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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01 Texas Code of Criminal Procedure

# Heart of darkness

The story of David Tuck's brutal sexual assault of a Hispanic teenager made national headlines. Here's how Houston prosecutors waded through conflicting testimony, a lack of physical evidence, and a defendant's horrific history to secure a life sentence.

***By Mike Trent***
Assistant District Attorney for Harris County


Mike Trent

By the time they got home from the Crawfish Festival, Billy Reyes[1] was thoroughly stoned. He and his new friend Gus Sons had been drinking vodka, smoking marijuana, snorting cocaine, and popping alprazolam "bars" for most of the day. Gus, a small-time drug dealer whom Billy had met at alternative school, had supplied the alcohol and narcotics, and it was his house the boys returned to that night, along with two other teenagers they had met up with at the festival: David Henry Tuck and Keith Robert Turner.

Tuck and Turner were Gus' friends from the neighborhood. Gus had known Turner for a few months, while Tuck was a much more recent acquaintance. Gus' nickname for Tuck was "Skinhead David" because of Tuck's shaved head, bigoted views, and neo-Nazi tattoos. Gus, who was of partly Hispanic descent, kept his ethnicity to himself. Tuck called himself an "independent skin" and made no effort to hide his racial prejudices. A brooding, quick-tempered young man, Tuck had just turned 18 and had recently been paroled—for the second time—from the Texas Youth Commission. He was a man of few words, but when he did speak he spewed venom against minorities and regurgitated the same tired, racist diatribes white supremacists have always used to justify their hate-filled ways of thinking.

Turner was like Tuck's shadow. He didn't have any swastika tattoos, but he echoed Tuck's sentiments on the racial superiority of whites. Turner was 17 years old and he, too, had recently been released from incarceration, but in his case it was for adult misdemeanors committed in Harris and Montgomery Counties. Turner generally followed Tuck's lead, but every now and then, as he would later that night, he had an idea of his own.

When the four got home from the Crawfish Festival in Old Town Spring, the binge of alcohol and drugs continued unabated. Gus' 12-year-old sister, Danielle, and a friend were at the house, too, and they hung out with the guys for a while, but it seems a bit of a stretch to call such a happenstance, informal gathering a "party," as the news media would characterize it later. Danielle's friend passed out early and went to sleep in a bedroom; she would neither see nor hear any part of the assault. Danielle stayed up with the four guys. By now Billy was so intoxicated he was stumbling around, bumping into furniture and knocking things over. He was not, however, too intoxicated to take offense when Tuck referred to Hispanics as "wetbacks." A heated argument broke out, and Gus

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# the Executive Director's Report

*By Rob Kepple*
TDCAA Executive Director

# Thanks for your service

In the last *Texas Prosecutor* we had the chance to thank a few prosecutors who have retired from the profession and moved on. Add to that list of folks who left office at the end of 2006 **Chris Schneider** (CDA in Caldwell); **Bill Hill** (CDA in Dallas); **Mike Wenk** (CDA in San Marcos); and **Bruce Fetter** (CDA in Gilmer). Y'all have made us proud—best of luck to you!

## The answer people

Congratulations to our research attorney, **Sean Johnson**, who passed the bar and was sworn in November 10 by the **Honorable Cathy Cochran**, Court of Criminal Appeals judge. The good news is, even though he is now a certified lawyer, he will continue to charge the same amount for his legal assistance!


Emily Sitton

And welcome to our new law clerk, **Emily Sitton**. Emily is a third-year student at the UT School of Law and is fresh off a tour of duty as an intern at the Travis County DA's Office. She has already hit the ground running, so feel free to call in and challenge her with a tough question. She's up to it.


Sean Johnson and Judge Cochran

## A hearty TDCAA welcome

Some new folks have been appointed to elected prosecutor positions during this last year. We have missed a few along the way, but you will meet these new prosecutors at our seminars: **Roy Cordes, Jr.** (CA in Richmond); **Rod Ponton** (CA in Alpine); **Donnis Scott** (CA in Tahoka); and **Jack McGaughey** (DA in Montague).

And January 1, a new crop of elected prosecutors took office. Welcome to **Richard "Trey" Hicks** (CDA in Lockhart); **Jody Upham** (CA in Ozona); **Paul Johnson** (CDA in Denton); **Sherri Tibbe** (CDA in San Marcos); **Clint Allen** (CDA in Linden); **Craig Watkins** (CDA in Dallas); **Landon Lambert** (CA in Clarendon); **Steve Hollis** (CDA in Jasper); **Rick Harrison** (CDA in Kaufman); **Misti Spacek** (CDA in Newton); **Bill Burnett** (CDA in Coldspring); **Billy Byrd** (CDA in Gilmer); **Lowell Thompson** (CDA in Corsicana); **Lee Hon** (CDA in Livingston); **Kristen Fouts** (CA in Haskell); **Stephen Tyler** (CDA in Victoria); **Elton Mathis** (CDA in Hempstead); and **Staley Heatly** (DA in Vernon).

Special mention goes to the newly appointed county attorney in Pecos, **Alva Alvarez**. Alva has just graduated from UT Law and passed the bar. As of December, at our Elected Prosecutor Conference, she had not yet received her bar card number. Alva was just getting her feet wet as an assistant when **Richard Slack**, the 92-year-old county attorney who served the public in various positions for over 40 years, retired. Don't let Alva get lonely out there. We are doing all we can to make sure y'all have the support you need to hit the ground running, but a phone call of encouragement from a neighbor wouldn't hurt either!

## Feats of Clay

As you know, **Clay Abbott** is our DWI resource prosecutor. In the last couple years he has crisscrossed Texas with tailor-made training for prosecutors and police officers. He's traveled so much he's on his second car (fortunately, he was able to find a decent duplicate of his trademark red Dodge convertible).

We have just been notified that Clay's efforts have been nominated for a prestigious "Best Practices" award from

the National Highway Traffic Safety Administration. Outstanding job, Clay! I expect the awards ceremony to take place this spring, and we will plan a watch party.

So if you want some "best practices" to hit your town, check out the website, www.tdcaa.com, to download an application for Clay's DWI training. Do it soon because he is already filling up his travel dates for the winter and spring. In the meantime, we're going to start hunting for another red convertible. At this rate he's going to need it soon.

## Membership update

Your association enjoys tremendous support from the folks it serves. Because of limited resources, we have to find different ways to bring you the training and services you need. One way is through our modest membership dues.

And as a reminder, your membership brings you some important services:

- discounted registration fees to the 2007 TDCAA Summer Legislative Updates;
- a complementary membership directory on CD-ROM, which will be shipped this spring;
- free registration to three-hour regional ethics training; and
- for elected prosecutors, free weekly legislative update faxes during the 80th Legislative Session from Shannon Edmonds (which can be shared with the whole office).

Associate members receive a free subscription to this flagship publication, *The Texas Prosecutor.*

If all of these benefits sound too good to pass up and you are not yet a full-fledged, dues-paying member, please call Lara Brumen, our membership director, at 512/474-2436 to sign up. We'd love to have you.

## Ode to a website

Many of you frequent the TDCAA website, www.tdcaa.com, which is a great resource for Texas prosecutors. One of the best things about it is the user forums where prosecutors share ideas and information. And we have found that the open forum can be downright inspirational to some members.

Recently, Richard Alpert, known for his DWI expertise and his books on the subject, showed real creative flare when he penned these lyrics as a way to honor the site:

**To the tune of "My Favorite Things":**

*Law briefs and papers and listings of experts,*
*Postings and musing and self righteous lecture,*
*Getting quick help as your rope frays to string,*
*These are a few of my favorite things.*

*Comments by Bradley in every third posting,*
*Talk about trials and sometimes some boasting,*
*Learned opinions and brief borrowing,*
*These are a few of my favorite things.*

*When the day drags*
*When my zeal sags,*
*When I'm feeling sad.*
*I simply log onto this wonderful board*
*And then I don't feel so bad.*

Why do I suddenly feel the urge to sew a bunch of kids' clothing out of curtains?

## You *can* come home again!

Many of you know **Dain Whitworth** as a defense attorney here in Austin. Many of you know Dain because he is married to **Judy Bellsnyder**, one of TDCAA's meeting planners. Even more of you know Dain because he was the first executive director of TDCAA, when this association got its start in training back in 1970. A good guy to be around, even if he was part of the loyal opposition.


Dain Whitworth

Well, I'd like to introduce you to Dain Whitworth, Assistant Criminal District Attorney in Port Lavaca. Dain took a job with **Dan Heard** in January. It sure is good to have Dain at our counsel table. Welcome home.

# DWI Corner

*By W. Clay Abbott*
TDCAA DWI Resource Prosecutor

## On your wish list for Santa

This holiday season, many Texas jurisdictions will see increased law enforcement and media activity during a just-announced crackdown on intoxicated drivers. I know more cases are not on any prosecutor's Christmas list, but fewer impaired drivers probably is, and the push is on.

On November 20, 2006, Mothers Against Drunk Driving (MADD) announced a nationwide Campaign to Eliminate Drunk Driving. This group, which has spearheaded campaigns for increased enforcement, better laws, and public awareness of the impact of impaired driving on innocent victims for decades, was joined by the National Highway Traffic Safety Administration, the Insurance Institute for Highway Safety, alcohol and auto industry groups, and law enforcement. Their call is not for *reducing* impaired driving but *eliminating* it. This is a lofty goal indeed. I, for one, would be glad to see it succeed so I can find another vocation.

The campaign has four initiatives:

- high-visibility law enforcement,
- maximum implementation of ignition interlocks,
- advanced technology research initiative, and
- widespread public support.

### Law enforcement

As I mentioned, December will be full not only of caroling and mistletoe but also highly visible police crackdowns on intoxicated driving. You may be contacted by local law enforcement to join in public announcements concerning your community's responses to national anti-DWI efforts. The idea is that there is no reason to sneak up on drunk drivers: The more publicized the initiatives, the greater the deterrence. Now, fewer impaired drivers on the road is on most prosecutors' Santa wish list. When we join with law enforcement in making these announcements, the message is stronger and certainly reminds the community of our largely invisible efforts.

### Ignition interlocks

The second initiative is also dependent on our work. Ignition interlocks are used in motor vehicles to disable the vehicle's ignition if the device detects alcohol in a deep-lung breath sample. Improvements in these devices have made them more difficult to tamper with or bypass. One very helpful feature is that they send reports of usage, failure, or tampering to the vendor, which then provides that information to probation or other monitoring entities. (What a compelling potential source of punishment evidence!) With DWI offenses having such a high and certainly dangerous incidence of recidivism, this technology can save lives.

Article 42.12 §13(i), Code of Criminal Procedure controls ignition interlock as a condition of DWI or other Chapter 49 offense probations. The condition is usually that the defendant will install, maintain, and pay for an ignition interlock device in his vehicle and not drive a vehicle in which ignition interlock is not installed.[1] All defendants receiving subsequent DWI (or other Chapter 49 offense) convictions must install an ignition interlock.[2] In addition, first-time offenders under age 21[3] or having a BAC of 0.15 or higher[4] must also install an ignition interlock.

Ignition interlock may be a condition of bond if the magistrate finds the condition reasonable and related to the community's safety.[5] It is a *mandatory* bond condition if the offense is a subsequent Chapter 49 offense or first-time intoxication manslaughter or intoxication assault offense.[6] Like with probation, the magistrate orders the device's installation and maintenance and that the defendant not operate vehicles without an ignition interlock.[7] Unlike proba-

tion cases, prosecutorial intervention in monitoring is a must if the bond conditions will have any effect.

## Medical technology

The third initiative is a forward-looking one. It is simply amazing to watch the development of modern medical science. The simplicity, mobility, and accuracy of devices monitoring the human body are accelerating at a science-fiction-type pace. As an example, technology developed to constantly monitor blood glucose levels in diabetics has launched an amazing ability to monitor a person's blood alcohol concentration (BAC). This new technology, called a Secure Continuous Remote Alcohol Monitor (SCRAM), has already come into use across the country and in Dallas, Denton, Rockwall, Kaufman, Collin, and other Texas counties. In simple terms, this ankle bracelet measures perspiration from the subject's skin to detect alcohol's presence. Our skin constantly gives off small amounts of perspiration and, based on the same scientific principles as breath testing, the percentage of alcohol in sweat is the same percentage of alcohol in blood. Using technology developed for communications, the device then sends its results by modem to a server, then to the Internet for monitoring by probation or prosecution. It produces an hourly confirmation that the individual is either consuming alcohol or not[8]—a result previously possible only through incarceration.

This technology is often used by prosecutors as a means of preventing a defendant from avoiding ignition interlock conditions. Those defendants who claim that they don't operate a vehicle or who claim that employers' vehicles cannot be equipped, are offered this more intrusive but more effective alternative. I have heard that making such an offer often helps the accused decide that he *does* have a vehicle that should be equipped. SCRAM is also tailor-made to fit DWI Court initiatives. Repeat offenders receiving this intensive, high-contact probation can be monitored hourly instead of weekly, and authorities can respond to the results in hours rather than weeks.

Based on the same science, auto manufacturers have developed a steering wheel that makes a similar analysis when the driver starts the car. Can you imagine what this might potentially mean? A world without DWI! What a great gift to prosecutors and the communities we serve! Believe me, I would love to train on another topic. MADD is not suggesting that every car have such a device, but it does advocate technological solutions and thinking outside the box. Prosecutors must be aware of these technologies because we all know what happens when we are left out of plans that affect the work we do.

## Public support

The final initiative is public support, which is created by community dialogue. You would think that everyone has heard the message about how dangerous, thoughtless, and selfish impaired driving is, but my guess is that there are a bunch of folks on your dockets and several on your jury panels who just haven't gotten the message yet. So I am glad the folks at MADD are still talking. We need to continue our dialogue with the public, in and out of voir dire, as well. Even more open discussion about impaired driving and its prevention is high on my Christmas list, even topping that new GPS gizmo for my car.

## Endnotes

1 Article 42.12 §13(i), CCP.

2 Article 42.12 §13(i), CCP.

3 Article 42.12 §13(m)(2), CCP.

4 Article 42.12 §13(i), CCP.

5 Article 17.40, CCP.

6 Article 17.441, CCP.

7 Article 17.441, CCP.

8 For more information on this device, see a manufacturer's website at www.alcoholmonitoring.com.

# Photos from the Key Personnel Seminar

# Photos from the Elected Prosecutor Conference

*Continued from the front cover*

# *Heart of darkness (cont'd)*

had to step between Tuck and Billy. It was the first and only time he would intervene on Billy's behalf.

Not long thereafter Gus discovered that his bag of narcotics, some of which he had picked up at the Crawfish Festival, was missing. Upset at the prospect of losing more than $300 worth of drugs, Gus asked Billy about them, and Billy denied stealing the drugs. A short time later, as Gus, Tuck, and Turner were smoking on the front porch, the highly inebriated Billy attempted to kiss Danielle. Danielle reported it to Gus, who then confronted Billy. Tuck accused Billy of stealing the drugs and trying to rape Danielle, both of which Billy denied. Without any further warning, Tuck slugged Billy in the face hard enough to knock him into a dog kennel. Billy just lay there, too drunk and stoned to get up. Sensing easy prey, Tuck and Turner dragged Billy into the backyard. Gus again accused Billy of kissing Danielle, hit him once in the chest, and backed off. That ended Gus' participation but not the assault. What followed was an attack of horrific violence.

## The bloody assault

Tuck and Turner began kicking, beating, and stomping Billy Reyes, Tuck wearing black, steel-toe boots, one of which was emblazoned with a swastika. Yelling "Beaner!" and other racial epithets, Tuck inflicted most of the damage. After one especially vicious kick, Tuck shouted "White power!" and gave a Nazi salute. Unable to fight back or defend himself in any way, Billy just lay there and took it, mumbling and groaning occasionally. Undeterred, or more accurately *encouraged* by the lack of resistance, Tuck and Turner began stripping off Billy's clothing.

"If you had any white in you, you would be helping me," Tuck told Gus. He then pulled out a silver pocketknife. When Gus started to protest, Tuck only glared at him. "Don't bitch out on me now," he told the frightened Gus, and began slashing at Billy's bare chest. He was making superficial wounds, almost as if he was trying to draw something. Detectives would later come to believe Tuck was attempting to carve a swastika.

While Tuck did this, Turner lit up a cigarette, which gave Tuck another idea. Taking the cigarette, he began touching the tip of it to Billy's bare skin, burning him on the arms, legs, back, and buttocks. Turner lit up another cigarette and joined in. Finally, Turner put the cigarette out right between Billy's eyes. Tuck chuckled, "Now he looks like a f***ing Hindu!"

Billy lay there motionless, a bloody mess. Tuck had kicked him in the face hard enough that detectives would later find medium-velocity-impact blood spatter on the left leg of Tuck's khaki pants. If Tuck felt rage inside, its only expression came out in his actions. Gus and Danielle saw few outward signs of anger, just a methodical infliction of pain instead. Billy could no longer speak because Tuck had stomped on his throat hard enough to break one of his tracheal rings. All he could manage was a weak, agonized moan. He lay there a few feet from the patio, naked and helpless. And now it was Turner who had an idea.

Walking over to the patio table where Gus was, Turner grabbed a pipe standing in the center of it. It was a white pipe made of PVC that served as the lower half of some long-forgotten umbrella. Normally it sat in a concrete base under the table. The top half had a joint and hook to hold the upper half with the umbrella. The lower half abruptly tapered to a sinister, conical point. Turner carried it over to where Billy lay facedown on the ground.

Squatting beside him, Turner shoved the white pole between Billy's buttocks and into his rectum, making sure that the sharp point was inside the anus. He then looked up at Tuck and, holding the pole with the blunt end angled upward, motioned with his head. Taking the invitation, Tuck viciously stomped on the blunt end of the pole with the bottom of his combat boot as hard as he could. Billy moaned sharply. Turner laughed. Tuck stomped the pole a second time even harder. Doctors later estimated that the pointed pipe went 8–10 inches inside Billy's body, rupturing his bladder and colon in the process.

Tuck and Turner were not finished, however. The two dragged Billy to the far end of the backyard, where a fence separated it from a drainage bayou. Noticing grass near his mouth, one of them grabbed a handful of grass and dirt

and shoved it down Billy's throat, gagging him. While Turner tossed Billy's shoes over the fence and began burning his clothing in a barbecue grill, Tuck returned to a frightened Gus. "Do you have any bleach?" he demanded. "We've got to get rid of the evidence." Gus shook his head no, but Tuck knew where the laundry room was and went inside to look for himself. He returned with a full bottle and a warning glare for Gus. "If you tell anyone about this, I'll kill you," he said, walking to the edge of the backyard where Billy lay, the pole still inside him. Turner joined him there.

Taking the cap off the bleach, Tuck poured the bottle into Billy's face, eyes, and open mouth. He poured bleach all over Billy's naked body, poured it down the pipe and into his traumatized abdomen as well. (Even seven months later at the trial, Billy still had visible areas of skin the bleach had burned off. The physicians who treated him did not think that bleach could account for the reaction they saw in Billy's immune system. They believe other chemicals, perhaps something like acetone, were poured on and in him.) Grabbing the end of the pole, Turner yanked it out and struck Billy in the ribs with it. He held it out while Tuck poured the last of the bleach on it, cleansing away any blood or fecal material, then Turner tossed it aside, laughing.

And at last, it was over. It had probably been around midnight when the confrontation began. Tuck and Turner had taken their time with Billy, as if savoring each moment of torment. It was now past 3 a.m. Leaving their victim for dead, the two leisurely went inside, warning Gus of the consequences if he reported them to the police. Scared and ashamed, shaking from the drugs he had taken and from what he had witnessed, Gus did nothing. He went inside and passed out on his living room couch. When he came to later that morning, it was around 9:45. Going outside to feed the dog, he saw Billy's naked body in the backyard, and everything came rushing back. Running inside, he pounded on his mother's door and yelled for her to call 911. Then he helped Billy inside to the kitchen table. Billy had lain injured in the backyard for at least six hours.

An ambulance came and transported Billy to the hospital. Tuck and Turner had beaten Billy so badly that his own parents could not recognize him. His face had swollen to the size of a pumpkin, with his eyes puffed shut and his lips turned inside-out. Noticing injuries to Billy's rectum, doctors soon realized they were dealing with not just a severe beating but also a sexual assault. Over the next few days they watched with deepening concern as Billy's white blood cell count skyrocketed and his organs shut down. Even after 48 hours in the hospital, he was not expected to live. Billy would stay in the hospital for the next three and a half months, undergoing dozens of surgeries to cleanse and repair his internal injuries. To this day he wears a colostomy bag, and doctors can only hope that they can someday repair his colon so that he can use the bathroom normally.

Deputies from the Precinct Four Constable and the Harris County Sheriff's Department who responded to the scene had little information to work with. They knew they had a badly beaten victim, but there were apparently no witnesses. Gus, who had popped more alprazolam while the police were on their way, lied and claimed to know nothing about the assault. Danielle, who had witnessed the beating from the sunroom and her upstairs bedroom window, also feigned ignorance. Fortunately, as so often happens in our business, the dimwitted perpetrators themselves provided detectives with their first big lead. Alert deputies saw Tuck and Turner skulking around the far side of the back fence, looking for Tuck's cell phone, which he mistakenly believed he had dropped. They detained the two and soon noticed blood on Tuck's pant legs. When questioned about it, Tuck requested an attorney. But later, when he overheard a comment by a detective that "that kid sure got the hell beat out of him," Tuck voluntarily (and *not* in response to custodial interrogation) admitted that he had beaten up Billy because he had "tried to rape Gus' sister."

Detectives would later take two voluntary, video-recorded statements from Tuck in which he admitted that he "lost control" and "blacked out" while beating Billy, and that he had been punching Billy while Danielle Sons sexually assaulted the victim with the pipe. Because of a problem with the legal warnings on the tapes, the trial court would later suppress these statements. The jury would never see them.

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## Trial preparation

The prosecution of David Henry Tuck presented numerous challenges. Most significant was the fact that the only eyewitnesses, Gus and Danielle, had not been honest with detectives initially and had minimized their own involvement in the offense. Though their account of the assault was basically consistent, the details of their own whereabouts and actions sometimes contradicted each other. Even if they were not outright accomplices, the two siblings had hardly shown a great deal of compassion or humanity toward Billy Reyes that night, both going to sleep with him still lying in the backyard, suffering. But as repulsed as everyone was at their callous indifference, their testimony was absolutely vital. Although the blood spatter on Tuck's pants strongly suggested he had kicked the victim, there was no physical evidence linking him to the pipe. The only evidence proving what he had done would have to come from Gus and Danielle.

Second, due to the lack of information on the scene, key pieces of evidence had not been collected on the morning of the offense. Some were *never* collected. Although it is easy to criticize with the benefit of hindsight, we must remember that many key details of the assault were not revealed by the reluctant witnesses until weeks and months later, long after the evidence was no longer available. The detectives were not even able to interview the witnesses on the day of the offense because they were still too intoxicated.

Third, we would receive no help from the victim. For more than a week, we feared that Billy Reyes would not survive at all and that we would be seeking a capital murder indictment instead of one for aggravated sexual assault. As he gradually stabilized and recovered in the hospital, I held out hope that some memories would come back to him prior to trial. But perhaps mercifully for his sake, Billy had no memory whatsoever of the attack or even the events leading up to it. He could add nothing to verify or contradict what Gus and Danielle said.

Finally, publicity posed a challenge. In the days immediately following the offense landing in my court, the news media was awash in lurid stories about the case. Neighbors of the Sons family as well as Tuck and Turner came forward to put in their two cents, relating not only things that they had witnessed themselves but also rumors that were floating around the Klein ISD about what had "really" happened. As the shocking details of the assault leaked out, along with the racial aspects, outrage erupted. I received furious letters, phone calls, and emails from people all over the country, demanding swift and harsh punishment for the perpetrators. Many groups insisted that the case be prosecuted as a hate crime under Penal Code §12.47. When I tried to matter-of-factly explain that the hate crime statute did not apply to 1st-degree felonies and would have no effect on the punishment, some media outlets portrayed it as a lack of zeal on my part for prosecuting the case, and outrage grew even more. As more and more publications and shows asked for interviews, I finally had to stop talking to the press for fear that the publicity would result in a change of venue.

Privately, I was glad that the hate crime statute did not apply because I was not at all certain that I could prove beyond a reasonable doubt that David Tuck had "intentionally selected" Billy Reyes "because of the defendant's bias or prejudice against a group identified by race.…"[2] After all, there were so many unknowns. Was the assault really about race, or was it about Billy's attempt to kiss Danielle? Or could it be neither of the above? Reading between the lines, I suspected that the missing narcotics had more to do with the attack than anyone was admitting. Even Tuck, in his video statements, suggested the possibility that Gus had "set the whole thing up." While some groups still pressed us to pursue hate crime allegations for statistical purposes, I was not about to add anything extra to my burden of proof with a superfluous enhancement.

Once it became clear that Billy was going to make it, we did what we could to fast-track the trial. With two unpredictable teenage witnesses, one of whom, Gus, was already on juvenile probation, I wanted to get the case tried before anything else happened to undermine it. The medical examiner's office completed DNA testing on a huge volume of evidence, verifying that blood consistent with the victim's genetic profile was all over Tuck's pants, boots, socks, and even underwear. Nikia Redmond, an analyst with the ME's office, would later testify that Billy's blood was on the hips and back of Tuck's

boxer shorts, possibly transferred there when he was pulling up his loose-fitting khaki pants. There was no genetic material of any kind on the pipe, which was consistent with Gus and Danielle's account of Tuck pouring bleach on it to destroy evidence.

As trial approached, I soon realized that the punishment phase might well involve more witnesses and evidence than the guilt/innocence phase. David Henry Tuck had been in trouble since he was 12, and his record consisted almost exclusively of assaultive offenses, the lone exception being a possession of a prohibited weapon he picked up after bringing a switchblade knife to school—hardly any less alarming than assault. All but one of these cases had resulted in juvenile adjudications, but the jury needed to hear the underlying facts because two of the assaults had been racially motivated. My co-counsel, Denise Nassar, shouldered the burden of interviewing and organizing the witnesses we called at the punishment phase, and I am deeply indebted to her for a job well done.

## The trial

On the day of the trial, we called a jury panel of more than 120 people. Almost half of them were excused because of strong opinions they had formed from pretrial publicity. Eventually, the jury of 10 women and two men heard two days' worth of evidence during our case-in-chief.

Gus did surprisingly well at Tuck's trial. On the stand, for the first time, he was honest about the fact that he had allowed the assault to happen without doing anything to help Billy Reyes. He agreed on cross-examination to being a "drug-crazed, armed drug dealer" as the defense characterized him, but his passive, remorseful demeanor on the stand enhanced his credibility to me. By no means was Gus *likable*, but he was at least *believable*.

**Prior to trial, I had grappled with the ethical dilemma of presenting testimony from Gus and Danielle that I simply did not believe.**

Danielle was a different story. Cold and sullen on the stand, her dark eyes showed no emotion whatsoever as she recounted what had happened to Billy. She claimed that Billy's attempt at kissing her had not upset her, and she denied encouraging or participating in the assault in any way. When asked about how she hurt her big toe, which several witnesses had seen badly bruised the next day, Danielle claimed that she had stubbed it on a curb walking her friend home that morning.

Prior to trial, I had grappled with the ethical dilemma of presenting testimony from Gus and Danielle that I simply did not believe. Their testimony regarding the elements of the offense was credible and supported by physical evidence, but other statements about their own involvment were not. How could I avoid suborning perjury? After consulting with Scott Durfee, general counsel and our office's ethics guru, I chose to handle this problem by 1) disclosing to defense counsel the portions of testimony I did not believe, including any evidence impeaching or contradicting them, 2) confronting Gus and Danielle about the statements I did not find credible, and 3) phrasing my questions at trial in a way that made it clear I was not sponsoring that particular testimony (e.g., "You are claiming that you never touched the complainant, correct?" and "And your explanation for your hurt toe is what?").

In the end, the jurors believed enough of Gus and Danielle's testimony to convict on the basis of it. They were unanimous in their condemnation of the teenagers' actions, however, and appalled at the lack of parental involvement that allowed for rampant drug abuse right under their mother's nose.

Billy Reyes testified near the end of the trial. He had no memory of the assault, or of even meeting Tuck and Turner, but he authenticated some photos of his injuries and was able to identify a bloody pair of shorts detectives had found concealed in an upstairs hamper at the Sons house. He added little to the case, but I knew the jury would want to see and hear from him before reaching a verdict.

During the trial, Denise and I used a variety of visual and multimedia aids to present our case, ranging from the traditional (a blown-up checklist of elements and an extra-large board listing

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the defendant's criminal history) to the more advanced (a PowerPoint presentation summarizing the evidence against him). After deliberating a little more than four hours, the jury convicted David Henry Tuck of aggravated sexual assault.

## Punishment

The defendant's prior juvenile adjudication and TYC commitment for aggravated assault acted as a prior felony conviction for enhancement purposes, so Tuck faced a range of 15 to 99 years or life in prison and up to a $10,000 fine. However, juvenile priors do not affect probation eligibility, so jurors were instructed that they could consider community supervision if they found the enhancement paragraph in the indictment to be "not true." Fortunately, this would not prove to be an issue, legally or factually.

At the punishment phase, Denise and I presented evidence of Tuck's history of assaultive behavior. Tuck had committed at least five assaults, two of them felonies and another two racially motivated. At age 12 he had viciously assaulted a teacher at his elementary school. At 14 he was caught with the switchblade, and later, while on probation for the weapon case and along with two other adult skinheads, Tuck had savagely attacked a Hispanic man at a gas station, kicking and stomping the victim with steel-toed boots. This incident ultimately resulted in the federal prosecution and conviction of the adult skinheads for racially motivated federal crimes, and it got Tuck locked up for the first time, but it did not stop the violence. At age 15, after his release but while still on probation, Tuck stabbed a girl at a party, earning himself his first trip to TYC. At age 16, less than three weeks after his release on parole, he assaulted a young Hispanic boy in his neighborhood, shouting "White power!" as he knocked him off his bike. When deputies tried to arrest him for that offense, he kicked one of them as well. Back to TYC he went.

In all, Tuck had been incarcerated for more than three of the last four years, and yet had somehow managed to commit three felonies and four misdemeanors by the time he was 18 years old. He had committed both of his last two offenses just weeks after being paroled from TYC.

**Perhaps mercifully for his sake, the victim had no memory whatsoever of the attack or even the events leading up to it.**

At the punishment phase, the jury learned more about Tuck's extremist views. An expert familiar with white supremacist symbolism testified about the meaning of the different tattoos on Tuck's body. Some, such as the swastikas and a crudely done "SKIN FOR LIFE," were obvious; others, such as "1488," more subtle.[3] Tuck's clothing told an even grimmer tale: The red laces on his black boots meant that he was a skinhead who had drawn blood for the cause of white supremacy. His studded belt with a horned skull buckle could serve as a fearsome weapon, just like the 4-foot tow chain hanging from his wallet. Silver *totenkopf* skulls, a familiar neo-Nazi motif, appeared as a recurring theme. Everything about the defendant seemed to be devoted to death and violence.

Delving into Tuck's school and TYC records, we discovered that, in his case, the outer image he projected matched his inner thoughts to a T. In elementary school he had once threatened to "blow up the school," and his disciplinary records listed him as "incorrigible" as early as age 12. At TYC, he had proudly proclaimed his skinhead identity and had listed "fighting" as one of his "special skills" during his initial assessment. He had always had difficulty controlling his anger. His parole officer testified that Tuck seemed to do well in structured, secure settings, but that in the outside world, he was "explosive." Finally, during two psychological evaluations at TYC, Tuck had admitted that he liked seeing blood and that he heard voices on a weekly basis telling him to kill people. He told the psychologist that his recurring obsession was to kill and mutilate a girl, squeeze the blood out of her, stitch the body parts back together and have sex with her corpse. During the punishment phase of the trial, I had Tuck's TYC parole officer read those quotes verbatim from the records as the jurors listened with absolute disgust and revulsion. The oppressive heaviness that fell over the courtroom after he did so was almost too much to bear.

After the State rested on punishment, Tuck's defense attorneys called his mother to the stand. She testified that he had come from normal, working-class family in the north Houston suburb of Spring. His parents had divorced when he was young, and his mother testified that when Tuck was very small, his father had fired a gun in front of him while in a rage. She also testified that Tuck's older half-brother, Sammy, a skinhead currently in prison, had influenced Tuck with his white supremacist beliefs. A jail chaplain also came to testify that he was leading Tuck toward Christian salvation and that he had seemed eager to learn about the Gospel. But neither he nor Tuck's mother could offer any insight or explanation about what had driven him to commit such a heinous offense. How or why he had become such a monster, no one could say.

After both sides had rested, it was time for closing arguments. The defense attorneys, faced with an overwhelming amount of negative evidence about their client, focused on a religious theme, asking the jury to be merciful to the defendant just as Jesus Christ had been merciful to all sinners. It was a low-key argument, conceding the issue of probation and simply asking for some leniency.

For the prosecution, it was time to pull out all the stops. During arguments on guilt/innocence, I had restrained myself from dwelling on too many of the gory details of the offense, choosing instead to logically guide the jury through the evidence and legal issues and to save my righteous outrage for punishment. Now, Denise and I brought the jury face to face with every sadistic thing David Tuck and Keith Turner had done to Billy Reyes. The savage beating, the cruel torture, the brutal sodomy with the pipe—just the offense by itself was more than enough to merit a life sentence. When you considered David Tuck and the type of man he was, with a history of violent, hurtful behavior, it made the appropriate sentence even more obvious. Finally, we reminded the jury that the world, including other skinheads and white supremacists, was watching to see what they would do. What kind of message did they want to send to other potential criminals with hatred in their hearts? What kind of penalty did an offense motivated by such odious beliefs demand? Nothing other than the maximum would be acceptable: A life sentence—with a $10,000 fine if they wanted to send a symbolic message as well.

I asked the jurors not to compromise, which in some cases would have been a dangerous gamble, risking a mistrial just to get a particular punishment verdict. But here I figured it would be a safe bet, and the jury did not disappoint me. In less than 45 minutes they gave David Henry Tuck life in prison and a $10,000 fine, the most they could give him. He took the verdict with the same dull, stoic glower he had worn on his face throughout the entire trial. When asked if he had anything to say before the judge pronounced sentence, his only words were "No, sir." The "SKIN FOR LIFE" had gotten just that.

*Editor's note: Shortly after the Tuck trial finished, Mike and Denise went to trial on Keith Turner's case. On December 11, 2006, a jury convicted him and sentenced him to 90 years in prison.*

## Endnotes

1 Pseudonym.

2 Code of Criminal Procedure Art. 42.014.

3 "14" refers to "14 Words": "We must secure the existence of our race and a future for white children" (a popular neo-Nazi slogan coined by David Lane, an imprisoned member of the white supremacist group The Order); "88" refers to the eighth letter of the alphabet, H. "88" = "HH" = "Heil Hitler."

# AS THE JUDGES SAW IT

*By David Newell*
Assistant County Attorney in Fort Bend County

## Questions

1 Paula Weightman was standing outside her house smoking a cigarette when she heard bloodcurdling screams from her neighbor, Patricia Ford. Ms. Weightman heard her neighbor scream, "Get out, get out!" followed by Ms. Ford's boyfriend, Vincent Davis, yelling, "I will show you!" Hitting noises followed this exchange, and Ms. Weightman called 911. The police arrived to the sounds of Patricia screaming for help. One of the officers opened the front door and told Patricia to run out of the house. She tried to run as she came out, even though she could barely stand. Ms. Weightman called Patricia over and helped her onto Ms. Weightman's porch. Patricia was trembling and holding her neck. She told Ms. Weightman, "He tried to kill me."

After the police had handcuffed Davis, one of the officers spoke with Patricia. It was during this conversation that Patricia related that she and Davis had gotten into an argument, he had accused her of sleeping with other men after she had insisted that he look for a job. Patricia told the officer she had tried to avoid Davis during the argument by moving to different rooms and even trying to leave the house. Unfortunately, as she tried to leave, Davis grabbed her by her shirt, threw her on the couch, and started beating her about the head and face with his fists and even put his thumbs in her eyes. He also put his knee on her throat while she was still laying on the couch. Patricia told the officer that she tried to throw coffee on Davis, but he grabbed the coffee and then threw her to the ground. While she was on the ground, Davis put his knee in her back and wrapped a rope around her neck, pulling her torso off the floor. Patricia pleaded that she couldn't breathe, and Davis released her. Patricia started screaming, and Davis choked her again, this time with his hands. Finally, Davis released her and she tried to run out the door, but he prevented her from leaving.


David Newell

Davis was charged with aggravated assault with a deadly weapon. Davis testified at trial, admitting that he had started the shouting match and acknowledging that he had inflicted the injuries shown in a photograph of Patricia. However, he denied choking her, putting a rope around her neck, and putting his thumbs in her eyes. Patricia did not testify at trial. The State introduced Patricia's hearsay statements to establish the elements of the case. The jury was instructed both on aggravated assault and simple assault, but Davis was convicted of the greater offense. The trial court sentenced him to 12 years in prison. On appeal, the State conceded that Ms. Ford's conversation with the police was testimonial and therefore erroneously admitted under *Crawford v. Washington*. Was the admission of Patricia Ford's hearsay account of the incident during Davis's aggravated assault with a deadly weapon trial harmless error?

yes _____ no _____

2 Jerry Glenn Reynolds was charged with driving while intoxicated after he blew twice the legal limit. Prior to trial he filed numerous pre-trial motions to challenge the admissibility of the breath test results. At a pre-trial hearing on those motions, the arresting officer, Trooper Parker, testified that he, a DPS trooper, was a certified Intoxilyzer 5000 operator. The technical supervisor also testified and was able to explain the science and technology upon which the Intoxilyer 5000 is based. She explained that the instrument that had tested Reynolds' breath was properly maintained and in good working order on the date that Trooper Parker tested Reynolds' breath. Trooper Parker testified that he had little or no understanding of the scientific principles behind the Intoxilyzer 5000.

The trial court overruled the pre-trial motions and held the breath test results admissible, and Reynolds pled guilty subject to his appeal of the trial court's pre-trial ruling. Must the Intoxilyzer operator, Trooper Parker in this case, be familiar with and able to explain the scientific principles underlying the breath testing instrument for the breath test results to be admissible?

yes _____ no _____

3 Evon Kelly and her son were involved in a car accident while she was driving. They were taken to the hospital emergency room for medical treatment. An emergency room technician/phlebotomist drew Kelly's blood for medical purposes, and hospital testing revealed that Kelly's blood-alcohol concentration (BAC) was above the legal limit. Soon after this, law enforcement officers came to the emergency room and asked Kelly for consent to draw her blood. She refused.

Several days later, the State obtained the medical records through a grand jury subpoena. Kelly was subsequently charged with DWI. Kelly filed a pre-trial motion to suppress, arguing among other things that she had merely acquiesced to the drawing of her blood by hospital personnel and therefore the results were obtained without her effective and informed consent. At the pre-trial motion to suppress, Kelly abandoned her claims regarding the 4th Amendment and argued exclusively that the phlebotomist had assaulted her by taking her blood without effective consent. Kelly argued that this assault was a violation of the law and any evidence police obtained through that violation should be excluded under the Texas exclusionary rule. The trial court excluded the blood-alcohol results without making any written findings of fact or conclusions of law explaining its legal basis for the ruling.

The 13th Court of Appeals reversed the trial court holding, among other things, that the blood was not taken pursuant to the phelbotomist's assault on Kelly and therefore the evidence should not have been suppressed. Did Kelly "consent" to the taking of her blood?

yes _____ no _____

4 Mary Harrison was stopped on suspicion of driving while intoxicated. She had been observed going from lane to lane and flopping around like a fish inside her own car. After she was stopped, she continued fidgeting, bending at the waist, and lifting up her legs. Harrison was placed under arrest and taken to the county jail where she was asked to provide a breath or a blood specimen. She consented and her breath tested negative for alcohol. She then consented to have her blood taken. The police then took her to Arlington Memorial Hospital to obtain a blood specimen. Unfortunately, the nurse was unable to get a blood specimen after trying five or six times due to Harrison's collapsing veins. These repeated attempts to obtain a blood specimen caused Harrison pain and resulted in bruising. The police asked if she'd be willing to provide a urine specimen. Harrison agreed to provide a urine specimen to avoid being stuck with a needle again and to avoid having her license suspended. None of the officers informed her that she did not have to consent or that her license would not be suspended if she refused to provide a specimen. The urine sample tested positive for controlled substances, the identity of which is not revealed in the court opinion. Harrison was charged with misdemeanor DWI.

Harrison filed a motion to suppress the urine test results. The trial court denied the motion, and Harrison appealed the ruling. The Fort Worth Court of Appeals held that the State failed to prove by clear and convincing evidence that Harrison had voluntarily consented to providing a urine specimen. Was Harrison's consent to provide a urine specimen involuntary?

yes _____ no _____

5 Steven Girdy was charged in a single indictment of aggravated kidnapping and aggravated assault. The events giving rise to the charges occurred during an unbroken sequence of events. Girdy grabbed a knife and threatened his girlfriend, Deandra Smith. He forced her into her car at knifepoint and drove her to a nearby field where he verbally abused her, threatened to kill her by holding the knife to her, and urinated on her. He ceased his conduct towards her only when he saw a police car approaching, at which time he forced Smith back into her car and drove away.

The aggravated kidnapping para-

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graph in the indictment alleged that Girdy "did intentionally abduct Deandra Smith, with the intent to prevent the liberation of Deandra Smith by using and threatening to use deadly force on the said Deandra Smith, and with intent to inflict bodily injury on her." The aggravated assault paragraph in the indictment alleged that Girdy "did then and there intentionally and knowingly threaten Deandra Smith with imminent bodily injury and did then and there use a deadly weapon, to wit: a knife, that in the manner of its use and intended use was capable of causing death and serious bodily injury." Girdy was convicted of both offenses. The jury sentenced him to 50 years in prison for the kidnapping and 10 years for the assault.

On appeal, Girdy argued that his convictions for both aggravated kidnapping and aggravated assault violated the double jeopardy clause of the 5th Amendment because aggravated assault was a lesser-included offense of aggravated kidnapping. Is this correct?

yes _____ no _____

6 Curtis Pope murdered Darrell North by stabbing him at least 50 times in the head, face, back, chest, shoulders, and torso. DNA tests tied blood found on the floor and furniture of the crime scene to Pope. After he was charged, the State filed a motion to discover Pope's expert witnesses. Pope filed a motion for independent DNA testing and asked the court to allow Dr. Robert Benjamin to review and examine all reports and testing already performed by William Watson. The trial court granted the motion and less than a month later, Pope designated Dr. Robert Benjamin as his defense expert. Six months later, the trial court granted a joint motion for additional testing on hair samples from Pope, the victim, and another suspect as well as fingernail scrapings from the victim. These tests excluded the additional suspect but not Pope. Immediately before the State called its first DNA expert, the defense filed a motion in limine to exclude any mention of Dr. Benjamin based upon the work-product doctrine of the attorney-client privilege. The trial court granted the motion. After vigorous cross-examination of the State's DNA expert, William Watson, the State argued that the defense had opened the door to the existence and role of Dr. Benjamin. The State was allowed to elicit from Watson that Dr. Benjamin was eminently qualified and that Dr. Benjamin had not requested any additional testing after reviewing all of Watson's records and notes. The State also elicited from a second expert, Jamie King, that Dr. Benjamin had not requested any additional testing after he had examined her bench notes.

At closing argument, the State argued that the defense had the same subpoena powers as the State to compel people to appear and testify. The State went on to argue over objection that the defense would have called Dr. Benjamin if there were any problems with the DNA testing. Was the testimony that Dr. Benjamin did not request any additional testing properly admitted?

yes _____ no _____

7 Roque Aranda was convicted of burglary and sentenced to 15 years in prison. He attempted to file his writ of habeas corpus with the Gaines County District Clerk, who refused to file it and returned the application and envelope unopened. Apparently, pursuant to a court order, Aranda had been found to be a "vexatious litigant" and as a result was prohibited from filing "new litigation" in state court under the Texas Civil Practices and Remedies Code. Aranda filed a writ of mandamus to require the district clerk to file his writ of habeas corpus. Should mandamus relief be granted?

yes _____ no _____

8 Joshua Delaney pled guilty to aggravated robbery during a "timely pass for plea" setting. In this type of setting, a defendant is given the choice to accept a judge's punishment or to ask for a jury to determine punishment. Delaney was admonished that there was no plea agreement in his case. He waived his right to a jury, pled guilty, and signed a stipulation of evidence stating that the allegations in the indictment were true. The court asked Delaney if he would accept a sentence of 10 years' deferred adjudication. He indicated that he would, choosing to accept the court's punishment rather than allowing the jury to assess punishment. Delaney was then informed of the full range of punishment and his right to appeal. He stated that he understood his rights and executed a waiver of appeal stating in the waiver that he did not desire to appeal.

After 10 months on deferred adjudication probation, the State filed a motion to adjudicate guilt, alleging that Delaney had violated the terms of his probation. Delaney was adjudicated and sentenced to life in prison. Was Delaney's waiver of appeal valid?

yes _____ no _____

9 Officer Thomas Griffin of the Houston Police Department received a call from Lisa Stark claiming that she had been the victim of identity theft. Citibank had called Ms. Stark to tell her that someone had opened a Visa account in her name at Gordon's Jewelry and had tried to open another account at Zales. Ms. Stark had also received a notice from the U.S. Postal Service confirming Ms. Stark's change of address. On Ms. Stark's behalf, Officer Griffin, who had 11 years of experience in the forgery division, contacted a U.S. Postal Inspector who informed Officer Griffin that two additional changes of address for Ms. Stark had been sent to the USPS. Officer Griffin drafted and presented an Affidavit in Support of a Search Warrant to District Judge William Harmon. Officer Griffin swore to the facts in the affidavit and requested that Judge Harmon authorize a search warrant to search the residence at the address where Ms. Stark's mail was being delivered. Judge Harmon signed and issued a search warrant. Officer Griffin executed the search warrant and recovered two shotguns from the residence of the would-be identity thief, Freddie James Smith, who was promptly arrested for felon in possession of a firearm.

Unfortunately, Officer Griffin never signed his affidavit. Was the search warrant valid?

yes _____ no _____

10 Clinton White stole a car and led the police on a high-speed chase that ended with White crashing into another car, killing the other driver. White was indicted for felony murder. The indictment alleged in one paragraph that White had caused the victim's death in the course of committing the state-jail felony offense of unauthorized use of a motor vehicle. In another paragraph, the indictment charged that White had caused the victim's death during the commission of the state-jail felony of evading arrest or detention in a vehicle. The jury charge authorized the jury to convict White if it unanimously found that he had caused the victim's death during the commission of either one of these two felonies. The jury charge did not require the jury to unanimously agree on which felony it believed White was committing when he caused the victim's death.

On appeal, White argued that this instruction denied him of his right to a unanimous verdict. Does the right to a unanimous verdict require that jury be unanimous as to the predicate felony in a felony murder case?

yes _____ no _____

## Answers

1 **No.** Despite the complete reliance upon Patricia's hearsay statements to prove the essential elements of aggravated assault with a deadly weapon, the Court of Criminal Appeals held that the error in the admission of the testimony was harmless beyond a reasonable doubt.

First, the court acknowledged that while some constitutional rights are so basic that they could never be subject to harmless error analysis, this case did not deal with the violation of a "basic" constitutional right. In other words, Davis was entitled to a fair trial, not a perfect one.

Then, the court examined whether the erroneously admitted testimony had a significant impact on the minds of an average jury. While the court acknowledged the evidence was "important" to the State's case, it went on to detail other evidence that the jury could have relied upon. The court noted, for example, that the bruises on Patricia's neck were consistent with strangulation by rope and Patricia had initially screamed to her neighbor that Davis had "tried to kill [her]." The court also rejected the argument that Davis might never have testified had the statements been excluded because it had not been argued or raised and such an argument would require speculation on Davis' strategy. More importantly, according to the court, had Davis not testified, there would have been no evidence to discount the theory that Davis had attempted to strangle his girlfriend with a rope.

Finally, the court rejected Davis' argument that the State had not called

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Patricia because it sought to deprive the defense of the opportunity to cross-examine her about her past criminal record and mental health problems. To this argument the court simply explained that "one could vigorously and extensively cross-examine Ms. Ford, but the bruises would still be on her neck, and there is no alternative explanation for them, even a hypothetical one." *Davis v. State*, 203 S.W.3d 845 (Tex. Crim. App. October 11, 2006).

2 **No.** The Court of Criminal Appeals unanimously held, in an opinion authored by Judge Price, that it is not part of the predicate for a breath test admission that the person operating the instrument understand the scientific technological principles behind it, provided he or she is properly certified under the statute to operate it. The court explained that the legislature has determined that the scientific theory underlying the breath testing instrument is valid and that the technique applying it is valid provided that the one administering it is certified and uses the methods approved by the rules of DPS.

Moreover, the court rejected Reynolds' argument that under *Hill v. State* the State is required to show that the person administering a breath test has an understanding of the scientific theory underlying the instrument. The court put it very bluntly, "We hold that the law is, always has been, and will remain the same, *viz*: it is *not* a part of the predicate for the admissibility of breath test results, including Intoxilyzer 5000 results, that the operator of the apparatus himself understand the scientific and technological principles behind the apparatus, so long as he is properly certified under the statute to operate it." The fact that an opponent of a breath test can demonstrate that the operator has not retained all the knowledge required of him for certification only goes to the weight that should be given the operator's testimony, not its admissibility. *Reynolds v. State*, 204 S.W.3d 386 (Tex. Crim. App. October 18, 2006).

3 **Yes.** Even reviewing the record in a light most favorable to the trial court's ruling, the Court of Criminal Appeals held that the record did not support the trial court's implicit finding that Kelly had not consented to the hospital's drawing of her blood. The Court of Criminal Appeals acknowledged that Kelly testified that she did not consent by expressly giving the phlebotomist permission to draw her blood. However, the court went on to note that no one testified that Kelly had expressly refused to give the phlebotomist permission to draw her blood. The only thing this showed was that Kelly had "merely acquiesced" to having her blood drawn. The court then pulled out copies of Webster's New Collegiate Dictionary and Roget's Thesaurus to explain that "acquiesce" is essentially synonymous with "consent." For good measure, the court also distinguished consent to a phlebotomist in a hospital from the consent to search, explaining that the former is not held to the same scrutiny as the latter. *Kelly v. State*, _____ S.W.3d _____, 2006 WL 3019246 (Tex. Crim. App. October 25, 2006).

4 **No.** According to the Court of Criminal Appeals, the State met its burden to show that Harrison had voluntarily consented to providing a urine specimen. According to the court, the court of appeals failed to take into account that Harrison had not withdrawn her consent but had provided a consent to a less-invasive alternative. Thus, this was not a situation where Harrison had consented because of physical or psychological pressure from law enforcement. Moreover, the statutory consequences related to the refusal to provide a blood specimen do not apply to the refusal to provide a urine specimen. The court rejected the dissenting opinion argument that consent was involuntary because Harrison had not been read statutory warnings prior to giving a urine specimen and she had not been told she had the right to refuse. According to the majority, there is no requirement that a defendant be given statutory warnings before she is asked to provide a urine specimen. Moreover, officers are not required to inform a defendant that she may refuse to provide a specimen if they have already read statutory warnings before requesting a sample of breath or blood. Thus, Harrison's consent was not involuntary. *Harrison v. State*, _____ S.W.3d _____, 2006 WL 3077511 (Tex. Crim. App. November 1, 2006).

5 **Yes.** The Court of Criminal Appeals affirmed the Amarillo Court of Appeals decision vacating the aggravated assault charge because it was a lesser-

included offense of aggravated kidnapping. The State argued that each offense contained elements that the other did not. According to the State, the greater offense of aggravated kidnapping required proof of an additional element that aggravated assault did not, namely that Girdy "abducted" his girlfriend. Conversely, the State argued that aggravated assault required the threat of imminent bodily injury by a threat with a deadly weapon, but aggravated kidnapping only requires the threat of deadly force.

The court rejected this claim, refusing to "quibble" over any arguable difference between the terms deadly force and deadly weapon. Deadly force necessarily requires the use of a deadly weapon, and display of a deadly weapon may and frequently does produce a threat of deadly force. And if a perpetrator uses deadly force to abduct someone, the threat of bodily injury will generally involve "imminent" injury. The court characterized the State's claims as an argument regarding adequate notice, which is different from a claim involving double jeopardy. The entire trial record and the pleadings show that Girdy's aggravated assault established proof of the same or less than all the facts required to establish aggravated kidnapping. It was, therefore, a lesser-included offense for double jeopardy purposes, and the court of appeals properly vacated the offense carrying the lesser punishment. *Girdy v. State*, _____ S.W.3d _____, 2006 WL 3077515 (Tex. Crim. App. November 1, 2006).

**6 Yes.** The fact that a particular person did or did not request additional tests of the State's experts was not a matter of attorney work-product, it was a fact within the personal knowledge of the State's expert witnesses. The Court of Criminal Appeals first noted the difference between the attorney-client privilege and the attorney work-product doctrine. The former belongs to and protects the client, while the latter belongs to and protects the attorney.

Regarding experts, the court noted that a consulting expert's identity, mental impressions, and opinions that have not been reviewed by a testifying expert are generally not discoverable. In contrast, there is no work-product protection for testifying experts, which is why attorneys must designate an expert as a testifying expert if there is any chance the attorney intends to call that expert to the witness stand. The court interpreted article 39.14 of the Code of Criminal Procedure as calling for the designation of testifying experts because the statute refers to experts that the State or the defense "may use" at trial. In this case, Pope designated Dr. Benjamin as a potentially testifying expert and never sought to de-designate him. Consequently, the trial court properly allowed questioning regarding his existence and whether he requested additional testing from the State's experts.

Finally, the court noted that a jury is always permitted to draw inferences from known, un-privileged facts, and the attorney work-product doctrine does nothing to prevent a jury from making reasonable deductions from known facts. *Pope v. State*, _____ S.W.3d _____, 2006 WL 3302823 (Tex. Crim. App. November 15, 2006).

**7 Yes.** The Court of Criminal Appeals granted mandamus relief because a writ of habeas corpus is not a civil proceeding. The court noted that generally writs of habeas corpus are criminal for jurisdictional purposes and the rules of civil procedure generally do not apply. Thus, the Civil Practices and Remedies Code did not bar the filing of Aranda's writ of habeas corpus, regardless of how "vexatious" a litigant he was. Moreover, the district clerk had a ministerial duty to file the application, and there was no way for Aranda to appeal the denial of such filing. Consequently, mandamus relief was appropriate. The court did note, however, that frivolous habeas applications can result in the loss of good time credit for the inmates who file such a frivolous claim. *Aranda v. District Clerk*, _____ S.W.3d _____, 2006 WL 3302671 (Tex. Crim. App. November 15, 2006).

**8 No.** When a waiver of appeal is not bargained for and punishment is uncertain at the time of the waiver, there is no knowing and intelligent waiver of appeal. The Court of Criminal Appeals granted relief in response to Delaney's writ of habeas corpus claim, explaining that Delaney could not have knowingly waived his right to appeal because he did not know with any certainty at the time he pled whether he would ever be punished and what that punishment would be. The Court of Criminal Appeals

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noted the concerns that arise from pre-sentencing waivers of appeal, notably, that a defendant cannot anticipate unknown errors that might occur during trial; therefore, a pre-trial waiver could not be made knowingly and intelligently. Moreover, a defendant could not know the consequences of his waiver if he enters it prior to the imposition of sentence because he would not know with certainty what his sentence would ultimately be.

While the court acknowledged that a waiver of appeal that is bargained for and results in the imposition of a recommended punishment does not raise these concerns, the court granted relief for Delaney because his case did. Thus, the court held that one way for a pre-sentencing waiver of appeal to be valid is for the actual punishment to be determined in a plea bargain. Simply letting a defendant know what the full range of punishment is doesn't result in a knowing or intelligent waiver of appeal. *Ex parte Delaney*, _____ S.W.3d _____, 2006 WL 3391355 (Tex. Crim. App. November 22, 2006).

**9** **Yes.** Regardless of whether the search was justifiable under the good-faith exception, the Court of Criminal Appeals held that the warrant itself was valid because there was sufficient evidence that Officer Griffin had sworn to the affidavit.

The court explained that a valid search warrant requires only a sworn affidavit, not a signed one. Though the memorialization of the officer's act of swearing is important, it is the act of swearing, not the signature itself that is essential to the warrant's validity. The court justified its decision based upon the fact that neither the United States Constitution, nor article 18.01 of the Code of Criminal Procedure requires a signature, only an oath. The purpose of the oath is to call upon an affiant's sense of moral duty to tell the truth and instill in him a sense of seriousness and responsibility, while the purpose of the signature is to memorialize the recitation of the facts contained in the affidavit.

The court went on to list the three pieces of evidence that proved that Officer Griffin satisfied the oath requirement under article 18.01. First, and perhaps most ironically, Officer Griffin submitted a signed affidavit in the pre-trial suppression hearing, swearing that he swore under oath before Judge Harmon that the facts contained in the affidavit attached to the search warrant were true and correct. Second, Judge Harmon also submitted an affidavit wherein he stated that it is his standard practice to have search warrant applicants swear to the truthfulness of their affidavits. Finally, the unsigned affidavit attached to the warrant contained the recitation that Officer Griffin's affidavit was sworn to under oath. *Smith v. State*, _____ S.W.3d _____, 2006 WL 3391008 (Tex. Crim. App. November 22, 2006)(8:1)(Keller, J. dissenting without opinion).

**10** **No.** The Court of Criminal Appeals agreed with the Dallas Court of Appeals that in felony murder cases with multiple predicate felonies, a jury is not required to unanimously agree on which predicate felony the defendant committed.

The term "felony" is the element of felony murder that the jury must unanimously agree on. Thus, all the jury must agree to is that the defendant had caused a person's death during the commission of *a* felony, not a specific one. Additionally, the court noted that the statute's use of the transitive verb "commits" further suggests that all that is required to prove the offense of felony murder is proof that the defendant was committing a felony, not one specific felony out of a combination of felonies. Ultimately, the predicate felonies constitute the "manner and means" by which a defendant commits felony murder, and dispensing with the jury unanimity requirement does not offend due process because the underlying felonies are basically morally and conceptually equivalent. *White v. State*, _____ S.W.3d _____, 2006 WL 3499217 (Tex. Crim. App. December 6, 2006).

## BACK TO BASICS

*By Greg Gilleland*
Assistant Criminal District Attorney in Bastrop County

# Opening statements[1]

How to start your case strong by grabbing the jury's attention—and keeping it

"The State's opening statement should have the narrow purpose of stating what evidence will be presented in order to make it easy for the jury to understand what is to follow—it is not an argument."[2]


Greg Gilleland

We have been programmed since childhood to listen to stories, and indeed, in its most basic form, an opening is simply a story. By making a cogent, concise opening statement, you are availing yourself of the rule of primacy. In other words, the jury will hear and remember your version of the facts first.

If you aren't sure how long your judge will allow you for an opening statement, be sure to ask beforehand so you can fit any time constraints. You want to be able to address the crucial points of evidence as they relate to the elements of the offense.

Consider these examples. A great songwriter, in a three-minute song, can tell a heart-wrenching story that lasts in your memory for years.[3] Likewise, a motion picture is often 60 or so two-minute scenes strung together in a (hopefully) coherent and interesting story.

If your judge gives you only five minutes for a no-test DWI opening, you can still make 20 strong statements, each lasting 15 seconds or less, about the evidence.[4] The key to a successful, understandable, and coherent opening is to then join those individual elements together into a story or a theme.

## Things you can't say

- Never, ever refer to whether the defendant testifies. Ever.
- Don't tell the jury that what you say is not evidence. The judge may tell them so, the defense attorney may tell them so, but don't reinforce the concept by saying it yourself.[5]
- The opening statement is a statement of what the evidence will show; it is not an argument. If you argue, defense counsel will object, and the judge will sustain it. This is bad because it makes you look like you are not following the rules; it interrupts the flow of your opening statement, and at this time in the trial you have the total, undivided attention of the jury.
- Don't overuse the phrase "what the evidence will show" or use the dreaded analogy of "an opening statement is like a roadmap."
- Don't use police jargon. Be sure to break down facts into concepts that laypeople can easily understand.

At the same time, when giving your opening, try to take your time. Speak slowly. Explain relationships between witnesses and why they are important in the context of "what the evidence will show." Tell the facts that the witnesses and evidence will prove. Tell them opinions of expert witnesses who will testify. Use demonstrative evidence. Make sure the jury understands exactly what evidence proves the elements in the trial and why.[6]

## Developing a theme

This is often the most difficult part of opening argument.[7] Discuss this beforehand with your coworkers or, if you are in a small office or all your fellow prosecutors are horribly busy, use the TDCAA user forums to discuss and develop your themes. It is a quite useful exchange of ideas.[8]

Let's say that your case involves feuding neighbors whose dispute has lapsed into a physical assault (I know this never, ever happens, but just use

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your imagination and bear with me). You might begin the theme in voir dire by asking the panel a few questions such as, "What is a good neighbor?" The panelists will respond with various attributes possessed by good neighbors.

Your theme could then continue through opening argument. You could label the 911 reportee who is uninvolved in the neighbor fracas as being a "good neighbor" who sees the assault on the victim and calls the police to make it stop. Perhaps another "good neighbor" is the person who saw the assault, intervened, and provided first aid to the injured victim.

Of course, in closing argument, you would then tie it all together to show reasonable deductions from the evidence. You might argue that two "good neighbors" (i.e., those not involved in the conflict) both saw the incident and clearly decided the victim was indeed the actual victim.[9]

## Get the bad stuff out there

I tell the jury about my case's weaknesses first, during my opening statement. If there are law enforcement mistakes or witness issues, I will lay them on the table for the jury in the opening statement. That way, by implication, the jury not only knows that the State of Texas is seeking the truth, but also that the State of Texas doesn't want to hide any relevant facts from the jury, and that in spite of whatever the damaging evidence is, the State of Texas *still* thinks the defendant is guilty.

The thunder of your defense attorney is stolen on these issues and the jury will remember that you told them about the kinks in the evidence first. Tarrant County Assistant Criminal District Attorney Betty Arvin also suggests that you disclose your weaknesses in opening. Most importantly, Betty says the theme must embrace the weaknesses but not in an apologetic or defensive manner.

What kind of weaknesses are we talking about? Sloppy police investigations, recanting witnesses, accomplice/criminal witnesses, hostile witnesses, and witnesses who don't present well are just a few examples.

## Motion in limine

A savvy defense attorney will file a motion in limine regarding prosecutors' opening statements. The State should also file a strong motion in limine. Develop a good one, then modify it according to the lawyer or the case you're handling. Some areas I find useful to seek to prohibit are:

- not expressing his personal opinion regarding the evidence, investigation, or prosecution of the case;
- not expressing any discussions that he has had with his client or anything that his client has said to him (doing so makes the attorney a witness);
- not expressing what other attorneys or expert witnesses might say about his defense theory;[10]
- absolutely not saying that the attorney will advise his client whether to testify. It is the client's decision, not the attorney's;
- anything that the evidence may not show. It's unethical, and the defense attorney will beat you over the head with it in closing argument. Do take note, however, if the defense makes promises in its opening that it doesn't keep.

## Advance rulings

If the crucial evidence in your trial involves a confession or the admissibility of evidence still subject to a suppression hearing that won't occur until after the trial has started and your opening argument made, I always go on the record outside the jury's presence to ensure that I will be allowed to make statements of what that evidence will show. All judges I have dealt with allow you to proceed with your evidence, knowing that I would not risk mentioning evidence if there were a valid admissibility issue.

Likewise, have exhibits and charts or diagrams admitted demonstratively for the purpose of opening statement. Then you can argue from these items, giving the jury a visual memory and a way to connect what will happen in trial.

For example, in a murder trial I tried awhile ago, nine witnesses were to testify to a different part of the shooting. One saw all of it; some saw different parts of it, and their testimony corroborated the first witness' testimony; some saw the killer with the gun after the murder, and one saw the killer dispose of the gun. Yet another saw the killer with the gun before the murder; the defendant actually informed this witness that he was taking the weapon to a football game to kill a rival. As I told the story to other prosecutors before trial, even *they* were confused over the similarity of wit-

nesses' names and had a hard time remembering who saw what.

Then there were the experts: the medical examiner, ballistics expert, firearm examiner, fingerprint techs, fingerprint examiners, crime scene unit, and gunpowder and lead residue expert, not to mention the detectives and police officers who pursued and ultimately apprehended the killer.

I made a chart that grouped the witnesses into the above categories, and as I spoke, I pointed with my old-fashioned telescopic pointer to each witness' name as I explained what their testimony or evidence would be. Several of the crime witnesses had some very complex but similar names, and the visual helped jurors identify who would say what. The chart reappeared in closing to recap the testimony. This type of graphic can be made on your computer word processor and then simply blown up to poster size and mounted to a foam poster board—it does not have to be fancy. But it should be large so the jury can easily read the type from a distance. Keep it as simple as possible, because too much information will just confuse the jury.

Betty Arvin suggests, and I strongly agree, to hold back a strong fact that will come out in evidence (if you have other strong evidence). If you have a crucial fact that is a lynchpin between bits of circumstantial evidence, consider holding it back and letting the jury discover it as the story unfolds at trial, thus filling in a crucial gap. I like this tactic because it awakens the jury's interest to the importance of the particular evidence in question. By letting the jury think they discovered the crucial link, you can still tie up the loose ends in closing argument, arguing why this link is so important to the circumstantial evidence, and the jury's interest will be very focused on this matter.

If you have unprepared witnesses or evidence whose admissibility is seriously challengeable, then I urge caution. It is best to not use this type of evidence in your opening. You can always correctly say something generic such as: "Witness Smith will tell you what she saw that night at the bar, the night the victim was injured."

It is not unusual for a witness to not really want to speak with you in a forthcoming manner before trial due to nervousness, claimed forgetfulness, hostility against the State, etc. You can easily deal with such witnesses as in the above example in case you must put them on for some other crucial reason.

## The one-two punch

Some lawyers say that trials are won or lost beginning with voir dire. Whether you subscribe to that theory, common sense tells us that the opening statement is the perfect follow-up to a strong voir dire. If you have done your voir dire correctly, then your newly impaneled jury is hungry for the *real story*. You've talked all about the legal issues and talked around the general factual concerns of the case, but opening statement is your time to command the most attention of the jury. They are fresh and still very interested in exactly what occurred in the case, and you can keep their attention because you are the first one to talk.

I'm no psychologist, and I can't say I begin to understand the wherefores and whys of some human behavior, but I do know that forceful language can be very persuasive in convincing the jury that you truly believe in your case. If you don't believe in your case, how can you expect the jury to believe in it? I say, "The evidence *will show*…" But don't oversell the case, and always keep the tone appropriate to the type of case you are handling.

I generally present my argument in the chronological order of how the events developed, but occasionally you may want to present one, such as a circumstantial case, by discussing each piece of evidence that connects the defendant to the crime. Or if there is a really strong piece of evidence, then I might open with that and then backtrack to the story.

For example, in a spousal abuse case, I might begin by saying that Annie Abused showed up at the ER and looked like someone had beaten her badly with a banjo. She was bleeding and had to seek medical care. She got 20 stitches and had a broken nose, broken teeth, and a crushed cheekbone. She was excited, visibly shaking, very emotional, crying uncontrollably, and exhibiting all the signs of a person who had been beaten.

"EMS will tell you that Annie said Willie Wifebully had beaten her. You will hear doctors say that Annie told them that Willie Wifebully had beaten her. The police and 911 operator will tell you that Annie told them that Willie Wifebully had beaten her. Two weeks after the beating, Annie told the judge in

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the protective order hearing that Willie Wifebully had beaten her.

"The police will also tell you that when they arrived at Willie Wifebully's house, he was intoxicated and belligerent and that both knuckles and hand were cut and bleeding from fresh injuries. The police will tell you that Willie Wifebully spontaneously told them, before they ever said a word, that 'I didn't beat Annie up.'

"The DNA analyst will tell you that the blood stains on Willie Wifebully's shirt, shoes, and pants and in the home Annie and he shared cannot be excluded from being Annie's blood.

"Two days before trial, Annie Abused told us that she lied in her first story to the police. She now says someone else beat her, a person she was having an affair with. She lied because she was mad at Willie. She can't remember the last name of the person who beat her, but Willie Wifebully was not anywhere around at the time of the beating. She went to Willie after her beating, and that is how the blood got on his clothes and at their home.

"Finally, you will hear from a blood spatter expert who will testify about blood, how gravity affects blood, and what it does when it exits the body. This expert will testify that the blood spatter patterns on the clothing of Willie Wifebully, on the suspect's banjo, and at the crime scene are proof that Willie Wifebully assaulted Annie Abused.

"At the conclusion of the State's case, the State of Texas will ask you to find the defendant, Willie Wifebully, guilty of aggravated assault."

## Additional tips

I've read up on the subject of opening arguments lately, and I think that Betty Arvin said it best in her summary of important opening argument actions. It could not be said better than she says it:

- Be yourself. Jurors have an amazing ability to spot a fake.
- Practice. Try out your theory and theme on non-lawyer and lawyer friends to get feedback. Find out if your theory or theme makes sense.
- Repetition. It is the key to getting jurors to remember important points and favorable evidence. Repeat them like a mantra throughout your opening statement and your case.
- Appearance. Jurors expect you to look like a prosecutor: conservative and well-groomed. Do not disappoint them.
- Start strong and end strong. Use the principles of primacy and recency in your opening statement. Spend time constructing your first and last sentence and your first and last paragraphs. They are very important and should have an immediate emotional impact. They usually contain your theme. Don't be afraid to start right with facts.

## Endnotes

1 The author gratefully acknowledges the liberal use in preparation of this article of an excellent seminar paper by Tarrant County Assistant Criminal District Attorney Betty Arvin, entitled "The Need for an Opening Statement OR How to get a 'guilty' before you've put on your evidence," which has been presented at numerous TDCAA seminars. In her paper, Betty credits papers on this topic written by Tarrant County ACDA Gregory T. Miller, Dallas County ACDA Bill Wirskye, Bronx New York Assistant District Attorney Daniel McCarthy, and suggestions and editing by Tarrant County's Mark Thielman. I thank these people too.

2 *U.S. v. Dintz*, 424 U.S. 600 (1976)

3 Ladies and gentlemen of the jury, I submit for your consideration, great songs like "He Stopped Loving Her Today" by George "No-Show" Jones; "Mr. Bojangles" by Jerry Jeff Walker; "I Want To Hold Your Hand" by The Beatles, and perhaps most terrifyingly, "Dueling Banjos." Every generation has songs such as these imprinted in the "I can't forget this no matter how hard I try" section of their brain. They're just great stories.

4 Fort Bend County Assistant County Attorney and TDCAA lecturer David Newell might well refer to this 15-second piece of evidence summary I speak of as a "sound byte" or a "sound byte of evidence."

5 I am in no way implying a lack of ethics here but rather the simple application of psychology. Don't tell the jury not to listen to you. As TDCAA's Shannon Edmonds notes, once you say it, the jury tunes you out, and your authority is gone.

6 Always try to have a written report from your expert so that if objected to when you make a statement in your opening, your response is that it was based on what the expert said in his written report.

7 Daniel McCarthy of the Bronx County DA's office in New York says that a theme is "a focused and cohesive understanding of the case which guides the prosecution in the presentation of the evidence." From the lecture material of Betty Arvin, as cited hereinabove.

8 Trust me on this, I'm a lawyer. The forum is really a great resource that can help you solve lots and lots of problems and answer your questions. Remember, the only stupid question is the one that is never asked.

9 I personally struggle with developing good themes. I may have several themes developed for a trial, and then it is not until I stand up and begin speaking that a newer, more improved, more easily explained theme comes to me. The main thing is, a good theme is hard to beat, and you can learn good themes by talking to other prosecutors.

10 This actually happened last month (but was stopped by a State's objection) in an aggravated sexual assault of a child trial in my office. (The following is paraphrased but very close to the actual statements):

Defense attorney: You know, everyone tells me that this is a crazy defense. Other defense attorneys—

Me: Your honor, I object. Counsel is testifying.

Court: Sustained. Jury will disregard the last statement of Mr. ___ (defendant's attorney)

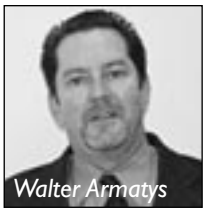
## CIVIL LAW UPDATE

*By Walter Armatys*
Assistant County Attorney
in Fort Bend County

# Pleading a termination of parental rights case

This article's goal is to provide tips and insights on these tough trials.

While I don't profess to be the definitive expert on the subject, what follows are some things I have learned from trying these cases over the past six years, through trial and error. I hope that you will find something helpful to you in your upcoming trials.


Walter Armatys

The scope of your trial (not to mention your service requirements) will necessarily be dictated by the different grounds in your original petition. On the most basic level, you will have to prove two things. You'll always have to prove that termination of the parent-child relationship is in the child's best interest. While there are numerous factors to consider when determining that, you can get by with a bare assertion that termination is indeed in the child's best interest. This leaves you with the task of choosing and pleading what conduct the parent engaged in (or failed to engage in) that justifies the lawsuit. §161.001 of the Texas Family Code provides a list of the possible grounds that satisfy this element of your case.

I typically plead not only the grounds that fit my case at that time, but also any grounds that will likely become grounds at trial. For example, in a "crack baby" case, you will obviously want to plead that the parent engaged in conduct that endangered the child under §161.001(1)(E). You'd also probably want to plead a ground listed under §161.001(1)(R), namely that the mother was the cause of the child being born addicted to a controlled substance. However, you may also want to plead the abandonment grounds under §161.001(1)(A), §161.001(1)(B), §161.001(1)(C), or §161.001(1)(G). You may also plead failure to support in accordance with the parents' ability under §161.001(1)(F); constructive abandonment under §161.001(1)(N); failure to comply with court-ordered services under §161.001(1)(O); or the failure to complete substance abuse treatment under §161.001(1)(P).

Please note, however, that ethically you cannot file frivolous pleadings without some good-faith basis. Obviously, you should not allege that the parent has been convicted of murdering the other parent under §161.001(1)(T) unless you have some good-faith basis to support your pleading (and no, difficulty in serving the father doesn't count). However, you can use common sense. My experience has been, for example, that many people who use cocaine while pregnant will not comply with services, will not visit the baby, and will continue to test positive for drugs after they go to treatment (if they go at all). As such, you will need to plead those grounds from the outset if you want to be certain you can put proof of those grounds on later. Similarly, in RAPR (Refusal to Accept Parental Responsibility) cases, you can pretty much imagine that if a parent is bringing her child to CPS for placement in foster care, she might not be all that committed as a parent, so you're probably safe pleading the grounds that the parent will not pay the court-ordered child support, will not follow the court-ordered services, has constructively abandoned the child by not visiting, and any other grounds that logic dictates may come up in the future.

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Further, in every case, plead that the parents executed a voluntary affidavit of relinquishment under §161.001(1)(K). Fortunately for these children, parents who engage in behavior likely to bring them into contact with CPS are also fairly chomping at the bit to relinquish and get on down the road, free from the burdens of involvement in a CPS case. Even in situations where parents may initially act as if they want their child returned, those parents may determine later that the child is too much trouble. So you need to plead the voluntary relinquishment ground to prove it later.

Don't worry about filing a petition with grounds that you only *believe* will come to fruition. While opposing counsel can certainly challenge your pleadings through a special exception, you are probably not going to have any filed against you. I haven't seen one yet. However, if you are hit with one, simply amend to pare the pleadings down to comport with the facts as they then exist, knowing that you will need to keep an eye on the case and amend in accordance with the facts as they change over the course of the case.

In cases regarding older children (i.e., teenagers), you may not be looking at termination, given their ages, but that doesn't mean you should forego pleading termination grounds without giving some thought to the matter. Relatives have many motivations to adopt, ranging from the altruistic sense of familial commitment to the cynical desire to claim the subsidies that accompany adoption. Parents are often agreeable to executing a voluntary affidavit of relinquishment if they know that Aunt Sally or Grandma will adopt. Additionally, if you don't plead termination initially, once the parents are served and the case implodes, you will need to re-serve them with citation if you amend your pleadings to include adoption grounds. You avoid this problem by pleading termination in the original petition. This is important, as it is common for these parents, once they have left the building, to be very hard to locate again.

Which brings me to a major practical consideration that underlies all pleading decisions: the service of the citation. Serving is often more difficult than it should be, particularly when dealing with presumed or alleged fathers. It is not at all unheard of to have three, four, or five men named as alleged fathers in a single case. Initially, when you begin to do this work, that may surprise you. Later, you will begin to realize that you just aren't getting out enough.

**I have advised our caseworkers to look for these fathers as if they owe us money. A lot of money.**

It is difficult for CPS caseworkers to justify taking time to look for some guy (or guys) who very likely know the mother was pregnant but do not want to accept the responsibility for their part in creating a child. It is an understatement that caseworkers are overburdened. They have way too many cases that need attention on their desks. However, you must make certain that your caseworker uses due diligence in trying to locate the fathers. Many times, mothers will say they doesn't know where the fathers are. That may be true, but your inquiry cannot end there. I have advised our caseworkers to look for these fathers as if they owe us money. A lot of money. Putting aside what that says about how society values our children, I suggest to caseworkers that they need to ask a mother not only where dad is but also:

- Does she have any identifiers on him (SSN/DOB/TDL)?
- Where did he last live?
- What were his favorite hangouts?
- What mutual friends do they have?
- What are his mother's and father's names?
- Where did he last work?

Any information you obtain must be investigated. For instance, if you locate the paternal grandmother, ask her the same questions. In addition, check the county jail and the jails of surrounding counties, local phone books, and the Diligent Search Unit in Austin.

With respect to the phone book, consider sending out an "I'm-not-saying-you-are, but-you-may-be-the-father-of-a-baby" letter to anyone with your guy's last name and first initial. In your letter, be sure to advise the recipient to contact you. Further, tell him to contact you if he is not the father but knows who might be. It is only after doing all of the above that you have enough information to obtain an Affidavit in Support

of Citation by Publication that will withstand a challenge from someone who later appears. Understandably, caseworkers hate doing this much work to locate a guy who obviously doesn't want to be located, let alone have anything to do with his child, but you don't want a lack of diligence at this point to ruin your case later.

In conclusion, there isn't one right way to plead a parental rights termination case. Generally, you want to plead it broadly enough so that you are not boxed in at trial because you didn't anticipate a particular basis for termination or because not everyone has been served properly. But I hope this article has provided you with some help so that your trials are not filled with errors.

# CRIMINAL LAW

*By Curtis Howard and Gail Leyko*
Assistant Criminal District Attorneys in the
Collin County Criminal District Attorney's Office

## *The State v. John Steven Gardner*

### A look into the capital prosecution of a serial domestic violence case

At 11:58 p.m. on January 23, 2005, 911 dispatcher Erin Whitfield received a cell phone call from a woman claiming she had been shot in the head. She was having a difficult time communicating but was able to provide her address, identify her attacker as her estranged husband, and state that he was driving a white pickup truck with Mississippi plates. When deputies arrived, the house was secured with no indication that anyone had broken in. The deputies forced their way into the house and found Tammy Gardner in her bedroom curled up under her covers. Tammy had been shot in the right temple, and the bullet had exited through the left side of her face just under her jaw. A trail of blood led from the bed to the bathroom, where blood-soaked toilet paper filled the trash can. Despite being shot, she had the ability to get her cell phone, call 911, and provide enough information that eventually led to the arrest of her estranged husband, John Steven Gardner. Tammy was taken by helicopter to Parkland Hospital in Dallas where she lapsed into a coma. Two days later, she was removed from life support and died.


Gail Leyko and Curtis Howard

## The investigation

Based on Tammy's dying declaration to 911, Collin County Sheriff's Department Investigator Parrish Cundiff had a place to start. During the early morning hours of January 24, he located Gardner's father in Mississippi. Investigator Cundiff told him Tammy had been in an accident and obtained Gardner's cell phone number. At 5:05 a.m., Cundiff called Gardner's number, but the man who answered immediately hung up.

At 1 p.m. the same day, Investigator

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Cundiff received a call from the Jones County Sheriff's Department in Laurel, Mississippi, reporting that Gardner wanted to turn himself in. Since only 13 hours had passed since the investigation had started, a warrant had not been issued. Investigator Cundiff talked to Gardner on the phone. He never admitted shooting his wife, but he said he drove a white pick-up truck with Mississippi plates and gave vague, deceptive answers as to his whereabouts the previous evening.


*Tammy Gardner*

Cundiff enlisted the assistance of investigator Jason Strickland of the Jones County Sheriff's Department to lead the Mississippi portion of the investigation. Investigator Strickland went to Gardner's house and found a .44 Magnum revolver under his brother-in-law's mattress; the gun was fully loaded except for one empty shell casing. Investigator Strictland took sworn statements from Gardner's sister and brother-in-law stating the gun was always loaded and that neither had recently fired it.

Investigator Strickland had the truck impounded and processed for evidence. Two important pieces of evidence came from the truck's cab: Two red fibers and a hangtag from a pair of Brahma work gloves with a red price sticker reading $1.49.

Because Gardner was not talking, Investigator Cundiff sought to corroborate Tammy's statement that Gardner had been in Texas. He subpoenaed Gardner's credit card statement, which showed that on the day of the shooting, he made two purchases at an Exxon station in Marshall, Texas, for gas and some other items. When our investigator visited the gas station, he found they sold Brahma work gloves for $1.49; the hangtag exactly matched the one found in Gardner's truck. An additional credit card purchase in Rayville, Louisiana, the day after the shooting appeared to be for fuel.

Additionally, the red fibers were similar to the robe Tammy was wearing when she was shot. Criminalist Michael Villareal would later testify that the samples were similar in size, color, and composition. He explained to the jury that in analyzing fibers, this was as close to an exact match as possible.

## The relationship

As this case transitioned from the sheriff's department to our office, we discovered information on the abusive relationship between Gardner and Tammy.

The two had married in 1999. During the first couple of years, Tammy became more isolated from both her friends and family. During one incident, a coworker was at the house when Gardner came in and exploded into a rage. He threw Tammy down on the bed, held a gun to her head, and told the coworker to leave. As she left, Tammy pleaded for her friend not to call the police. Although Tammy's daughter lived with them the first couple of years, Tammy eventually made her move to her father's house because she was afraid for the child's safety. This move changed the nature of her relationship with her daughter because she would not allow her daughter to visit if Gardner was around. Tammy's son and grandchildren lived in a trailer on the same property as she and Gardner. The relationship with these family members also changed, and Tammy got to the point where she would not allow him or her grandkids to come over when Gardner was home.

When Tammy was working, coworkers noticed that she would come to work with various injuries to her face and arms. She would always have an excuse as to their cause. Eventually, Tammy became somewhat outspoken about her relationship with Gardner. For example, when a coworker asked about an injury to her cheek, Tammy told her that Gardner had hit her with a hammer. In addition to Tammy's injuries, coworkers noticed that Gardner often drove by her workplace or sat across the street partially hidden from view. Tammy avoided going to lunch or out with her coworkers because she was worried about Gardner's temper. She eventually began telling her friends and coworkers that the only way she was going to get out of this relationship was when he killed her.

A year before the shooting, Tammy was having problems seeing out of her left eye. The optician referred her to a neurologist. She informed the neurologist that she would often get hit in the head by her horse. But after the meeting, she spoke to the officer manager and wife of the doctor, Joy Flavill. Ms. Flavill was a domestic violence counselor from New Mexico and had developed a part-

time practice in her husband's office. Tammy was comfortable with Ms. Flavill and provided detailed information about the type of abuse that she suffered at Gardner's hands. She talked about the gun that Gardner kept near the bed and that during sex he would take the gun out and caress her body with it. She also told Ms. Flavill that when he got angry, Gardner took out the gun and hit her on the left side of the face and head with the barrel. Tammy was worried that this abuse was causing the problems with her left eye. She also told Ms. Flavill that the only way she was going to get out of the relationship was when Gardner killed her, a sentiment Tammy echoed several times to those around her. Ms. Flavill attempted to get Tammy to go to a shelter, but Tammy never followed through.

In 2003, Tammy wrote a letter to each of her family members asking for forgiveness because of her relationship with Gardner and its effect on her relationships with others. She gave these letters to her ex-husband with instructions to give them to her children upon her death.

## The divorce

In December 2004, Tammy and Gardner split up, and Gardner moved out of the house. His parents helped him pack up his belongings and moved him back to Laurel, Mississippi, where he had grown up. Initially, Tammy believed that the break-up might have been her chance to get away from Gardner. She started to spend more time with her daughter and went out with friends from work. Tammy's friends said that they were finally seeing signs of the carefree person they knew before she became involved with Gardner. She filed for divorce, and he signed a waiver of citation January 13, 2005, 10 days before the shooting. There were many phone calls and text messages between Tammy and Gardner during these last 10 days. Tammy seemed to get more concerned and agitated during these communications.

On the day of the shooting, Tammy went to church and had lunch with her daughter. Throughout lunch and into the early afternoon, Tammy received text messages from Gardner. Her daughter read some of these messages aloud to her mother: The notes asked if she was "going to go through with it?" When Tammy did not respond, the message read "yes or no." When Tammy still did not respond, the messages' tone changed to "YES OR NO." The text messages stopped at about 5 p.m.


Rhoda Gardner

That afternoon, Tammy was very concerned about the tone of Gardner's communications. She went to see a coworker, David Young, for advice. Mr. Young testified that when she arrived, she was all business. She wanted to figure out a way she could disappear that would allow her to maintain contact with her family and pay her bills. After she left Mr. Young's house, she went home. According to her phone records, she called Young at 11 p.m. and they talked for 13 minutes. She let him know that everything seemed to be all right. The next call that Tammy made was to 911 exactly 45 minutes later.

## The death of Rhoda Gardner

We knew early in the investigation that Gardner had a long history of physical abuse toward women in his life. We determined that he had been married five times and had shot his second wife, Rhoda Gardner, in 1982.

In December of that year, Gardner had been having marital problems with his pregnant 18-year-old wife, Rhoda. On December 12, he went to the apartment where she was staying with her girlfriend and attempted to talk to her. He became angry, and the friend called police, who quickly responded, and Gardner left. The next morning, Rhoda left the apartment building to go to work. As she walked to her car, Gardner came from around the corner of the building and called her name. When she turned around, he shot her twice. The first shot grazed her breast, and the second shot hit her abdomen and severed her spinal cord. After she dropped to the ground, Gardner walked over to her and shot her in the face. He then walked away.

Rhoda survived the shooting but was left a paraplegic; she was hospitalized to undergo surgeries to her face and abdomen. Also as a result of the shooting, Rhoda lost the baby. The doctors were required to perform surgery because of the spontaneous abortion and on February 1, 1983, Rhoda Gardner died from complications during surgery.

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Gardner was charged with and pled guilty to aggravated assault with a deadly weapon and received eight years in the Mississippi Department of Corrections.

## The other wives

Knowing about Gardner's abusive history, our investigator, Kelly Adley, set out to find his surviving three wives. He had had a child with only the fourth, and we traveled to Mississippi to talk to her. She was not happy that we found her, but she begrudgingly spoke with us. She detailed an abusive relationship with Gardner in which he killed one of her puppies with a hammer as a way of getting back at her when she did something wrong. After they divorced, he was allowed visitation with their son. She eventually refused any visitation because she found out that Gardner was showing their son pornographic photos of women he had been with. We wanted her to testify, but she refused to come to Texas and was still very frightened of her ex-husband.

We located Gardner's third wife, Margaret Westmoreland, in Tennessee. Their relationship started when Gardner was still serving time for shooting Rhoda. She had known both Gardner and Rhoda before the shooting, but somehow he was able to convince her to overlook his "past indiscretion." After serving two years, Gardner was paroled and moved into Margaret's home, and their relationship followed a familiar pattern. She testified that Gardner collected swords, and when they were fighting, she would wake up and he would be sitting nearby rubbing the sword. She told us that she expected that he would kill her one day. She testified that after an attempt to break off the relationship, Gardner went to the restaurant where she worked and took her by knifepoint. Her coworker called the police, and they gave chase until he finally pulled over and released her.

## The sexual offenses

In addition to his violent tendencies, we also determined that Gardner had a history of sexual offenses. His criminal history included a conviction in Dallas for indecent exposure in December 1992. During this incident, Irving officers were performing surveillance at the Irving Mall during the Christmas shopping season. Gardner was seen driving around the parking lot masturbating. When he was pulled over, he was found in possession of two illegal knives and a club.

In addition to this conviction, we found a pattern of deviant sexual behavior toward the daughters of the women he was with. We talked to Margaret's daughter, Rebecca Fetherie, who talked about the relationship she had with Gardner when she was 13. She testified that he acted like a boyfriend. Gardner liked to massage Rebecca and would want to apply her make-up. This grooming process continued to the point where he would tell her if she slept with the devil that she would get magical powers. Then he would start referring to himself as the devil. Fortunately, Gardner was removed from Rebecca's life prior to any more sexual acts occurring.

During our investigation, we also found that Gardner had been acting out sexually toward Tammy's daughter before she moved to her father's house. This culminated in a situation where Gardner threw her down on the bed and attempted to sexually assault her. She kept telling him that she was going to tell, which stopped the assault. It was not long after that incident that she moved out of the home.

## The guilt/innocence phase

The cold-blooded way Gardner killed his wife, along with his history of abusing women and children, made this the type of case for which the death penalty was created. The grand jury originally indicted Gardner for committing murder in the course of burglary, but after we continued investigating, we re-indicted Gardner to include committing murder in the course of retaliation for filing the divorce.

As we went through the pre-trial process and even voir dire, the defense was more than willing to plead to a life sentence. Based on the evidence and Gardner's history, it was not an option. But these conversations led us to believe the defense was going to attack the capital aspect of the case.

We felt that under the burglary theory, the defense was going to focus on the fact that Tammy and Gardner had lived together in the house just a month before, that there was no evidence of any "breaking and entering," and there was no proof that Tammy did not invite Gardner in. To help shore up our position, we found that Tammy's mother

owned the house; she testified that Tammy had the authority to let whomever she chose enter. We showed that after Gardner moved out, Tammy bagged up all of his property and threw it away. Finally, Tammy's daughter testified about the text messages Gardner sent on the afternoon of the shooting, and David Young testified about how scared she was those last few hours before the shooting. We felt this testimony provided enough evidence to show that Tammy would not let Gardner in the house if he showed up at the front door. Tammy's son testified that Gardner gave him a set of house keys before he left but that there was still a missing set, which explained how Gardner may have entered the house without Tammy's knowledge.

Although before trial, we felt that our retaliation theory was the weaker of the two, Tammy's daughter did an outstanding job explaining the pattern of Gardner's calls, what he was texting, and how Tammy reacted. By the end of State's case-in-chief, the retaliation theory became the stronger of the two.

The jury was out for three and half hours before they returned with their guilty verdict on the capital murder charge.

## Punishment

We felt that if we could prove the capital aspect of Tammy's murder, we would not have any problems showing that Gardner was a future danger. Not only did we want to show Gardner was extremely violent with women in his life, but also that he had a pattern of seducing and taking advantage of women with histories of self-esteem and relationship issues.

**The cold-blooded way Gardner killed his wife, along with his history of abusing women and children, made this the type of case for which the death penalty was created.**

We started by proving up the murder of Rhoda Gardner through Dr. William Rohr, the county medical examiner, along with the hospital and autopsy records we received from Mississippi. Of Gardner's three living ex-wives, we could only get Margaret Westmoreland to testify. She was crucial in providing insight about Gardner's personality and his ability to initiate this type of intimate relationship with a woman. She explained that once Gardner became a crucial part of her life, he changed and became violent and controlling. Part of his pattern of control included threatening to skin her daughter alive while she watched. The parallel between Margaret's and Tammy's relationship with Gardner could not have been more obvious.

Margaret's daughter, Rebecca Fetherie, also testified about both her and her mother's relationship with Gardner. She knew about Rhoda's shooting and testified that Gardner talked to her about it. Once, he explained that after he shot Rhoda, he walked over to her to watch her urinate on herself because that's how he knew she was dying. Rebecca also had the opportunity to experience Gardner's wrath. She testified about an incident in April 1987 when her mother called her from work to say she was going to be late. When Rebecca relayed the message Gardner, he flew into a rage and beat her so badly that he split her head open. When Margaret arrived home from work, she found Rebecca in the shower bleeding profusely from her head while Gardner acted as if he had no idea what was happening. In that instance, Gardner pled guilty to injury to a child and his parole was revoked.

Although you never want surprises during trial, we found out during testimony that Margaret continued her relationship with Gardner, which included conjugal visits to the Mississippi State Penitentiary, after his parole was revoked for the assault on her daughter. Such behavior fit our theory showing the power and control Gardner had over women even when he was confined.

We concluded our punishment evidence with testimony about Gardner's deviant sexual conduct from the Irving police officers who witnessed Gardner exposing himself at the mall and from Rebecca Fetherie and Tammy's daughter about his inappropriate sexual conduct.

The defense started its case with a few character witnesses who had worked with Gardner in the past but did not

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provide much relevant information. They also admitted jail records showing Gardner had not had any disciplinary action since he had been incarcerated in Collin County.

Gardner's elderly parents were not able to come to Texas so his sister, Elaine Holliefield, was the only family member who testified. She told the jury about the harsh childhood that she and her brother suffered at their parents' hands. Their father was a minister and would get them up early in the morning for daily prayers. Even when they had friends spend the night, the friends would be required to participate in these early morning sessions. Ms. Holliefield also detailed an alcoholic household with regular domestic violence occurring between their parents and said their parents would beat and abuse them. We could counter this testimony on cross-examination by discussing Elaine's long-term, stable marriage and apparent close relationship she and her children continued to maintain with her parents.

In all our serious cases, we subpoena a defendant's jail mail. Gardner mostly wrote to his parents, and those letters were religious in nature and only discussed the meaning of various chapters and verses in the Bible. We also knew Gardner was going to use the childhood abuse excuse as part of his mitigation evidence (as that was the theme his defense counsel began during voir dire). We found one letter to his parents where he talked about the great childhood he had and what great parents they were. He went on to thank them for their love and support since he had been incarcerated. During cross of Elaine, she authenticated the letter, and it was admitted into evidence and read to the jury. We felt this letter dealt a serious blow to the only mitigation evidence the defense was able to present.

## The experts

We knew the defense had hired Dr. Kate Allen and Dr. Gilda Kessner as experts, and we figured the defense strategy would try to show Gardner could not be a future danger because he would be locked away from women. We asked A.P. Merillat, an investigator with the Special Prosecution Unit, to assist us during rebuttal by countering the defense's claim that Gardner wouldn't commit future acts of violence from within the penitentiary. Mr. Merillat sat with us as the defense started calling their punishment witnesses; both Dr. Allen and Dr. Kessner were in the courtroom as well. Following the testimony of Gardner's sister, the defense asked the court for a recess. When we returned, the defense unexpectedly rested. Apparently, the threat of Mr. Merillat's testimony about the reality of incarceration in the Texas prison system would have eviscerated Gardner's argument that he would not be a future danger when he is locked up. The defense's quick rest allowed defense counsel to argue that we failed to show that Gardner was a future danger because we did not offer any evidence that he had ever committed a violent criminal act while he was incarcerated. Two hours following the conclusion of final arguments, there was a knock at the jury room door. As we sat at the counsel table, we listened as the judge announced that the jury reached the same conclusion we had: John Steven Gardner deserved a sentence of death.

## Conclusion

As Gardner was led out of the courtroom, we were not surprised that he showed no reaction. We had watched his lack of emotion when he was found guilty of capital murder. We sat in the same room with him for over five weeks, and he never showed any emotion about the possibility of receiving the death penalty. There were times, outside the jury's presence, where he would laugh, joke, and even attempt to interject himself in the conversations between the attorneys and judge. During our case, we wanted to show these two faces of John Gardner. The first was that of a friendly, unassuming guy who allows others to feel comfortable around him. We saw this side of him when we talked to his ex-wives and people he worked with—even the jail deputies who had spent time with him told us how polite he was.

But the other face, the one we showed the jury, was the manipulative, controlling, and violent personality of a sociopath. John Steven Gardner is a predator. And thanks to the dedicated work of law enforcement agencies from Texas to Mississippi, Gardner will never have the ability to prey on our community again.

# *Oscar Sherrell Award winner*


*Jaime Esparza, the DA in El Paso, congratulates Amy Lujan, victim assistant coordinator at the El Paso District Attorney's Office, on winning the Oscar Sherrell Award at the Key Personnel Seminar in Arlington in November.*

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