VOLUME 51 / NUMBER 3 • MAY/JUNE 2018

A PUBLICATION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

The PROSECUTOR

— IN THIS ISSUE —

Wayne A. Jordon & Judge Sandra Grisham
2018 National Courses

Prosecuting Sexual Assault & Related Crimes
August 13–17, Bellevue, WA

Office Administration
September 10–14, Phoenix, AZ

Prosecuting Drug Cases
October 1–3, Salt Lake City, UT

Domestic Violence
October 29–November 2, Long Beach, CA

Mental Health
November 5–7, Myrtle Beach, SC

Forensic Evidence
December 6–8, Albuquerque, NM

REGIONAL OPIOID TRAININGS

Washington, DC—July 23
Salem, MA—September 17
Omaha, NE—October 15
Phoenix, AZ—December 10
Indianapolis, IN—TBD
Atlanta, GA—TBD
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Portland, OR—TBD

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ABOUT THE COVER
The first structure erected in Easton, Talbot County, Maryland was a Quaker meeting house built in 1682 and is still in use today. The first Talbot County courthouse was designated in 1679, however a new courthouse was re-designated in 1709. Later, in 1789, a larger building was erected on the same site which is the site of the current Talbot County Circuit Courthouse. That same building was expanded, renovated, and modernized, without loss of its Georgian style and beauty, to be the courthouse it is today.

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View *From the Hill*

By Nelson O. Bunn, Jr.
NDAA Executive Director

Nelson O. Bunn, Jr.

Substantive work on the Hill has started to wind down as Members gear up for the election cycle. Numerous primaries have already occurred where some incumbents have been defeated, while many others have announced their retirement. The recent retirement announcement by Justice Kennedy has also caused a lot of buzz on the Hill.

As always, NDAA members are encouraged to contact Nelson Bunn on any policy or legislative issues that arise. He can be reached at nbunn@ndaajustice.org or at 703-519-1666.

Below is a snapshot of issues acted on since the last update to NDAA members:

Child Abuse Issues

- NDAA strongly supports the recent introduction of the Victims of Child Abuse Reauthorization Act, which would reauthorize grant funding for training and technical assistance of prosecutors in the field handling child abuse cases. It would also increase the authorization level of the program from $20M to $25M.

- NDAA is also supporting legislation introduced by Sen. Blunt (R-MO) that would make it mandatory for Child Protective Services agencies to report child fatalities to the National Child Abuse and Neglect Data System (NCANDS). The mandatory reporting would be tied to receipt of federal funding under the Child Abuse Treatment and Prevention Act (CAPTA).

- NDAA is supporting legislation introduced to strengthen capabilities and resources for the National Center for Missing & Exploited Children's administration of the Cyber Tipline to help missing and exploited children.

Questions or feedback: Please contact Nelson Bunn at nbunn@ndaajustice.org or at 703-519-1666.

Drug Policy

- NDAA recently provided its support to the Substance Abuse Prevention Act of 2018, introduced by Senator Cornyn (R-TX) and Senator Feinstein (D-CA).

- In June, the House passed the *Stop the Importation and Trafficking of Synthetic Analogues Act*, which allows a faster process for identifying and removing synthetic analogues from the street and out of the hands of drug traffickers.

Electronic Evidence Issues

- Recently, the Supreme Court ruled in *Carpenter* that the situation before them constituted a search and required a warrant per the 4th Amendment. NDAA authored an opposing view in USA Today highlighting the potential impact the ruling could have on prosecutors across the country.

Forensic Science

- The House recently passed the Justice Served Act on a 377-1 bipartisan vote. This legislation is strongly supported by NDAA and would authorize a carve-out of 5-7 percent of funding from a portion of the Debbie Smith DNA Backlog Elimination Act to enhance the capacity of State and local prosecution offices to address the backlog of violent crime cases in which suspects have been identified through DNA evidence. The legislation has garnered support from numerous stakeholder groups.

- As a follow-up to a Rapid DNA Symposium hosted by the FBI in Washington, DC several weeks ago, NDAA has been invited to participate in two working groups to address issues arising from the use of Rapid DNA. One group will focus on Non-CODIS Rapid DNA Best Practices/Outreach and Courtroom Considerations, while the other group will focus on Crime Scene Rapid DNA Technology Development.

- NDAA is co-sponsoring an upcoming Forensic Science Symposium August 7-10 in Washington, DC, which is being hosted by the National Association of Attorneys General. The Department of Justice is also a cosponsor for this event.

Miscellaneous

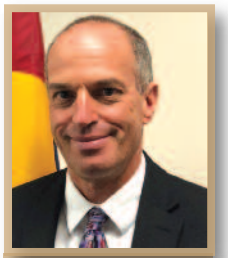
- Recently, the Pet and Women Safety Act, supported by NDAA, passed the Senate and aids domestic violence and sexual assault victims by expanding federal domestic violence protections to include threats or acts of violence against a victim's pet.

- In June, a reauthorization of the Project Safe Neighborhoods program was signed into law after bipartisan support in both chambers of Congress. The program continues valuable efforts at reducing violent crime in communities across the country.

- NDAA sent a letter to the House Financial Services Committee urging inclusion of language in an anti-money laundering bill that would require the collection of beneficial ownership information that provides valuable information to law enforcement and prosecutors when investigating money laundering and other financial crimes.

The Prosecutor

Prosecuting a Mass Casualty Homicide — The First 24 Hours



Rich Orman

By Rich Orman

For us, the call came in the middle of the night. There had been a mass-shooting at the Century 21 Theater in Aurora. For you, a mass casualty homicide may come in the middle of the day, or while you are at church on Sunday morning. Unfortunately, for more than one prosecutor reading this article, it's not a matter of if it comes, but rather when it will come. Are you and your team prepared to handle it? Whenever it comes, the first 24 hours investigating and preparing for the prosecution of a mass casualty homicide are pivotal. There are steps to be taken to protect oneself and protect what will be a complex and labor-intensive case. From its inception, it will be anything but a "normal" homicide.

Pretrial Publicity

Most, if not all, prosecutors deal with pretrial publicity. And most may think that past experience has prepared them well for the onslaught of television, newspaper, and online media outlets that will converge on a mass casualty homicide. Anyone that thinks that is almost certainly wrong.

The local police chief, sheriff, and FBI Special Agent in Charge (SAC) will likely want to give a press conference, and they may invite the elected prosecutor to participate. Unlike most other cases, there will be

Rich Orman is a Senior Chief Deputy District Attorney in Colorado's 18th Judicial District. He was one of the prosecutors on the Aurora, Colorado theater shooting trial. This is the first in a series of short articles on lessons learned from that case.

detailed briefings for civilian government officials (the President of the United States was personally briefed on the investigation in our case), and some of them may talk to the press. A prosecutor on one of these cases quickly comes to realize that the only people who need to be briefed on the case are those individuals who have an *operational* need to have the facts, or put another way, people who are actually *working on the case*. So, the prosecutor should, if possible, limit briefings given to civilian government officials, or even law enforcement officials who are not working on your case. The risk of improper and anonymous statements in the media is directly proportional to the number of people briefed on the investigation.

Apart from limiting briefings, there are certain things that a prosecutor can do to protect the integrity of the case. First, the prosecutor should immediately pull the local rules on pretrial publicity, which in most places will be based on ABA Rules of Professional Conduct 3.6 and 3.8. RPC 3.6 generally prohibits "extrajudicial statements" that an attorney should know will "have a substantial likelihood of materially prejudicing an adjudicative proceeding . . ." The comments to the rule provide specific examples of what not to say, which are often the very things that the press is most interested in, for instance the past criminal record of the suspect, or statements made by the suspect, or what evidence has been collected. Anyone giving a press conference or interacting with the press needs to know these limitations intimately.

Additionally, Rule 3.8 prohibits making "extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused," and mandates that you as a prosecutor "exercise reasonable care" to prevent the police who work with you from making such comments. This means that the prosecutor is to some degree ethically responsible for improper statements made by police working on the case.
The answer on mitigation of this is simple: send your local version of 3.6 and 3.8 to every law enforcement agency that may possibly work on the case and ask them to disseminate it to all personnel, and to prohibit all personnel from speaking to the media about the case without the prosecutor's approval. Law enforcement agencies may be resistant or even refuse, but there is no better way to comply with a prosecutor's ethical responsibilities than to send the rules to law enforcement in the jurisdiction as quickly as possible.

The Mental Health Defense

Unless a mass casualty homicide is an act of political terrorism—and sometimes even then—the defense will likely be insanity. A prosecutor on a mass casualty homicide must be fully cognizant of the jurisdiction's sanity law as soon as feasible, but certainly within the first 24 hours. Put another way, the prosecutor needs to be an expert on legal insanity in order to assist law enforcement in their investigation, as they are likely going to be unfamiliar with the concepts and types of evidence that are helpful in a case where legal insanity is at issue.

While reading states and reported decisions may allow the prosecutor to become an expert on insanity law, it will not make the prosecutor an expert on the mental health subject matter. For that, the prosecutor needs to find a forensic psychiatrist or psychologist and bring him or her on board as a consultant as quickly as possible. He or she can be invaluable in suggesting areas of investigation, and if a suspect agrees to a police interview, he or she can suggest questions to ask or areas of questioning. There likely will only be one opportunity for an initial interview. Having an expert help structure questions asked during the interview can lead to solid evidence during the investigation and prosecution of the case. Also, the outward behavior and demeanor of the suspect at or near the crime can be extremely important evidence, and the only way to really capture that is to record it. A good recommendation is to have law enforcement record the suspect as

much as possible. If the suspect is being driven in a patrol car, have an officer with a video camera (it can be a cell phone) record them during the ride. Record the suspect walking from the patrol car to the interview room. Record the suspect in the interview room (that one is obvious). Record the suspect on the way back to the car, during the ride to the jail, in the sally port at the jail, and so forth. There will never be an opportunity to preserve this evidence later.

Because juries find the demeanor of the suspect so important, the prosecutor should ask the jail to have *everyone* who comes into contact with the suspect (outside of a privileged communication) memorialize their encounter in a written report. All of this can help immensely when countering their insanity defense, because it is likely to show how *normal* the suspect is acting.

Working with Federal Law Enforcement Partners

Local law enforcement will invariably have offers of assistance from federal law enforcement partners. This assistance can be extremely valuable—it certainly was for us. But chances are that the feds do things differently than a state or local agency. They may document things differently. They may have different ideas of discovery, and what they need to provide to the prosecution. They may even want to classify records related to the case. The prosecutor needs to have an early and frank discussion with the FBI (or any other federal agency wanting to help) about what the local discovery obligations are, and what they will need to provide the prosecution, such as every report and all notes taken. The prosecutor also needs to insist that nothing gets classified, which could prohibit information being disclosed to prosecutors and the defense.

The World Outside

While the police and the prosecutor are focused on the mechanics of the investigation, which witnesses should be interviewed, and which evidence should be collected, an army of journalists will descend on the case. They will interview your witnesses. They will find new witnesses. They will find information online. The prosecutor needs to know about all of this, so it is important to develop a plan to monitor the internet and social media. The police can get investigative leads from this, can find new witnesses, and can see what information—and disinformation—is out there about the case.

While the police and the prosecutor are focused on the mechanics of the investigation, which witnesses should be interviewed, and which evidence should be collected, an army of journalists will descend on the case.

It is Never too Early

Lastly, it is never too early to start interviewing anyone who has had contact with the suspect. Friends, family, college roommates, classmates, someone who knows them from the gym, or even the clerk at the local liquor store where the suspect buys beer. All of these people can provide valuable insights into the present and historical mental state of the suspect, helping the prosecutor develop his or her approach to the case with the media and the suspect's attorneys.

The Prosecutor

St. Louis County Alternative Courts

Chelsea L. Mortimer

By Chelsea Mortimer

St. Louis County suffered 203 deaths attributed to opioid overdoses in 2017. By comparison, in 2001 there were less than 25 deaths related to opioid overdoses. In 2017, the oldest individual who succumbed to an opioid overdose related death was 62 years old, while the youngest was 14 years old. In 2017, St. Louis County had a population of approximately 1 million residents and there were 42.7 opioid-related deaths per 100,000 residents. In the news, on the streets, in the courthouse and in residents' homes the word is relentless: we are battling the opioid addiction.[1]

The 21st Circuit Court, based in St. Louis County, boasts four Alternative Courts and one Diversion Program attempting to make a dent in these sobering statistics.

Robert P. McCulloch, the elected Prosecuting Attorney for St. Louis County, in partnership with the St. Louis County Courts, has provided unending support for all five of these programs in an effort to support a jurisdiction-wide effort to combat the opioid crisis. Without the support of many different organizations and volunteers, from a retired mental health professional to a retired detective, as well as the full-time probation officers, judges and staff, these programs would not be possible.

The first St. Louis County Alternative Court, deemed "Drug Court", was created in 1999 and included defendants with felony charges for driving while intoxicated and participants with felony drug charges. In 2012, the two courts split and a separate DWI Court was created. In late 2015, a special court to address the specific needs of United States Military Veterans was created and in 2017, a special docket for individuals with non-violent felony charges who had a mental health diagnosis was created.

Participants in all four of these programs plead guilty to the felony charge, but at the end of the intense program, which spans a minimum of 15 months, these individuals have the opportunity at a

[1] Detective Ricardo Franklin provided this data. He is part of the "St. Louis County Multi-Jurisdictional Task Force". Specifically, he is involved in the "Heroin Prevention Initiative". In this role he partners with school districts, the Courts, the Department of Health and other coalitions to provide education, prevention and awareness.

Chelsea L. Mortimer is an Assistant Prosecuting Attorney in the Office of the Prosecuting Attorney, St. Louis County, Missouri.

new life. Upon successful completion of their individual program, their original felony plea can be withdrawn, and they can plead to a lesser felony, a misdemeanor, or in some instances their case is dismissed altogether.

There is no doubt that the incentive is huge, yet the program is not always easy. Participants are required to attend intensive therapy sessions for the purpose, and hope, that they can address the underlying issues that have led them to use illegal, or misuse legal, controlled substances. In all four programs, participants are required to complete a certain number of community service hours, submit to random urinalysis tests, meet regularly with their assigned probation officer, and appear in court weekly at the beginning of their tenure in the program. Sanctions are graduated, meaning they get more severe as the infractions compile and can include extended stints in custody in the St. Louis County Department of Justice Services.

In St. Louis County, the results are overwhelmingly positive. The graduation rate of Alternative Courts in St. Louis County is 81% as compared to the statewide rate at 59%. Likewise, the St. Louis County Alternative Courts recidivism rate as compared to the state is similarly impressive: 17.3% are back in the justice system among Missouri Alternative Court graduates, while only 7.5% return among St. Louis County Court graduates.[2]

Numbers make sense to lawmakers, program directors, and fundraisers, yet the goal of these Alternative Courts is to connect with individuals and address underlying issues such as mental health and substance use disorders. Connie K. is one such individual impacted by the alternative court model in St. Louis County. For her, July 4th, 2018 is a big day, which marks her third year being "clean". Connie was our first Veteran's Court graduate in St. Louis County. With the help of the St. Louis County Veteran's Court, Connie says that she can identify her strengths and weaknesses, and, more importantly, she now knows how to handle tough situations.

Another individual impacted is Eric R., who graduated from Alternative Court in February 2018. Eric R. said, "It's easy to say 'I've changed' or 'I'm going to change' when you're in jail or prison, but those changes don't necessarily translate into the world outside of incarceration." He states that gradually he made the changes that allowed him to positively claim "I've come too far in my career, sobriety and overall happiness to want to go back to my old life".

Will C. said "Now that I am beginning phase four, I feel like I am the best version of myself that I have ever been". He believed his drinking was "normal" prior to entering alternative court. He thought that he could handle the consequences after having his third DWI. However, Will is now open with his son and his family about what he is going through. Will reports that his perception of reality has changed and what was once "normal" is no longer his reality.

There is always room for improvement. St. Louis County Alternative Courts have partnered with the MO' Heroes project, part of Missouri's State Targeted Response to the Opioid Crisis (STR) Grant, to provide resources for opioid users such as information on recovery sites as well as training on the use of Narcan. The training is provided under the direction of Rachel Winograd, PhD and is not only targeted at the recovering user, but also at the family members who may be called upon to administer the life-saving drug in the event of an overdose. The hands–on portion of the training is led by a former individual suffering from a substance use disorder and former prosecutor, Chad Sabora.[3]

St. Louis County's Diversion Program is also expanding. The Diversion Program is a pre-issuance program that allows participants ages 17-25 to partici-

[2] The Office of the State Courts Administrator (OSCA) is tasked by the Drug Courts Coordinating Commission to share circuit and statewide participation statistics.

[3] Rachel Winograd, PhD, is an Assistant Research Professor at the Missouri Institute of Mental Health at the University of Missouri- St. Louis. MIMH and the National Council on Alcohol and Drug Addiction (NCADA) are partnered to bring the MO-HOPE project to provide community resources to those suffering from a substance use disorder. https://mohope-project.org/

Zach H. hands a picture he painted from art therapy to Circuit Judge Michael D. Burton, in charge of all St. Louis County alternative courts.

pate in random urinalysis testing and to speak with our program coordinator regularly to avoid being charged with certain offenses. Previously, only drug cases were being screened for this program; however, the County now includes other nonviolent crimes as well.

St. Louis County is diversifying its alternative court population. The County has been chosen to apply, and be part of, the Missouri Treatment Court Equity and Inclusion-Bureau of Justice Assistance Grant Project. The goals are to provide equivalent access, retention, treatment, incentives and sanctions and dispositions of historically under-represented populations, specifically, African-Americans and Latinos. Part of this undertaking is to provide a quicker turnaround time between the point an individual is arrested and their admittance into one of the appropriate alternative court programs.[4]

Equal access to treatment and resources is one of the highest priorities of the county and is at the forefront of our efforts. Expediting the process from arrest to acceptance into alternative court is also key in our effort to reduce wait times and ultimately save lives. Resolving legal issues and connecting residents that suffer from a mental illness or a substance use disorder to services more quickly could stop a fatal overdose or an alcohol related traffic accident.

Our hope is to provide the proper balance of treatment and justice to our community members. By allocating resources to alternative programs, we can hopefully promote rehabilitative justice.

[4] OSCA

The Prosecutor

Considerations for Using a Courthouse Facility Dog to Assist with Your Case

Gary S. Dawson

By Gary S. Dawson

Going to court and testifying is a stressful experience. For child victims and other victims of interpersonal or violent crimes, the stress and anxiety is worse.[1] A relatively common comment from victims is that the system (and testifying in particular) makes them feel re-victimized.

Those victims' experiences caused me to try using a dog to assist a victim testifying in court for the first time in Colorado in 2012. My victim was a 9 year-old child, testifying against her father. In fact, this was the second time she had to testify against him, because the first jury could not reach a verdict. During the first trial, although she and I had a good rapport and I had introduced her to the process a number of times, she could not testify in front of her father without several breaks, and her answers, when she gave them, were preceded by very long pauses. Still, when she wanted to do the right thing and testify again, I knew I had to do something to make this less traumatic.

Enter Maddie[2] and Pella.[3] Two, friendly, beautiful souls who just happen to be dogs who accompany witnesses to the stand.

Maddie accompanied my victim at the second trial, and this time she made it through her testimony with no breaks and even fewer pauses.

Pella, who began her career with the Aurora Police Department but came with her handler to the District Attorney's Office in 2015, has participated in over 300 forensice interviews, over 200 victim meetings, and has accompanied a dozen victims at trial, both children and adults.

So, you like the idea of a dog in court? Great, but, you may be saying, my judge and or defense counsel will never allow it. But, by following some guidelines and best practices, you may be able to convince them.

I. Best Practices

An excellent place to start for an office interested in using a dog in court should go to the Courthouse

1 R. Pantell, (2017), *The Child Witness in the Courtroom*; PEDIATRICS, vol. 139(3).

2 https://www.sentinelcolorado.com/news/wagging-trials/

3 https://www.cbsnews.com/news/pella-colorado-courthouse-dog-for-traumatized-children-testifying-in-court/

Gary S. Dawson is Chief Deputy District Attorney in Colorado's 18th Judicial District.

Dogs® Foundation website, courthousedogs.org. They are an invaluable resource.

The dog should be a graduate from an accredited assistance dog school, accredited by Assistance Dogs International.[4] Although all graduating dogs get training as service dogs, a facility dog is a dog whose handler has no disability and whose primary function is to work in a specific location.

This is an important consideration related to acquiring a dog for several reasons. A dog from an accredited organization means the dog has been properly trained. I have observed other "court therapy" dogs and the dogs can't stand, much less sit still. That behavior is bad in public but would destroy your ability to ever use a dog again if that dog behaved that way in your first attempt in the courtroom.

Second, a facility dog is *not* a therapy dog. What a courthouse facility dog provides is therapeutic, but that is not the dog's primary function. A prosecutor should be sure to not use the terms interchangeably in motions or in argument because not only is it incorrect, but the defense may seize on the "conclusory" title (that the witness needs therapy).

Third, many therapy dogs are pets trained by their owners and then registered with a therapy dog organization (or not).[5] Additionally, therapy dogs often do not work in public, and even then, their public appearances seldom require the formal decorum of a courtroom. Therapy dogs may or may not be comfortable with children. Therapy dogs or their handlers may be subject to additional restrictions, such as a maximum number of hours the dog can work, or require the handler to maintain constant leash contact with the dog.[6]

You, or your office, should also give thought to the handler. The defense may call this person as a witness if they sit in on interviews, so the handler should be someone who is familiar with the court process and would be comfortable testifying if needed.

II. The Status of the Law

Currently there are 162 courthouse facility dogs working in 37 states,[7] but how does a prosecutor get their "paw" in the door?

The use of well-trained canines is an emerging area of the law. A growing number of states have passed legislation authorizing the use of dogs in the courtroom.[8] This is an outgrowth of laws allowing a support person,[9] or the use of a comfort item[10] to help witnesses.

In the absence of legislation, however, you must rely on persuasive case law on the topic.[11] Fortunately, virtually all the case law is positive.[12]

Even without either controlling case law or a statue, a prosecutor can still craft a motion, citing to those statutes and case law, to build an argument for their own case.

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4 https://www.assistancedogsinternational.org/

5 A quick Google search will pull up many websites that offer a certification for a fee without any tests. Avoid those.

6 Full disclosure: Maddie was a therapy dog trained by Canine Companions for Independence (CCI). Pella is a Courthouse Facility Dog also trained by CCI. Pella was not working as a team until later in 2012 after the trial completed.

7 https://courthousedogs.org/dogs/where/where-united-states/

8 *See*, Alabama SB723 (2017); Arizona §8-422 & §13-4442; Florida §92.55; Hawaii HB 1668 (2016); Idaho §19-3023; Illinois §725 ILCS 5/106B-10; Mississippi §99-43-101; Oklahoma §12-2611.12; Virginia §18.2-67.9

9 *See, e.g.*, Ariz Rev. Stat. §13-4403(E); Ark. Code. Ann §16-42-102; California Penal Code Section §868.5 (a); Connecticut Gen Stat Ann Sec. §54-86g(a); Idaho code Ann §19-3023 (4); Minn, Stat. Ann §631.046 ; Nev. Rev. Stat. Ann. § 178.571 (6); New Hampshire Rev Stat. Ann § 632-A:6(V); New York Exec § 642-a; Wash. Rev. Code Ann §7.69A.030(2

10 *See, e.g.*, *Smith v. State*, 119 P.3d 411 (Wyo. 2005) (15 year old allowed to hold teddy bear); *State v. Hakimi*, 98 P.3d 809 (Wash. Ct. App. 2004) (7 year old allowed to hold doll); *State v. Marquez*, 951 P.2d 1070 (New Mexico App. 1997) (12 year old testified with teddy bear); *Sperling v. State*, 924 S.W.2d 722, 726 (Tex. Ct. App. 1996) (7 year old testified with teddy bear); *State v. Cliff*, 782 P2d 44 (Idaho Ct. App 1989) (8 year old allowed to hold doll).

11 *See*, *Smith v. State*, 491 SW3.d 864 (Tex. App. 2016); *People v. Johnson*, 889 N.W.2d 513, 523 (Mich. Ct. App. 2016; *State v. Jacobs*, 2015WL6180908 (9th Dist. Court of App. Ohio, 2015); *People v. Spence*, 151 Cal. Rptr. 3d 374 (2012) affirmed *Spence v. Beard,* ___F3d___ 2015WL1956436 (2015); *People v. Chenault*, 227 Cal. App. 4th 1503 (2014), *People v. Tohom*, 109 A.D.3d 253 (2nd N.Y. Appellate Division, 2013), *Washington v. Dye*, 283 P.3d 1130 (Wash. App. Ct. 2012); *Washington v. Coria*, Not Reported in P.3d, 168 Wash. App. 1029, 2012 WL 1977439 (Wash. App. Div. 1)(Wash. App. 2012).

12 *People v. Devon D.*, 90 A.D.3d 383 (Conn. App. 2014), one of the only cases to reverse on the use of the dog. While the court found the trial court had discretion to use the dog, the appellate court faulted the record on a lack of finding of "need." Also, as a cautionary tale, there is mention in the case of what may have been poor planning, since there is mention by the appellate court that the child "had been quite afraid of the dog initially."

Many states have a rule comparable to Federal Rule of Evidence 611 which allows a court to control the "mode and order" of the examination of witnesses. To this end, a courthouse facility dog falls under "making those procedures effective for determining the truth.[13]"

Dogs have been studied extensively, and their impact and ability to lessen stressors is well-documented.[14] The extension of well-trained dogs to the courtroom is a logical step[15] and has some distinct advantages over alternatives such as a support person, or closed circuit television.[16] As the court in *People v. Spence* noted, "[an] advocate must not sway or influence the witness, we cannot imagine that the Legislature intended that a therapy dog be so admonished, nor could an dog be sworn as a witness . . ."[17]

Unless your authority requires it, avoid framing the argument as if a witness "needs" the dog. Instead, frame the issue as being the presence of the dog will be helpful and beneficial. "Need" implies, if not outright sets, a higher standard than a court merely exercising its discretion in finding that a dog will benefit the promotion of truth and reduce stress or trauma for a witness.[18]

To minimize concerns of prejudice, consider submitting a proposed jury instruction,[19] or suggesting, like many other "difficult topics" the court allow that the parties address it in voir dire, and point out that at least one study concluded that jurors focus on their jobs and not the dog.[20] Allowing the dog to be put on the witness stand (depending on the layout of your courtroom) outside the presence of the jury is another remedy.

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Finally, be sure to make a record after using the dog, and try to get defense counsel (or the court) to agree to what did or did not happen while the dog was on the stand.

13 Fed. R. Evid. 611.

14 *See, e.g.*, C. Krause-Parello, et. al. (2016), *Effects of VA Facility Dog on Hospitalized Veterans Seen by a Palliative Care Psychologist: An Innovative Approach to Impacting Stress Indicators*, AMERICAN JOURNAL OF HOSPICE & PALLIATIVE MEDICINE, Vol. 35, 1: pp 5-14; R. Barker, et. al., (2012), *Preliminary Investigation of Employee's Dog Presence on Stress and Organizational Perceptions*, INTERNATIONAL JOURNAL OF WORKPLACE HEALTH MANAGEMENT, Vol. 5 (1), pp. 15-30; A. Leaser (2005), *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of "Dog Therapy" in Victim-Offender Mediation*, OHIO STATE JOURNAL ON DISPUTE RESOLUTION, Vol. 20 (3), pp. 943-980.

15 C. Holder, *All Dogs Go To Court: The Impact of Court Facility Dogs as Comfort For Child Witnesses on a Defendant's Right to A Fair Trial*, 50 HOUSTON L. REV. 1155 (2013).

16 M. Dellinger, *Using Dogs For Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171 (2009).

17 151 Cal. Rptr.3d 374, 405 (2012).

18 *See, People v. Chenault*, *supra*, at 1516-17, for discussion of the difference and reasoning.

19 *E.g.*, https://courthousedogs.org/legal/pretrial-motion/

20 D. McQuiston, et.al., *Utilizing Courthouse Dogs and Comfort Items to Assist Vulnerable Witnesses During Trial*, AMERICAN PYSCHOLOGY-LAW SOCIETY DIV. 41 (2016). http://www.apadivisions.org/division-41/publications/newsletters/news/2016/07/courthouse-dogs.aspx

The Prosecutor

Left Behind: Working with Families of Homicide Victims

Wendy L. Patrick

By Wendy L. Patrick

When dealing with victims of domestic violence, human trafficking, or sexual assault, we often talk about turning victims into survivors. Yet homicide victims leave literal survivors. The surviving family members of homicide victims suffer differently than surviving victims themselves, and are often in desperate need of services. Accordingly, handling a homicide case involves not only prosecuting the offender to the full extent of the law, but also achieving justice for the victim in a fashion that includes attending to the needs of those he or she left behind.

Family members and close friends of homicide victims are often severely traumatized. Darren Thiel, in a 2016 article entitled "Moral Truth and Compounded Trauma: The Effects of Acquittal of Homicide Defendants on the Families of Victims," cites previous research in recognizing that the grief of these suffering families is often more complicated and acute than those who lose a loved one to non-homicidal death—and that this finding is particularly true for parents of the victim.

In a 2014 study, "The Experiences of Homicide Victims' Families With the Criminal Justice System: An Exploratory Study," Christine Englebrecht and her colleagues noted there has been surprisingly little research done on how these people are affected by the loss of their loved ones. They noted that research that has been done has found that for many of those who are left behind, their impression of the criminal justice system is colored by their interaction with law enforcement.

In a Climate of Hostility, Victim Family Members Calm the Storm

Over the last several years, the law enforcement community has experienced social climate change

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fostering a culture of negativity. Due to highly publicized cases of officer involved shootings, in-custody deaths, and other incidents where civilians have clashed with law enforcement, public perception has fostered antagonism toward police, prosecutors, and in some cases, anyone connected with enforcing our laws.

The climate of hostility promotes violent protests, divisive rhetoric, and encourages civil disobedience. Selective footage of law enforcement contacts is often memorialized on cell phones, with the video going viral immediately for all the world to see, without the benefit of legal and evidentiary rules of admissibility.

In some cases, some of the loudest voices of protest during the criminal justice process are the family members of the homicide victims who have been left behind. Yet by attending to the needs and emotions of these suffering family members from the very beginning of the case, research indicates there is an opportunity to keep the storm at bay and foster a climate of patience and respect, instead of hostility and divisiveness.

Restored or Re-victimized

Englebrecht and her fellow researchers, exploring the impact of homicide on surviving family members, found that many families feel re-victimized and marginalized after dealing with the criminal justice system. They refer to the families of homicide victims are "secondary victims" in the sense that they suffer violence or victimization indirectly. Consequently, they experience a different type of grief and psychological difficulties than crime victims themselves. The question becomes whether we as a criminal justice system are informed and equipped to offer the type of support these secondary victims need.

Englebrecht recognized prior research found that homicide survivors who had a negative experience with the criminal justice system are more likely to suffer from mental health difficulties such as anxiety, and experience an exacerbation of post-traumatic stress symptoms, while families that met with victim advocates for example, reported positively about the experience.

On the Front Lines: First Responders Make First Impressions

We never get a second chance to make a first impression. And as we all know from experience, first impressions are often very hard to overcome. When investigating homicide, first impressions are made by first responders, on the front lines of assistance. As much as they are focused on the suspect and the victim, the victim's family members are often critical witnesses and sources of information who can become allies or antagonists depending on their interaction with law enforcement.

Thiel referred to previous research in noting that hearing the news of the death of a loved one, often in the form of a phone call from the police, sparks the trauma through disbelief, shock or uncontrollable emotion. Englebrecht recognized that the dynamic established in this initial contact is critical, because for many family members of homicide victims, a conversation with a police officer is their first experience with the criminal justice system. This initial interaction can set the tone for the entire investigation and prosecution of a case.

Englebrecht's research includes specific examples given by family members of homicide victims. She found that some family members describe being treated with skepticism and suspicion after the death of a family member, while others became discouraged by their interactions with law enforcement due to a perceived lack of compassion and empathy. Fortunately, others are left with a positive impression of law enforcement—particularly where the responding officers and subsequent detectives and prosecutors are aware of the importance of carefully choosing both words and demeanor when interacting with surviving family members.

Left Behind and Left Out

Once a case is filed, homicide victim surviving family members sometimes feel sidelined. They perceive that they are not only left behind, they are left out of

the criminal process. Englebrecht's research found that during the prosecution of a homicide case, survivors report disappointment and frustration in a perceived lack of involvement as the case progresses through the system. She also found that even worse, those that do interact with prosecutors and the court often described the experiences negatively—citing examples of frustration over not having a voice in the plea-bargaining process, to being rebuked by the judge in the courtroom for becoming emotional.

Yet there is hope. Some victims report positive experiences with the criminal justice system. Englebrecht's research found that a prosecutor who seeks to involve family members in the discussion of the appropriate punishment of an offender, for example, can be an enormously positive experience for the survivors.

Attending to the practical and emotional needs of homicide victim family members who are left behind can facilitate healing, improve relationships with law enforcement, and promote a healthy and positive climate of respect and cooperation that facilitates successful prosecution in the pursuit of justice.

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The Prosecutor

Does Addiction Impair One's Ability to Drive?

By Alyssa Staudinger, Tiffany Watson, and M. Kimberly Brown

Reports of drug-impaired driving are on the rise, especially as the opioid crisis continues to permeate communities across the United States and as more states move to legalize marijuana use. Like alcohol, drug-impaired driving can have dangerous consequences. A 2009 study by the National Highway Traffic Safety Administration ("NHTSA") found that "18 percent of drivers killed in a crash tested positive for at least one drug."[1] By 2016, over 43 percent of fatally-injured drivers with known drug test results were drug-positive and over 50 percent were positive for two or more drugs.[2] As these statistics indicate, the prevalence and dangerousness of drug-impaired driving is clear. These numbers also underscore the reason why every state makes it a crime to drive while under the influence of a drug. However, should the criminal justice system go further to protect the public by criminalizing drug addiction? Does the non-impaired but drug-addicted driver pose a similar danger to that of the driver under the influence of drugs? Does drug addiction impair one's ability to drive?

Many medical professionals and abuse counselors view drug addiction and mental health disorders similarly. The National Institute of Drug Abuse ("NIDA") states, "[a]ddiction changes the brain in fundamental ways, disturbing a person's normal hierarchy of needs and desires and substituting new priorities connected with procuring and using the drug. The resulting com-

[1] NIDA. "Drugged Driving." National Institute on Drug Abuse, 3 Jun. 2016, https://www.drugabuse.gov/publications/drugfacts/drugged-driving. Accessed 25 Jun. 2018, citing Drug Involvement of Fatally Injured Drivers. Washington, DC: National Highway Traffic Safety Administration; 2010.

[2] Governors Highway Safety Association and Responsibility.org, "Drug-Impaired Driving, Marijuana and Opioids Raise Critical Issues for States," May 2018.

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pulsive behaviors that weaken the ability to control impulses, despite the negative consequences, are similar to hallmarks of other mental illnesses."[3] The tendency to view drug-addiction as a disorder is relatively new.

Historically, those with an addiction to drugs were generally viewed as a menace to society. In 1937, Commissioner Henry Anslinger, the first commissioner of the Federal Bureau of Narcotics ("FBN"), testifying before Congress stated, "the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender."[4] Criminalizing the drug addict and drug-involved behavior increased in 1971 when President Richard Nixon declared a "War on Drugs."[5] Subsequently, the Reagan era saw the passage of The Anti-Drug Abuse Act of 1986, which strengthened prosecution and penalties for the drug user.[6]

The end of the twentieth century saw a shift in the paradigm toward a more treatment-centered focus to drug addiction. For example, in 2011, the Obama Administration announced The National Prevention Strategy, which focused on greater access to treatment services for more Americans.[7] A more treatment-centered focus is, no doubt, necessary, and policy in support of this focus is tantamount to the fight against drug-addiction. But should, and more importantly, *can*, the criminal justice system do more? The State of California says "yes."

California's Driving Under the Influence statute makes it ". . .unlawful for a person who is addicted to the use of any drug to drive a vehicle."[8] To establish that a driver was addicted while driving, a prosecutor must prove: (1) the defendant drove a motor vehicle; and (2) when he/she drove, the defendant was addicted to a drug.[9] The term "addicted" is not defined in the statute itself, but the California criminal jury instructions provide guidance by defining "addiction" in the following way:

> A person is addicted to a drug if he or she:
>
> 1. Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it;
>
> 2. Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses; and
>
> 3. Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.[10]

The prosecution has the burden to prove a defendant meets all three criteria of "addiction" at trial. "The focus of [the statute] is to prohibit the individual who presents a potential danger on the highway from

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[3] NIDA. "Comorbidity: Addiction and Other Mental Disorders." National Institute on Drug Abuse, 1 Mar. 2011, https://www.drugabuse.gov/publications/drugfacts/comorbidity-addiction-other-mental-disorders. Accessed 25 Jun. 2018.

[4] Drug Enforcement in the United States: History, Policy, and Trends, Lisa N. Sacco, Analyst in Illicit Drugs and Crime Policy, October 2, 2014 https://fas.org/sgp/crs/misc/R43749.pdf (internal citation: See statements by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury and Dr. James C. Munch, before the U.S. Congress, House Committee on Ways and Means, Taxation of Marihuana, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002.)

[5] Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control, June 17, 1971.

[6] "State of Addiction Policy: The Criminalization of Addiction," Sana Ahmed, https://www.sovhealth.com/editorials/state-of-addiction-policy/state-addiction-policy-criminalization-addiction/.

[7] "State of Addiction Policy: The Criminalization of Addiction," Sana Ahmed, https://www.sovhealth.com/editorials/state-of-addiction-policy/state-addiction-policy-criminalization-addiction/.

[8] *See* California Vehicle Code § 23152(c).

[9] California Vehicle Code § 23152(c); see also California Criminal Jury Instructions (CalCrim) 2112.

[10] CalCrim 2112; *see also People v. O'Neil*, (1965) 62 Cal.2d 748.

driving a motor vehicle . . . ."[11] Under California law, a person is addicted when he "has reached the point that his body reacts physically to the termination of drug administration."[12] Courts have described addiction as "more a process than an event."[13] In fact, the "emotional dependence and tolerance" elements have been found to be "descriptions of stages in the process which ultimately results in addiction."[14] A person addicted to drugs experiences physical symptoms when going through withdrawal of the drug, ranging from yawning and sweating to "…vomiting, diarrhea and fever…."[15] These types of symptoms may impact a person's ability to safely operate a vehicle and, thus, renders one a danger to others. California courts have analogized this to the epileptic driver and endorsed the law as "clearly within the legitimate confines of the state's police power."[16] If a prosecutor can prove a defendant was suffering from withdrawal sickness while driving, it "is the unmistakable signal that the user is addicted."[17]

Interestingly, California courts distinguish addicts from habitual users. One court opined that establishing "habitual use" is not enough to prove that a defendant is guilty of violating California law.[18] Though proving that the defendant was addicted at the time of driving is imperative, it is not an easy feat.

As every prosecutor knows, successful prosecution greatly depends on the strength of the evidence. In cases of driving while drug-addicted, a law enforcement officer must obtain actual evidence of addiction. Often, this means an officer must garner statements from the defendant. However, this can sometimes be difficult, considering a case cannot survive a probable cause analysis based on the defendant's statements alone.[19] Thus, the observations of the officer, including observations of track marks, pick sores, inability to draw blood, sunken cheeks, poor dental hygiene, are extremely important. Consequently, prosecutions of this offense in California remain relatively rare, due to the difficulty of proving the "addiction" element of this offense, as well as the specific investigative questions that must be asked by law enforcement. As an aside, while the legal use of a drug is not a defense to this crime, it is a defense if a defendant is participating in an approved treatment program.[20] This defense is, ostensibly, California's attempt to push drug-addicted defendants into treatment.

There is little doubt that drug-impaired drivers pose a significant danger to the public. Non-impaired but drug-addicted drivers pose a similar risk. California serves as an example of a creative manner to deal with at least one dangerous aspect that drugs present to society.

One court opined that establishing "habitual use" is not enough to prove that a defendant is guilty of violating California law.[18]

11 *O'Neil,* 62 Cal.2d at 752-53. The O'*Neil* case dealt with an earlier version of the driving while addicted statute, California Vehicle Code § 23105.
12 CalCrim 2112; *See also* California Vehicle Code § 23152(c).
13 *People v. Duncan*, (1967) 255 Cal.App.2d 75, 78 (internal citations and quotation marks omitted).
14 *Duncan*, 255 Cal.App.2d at 78; *see also* CalCrim 2112.
15 *O'Neil*, 62 Cal.2d at 753.
16 *O'Neil*, 62 Cal.2d at 753-54.
17 *Duncan*, 255 Cal.App.2d at 78.
18 *O'Neil*, 62 Cal.2d at 754. West Virginia, on the other hand, makes it a crime for ". . .a habitual user of narcotics or amphetamine or any derivative thereof []" to drive a vehicle. *See* West Virginia Code § 17C-5-2.
19 *See* CalCrim 359 ("[A] defendant may not be convicted of any crime based on his/her out-of-court statements alone. [The jury] may rely on the defendant's out-of-court statements to convict him/her only if [they] first conclude that other evidence shows that the charged crime was committed.")
20 *See* CalCrim 2112; if there is evidence a defendant is participating in an approved treatment program, the court has a *sua sponte* duty to instruct on the defense.

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