

**T | H | E** National Association of Criminal Defense Lawyers

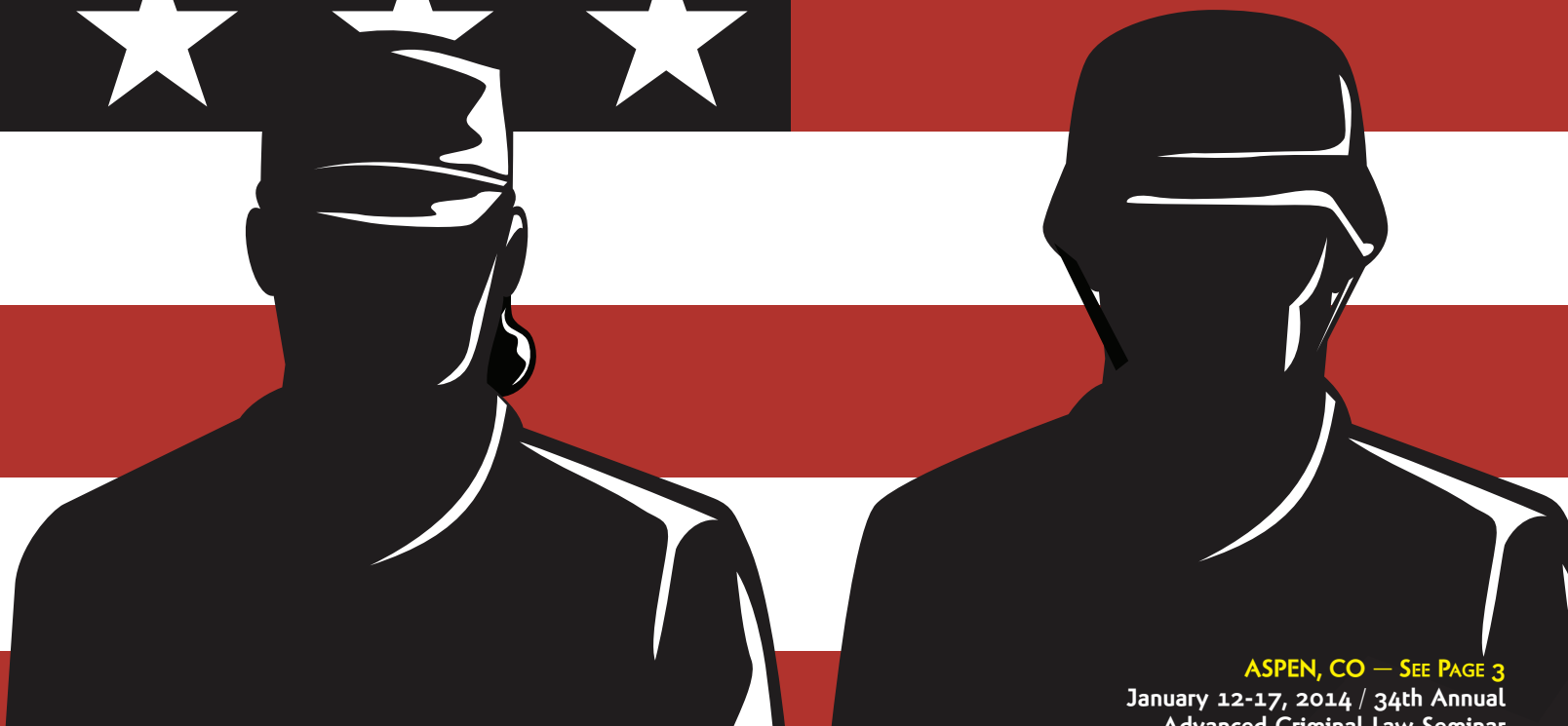
# CHAMPION

November 2013

## Defending the Combat Veteran

also in this issue

- ★ The Seven Rules of Plea Bargaining
- ★ Challenging Cell Phone Searches
- ★ Obtaining Evidence Under § 1782



**ASPEN, CO — SEE PAGE 3**

January 12-17, 2014 / 34th Annual  
Advanced Criminal Law Seminar

**NEW ORLEANS, LA — SEE PAGE 37**

March 5-8, 2014 / NACDL's 2014  
Collateral Consequences  
Conference & Midwinter Meeting

**GULFPORT, FL — SEE PAGE 54**

March 19-22, 2014 / 3rd Annual White  
Collar Criminal Defense College at Stetson

**LAS VEGAS, NV — SEE PAGE 56**

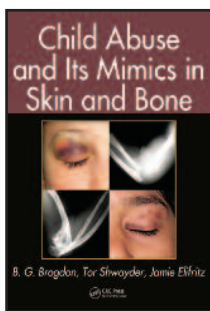
May 15-18, 2014 / NACDL's 7th Annual  
Forensic Science Conference & Spring Meeting

# BOOK REVIEWS

## Child Abuse and Its Mimics in Skin and Bone

By B.G. Brogdon, Tor Shwayder, and Jamie Elifritz  
CRC Press (2013)

Reviewed by Brandon Sanchez



Challenging the state's scientific evidence can be a daunting task, especially in child injury cases in which oftentimes the only evidence against a defendant is a questionable judgment call made by one medical professional or cryptic medical records. It is becoming standard practice to enlist the help of independent forensic pediatricians and pathologists to interpret the complicated evidence in these types of cases. *Child Abuse and Its Mimics in Skin and Bone* is a book that outlines bone and skin conditions that mimic and could be mistaken for actual physical abuse in children. The book was written by medical doctors with collective expertise in forensic radiology, pediatrics, and dermatology. Its stated design is for anyone who is confronted with the task of sorting out abuse from nonabuse in child injury cases, but the technical language of the book does make some of its content a real challenge for nonclinicians. This book is not designed as a quick read on the subject of defending child injury cases, but rather is more of a text reference that could be called upon as a resource when a specific skin or bone injury arises.

The book has a user friendly layout organized into five chapters over 193 pages. Chapter 1 serves as an introduction to the subject and provides a historical perspective of the concept of child abuse. It also mentions what con-

stitutes an acceptable radiologic and dermatologic survey in infants and young children, which an attorney might find useful when evaluating any similar exams performed by the state's witnesses.

Chapters 2 and 3 cover musculoskeletal trauma and how they appear in radiologic evidence. This is the "bone" injury section of the book, and readers will find approximately 50 different picture-rich examples of intentionally inflicted bone injuries and their many nonabuse-related mimics. The photos provided here appear to be almost entirely X-ray photographs. In these chapters the authors provide highly technical observations about X-ray photography in abuse cases contrasted against X-ray photography in nonabuse mimic cases. The faint of heart beware, these two chapters are highly technical and require a medical dictionary for the lawyer to comprehend. Chapter 3 lists dozens of potential mimics found in bone. Some examples of the many mimickers detailed are Little Leaguer's Shoulder, birth injuries, rickets, Vitamin A intoxication, and osteogenesis imperfecta.

Chapters 4 and 5 of the book deal with skin injuries. Over the course of these approximately 50 pages the reader gains insight into dozens of skin conditions that could easily be mistaken for child abuse. This section of the book is much less technical and much more digestible for the nonclinician. The chapters include many color photographs that illustrate the authors' observations of skin injury quite well. The subjects covered include mimics of bruises, pattern injuries, and burns. Upon reviewing these two chapters and their graphic photographs, an attorney would have a usable insight on how to account for unexplained skin injuries.

Overall, while there are plenty of usable nuggets of information that could be grabbed by an attorney looking for a general read in the subject,



this book is highly technical and should best serve as a technical desk reference for analyzing evidence in cases with specific injuries such as burns, rib fractures, or skull fractures. This text would be best understood by clinicians in the field. But in the skilled hands of the attorney willing to put in the effort to comprehend the medical language, the information contained within this text will hopefully fulfill the authors' intentions of (1) helping those charged with the task of distinguishing between actual abuse and nonabuse in children get it right and (2) eliminating the horrors that go along with getting it wrong. ■

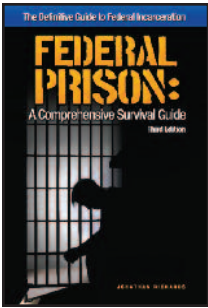
### About the Reviewer

Brandon Sanchez has been a trial attorney with the Missouri State Public Defender System since 2003. He has litigated numerous child injury cases.

*The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.*

## Federal Prison A Comprehensive Survival Guide

By Jonathan Richards  
SK Enterprises (2012)  
Reviewed by Ann L. Hester



If you have clients who are about to begin a federal prison sentence, Jonathan Richards' book, *Federal Prison: A Comprehensive Survival Guide*, could alleviate some of their anxiety by providing them and their families with useful information about what to expect from prison life. The book also is a valuable resource for attorneys who would like to be able to answer clients' questions about prison or who simply want to know more about the conditions clients experience in prison.

Richards is a former federal inmate who served time at a Federal Medical Center (Devens). The book is based on his experiences and those of other inmates. In fact, the book's appendix includes narratives from several other inmates. While some of the information will be relevant to prisoners serving sentences at any security level, the book will be most helpful to prisoners serving time in a Federal Prison Camp (FPC), a Federal Medical Center (FMC), or a Federal Correctional Institution (FCI).

The book proceeds primarily in chronological order, beginning with a chapter on preparing for prison, explaining how inmates are designated, and moving on through chapters aimed at arrival at a prison facility, surviving in prison society, eating, working, visiting privileges, medical care, and release. It also has a handy table of contents in case the reader is looking for a particular subject.

The author's style is conversational, and although it contains a lot of information, I found it easy to read. Although I have been representing indigent federal prisoners for years, I was surprised by some of the information. For instance, I did not know that many prisoners entering a federal prison begin their stay in solitary confinement if a bed is not available. What an introduction! I also had no idea that in some facilities, rather than living in cells, prisoners are assigned to "cubes," which have walls about five feet high, making top bunks extremely

undesirable and making headphones and a radio, which they must purchase from the prison commissary, a necessity for inmates who are bothered by the noise.

Perhaps the most valuable tips in the book are Richards' bits of advice about etiquette among inmates. For instance, use of the prison commissary and trading snacks from it involve a set of customs among prisoners that anyone entering prison for the first time will have to learn. Knowing which inmates to avoid being seen with (child sex offenders!) and avoiding being perceived as too friendly with corrections officers (snitch!) also is important for a new prisoner.

This book can answer many of your federal clients' questions before they report to prison, and it also may provide them with information they didn't know they needed. But be aware that it costs \$97 per copy on Amazon.com. While relatively inexpensive compared to legal treatises, the price makes this book out-of-reach for my indigent clients. ■

### About the Reviewer

Ann Hester is an Assistant Federal Defender in Charlotte, N.C.

## Deal With the Devil

### The FBI's Secret 30-Year Relationship With a Mafia Killer

By Peter Lance  
William Morrow (2013)  
Reviewed by Darryl Genis



As noted in a 2006 review of *Triple Cross*, his most recent book on counterterrorism, "Peter Lance is the last of a dying breed: an investigative reporter who is disciplined enough to devote half a decade in pursuit of the truth. A newsman cut from the same cloth as the legendary journalist I.F. 'Izzy Stone.' A gumshoe reporter who still pounds the pavement and relies heavily on public documents to present the facts."

Having been exposed to Peter

Lance's investigation of corruption in the Santa Barbara Police Department, I can second that reviewer's sentiment wholeheartedly. Only in *Deal With the Devil*, he'd been raking the muck on the FBI for nearly 12 years post 9/11 and this, his latest epic, is a page-turning indictment of the FBI's shameful organized crime track record dating back to the early 1960s. With meticulous research based on more than 20,000 pages of trial transcripts, interviews and heretofore secret FBI memos, Lance documents the Bureau's decades-long corrupt relationship with one of the most vicious members of the Mafia in history: Gregory Scarpa Sr. aka "The Killing Machine," "The Mad Hatter" and "The Grim Reaper," one of America's most prolific serial killers ever.

*Deal With the Devil* is an investigative history that reads at times like a John Grisham thriller and at other times like a legal brief. This book is a "must read" for any criminal defense attorney: It reveals the willingness of senior FBI officials and federal prosecutors to ignore *Brady* material and to utilize secondhand and thirdhand hearsay testimony from bottom-feeding Mafia soldiers to send defendants away for multiple life terms, even after these informants had served in Scarpa's murderous crew at the same time he was acting with the clear advise and consent of Bureau officials in New York and D.C.

Lance makes some extraordinary revelations: Two years before Joseph Valachi (credited as the first Mafia turncoat) testified before a Senate committee in 1963, Scarpa gave Hoover the entire Mafia playbook — including the hierarchy of La Cosa Nostra, the secret induction rites, and the leadership of all five families. During his years as an informant, the FBI facilitated insurance rewards and paid Scarpa fees that equaled more than \$1,000,000 (in 2013 dollars). From 1980 to 1992 Scarpa Sr. committed or ordered 26 murders while he was serving as a "T.E." (Top Echelon informant) for his last "control" agent, including the violent rebut of his own brother Sal in 1987 and the drive-by slaying of his nephew Gus Farace, which triggered a 500-agent manhunt.

Scarpa, who ran multi-million dollar drug, gambling, and auto theft operations, also stole millions in bullion, jewelry, stocks and bonds. While three separate Justice Department Organized Crime Strike Forces (in

Chicago, Newark, and Brooklyn) were trying to convict him, FBI officials intervened to keep him on the street. Using FBI intelligence, Scarpa personally instigated and waged the third war for control of the Colombo family from 1991-1992 — a conflict that left 14 dead and dozens injured, including several innocent bystanders. In fact, Scarpa was personally responsible for up to six of the homicides.

Perhaps most surprising from an historical standpoint: More than 20 years after J. Edgar Hoover pledged to end the FBI's illegal Counter Intelligence Program (COINTELPRO), a covert operation aimed at disrupting domestic targets, the Bureau continued to operate a de facto COINTELPRO against the Mafia using Scarpa, who acted as an agent provocateur to destabilize La Cosa Nostra from within.

This is the James "Whitey" Bulger story on steroids.

Lance, who has a J.D. from Fordham University School of Law and previously worked as a trial preparation assistant in the Office of the Manhattan D.A., paints a shocking picture of the best and brightest federal agents in the New York office embracing their deal with "The Grim Reaper" and the assistant U.S. attorneys in the Eastern District (Brooklyn) who were so bent on getting convictions that they side-stepped the Constitution and due process in order to protect this "dirty little secret." If you start turning the pages of *Deal With the Devil*, you will not be able to put it down. ■

### About the Reviewer

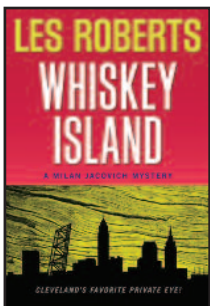
Darryl Genis is a DUI defense attorney in Santa Barbara, Calif.

## Whiskey Island

By Les Roberts

Gray & Company (2012)

Reviewed by Gail Gianasi Natale



Many county officials in Greater Cleveland — including a judge or two — have been charged with such federal crimes as bribery and money laundering and violating the public trust; some have

been convicted, some still await trial, a few await sentencing. Les Roberts fictionalizes these events in *Whiskey Island*, his 14th novel featuring private investigator Milan Jacovich (MY-lan YOCK-o-vich).

Roberts' Jacovich novels, set in Cleveland, use local references in most of the titles. *Whiskey Island* is a peninsula on the Near West Side of Cleveland west of where the Cuyahoga River enters Lake Erie. It once was home to a distillery and now has a marina, a park, and at least one bar.

Roberts doesn't mention the Cuyahoga River catching fire, but in this book the author doesn't treat his adopted home town very well. The city's image — already smudged for various reasons — does not emerge as very nice.

In earlier Jacovich novels, the hero, a former Cleveland cop who grew up in one of the city's many old ethnic neighborhoods, trades on his Slovenian background. More recently Milan has become more cosmopolitan and less ethnic.

Jacovich's current client is a dapper, sleazy Cleveland councilman awaiting trial on 31 counts of bribery. The councilman with expensive tastes and kinky habits hires Jacovich to find out if someone wants to kill him — or not — because he doesn't want to go to the police.

Jacovich used to work alone — with a little help from his friends on the force and in the mob. In his two most recent adventures Roberts introduces Kevin "K.O." O'Bannion, a young former delinquent from nearby Lake County who aspires to be a detective. K.O. loves and trusts no one except his cat. He is not yet sure of Milan.

Jacovich has just hired K.O. to be his associate — Robin to Milan's Batman? The two offer a realistic generational contrast. K.O., of course, is a technical maven. Milan still uses paper, pencil, and the telephone book.

While investigating the councilman's fears Jacovich and K.O. uncover layers of political corruption as they encounter shady landlords, an FBI agent and Cleveland police hostile to the detectives — and a middle-aged hooker who does anything for money. Her strangled body is found near the zoo.

Finding out who or what is behind the murder and corruption is a mystery that only Milan Jacovich can solve.

Both K.O. and Milan are vividly drawn — like two red balloons bobbling down the foggy Cuyahoga — but most of the other characters are not as well-

developed, including Milan's latest and K.O.'s first love interests. As a result the plot occasionally is confusing, but the storyline comes through as one swims through the chapters. The reader must keep paddling, but the result is worth the effort.

Milan and K.O. look into the councilman's background and finances; they investigate several shady folk inside and outside the councilman's ward. These include a high-powered downtown lawyer, a convicted judge, a slumlord minister, a weirdly odd couple, and the county prosecutor and his wife.

The detective and his assistant are likable. You want them to win. Of course they do, but not without some harrowing scrapes. K.O. gets chloroformed and kidnapped by a couple of goons and narrowly escapes from a second-floor window; Milan almost gets killed in a scary chase through a building where boats are stored for the winter — on *Whiskey Island*.

The book is a good read for anyone who likes police procedurals and corrupt politicians. It is especially enjoyable for Clevelanders and Cleveland ex-pats. Besides a good yarn, Roberts provides a tour through popular and not-so-well-known city locations. He takes the reader through nooks and crannies outside the city such as K.O.'s home in Mentor in adjacent Lake County.

Roberts, an L.A. transplant, has improved his knowledge of Cleveland over the years but still makes minor mistakes. He puts the county prosecutor's headquarters in the County Administration Building rather than the Justice Center across the street. (At least Roberts no longer calls the office the district attorney.) And what Clevelanders know as the downtown mall near the lake Roberts calls by its official but seldom-used name, Veterans Memorial Plaza.

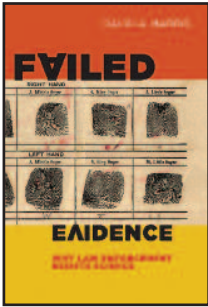
Milan Jacovich continues to be someone with whom a reader would like to share a Stroh's — either at Vuk's Tavern in the old Slovenian neighborhood where Milan had his first legal drink or at a classier bistro on Fourth Street or the Flats. This reader looks forward to Roberts' next installment. ■

### About the Reviewer

Gail Gianasi Natale, a native Clevelander who represents convicted indigents in Arizona state and federal courts, has read all 14 of Les Roberts' Milan Jacovich novels.

## Failed Evidence Why Law Enforcement Resists Science

By David A. Harris  
New York University Press (2012)  
Reviewed by Tony Bornstein



As of this writing, the Innocence Project lists 311 exonerations. If that number is extrapolated to cases in which DNA was unavailable, the number of wrongful convictions becomes

far greater. Yet — except in rare instances — law enforcement officials have alarmingly failed to identify this as a systemic problem. A curious position, given that when the wrong person is convicted the real criminal roams free, possibly committing more crimes. Why do these officials remain so resistant to the growing body of scientific evidence that exposes defective practices and can guide much-needed reforms?

To answer this question, David Harris has given us *Failed Evidence: Why Law Enforcement Resists Science*. The book offers several recommendations to help overcome this resistance.

Harris describes some of the most problematic areas of police investigative practices including standard eyewitness identification procedures and interrogation methods grounded in the so-called “Reid technique.” He then reviews what science has to say about these practices and their propensity to produce wrongful convictions.

Drawing on the groundbreaking 2009 study by the National Academy of Sciences, Harris brings attention to flawed forensics by discussing the paucity of genuinely scientific methods in entrenched investigative techniques such as hair comparison, bite-mark evidence, and fingerprints. He illustrates these flawed practices with notable examples such as the FBI’s fingerprint analyses in the Brandon Mayfield case.

Having established that calls for forensic reform have been irresponsibly disregarded, Harris recounts the rationales most frequently offered by law enforcement for rejecting both the scientific reasoning and proposed fixes. He then proceeds to dismantle these justifications and in their place

presents alternative explanations for the resistance.

In a particularly interesting chapter, Harris discusses the cognitive reasons that police and prosecutors resist scientific studies that call standard practices into question, and which, in a rational system, would readily yield reform. One is cognitive dissonance: “a state of tension that occurs when a person holds two beliefs or ideas that are psychologically inconsistent.” In such a situation, one of the conflicting ideas or beliefs must yield. Harris considers this cognitive state within the context of law enforcement, describing the difficulties officials face reconciling their self-perception as “the instruments of right, truth and justice in the system” with the knowledge that long-utilized investigative procedures have produced miscarriages of justice. In this field, when new scientific evidence conflicts with strongly held beliefs, it is often rationalized away. “[We] don’t need scientists to tell [us] the right way to do a job that [we] know better than anyone.” In the words of one researcher, instead of rational beings, we are “rationalizing beings.”

Distinct from these cognitive factors, Harris discusses the institutional and political barriers to reform. The system pressures police departments and prosecutors’ offices to close cases as quickly as possible; according to one police officer, “The stats are, ‘Did you close the case,’ not ‘Was justice done.’ That’s not even on the police report.” In addition, Harris astutely notes that those who have a stake in the existing order demonstrate a natural inclination “to scrutinize new approaches with extreme skepticism.” In the political arena, few politicians are eager to expend their political capital working to cure wrongful convictions, and reasonably fear that such action offers easy fodder for opponents looking to cast them as insufficiently tough on crime.

*Failed Evidence* helps us understand this mindset of resistance that any reformer in the criminal justice system must confront if she hopes to produce change. The book is not always an effortless read; portions can be dense, as exemplified by a section entitled “Behavioral Economics: Prospect Theory, Loss Aversion, Endowment Effect, and Status Quo Bias.” Nonetheless, those segments are the exception, and by and large, *Failed Evidence* is highly accessible.

The book also sets out several rec-

ommendations, both systemic and in individual criminal cases, to ensure that shoddy evidence is not employed. On a micro level, defense lawyers must actively enforce rules on the admissibility of scientific evidence. Either because of a lack of understanding of scientific principles or for other reasons, these vital challenges remain too few and far between. On a systemic level, the book makes sensible recommendations for reform. Drawing on the latest scientific literature, the author proposes several changes that law enforcement should immediately adopt. Noting that hortatory guidelines are useless if they go unheeded, he also calls for conditioning federal grant money to local law enforcement on its responsiveness to necessary changes.

To secure systemic change, Harris emphasizes the need to convince leaders of the law enforcement community, and those on the political right, to embrace these reforms. These leaders can be persuaded to join the effort if it is cast as a means of ensuring the integrity of the criminal justice system, which will, in turn, promote society’s trust in the results that system produces.

To make this point, he cites several leading examples of reform: In Houston and Dallas, the elected district attorneys created “Conviction Integrity Units” within the DA’s office; in North Carolina, a conservative state supreme court justice established the state’s Innocence Inquiry Commission; and in New Jersey, the attorney general promulgated new statewide guidelines governing police practices in cases involving eyewitness identifications — in 2011, the state’s supreme court “effectively made the guidelines mandatory for police in New Jersey.”

Overall, the book serves as a vital resource for those seeking to overcome the system’s reliance on failed evidence by identifying sources of the problem and suggesting both quick and long-term remedies. It will help ensure the adoption of evidence-based methods that can achieve more accurate results in the nation’s criminal justice system. ■

### About the Reviewer

Tony Bornstein is an Assistant Federal Public Defender in Oregon.