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Editor: Paul Burglin

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A CONVERSATION WITH NCDD'S AMICUS GURU LENNY STAMM

NCDD Regent Leonard "Lenny" Stamm is a former President of the Maryland Criminal Defense Attorneys Association and author of Maryland DUI Law (West Publishing). The following is a recent interview with Stamm concerning his extensive work on NCDD's Amicus Committee and some recent SCOTUS decisions about confrontation and warrantless blood draws.

Editor: How long have you been on the *Amicus* Committee with NCDD, and how did it come about?

Stamm: Each year the Dean makes up a committee list. One year I found myself appointed to the Committee and a year or two later I became the chairman.

Editor: It obviously entails a real time commitment---do you dread or relish it?

Stamm: I guess it depends on how busy I am at the time. I don't dread it but we obviously have to be very selective about the cases in which we choose to participate.

Editor: How is it determined which cases NCDD will submit an *amicus* brief on?

Stamm: We look for cases that will have the maximum benefit for our members, so I'm looking for issues that apply in a large number of states. Any request for an *amicus* brief is circulated among the members of the Committee, which includes Gary Trichter, Jim Nesci, and Don Ramsell, as well as the Dean, for their thoughts.

> *"We look for cases that will have the maximum benefit for our members..."*

Editor: Are NCDD amicus briefs limited to SCOTUS cases?

Stamm: In most instances the cases are pending before the United States Supreme Court, but on occasion cases of national interest will also be pending before a state Supreme Court and we'll get involved in some of those cases. Issues of state law that are unique to that state are less likely to be selected. However, if a member has a case in their state and feels that an *amicus* brief from the NCDD would be helpful, we might consider letting another member in that state write a brief and submit it under our organization's name. It would have to be first rate to get approval.

Editor: What are your most memorable *amicus* briefs, and which have been the most satisfying for you?

Stamm: The two that stand out are *Bullcoming v. New Mexico* which we won, and *Missouri v. McNeely* which is pending. *Bullcoming* was very interesting for me on a number of counts. I was the lead editor. We were working with some excellent lawyers in New Mexico, and we had initially agreed to split the 9000 word limit in half. They were doing a brief legal discussion and writing about cases of documented lab failures and lies, while we were doing a primer on gas chromatography which we informally called "GC for Dummies." While we were

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DEAN'S MESSAGE

A few weeks ago, I was fortunate to have an opportunity that few criminal defense lawyers ever experience, specially later in their careers. I served on a felony jury. Much like my hole-in-one a few years ago, it was an event I had long since given up hope of ever experiencing. Though it, regrettably, was not a DWI or an intoxication related case, many of the lessons from this trial are applicable to DWI trials. Most of the lessons are ones that many of us know, but are worth repeating.

This was a child endangerment case in which the State alleged that the Defendant negligently placed three children (ages one, two, and four) in imminent risk of death or bodily injury by the placement of two space heaters and an old car battery, which they alleged could have caused a fire, electrocution, or poisoning. The evidence showed that there was an old car battery with a dried up acid leak on the front concrete step to the trailer, that there was a newish looking space heater too close to trash on the floor and a couch, which the officer said was hot to the touch, and that there was an older looking space heater on a baby potty or stool in a bathroom where the toilet had overflowed and dirty clothes had been used to wipe up the water. The Defendant, the mother of two of the children, was not present in the trailer when it was raided, but had been there a few hours earlier. The father of all three children was in the trailer and the children were in the living room watching television. The overall condition of the trailer was disgusting – there were scores of dirty diapers on the floor, the entire place was filled with trash, and it was apparent that the filth had been there for quite some time, despite the mother's claim in a post arrest video statement that she had cleaned it two days earlier. The trailer was raided because the father had just taken a controlled delivery of a package from California that contained marijuana. More witnesses and time were taken in the two and one-half hours of testimony to explain the discovery of the package in the mail and the controlled delivery than was taken to explain the charged offense.

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working on the brief, I attended a class in Chicago organized by Justin McShane with Lee Polite and Harold McNair on gas chromatography which was enormously helpful in writing the *amicus* brief in *Bullcoming*. I was also working very closely with Ron Moore and Justin McShane in producing our part of the brief. Their contributions should not be underestimated. It soon became apparent that our portion of the brief was going to be more than 4,500 words. We communicated with Jeff Fisher who was lead counsel in *Bullcoming*, and had also argued and won *Crawford v. Washington*, *Davis v. Washington*, and *Melendez-Diaz v. Massachusetts*, and he suggested that an *amicus* brief would be more helpful by giving the justices additional facts then it would by arguing law. He was already arguing law and he indicated to us that if we argued law the justices would probably not read our brief. As a result of that input, the New Mexico attorneys agreed to shorten their portion of the brief. It was also an interesting experience for me because when you are writing a brief with other lawyers and editing each other's contributions the editing process requires a great deal of time and attention. There were numerous occasions where I found that other lawyers had edited what we had written, and without meaning to, they had changed the meaning and I had to un-edit their edits. Our brief stands as an excellent primer on gas chromatography. In *McNeely*, I was not the lead editor which was very challenging as well because on occasion I had to insist that certain portions that had been deleted be reinserted. However that was also nice because the law firm of *Sidley-Austin* did all of the heavy lifting.

Editor: Which of the *Confrontation Clause* cases has NCDD submitted an amicus brief on?

Stamm: We submitted briefs in four Supreme Court cases, two of which the Court declined to hear. The first was *Napier v. Indiana*. This was a case that (NCDD Fellow) Jess Paul had lost in the Supreme Court of Indiana and dealt with the admission of a breath test where the test technician did not appear in court. In that case we filed an *amicus* brief in support of Jess's *cert.* petition, and his *cert.* petition was denied. A year or two later we were asked to file another *amicus* petition in *O'Maley v. New Hampshire*. This was a DUI blood test case where the chemist who conducted the blood analysis did not testify but his supervisor did. While I was working on that brief, I had a discussion with Norman Reimer, the executive director of the National Association of Criminal Defense Lawyers (NACDL). He suggested that I contact members of NACDL's *amicus* committee to see whether they would want to join our brief in *O'Maley*. So I contacted Jeff Green, an attorney in Washington, D.C., who was on NACDL's *amicus* committee and he indicated to me that they were filing an *amicus* brief in *Melendez-Diaz v. Massachusetts*. The facts in *Melendez-Diaz* were more favorable because no live person had testified whereas a supervisor had testified in *O'Maley*. As a result, NACDL decided to not join the *amicus* we filed in *O'Maley*, but offered us an opportunity to join their brief in *Melendez-Diaz*. So that was how we got involved in *Melendez-Diaz*. The year after *Melendez-Diaz* we got involved in *Bullcoming v. New Mexico*, where we filed an *amicus* brief with NACDL and the New Mexico Public Defender's Association.

Editor: Let me ask you something about *Williams v. Illinois*. Was the plurality saying that the preparation of a lab report is akin to a 911 emergency call anytime law enforcement has not yet identified an active serial rapist or killer, and the report is therefore nontestimonial?

Stamm: I don't think we should give any credence to the plurality opinion in *Williams* because there were expressly 5 votes against that reasoning.

Editor: Why do you think Justice Thomas relied solely on the lack of solemnity of the lab report in *Williams*, while simultaneously making the point that prosecutors cannot escape confrontation by making reports technically informal?

Stamm: That's been his big issue since *Crawford v. Washington* so I guess you'd have to ask him that question. None of the other justices agree with him.

Editor: Do you agree with the dissent in *Williams* that the "primary purpose" of a lab report is irrelevant to the determination of whether it's testimonial or not?

> *"The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose."*
>
> - **Justice Alito** (writing for the 4-member plurality in *Williams*)
>
> *"We have previously asked whether a statement was made for the primary purpose of establishing `past events potentially relevant to later criminal prosecution'—in other words, for the purpose of providing evidence.* **[cites]** *None of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual…"*
>
> -**Justice Kagan** (writing for the 4-member dissent in *Williams*)]

Stamm: I don't agree that's what they said. What Justice Kagan's dissenting opinion notes is that the majority had used the wrong "primary purpose" test. The plurality's test is whether the primary purpose was to be used against a particular targeted individual. The proper test is "whether the primary purpose of an extrajudicial statement was 'to establish or prove past events potentially relevant to later criminal prosecution.' "

Editor: So the phrase "primary purpose" in previous *Confrontation Clause* decisions was in connection with whether the statement or report is primarily offered to provide evidence, as opposed to why it was originally uttered or prepared?

Stamm: No, I don't think so. The Court in the case of *Davis v. Washington* distinguished between situations where the police were investigating an ongoing emergency versus a situation where they were asking about facts relating to past events. Also, although in *Michigan v. Hammond* the Court may have been stretching a bit, they considered the victim's identification of the location of his assailant to be in reference to an ongoing emergency. So the primary purpose test deals with the primary purpose for which the statement was made not for which it would be offered in court. All of these statements are offered as evidence in court. At the time the statement is made it is either to respond to an ongoing emergency or to relate facts of past events that are likely to be used in a criminal prosecution.

Editor: Does the 4-1-4 *Williams* decision provide any guidance to trial courts when it comes to the admissibility of test results and accuracy/ calibration records in DUI cases?

Stamm: I think a more accurate way to describe *Williams* is 4-5 on the relevant issues, and 1-8 on Justice Thomas's issue. So there are still five members of the Court that believe that test results are testimonial. As far as accuracy and calibration records, that was discussed in *Melendez-Diaz* and that view has never held 5 votes either.

Editor: Is it unrealistic to expect trial courts to limit the *Williams* decision to just bench trials?

Stamm: I don't see how *Williams* can be given any precedential effect, although I'm sure some courts will go through contortions to follow it.

Editor: You attended the oral argument for *Missouri v. McNeely*. What was it like?

Stamm: It was very exciting, and I was pleasantly surprised that all eight speaking justices---that's all nine, minus Justice Thomas---seemed to take for granted that a warrant would normally be required to support a blood draw in a routine DUI case, unless the police have difficulty getting a warrant.

Editor: In your view, how do warrantless blood draws in DUI cases square with the implied consent laws?

Stamm: The Solicitor General's brief conceded that implied consent is not necessarily the same as consent for Fourth Amendment purposes and the justices seemed disinclined to accept that you give up your Fourth Amendment rights by driving in a car. Justice Scalia implied that a person has a stronger Fourth Amendment right in their body than in their home.

Editor: Do you think SCOTUS will hold a warrant for blood is not required if breath or urine testing is offered as an alternative but refused?

Stamm: No.

Editor: Give us your prediction on how SCOTUS will rule in *McNeely*?

Stamm: I think they will affirm the Missouri Supreme Court, but also try to set out some guidelines that allow police to obtain blood without a warrant where there is both probable cause and good faith reasonable efforts to get a warrant have been exhausted but time is running out to get a sample within state mandated time requirements. Although I've been wrong before.

Editor: What is next on the horizon for you?

Stamm: My afternoon DUI trial in Rockville, Maryland. ■

Editor's Message: Contributions to the NCDD Journal are welcome. Articles should be about 1200-1500 words and relate to DUI/DWI defense. Trial Tips should be about 200-300 words. Please prepare in Word and submit as an attachment to **burglin@msn.com.** The NCDD reserves the right to edit or decline publication. Thank you.

SCOTUS RADAR

The U.S. Supreme Court has granted a petition for writ of certiorari to determine "whether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights."

Salinas v. Texas (No. 12-246)

Lower Ct: Texas Crim. App. (PD-0570-11)

Oral Argument set for hearing on April 17, 2013. ■

Ava George Stewart (IL) gets a well deserved toast from Regent Jim Nesci (AZ).

Ron Moore (CA), Joe St. Louis (AZ), and Tim Huey (OH) enjoy a lighter moment after their respective lectures.

NCDD's *Winter Session* 2013 was held in Scottsdale, Arizona, at the *Hyatt Regency Resort and Spa at Gainey Ranch* last month. Following morning sessions on *voir dire*, cross-exam, field sobriety tests, and breath and blood testing, attendees enjoyed golf, dining, and visits to popular spots like Camelback Mountain and the Taliesin West home of Frank Lloyd Wright. As always, the Winter Session provided a special opportunity for members to learn, share, and connect with one another. ■

CASE LAW ROUNDUP
Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

Calibration Records Held Admissible Over *Confrontation* Objections

People v. Lopez
55 Cal.4th 569 (2012)

Seizing on Sotomayor's concurring opinion in *Bullcoming* ("machine-generated" data may be admissible), the California Supreme Court held that a lab report was properly admitted even though the analyst did not testify. It was a six-page report that included the following:

Page 1 - Chain of custody log sheet (showing the results of nine blood samples the analyst tested on the same date, including defendant's)

Page 2 - Printout of the GC machine's calibrations on the day of the test

Pages 3 and 6 - Quality control runs before and after the samples were tested

Pages 4 and 5 - Two computer-generated numerical results (.0906 and .0908)

The majority opinion described pages 2-6 of the documents as machine-generated data measuring calibrations, quality control, and the blood-alcohol concentration. Though the analyst had initialed page 1 and signed page 2, there was no statement by him on any of the pages. The testifying criminalist said he was a colleague of the analyst and had trained him, was intimately familiar with his procedures in testing blood for alcohol, and that everyone in the lab was trained in the same manner. Based on his own training, he said he concurred with the results. Cf., *Bullcoming* (no underlying data or chromatograms were offered at trial in *Bullcoming*, and no independent opinion was offered by the surrogate witness).

Jenkins v. State
___So.3d ___ (2012 WL 4711432 (Miss.)

Defendant was sentenced to life in prison for possessing less than two grams of cocaine. His conviction was affirmed even though the analyst who performed the test and identified the substance did not testify. She was on indefinite medical leave with stage-four cancer so her supervisor/technical reviewer testified instead.

The surrogate witness performed "procedural checks" by reviewing all of the data submitted and the conclusions contained in the analyst's report. Based on this review, he reached his own conclusion that the substance was cocaine. The certified report was signed by both the analyst and the testifying supervisor.

The Court held that this satisfied the Confrontation Clause and was allowed by *Bullcoming*. The salient point was that the supervisor was actively involved in the report's production and had intimate knowledge of the analyses even though he did not perform the test first hand.

Chambers v. State
___ S.W.3d ___, 2012 Ark. 407, 2012 WL 5360966 (Ark.)

In this .108 / .105 breath-alcohol test case, defendant objected to the admission into evidence of certificates certifying that the Datamaster was properly certified and calibrated, on the basis that they constituted testimonial hearsay in violation of *Melendez-Diaz*.

Finding the subject certifications were not created for the purpose of providing evidence against any particular defendant, the Court held they were non-testimonial (citing *Commonwealth v. Zeininger*, 459 Mass. 775, 947 N.E.2d 1060).

"We agree with the Court of Appeals of Oregon, which concluded that such records `bear a more attenuated relationship to conviction: They support one fact (the accuracy of the machine) that, in turn, supports another fact that can establish guilt (blood alcohol level).' *State v. Bergin*, [231 Or.App. 36] at 41, 217 P.3d 1087. Indeed, it appears that the Supreme Court has already acknowledged this attenuation, stating in *Melendez-Diaz*, supra at 2532 n. 1: Contrary to the dissent's suggestion…we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case…[D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.'"

"That the records are generalized and performed prospectively in primary aid of the administration of a regulatory program makes all the difference."

The Affirmative Defense of Involuntary Intoxication Causing Unconsciousness

People v. Mathson
___ Cal.Rptr.3d ___, 2012 WL 542716 (Cal.App. 3 Dist.)

An unanticipated reaction to medication, taken as prescribed, constitutes an "involuntary intoxication" defense in some jurisdictions. In California, a person who acts conscious is presumed conscious, but a defendant can overcome it by producing sufficient evidence to raise a reasonable doubt that he was unconscious when he acted during the commission of the alleged crime. *People v. Hardy* (1948) 33 Cal.2d 52. Involuntary intoxication that causes a state of unconsciousness is recognized. *State v. Wilson* (1967) 66 Cal.2d 749.

Suppose the individual knows, or should know based upon warning labels, medical advice, and/or past experience, that the use of Ambien *might* cause him to sleep-drive in an unconscious state. Does such knowledge negate an involuntary intoxication defense?

Here, defendant sought a jury instruction stating that one can only be found guilty of DUI under such circumstances if he knew that his taking Ambien would actually cause him to drive (not that it just might). The trial court rejected this proposed instruction and the Court of Appeal affirmed.

"Essentially, defendant asserts that until a person actually has a sleep driving experience, intoxication resulting in sleep driving is involuntary. We equate this to a rule that would provide Ambien users one free sleep-driving episode before they could be held criminally culpable, even though they knew the drug has caused sleep driving by others. Defendant does not cite any authority in support of this proposition."

After exhaustively analyzing the legal precedents on the defense of involuntary intoxication and unconsciousness, and brilliantly critiquing California's pattern jury instructions on it, the Court recommends a baffling instruction that guts a legally recognized defense:

"Voluntary intoxication is not a defense to driving under the influence of drugs. If you conclude the defendant's intoxication was voluntary, then the defendant's unconsciousness resulting from that intoxication is not a defense to the crime. A person is voluntarily intoxicated if: (1) the person willingly and knowingly ingested a drug; (2) the drug was capable of producing an intoxicating effect and (3) the person knew or reasonably should have known that the drug could produce an intoxicating effect."

NOTE: The last sentence of this recommended instruction is what's problematic, because knowledge that a drug can produce an intoxicating effect is not necessarily knowledge that it will produce a specific intoxicating effect (e.g., one that may cause a person to sleep-drive).

Furthermore, what about the fellow who takes every reasonable precaution to avoid driving after taking Ambien, but crawls out of bed in an unconscious state and somehow finds the key to a car and sleep drives? Should he be held criminally liable under such circumstances? Perhaps a "mistake of fact" or "involuntary act" defense lies in this situation.

City of Missoula v. Paffhausen

___P.3d ___, 2012 WL 5866259 (Mont.), 2012 MT 265

The State argued that involuntary intoxication (purportedly caused in this case by a rape date drug) is no defense on the basis that mental state is not an element of the DUI offense. However, the absence of consciousness excludes the possibility of a voluntary act and "automatism" caused by involuntary intoxication is a valid affirmative defense. To prevail on it, the defendant must present sufficient evidence to raise a reasonable doubt that he was involuntarily intoxicated and was acting in an unconscious state.

Community Care-Taking Exception

***Alford v. State* (2012) Unpublished Opinion Following Rehearing**

Texas R. App. P. 47 (No. 05-10-009-CR)

In evaluating a "community care-taking" exception to the warrant requirement, the Texas courts consider four non-exclusive factors: (1) the nature and level of distress exhibited by the individual; (2) the location of the individual; (3) whether the individual was alone or had access to assistance independent of the officer; and (4) to what extent the individual, if not assisted, presented a danger to himself or others.

Here, defendant was merely observed "kind of turned sideways [with half her] body out [the car and] leaning over saying something to the driver." They were purportedly talking "kind of loud" but the officer said he could not tell if there was a disturbance. As the officer approached, the passenger switched places with the driver and began to drive away. The officer did not say he observed anything indicating distress. The vehicle was at a dead-end street next to an open Jack-in-the-Box restaurant. The defendant was with her sister and had access to the restaurant if she needed help. There was no indication she was in need of any help.

Thus, all four factors went for the defendant and no "community care-taking" exception existed. The State's contention on appeal of a "consensual encounter" was deemed waived since it was not preserved at the trial court level. The trial court erred in denying the motion to suppress evidence.

State v. Pexa

___ N.W.2d ___, 2012 WL 6652580 (Minn.App.) (Unpublished)

Defendant's blood-alcohol level was .09 percent about 150 minutes after driving. Due to a discovery violation, the prosecution was precluded from having its expert opine as to his BAC at the time of driving based on retrograde extrapolation.

Declaring that a "specific numerical alcohol concentration is a scientific matter" beyond the "general knowledge of a lay jury," the Court concluded it is "impossible for a lay jury to infer a precise level of alcohol concentration at a specific point in time…without the aid of a qualified expert[,]" and the trial court should have therefore dismissed the .08 or higher charge when it made the discovery order.

Had the test result been higher and/or the time between driving and testing shorter, an inference might have been permitted without expert testimony.

No Fourth Amendment Detention Where Motorist Unaware Of It

Tate v. People

___ P.3d ___, 2012 WL 6685769 (Colo.), 2012 CO 75

A person is not "seized" within contemplation of the Fourth Amendment unless he is conscious of it. Thus, an officer did not detain a motorist by blocking his departure where the motorist was passed out.

"As Professor LaFave has observed, `If, as stated in Brendlin, for a person to be seized he must "perceive a show of authority as directed at him" it would seem to follow that if the person claiming to have been subjected to a Terry stop was not aware of that police conduct necessary to "a show of authority," then again there has been no seizure.' 4 Wayne R. LaFave, Search and Seizure § 9.4, at 153 (4th ed. Supp. 2011-2012)(quoting Brendlin, 551 U.S. at 262)."

City of Hutchinson v. Davenport

30 Kan.App.2d 1097, 54 P.3d 532 (2002)

A bad day at Black Rock for this poor fellow, but things turned out okay for him in the end. He went to a law enforcement center to check on his daughter who had been picked up, and to locate her vehicle. Detecting an odor of alcohol on his breath, an officer told him to not drive even though his speech was not slurred and his gait was normal. He said he was just walking and departed. The officer observed him looking up and down the street before getting in a vehicle and driving away. He told another officer he thought the driver might be intoxicated and to check on him, even though no bad driving was observed. An enforcement stop led to his arrest.

The Court held that the mere odor of alcohol and the "I'm walking" statement were not enough to constitute reasonable suspicion for the enforcement stop.

EDITOR'S NOTE: Oddly, the Court agreed with the trial court's conclusion that "If [the reporting officer] had believed [the] defendant was intoxicated, he could have arrested him at the Law Enforcement Center. He did not." The oddity is that if the second officer lacked even reasonable suspicion to make a *Terry* stop, how would the first officer have had a legal basis to *arrest* him at the station, and for what (the offense of public intoxication involves a level of intoxication considerably higher than what's required for driving under the influence)?

A different result might have occurred had the State argued (or the Court found) that the detention was objectively reasonable based on the defendant's failure to follow the first officer's order ("don't drive")!

Nurse Gets Arrested For Refusing Blood Draw Order

Depalis-Lachaud v. Noel

U.S. Court of Appeals (11th Cir. 2013) – No. 12-12903 (Unpublished)

A deputy sheriff transported a suspected drunk driver to the hospital following an accident, and directed a registered nurse to draw blood for evidentiary purposes. The nurse declined to do so without at least talking to a superior or on-duty doctor, and was arrested by the deputy for allegedly violating Florida statutes 843.02 (resisting or obstructing an officer in the execution of any legal duty) and 843.06 (neglecting or refusing an officer in the execution of his office in a criminal case).

The nurse brought a 1983 civil rights action against the deputy sheriff, and in reversing an order for summary judgment against the deputy, the Court held that "a reasonable officer could believe that [the nurse] obstructed, resisted, or opposed [the deputy's] efforts to obtain the blood sample in violation of [the foregoing statutes]. The Court also affirmed the trial court's denial of the deputy's motion for summary judgment, thus leaving him potentially liable.

Editor's Note: Police officers have "qualified immunity" in 1983 actions, which shields them from liability for false arrest claims if they are able to show the existence of either factual or arguable probable cause to arrest.

Expired Tube and "Vigorous Shaking" Leads To Exclusion of BAC Result

Hunter v. State

___ A.3d ___, 2012 WL 5349395 (Del.Supr.)

Sometimes a leading question can backfire, and sometimes the best objection is the one you don't make.

Q: *Okay. So she shook it vigorously just to make sure everything was mixed up properly, right?*

A: *Yes.*

On cross, the defense attorney had the witness read the manufacturer's admonition on the collection kit, "Do not shake vigorously."

The prosecutor's helpful witness also said the expired date on the tube did not affect the sample's integrity, only to be asked on cross to read the admonition that states, "Do not use tubes after the expiration date."

This was an ugly-fact case with the suspected drunk driver seriously injuring an EMT with a vicious kick, and a forced blood draw that involved the use of a taser. Yet the Court reversed the DUI conviction for failure to properly exclude the blood test evidence as foundationally unreliable.

"Following the manufacturer's use requirements ensures the reliability of the scientific test. It is this guarantee of reliability and accuracy that is the foundational cornerstone to the admissibility of the results of a scientific test. Without that guarantee of reliability, there exists too great a risk that a jury will be persuaded by scientific evidence that is unreliable." (citing *Clawson v. State*, 867 A.2d 187, 191 (Del.2005), which held that breath-alcohol results were inadmissible for failure to only observe defendant for 19 minutes instead of the manufacturer's 20-minute requirement). ■

TRIAL TIP TREASURE

by D. Timothy Huey

Your cross-examination makes witnesses sweat bullets, you've won every argument you've ever had and can sell ice to Eskimos; and yet these lawyerly qualities won't help you pick a jury. If "*voir dire* is a conversation, not an interrogation," then *we have a problem Houston*. Most lawyers are not great at two-way conversations. If you often hear "*wow, you're a great listener*" then skip this, if not here's an "ah-hah" moment I had at the Winter Session when Bob Hirshorn said "*voir dire* is therapy." (He didn't mean for the lawyer.) Bob meant that discussing negative feelings can help the juror get that out of his system and not take it back to the jury room. The ah-hah idea was - what if we prepare for *voir dire* by putting ourselves in the mindset of a therapist? By that I mean: the point of *voir dire* is to get jurors talking and revealing things about themselves; therapists are great at that generally due to the way they ask and respond to questions and their non-judgmental attitude towards the answers. So why not try to craft therapist like questions?

Does this seem at all familiar? *Lawyer*: "Mrs. Jones would you agree that the presumption of innocence is important?" *Juror*: "Not really." Kneejerk lawyer response: "But ma'am don't you realize … blah, blah, blah…" Therapists don't argue with patients. Here's a lawyer-as-therapist reply: "Thank you for your honest response, can you tell me what makes you feel that way?" "Is there anyone else in the group who feels perhaps a little differently?" "You know maybe I should have asked 'what does the presumption of innocence mean to you.' Mr. Smith, your thoughts?"

Similarly a good therapist would not ask a closed ended question like "Bobby would you agree with me that you wet the bed because you hate your mother?" But we regularly ask things like "Mr. Jones would you agree that we should hold the government to the highest standard of proof in a criminal case?" Instead try a therapist-like "why" question: "Mr. Jones why does the government have such a high burden of proof?" "Do you think they should?" "Who feels differently?" "What amount of proof should we require before we brand a man a criminal for life?" Yes I know the latter shade a bit more towards persuasion than therapy. ***Damn it Jim, I'm a lawyer not a psychiatrist*** - but I will try to be more like one in voir dire.

Editor's Note: This edition's trial tip treasure comes from Ohio attorney Tim Huey. Tim is an NCDD sustaining member and its state delegate for Ohio. He is also the Immediate Past President of the Ohio Association of Criminal Defense Lawyers (OACDL) and oversees its annual DUI defense seminar. ■

THE IMPORTANCE OF JURY INSTRUCTIONS

A frequently overlooked aspect of trial work is the importance of jury instructions. Pattern jury instructions may be sufficient in the vanilla DUI case, but not so in most accident cases involving injury or death. In these situations, jurors need pinpoint instructions on things like foreseeability, proximate cause, and duty.

In a recent vehicular manslaughter case (defendant was accused of making an unsafe turn causing death to a motorcyclist), California attorney Douglas Horngrad submitted a number of special jury instructions. His defense theme was that the motorcyclist was speeding and his client reasonably thought she could make her turn safely. The following are just a few of his proposed instructions (and most were given), and they show how Horngrad draws upon both civil and criminal case law and pattern jury instructions to tailor special instructions for his defense. The defendant's name has been changed to protect her privacy, but also note how he refers to her by name instead of as "defendant."

SPECIAL INSTRUCTION NUMBER SEVEN

Negligence is relative and not absolute, and allegedly negligent conduct must be considered in the light of all the surrounding circumstances. (Witt v. Jackson (1961) 57 Cal.2d 57, 66.)

SPECIAL INSTRUCTION NUMBER EIGHT

A motorist has a duty only to see that which is clearly visible and which would be seen by anyone exercising ordinary care. (*Electrical Products Corp. v. Tulare County* (1953) 116 Cal.App.2d 147, 154.) Therefore, if you find that Ms. Levy exercised ordinary care but could not see the oncoming motorcycle, you must find Ms. Levy not guilty.

SPECIAL INSTRUCTION NUMBER NINE

The exercise of due care does not require a motorist to move at a creep nor to stop every five yards. While the law imposes a duty such that a collision in similar circumstances could have been avoided by a person exercising ordinary care, the law does not require a motorist to exercise the exacting level of care necessary to avoid all collisions in all circumstances. (*Burton v. City of Los Angeles Railway Corp.* (1947) 79 Cal.App.2d 605, 610.)

SPECIAL INSTRUCTION NUMBER TEN

The general rule is that every person has a right to presume that every other person will perform his or her duty and obey the law, and in the absence of a reasonable ground to think otherwise, it is not negligence for one person to assume that she or he is not exposed to danger which comes to him or her from a violation of law or duty by another person. (*Leo v. Dunham* (1953) 41 Cal.2d 712,715.) A motorist is only required to keep her automobile under such control as will enable her to avoid a collision with persons using ordinary care and precaution. (*Burton v. Los Angeles Railway Corporation* (1947) 79 Cal.App.2d 605, 610.) But if in the exercise of ordinary care the collision could not have been avoided, it cannot be said that the motorist acted negligently. (*Watkins v. Nutting* (1941) 17 Cal.2d 490, 494.) Therefore, if Ms. Levy was acting with usual and ordinary caution and without unlawful intent, you may find that the collision was an excusable accident. ■

Dean's Message

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First, and foremost, a lawyer should always read the information provided in juror information forms. Had the prosecutor done so in this case, it is doubtful I would have served on this jury. Since we almost always want to identify the jurors that might be adverse to our side or theory of the case, we ought to at least read the information we have been given. Some things are so basic that we should never fail to do them.

Second, we should almost always ask potential jurors the final loaded question: is there anything you know about yourself, your situation, or your feelings that you or any reasonable person would believe we would want to know in deciding whether you are an appropriate juror for this case? Had I been asked this question by the prosecutor, I would have volunteered my status as a criminal defense lawyer. Not being asked imposed no obligation on me to orally volunteer more detail about my status as a lawyer that had already been disclosed in writing. Not mentioning it when asked, however, would have been tantamount to answering falsely. Of course, the one exception to this advice is a situation where you know something about someone on the panel that the prosecutor seems to have not discovered. But, be careful: what appears to be a lack of discovery may just be a decision not to let the adverse juror ruin the prosecutor's voir dire.

Third, you must at least begin to sell your theory of the case during voir dire. This is the first, and some say most important, opportunity to persuade those who will decide the case that you have a real reason to be trying the case. Failing to do so results in the jury not having any frame of reference against which to view the evidence that will be forthcoming. Time limits will always influence how much of this can be done, but some effort at beginning to frame and persuade is critical if you want a better chance to prevail at trial.

Fourth, if you do not voir dire on reasonable doubt and give it meaning and context, the jury will not have any frame of reference for it when they deliberate. In this case, no juror, other than me, ever uttered the words "reasonable doubt" during deliberations – it was foreign to them because they had not heard it during voir dire and had not been taught how it would relate to the issues in the case.

> *"…structure the voir dire so that every person who may serve on the jury has to say… `not guilty'…"*

Fifth, a potential juror who cannot say, is timid about saying, or who chokes on the words "not guilty" during voir dire is unlikely to say the magic words in the jury room. The defense lawyer should structure the voir dire so that every person who may serve on the jury has to say the words "not guilty" not less than twice, and preferably three times, during voir dire. You will be amazed at what you learn. As a corollary, beware of those who have prior criminal jury service. They have most likely already been content with finding someone guilty. The juror in our case who had been on two prior juries and a grand jury was the target of the group's selection of a foreman. It did not help the defense.

Sixth, if you do not talk to a potential juror during voir dire, you learn nothing and may likely end up with a juror who is adverse to you even though you do not know it. This jury was full of them. When it comes time to exercise peremptory strikes, you may strike a juror who has said something over one who has not spoken just because you know nothing about the one who did not talk. Just like we cannot make competent strategic choices at trial without a full pretrial legal and factual investigation, we cannot make intelligent use of peremptory challenges without similar investigation during voir dire. If we know nothing about a juror, it is our fault and we have not done our job effectively.

Seventh, if you are in a jurisdiction that permits the prosecutor to make a plea for law enforcement at guilt (to send a message to the Defendant or others with a guilty verdict), you must preempt this during voir dire. The easiest way to do so is to say something like, "Some people say that a jury should find someone guilty to send a message to the Defendant and others say that a jury should only find someone guilty if the State proves all elements of the offense beyond and to the exclusion of all reasonable doubts. Who thinks it is ever appropriate to find someone guilty to send a message? (I have never had a single hand go up, but any that did would not be on my jury) Who thinks it is only proper to find someone guilty if the State proves all elements of the offense beyond and to the exclusion of all reasonable doubts? (I have always had every hand go up). The side benefit from this very short and quick voir dire is that I have never had a prosecutor thereafter make a plea for law enforcement argument after seeing all jurors reject it during voir dire.

Eight, opening statement is a time to further the framing of the case that should have begun in voir dire -- a way that continues to persuade. It is not, contrary to popular belief, a time to merely recite facts, much less to repeat the bad facts already presented by the prosecutor.

Ninth, if your judge is going to read the jury instructions, ask the judge to give each juror a written copy to read along with. Even though I am very familiar with Texas jury instructions, I found it very difficult to stay constantly focused during the monotonous reading of it. If I got lost on occasion, I guarantee that my fellow jurors were totally lost. There is no way that a juror will listen to, process, and grasp all of the nuances in a charge that is merely read. If we want them to pay attention and have some chance at comprehending it, we ought to at least give them a written copy to read while it is being read to them.

Tenth, if you want your jurors to ever look at the jury charge in the jury room, you had better make sure that there is more than one copy. Six or twelve people cannot read the same document at the same time and one person in the jury room reading it to others, and often out of context, does no more good than it did when the judge read it. Of the 12 people on my jury, only four ever read any part of the jury charge in the jury room, despite the significant details of it being talked about by everyone in many different, and often incorrect, ways.

> *"…if you do not want the jury to dislike your client, you had better do something to humanize him or her."*

Eleventh, if you do not want the jury to dislike your client, you had better do something to humanize him or her. This should go without saying, but it often happens that all the jury knows about a defendant is what the State and officers tell the jury. This jury was, from the outset, a runaway train to conviction because most did not like the defendant. They had no reason to

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know or like her, or to excuse the ambiguous conduct, because it was never put in a context that made her look like a victim rather than a bad actor.

Twelfth, jurors will do things the charge and instructions say not to do. On three occasions, various members of this jury tried to convince others that they should go ahead and find her guilty because we would not be required to send her to prison. No one other than me, after waiting until no one else stopped the argument, was aware (the instructions notwithstanding) that it was improper. We need to make sure juries know that labeling someone a criminal is a punishment and a decision that ought to be taken at least as seriously at what statutory punishment might later be imposed.

Thirteenth, jurors will use their own life experiences to frame the arguments in the jury room. This may bite us badly if we have not given them alternative frameworks during voir dire or closing arguments. If there is a "parade of horrors" (bad consequences in a broader framework) to finding guilt in this case, we ought to be arguing it. We can frame it as, "Finding guilt in this case would also subject everyone whose does X, Y, and Z to also being guilty of a felony." X, Y, and Z need to be something that most, if not all, jurors would find to be an unacceptable basis from which to find criminal culpability. It may restrain some jurors from framing the case in a way that hurts us. At the very least, it will give those who may be inclined to take our side some ammunition to respond to the way adverse jurors may frame it.

The most difficult question I was asked by fellow jurors during voir dire was "What would persuade you to change your mind?" It was a thought provoking and loaded question. Ultimately, I responded, "Nothing, because the problem is not with your arguments, but with the lack of evidence and we have heard all we are going to hear." We need to give jurors who may be favorable to us such ways to defend their own conclusions.

Finally, the temptation to change one's vote to go along with the overwhelming majority is powerful. Though I knew better, I considered it. I mean really considered it. Ultimately, my head won out over the pressure, which was substantial. We need to seriously address this in voir dire and empower people to stick to their beliefs. Of course, the guilty juror who exclaimed within the first 30 minutes of deliberations that she would rather they have to retry the case than ever vote not guilty made it certain that this jury would never acquit. The movie, Twelve Angry Men, is an excellent example of the pressure that can be exist in a jury room. You need to always look for and hope to have a Henry Fonda on your jury.

In this case, we ultimately hung at 12-2 for conviction. I was, proudly, one of the two in the minority, but am just as convinced now as I was then that the State had not proved beyond a reasonable doubt that the danger -- as specifically pled (and not from the general living conditions in the trailer) -- of death or injury to the children was imminent. The take away from this is that if you want the jury to focus on the core issue that might get you an acquittal or a hung jury rather than a guilty verdict, you should also focus on the core issue throughout the trial. No other juror seriously cared or gave meaning to the requirement that the danger be imminent; they only wanted to convict because of their general disgust for the living conditions and the Defendant. I also have no doubt that if I had cratered, the one remaining not guilty vote would likely have cratered as well. Fortunately, by the time we began hearing evidence, three days after we were selected, the judge and all parties had figured out who I was. This resulted in the judge not making the effort to give us a dynamite charge, which was a good thing since the entire jury room bristled in anger (at the judge) when after the first, "we are deadlocked" note, the judge simply told us to "continue to deliberate." It was a reaction I had not expected, but one we ought to keep in mind when we get similar deadlocked notes.

Our life experiences, including jury service, can contribute mightily to how we try cases and should make us all better trial lawyers. For those who want to be better DWI trial lawyers, the next opportunity is in New Orleans, March 21-23, 2013, at Mastering Scientific Evidence (MSE) in DWI Cases. See the CLE listing at www.tcdla.com for the agenda and registration form.

--- Troy McKinney ■

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