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NCDD Journal

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Editor: Paul Burglin

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NCDD READIES FOR MSE IN NEW ORLEANS

Following the Winter Session in Orlando, Florida (January 18-20, 2012), the NCDD heads to New Orleans to co-host the 19th annual Mastering Scientific Evidence (MSE) seminar on March 22-24, 2012.

MSE was launched in 1994 by renown DUI defense attorneys William C. "Bubba" Head, Lawrence Taylor, Don Nichols, and the late Reese Joye. These founders made it their mission to educate the DUI defense bar on forensic science, including the various flaws in chemical testing and alcohol measurement devices. Two years later, a mock jury trial with jury deliberations extended the seminar to an annual three-day format.

Head, whose staff coordinated the first 11 MSE sessions in Atlanta, Georgia, handed over the reins of MSE to the Texas Criminal Defense Lawyers Assocation (TCDLA) in 1995. Soon thereafter, the annual home for MSE became New Orleans, Louisiana, and the NDDD has been a co-host of it ever since.

Texas attorney and NCDD Regent Troy McKinney puts the nuts and bolts of the seminar together each year. "He's the General who has made it so successful," says his Texas colleague and NCDD Fellow J. Gary Trichter.

Trichter states that "MSE is the key to the bank and attorneys should embrace the science [involved in DUI defense] and not fear it." A bonus, he adds, is that "a lot of learning and networking takes place after hours in the French Quarter and at the golf tournament held the Wednesday before the seminar starts."

"MSE, along with the NACDL-NCDD Fall Seminar in Las Vegas, and the NCDD Summer and Winter Sessions, is one of the four programs that now dominate national DUI/DWI defense training," says Head. TCDLA Assistant Executive Director Melissa Schank anticipates over 200 attendees at MSE this year.

This year's MSE program will include lectures on forensic science, trial techniques, breakout sessions with exposure and training to the major breath-alcohol testing devices, and a mock trial with an audio and video feed of jury deliberations shown in the seminar room.

DEAN'S MESSAGE
George Stein

Now that the New Year is upon us, I want to start by wishing all of you a happy, healthy and prosperous 2012.

Our Winter Session in Orlando, Florida, is almost upon us. It pleases me to bring the seminar "back home" to the U.S.A. For those attending, I feel certain that you will not only enjoy the great venue we have chosen, but will also be enriched by the special line-up of speakers selected.

The cause that I am focusing on this year is educating Public Defenders. I encourage you to speak to your local Public Defenders to let them know that the NCDD has numerous scholarships at their disposal. I want to thank all of you who have helped me with this cause and shown your generosity by sponsoring your local Public Defenders. NCDD members who have gone out of their way to help thus far, include Mike Hawkins, Allen Trapp, Jay Ruane, Drew Carroll, Scott Joye, Candice Lapham, and many more!

This has been a fulfilling term for me. I have spent time with many of our members in Chicago for an advanced Blood Chromatography class. I have also had the pleasure and honor to speak with Lenny Stamm at a recent South Carolina DUI Defense Seminar. After Orlando, the next stop will be in New Orleans for MSE, and last but not least, we circle back to Harvard for an outstanding Summer Session!

I look forward to meeting new members and starting new friendships at these future events.

- George A. Stein

E.D.'S CORNER
Rhea Kirk

Could the holiday season have come and gone any faster! The Winter Session in Orlando is almost here (Jan 19-20) and we are gearing up for the Mastering Scientific Evidence (MSE) seminar in New Orleans (March 22-24). Make your reservations now by going to www.ncdd.com and clicking the link for "Sessions and Seminars."

Dues for General Membership are due by January 31, 2012. You must send your completed Membership Renewal form along with your dues. Hopefully, you have already received your form from me through the mail, but, if you haven't, simply email me at rhea@ncdd.com or call 334-264-1950 and I will get one to you immediately.

I hope you have been using the NCDD website! There is so much information available to you all in one place! You can add your picture and change your own bio! Don't forget to take a look at the Virtual Forensic Library, Members Blog and the Brief Bank!

Hope to see you in both Orlando and New Orleans!

- Rhea

Williams v. Illinois

High Court Not Likely To Retreat From Bullcoming In Latest Confrontation Case

The United States Supreme Court heard oral arguments last month in *Williams v. Illinois*, and will soon issue its latest decision in a round of Confrontation Clause cases that began with *Crawford v. Washington* seven years ago.

Crawford held that out-of-court statements made in anticipation of litigation are "testimonial" and therefore inadmissible, even if such statements are deemed reliable. The high Court subsequently held in *Michigan v. Bryant* and *Davis v. Washington* that statements made in connection with an ongoing emergency are non-testimonial and are therefore admissible even if the declarant does not testify. All three of these cases involved domestic assaults.

Five years after *Crawford* breathed new life into the Sixth Amendment's Confrontation Clause, *Melendez-Diaz v. Massachusetts* held that laboratory certificates concerning the nature and quantity of a controlled substance may not be admitted absent a defense opportunity to confront the lab analyst. Writing for a 5-4 majority, Justice Scalia declared that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." The majority concluded the certificates are testimonial and that "confrontation" is guaranteed to the accused. Justice Kennedy, in a dissenting opinion joined by Justices Alito, Breyer, and Roberts, assailed the decision as "adding nothing to the truth-finding process" and likely causing "[g]uilty defendants [to] go free, on the most technical grounds…"

Last year, *Bullcoming v. New Mexico* applied the *Melendez-Diaz* rule in a drunk driving prosecution where a lab analyst was permitted to testify as to a blood-alcohol test performed by a different analyst who was on unpaid leave and did not testify. Though the witness was familiar with the instrument used and the lab's procedures, he neither participated in nor observed the actual blood test. Writing for the same four dissenters, Kennedy again vented a strong opposition and questioned whether the actual analyst would even remember one of many blood tests performed.

So with this backdrop it surprised legal analysts when Kennedy took the microphone at oral argument in *Williams* last month and appeared to have accepted *Melendez-Diaz* and *Bullcoming* as settled law. The issue in *Williams* is whether a prosecutor's expert witness may reference in his opinion the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts. Kennedy rhetorically asked, "How does it become non-testimonial when it's relayed by the recipient of the report?" He also commented that if the expert were not relying on the truth of the matter asserted (the DNA profile determined by the Cellmark lab), it would be irrelevant to the fact-finder. Finally, he noted that "[t]he key actor in the play, the Hamlet in the play, is the person who did the test at Cellmark."

Justices Kagan and Sotomayer were not on the bench-when *Melendez-Diaz* was decided. They have replaced retired Justices Stevens and Souter who formed part of the five-member majority in that decision, though both joined the five-member majority in *Bullcoming*. However, Justice Sotomayer wrote a separate concurring opinion in *Bullcoming*, and raised the possibility that it may be permissible to have a supervisor or reviewer with some connection to the testing testify about a result when an analyst is unavailable. This makes Sotomayer a wildcard in *Williams*, though she may duck the issue by siding with Kagan's expressed view that *Williams* is not really a Confrontation case---it's simply a failure of the prosecution to present any evidence of the result relied upon by the expert in forming his opinion. Although experts can base an opinion on assumed facts, there must be at least some evidence of the assumed fact presented at trial and the Cellmark report itself was not admitted into evidence.

A decision in *Williams* is expected this year.

KEEPING ACCURACY/ CALIBRATION RECORDS OUT

by Justin J. McShane[1]

An important issue in DUI/DWI trials is whether certificates of "accuracy and calibration" for breath-alcohol devices are admissible over a hearsay objection.

Prosecutors point to Footnote 1 in *Melendez-Diaz* (2009) ___ U.S. ___, 129 S.Ct. 2527, and attempt to frame these certificates as non-testimonial maintenance records. The subject footnote reads:

> Contrary to the dissent's suggestion, post, at 3–4, 7 (opinion of Kennedy, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," post, at 7, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, ibid., from United States v. Lott, 854 F. 2d 244, 250 (CA7 1988), "gaps in

[1]Justin J. McShane is a Board-Certified DUI attorney based in Harrisburg, PA. He was a contributing author on the NCDD's *amicus* brief in *Bullcoming v. New Mexico* (2011) ___ U.S. ___, 131 S.Ct. 2705.

the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. See infra, at 15–16, 18.

With this footnote, the majority was attempting to foreshadow what would later in *Michigan v. Bryant* (2011) ___ U.S. ___, 131 S. Ct. 1143, become the "primary purpose test" for determining whether a given record is testimonial and subject to the Confrontation Clause. Some records have a mixed purpose. For example, in the case of hospital analyzers, their records of testing and efforts to calibrate and verify may not be testimonial if the government can establish that they are used for diagnostic/treatment purposes as well. This is to be contrasted with breath-alcohol testing documents used by law enforcement, as such records are prepared in anticipation of prosecution-related litigation. As one way to demonstrate this point, Atlanta attorney Michael Hawkins suggests asking the court to take judicial notice of when the regulation/statute requiring the certificates to be issued was promulgated, and then challenging the prosecutor to produce any certificate of calibration and accuracy in existence before that date.

The following questions are offered as a technique for dealing with a breath-alcohol test administered at a jail where the testifying witness did not perform the acts that result in the issuance of the certificates of accuracy and calibration:

Now I'd like to talk to you about what you do at the prison, you understand.

You test people?

You test people who are arrested for drunk driving?

For their Breath Alcohol Content?

That is your job?

This is not a medical purpose that you do this for?

A police purpose?

It isn't open to the public?

No one can pay to be tested?

Someone walking off the street can't be tested by you?

That's because it is at the jail?

The only folks who can get there are those who are arrested?

The police have to bring them to you?

You do testing only for law enforcement?

Now, I'd like to talk to you about the calibration and accuracy check data, *(Commonwealth's Exhibit 3,)* the District Attorney entered into evidence the last time we were here, you understand.

There is a calibration performed on this machine?

The calibration is done for a reason?

To see how the machine is doing?

If it is out of calibration, the results are no good?

If there is no proof of calibration, the results are no good?

Calibration is important?

Without proof of calibration we cannot have a valid result?

There is also an accuracy check performed on this machine?

The accuracy check is performed for a reason?

To see how the machine is doing?

If it is out of accuracy, the results are no good?

If there is no proof of an accuracy check, the results are no good?

An accuracy check is important?

Without proof of accuracy we cannot have a valid result?

Now I'd like to talk to you about these documents here, (*Commonwealth's Exhibit 3,*) you understand.

We can agree that you were shown these documents?

These documents exist for a reason?

So that when you go to court, you can show it to the judge or the jury?

These documents exist to allow for the admissibility of the results of the police testing?

No other reason?

Now I'd like to talk about your personal efforts to determine the accuracy and the calibration of this machine on September 12, 2008, you understand.

You didn't perform the calibration check?

You didn't perform the accuracy check?

Someone else did?

But you can't tell us what that person actually did?

How they did it?

That's because you did not see it?

You weren't there?

You weren't present when the calibration curve was generated?

You are relying on documents you did not generate?

Or were present for?

These documents are the only proof of accuracy and calibration?

You don't even know how to generate a calibration curve?

How to evaluate it?

What's good or bad?

Editor's Note: The primary purpose of a breath-alcohol testing device may well determine whether the calibration and accuracy records maintained for it are "testimonial." For example, a preliminary alcohol screening (PAS) device may be administered for the primary purpose of determining whether one is safe to drive, whereas records maintained for post-arrest breath-alcohol testing are primarily for use at trial.

CASE LAW ROUNDUP

Case Highlights from Illinois Attorney Donald Ramsell

Reasonable Suspicion

***State of Kansas v. Peach*, Slip Copy, 2011 WL 4440184 (Table) (Kan.App.)**

The driver passed a police cruiser parked on the side of the road which may have had its headlights on or just the parking lights. When the driver did not dim his brights as he passed, the officer made a u-turn and detained him.

The detention was held unconstitutional because the subject statute only requires the dimming of bright lights when a motorist is approaching "an *oncoming* vehicle within 500 feet..." Since the police cruiser was parked on the side of the road it was stationary and not oncoming.

The Court also rejected a prosecutorial claim of "good faith," holding that a mistake of law cannot be the basis for the "good faith" exception to the warrant requirement.

***State of Montana v. Cameron*, --- P.3d ----, 2011 WL 5353102 (Mont.), 2011 MT 276**

Though driving on the centerline several times was not a violation of law *per se*, it did constitute sufficient grounds for an experienced DUI officer to stop a vehicle at night.

Editor's Note: if there is one common theme that can be drawn from the plethora of cases on the subject of stops, lane lines and weaving, it appears to be as follows: While a brief momentary crossing of a lane line may not be a violation of the improper lane usage law (when there is no danger to others on the roadway) and hence may not form a reasonable basis for a vehicle stop, continuous weaving (taken in conjunction with other facts such as time of day) can be a stand-alone basis to stop a vehicle as reasonable suspicion of impaired driving.

***Hawaii v. Sereno*, 125 Hawai'i 246, 257 P.3d 1223 (Table), 2011 WL 2464753 (Hawai'i App.)**

Defendant's car was struck by another vehicle and crashed into a house. Though Defendant admitted drinking, the Court affirmed the trial court's grant of a motion to suppress evidence. The trial court gave no weight to the accident (since fault by Defendant was not shown), and refused to infer a consciousness of guilt by Defendant's refusal to perform field sobriety exercises.

***State of Utah v. Houston*, ___ P.3d ___, 2011 WL 4865169 (Utah App.), 2011 UT App 350**

A deputy made a traffic stop based on a statement from a fellow deputy that the driver had a revoked license until 2012, and that he had verified the same "a few days" earlier on a Driver's License computer data system.

Notwithstanding the possibility of a glitch in the computer data system, or that the driver had just gotten the license reinstated, the Court affirmed the denial of a motion to suppress evidence. The deputy's basis for reasonable suspicion included the collective knowledge imparted to him by the fellow deputy (the "collective knowledge" doctrine), and the "few days" gap did not eliminate his

reasonable suspicion.

Implied Consent Regarding Hospital Patient-Driver Cases

Not Triggered:

***State of Ohio v. Rawnsley* WL 5319863 (Ohio App. 2 Dist. 2011)**
A drunk driving suspect was taken directly to a hospital by police instead of jail, and the officer testified the suspect was not under arrest when the implied consent admonition was read and a blood sample was drawn. Held: The blood test evidence was excluded on the basis of invalid consent and no exigent circumstance for not seeking warrant.

Other courts considering this issue have predominantly found a "de facto" arrest or exigent circumstance (alcohol burn off) justifying the warrantless taking of blood (see, e.g., *Buford v. State of Georgia*, --- S.E.2d ----, 2011 WL 5248199 (Ga.App.).

Editor's Note: The Rawnsley case is valuable on two points. First, the mere reading of an implied consent advisory which contains language telling a person that one is under arrest, does not necessarily make it so. Secondly, exigent circumstances do not automatically exist merely because blood alcohol dissipates over time (if there is time to seek a warrant and get a blood draw within three hours of the driving then there is no exigent circumstance).

Triggered:

***Buford v. State of Georgia*, --- S.E.2d ----, 2011 WL 5248199 (Ga.App.)**

Defendant was secured to a board in a hospital room with tubes attached to his body. A reasonable person in his situation could not have thought that he was free to leave when the trooper announced that he was charging him with DUI. Thus, it was reasonable for the trial court to conclude that he was under arrest when blood was drawn from him under the implied consent law.

Editor's Note: DUI suspects are frequently taken directly to a hospital by paramedics and later confronted in that setting by an officer demanding a blood or breath sample. As in this case, the question arises as to whether a lawful arrest has taken place which is a condition precedent to most implied consent statutes. Other courts have found there to be a *de facto* arrest even though the formality of an arrest has not occurred.

Confrontation Cases

***Commonwealth v. Dyarman*, --- A.3d ----, 2011 WL 5560176 (Pa. Super.), 2011 PA Super 245**

The court was asked to decide whether admission of the calibration records of an Intoxilyzer 5000en violated the Confrontation Clause absent testimony from the individual who performed the accuracy checks.

Held: The calibration logs were admitted to establish the chain of custody and accuracy of the device; they were not created in anticipation of Appellant's particular litigation, or used to prove an element of a crime for which Appellant was charged. Thus, the logs were not "testimonial" for purposes of the protections afforded by the Confrontation Clause.

***People v. Nunley*, --- N.W.2d ----, 2011 WL 4861858 (Mich.App.)**

The prosecutor obtained Defendant's "certified driving record, signed and sealed by the Secretary of State" from the Secretary of State's Office, which included a declaration that defendant had been served with an order of license suspension/restriction by mail.

On appeal from an Order excluding the certificate at trial, the prosecutor argued that the certificate of mailing is analogous to a docketing statement or a clerk's certification authenticating an official record and is therefore non-testimonial and admissible. In support of his argument, the prosecutor relied on the following passage in Melendez–Diaz:

"The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." [Melendez–Diaz, 129 S.Ct at 2538–2539 (citations omitted).]

The Michigan appellate court wrote in response:

"The prosecutor asserts that the situation in the present case is identical, arguing that Secretary of State records are similar to a clerk's certification. The prosecutor has missed a crucial distinction. If the document at issue was merely a copy of defendant's driving record sent along with the "Certificate of Mailing," and "F. Beuter" was merely certifying the authenticity of that record, the prosecutor would have an excellent point. But, the copy of the record is not at issue and Beuter was not certifying its authenticity. Beuter was certifying that the notice of suspension had been sent, the very fact that must be proved to convict defendant of DWLS. The critical distinction is that the author of the certificate of mailing, here F. Bueter, is providing more than mere authentication of documents, he is actually attesting to a required element of the charge. Unlike a docketing statement or clerk's certification, the certificate of mailing will be used against defendant to prove an element of DWLS–2nd offense and is necessary for establishing an essential fact at trial.

The prosecutor also argued that the certificate of mailing is admissible because the Secretary of State's records are not prepared "solely" for trial. It cited to state law requiring that notices of suspensions be sent to the driver and that records of the same be maintained. In rejecting this position, the court replied:

"Careful review of MCL 257.204a reveals that it does not require creation of the certificate or maintenance of the certificates in the Secretary of State's records. Although MCL 257.204a(1)(h) requires the maintenance of "notices," it does not require records to be kept of the certificates verifying the fact that a notice has been sent. Our review of the record in this case shows that the certificate of mailing does not appear in defendant's certified driving record. The Secretary of State created the certificate of mailing independent of MCL 257.204a.

Additionally, the court wrote:

"A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant."

In sum, the court stated:

"It is important to keep in mind just what the prosecutor wants to have admitted and what the lower courts refused to admit. It was not defendant's driving record. Nor was it the notice of suspension. It was the certificate of mailing that the notice of suspension was in fact mailed to defendant. The key factor in this case is that the certificate of mailing is proof of notice by virtue of the plain language of MCL 257.212, which will indisputably be used to establish an element of the offense charged."

***Derr v. State of Maryland*, --- A.3d ----, 2011 WL 4483937 (Md.)**

While the defense bar anxiously awaits the U.S. Supreme Court's decision in *Williams v. Illinois*, this Maryland appellate court determined that the Confrontation Clause is indeed violated under the same circumstances presented in *Williams* (an expert witness introducing and relying upon a non-testifying expert's DNA analysis as a basis for his own conclusion).

"[B]ecause of the Confrontation Clause, an expert may not render as true the testimonial statements or opinions of others through his or her testimony. Although [a State rule of evidence] allows for an expert to base his or her opinion on inadmissible evidence, to the extent that [this rule] offends the Confrontation Clause, such testimony will not be admissible.

"Specifically, if the inadmissible evidence sought to be introduced is comprised of the conclusions of other analysts, then the Confrontation Clause prohibits the admission of such testimonial statements through the testimony of an expert who did not observe or participate in the testing. Conversely, if the evidence relied upon by an expert in his or her testimony assembles nontestimonial information from one or more sources, and then draws a conclusion based on that information, then the expert is not merely serving as a surrogate to convey the conclusions of other analysts, but rather, is forming and testifying as to the expert's own independent opinion."

Anonymous Tipster Cases

Tip Considered in Connection With With Community Caretaking Doctrine

***State v. Deccio*, 136 Idaho 442, 34 P.3d 1125**

A telephone tipster, claiming to be the defendant's wife's best friend, called the police and claimed that the defendant was drunk, suicidal and driving.

The Idaho Court stated that the same test used to deal with anonymous tips in the criminal context should be used in the community caretaking field, and held that the deputy's enforcement stop of the matching vehicle was illegal where the officer did not observe any vehicle code violations or erratic driving.

"The female caller refused to identify herself or give her address. She merely stated that she was the best friend of Deccio's wife. The female did not call from home but from a phone at a local bar and indicated that she did not intend to stay there, thus avoiding the possibility of being identified or questioned. There was no indication that the female personally observed or had any first-hand knowledge of Deccio's suicidal or intoxicated condition. The female stated only that she had been speaking with Deccio and his wife and that he had been drinking all day. Moreover, the caller did not distinguish what information she obtained directly from Deccio and what hearsay information she obtained from Deccio's wife concerning Deccio. The magistrate found that, although the caller knew where Deccio lived and the type of vehicle he drove, such information was easily obtainable. The female's prediction that Deccio would not be home if officers were to check did not in itself make the tip more reliable."

The Court concluded that this anonymous tip did not bear sufficient indicia of reliability justifying the stop of defendant's vehicle.

Stop Lawful Where Tipster Provides Sufficient Details and Means To Identify Caller

***U.S. v. Chavez*, --- F.3d ----, 2011 WL 4925884 (C.A.10 (N.M.))**

Whether a tip provides reasonable suspicion to make a traffic stop is case-specific. Although no single factor is dispositive, relevant factors include: (1) whether the informant lacked "true anonymity" (i.e., whether the police knew some details about the informant or had means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant.

"All of these factors were present in this case. First, although the caller did not provide dispatchers with his name, he told them he was a Wal–Mart employee at a specific Wal–Mart store and thereby provided the police with information to discover his identity. Second, he stated he had witnessed the events in the parking lot firsthand. Third, he provided the dispatchers with detailed information about the events he witnessed, including the model of each vehicle involved in the disturbance and each vehicle's license plate number. Fourth, he explained he was calling to report a disturbance in his employer's parking lot, which explained his motivation for reporting the incident to police. Finally, Officer McColley verified some of the information provided by the caller—including that there was a black pickup truck and a white Cadillac in the parking lot—before stopping Mr. Chavez. Based on these circumstances, we hold that the caller's tip bore "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop."

Proximate Cause Of Injury Or Death --- Evidence Of Other Driver's Intoxication Deemed Relevant And Admissible

***State of Minnesota v. Nelson*, --- N.W.2d ----, 2011 WL 5829025 (Minn.App.)**

In a criminal vehicular homicide case in which the negligent conduct of two motor vehicle drivers intertwines to cause the death of one driver, the trial court abused its discretion by excluding evidence of the victim driver's alcohol consumption while admitting evidence of the defendant driver's alcohol consumption.

Furthermore, the jury instruction must define causation to inform the jury that a guilty verdict requires that the defendant driver's conduct must have played a *substantial part* in bringing about the death or injury of the victim driver.

Editor's Note: Not all states use the 'substantial factor' phrase in their definition of proximate cause.

Juror Discharge

***Commonwealth v. Cameron*, Slip Copy, 2011 WL 3341091 (Table) (Mass.App.Ct.)**

Where a juror acknowledged a language problem in understanding deliberations, and the problem was evidenced on the record as required, the trial court did not abuse its discretion in removing the juror during deliberations.

The normal rule in MA following a juror discharge is that the jury is to be instructed "not only to begin deliberations anew ... but also that the reason for discharge is entirely personal and has nothing to do with the discharged juror's views on the case or his relationship with his fellow jurors." *Commonwealth v. Connor*, 392 Mass. at 845–846.

Because the language problem was the obvious reason in this instance, it was permissible to dispense with requirement of advising the panel as to the reason for the discharge.

Post-Arrest Search of Vehicle Found Constitutional

***State of Wisconsin v. Billips*, Slip Copy, 2011 WL 4578555 (Wis. App.)**

After arresting defendant for DWI and observing and seizing several open containers that were in plain view, a full search of defendant's vehicle uncovered marijuana.

Rejecting the claim that the post-arrest vehicle search was unconstitutional per *Arizona v. Gant* (2009) 556 U.S. 332, the Court noted that *Gant* "expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once some evidence is found."

TRIAL TIP TREASURE

By: Ken Fornabai

Attorney: Mr. Jones had no difficulty exiting his car?

Cop: Well, yes, in fact he stumbled and almost fell.

Attorney: You made no mention of this in your report?
Cop: Counsel, you can't write every detail in your report.

If you initially wed an officer to his report you can effectively derail this type of damaging testimony. Moreover, once you have locked the officer into the four corners of his report, you can then capitalize on his failure to include things jurors would typically expect from an impaired driver (e.g., He immediately reacted to your red light and pulled over appropriately?).

Here is a cross-examination technique that ties an officer to his report:

1. In your direct testimony you often referred to a written report you wrote?
2. When did you write it?
3. The purpose of your report is to make an accurate record of the details so you can testify accurately at trial?
4. You have been trained to include the facts supporting your decision to detain and arrest the individual?
5. Did you review it prior to trial?
6. You still had to refer to it several times during your direct testimony?
7. It's fair to say you cannot recall all of the specific facts of an incident that occurred months ago without using a written report?
8. You will agree (nodding your head up and down), that your memory was better when you wrote the report than it is now?
9. You have ticketed/arrested many people before this incident with Mr. Jones?
10. You prepare a police report for each DUI case?
11. It must be hard to remember even the name of the person you arrested just prior to Mr. Jones, or the person you arrested just after him, is that right? Do you remember?
12. If your memory today differs from a fact recorded in your police report, what would you say is more accurate, your memory of this event some eight months ago or the facts as you described them in your report?

When you start your examination by marrying the police officer to his report, you avoid a frustrating examination and an uncontrollable witness. The witness is now unable to add negative facts.
Editor's Note: This edition's trial tip treasure comes from Ken Fornabai, a Washington State attorney whose practice is limited to DUI defense. Mr. Fornabai is a former President of the *Washington Foundation for Criminal Justice* and a founding member of NCDD. He has lectured extensively on various aspects of DUI defense work.