TACDL
...wherever justice demands

Tennessee Association of Criminal Defense Lawyers

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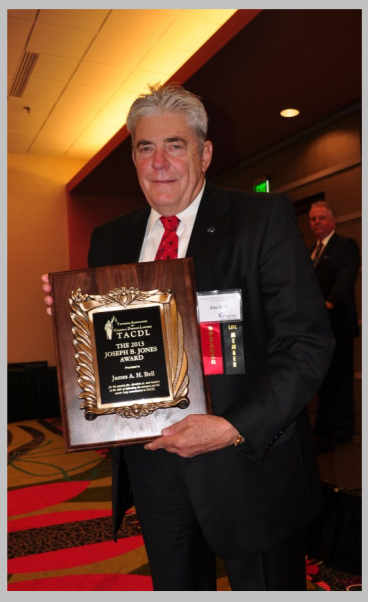
For The Defense

In this Issue:

Always Get the Data!

The Fukushima of Forensics: Annie Dookhan

By Justin J. McShane and Josh D. Lee

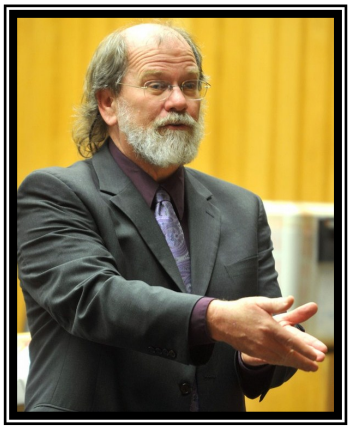


A Look Back at TACDL's 40th Annual Meeting

In this Issue:

From the President

Mike Whalen



Some of you may find this hard to believe but I NEVER get tired of going to TACDL Annual Meetings! I don't think I've missed one in the 16 years I've been in practice. Call me crazy but YOU are the folks I like being around. But for me it goes beyond that. I have other interests, but given the option of which to do TACDL wins every time.

Why? If you have to ask you may never be able to understand, but here's how it is for me. Its because we are criminal defense lawyers. Cut us in half and we'd be as TACDL on the inside as we are on the outside. Its what we do. Many of us have had interesting lives. We may have traveled a bit. We had other jobs, other lives. We read. We could talk about any of that stuff. But get us together in a room and what we really like to talk about is how to do the best cross examination of a snitch or a cop! How to walk them gently but assuredly to the edge of that cliff, convince them to jump and what tune is best to whistle as they plummet to the bottom.

That's why when young lawyers ask for our time to discuss their cases we say yes. Talking about how to try a case! You might as well ask me about what its like to sail in a steady 15 mile an hour breeze on a warm November afternoon. Yeah its just like that!

Last Thursday afternoon I met with Suanne and Austin to walk them through the hotel and show them where the annual meeting events would take place. As we walked out the front door, there comes Don Dawson. And over there Sam Perkins. There's Jim Bell. The meeting doesn't start till Friday but the family is gathering. Then at about six that evening my better half and a 21 year veteran of the Knox County Public Defender's Office, Marie Steinbrenner and I headed for the Sunsphere and the reception hosted (and PAID for) by David Eldridge and Tasha Blakney and Tom Dillard, Wade Davies and Steve Johnson. Thursday evening before the annual meeting and the place is packed with TACDL folks!

Two days of CLE with each presentation seemingly better than the last and all serving to inspire and to sharpen the tools we use daily. In a room filled with people who live to do this work. At the lunch I'm supposed to make a speech. But leading up to that all these great TACDL people are being recognized for their service to the profession and the association. New folks, veterans faces we've not yet come to recognize and those we'd know from a mile away. Each award an inspiring story to remind us why we get up each day and do what only we do.

Standing on that stage I was overwhelmed. I got nothing prepared to say and I'm looking at a crowd made up of my heroes. EVERYONE IN THAT ROOM. From the folks who have been there every year since 1973 to the ones there for their first TACDL meeting. From the guy with the thousand dollar cuff links to the young woman only able to attend because there was a scholarship. Everyone one of them is my hero because they could be doing something else but instead they are Criminal Defense Lawyers. A week later and I still got that tingle. Still fired up and ready to go.

Becoming TACDL's president is an honor and a privilege. One I've done little to deserve. But its also like getting a NOT GUILTY. It feels as great to a part of this organization as it does to walk that client out the GOOD door. The one without the bars and shackles. But just like that NOT GUILTY, the next day there was no marching band, no week off. Just some Sunday jail visits, some phone calls and getting back at it. That's what we do. The practice and the organization require it.

As to the work of TACDL, much has been done and much remains. Just like the practice TACDL has to bring in money. If your're reading to this point you care. So find a lawyer who is not a member. Take them to a Roundtable. Talk about the benefits and sign them up. Many hands make light the work. Join a committee. Email me or Suanne. We'll hook you up. Find your local member of the legislature. Introduce yourself. Let them know that you can help with information and context when bills affecting the criminal justice system come up. Remind them that there is more to the Constitution than the Second Amendment. There's the Sixth Amendment and loyalty to it requires funding the indigent defense system. Lets us know if you have contacts in the legislature, we can get you talking points.

Just like family, TACDL is strongest when we all pull together. The work of heroes is never done!

Mike is an attorney practicing in Knoxville. He may be reached at whalenlaw@bellsouth.net..

From the Executive Director

M. Suanne Bone

TACDL recently celebrated '40 years of Instructing and Supporting Liberty's Last Champions' in Knoxville. Attorneys from across the state gathered for two days of training and camaraderie. A special thank you is extended to Ritchie, Dillard, Davies & Johnson, P.C. and Eldridge & Blakney, P.C. for hosting the welcome reception on Thursday evening at the Icon Bar in the Sunsphere. The seminar began on Friday morning with dynamic presenters – thank you to Mike Whalen, Jerry Black, Randy Reagan, Jonathan Cooper and Marcos Garza for securing the slate of speakers. On Friday evening, a reception, sponsored by Thomson Reuters WestLaw, was held at the Holiday Inn World's Fair Park honoring James A. H. Bell. Jim was honored for his lifetime of work and service to the justice system. The dynamic presentations resumed on Saturday morning.

The Annual Membership Meeting was held on Saturday at the Holiday Inn. Rob McKinney handed the President's gavel to Mike Whalen (Knoxville) and the following members were elected to serve on the Executive Committee: Samuel Perkins (Memphis) as President-Elect, Paul Bruno (Nashville) as Treasurer, Sara Compher-Rice (Knoxville) as Secretary and Rob McKinney (Nashville) as Past President. During the luncheon the following individuals also received awards. The Joseph B. Jones award was presented to James A. H. Bell. The Robert W. Ritchie award was presented to John G. Oliva. The Capital Defense Award was presented to Paul Bruno. The Capital Defense Committee also presented two Lifetime Achievement Awards to Ron Lax and Chris Armstrong. The Massey McGee Trial Advocacy Award was presented to Arthur E. Horne, III, Sunny Eaton and George Maifair. The Workhorse Award was presented to Mary Ann Green, Joe Ozment and Mike Working. Penny White was recognized for her tireless energy, dedicated hours and diligent research to the Capital Case Handbook. Also, thank you to Austin Brown for his assistance throughout the weekend and seamlessly running the audio/video presentations.

The 6th Annual DUI Seminar and Training is right around the corner. The two day training will be held on October 24-25, 2013 at the Harrah's Resort Tunica in Tunica, Mississippi. Rob McKinney is the producer of this annual training and has secured many renowned presenters and speakers. Visit the TACDL website, www.tacdl.com, to register--also be watching for the completely redesigned tacdl.com to launch in the coming weeks!

The TACDL Board of Directors Meeting will be held on October 24, following the conclusion of day one of the DUI seminar. All TACDL members are invited to attend the board meeting.

As always, feel free to contact me with questions or concerns. I appreciate the guidance from all TACDL members and look forward to working with you in the future.

M. Suanne Bone is the Executive Director of TACDL. She may be reached at suannebone@tacdl.com and 615-329-1338.

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TACDL Roundtables

Nashville

1st Thursday of each month
Rich McGee and **Lisa Naylor**
615-254-0202
richardmcgeelaw@gmail.com and **lisanaylor@comcast.net**

Chattanooga

1st Thursday of each month
Myrlene Marsa and **Rich Heinsman**
423-756-4349 (Myrlene) and **423-757-995 (Rich)**

Memphis

3rd Thursday of each month
Lauren Fuchs
901-384-4004
lmfdefend@aol.com

Knoxville

Last Thursday of each month
Mike Whalen
865-525-1393
whalenlaw@bellsouth.net

Join fellow Criminal Defense professionals for discussion on pertinent legal issues and be entered into a

News from Capitol Hill

Nathan H. Ridley

BRADLEY ARANT BOULT CUMMINGS LLP

I have come to the conclusion that politics is too serious to be left to the politicians. Charles de Gaulle. General de Gaulle eventually became the President of France. Politics and good public policy are serious to TACDL, too. So TACDL members use their dues dollars to advocate before the Tennessee General Assembly, also known as the state's board of directors. Most professional associations do this, and some would say that advocacy is the key role of an association. The business community in Tennessee understands this. It is no accident or coincidence that our state's leading corporate citizen, AT&T, has the largest number of registered lobbyists with 16 among the total of 518 registered lobbyists and a six figure political campaign account to boot.

In addition to legislative advocacy efforts, TACDL also offers a wide array of continuing education opportunities to their members as well as networking opportunities. TACDL offers CLE opportunities relevant to the practicing criminal defense bar, and networking opportunities for the cagey veterans as well as the green as grass new practitioners. So, in summary, advocacy, continuing education, and networking. What is legislative advocacy?

The first role for legislative advocacy is triage nurse. Early in the legislative session each of the 132 members of Tennessee General Assembly may file bills. In 2013, the State Senate had 1,422 bills, and the State House had 1,365 bills, together with almost 1,000 joint resolutions. Some of these bills and resolutions had no effect on the criminal justice system, and those did not make the TACDL lists established by the TACDL Legislative Committee. The others did affect the criminal justice system and did make the TACDL lists. The first list is the Action list, and for bills on that list we actively engage members of the appropriate Subcommittees and Committees. The Action List includes bills all along the criminal justice process from arrest to parole. The second list is the Watch list. Those bills affect the criminal justice system, but usually in a tangential way that does not terribly impact the daily practice of the membership.

Once the bills are triaged, the second role for legislative advocacy is position coach. For example, the TACDL position on the authorization of strip searches for every person in the state's local jails (SB 598/HB 275) was opposition. While the U.S. Supreme Court found the procedure to be constitutional in the 2012 case of Florence v. County of Burlington, the TACDL position was opposition because of concerns about implementation in each of Tennessee's 95 county jails.

The next role for legislative advocacy is vote counting at the committee level. The legislature at work is the legislature in committee. Once a bill is introduced, the Speaker refers each bill to the appropriate standing committee or subcommittee. When a bill is calendared, that is, placed on a docket, appointments are made with the appropriate committee members to determine their positions on the bill. If a bill has a majority of affirmative votes, it will be referred to the scheduling committees to be scheduled for full floor debate. If the bill receives a constitutional majority on the floor of the Senate (17) and the floor of the House (50), it will be forwarded to the Governor for his action. The next step is on to LexisNexis for publication in the Tennessee Code Annotated. At each step of this process, in the course of vote counting, TACDL staff will speak to legislators, legislative staffers, other lobbyists, executive and judicial branch officials, and TACDL members, in order to assess, process, and count.

All this is a grand simplification of a complex process. Vote counting is a complex art typically predetermined by relationships. If a legislator faces the calculus problem of deciding how to vote on a bill, the first variable in the equation is, will this vote affect my reelection effort. The key to that variable is whether influential opinion leaders in the district will support this vote. Who are the influential opinion leaders? Voters who have relationships with the elected official are influential opinion leaders. Who are the voters with relationships? The voters who want to have relationships. Tennessee has two kinds of voters, engaged and apathetic.

Unnamed Legislator. The unnamed legislator is time. This year, the General Assembly convened in early January and adjourned in mid April. The process noted above happens in a hurry. Often, the process leaves little time for thinking. When faced with a docket of bad bills on a Friday for a hearing on Tuesday or Wednesday of the next week, ideally TACDL members would communicate with their legislators on the subcommittee or committee and voice their concerns. Time pressures often make that difficult for the TACDL members and the legislators. Not all telephone calls or emails are returned, but typically the call of the influential opinion leader is returned. That conversation can buttress and make more effective the message delivered by TACDL staffers in Nashville.

Legislative Notes. On a somber note, we must remember the family of State Representative Lois DeBerry in our thoughts and prayers. Representative DeBerry died on Sunday, July 28, 2013. With her election in 1972, she was the first African American woman elected to the General Assembly from Shelby County and the second statewide. She was the longest serving member of the House. She served as Speaker Pro Tem of the House from 1987 until 2011. She developed an expertise in education and correction issues, and her opinions and demands for decorum were respected in the often rowdy State House. She was one of the better stump speakers around, and wise candidates and public officials coveted her support. Tennessee is a better place because of her willingness to serve.

Calendar Notes: State offices and courthouses will be closed Monday, September 2, 2013, in observation of the Labor Day Holiday.

The 108th General Assembly will reconvene on Tuesday, January 14, 2014.

Nathan Ridley is an attorney with the Nashville firm, Bradley Arant Boult Cummings LLP. You may contact him by e-mail at nridley@babc.com.

Always Get the Data!

The Fukushima of Forensics: Annie Dookhan

Justin J. McShane, JD, F-AIC and Josh D. Lee, JD

The forensic science world was rattled recently with revelations that a Massachusetts state crime laboratory had likely produced tens of thousands of erroneous results over nine years at the hands of now infamous chemist Annie Dookhan. Dookhan went from the laboratory's poster child of a hard working chemist to the poster child for why this country desperately needs major meaningful reform in the forensic sciences. You will soon discover why we believe those two seemingly opposite descriptions are closer to the same than you many believe.

According to *The Boston Globe*, Scott Burns, the executive direc-tor of the National Dis-trict Attorneys Asso-ci-a-tion, said Dookhan's alleged actions are not without precedent but far from typical[i]. We agree with him. Only the scope of this disaster is what makes it so remark-able. How-ever, there is a long, long list of shameful forensic disasters: Fred Zain (West Virginia & Texas), Joyce Gilchrist (Oklahoma), Dee Wal-lace (Texas), Garry Veeder (New York), Eliz-a-beth Mansour (New York), Anne Marie Gor-don (Washington & California), Charles Smith (Canada), James E. Price (Texas), and Deb-o-rah Mad-den (California) just to name a few.

The state of Massachusetts is focusing all of its attention on a single analyst and that is an inade-quate, misleading, and borderline dishonest response to this scandal. Here is the whole story that needs to be told.

Is the Dookhan matter the canary in the coalmine of forensics?

Who is Annie Dookhan and why should I care?

Annie Dookhan was a chemist who worked in a Massachusetts Department of Public Health state laboratory and allegedly falsified thousands of tests that were used in criminal prosecutions. Her misdeeds have been investigated and are detailed in a 101-page State Police report.[ii]

A review of this report and investigation paints the following picture:

<u>General matters of concern surrounding the crime laboratory:</u>

> This crime laboatory was designed as a two-chemist system. Meaning that any reported re-sult was supposed to be the product of two separate people doing two separate processes. There was a "primary chemist" who did the initial screen tests (colormetric-reagent based color-change testing with no photographs taken) and crystallography (microscopic-based sight-based examination with no photomicrographs taken) and "sec-ndary chemist" who did the instrumentation and mass spectral elucidation using Gas Chromatography-Mass Spec-trometry (GC-MS). However, there was no independent Quality Assurance (QA) officer. [Comment: The independent QA officer would preform the essential double-checking of the work by those two chemists or among each other.] There was no independent QA officer actually looking at the data generated or if there was any data generated at all. There was no double-checker.

- Employees in the laboratory made numerous complaints to their supervisors about Dookhan and her work product. These complaints were ignored. Complaints included:
    - Multiple accounts from fel-low bench work-ers in the lab-o-ra-tory who said they never saw Dookhan use the micro-scope at all while she con-tin-ued to report re-sults as a primary chemist per-form-ing crys-tal-log-ra-phy test-ing (which requires microscopy)[1]
    - Co-workers com-plained that Dookhan was forging their signatures.
    - Others complained about her lack of documentation.
    - Others complained about her questionable laboratory results.
- Frequently, Dookhan was allowed to be both the primary chemist and the secondary chemist on the same sample. This was clearly against written laboratory procedures and policy.
- Dookhan was allowed to train others in Quality Control (QC) procedures (teaching the ma-chine right from wrong) although she was not qualified to do so.
- When chemists were infrequently audited, it is unclear as to whether or not it was a full re-test of samples or simply a paper audit.
- There was no record of how samples could or should be resubmitted for testing. When re-testing was preformed, the number of times an item was retested was not tracked. Not all data from all testing was preserved. In other words, they just simply retested until they got the result they wanted with all "non-conforming" results being disregarded, not disclosed and records destroyed. Only the "agreeable" results (read as consistent with desired results consistent with prosecution) were saved.
- The evidence room and evidence safe were readily accessible to chemists even when they were alone.
- The evidence room procedures restricting access were ignored and circumvented. The safe could be opened by either a palm reader or a key. The key was left in the keyhole as a nor-mal practice. The safe was found open on numerous occasions. The safe was left unattend-ed. It was routinely left propped open when the laboratory was "busy." It was accessible by codes and keys that had not been changed in over a decade. Chemists had keys to the lab which also were capable of opening the evi-dence safe. Further, the palm reader access point to the evidence room might not have been recording those who entered.[2]
- The laboratory bench areas were set up with artificial barriers between bench chemists using brown construction paper. This made it where one chemist could not see what the other chemist was doing.

[1]Massachusetts State Police Investigation Reports, pg. 21.

[2]Massachusetts State Police Investigation Reports, pg. 8; 14-15; 35; 40.

Matters specific to Dookhan:

- On a global level, Dookhan literally made up QC results, recording them in the "Qual-ity Control Daily Injector Test on the GC/MS." In other words, Dookhan forged QC documents that are essential to insure that the GC-MS instrumentation worked properly and was reporting true results. Dookhan repeatedly failed to properly run QC test samples not even bothering to fill out false documents claiming to do the work. [Comment: This is a global problem as frequently a machine would be set up in a specific way and then used from there on out by other analysts who did the proper testing on other samples. But because the machine was not set up properly or at all, all test results from that machine are suspect. This is where the number of affected tests can and should far exceed the 60,000 cited.] [3]

- On a global level, Dookhan failed to calibrate balances. [Comment: The improper calibration of the balances (i.e. scales) means the quantification (the amount or the gross weight) of the suspected drugs is suspect. There are weight based decisions (trafficking versus possession) and mandatory minimums based upon weight in Massachusetts.]

- Dookhan was a through-put master. She often analyzed more samples in a week than her fellow analysts did in a month. [Comment: This level of "production" should have concerned everyone. It was even complained about by fellow coworkers. It appears that these complaints were ignored.] [4]

- As a primary chemist, Dookhan dry-labbed. Instead of doing any sort of scientific process, she would simply look at the samples instead of testing them and form a conclusion and report it out. [Comment: Dry-labbing is what people in the industry call it when one does not even test a sample or perform any testing at all and instead merely makes up a result and reports it as if they had completed the full process. This is absolutely the most dishonest act a person can do in a laboratory setting. Dry-labbing is a flat out bald face lying.] [5]

- When working as the primary chemist, Dookhan ignored laboratory procedures by loading and running her own samples on the GC-MS rather than turning them over to the secondary chemist. [Comment: This is how she very easily dry-labbed. She would get the answer from the GC-MS instrumentation and then "back-fill" the documents claiming that she did the primary chemist's job but did not at all.]

- When she was the primary chemist, she would handle the aliquots of the samples in a poor manner that would foster cross contamination. She would keep racks upon racks of sample vials out in the open on her bench top.

[3]Massachusetts State Police Investigation Reports pg. 22; 72.
[4]Massachusetts State Police Investigation Reports pg. 19.
[5]Massachusetts State Police Investigation Reports, pg. 73; 77.

- When she dry-labbed, many samples came back from GC-MS analysis as heroin when she had supposedly tested it as the primary chemist (colormetric and crystallography) and found it to be cocaine and vice versa. She would claim to conduct primary analysis on items thought to be marijuana (contains Delta 9-THC). It would be passed along for GC-MS work with the results either coming back as THC negative, a trace amount, or not extracted (co-elution with narcotics). [6] She would then alter these original seized samples so that they would come out the way she wanted. In other words, she would purposefully contaminate them and forever alter the sample so that her dry-labbing would not be discovered.[7]

- Dookhan would routinely forge the signature of other analysts, chemists, and, shock-ingly even, evidence officer initials. She did not keep track of which cases she did this on. Again, this was reported and evidently completely ignored by laboratory supervisors. [8]

- Dookhan routinely failed to fill out basic chain of custody documents.
- Dookhan was alone in the evidence locker on occasion, which was against laboratory rules.

- Dookhan became the "go-to" chemist of choice by district attorneys. She would rou-tinely receive direct calls from them. She would prioritize those requested items and received extraneous information about the case so as to skew her opinion. In fact, as the investigation reveals, Assistant District Attorney George Papachristos exchanged dozens of direct emails with Dookhan about cases and her analysis. Some emails dating back to 2009. Papachristos resigned when these email exchanges became public. It was clear that she had many email exchanges and direct cell phone conversations with several DAs. All of this in violation of the laboratory's established procedures and protocols.[9]
- She was suspended. [Comment: The District Attorney's Office did not inform the defense bar that she had been suspended. It is unknown if this was known to them or that the laboratory management failed to inform the DA's office.]
- Even while she was suspended and prohibited from doing any active work, she continued to do so. [10]
- Even while she was suspended and prohibited from doing any active work, she had access to the evidence office computers.
- She confessed that she lied about having a Master's Degree. [iii]
- She confessed that she lied about a lot of her training.

In short… she just lied by her own admission. She confessed that she lied about her resume. She admitted that she lied about train-ing she never had. She admitted that she lied about having a Master's degree. She admitted that she lied about testing. She lied about laboratory wide procedures.

[6]Massachusetts State Police Investigation Reports pg. 6; 23.
[7]Massachusetts State Police Investigation Reports pg. 7; 23.
[8]Massachusetts State Police Investigation Reports pg. 5-6; 15; 22; 40; 72.
[9]Massachusetts State Police Investigation Reports pg. 24; 40; 72.
[10] Massachusetts State Police Investigation Reports, pg. 72.

Why did she do it?

To get a job and to be viewed as a good employee. She confessed that she lied for a reason. Logically, she lied to help the prosecution's case. She lied to make things better for herself.

The State Police report paints a very sad picture of someone whose life was falling apart: Miscarriage, pending divorce, a boss yelling at her about throughput issues. Most crime laboratories that we know keep better stats about the numbers that a given technician processes than baseball teams do about their players. She was not keeping up with her peers. In the beginning, she probably didn't sit down and deliberately choose to hurt anyone. She just wanted the yelling to stop. She just wanted to keep her job as she was now divorcing and facing financial ruin. So something had to change. She had to find a way to make sure her job was secure.

How did it happen?

So it likely started with one day, one test that was dry-labbed. She crossed that invisible line. And you know what? Nothing happened. That's right, nothing happened. Life moved on. No alarms went off. No one was any the wiser. In fact, she was known to have remarked that after she confessed and was caught that she did not understand why the media would care about what she did and didn't seem to appreciate the gravity of her actions. [iv]

Because there was no QA officer actually looking at the data generated or if there was any data generated at all, it just slipped right by. There was no double-checker.

So then, as the sun came up the next day, she went to work. The boss likely yelled at her for throughput deficiencies. She felt her job was in jeopardy. So, she did it again. Again, no one caught her. She finally made quota. The next day the boss didn't yell. She liked that. She dry-labbed more to become the top technician as measured by throughput. Shortly thereafter, she was being praised. Other analysts were asked "Why can't you be more like Annie?" She was rewarded. She kept her job. Her supervisors liked her. As the State Police report shows, her supervisors simply ignored any negative feed-back from her peers (and even straight forward reports of dry-labbing) because she got the job done. She processed samples. The prosecutors and police became her friend. They viewed her as the best analyst. As humans, we all want to be liked and respected. She was now liked and respected.

It's simple biofeedback.

Much like the prototypical embezzler. The crime is committed first in a small scale: "I'll take just enough this one time to make the mortgage/rent." Then, when the embezzler is not caught, the thought becomes "I can take some more and no one will notice." Then like all things, greed takes over. It turns into the secretary who only makes $25,000 a year on the books owning a several hundred thousand dollar yacht. Then the business owner whose funds were embezzled throws up his or her hands say-ing "OMG! How did this happen?"

In both these cases, it is simple: Insufficient checks and balances.

The Root of the Problem

We live in an interesting time in forensic science. We have great technology and fascinating equipment that is capable of producing valid results. However, some very important components are missing from the equation. Quite frankly they are the most important pieces to the equation: validation, traceability, quality assurance (QA) and transparency. Frequently, we miss out on proof of how the actions were performed and/or how useful the actions are: traceability. Finally, we miss out on having an important double check of the process: quality assurance. It is only if there is a meaningful nexus between these three important concepts (validation, traceability, and quality assurance) that we can begin to have confidence in our reported results.

The lack of transparency in the validation of these techniques that are applied has built up over the years to the point of utter failure. We routinely wake up to headlines that dozens, hundreds and even thousands of results are cast into jeopardy. This is why we predict that we are quickly approaching the tipping point towards the ever bigger, and ever more alarming headlines that we are just starting to see that cast doubt over all forms of forensic science. When there is a lack of regulation and oversight (such is now the case in forensic science), activity moves into that area and overwhelmingly expands towards the absurd. Where forensic science activities might have had some legitimate use originally, in this day and age of modern testing, we see some really bizarre suggestions trying to slip their way into the mainstream of our courts of justice.

Yet at the same time defense attorneys all across the U.S. are trying to get data from labs only to be met with objections and refusals from lab personnel.

We need to remain ever vigilant and skeptical, now more than ever. The veneer of science and scientific processes is at an all-time high, but when truly examined it is simply superficial in some cases. The biggest threat we have is not in being wrong, but rather to allow the propagation of error to accumulate into mere repetition and the anchoring of forensic science tech-niques into our courts merely by their repeated presence instead of their fundamental validation.

When court rulings suggest that a forensic technique must be valid simply because it has existed (perhaps never being ques-tioned in the first place) and has been accepted into court for decades and by inference holding that science is static, then justice is a casualty. Who in their right mind believes that science is static? Our understanding of science is subject to change as we learn more. Science is evolutionary, and incremental. Yet, our court system by mere edict holds otherwise.

In essence, it comes down to our society's willingness to accept risk. To what end are we willing to accept what level of risk in being wrong? In every sort of industry (environmental, pharmaceutical, manufacturing) there is a triad of reducing risk: validation, traceability, and quality assurance. It is enshrined in the very basic movement of Six Sigma.

> Six Sigma is a business management strategy, originally developed by Motorola in 1986. Six Sigma became well known after Jack Welch made it a central focus of his business strategy at General Electric in 1995, and today it is widely used in many sec-tors of industry. Six Sigma seeks to improve the quality of process outputs by identifying and removing the causes of defects (errors) and minimizing variability in manufac-turing and business processes. It uses a set of quality management methods, including statistical methods, and creates a special

> infrastructure of people within the organization ("Black Belts", "Green Belts", etc.) who are experts in these methods… The term Six Sigma originated from terminology associated with man-ufacturing, specifically terms associated with statistical modeling of manufacturing processes. The maturity of a man-ufacturing process can be described by a sigma rating indicating its yield, or the percentage of defect-free products it creates. A six sigma process is one in which 99.99966% of the products manufactured are statistically expected to be free of defects (3.4 defects per million). Motorola set a goal of "six sigma" for all of its man-u-fac-tur-ing oper-a-tions, and this goal became a byword for the man-age-ment and engi-neer-ing prac-tices used to achieve it. [V]

If industry can do this, why on Earth can't forensic science?

In the courtroom, shouldn't we demand that we have a process in place that results in fewer defects than the making of a cell phone? Absolutely.

When asked why do we see these forensic science scandals, we suggest the answer is simple. We have failed to demand processes (simple processes) that minimize the risk of being wrong.

Like the tip of an iceberg, when these scandals are discovered, it is quite simply the equivalent of the Fukushima-like disaster. There is a cascading effect of failure. There is a global failure of quality assurance or traceability or in underlying validation. The entire point of having a double check (what is called either technical review or a quality assurance review) with every result is to have someone greater qualified than the bench analyst disbelieve the data produced and seek to falsify its validity and only approve it if there is no question of the data. When there is a noticeable failure that reaches the headlines, there was undoubtedly a massive failure of the quality assurance (QA) program that may or may not have been in place. Was the QA officer not trained well in the technique? Was there too much throughput that the QA degenerated to nothing but a rubber stamp? Was the QA officer incompetent or fraudulent? Was there no QA at all?

As is often the case in these cases where aberrant invalid results are produced, the knee-jerk reac-tion of those that are in political control of a testing laboratory is to seek to blame one analyst and claim that the sole analyst alone is the source of all that is wrong. In the process, this analyst is classified as either a rogue lone wolf or an incompetent oaf. A press conference is held with no meaningful information told to the public as to the scientific source of the error with non-scientists assuring the public that the issue has been identified, quarantined, and corrected with no damage. This oddly predictable pattern is repeated in all of the major national scandals: Houston Police Department, Washington DC, Colorado Springs, Philadelphia, San Francisco, Michi-gan, Massachusetts and on and on.

The truth of the matter is that with these types of events, it is never a lone wolf or a poorly trained analyst situation, but rather a systemic failure and is indeed symptomatic of some large scale issue that includes the training of the analyst, the supervision of the analyst, the lack of meaningful periodic proficiency training of the analyst, the analysts' proper training and initial review of his/her own data, the quality assurance officer, the lab supervisor, and ultimately the lawyers (both prosecution and defense) and judges of criminal justice system. This is true even when the rogue analyst is a pathological liar, because a lab that is set up appropriately has procedures and safeguards in place to catch a person such as that. So merely firing the responsible person ignores the other failures in the lab setup and operation

An error that is “discovered” to include many samples is not an accident or something that happened overnight. It is repeated error that should have been discovered by someone in that laboratory system or in the criminal justice system well before it got to the headlines. The laboratory's aftergenerated claims that frequently report no source of the error and issues instead bald conclusions that are in keeping with its vested political interest to minimize the error and isolate the analyst is just babble and garbage. It is dishonesty.

It is amazing the state of forensic science in the courtroom. All too many judges routinely deny discovery motions for scientific data, validation studies and even basic scientific data. They jus-tify this by stating that a conclusory report (which merely states an opinion) is good enough. Blind trust. Further, it is troubling to us that there still appears to be a debate about the need for actual confrontation in court of the folks who actually perform the analysis.

Defense attorneys do not get data. We get simple conclusory statements that state a scientific opinion, but is couched and phrased as an absolute with no meaningful scientific explanation as to how the conclusory opinion was formed. [Vi]

All of this leads towards a grand statement:

Just because the result came from a laboratory does not mean it comes from the Almighty. This is not simply a Massachusetts problem. It is the canary in the coalmine. When these things happen, it is incumbent upon the laboratory to release the data of its investigation so the scientific community can see if it is correct in what it is claiming. Many would offer to do this verifi-cation for free.

If these types of errors were discovered in an EPA or FDA regulated laboratory in the private sector, it would be shut down immediately, fully investigated by a wholly independent laboratory auditor, heav-ily fined, possibly key members in the QA chain possibly indicted, and the documents and information would be made available to others to review the conclusions in a wholly transparent and scientific way.

When Fukushima happened, it was shut down immediately, fully investigated by wholly independent auditors (many auditors), and the documents and information made available to others to review the conclusions in a wholly transparent and scientific way. Then, after a while, it is checked again in a meaningful way by independent agencies. Most importantly, the lessons learned by that failure were examined in the light of current situations to insure that this failure was protected against happening elsewhere. Just to name a few of the auditing agencies and their detailed release of data:

- The Great East Japan Earthquake. Expert Mission. IAEA International Fact Finding[vii]
- American Nuclear Society Special Committee On Fukushuma[viii]
- USNRC Follow-up to Fukushima Daiichi Nuclear Station Fuel Damage Event[ix]

Meaningful quality assurance, proper training, method validation, adherence to a validated series of instructions, achieving traceability, and the like are not that hard to implement and monitor. We can do better.

The performance of tasks in forensic science should not be a leap of faith, but rather firmly grounded in science instead. Why isn’t it?

We know how to do better. We must do better. When a laboratory claims that it is doing truly validated science but does not have complete transparency and documented proof one must be skeptical.

There is just too much at stake to blindly trust. There is independent, third party review for a reason. Fukushima was well investigated by the company itself, the Japanese government, the International Atomic Energy Agency, US Nuclear Regulatory Commission and others. We must do likewise if there is to be confidence in the reporting of results in the forensic arena.

Trust but verify.

The solution to the Annie Dookhan Problem

No criminal justice system can cope with suddenly having 60,000 to 100,000 cases injected into it with no warning. Court budgets are already strained. The pressure to declare this scandal over must be quite overwhelming. In a swift and bold move, Chief Justice Robert A. Mulligan, Chief Justice of the Trial Court for the Commonwealth of Massachusetts, has created a special court to handle the aftermath of the Annie Dookhan mess.

What we fear the most is half-measures and a quick "investigation" as opposed to a true investigation into the scientific Fukushima of Forensics that this Annie Dookhan matter truly is. This is a scientific disaster, not a political one. While there is a political component to it all, this should not be handled politically. There must be full transparency. We do not need a "here is what is wrong (pointing to one per-son); we fixed it quick" type of situation. We need to have a whole scale bottom-to-top retooling of the forensic science system. Like mythical Phoenix from the ashes, the Commonwealth of Massachusetts has an opportunity to resurrect its system to be like the beacon on a hill for others to see and strive to become. Let's hope that Massachusetts does not take the easy, but only temporary, way out like so many labs have done before it. Set the standard Massachusetts.

At a minimum, there should be:

- a wholly independent lab with no police or District Attorney oversight;
- a meaningful and wholly independent QA program;
- barcoded sample tracking;
- videotaping in the laboratory;
- full vetting of all employees;
- blinded proficiency testing;
- independent auditing;
- random rechecking of actual samples by the independent QA officer;
- testimony monitoring by the QA officer;
- full transparency to the criminal defense bar of all information; and publication of validation studies along with all policies, procedures, and instructions online so all in the world can see it.

We are willing to bet that none of the above will happen.

The standard should be: what would an FDA or EPA compliant lab do? Then comes the question of what is the scope of the review of the Dookhan court? What can this special court do? Freeing those in jail? That's the remarkably easy part.

The larger loom-ing social question becomes:

- How do you give time back to the people who were jailed?
- How do you give those who lost their jobs their jobs back?
- How do you reconnect a mother or father who lost their parental rights because of these tests?

- How do you "un-homeless" those who were made homeless when they lost their public housing?
- How do you reunite families who were split up when a parent was deported because of these tests?
- How do you give a person their career back?

Do you compensate those convicted? If so, how much?

Instead, sadly we predict that this scandal will result in yet another in the long list of laboratories who were simply declared "fixed" (with no transparency in the data) with those administratively in charge finding a ready singular scapegoat to blame the problems on so the public will have a false sense of security and rest assured that the problems were the fault of merely a single rogue analyst and not a sys-temic laboratory and cultural failure.

The long-term solution to the Forensic Science Problem

As a criminal defense attorney, you and no one else serve as the last, best, and final line in the justice chain.

This is why we, and many others, espouse the mantra: **ALWAYS GET THE DATA**. Not just the conclusory report, but also the underlying data. I mean this in every single case. Even if you think it is a sure fire guilty plea.

Here is why you must: Annie Dookhan.

We don't care if you don't know what it is or what it means, you always must get the data. You can start learning what it means, you can call upon colleagues or experts to help you determine what it means. But we beg of you, please, just get the data.

In the case of Annie Dookhan, for many of her cases, there was no data at all. Zero. Zippo. None. If the attorneys who plead out the 34,000 cases of hers had simply asked for the data, then maybe, just maybe this would have been discovered earlier.

But there should be more. Do you know why convenience stores have security cameras?

- to deter crime against the store;
- to catch those who have taken money from the register;
- to catch shoplifters;
- to catch employees who steal from the company;
- to see when employees leave early or come in late;
- to record when crime happens; and to aid in the pros-e-cu-tion of those who cheat the store or rob the store.

It seems like such a basic safeguard that there would be no legitimate argument against having it. Who would want to work in a convenience store without it? By having it there, legitimate customers feel safer and are in truth safer.

How about banks? They have security cameras for the same reasons. Motion activated cameras are inexpensive. Memory is dirt-cheap.

Who can legitimately argue against these omnipresent fixtures in our lives? In a technologically advanced world, our expectation of privacy is less and less and less.

As a society, why do we have better safeguards against fraud and against crime at a 7-Eleven than we do in a crime laboratory? Many more people can be hurt by a crime laboratory than in a 7-Eleven. The simple salient take away fact from the Annie Dookhan situation that we can all appreciate is that the traditional safeguards such as human integrity, and the Confrontation Clause will not stop the Annie Dookhans of this world. She was willing to put her hand on the Bible, swear an oath and lie. She was willing to forge documents of her coworkers. She was willing to purposefully contaminate samples to change the results to suit her own meaningless selfish agenda. When someone is willing to do all of this and goodness knows what else, the traditional safeguards are worthless. Confrontation cannot stop all of that. Human integrity is not a sufficient check against these transgressions.

Save this article, come back and read this article again in a year or two. We guarantee that there will be more analysts exposed for lying in court about their resumes and their work performance. Following our suggestions is the only way to best curtail this behavior.

It's time that we just put an end to it all. It's time we call for the ultimate forensic safeguard. Let's videotape the laboratories.

Conclusion

The goal of any identification or quantitation is to produce a specific and true expression that is valid. In the forensic world how we scientifically arrive at a reported result should not be an act of mysterious busy-work or no work at all. Instead, it should come from planned, purposeful and meaningful action that is validated and truly scientific, action that can be verified and is reliable. As scandals like the Annie Dookhan case teach us, we can do better. We must demand better. We must force them to do better. Left to their own devices, they cannot effectively govern themselves. Our system of justice demands no less.

Justin McShane is a Board Certified Criminal Trial Advocate by the National Board of Trial Advocacy and a skilled litigator.

Josh Lee is one of three attorneys in the United States, and the only Oklahoma attorney, who has been selected as an Assistant Chromatography instructor for the American Chemical Society.

[i]http://www.boston.com/2012-09-28/news-local-massachusetts/34128215_1_special-courts-criminal-cases-drug-lab?camp=pm (last accessed October 18, 2012)

[ii]http://www.boston.com/news/local/breaking_news/Dookhan.Discovery%209.26.12.pdf (last accessed October 18, 2012)

[iii]Curriculum Vitae of Annie Khan (Dookhan)
http://cache.boston.com/multimedia/2012/09/25chemist/Dookhan_resume.pdf (last accessed October 18, 2012)

[iv]Murphy, Bridgett, "Suspicions ignored as bosses let chemist work on" http://hosted2.ap.org/wrko/WRKONews/Article_2012-09-27-State%20Police%20Lab%20Shutdown/id-b722025e73934086b4172a5f1f3fad62 (last accessed October 18, 2012)

[v]"Six Sigma" http://en.wikipedia.org/wiki/Six_Sigma (last accessed October 18, 2012)
rpts.html (last accessed October 18, 2012)

[vi]The following is an example of the typical text from the "Certificate of Analysis" reporting issued by the Massachusetts Department of Public Health: [This particular example is from the famous *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and was State's trial Exhibit 10]

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
State Laboratory Institute
305 South Street
Boston, MA 02130-3597
617-983-6622

DATE RECEIVED: 11/19/2001
DATE ANALYZED: 11/28/2001

No. 615742
I hereby certify that the substance
Contained in 2 plastic bags MARKED: 615742
Submitted by P.O. FRANK MCDONOUGH of the
BOSTON POLICE DEPT.

Has been examined with the following results:
The substance was found to contain:
Cocaine, a derivative of Coca leaves, as defined in
Chapter 94 C, Controlled Substance Act, Section 31,
Class B.

NET WEIGHT: 2.41 grams
DEFENDANT: MONTERO, ELIS A. ET AL
_____/s/_____/s/_____
Assistant Analysts Della Saunders Michael Lawler

Sworn and subscribed to before me on this day, 12-04-
01. I know the subscribers to be assistant analysis of
the Massachusetts Department of Public Health.

My Commission Expires 8-25-06 _____/s/_____
NOTARY PUBLIC

Chapter 111, Section 13 of the General Laws
This certificate shall be sworn to before a justice of the Peace or
Notary Public, and the jurat shall contain a statement that the
subscriber is an analyst or assistant analyst of the department.
When properly executed, it shall be prima facie evidence of the
composition, quality, and the net weight of the narcotic or other
drug, poison, medicine, or chemical analyzed, and the court shall
take judicial notice of the signature of the analyst or the assistant
analyst, and of the face that he/she is such.

[vii]http://www-pub.iaea.org/mtcd/meetings/pdfplus/2011/cn200/documentation/cn200_final-fukushima-mission_report.pdf (last accessed October 18, 2012)

[viii]http://fukushima.ans.org/report/Fukushima_report.pdf (last accessed October 18, 2012)

[ix]http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/follow-up-

TACDL Membership Benefits:

Amicus: Members monitor the appellate courts and file briefs on issues concerning criminal law.

Continuing Legal Education: Provides 80+ hours of CLE across the state annually.

Criminal Justice Policy: Members serve on the Judicial Selection Commission, Judicial Evaluation Commission, Bench-Bar Relations Commission, Domestic Violence State Coordinating Council, and various short-term task groups to represent the criminal defense bar.

Forensic Experts: Database of expert witnesses for use by members.

Legislative: Employs a lobbyist to monitor and work with legislative committees, who informs members of issues in the Legislature and other policy-making bodies.

Resource Library: Educational materials and videos available for purchase from past seminars.

Member Network: Members provide assistance to each other in practicing criminal law through the Members-Only listserv. Also, a new attorney mentoring program is available upon request.

Publications: Publishes a bi-monthly newsletter entitled ***For the Defense***, a weekly on-line newsletter entitled ***The Weekly Writ***, Tennessee death penalty manuals, and juvenile defense books.

Strike Force: Specifically designated members provide free counsel to other members facing criminal contempt charges in the courts for "zealously" representing clients' rights.

Website: Information pertaining to TACDL, its Board of Directors, current membership list, a listing of all CLE seminars for the year and links to research sources.

2013 TACDL Membership Dues

$5,000 – Life Member (One-time payment): Free CLE, pay for handouts & extras

$1,000 – Sustaining (Free Annual Mtg., converts to Life Membership after five years)

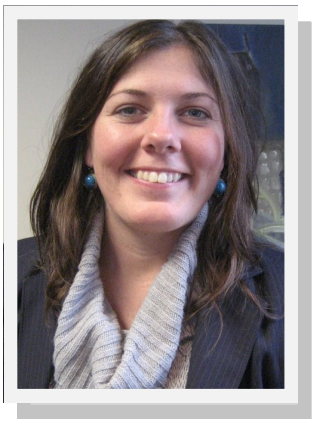
$175 – Regular (Private attorney), **Affiliate** (Non-attorney defense professional) & **Federal Public Defender** (public attorneys or staff not under special contract)

$85—Special Contract (paid by State Public Defender Conference)

$50—New Member (First two years of criminal defense practice) &

$25—Law Student (Enrolled in law school)

The Board of Directors recently voted to give every member a $50 CLE credit if they sign up a New Member!



State Case Law Update

June 2013-August 2013

Chelsea Nicholson

Court of Criminal Appeals

INEFFECTIVE ASSISTANCE OF COUNSEL

Edward Thomas Kendrick, III v. State of Tennessee, E2011-02367-CCA-R3-PC, Hamilton Co., 6/27/13, The Defendant was convicted of first degree premeditated murder. The CCA affirmed the Defendant's conviction on direct appeal. The Defendant filed for post-conviction relief, alleging ineffective assistance of counsel. The post-conviction court denied relief, and this appeal followed. The CCA concluded that the Defendant established that he received ineffective assistance of counsel at trial, because it is reasonably likely that a jury would have convicted him of a lesser degree of homicide absent the deficiencies in his trial counsel's performance. The CCA reversed the conviction and remanded the case. The Defendant's sole defense at trial was that the gun discharged on its as he was moving it within the vehicle. The CCA found that the trial counsel was deficient in failing to adduce expert proof about the trigger mechanism in the rifle. Expert testimony was available to prove that the trigger mechanism in the rifle was defective and could have caused the rifle to fire without the trigger being pulled. This proof was also crucial to the substance of the defense, as well as to both bolstering the Defendant's credibility and challenging the State's expert proof.

SEARCH AND SEIZURE

State of Tennessee v. Michael D. Boone, M2011-02435-CCA-R3-CD, Davidson Co., 6/10/13, After the trial court denied his motion to suppress, the Defendant pleaded to possession with intent to sell or deliver .5 grams or more of a substance containing cocaine and possession with intent to sell or deliver not less than one-half ounce or more than ten pounds of marijuana reserving a certified question of law: "Does the affidavit of probable cause in the warrant . . . contain sufficient information to establish a nexus between the residence to be searched and criminal activity; and, if so, does the affidavit further contain reliable information of ongoing criminal activity so as to establish probable cause . . . ?" The CCA affirmed the trial court determining the affidavit provided sufficient probable cause to support the search warrant. The CCA concluded that there existed a nexus, which was created by law enforcement officers' personal observation of the Defendant exiting and freely reentering the residence before and after the drug sale.

State of Tennessee v. Michael T. Shelby, M2011-01289-CCA-R3-CD, Montgomery Co., 6/19/13, The Defendant was indicted for promoting the manufacture of methamphetamine, possession of methamphetamine, and possession of drug paraphernalia. The Defendant filed a motion to suppress, claiming the search warrant lacked probable cause. After a suppression hearing, the trial court granted the Defendant's motion to suppress, finding that the search warrant was legally defective. The State appealed. The CCA reversed the judgment of the trial court finding the information contained in the warrant came from a "concerned citizen." The Defendant argued that the warrant was invalid on its face arguing that a "concerned citizen" did not qualify as a "citizen informant" because this person was with the Defendant and others over the course of four days while they allegedly manufactured methamphetamine. The Defendant submitted that this "concerned citizen" was part of the criminal milieu and therefore a criminal informant. The State argued the "concerned citizen" was not a part of the criminal milieu. The CCA

agreed that the concerned citizen was a criminal informant but, even so, the warrant had a sufficient showing of probable cause pursuant to *State v. Jacumin*.

State of Tennessee v. Anthony Woods, W2012-01871-CCA-R3-CD, McNairy Co., 7/3/13, The Defendant was convicted of one count of facilitation of intent to deliver less than 0.5 grams of cocaine and one count of simple possession of marijuana. The evidence in the case was seized pursuant to a search warrant issued for the home of the Defendant's girlfriend and the Defendant's teenage daughter. The Defendant's original appeal was dismissed due to an untimely notice of appeal. The Defendant then brought a post-conviction petition, and the post-conviction court granted the Defendant this delayed appeal pursuant to Tennessee Code Annotated section 40-30-113(a)(1). The Defendant challenged the sufficiency of the evidence, the trial court's refusal to admit an audio recording or transcript of the preliminary hearing into evidence, and the legality of the search warrant. Because the search warrant failed to adequately establish the credibility of the confidential informant and because the Defendant had standing to challenge the warrant, the CCA reversed the Defendant's convictions.

SELF-INCRIMINATION CLAUSE

State of Tennessee v. Joshua Brandon Tate, M2011-02128-CCA-R3-CD, Davidson Co., 7/31/13, The Defendant was convicted of seven counts of sexual battery, eight counts of rape, and one count of solicitation of a minor. The trial court granted a portion of the Defendant's motion for new trial, vacating the rape convictions in counts seven through twelve, and the conviction for sexual battery in count thirteen. On appeal, the Defendant submitted the trial court erred in allowing testimony about Appellant's failure to attend voluntary interviews with the police. The CCA found that the trial court erred in admitting this testimony that the Defendant failed to attend voluntary police interviews in violation of the Defendant's right to remain silent/self-incrimination clause, and this error required reversal for a new trial.

SENTENCING

State of Tennessee v. Alan Robert Benjamin, E2012-01557-CCA-R3-CD, Hamilton Co., 6/26/13, The Defendant pleaded guilty to two counts of robbery and one count of attempted aggravated robbery. The trial court sentenced the appellant as a Range I, standard offender to five years for each offense, with the sentences to be served consecutively for a total effective sentence of fifteen years. The court ordered the appellant to serve eleven months and twenty-nine days confinement for each offense, with the remainder of the sentence to be served on supervised probation. On appeal, the Defendant challenged the length of the sentences imposed by the trial court, the imposition of consecutive sentencing, and the denial of full probation. Upon review, the CCA concluded that the trial court erred by allowing the appellant to choose between two proposed sentencing options. Therefore, the judgment of the trial court was reversed and remanded.

SUFFICIENCY OF EVIDENCE

State of Tennessee v. Antonio Grandberry, W2012-00615-CCA-R3-CD, Shelby Co., 6/21/13, The Defendant was convicted by of especially aggravated robbery. On appeal, the Defendant argued that the evidence was insufficient to support his conviction. Additionally, the Defendant asserted that the trial court erred in not instructing the jury on the offense of facilitation of especially aggravated robbery. The CCA concluded that the evidence was insufficient to support a conviction of especially aggravated robbery or any of the lesser-included offenses pertaining to robbery but was sufficient as to the lesser-included offense of aggravated assault. The CCA modified the Defendant's especially aggravated robbery conviction to aggravated assault. The CCA submitted the evidence showed that the Defendant approached the victim's vehicle and shot through the passenger side door hitting the victim in the leg;

however no further evidence was offered showing that he shared the same intent with his codefendant to rob the victim.

THIRTEENTH JUROR

State of Tennessee v. Philip Trevor Lenoir, E2012-01257-CCA-R3-CD, Monroe Co., 7/13/13, The Defendant was convicted of aggravated child neglect. Thereafter, the trial court judge recused herself and a successor judge was appointed. The Defendant appealed claiming: the successor judge failed to engage in the proper analysis as the thirteenth juror. The CCA concluded that because the successor judge was unable to properly approve the verdict as "thirteenth juror," a new trial must be granted. The judgment of the trial court was reversed, and this case was remanded for a new trial.

Tennessee Supreme Court

DETAINERS

State of Tennessee v. Michael Shane Springer, W2010-02153-SC-R11-CD, Gibson Co., 6/24/13, In this appeal, the TNSC interpreted the meaning of the phrase "term of imprisonment" in Articles III and IV of the Interstate Agreement on Detainers ("IAD"), Tenn. Code Ann. §§ 40-31-101 to -108 (2006), and determined whether the Defendant was entitled to relief under the IAD. After the Defendant was tried and convicted in federal court, he was indicted by the grand jury in Gibson County on the related state charges. Before being sentenced in federal court, the Defendant filed a demand for speedy disposition of the state charges under Article III of the IAD. While the Defendant was confined at a federal temporary detention facility after his sentencing in federal court, the Gibson County Sheriff filed a detainer and transported the Defendant to Gibson County for an arraignment. After counsel was appointed and the Defendant was arraigned, he was transferred back into federal custody. The Defendant filed a motion to dismiss the state indictment for violations of Articles III and IV of the IAD. The trial court denied the motion. The defendant entered a conditional guilty plea reserved a certified question of law seeking appellate review of the denial of the motion to dismiss because of the alleged violation of the IAD. The CCA, in a divided opinion, affirmed the trial court's denial of the Defendant's motion to dismiss. The TNSC held that for purposes of the IAD, a prisoner who is incarcerated after sentencing is serving a "term of imprisonment." Also, the TNSC held the Defendant was a federal pretrial detainee at the time he filed a procedurally deficient demand for speedy disposition and was not entitled to relief under Article III; and that the Defendant was serving a term of imprisonment when he was transferred, pursuant to a detainer, from the federal temporary detention facility to Gibson County for his arraignment and back to federal custody on the same day. Article IV of the IAD was violated when the Defendant was transferred back to the federal detention center before being tried for the state charges. The judgment of the CCA was reversed, the conviction was vacated, and the indictment against the Defendant was dismissed with prejudice.

SUFFICIENCY OF EVIDENCE

State of Tennessee v. Ledarren S. Hawkins, W2010-01687-SC-R11-CD, Madison Co., 6/20/13, The Defendant was convicted of first degree murder and tampering with physical evidence. On this appeal, the Defendant sought reversal of his first degree murder conviction on the ground that the trial court de-

clined his request for a jury instruction on defense of a third person. He also sought reversal of his evidence-tampering conviction on the ground that his abandonment of the murder weapon did not amount to tampering with physical evidence. The CCA upheld his convictions and sentences. The TNSC determined that the trial court properly denied the Defendant's request for an instruction on defense of a third person. However, the TNSC also determined that the Defendant did not tamper with physical evidence in violation of Tenn. Code Ann.§ 39-16-503(a)(1)(2010) by tossing the murder weapon over a short fence where it could be easily observed and recovered. This conviction and sentence was reversed.

Chelsea Nicholson, Attorney at Law practices in association with Mink & Duke in Nashville, Tennessee. She can be reached at chelsea@cnicholsonlaw.com or 615-256-0138.

NACDL News Update

Photo courtesy of NACDL

Johnson, Henderson join NACDL Board

Washington, DC (July 30, 2013) -- NACDL installed its new officers and directors at its Annual Board and Membership Meeting in San Francisco, California, on July 27, 2013.

Newly installed officers and directors:

Executive Committee

President: Jerry J. Cox (Mount Vernon, KY)
President-Elect: Theodore Simon (Philadelphia, PA)
First Vice President: E.G. Morris (Austin, TX)
Second Vice President: Barry J. Pollack (Washington, DC)
Treasurer: John Wesley Hall (Little Rock, AR) (second year of two-year term)
Secretary: Rick Jones (New York, NY)

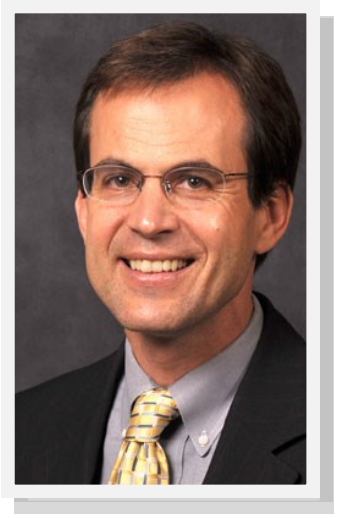
Board of Directors

Christopher W. Adams (Charleston, SC)
Brian H. Bieber (Coral Gables, FL)
Andrew S. Birrell (Minneapolis, MN)
Susan K. Bozorgi (Miami, FL)
Maureen A. Cain (Denver, CO)
Paula Henderson (Knoxville, TN) (Affiliate Representative)
Stephen Ross Johnson (Knoxville, TN)
Elizabeth Kelley (Spokane, WA)
Norman R. Mueller (Denver, CO)
Kristina W. Supler (Cleveland, OH)
CeCelia Valentine (Phoenix, AZ) (Affiliate Representative)
Christopher A. Wellborn (Rock Hill, SC)
Steven M. Wells (Anchorage, AK)
Christie Williams (Austin, TX)
William P. Wolf (Chicago, IL)

George H. Newman (Philadelphia, PA) was appointed Parliamentarian by NACDL President Jerry J. Cox at the July 27 meeting of the Board of Directors.

Directors Alexander Bunin (Houston, TX) and Bonnie H. Hoffman (Leesburg, VA) were selected to serve on NACDL's Executive Committee.

Please contact Ivan J. Dominguez, Director of Public Affairs & Communications, (202) 465-7662 or idominguez@nacdl.org for more information.



JUNE SURPRISE

THE SUPREME COURT ENDS THE TERM WITH SIGNIFICANT CRIMINAL CASES

Wade V. Davies
Ritchie, Dillard, Davies & Johnson, P.C.

Back in the early spring, when I agreed to present the federal case update at TACDL's June "Legislative Update and Case Review" seminar, it didn't occur to me what happens in June. As I was trying to prepare for the seminar, the Supreme Court cranked out one important criminal case after another, and I scrambled to get ready to critique them as soon as they came out. Now that I have had a little time to reflect, here are some of what I think to be the more important cases.

Ex Post Facto Clause/Federal Sentencing Guidelines:

You might have thought it beyond question that a Guideline amendment that increases punishment could not be applied retroactively without violating the Ex Post Facto Clause. In *Peugh v. United States*, 133 S.Ct. 2072 (June 10, 2013), the government had a creative argument to the contrary. The government's position was that, because the Federal Sentencing Guidelines are only "advisory" post-*Booker*, it does not violate the Constitution to apply a Guidelines amendment retroactively. In other words, because an increased sentence is not mandatory, thre is no Ex Post Facto Problem. The Court, though, rejected the government's argument and held that if the new version of the sentencing guidelines provides a higher sentencing range, sentencing courts must apply the more lenient version that was in place at the time of the offense.

The issue came up in the context of a bank fraud scheme that was carried out between 1999 and 2000. The defendant was sentenced in 2009 using guidelines that had been amended upward twice. The circuit court of appeals accepted the government's argument that the guidelines were not mandatory, so there was no ex post facto problem. In the opinion authored by Justice Sotomayor, the Court found that where there is "sufficient risk" of increasing the defendant's punishment—whether mandatory or not—the Ex Post Facto Clause bars using the higher guideline range.

Plea Negotiations and Court Involvement:

We understand that judges are not supposed to engage in plea negotiations, and Federal Rule of Criminal Procedure 11(c) says just that. In *United States v. Davila*, 133 S.Ct. 2139 (June 13, 2013), the Court addressed a situation in which a court was to found have participated in plea discussions. The holding of the Court was that such error that is subject to harmless error review and there is no automatic reversal for a violation of the rule. What I found interesting about the case, however, was the conduct that violated the rule. This was a tax case in which the defendant complained about counsel. The defendant represented to the magistrate judge that his counsel just kept advising him to plead guilty. The magistrate judge told the defendant that sometimes that is the best advice and made some other mild comments in the course of denying the defendant's request to replace counsel. That was enough to violate the rule (but not enough to trigger automatic reversal).

DNA Testing/Arrest:

In *Maryland v. King*, 133 S.Ct. 1958 (June 3, 2013), the Court concluded that when officers make an arrest supported by probable cause for a serious offense, it is a legitimate booking procedure and reasonable under the Fourth Amendment for officers to take and analyze a cheek swab of the arrestee's DNA. The defendant had been arrested for assault (menacing with a shotgun). During booking, the defendant was swabbed and found to match the DNA collected in a prior rape case. The Court acknowledged that the swab is a search but found it to be reasonable under the Fourth Amendment, cit-

ing a number of legitimate law enforcement reasons. Justices Scalia, Ginsburg, Sotomayor, and Kagan dissented. They described this case as the first time the Court has upheld a suspicion-less investigatory search.

***Apprendi*/Mandatory Minimum:**

In *Alleyne v. United States*, 133 S.Ct. 2151 (June 17, 2013), the Court found that the allegation that a defendant "brandished" a gun under 18 U.S.C. § 924(c), which increases a mandatory minimum sentence to seven years, was an element of the crime that must be submitted to a jury. The interesting thing about this case is that the Court specifically overruled its opinion in *Harris v. United States*, which had been decided only in 2002.

This case has already been used to the benefit of defendants – *by Attorney General Eric Holder*. On August 12, 2013, the Attorney General issued a memorandum changing the government's policy on mandatory minimum offenses. The Attorney General started out by quoting *Alleyne* for the proposition that any fact that triggers a mandatory minimum sentence is an element that must be plead in the indictment. He instructed prosecutors to evaluate whether a case involves a non-violent, low-level drug offender: in those cases prosecutors are directed to refrain from putting the language in an indictment – thus preventing the triggering of the mandatory sentence.

Pre-*Miranda* Silence:

We all know that a defendant's invocation of his right to counsel or his right to silence after being given *Miranda* warnings cannot be used against the defendant in court. On June 17, 2013, the Supreme Court addressed an issue that has been bubbling for a long time: whether it violates the Fifth Amendment to comment on pre-*Miranda* silence. The Court ruled squarely against the defendant, holding that it does not violate constitutional rights. The facts in *Salinas v. Texas*, 133 S.Ct. 2174 (2013) involved a non-custodial interview at a police station. The defendant responded to a number of questions but did not say anything when asked if his shotgun would match the one used in a crime. The Court

found no Fifth Amendment issue because the defendant did not invoke his Fifth Amendment rights. A defendant must invoke the Fifth Amendment to rely on it.

SORNA/Necessary and Proper Clause:

I was impressed by the defendant's argument in *United States v. Kebodeaux*, 133 S.Ct. 2496 (June 24, 2013), because it is not often that you see a challenge to a statute based on the Necessary and Proper Clause. The Court held that SORNA registrations requirements, as applied to *Kebodeaux,* fell within the scope of Congress's authority under the Necessary and Proper Clause. This constitutional clause grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution before going Powers" and "all other Powers" that the Constitutions vests in the United States government or departments.

In the *Kebodeaux* case, the defendant was court-martialed before SORNA. He registered under the requirements at the time, then he moved without re-registering. He was convicted using the new statute and challenged Congress' authority under the Necessary and Proper Clause. The Court noted especially that he was subject to prior registration requirements and that the newly enacted requirements were necessary and proper to carrying out the federal government's power.

Sentencing/Armed Career Criminal:

In *Descamps v. United States*, 133 S.Ct. 2276 (June 28, 2013), the definition of prior "violent" convictions under the Armed Career Criminal Act made its way to the United States Supreme Court again. The Court had previously held that the generic definition for the offense of "burglary" constitutes a violent crime for ACCA purposes. Here, the Court looked at California's burglary statute and concluded that it could not serve as a qualifying conviction because California statute has "indivisible" elements that are broader than generic burglary. The Court also held that the "modified categorical approach" of going beyond the elements of the statute to look at the actual conduct could not be applied to an indivisible state statute. The practical point of this decision is that the ACCA—just like the Guide-

lines' Career Offender provision—is an area where defense counsel probably miss opportunities by assuming convictions qualify when there may be legitimate challenges.

Hobbs Act/Statutory Construction:

The Court illustrated that statutory construction can be very beneficial to defendants. In *Sekhar v. United States*, 133 S.Ct. 2720 (June 26, 2013), the Court reversed a Hobbs Act conviction under 18 U.S.C. § 1951(a) based on obtaining property with consent induced by force, violence, fear or under color of right. The decision was based on the fact that the government failed to prove the element of obtaining *property* from another. The government had tried to use a recommendation that an employer approve an investment, and that was not sufficient property interest.

Finally, although not a June case, I can't help mentioning that on April 17, 2013, the Court decided in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) which held that the natural dissipation of alcohol in the blood does not create an exigency in every case to justify conducting a blood test without a warrant.

This summary does not do the cases justice. All I can do here is alert you to the issues. Where you find the language that can really be helpful is by digging in and mining the case for points that can be analogized or distinguished in a way that helps your clients.

Wade Davies is a partner in the law firm Ritchie, Dillard, Davies & Johnson, P.C. in Knoxville, TN. He can be reached at wdavies@rddjlaw.com or at (865) 637-0661.

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Deciphering the New DUI Restricted Driver's License Requirements

Sara Compher-Rice
Oberman & Rice

In the wake of the passage of two lengthy DUI bills this past legislative session[1], the landscape of DUI laws and penalties in Tennessee has changed—in some ways, quite dramatically. In combination, the new laws serve to both reorganize and enact substantive changes to Tennessee DUI laws. While a close comparison of Tennessee DUI laws prior to and after July 1, 2013 shows vast changes to the code, the majority of these updates are minor. DUI practitioners should familiarize themselves with the new organization. More importantly, counsel must understand how the law has changed, both to the benefit, and in some cases, detriment, of their clients.

While it is difficult to provide a detailed analysis in the confines of this publication, the most common questions that arise from the new laws involve restricted driver's license eligibility and ignition interlock device requirements. Accordingly, I have provided a brief outline of some of the most frequently asked questions on this subject. Please be advised that the following information is intended to provide a general outline of the current state of the law. I would advise a more detailed review of the relevant code sections for application to specific case scenarios.

Do the new restricted driver's license laws apply to those arrested prior to July 1, 2013?

Section 22 of Public Chapter 344 indicates that the new enactments "shall apply to offenses committed on or after [July 1, 2013]." T.C.A. § 55-50-502(c)(3)(D) further provides, "If the violation resulting in the person's conviction for [DUI] occurred prior to July 1, 2013, the law in effect when the violation occurred shall govern the person's eligibility for a restricted motor vehicle operator license unless the person petitions the court to consider the person's eligibility under the law in effect when the petition is filed." Accordingly, when appropriate, counsel should craft an argument that your client is entitled to benefit from the law in effect at the time of the petition for a restricted driver's license.

When is my client eligible for a restricted driver's license?[2]

It is easier to outline when a defendant is <u>not</u> eligible to receive a restricted driver's license. A person is ineligible for a restricted driver's license if:

The person has a prior conviction for Vehicular Assault by Intoxication, Vehicular Homicide by Intoxication, or Aggravated Vehicular Homicide in Tennessee, or a similar offense in another state;[3] or

Another person is "seriously injured or killed" in the "course of conduct that resulted in" the driver's conviction for DUI.[4]

Although the lengths of the revocation periods following a multiple offense DUI conviction remain the same (2nd offense is 2 years; 3rd offense is 6 years; 4th or subsequent offense is 8 years), multiple offense defendants are now able to apply for a restricted driver's license. The new law recognizes, "In the interest of public safety, a driver who has been prohibited from driving a vehicle in this state pursuant to [T.C.A. § 55-10-404(a)] may apply for a restricted license."[5]

Is an ignition interlock device (IID) now required with every DUI conviction?

The new provisions do not require an IID for every DUI offender who applies for a restricted driver's license.

What are the IID requirements with a DUI 1st offense conviction?

The use of an IID is not required with every DUI conviction. Rather, one of the prerequisites listed below must be present to mandate the order for an IID. For instance, an IID is not required if a person refuses a chemical test and is convicted of DUI unless certain other factors are present. Further, should a person be convicted of DUI by impairment (rather than by violating the *per se* limit), an IID may not be required.

When obtaining a restricted driver's license following a conviction for DUI 1st offense, motorists are required to operate only vehicles equipped with an ignition interlock device when[6]:

1. The person's blood or breath alcohol concentration is .08% or higher;
2. The person's blood or breath alcohol concentration contains a combination of any amount of alcohol *and* marijuana, a controlled substance, controlled substance analogue, drug, or any substance affecting the central nervous system;
3. The person was accompanied by a person under the age of 18 at the time of the DUI offense;
4. The person was involved in a traffic accident for which notice to a law enforcement officer was required, and the accident was the proximate cause of the person's intoxication; or
5. The person violated the implied consent law and has a prior conviction or juvenile delinquency for a violation that occurred within five years of the instant implied consent violation for:
    A. Implied consent under § 55-10-406;
    B. Underage driving while impaired under § 55-10-415;
    C. The open container law under § 55-10-416; or
    D. Reckless driving under § 55-10-205, if the charged offense was § 55-10-401.

It should be noted that even if not mandated by statute, judges have discretion to order the use of an IID either in addition to or in lieu of geographic restrictions.[7] A motorist may also request the court to order an IID in lieu of geographic restrictions; however, if ordered at the defendant's request and not of the court's own accord, the motorist is not eligible to apply for ignition interlock fund assistance.[8]

What are the IID requirements with a DUI 2nd or greater offense conviction?

If a person has a prior conviction within the past 10 years for DUI or Adult DWI in Tennessee or a similar offense in another jurisdiction, the court may order a restricted driver's license. However, the court must order that the person operate only a vehicle equipped with an IID.[9]

Does a violation of the Implied Consent law require the use of an IID with a restricted driver's license?

A refusal under the Implied Consent law does not automatically trigger the requirement for an IID. In fact, no ignition interlock device is required unless the person (1) is found to have violated the Implied Consent law; (2) is convicted of the related-DUI offense (assuming it is a first offense); and (3) has one of the qualifying prior convictions as noted above.

Sara Compher-Rice is a partner with Oberman & Rice in Knoxville, TN where she focuses her practice on defending those accused of DUI and related offenses. Sara currently serves on the TACDL Executive Committee as Secretary. She has been named a Mid-South Super Lawyers Rising Star every year since 2011 and has also been recognized as a "Best Lawyer" in the area of DUI Defense for the 2012, 2013, & 2014 editions of The Best Lawyers in America®.

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[1]Public Chapter 154 was signed on April 16, 2013, became effective July 1, 2013, and served mainly to reorganize the DUI statutes. Public Chapter 344 was signed into law on May 13, 2013, most provisions became effective July 1, 2013, and the law changed the requirements for restricted driver's licenses and ignition interlock device requirements.

[2]Author's Note: This question applies to defendants with a Tennessee driver's license.

[3]T.C.A. § 55-10-409(a)(1). Author's Note: No "look-back" period is included. Accordingly, any prior qualifying conviction, regardless of its age, would preclude a person from obtaining a restricted driver's license.

[4]T.C.A. § 55-10-409(a)(2). Author's Note: The law prior to July 1, 2013, required that the injury or death be the "proximate result of the driver's intoxication."

[5]*See* T.C.A. §§ 55-10-404, 55-10-409.

[6]*See* T.C.A. § 55-10-409(b)(2)(B).

[7]T.C.A. § 55-10-409(b)(2)(D).

[8]T.C.A. § 55-10-409(b)(2)(C).

[9]T.C.A. § 55-10-409(d). Author's Note: If the motorist has a prior conviction within the past 5 years, the IID shall be required for an additional 6 months after the license revocation period, as required by T.C.A. § 55-10-417(l).

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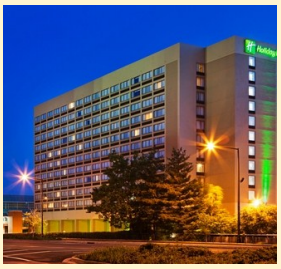

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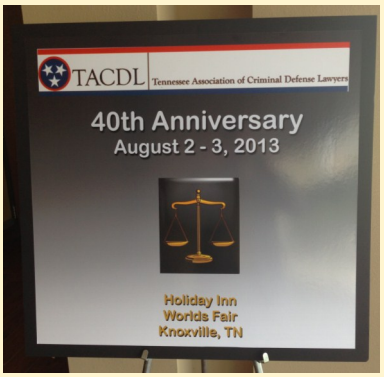

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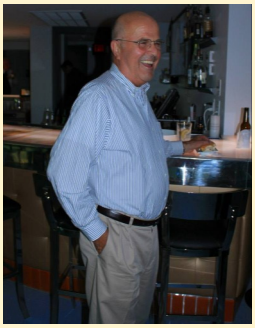

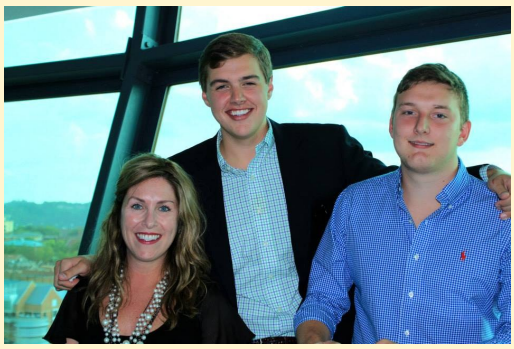

Back to Basics

Need to Attack a Search Warrant?
Call Your English Teacher!

Melanie Futrell Sellers, J.D., and Vera Scarbrough, M.A.

As my children grow older, I hear myself channeling my former teachers and coaches. Struggles over math homework cause me to bark: "You can't mix apples and oranges! If you do, you're left with nothing but fruit salad." During youth league basketball games, I am the embarrassing parent sitting on the top row yelling "S-L-I-D-E Y-O-U-R F-E-E-T!!!" When my children are upset over a perceived injustice, I quote my world history teacher (who also happened to be my mother): "Life is not fair. You might as well get used to it." I am surprised, however, how many times the oft repeated words of my high school English teacher come to mind when I review important legal documents. "*USE ACTIVE VOICE!"*

Before my recent switch from the dark side, police officers often asked me to review their search warrant affidavits for legal sufficiency. While I did not think it my place to serve as the grammar police, I could not help but notice that many of the subtle deficiencies in the search warrant applications I read would not exist if the writer had been in my senior English class with nine other college prep students. Granted, we attended a small, rural school, but we had to write one critical review after another. Competing with students from larger, metropolitan schools proved no challenge in college because we gave Chaucer and Shakespeare their due in high school. Unless English students can compare Chaucer's beast fable of rooster and hen to a modern day husband and wife, or discuss the metaphoric images one sees when Lady Macbeth threatens to bash her child's brains against a wall rather than betray her husband, and *USE ACTIVE VOICE*, they simply have not mastered the written word. This rule proves to be true in all writings, whether it be by a law enforcement officer drafting a search warrant or an average person giving any factual account.

After spending twelve years as an Assistant District Attorney, I grew tired of processing people. When the opportunity to transfer to the Public Defender's Office presented itself, I shocked everyone when I announced my decision and left. The opportunity to challenge a search warrant came quickly and I reacquainted myself with Misters Aguilar and Spinelli who are still very welcome in our fair state. I contemplated the search warrant affidavit written by a career law enforcement officer and smiled when I very quickly realized that "*USE ACTIVE VOICE!"* was definitely not something he had heard during high school or college. If he had, he would have mastered one basic rule about verbs. Verbs have two voices—active and passive. Two kinds of relationships exist between the subject of a sentence and the verb of a sentence. Active voice indicates the subject is the doer/performer of the action. Passive voice indicates the subject has been acted upon. Active voice verbs have a direct object (or receiver of the action) while passive voice verbs do not.

Example:
Our football team was selected to state finals.
Who selected the football team? Be more specific and say which football team as well.

Corrected:
TSSAA selected the Elizabethton High School football team to an exhibition game in Nashville.

Example:
His body was discovered at noon.
Who discovered the body? Where? When? Etc.

Corrected:
Two Fox Den residents discovered a hobo's body last Friday noon in the hedge row.

Example:
The student was bullied on the school bus.

Corrected:
Eighth graders bullied the sixth grader on the school bus.

As these examples show, my English teacher correctly insisted that active voice be used because it is more precise, clearer, and more formidable. There is never a question of who performs the action or the person or thing doing the act. "Passive voice is rarely used except in scientific experiments/writing, etc. where the experiment is more important than the experimenter," she would say.

After filing my first motion to suppress, I thought it might be a fun experiment to contact my high school English teacher (via Facebook, of course) and ask her to pull out her red pen one more time. I emailed her the following two fictional paragraphs to criticize at will in hopes of learning whether good writing and probable cause truly do go hand in hand. Though factually generic, these paragraphs are identical in style to many I have seen in the course of my career.

> On April 7, 2010 at approximately 2:20 PM, the body of John Smith was discovered in his residence. It appeared that he died of a stab wound to the heart. Among items recovered from the Smith residence was the computer, a computer tablet and John Smith's cellular phone. During the course of the investigation, Steven Brown was developed as a suspect in this case.
>
> In the fall of 2009, John Smith made complaints about Brown harassing him and his family by telephone and email. Also, it has been documented that others have complained about similar

> harassment from Brown. It has been discovered and established, as well as stated by other witnesses, that Steven Brown has the email address of steven.brown@emailaddress.com and the cellular telephone number of (423)555-1111.

The results of our experiment look like a crime scene with spatters of red ink across the page:

> On April 7, 2010 at approximately 2:20 PM, the body of John Smith was discovered in his residence. ***Use active voice! At the onset: Give who, what, when, where—ALWAYS!!—Who discovered John Smith's body? Police, local police, Lt. Dan Brown, etc.? Where is the residence?***
>
> It appeared that he died of a stab wound to the heart. ***Use active voice! Ex: Responding officers observed stab wounds to the heart as the probable cause of death.***
>
> Among items recovered from the Smith residence was the computer, a computer tablet and John Smith's cellular phone. ***Active voice! Ex: Police recovered a computer, computer tablet, and John Smith's cellular phone from the residence.***
>
> During the course of the investigation, Steven Brown was developed as a suspect in this case. ***HELP! When does Brown enter the picture? Is he there? Is he in the room? How did investigators reach this conclusion? Was he charged at the scene? What actions led investigators to go after Brown?***
>
> In the fall of 2009, John Smith made complaints about Brown harassing him and his family by telephone and email. ***Good use of active voice, but to whom did he make the complaints?***
>
> Also, it has been documented that others have complained about similar harassment from Brown. ***Who documented these reports? Who are the "others"? Are they Smith's neighbors? Co-workers? WHO ARE THEY???***
>
> It has been discovered and established as well as stated by other witnesses, that Steven Brown has the email address of steven.brown@emailaddress.com and the cellular telephone number of (423)555-1111. ***Who discovered / established email and cell number? How? Who are the witnesses? Why is this important to the narrative?***

This fun little experiment demonstrates what we as legal professionals often forget. The purpose of an affidavit in support of a search warrant is simply to communicate with a judicial officer. The law requires that probable cause determinations be made by a neutral magistrate—not a prosecutor or police officer. A magistrate simply cannot make an informed decision unless the affiant has described sufficient facts and circumstances within the four corners of the affidavit. By providing tests such as Aguilar-Spinelli, our Courts are merely establishing a rubric to follow in assessing whether there truly has been an actual communication of facts rather than a recitation of rumors, conjecture, and conclusory speculation. My experience as both prosecutor and defense attorney has taught me to step back and first examine a search warrant affidavit for its effectiveness at telling a story by use of the written word. Defense attorneys using this approach may have one of those "AHA!" moments and actually look forward to drafting the resulting suppression motion:

> The Affidavit in Support of Search Warrant contains conclusory allegations and assertions of fact insufficient to establish probable cause for a search warrant. First, the Affidavit does not identify the informational source of the factual allegations. Failure to establish whether the factual assertions are based on information from the affiant, fellow officers, citizen informants, criminal informants, or "those from the criminal milieu", prohibits a judicial determination of the standard by which the reliability of the source must be judged. Secondly, the Affidavit fails to contain the basis of knowledge of the unknown informant or informants. Finally, and as there are insufficient facts to invoke the presumption of reliability of law enforcement officers and citizen informants, the Affidavit fails to contain a basis establishing the credibility of the informant or that the information is reliable.

"[G]eneral warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed…are dangerous to liberty and ought not to be granted." *Tenn. Const. Art. I, § 7.* I never imagined the tempering by fire I received in college prep English class would help me preserve the privacy and personal liberty guaranteed my clients. In our system of justice, a red felt tip pen may truly be mightier than the sword.

Melanie Futrell Sellers is an Assistant District Public Defender practicing in Carter and Johnson Counties. She is a 1997 graduate of the University of Tennessee College of Law. In 1990, and perhaps more importantly, she and twenty-nine other students graduated from Oakdale High School in Morgan County, Tennessee where she received one of the best college preparatory educations available in the state. She can be reached at melanie.sellers@tn.gov.

Vera Scarbrough is a retired English teacher with over 30 years teaching in public schools. She has a Master's Degree from Middlebury College's prestigious Bread Loaf School of English and has served as a community college English adjunct professor for several years. She is married with two grown children and has four grandchildren. She is active in community and church activities and currently serves as a board member on the Princess Theatre Restoration Project in Harriman, Tennessee.

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- Type your title and byline in the center of the page.
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- Use 12-point type in Times New Roman font for the entire article and double-space your text.
- Use *italics* for case names in the article, and citations should generally follow The Bluebook, a Uniform System of Citation.
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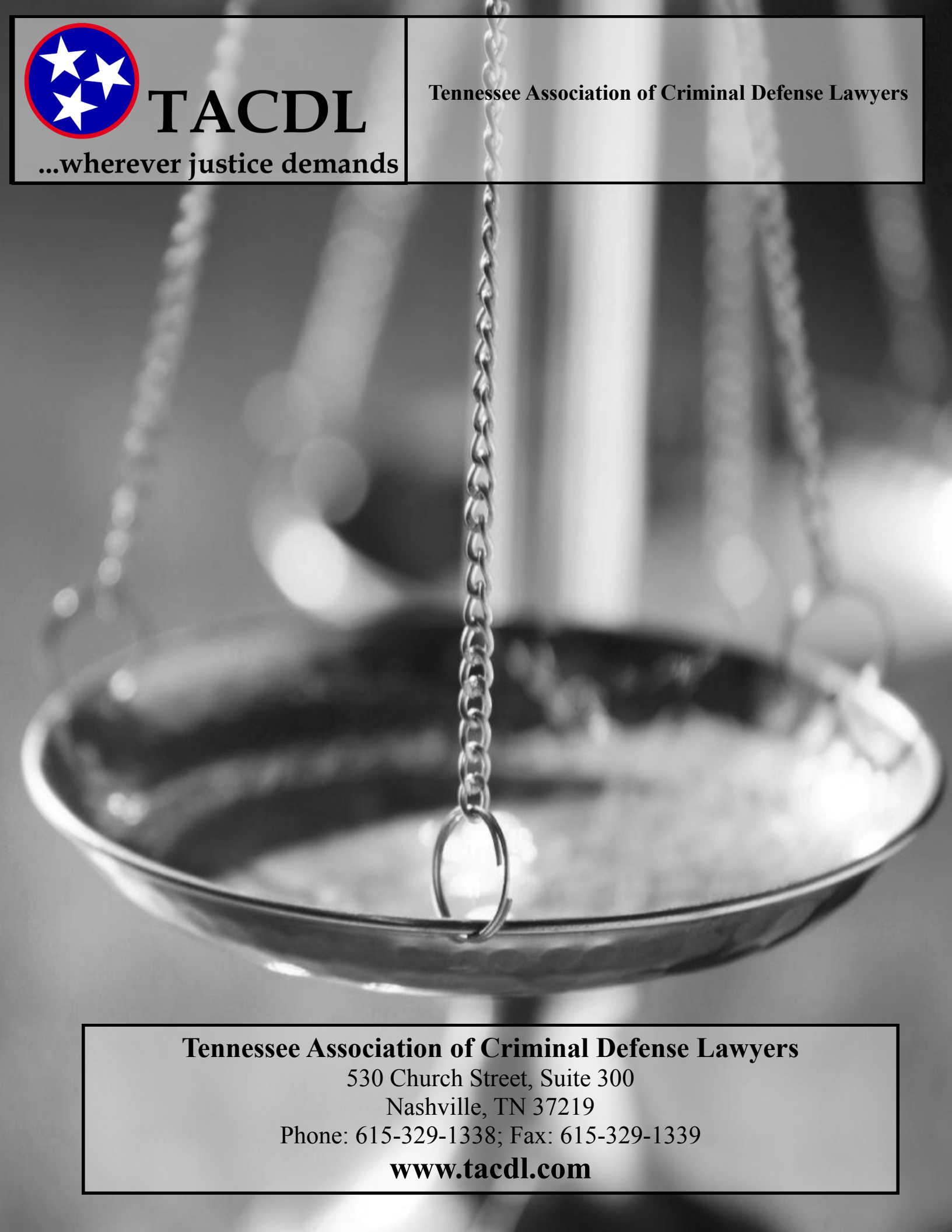

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