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Published on *Voice For The Defense Online* (<http://www.voiceforthedefenseonline.com>)

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Photo

 [\[1\]October13-author-gustitis.jpg](#)

Stephen Gustitis is a [\[2\]criminal defense lawyer in Bryan-College Station](#). He is Board Certified in Criminal Law by the Texas Board of Legal Specialization. He is also a husband, father, and retired amateur bicycle racer.

?Off the Back? is an expression in competitive road cycling describing a rider dropped by the lead group who has lost the energy saving benefit of riding in the group?s slipstream. Once off the back the rider struggles alone in the wind to catch up. The life of a criminal defense lawyer shares many of the characteristics of a bicycle rider struggling alone, in the wind, and ?Off the Back.? This column is for them.

Stories from Stephen Gustitis

[\[3\]Off the Back: How to Use Stories to Distinguish Yourself From the Competition - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, February 6th, 2018

Stories are the vehicle through which criminal defense lawyers typically communicate with juries. Since the jury decides whether a defense case is persuasive or not, it must be built from their point of view. And since juries are people oriented, rather than law oriented, they use their feelings and emotions to make decisions more often than logic. That?s why the story is such an effective way to communicate with them. Juries determine how plausible a case is by placing the story next to their own ideas about how the world works.

[\[3\]Read more](#)



[\[5\]](#)

[\[5\]Off the Back: Challenging a Warrantless Search by Police in a Constitutionally Protected Space - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, October 31st, 2017

Last month six defendants litigated a group suppression hearing that raised the issue of a warrantless search of a constitutionally protected space. The warrantless search resulted in the police observing contraband in plain view. A search warrant was subsequently secured alleging that plain view contraband created probable cause to search the space. Below is a summary of our collective research. It may give defense lawyers a place to begin when challenging their own warrantless entry/search cases. Further, I cannot take full credit

for this research.

[\[5\]Read more](#)

[\[6\]Off the Back: Staring Down the Wrath of Hurricane Harvey - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, September 30th, 2017

I was fortunate to have survived much of Harvey's rage. But an attorney colleague of mine was not so lucky. Listening to her story, I was struck not only by the terror of nature's fury, but by her steely coolness under pressure in the midst of a crisis beyond her control. This is how she stared down the wrath of Hurricane Harvey.

[\[6\]Read more](#)

[\[7\]Off the Back: Will H.B. 3016 Change the Way We Defend DWI Cases? - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Thursday, August 31st, 2017

Deciding to litigate a DWI first offense has historically been a no-brainer. Unless the prosecutor was willing to reduce charges and offer deferred adjudication on obstructing a highway, for instance, teeing-up a jury trial was almost automatic. What did the client have to lose when the best offer was a DWI conviction? Expunging or sealing the records of a conviction was impossible, anyway. But if deferred adjudication for obstructing was on the table, the calculus was much different.

[\[7\]Read more](#)

[\[8\]Off the Back: Summoning Courage to Try Something New - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, July 25th, 2017

My inspiration for this piece was our colleague and friend, John Gioffredi.1 John's approach to DWI defense has changed the way I try cases. His approach is not fancy, nor terribly difficult. In fact, it uses tools of our trade that we all possess. But in one important way, John's approach is different. Trying cases like John Gioffredi takes some courage. It compels one to shoulder additional risk. It causes us to work harder. It compels us to learn new things . . . things that may be unproven in our personal experience.

[\[8\]Read more](#)

[\[9\]Off the Back: Evaluating Anonymous Tips - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, May 9th, 2017

I dropped by a suppression hearing recently and listened to a prosecutor argue the merits of an anonymous tip, which they claimed justified an investigatory detention. I was puzzled. The State asserted their anonymous tip was "reliable" and, therefore, justified the stop and subsequent arrest of the defendant. Though recent case law had expanded the realm of situations in which anonymous tips may justify a detention, I soon realized the prosecutor was arguing only half the story. Evaluating a stop based upon an anonymous tip was actually a two-step process.

[\[9\]Read more](#)

[\[10\]Off the Back: More Women Criminal Defense Lawyers Wanted - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Thursday, March 30th, 2017

From my perspective the criminal law defense profession continues to be a man's world. Based on 25 years of observation, the number of women defense lawyers at the county courthouse continues to be a minority. It should not be so, however. There should be more of them in our courtrooms fighting for the rights of the

citizen accused.

[\[10\]Read more](#)

[\[11\]Off the Back: How Might Criminal Defendants Fare With a Justice Neil M. Gorsuch? - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Thursday, March 9th, 2017

If confirmed by the United States Senate, Judge Neil M. Gorsuch would fill the SCOTUS vacancy left by Antonin Scalia. During his 30 years on the Court, Justice Scalia moved the law dramatically favoring criminal defendants in several areas. One example was *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004), which held that live witness testimony was constitutionally required in criminal trials for all "testimonial" out-of-court statements. Another was *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct.

[\[11\]Read more](#)

[\[12\]Off the Back: Preserving Error in Retrograde Extrapolation Cases - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Wednesday, January 25th, 2017

Last month we introduced the [\[13\]toxicological aspects of cross-examining](#) the retrograde extrapolation expert in DWI trials. Now, an understanding of toxicology will promote our error preservation before the State's expert attempts to bamboozle the jury with opinions about the client's driving time BAC.

[\[12\]Read more](#)

[\[14\]Off the Back: A Toxicological Guide to Retrograde Extrapolation Cross-Examination - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, December 6th, 2016

Prosecutors like to use it. Occasionally, we may like it, too. Retrograde extrapolation is the method by which one estimates a person's BAC at the time of driving based upon a chemical test result later in time. Swedish physician Erik M. P. Widmark first calculated absorption and elimination rates of alcohol in the body.

[\[14\]Read more](#)

[\[15\]Off the Back: Using Metrology to Understand Forensic Measurements - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, November 5th, 2016

Metrology is the science of measurement. The State often relies upon measurements to prove allegations against our clients. For example, the determination of breath and blood alcohol concentrations in a DWI trial involve measurement. The weight of a controlled substance, and its identity, involves measurement. Other examples may include DNA and radar speed detection. Essentially, a forensic science implicating physics, chemistry, toxicology, engineering, psychology, or medicine may also implicate the science of measurement.

[\[15\]Read more](#)

[\[16\]Off the Back: How to Subpoena an Out-of-State Witness - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Friday, October 7th, 2016

Successfully summoning an out-of-state witness to testify in Texas is a chore. Texas Code of Criminal Procedure, Article 24.28, is entitled Uniform Act to Secure Attendance of Witnesses from Without State. Section 4 provides our authority to subpoena a witness from another state. The process is error-prone and rarely guaranteed. Nonetheless, your out-of-state witness may be the lynchpin of your case. To this end,

some insight into the logistical pitfalls may save you hours of work and millimeters of stomach lining.

[\[16\]Read more](#)

[\[17\]Off the Back: How to Cultivate Your Personal Brand - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Friday, September 2nd, 2016

How do your individual attributes and professional experiences create value in the lives of other people? What qualities do you project? For what are you known? In total, these things embody your personal brand. And like it or not, you already have one. Accordingly, consider your brand as a manageable asset. Your brand is something to continuously shape with the intention of helping others benefit from having a relationship with you. It should represent the value you are consistently able to deliver to those you serve.

[\[17\]Read more](#)

[\[18\]Off the Back: How to Find the One Best Case for Your Client - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, June 11th, 2016

You reviewed the probable cause and interviewed your new client after receiving the court-appointment order. Prior to meeting the client, perhaps, you received a call from his mother, who shared some facts and issues related to her son's case. As you return from the county jail, your head is now muddled with facts, arguments, theories, and things to do. The client's case is *your* responsibility now. From the jumble of information collected during intake, how do you set about finding the most powerful case for your new client?

[\[18\]Read more](#)

[\[19\]Off the Back: 'Do I Really Think I'm Helping Anybody??' - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Thursday, May 5th, 2016

It seems I've been dangling *Off the Back* lately . . . regularly advising good clients of bad news. It's been a headwind, for sure. And not something to share with many. Mostly, it's a private struggle. And such a dichotomy. Strength on the outside, weakness on the inside. I could not have scripted the human condition any better. Inevitably, the self-doubt follows: Do I really think I'm helping anybody? Gratefully, the answer does not exist in the microcosm of introspection. Rather, it's found in the macrocosm of the justice system in which we work.

[\[19\]Read more](#)

[\[20\]Off the Back: Planning for Life After the Practice of Law - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, April 9th, 2016

Our money is rarely a topic of conversation at the courthouse. We are often stoked to talk about the law . . . always primed to share details of our latest victory or penetrating cross-examination. But what about money? When our law practice closes its doors for the last time, what will we have to show for our decades of sacrifice? Hopefully, we'll have some degree of financial freedom. But the statistics are dismal. Americans do not save enough.

[\[20\]Read more](#)

[\[21\]Off the Back: Transportation Code Section 724.017 Compliance in ALR Blood Test Failure Cases - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, March 12th, 2016

In Brazos County the Department of Public Safety has been using sleight-of-hand to prove up blood test results in ALR failure cases. Their conjuring attempts to correct an evidentiary deficiency in their blood test proof. Specifically, the Department tries to argue these blood test failures resulted from the suspect's ?express consent? to provide a blood sample, rather than ?implied consent? under Chapter 724 of the Texas Transportation Code.

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[\[22\]Off the Back: Safeguarding the Great American Experiment - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Tuesday, February 16th, 2016

I?ve been remiss. Like my fellow defense attorneys, I habitually keep my head buried in court appearances, case law and statutes, cross-examination preparation, closing arguments, and customer service. I?ve been remiss because the daily grind has so easily diverted me from reflecting on a deeper meaning in this work. Namely, safeguarding the great American experiment. We protect individual liberty and freedom. Values our founding fathers determined were most vital to a free society.

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[\[23\]Off the Back: Getting Creative?Use Kelly v. State to Challenge Any Scientific Evidence - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Wednesday, January 6th, 2016

In a contested bond revocation hearing, not long ago, the State attempted to admit evidence our client violated a restricted zone using global positioning system (GPS) evidence. They further sought to admit evidence from a Secure Continuous Remote Alcohol Monitoring ([\[24\]SCRAM](#)) device that she inappropriately consumed alcohol while on bond.

[\[23\]Read more](#)

[\[25\]Off the Back: Forging Fear Into a Constructive Edge - By Stephen Gustitis](#)

[\[4\]Stephen Gustitis](#)

Saturday, November 21st, 2015

When I was prosecuting habitually barking dog cases on a 3rd-year bar card, I wondered when my fear of jury trials would ever end. That was 1989. To this day I remain uneasy and agitated the morning a trial begins. In fact, I?m miserable. Until I speak my first words during voir dire, I?m frightened. I fear the beginning of my opening statement. I fear an imminent cross-examination for which I am properly prepared. I fear the start of a closing argument. I fear receiving a verdict. For the most part, I fear every aspect of a trial.

[\[25\]Read more](#)

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