE credit by the State Bar of California in the amount of 9 hours, of which 2.5 will apply to legal ethics. OCDLA is also an approved Oregon DPSST CLE provider.

### REGISTRANT INFORMATION

| Name __________________________ | Bar#/PSID# __________________________ |
| Name for Badge __________________________ |
| Address __________________________ | City __________________________ | State ______ | Zip __________ |
| Phone __________________________ | Fax __________________________ |
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### CLE TUITION AND MATERIALS (download link emailed in advance)

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Other Material Options

- Add a CD of materials and supplements for an additional $15. + $_____
- Add a hardcopy of essential materials (w/o supplements) for an additional $30. (Pre-order the hardcopy by April 10.) + $_____

### CAN’T ATTEND?
Get the audio and written materials.

SAVE $: Download materials and MP3 audio following the seminar, $230, members only

- Written materials (CD) & audio CDs for CLE credit, $255, members only = $_____
- Written materials (hardcopy & CD) & audio CDs for CLE credit, $285, members only = $_____
- Written materials only (hardcopy & CD), $150, no CLE credit = $_____

### OCDLA FUND DONATIONS
I would like to donate $25 to the:

- Scholarship Fund to assist members who would otherwise be unable to attend = $_____
- Legislative Advocacy Fund which supports OCDLA’s lobbying efforts. = $_____
- General Fund; my gift will be applied where it is most needed. = $_____

### OCDLA MEMBERSHIP
Membership valid through June 2015.

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Payment must accompany registration.

- Check enclosed ✓ VISA/MC/AMEX/Discover TOTAL = $_____

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The defendant in Antoine was charged with four counts of sodomy; each of those four counts was worded identically:

Antoine, 269 Or App at 69. "Antoine filed a demurrer, arguing that the indictment “provided insufficient notice of the charges, placed him at risk of double jeopardy, and failed to ensure that he was being tried only for those criminal acts for which the grand jury had indicted him.” The prosecutor asserted that the state could resolve the problem by making an election at the end of its case. The trial court agreed, and held that the prosecution could only elect factual incidents relied upon by the grand jury."

Antoine responded to that ruling by unsuccessfully moving the court to order the state to disclose grand jury notes, in order to discern which factual incidents were in play. In responding to that motion, the prosecutor disclosed that the grand jury had been presented a “broad” description of sexual abuse inflicted on the victim by the defendant and that the resulting counts were “representative samples” of that evidence. The prosecutor assured the court that the state could tie specific counts to specific incidents when it made its election. The state subsequently elected at the close of its case, and the trial court tailored the jury instructions to signal that particular counts were tied to specific factual incidents detailed in the state’s evidence.

On appeal, Antoine reasserted that the generically-worded indictment violated his constitutional right under the Sixth Amendment and Article I, section 11, to notice of the charges against him. The Court of Appeals “agree[d] with defendant that the indictment itself did not provide him with sufficient notice, and the problem with inadequate notice, which arose before trial, was not cured during trial.”

That holding is significant. The court noted the general rule that an indictment generally is sufficient if it charges an offense in the words of the statute. An exception to that rule exists where the indictment fails to inform the defendant of the specific factual allegations that he must defend against and discovery does not supply that missing information. But Oregon courts have never

Continued on next page
APPELLATE PERSPECTIVE Continued from previous page

endowed the exception with a lot of teeth. See, e.g., *State v. Molver*, 233 Or App 239, 244-49, 225 P3d 136 (2010) (discussing exception but concluding that DUII allegation was not sufficiently complex to render generically-worded indictment insufficient).

In *Antoine*, Judge Nakamoto restores adequate notice and the corresponding opportunity to defend against the charges as the focus of the analysis:

This case involves multiple, separately identifiable criminal acts, but the indictment tracks the wording of the criminal statutes without differentiating separate criminal acts. From discovery, defendant learned that the victim had described more criminal acts than were charged in the indictment, and the state elected the specific criminal acts that it was prosecuting only after the close of its case-in-chief. As a result, the state's charging method effectively allowed the state to adduce evidence of multiple criminal acts in each count of the indictment, without defendant knowing which of the acts would be specified and argued to the jury for convictions. Such a charging process failed to provide defendant with proper notice of the charges before trial.

*Antoine*, 269 Or App at 76-77; emphasis added.8

However, having found that the indictment failed to sufficiently apprise Antoine and the trial court of the charges prior to trial (which the court labeled the “core function” of an indictment), and that pretrial discovery failed to bridge that gap, the court nevertheless affirmed the trial court's denial of the demurrer. The court determined that *State v. Hale*, 335 Or 612, 75 P3d 448 (2003), cert den., 541 US 942 (2004), demanded that result.

The defendant in *Hale* filed a demurrer, arguing that the allegations of aggravated murder based on murder to conceal the crime of sexual abuse which generically mirrored the statutory wording, failed to provide adequate notice.9 Pretrial discovery indicated that Hale or another person may have sexually abused a number of the murder victims.10 The Supreme Court agreed that Hale was entitled to know which facts and circumstances the state was relying on to support the aggravated murder counts.11

However, the *Hale* court held that the trial court properly denied the demurrer, because Hale had other methods available to him to acquire that information, such as by “later moving” to require the state to elect.12 The *Antoine* court understood *Hale* to “place the burden on a defendant to attempt to procure adequate and timely notice of the charges against him, even when an indictment that is alleged in the words of the statute does not provide such notice.”13 Given that burden, when the prosecutor proposed to elect after the state's case-in-chief, Antoine's failure to object and demand that the election occur pretrial was fatal to the issue on appeal.14

Continued on page 23.
Is *Stare Decisis* Dying In Oregon?

By Daniel R. Schanz

Around the year 2000, there was a growing concern in the Montana State Bar that its Supreme Court rulings were inconsistent. Cases were being overturned at an alarming rate, and it was considered malpractice not to appeal. The Montana Court was purportedly the most active in the state's history—rewriting law at an unprecedented rate. One commentator on the situation in Montana noted that predictability had been lost, and the inevitable consequences when that occurs are that “Businesses cannot feel confident in their business decisions. Lawyers cannot give reliable advice. Individuals cannot act secure in the belief that their actions comply with the law. After all, the law’s interpretation may change next week.” It was the Montana Court’s unwillingness “to stand beside things decided”—or in Latin, *stare decisis*—that had caused the storm for which no one could find a harbor.

Over the past several months, those of us who follow the listserv have seen a growing list of cases, assembled by Tom Christ, in which the Oregon appellate courts have reversed lower courts with sweeping statements “disavowing” and “overruling” earlier precedents.

From a distance, it appears that our appellate courts are retreating from earlier established precedent at an accelerated rate. Which raises the question, “Is *stare decisis* dying in Oregon? And perhaps more importantly, “Should we, as members of the civil defense bar, care?”

*Stare decisis* is a doctrine firmly established in Oregon law and relied upon in our earliest reported cases. The doctrine, although now riddled with exceptions, is still applied today, as evidenced by the relatively recent case of *Farmers v. Mowry*. In *Farmers v. Mowry*, the Oregon Supreme Court applied *stare decisis*, but further softened its application as it relates to statutory interpretation.

Since 2011, *Farmers v. Mowry* has become the most frequently cited authority in those cases where our appellate courts have “overruled” or “disavowed” established precedent.

As members of the civil defense bar, *stare decisis* is as important to our respective practices as it is to our clients’ efforts to conduct their businesses with a level of certainty. A primary purpose behind *stare decisis* is to promote predictability and stability within the law. Our Supreme Court has stated that “Stability and predictability are important values in the law; individuals and institutions act in reliance on this court’s decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness.”

Our clients want to conduct their businesses and professional practices so as to comply with the law and to avoid unforeseen liability. Insurers spend significant amounts of time and money predicting their exposure based upon settled principles within the law so that premiums can be determined. We rely upon precedents in advising our clients, asserting legal positions, and settling and trying cases. When uncertainty is introduced into the equation, costs go up, clients are left with unanswerable questions, and future decisions are delayed or impacted. The doctrine of *stare decisis* promotes stability.

Adherence to the doctrine of *stare decisis* also promotes slow, incremental changes in the law, rather than revolutionary or “erratic change.” Our Supreme Court has noted that it ”will not depart from established precedent simply because the ‘personal policy preference[s]’ of the members of the court may differ from those of our predecessors who decided the earlier case.” None of us want what purportedly happened in Montana to occur in Oregon jurisprudence. Slow, metered, and regulated changes in the law allow for our clients to plan and meet their customers’ needs accordingly. Respect for the law and the legal process is also furthered when clients and attorneys see consistency and constancy in decisions by our appellate courts.

A commitment to the doctrine of *stare decisis* also creates efficiency within our legal process. Judge Cardozo noted that without an active application of the doctrine of *stare decisis* “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him [or her].”

The Oregon Court of Appeals consistently ranks as one of the busiest appellate courts in the nation. Over the past 10 years, the range of new appeals filed per year is between 3,200 and 4,100. *Stare decisis* is one of the tools that allows our appellate courts to...
From the Criminal Defense Perspective

John Tyner

The issue of departure from stare decisis by the Oregon Supreme Court has reached critical mass in Oregon with recent case law decisions in a number of different practice areas. The criminal procedure departures in three August cases, referred to in Shawn Wiley and Peter Gartlan’s article, “The Unger Games,” in the Nov–Dec 2014 Oregon Defense Attorney show the retreat from prior recent precedent in State v. Hall, 339 Or 7 (2005). In that case, the court used Fourth Amendment language of deterrence and police “good faith,” where formerly it used privacy rights language. Other state bar practice areas are noting this process as well, as the accompanying article here from the insurance defense community shows.

Bronson James, in his presentation at the 2014 Annual Conference, revealed the extent of this transformation as it applies to criminal law. The retreat is most pronounced in search and seizure law, which is interesting because the privacy rights analysis was actually voted on in the aftermath of the defunct “Victims Rights Initiative” (BM 40). Oregon voters opted to retain Oregon’s independent constitutional interpretation under Article I, section 9, to the Oregon Constitution.

Formerly under Article I, section 9, a search is “an intrusion by a governmental officer, agent, or employee into the protected privacy interest of an individual.” State v. Nagel, 320 Or 24, 29 (1994). The US Supreme Court uses “reasonable expectation of privacy” language from the US v. Katz opinion as the federal standard. An expectation of privacy is one that is “legitimate” or that “society is prepared to recognize as reasonable.” United States v. Jacobsen, 466 U.S. 109, 122-23, 104 S.Ct. 1652, 1661-62, (1984). In contrast to the federal constitution, a search under the Oregon Constitution is not defined by a reasonable expectation of privacy, but in terms of “the privacy which one has a right.” State v. Campbell, 306 Or 157, 164 (1988). This is a more nuanced view of people’s rights in an environment where expectations of privacy are in general retreat as technology and police practices intrude with greater frequency into areas formerly thought private.

hear and resolve the volume of cases presented. Our clients benefit in having a case heard within months, as opposed to years, after an appeal is filed.

Finally, when courts make decisions based upon reasoned judgments from the law and not current social, personal, or political preferences, the public’s perception of the process is enhanced. Our Supreme Court has consistently recognized that to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness. Moreover, lower courts depend on consistency in this court’s decisions in deciding the myriad cases that come before them. The Mowry Court observed: “Few legal principles are so central to our tradition as the concept that courts should ‘[t]reat like cases alike’ . . . and stare decisis is one means of advancing that goal.”

As members of the Oregon State Bar and the OADC, it is our aspiration to improve the image of the legal profession in the eyes of the public and to promote respect for the courts. Application of the doctrine of stare decisis helps us to advance that goal.

Is the doctrine of stare decisis dying in Oregon? It is too early to tell, but this is an issue that deserves our attention. Early identification of any potential problem is essential to effective intervention. At the trial court level, we need to create a record underscoring the importance of precedent and the policy reasons behind the doctrine of stare decisis. The Supreme Court has provided strong language in support of the doctrine, and we need to continue to urge its application. At the appellate level, the doctrine and its application continue to evolve. The U.S. Supreme Court has a four-step rubric that it applies before a precedent is abandoned. Such a formal rubric does not exist in Oregon, but it may be time to urge its creation, when the appropriate case presents itself.

Endnotes

2 Id. at 43.
3 I thank Tom Christ for preparing the list and other observant members who have added to it. With that said, this article and the positions asserted are only my own.
5 See e.g. Multnomah County v. Sliker, 10 Or 66 (1881).
7 Farmers v. Mowry, 355 Or at 697.
8 Randy J. Kozel & Jeffrey A. Pojanowski, Administrative Change, 59 UCLA L. REV. 112, 137 (2011) (“A strong doctrine of stare decisis is consistent with a judiciary characterized by steadiness and gradualism rather than erratic change.”)
9 Farmers v. Mowry, 350 Or at 697.
10 See Administrative Change, supra at 149.
11 Oregon Court of Appeals Web Site; informational page (http://courts.oregon.gov/OA/AppPages/index.aspx).
12 Farmers v. Mowry at 698, internal citations omitted.
13 See “Statement of Professionalism,” Adopted by the Oregon State Bar House of Delegates and Approved by the Supreme Court of Oregon effective December 12, 2011.
The Assaultive Behavior Jury Instruction

Complaining When You Don’t Get It, Complaining When You Do

by Ryan Scott

Ed. Note: This article originally appeared in the online Library of Defense, March 2, 2015.

As I have written about before, when a defendant is charged with knowingly causing an injury or serious physical injury, State v. Barnes holds that he does not need to know he is causing an injury or a serious injury but rather he must know he is “engaged in assaultive behavior.”

But what is assaultive behavior? A punch, sure. A push? A push out of the way? Please define assaultive behavior in such a way that doesn’t require knowingly causing an injury. Nor can it require recklessly causing an injury, because that’s a lesser-offense. Seriously, give it a try. It’s not easy.

The recent opinion in State v. English had the COA noting the absence of any clear definition of “assaultive behavior.”

Barnes does not illuminate what it means to know that one’s conduct is of an “assaultive nature,” because there was no basis for dispute that the conduct of the defendant in Barnes—punching a security officer in the eye—was assaultive in nature. See 329 Or at 329-30.

Unlike the conduct in Barnes, defendant’s conduct was not of a classically “assaultive nature”; rather than directly inflicting injury on V, defendant exposed V to the dog, an intervening actor, and the dog inflicted the injury.

We agree with defendant that Jantzi offers some guidance for analyzing this case. The defendant in Jantzi hid in the bushes holding a knife he had used to slash the victim’s tires and, when the victim jumped on top of the defendant, they rolled over in such a way that the victim was stabbed in the abdomen. 56 Or App at 59. The trial judge, who was the factfinder, believed that the defendant did not intend to stab the victim but reasoned that the defendant, nonetheless, “knowingly” caused the injury—as required for charge of second degree assault—because he knew he had a dangerous weapon and that a confrontation was going to occur. Id. at 61. We held that the court’s findings did not permit conviction for a “knowing” assault, because “a person who ‘is aware of and consciously disregards a substantial and unjustifiable risk’ that an injury will occur acts ‘recklessly,’ not ‘knowingly[.]’” as those mental states are defined in ORS 161.085. Id.

So there’s no question in a case where the behavior is not of a “classically” assaultive nature (for example, a shaken baby case), you would be entitled to an instruction stating that the defendant must know he is engaged in assaultive behavior. That is an element of the crime and it has been since Barnes.

But if it’s an element of the crime, then you are entitled to a definition. Here’s a case that I often use to federalize my complaint that an instruction is ambiguous:

The court held that the evidence was sufficient to support the convictions under Jackson v. Virginia. However, based on In re Winship, Sandstrom, and Estelle, the appellate court held that ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the state of its burden of proof of an element of the crimes with which he was charged.

Continued on next page
The instructions were, at the very least, ambiguous on the question of whether the inmate could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that the inmate knew that an accomplice intended to commit murder. The court held that there was a reasonable likelihood that the jury misapplied the ambiguous jury instructions. Relieving the state of its burden of proof on that issue was not harmless error.


So ask for an instruction requiring the state to prove your client knowingly engaged in assaultive behavior. And ask for a definition of assaultive behavior. You should draft your own definition, of course, with an eye towards the best possible definition for your client. The state or the judge will draft their own. Odds are you'll find something in their definitions worth objecting to (for example, a definition that would require the state to show less culpability than it would if the crime was charged recklessly).

Do all this, and you'll make some interesting case law.

POST-CONVICTION RELIEF Continued from page 16.

How can clients obtain a PCR attorney?

Clients should include a specific request for counsel and an affidavit of indigence with their pro se petition. This request should include a request to waive the filing fee (currently $252). The affidavit should include a statement of their assets, debts, and income from the previous year and that they cannot afford to pay the expenses of a PCR case.

Once their petition is filed and indigence determined, the court will appoint PCR counsel, who will have an opportunity to file an amended petition after they review the case to include any issues the attorney finds, to federalize issues and to ensure that the necessary documents are attached.

Despite that result, Antoine is a significant victory in an area of law that has consistently proven frustrating for the defense. Most courts faced with generic allegations and a record that would support multiple incidents of the relevant crime have focused on the requirement that jurors agree on the factual predicate underlying their verdict. Antoine squarely addresses the deficiencies in notice to the defendant inherent in those circumstances, with the corresponding difficulty in preparing to defend against the charges. The opinion provides a blueprint for us going forward: identify the extent to which the indictment and pretrial discovery fail to identify the factual instances the prosecution will rely on to prove the allegations, and demand a pretrial election. A judge who refuses to require an early election violates your client's rights under the Sixth Amendment and Article I, section 11, and the issue is properly preserved for appeal. On the other hand, if the judge forces the state to elect prior to trial, motions for judgment of acquittal and to exclude other acts evidence (even post-Williams) gain focus and strength. 15

Two interrelated issues remain. The Antoine court explicitly left for another day the application of its analysis to a more extreme, but no less common, variant of generic charging: "cases in which young children or others with disabilities may not be able to describe a particular incident with specificity and instead may generically describe repeated abuse of a particular type that has occurred over a period of time; in other words, they cannot describe dates, exact locations, or other details to differentiate one incident from the next." 16 That situation will test the court's ability to balance the interests of the state in prosecuting those cases and the defendant's right to notice of the charges.

It will also fully implicate the due process concerns that the Antoine court declined to address. Article I, section 12, of the Oregon Constitution, prohibits a second prosecution if (1) the charges arise out of the same act or transaction, and (2) the charges

Continued on page 25.
VIEW FROM HERE Continued from page 5

begin feeling drained, unappreciated, and taken advantage of. In
those times, as my husband notes, I am more prone to petulance.
This petulance infects my arguments. Thus, my work both creates
and falls upon deaf ears. I lose my effectiveness and harm my client’s
chances. I settle into an existence that is rather like that of a two-
year-old child. I know what I want and I want it now.

Unlike the child, though, I do know how to balance my needs
with my clients’ needs, and when I do it is better for all of us. When
I get to watch my stepdaughter laugh with delight at her father’s
strange observations about men, it makes turning off my computer
easier. I am not perfect at this, and I haven’t been doing it for long
enough. Recently, though, I began to realize I was becoming toxic. I
needed to change the alchemy of my life.

This need for change upon me as I spent a lot of time
with my mother in the hospital and at cardiologists’ offices. My
mother is 70 years old and lives four blocks from me. It was a sharp
slap when I realized one morning that this was both the greatest
amount of time and most frequent contact I’d had with her in
months. I’d lost track. I was too intense. Oh sure, I’d stop by, or
call her quickly, but those were just moments, not time. Since then
I’ve learned recipes from her that I love (and written them down,
she does them off the cuff), watched her laugh at movies she’s never
seen, and began to learn to crotchet again. Sunday nights are phone
call nights. I talk to my brother in Alaska, my father in Tillamook,
my sisters – one in Vale, one in Garibaldi – each Sunday catching
up with one of these family members.

I am not perfect. I falter at these “routines” at times. When
I miss these opportunities to connect, I experience a sense of
emptiness more profound than when I bookend a day with
darkness. It’s the sense that the moment held something essential
and valuable and that in my distraction, suddenly, like a breath of
wind, the moment is gone.

So feed yourself – the other part of yourself, not just your
passion for defense work. Honor the part of you that makes you
so good at what you do – honor that empathy, humanity, love
and caring. Create the moments that revive you. Repeat. This
will preserve you both personally and professionally. Plus, those
memories will warm you in the autumn years.

With deepest regard, respect and admiration,
Eve (El Presidente Muerte)
could have been tried in the same court, and (3) the prosecutor knew or reasonably should have known of the facts relevant to the second charge at the time of the original prosecution. The use of generic, identical allegations as “representative examples” of repeated, nondifferentiated factual incidents, any of which could constitute the charged crime, creates a substantial double jeopardy risk for defendant. The resulting trial typically contains no evidence from which one can determine which incidents form the basis of the jury’s verdicts. Yet the complaining witness typically provides testimony alleging large numbers of those incidents. What protects the defendant from the state again charging defendant with the exact same crimes committed during the exact same time frame?

Those are questions and issues for another day. In the meantime, Antoine gives us the opportunity and authority to demand pretrial notice where the indictment and discovery do not clearly delineate which factual incidents the state intends to rely on to prove the charges against the client.

Endnotes

1 Courts have often addressed the third concern—juror agreement on factual predicates—by requiring the prosecution to elect at the close of its case which act it is relying on to prove a particular charge. State v. Randolph, 123 Or App 566, 569, 860 P2d 873 (1993), State v. Yielding, 238 Or 419, 424, 395 P2d 172 (1964); State v. Pace, 187 Or 498, 212 P2d 755 (1949); State v. Ewing, 174 Or 487, 149 P2d 765 (1944).

2 Antoine was also charged with four counts of sexual abuse that were similarly indistinguishable from each other. Id.

3 Id. at 70.

4 Id. at 71.

5 Id. at 72-73.

6 Id. at 73-74.

7 Id. at 76.

8 The Antoine court also noted that the indictment’s lack of specificity with regard to which factual incidents formed the basis of the charges made it impossible for the trial court to evaluate objections to other bad acts evidence under OEC 404(3), because the court cannot know which acts are the charged acts and which are the “other” acts. Id. at 77-78. However, the Oregon Supreme Court’s more recent opinion in State v. Williams, 357 Or 1 (March 19, 2015), may affect that portion of Judge Nakamoto’s analysis.

9 Hale, 335 Or at 617-18.

10 Id. at 616.

11 Id. at 620-21.

12 Id. at 621.

13 Antoine, 269 Or App at 78.

14 That result is somewhat puzzling, even in light of Hale. Antoine fully preserved the issue of inadequate notice by filing a demurrer in which he argued that the indictment and pretrial discovery failed to provide sufficient notice of the charges. The Court of Appeals held that, in fact, such notice was lacking, which violated Antoine’s constitutional rights. Yet because Antoine did not utilize another method of acquiring the necessary information prior to trial (one that the trial court could have ordered in response to Antoine’s demurrer), the Court of Appeals affirmed his conviction. Id. at 79.

15 Should the legislature pass OCDLA’s 2015 bill (SB 822) to require grand jury proceedings be recorded, the defense will have a significantly stronger ability to argue that the factual incidents identified in the state’s pretrial election do not match the facts found by the grand jury. The Antoine court rejected that argument, somewhat reluctantly holding that prior Supreme Court opinions required it to presume that the grand jury relied upon the same factual incidents as the prosecution elected to rely on at trial. 269 Or App at 81-84 (citing State v. Wimber, 315 Or 103, 115, 843 P2d 424 (1992); State v. Pachmayr, 344 Or 482, 492-95, 185 P3d 1103 (2008)).

16 Antoine, 269 Or App at 77 n6.

17 State v. Leverich, 14 Or App 222, 225, 511 P2d 1265 (1973); see also ORS 131.515.
June 18–20 • 2015 Annual Conference

Skills and Thrills

Special Guest Speaker

HANNI FAKHOURY, Electronic Frontier Foundation, San Francisco

◆ Taking the Sting Out of Stingray: Post-Riley Digital Searches and Litigation in the Era of Secret Cell Phone Tracking

Main Tent Attractions

◆ The Weed Freed: Apres Measure 91, Quoi? Including New Criminal Penalties, Marijuana Legislative Update and Expungement — Lee Berger, Portland

◆ A Tightwire Act: Appellate Update
  Shawn Wiley and Kali Montague, Office of Public Defense Services, Salem


◆ First Things First: Yep, It’s Jury Instructions — Ryan Scott, Portland

◆ Dire Voir Dire: Not Just Batson — Scott Sharp, Metropolitan Public Defenders Office, Portland

◆ Daredevil Direct: Dancing on the Wire Without a Net — Shaun McCre, Eugene

◆ Not Clowing Around: Creative Cross of Cops — John Henry Hingson, III, Oregon City

◆ Ethical Quandaries: A One-Way Ticket to Russia

◆ Breaking Bad? Prior Bad Acts: State v. Williams
  Mary Reese and Kristin Carveth, Office of Public Defense Services, Salem

Breakouts

◆ Counseling Restraint: The Practical Side of Restraining Orders
  Andy McLain, Portland

◆ Sure-footed SAPO Defense: Everything You Need to Know About Sexual Assault Protective Orders — Lisa Ludwig, Portland

◆ Enter at Your Own Risk (or, There Ain’t No Veterans Court) / Defending Veteran Clients Facing Prison Time — Jesse Wm. Barton, Salem, and William “Bud” Brown, PhD

◆ Aiming Higher: Demonstrative Evidence Using Free Programs and Online Tools
  Michael Rees, Metropolitan Public Defenders Office, Portland

◆ It’s a Balancing Act: Storytelling with Technology — Kasia Rutledge, Metropolitan Public Defenders Office, Portland

◆ Look Before You Leap: How to Succeed in Private Practice — Bob Thuemmel, Portland

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BOOK REVIEW

The Science of Perception and Memory: A Pragmatic Guide for the Justice System

Daniel Reisberg
Oxford University Press: October, 2014

Book Review by Susan Elizabeth Reese

If you care about the accuracy of witness evidence, this small, information-rich volume is for you.

Professor Reisberg provides a comprehensive and comprehensible handbook for understanding how we observe, how we remember and how we recall information that may be critical in a legal proceeding. The book offers not only an overview of the scientific method and its use in the study of memory and perception, but also a strong argument for its utility in the legal system in the search for justice.

Reisberg begins by observing that, while scientific studies are “slowly percolating into the legal world, and research psychologists are already advising” lawyers and testifying in courts, the field is by no means universally accepted in the legal arena. He notes criticisms that his field is ever evolving (and, hence, uncertain), is merely common sense (and, hence, irrelevant) or – even worse – an attack on evidence itself (and, hence, biased). One by one, he examines and answers each concern.

Reisberg offers an explanation of the roles and techniques of a research psychologist, contrasting those with the roles and techniques of the more visible clinical psychologist. He describes the different types of information that each can bring to the justice system. He also describes the scientific method, touching on such areas as replication, peer review, measurements, error rates and standards.

The book is organized logically. After addressing what Reisberg calls “foundational issues,” he examines perception and memory: how we see, and how we store, retrieve and communicate our observations. From there, he moves to areas central to the justice system: how an identification occurs; how a witness links perception to an identification; factors that promote witness accuracy; and factors that contribute to a false identification. The book addresses, of course, identifications by face and facial features; it includes sections on memory for voice and conversations. There is a chapter about lies and one about confessions. Reisberg examines how jurors perceive, and he devotes the final two chapters to children’s memories and proper, scientifically based interviews with child witnesses.

Reisberg provides a digest of the research in this area. Each observation is buttressed with notes to the studies upon which it rests. The annotations are folded into the text – unobtrusive, but offering a handy reminder that there is more to be learned if one wishes to follow a particular study or probe more deeply. Nearly 40 pages of references at the end of the book provide a bibliography of the most comprehensive and (for the most part) contemporary material available.

Roughly three quarters of the cases in this country (there are currently over 300) in which the wrong person was convicted served time in prison and was eventually exonerated involved a mistaken identification. These “bad IDs,” Reisberg points out, account for more of these cases than all other causes combined. These witness errors include cases in which witnesses testified that they were absolutely certain (of) their identifications;….cases in which the identifications had been made by law enforcement…; (and) also cases in which there were multiple identifications of the defendant. In all cases, though, we know that these identifications were mistaken because the DNA evidence tells us the defendant was innocent.

... juveniles and the mentally impaired are susceptible to confessing falsely; but surprisingly, factual innocence may lead to a false confession.

Continued on next page

OCDLA Life Member Susan Elizabeth Reese practices law in Portland. She serves on OCDLA’s Education Committee.

This book review is reprinted with permission from the January/February 2015 issue of The Champion, published by the National Association of Criminal Defense Lawyers.
The book has several themes. The thorough examination of each one offers some surprising conclusions.

First, Reisberg notes that common sense beliefs – those held by typical jurors – are not only out of step with science but also reflect a consistent bias. Jurors as a group place far too much weight on eyewitness testimony and rely far too often on confession evidence. Reisberg points out – as most such scientists have done – that our memories are not like video recorders, faithfully and accurately storing observations to be replayed, when requested, in legal proceedings. By showing us – in careful, readable prose – how memories are made, stored and retrieved, he points out the risks of giving too little or too much weight to a particular type of recollection.

Reisberg notes that a witness’s degree of certainty about an identification has little relationship to its accuracy. [Ed. note: See Dr. Reisberg’s article on page 14 of this issue for more.] Likewise, the amount of detail or the emotional content in a memory cannot be an indication of its truth or falsity. Consistency of recall is also not a gauge of memory accuracy.

We learn about source confusion – the idea that a memory may seem familiar, not because of the issue before us, but because of an event or experience in our past to which it relates. We find out that “cues” investigators may use to determine whether a witness is truthful (fidgeting, shifty eyes) are scientifically no more reliable than flipping a coin.

We discover why people confess, and examine factors contributing to false confessions. Not surprisingly, juveniles and the mentally impaired are susceptible to confessing falsely; but surprisingly, factual innocence may lead to a false confession. Although Reisberg notes that the vast majority of confessions “are likely to be accurate,” false confessions occur often enough to be deeply troubling, especially when we acknowledge the power of confession evidence in the courtroom.

Reisberg’s next theme is that our perceptions are, by and large, accurate more often than not. Our memories are, generally, “relatively complete, long-lasting, and correct.” Thus, science can not replace the need for an identification by a witness or an observer’s memory of an event. Science does not discard witness evidence, but it can add to or explain the process of making that evidence as accurate as possible. Reisberg reassures us,

Psychology’s contribution to the justice system is based on studies that have survived the scientific community’s quality control. When our studies involve analogs to real world phenomena or are conducted in controlled settings, we provide the appropriate assurances that extrapolations from the results are indeed warranted, and finally, when the data are not yet clear or the hypotheses not yet tested, we keep quiet and don’t try to offer claims that are not yet justified.

As Portland ponders its special rule for police – that any officer involved in a shooting is allowed two full days before answering questions about the incident – Reisberg’s observations are particularly significant. He notes that although the speed of forgetting is uneven, “forgetting is rapid at first, and… even a short delay in an investigation can have a large impact on memory.”

“Nevertheless,” he also observes, “forgetting tends to be slower for emotional materials… (and) forgetting can be dramatically slowed if someone occasionally ‘revisits’ a memory.”

Clearly, during this crucial 48-hour period, a memory may degrade but also be influenced by “revisiting” the events, a process which should be examined carefully as such an incident unfolds.

Finally, Reisberg firmly points out, scientific testimony never includes a judgment that a particular witness is being truthful, or a specific identification is accurate or a certain confession is false. What science offers, rather, is information that can guide a “risk assessment”: What is the risk that an identification is mistaken? How seriously should we consider whether a particular confession is false? What weight should we give to a young child’s report?

Mistaken witnesses, confessions wrongly secured, misguided reliance on “common sense” impressions, and inadvertent cues provided during a child’s interview not only risk convicting the innocent but also, correspondingly, mean that the guilty go free. By using science to help us determine the risks of error, Reisberg concludes, we “allow the justice system to make sophisticated, well-informed, sensible judgments of these risks so that all in the system can be intelligently guided as they assess the memory- and perception-based evidence that enters our legal system.”

Reisberg’s wry humor sprinkles an occasional smile into the text: “individuals who were recalling an episode in which they had been abducted by space aliens … most people would count … as a false memory…”

This book is an invaluable contribution to a responsible, reasoned and well-informed use of science in the justice system.

Endnotes

1 St Louis, MO, prosecutor Robert McCulloch, in announcing his grand jury’s controversial decision not to indict a police officer in the recent high profile shooting case involving an unarmed teenager, pointed to problems with eyewitness testimony: “Eyewitness accounts must always be challenged and compared against the physical evidence…. [Here] some [eyewitness accounts] were completely refuted by the physical evidence….” FOX News video broadcast, November 24, 2014, 8:19 p.m.
Indeed, numerous facts make this non-correspondence inevitable: A witness’s description of an individual, as opposed to an I.D., relies on verbal processes that are usually focused on individual features, and the description itself depends on the witness’s ability to recall information from memory. An I.D., in contrast, relies on visual processes which depend on a holistic view of the face rather than features per se, and depends on the ability to recognize a face that’s been in view (in a mug shot or in a lineup).

Each of these contrasts (verbal/visual; feature-based/holistic; recall/recognition) depends on distinct mental processes served by different brain areas, and this nearly guarantees that the quality or reliability of one of these efforts (e.g., offering an elaborate description) tells us little about the quality or reliability of the other (e.g., making an accurate pick from a lineup). The Lawson ruling has these points exactly right.

What about composite sketches? The process of creating these sketches typically begins with a conversation between the witness and a police artist – and so begins with a description. In addition, composites are often created in a feature-by-feature fashion. (“Which of these noses looks right? Which of these chins?”) This emphasis on individual features parallels what ordinarily happens in a description, and is distinct from what happens when people look at (and, potentially, recognize) a face. Hence, for multiple reasons, the mental processes relevant to a composite are closer to those involved in a verbal description than they are to those involved in someone’s effort at making a lineup pick.

Overall, then, prosecutors should not try to bolster an I.D. by pointing to the fullness of the description or the fluency with which a composite was created. But, by the same token, defenders shouldn’t try to impeach an I.D. by pointing to a sparse description or even one that’s inconsistent with a lineup pick. Imagine, for example, a witness who, right after a crime, tells the police about the perpetrator’s bushy eyebrows and wide nose, but then picks someone from a lineup who has neither of these traits. Here it’s important to bear in mind that recognition (needed for the I.D.) is distinct from, and more accurate than, recall (needed for the description). Moreover, humans have specialized brain tissue that makes them especially skilled in recognizing faces, but we don’t have a specialized skill for describing faces, and, in truth, these descriptions often contain errors. For these reasons, the I.D. choice is likely to be more reliable than the description.

None of these considerations, though, should be understood as arguments against the police collecting descriptions or creating composites. These steps are often important elements in an investigation. Even so, both the science and the law suggest a need for caution in interpreting these types of evidence. We should give little weight to any correspondence between the description or sketch and the appearance of the accused person sitting in the courtroom.

For more on these issues and on the broad intersection between research psychology and the justice system, see

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