THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 38, Number 1 • January-February 2008

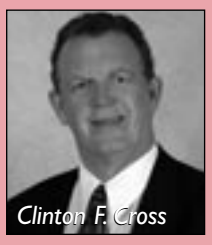
"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01 Texas Code of Criminal Procedure

Prosecuting deceptive business practice cases

It's a smart idea to dig deeper with theft-of-services cases that look only civil in nature; sometimes a criminal complaint exists, and prosecuting criminally may be the only way to gain true justice for the victims.

By Clinton F. Cross
Assistant County Attorney in El Paso County

The El Paso County Attorney allots significant resources to prosecuting criminal deceptive business practice cases. Most cases involve home remodelers, pool companies, and landscapers who do not provide the services that consumers pay for. While the sums involved are often small, sometimes hundreds of thousands of dollars are at stake.


Clinton F. Cross

The problem has only grown of late. In fiscal year 2006-07, the El Paso County Attorney's Office handled 396 deceptive business practice cases. In three years, our office's criminal deceptive business practice caseload has more than doubled.

In two recent cases (which were resolved in December), one complaining witness paid the defendants more than $100,000 to build a home, which was never done. In the second case, another complainant paid over $75,000, and a third paid approximately $50,000, all for real estate and homes that were not delivered.

In El Paso, the district attorney prosecutes theft cases, and the county attorney prosecutes deceptive business practice cases. The division of responsibility for prosecution of criminal cases in El Paso County occurred more than a decade ago to consolidate most of the responsibility for prosecution of criminal cases in the district attorney's office. In spite of the consolidation, the county attorney retained the right to prosecute a limited number of criminal cases, including deceptive business practice cases.

The DA declined the two cases when presented as thefts (as you will read later, theft is not always the best charge in these situations) but referred them to the county attorney for possible deceptive business practice prosecution. The CA filed charges against both defendants, one of whom pled guilty and was sent to jail for a year. That defendant was the primary wrongdoer. The State dismissed its claims against the second defendant after he made restitution to the victim.

Left to their civil remedies, these victims in all probability would not have seen justice. But they were indeed

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TDCAF News

By Emily Kleine
TDCAF Development Director

Looking ahead to a successful 2008

What a phenomenal year 2007 was at the Texas District and County Attorneys Foundation! Nearly 18 months since its inception, the foundation has far surpassed expected outcomes. The 2007 charter annual campaign was a great victory, and we look forward to 100 percent participation from *all TDCAA members* in 2008.

In November, I visited the Panhandle to meet with several potential contributors. **Randall Sims**, District Attorney in Potter County, led the way in "localizing the ask" (non-profit parlance for teaming up with a prominent community member, such as Mr. Sims, in requesting contributions). With Randall's help, we were able to secure new corporate and private money. I look forward to coming to many more districts in 2008 to join forces with TDCAA members in getting the word out about TDCAF and TDCAA.


Randall Sims

In March, the first-ever **Champions for Justice** event will be held in Fort Worth at the home of TDCAF Advisory Board Member, **Sherri Wallace Patton**. It's the first of four such events we plan to host around the state in 2008. Its purpose will be to inform community leaders about TDCAF, raise awareness about the importance of excellence in prosecutor training, and generate funding for the foundation. Thanks to **Tom Krampitz**, TDCAA's former executive director, who has been instrumental in launching this endeavor.

Kudos also to **Teresa Clingman** of Midland and **Sherri Tibbe** of San Marcos for devoting their time and energy to writing endorsement letters supporting TDCAF to funders in their districts. This is a simple way to bring the TDCAF message *home* to local communities and to show your support of TDCAF, Texas prosecutors, crime victims, and your community. I will be asking many of you to consider doing the same.

I look forward to seeing you all in 2008 and visiting with you about how *you* can help in TDCAF's growth! Thank you for your genuine support and excitement about the foundation. As always, if you have any questions or ideas, please call me at 512/474-2436.

Recent gifts

Kevin Acker, County Attorney in Ward County

Teresa J. Clingman, District Attorney in Midland County

Laurie K. English, 112th Judicial District Attorney in Pecos, Crockett, Reagan, Sutton, and Upton Counties, *in honor of the 112th DA's office staff and three successful years together*

Gail Ferguson, TDCAA Administrative Assistant, *in memory of Donnie Bybee, father of Becky McPherson, 110th Judicial District Attorney*

David L. Finney, Assistant County and District Attorney in Ellis County

Ramon Gallegos, County and District Attorney in Terry County, *in honor of G. Dwayne Pruitt*

Russell Hardin, Jr., Attorney at Law in Houston

Richard Reagan Hicks, III, Criminal District Attorney in Caldwell County

Douglas W. Howell, III, Assistant District Attorney in Brazos County

William D. Kleine, friend of TDCAF in Midland

Vicki Howard Pattillo, 25th Judicial District Attorney in Guadalupe, Gonzales, and Lavaca Counties

Lynn Switzer, 31st Judicial District Attorney in Gray, Hemphill, Lipscomb, Roberts, and Wheeler Counties

Russell D. Thomason, Criminal District Attorney in Eastland County

Jody K. Upham, County Attorney in Crocket County

James R. Young, Assistant District Attorney in Travis County

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the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

Nelson Barnes reporting for duty

In the last edition of *The Prosecutor*, I mentioned the newly elected board members. But I forgot one: **Nelson Barnes**, an assistant DA in Belton, will be taking over for **Catherine Babbitt** of San Antonio as the Assistant At Large. Nelson had been off our radar for awhile only because he was in Afghanistan. I am confident that his service on our Board will be much less, let's say, exciting, than his experiences "in country." Thanks, Nelson, and not just for serving on our board.

2007 leadership takes a bow

This has been a busy year at the association: a legislative session, an office move, the first annual campaign of our new foundation, and a great summer regional series. It was brought to you by a terrific Board of Directors, and I'd like to thank some of the folks rotating off on January 1, 2008: **Mike Little**, DA in Liberty County; **Joe Brown**, the CDA in Grayson County; **Catherine Babbitt**, an assistant CDA in Bexar County; and **Sherry Coonce**, the Key Personnel Board chair from Montague County. Thank you for all of your hard work!

Make up your mind: Are we supposed to be tough or weak on crime?

I read with fascination the recent *Dallas Morning News* articles concerning murderers on probation in Dallas. You can check out an interesting web link on the subject at www.dallasnews.com/sharedcontent/dws/spe/2007/unequal/. At this site you can click on pictures of folks who got probation for murder in Dallas over the years and read about the circumstances of each sentence. As a former prosecutor who tried two murder cases that ended in probation from a jury, I don't think these cases sounded too bad: battered spouses, drug deals gone bad, and missing witnesses. Seems like that was what that broad range of punishment is for.

The CDA in Dallas, **Craig Watkins**, has done a good job of responding to the story and will take a look at the cases to make sure nothing has slipped through the cracks. But you have to feel for Craig and the folks in that office, given that they have most recently been criticized by the very same newspaper for being too aggressive against criminals. Gotta be odd to now be criticized for being too soft! But that just proves a point about the media: Good government is boring, so instead the media publishes stories on all sorts of topics that pick at your decision-making. And if y'all need some advice on the issue of probation for murder, give me a call—apparently I'm pretty good at getting it for a defendant.

The career path of Pat Neff

Many Texas prosecutors have gone on to fame and fortune, and a handful have even gone on to be governor of the state. You might find a recent book about one of our very own quite interesting. *The Life of Pat Neff*, written by Dorothy Blodgett, Terrell Blodgett, and David Scott, traces the energetic career of the former McLennan County Attorney. Neff served as the hard-nosed prosecutor in Waco from 1906 to 1912. What may be more interesting is that he actually served as the Speaker of the Texas House of Representatives *before* becoming county attorney. Could there be any doubt that serving as county attorney opens the doors of the governor's mansion?

Student loan forgiveness

Both the Senate and House versions of a student loan forgiveness bill have sailed through the U.S. Congress, but like ships passing in the night, there has been no resolution of the differences in the two measures. It is likely that this issue will be revisited in the spring and summer of 2008, so let's hope we see some movement then. And remember: Passage of a loan forgiveness bill is the focus of the National District Attorneys

Association (NDAA) at this point. If the bill passes, step two will be to hunt for funding.

Sounds like the national Congress works on the "three-session rule" just like the Texas legislature—it takes three sessions (minimum) to pass a good idea!

New York death penalty is executed

You might have read that this past November, the last of New York's death row inmates was re-sentenced to life with parole. Queens County prosecutors had fought hard to have the death sentence of this mass-murderer carried out, but the New York appellate court decision that declared the state's death penalty scheme flawed stood in their way.

No surprise. If you ever read the 20-page New York death penalty law, you would have told the prosecutors from the start not to even try. Indeed, when New York first passed the law, its prosecutor's association called TDCAA to ask for the names of some Texas prosecutors who could teach their folks how to handle death penalty cases. The Texas prosecutors who volunteered did their best but predicted that the effort to carry out the death penalty in New York was doomed. You see, when a death penalty statute is passed in a political environment that requires a wholesale sell-out to anti-death penalty interests, you can pretty much guarantee a boogered-up mess of a statute. I think one prosecutor from the northern part of our state actually told them, "This dog just won't hunt." The New Yorkers apparently did not understand what that meant and wasted the next 15 years trying.

Déjà vu all over again

"Forced with a shortfall in state funds, a staggering prison population and an unprecedented two-year budget request from TDCJ, state officials are looking with favor at less expensive, and less punitive, ways of dealing with the prison population. … Alternative approaches to handling criminals have received endorsements [from many groups and government committees]. All of the proposals were spawned by an increasing belief that Texas is sending too many people to prison."

Sound familiar? It should, because you have been hearing a lot of this type of talk. The legislature did a pretty good job last session of balancing these new "less punitive" concepts with capacity expansion, both in alternative sentencing options and possible hard beds. But you should expect to hear more of this talk, as fiscal conservatives join up with ACLU-types in an effort to reduce prison populations—and save money.

And the quotes about all these new ideas? They are from an article printed in the *Dallas Times Herald* in 1983 and reprinted in a Prosecutor Council Newsletter we discovered when we moved out of the old offices. As you might recall if you were practicing in the late 1980s, that was when the criminal justice system went to hell in a handbasket because we didn't have any prison space. The complaint in the quote above, by the way, was that we had 36,700 inmates at the time, and if we weren't careful, we could end up with 60,000 to 100,000 beds by 1993—as compared to current capacity, which is 155,000 beds.

State Bar credit

A quick reminder to those who are taking a TDCAA course at the end of the month in which they need to complete their MCLE hours. We at TDCAA get the MCLE cards over to the State Bar pretty quickly, but if the last day of a seminar is near the last day of the month, consider going to the State Bar website and adding in the hours yourself. Better safe than suspended.

"First thing we do, let's kill all the lawyers."

You will find this quote in William Shakespeare's *Henry VI, Part II*. And you will also find plenty of debate about the meaning of the phrase. Was the Old Bard condemning lawyers or actually acknowledging that to hatch an evil plot, you needed to get the law out of the way?

I vote for the latter. Just look at the recent events in Pakistan, when the army faced off against an angry mob of displaced and ousted … judges and lawyers. Somehow, that doesn't sound too scary. The president claimed that running off all the lawyers was necessary to "preserve the democratic transition." Huh? But it proves that there must be something to this rule of law that we work so hard to enforce. And my guess is this type of trouble could never happen in Texas, because as I recall, the Texas Legislature just expanded prosecutors' ability to pack heat.

the President's Column

By Bill Turner
District Attorney in Brazos County

Who is our client?

Question: Whom do you represent?
Prosecutor: The State of Texas.
Question: Who is that?
Prosecutor: Hmmm … Let me get back to you on that.

In the legal world, our brothers and sisters practicing in the civil arena can point to a warm body and say: "That's my client. That is the person I have an obligation to represent. It's my job to pursue his or her interest with zeal." Once a civil practitioner identifies his client's best interest, his duty is clear.

Before we, as prosecutors, can identify the best interest of our client, we have to first determine who our client is. Who (or what) is this "State of Texas" which we have an obligation to represent? The answer to that question is complicated.

The options

The law. On the first day on the job, each prosecutor raises a hand and swears to preserve, protect, and defend the Constitution and laws of the United States and the State of Texas. That sounds pretty simple. When we say we represent the State of Texas, we really mean we represent *the law* of the State of Texas. The legislature passes a law, the courts interpret it, and we apply that law to the facts that come before us. Ours is not to reason why, ours is but to do or die.

Justice. Article 2.01 of the Texas Code of Criminal Procedure tells prosecutors that it is not our primary duty to convict, "but to see that justice is done." Now wait a minute. I just took an oath to enforce the law; now one of your laws is telling me that enforcing the law is subordinate to doing justice. Does that mean that my true client is my sense of fairness and that enforcing the law is a tool to help me carry out my personal preference?

The people. We learn in civics class that in a representative democracy, our government officials are public servants who serve at the pleasure of the people and are elected or appointed to represent the will of the people. If that proposition is true, shouldn't we look to the community that put us in office to decide what laws to enforce or what their definition of justice is?

The victims. Many crimes leave real human beings hurting. Their lives have been altered by a criminal act, and they look to the courthouse for justice. They have a unique perspective on the offense, and many times we are their only voice. Don't we have a moral obligation to represent their point of view? What if their view of justice collides with the community's view or with our own sense of fairness?

Most of the time, our sense of justice, the legal consequences of crime, the community's interests, and the wishes of the victim coincide. However, there are times when those interests conflict. It is then that the prosecutor has to struggle with the question: "Who is my client?"

To answer that question, I called on some fellow elected prosecutors to get their views. Their answers are both fascinating and inspiring.

Kerry Spears, County and District Attorney, Milam County

Whom do you represent?

I represent the people of my county, but in doing so I am helping people throughout Texas because criminals travel and do bad things to people all over the state. Sometimes a defendant in one case ends up being a victim in another, and I find myself representing the same person I prosecuted.


Kerry Spears

What do you do if your community disagrees with you?

I think they already do. We don't represent the community the same way Congress represents the people. We don't represent special interest groups. Our job is to do what is right, and in doing what is right we are representing the people,

whether they think so or not. My duty is to protect the community whether they ask for it or not. We have a continuing obligation to educate the public about why it is important to uphold the law.

Are you saying that if you decide what is right, you can then disregard your community's views on the subject?

No, my idea of justice is tempered by the public's view. I also have to be realistic. If my juries are having a hard time convicting a child molester when the only evidence is the word of the child, I have to adjust my plea offers because I believe some justice is better than no justice. So the community does play an important role.


Michael Fouts

When you recently tried Jose Hernandez for negligent homicide when his dogs killed Lillian Stiles, did you feel like you had to stretch the law a little because justice demanded it?

No, I took an oath to uphold the law. I would not have proceeded if I did not believe that his conduct violated the statute. We may have different interpretations of the law, but our job is to enforce it.

What does seeking justice mean to you?

Theodore Roosevelt said it better than I can: "Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong."

Michael Fouts, District Attorney, Haskell

Whom do you represent?

Every citizen within my district and victim who is wronged by a criminal defendant. I represent the interests of my community, their safety, and quality of life.

What is your obligation to the law?

We have to follow the law. We don't get to pick and choose what laws we like and don't like. The law is the guide post and the map. We have to comply with it. I can't say I agree with every law, especially the penalties of some of the game laws, but I enforce them.

If we have to follow the law, what does prosecutorial discretion mean?

There are times when people stumble and make a mistake, and their conduct results in a technical violation of the law, but there is no wrong committed. It just doesn't smell like a crime. When I face that kind of an issue, I ask myself: What is the greater good? Is society better off by me prosecuting? What good would we accomplish by pursuing this? What would a jury in my community think of this case?

What is your obligation to the community?

The community sets the standard. I have to be aware of what the people in my community expect because they set the bar. Justice can vary from one community to another, so in the grand scheme of things the views of the community play a role in decision making, but the community cannot be the be-all and end-all. They can't dictate the result. As decent human beings we have a sense of right and wrong and fundamental fairness, and that consideration trumps community sentiment. For example, if the mayor's kid got in trouble and everybody in town liked him, you prosecute the case because justice dictates that everybody be treated the same regardless of their station in life. The prosecutor's sense of decency and fundamental fairness controls.

Henry Garza, District Attorney, Bell County

Who is your client?

We do not have a live body we can point to and say "This is my client." Principles of justice do not fit nicely into a body that way. My decisions are governed by the law to the benefit of the people of the State of Texas, the county I represent, and, in turn, victims who have been harmed. I am asked to do all that I can to see that justice is done and fairness is accomplished in all of my decisions.

What is justice?

Justice is working to do what is right by striving to achieve the purpose of the law. There are two components of justice that come to mind. The first is basic fairness, regardless of who you are, where you are from, or whom you know, that you will be fair in applying the law regardless of outside influences. The second is that people should be held accountable for their conduct in proportion to their conduct and past circumstances.


Henry Garza

When justice has been done, you know it. You see it on the faces of victims, and you hear it from their comments when they go home. When victims first enter our offices, they are many times angry, frustrated, and confused, and it is understandable—something horrible has just happened to their family. But at the end of the day, when they leave, you know that justice has been done when they feel that they were treated fairly and their case was handled professionally and in the right way.

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What role does the community play in determining justice?

We are asked by the community to do what is right, to uphold the law in the way it was intended. The secret of success for elected officials is to always say yes, but our duty as prosecutors will require us at times to say no—to say no when justice dictates it. The day you say no is the day things will change. You won't be as well-liked. You have to have the integrity to say yes when you need to say yes and no when you need to say no, regardless of the consequences.

What is the purpose of prosecutorial discretion?

The world is not black or white. There is gray, and in these gray areas we are called upon to use discretion. Part of our job is to give a fair response to a defendant's conduct and at the same time keep our communities safe. Crimes that fall in this area simply require us to apply our common sense as prosecutors, while at the same time, fulfilling our goal of enforcing the law and seeing that justice is done.

Jaime Esparza, District Attorney, El Paso County

Who is your client?

If we just say our client is the State, that really doesn't tell you much. But if you think of the State as a living, breathing organism, you have a better sense of your obligation. I really like the notion that as attorneys we have an obligation to protect our client's interests, and as prosecutors we have an obligation to protect the State's interests. The State's No. 1 interest is justice, and she requires that we be just to the accused, to the victim, and to our community.


Jaime Esparza

What is justice?

Justice in a perfect world is when we know everything there is to know about a case so that we can make the right decision. In reality we are limited by what we know about the crime. Justice requires that we punish fairly and are honest about how we approach and obtain a conviction. Justice also means we have to be responsive to the loss and hurt associated with crime and the recognition that the victim may never be the same. Finally, justice includes protecting the community.

What role does the community play in your work?

The community tells us what justice is when they sit on a jury. Of course only a fraction of the cases go to trial so we have to use our judgment in making most decisions.

What happens when your obligation to justice is at odds with your community's view?

Our client wants us to protect her. Protecting our client can put us at odds with our community. As we protect our client, it is often difficult to explain to the community how we come to our decision. We are asked to take everything into account: the illegal conduct, strength of the evidence, defendant's circumstances, injury to the victim, safety of the community, and limited resources we have at our disposal. Unless you are actually involved in the case, it is difficult to completely understand the reason for our decisions.

What are your thoughts about prosecutorial discretion?

I am required to protect my client by using my judgment based on my experience and what I know about the case. When the legislature limits my discretion, it limits my ability to do justice and protect my community.

What keeps prosecutorial discretion in check?

I was elected to be the prosecutor, not the governor or the czar. There are natural checks and balances in the system. The State has good lawyers protecting her interests, and defendants have good lawyers protecting their interests. Judges and juries have an important role. All of these forces keep us in check and make us act responsibly in each case.

I have grown to appreciate how difficult and important this job is. Often, the media hurts us by making it look simple or wrapping it up in a neat one-hour television show. Our job is as simple as right and wrong and also that complicated.

Conclusion

Who is our client? It is on every indictment: the State of Texas. At the conclusion of every charging instrument, she reminds us that crime violates her peace and dignity. She expects us to enforce her laws, protect her people from harm, and respond to her citizens. She asks that we do it with fairness and honesty. Judging by the prosecutors I spoke with, she is getting her money's worth.

DWI Corner

By W. Clay Abbott
TDCAA DWI Resource Prosecutor

Upcoming DWI Summit

As I begin the fourth year of my employment as TDCAA's DWI Resource Prosecutor (funded by the Texas Department of Transportation), I would like to update everyone on what we've accomplished so far. During the last three years, we have held 45 regional DWI programs in every part of the state, provided the *Investigation & Prosecution of DWI* manual to more than 3,000 prosecutors and police officers, and distributed the *Intoxication Manslaughter* publication to every Texas prosecutor. The good news is we are not finished.

With support from the Texas Department of Transportation, Anheuser-Busch Companies, and Texas District and County Attorneys Foundation, TDCAA will present a free, live, satellite-broadcast seminar to more than 30 Texas cities on Friday, March 7, 2008. This program is called the Guarding Texas Roadways DWI Summit. It will be filmed in the Anheuser-Busch studios in St. Louis and broadcast live to more than 30 distributorship training facilities simultaneously all across the state. This training will be the first of its kind in the nation.

It is a free session and will be certified for four hours of MCLE/TCLEOSE credit. The training includes four topics: 1) investigating collision scenes; 2) preparing officers for trial and testimony; 3) standardized field sobriety testing; and 4) gathering blood evidence. The presenters will be me; Richard Alpert, Assistant Criminal District Attorney in Fort Worth; Warren Diepraam, Assistant District Attorney in Houston; and Maureen McCormick, Assistant District Attorney in Nassau County, New York. It is unprecedented to bring this caliber of speakers to so many cities in our state. Even with the road miles I have logged the last three years, I can average only about 15 cities annually.

I am also very pleased that the programs will not have that "let's put our feet up and watch the show" feel. On the contrary, it will be very interactive! On December 4, most of our local host offices sent a faculty member to Galveston to learn how to work as local faculty at the DWI Summit. Each segment will include discussions of local issues, and each local host will answer what questions he can or forward them to the speakers in St. Louis. I am really excited that this program will be the best of both worlds: It will be technically polished, thanks to the skills of the fine folks at Anheuser-Busch in St. Louis; it will be rich in content because of the outstanding state and national traffic offense prosecutors who are presenting; and it will promote practical local solutions and networking by putting a local prosecutor in charge of each location.

Each attendee will also receive TDCAA's *DWI Investigation and Prosecution*, *Intoxication Manslaughter,* and *Traffic Stops* books.

But because this program is an unprecedented endeavor on our part, we need your help to get the word out. Vocal support and promotion from you, our members, is essential to this new effort. Early in the new year online registration and written promotional and registration materials will be available; please call your law enforcement agencies to prod them into signing up. We also need your prosecutors and investigators there, so don't hesitate to hop online and submit your registration.

After our March 7th DWI Summit, TDCAA will begin setting up local DWI training for the remainder of 2008. Watch the website, www.tdcaa.com, for information on how host a more intensive program in your jurisdiction after the March 7 satellite broadcast.

Like the programs I have done the last three years, this training is set up to

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train prosecutors and officers at the same time. This idea is really fairly uncommon in Texas. Many of you have heard my initial introductions to my programs: I ask my mixed audience what the biggest intoxication-related problem is in their jurisdiction. After some uncomfortable silence (and often a shot at local judges), I get the answers I expect: Officers think the problem is prosecutors, while prosecutors invariably say the problem is police. We then spend the rest of the day fixing both the problems and the misconceptions.

It never ceases to amaze me how little officers know about what happens in court and why it happens. I am equally amazed how little prosecutors know about what happens on an average police patrol. (As if there is such a thing.) In addition to attending TDCAA's excellent training sessions, there is another solution.

Police ride-alongs

I had tried six or seven DWI jury trials before I went on my first ride-along with DPS. Rusty Thorton, my very wise misdemeanor chief, suggested it after what I am sure was a very loud dissertation in the office hallway on why bad police work was the cause of my latest not-guilty DWI verdict. For several weekend nights I spent time with a couple of excellent troopers on Lubbock's highways and back roads. I had a blast and learned an enormous amount about how to present a DWI case to a jury. I discovered that the video didn't catch everything I needed to ask about. I learned most folks who got stopped, and even many who had been drinking, drove away from the stop after the investigation. I gained an appreciation for how difficult it is to administer SFSTs 5 feet from speeding traffic to a surly suspect on a windy (the wind always blows in Lubbock), dark country road. I learned most officers have saint-like patience not to shoot the people they have to investigate. I learned from how far away you can smell the alcohol on a drunk's breath as I held my nose in the front seat of the trooper's cruiser.

But perhaps most importantly, I forged a relationship with the officers I would later put on the stand. And *they* found someone in the DA's office they could call with questions. I owe a lot of my current knowledge to Rusty and those troopers.

Often prosecutors worry about becoming a witness in cases they may have to try. Talking with adjoining or other close jurisdictions about accompanying their officers can often solve this problem; it can often be done easily during DPS' STEP program or high-visibility enforcement rollouts.

Also, prosecutors should familiarize themselves with officers' workplaces by seeing the booking and breath test areas, driving around with the officer while he explains their video capabilities, sitting through a STEP roll call, and listening to how the agencies pick which places to patrol. Prosecutors will also become much better at presenting cases if they know how officers are trained. Volunteer to be the subject at an SFST update "wet lab." If you prefer not to drink, simply observe a wet lab; it will change your perspective on the BAC readings you regularly see. In addition, meet with your technical supervisor as she does maintenance on the breath instrument. Nothing helps you present something more than actually seeing it performed.

And officers, before you get a swelled chest, you need to do a ride-along too. Officers get a very heavy dose of one part of the trial and are excluded from the rest. It is rather hard to put the importance of the officer's direct and cross-examination into the perspective of the whole trial without ever observing a whole trial. I have often told officers who feel underappreciated by prosecutors that they really should sit through a final summation where prosecutors regularly extol the virtue of the street officer. Because "the rule" excludes all witnesses to a case, officers must observe a case in which they are not involved. (With all of the defendant's relatives in attendance, a uniformed officer's presence in court would be nice for prosecutors as well.)

Conclusion

By spending the time training and working together we create much better trial and investigation teams. At the end of my programs, I hear the same things from officers and prosecutors alike. Each are impressed with the dedication of the other. The mingling creates a sense of teamwork and reinforcement of our common goals. In the quest to make Texas roadways safer, prosecutors and officers have too few allies; it is a shame not to commiserate with the ones we *do* have.

Newsworthy

Freshman Legislator Award winner

State Senator Dan Patrick (R–Houston) was honored by TDCAA with its Freshman of the Year Award at the Elected Prosecutor Conference in Galveston; he's pictured above between Rob Kepple, TDCAA's Executive Director, and Shannon Edmonds, TDCAA's Staff Attorney. Senator Patrick was recognized for his work during his first session as a legislator, which included his opposition to an expansive journalist shield law and an extra-judicial innocence commission. He also filed bills that would increase punishments for DWI offenders and improve the collection of DNA evidence from convicted felony offenders. "I am glad I joined forces with the district and county attorneys of Texas and look forward to continuing our collaboration against future attacks on the integrity of Texas' criminal justice system," Senator Patrick said. Congratulations!

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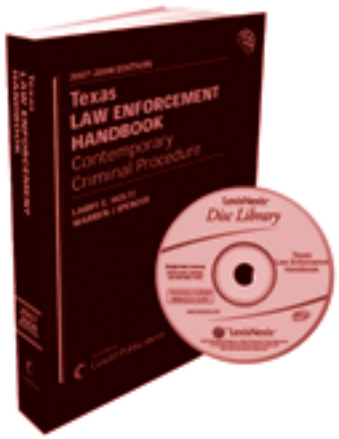

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Photos from the Key Personnel Seminar

Much thanks to Erik Nielsen, TDCAA's Training Director, for snapping photos at these two seminars.

Photos from the Elected Prosecutor Conference

Newsworthy

A few words about TDCAA's new website

Since our launch of the redesigned TDCAA website in mid-November, we've gotten lots of feedback, most of it complimentary. Our goal was to make the site more user-friendly (both for our members and for our staff, who must maintain the site), streamlined, and foxier. We hope you agree that we've succeeded.

We've fielded a few common questions since the launch, and we wanted to provide answers in a wide forum.

Q What happened to all of those sample forms that were in the Forms & Briefs sections of the old website?

A TDCAA staff made the decision to remove forms and briefs because most of them were so old, they might be more harmful than helpful for prosecutors to use. In the future, when TDCAA hires an additional staff person to assist with legal research and technical assistance, we hope to reopen a forms and briefs section on the website and have sufficient staff to ensure the forms are up-to-date. Until that time, anyone from a prosecutors' office seeking a particular form can call the TDCAA offices and speak with the research attorney, who will do his best to track down a current form from TDCAA, other publications, or another prosecutors' offices.

If you are hunting for something that was noted in this newsletter, though, you could be in luck; those documents might exist on our server. Email the editor at wolf@tdcaa.com to request such a file.

Q What happened to the links page? I used it all the time to get to the courts' websites.

A Again, keeping the links' page current was a tough job, one we couldn't adequately do with our current staff. We recommend simply bookmarking those sites you commonly visit rather than hopping to them from our website.

Q I heard a rumor that there won't be any more binders at your seminars, that the papers will be posted online. What gives?

A That rumor is right on. Starting with January's Prosecutor Trial Skills Course, we will no longer provide speakers' PowerPoint printouts or papers in a big fat plastic binder.

Instead, upon registering for a seminar, attendees will receive an automatic email confirming their registration and providing a web address and password to enter it; at that address, folks can download papers and PowerPoint presentations for the upcoming seminar, print them out, and tote them to the conference (if desired). The web page will be available seven days before the conference and permanently shut down at its conclusion to ensure that only paid attendees can access its information. After that time, you'll have to request the papers through TDCAA staff.

At the seminar itself, we will provide a slim paper folder with blank evaluation forms, an attendee list, a schedule, and a CD-Rom with all of the speakers' papers and PowerPoint presentations (for those who can't download them from the website or prefer to use a disk). We hope you'll be as pleased as we are not to lug around a six-pound binder at the next Annual!

Law & Order Award winner

State Representative Larry Phillips (R-Sherman) was recently honored by the Texas District and County Attorneys Association with one of its Law & Order Awards recognizing his outstanding legislative work on criminal justice issues during the 80th Regular Session. (He is pictured at right with Grayson County CDA Joe Brown and TDCAA Executive Director Rob Kepple.) Among his many accomplishments this session, Phillips passed legislation that makes DWLI-1st offense a Class C misdemeanor (HB 1623) and he advocated for constructive changes to TYC. He also fought several pieces of legislation that were strongly opposed by prosecutors, crime victims, and law enforcement officers. Congratulations!

TDCAA's upcoming seminar schedule

Prosecutor Trial Skills Course, Jan. 13–18, at the Doubletree North in Austin. Call 512/454-3737 or 800/347-0330 for reservations.

Investigator School, Feb. 11–15, at the Omni Bayfront in Corpus Christi. Room rates are $85 for a single, $109 for a double, $119 for a triple, and $129 for a quad; these rates are good until Jan. 20 or until sold out. Call 361/887-1600 for reservations.

Guarding Texas Roadways DWI Summit, March 7, in 30+ Texas cities. Watch our website for updates.

Investigation and Prosecuting Crimes Against Children, April 8–11, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Civil Law Seminar, May 28–30, at the Sheraton in downtown Austin. Call 512/478-1111 for reservations.

Crime Scene to Courtroom, June 18–20, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Prosecutor Trial Skills Course, July 13–18, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Advanced Trial Skills: Homicide, August, at the Baylor School of Law in Waco.

Annual Criminal & Civil Law Update, Sept. 17–19, at the San Luis Resort in Galveston. Both the San Luis and the Hotel Galvez are booked; call for overflow rooms at the Hilton at 409/744-5000, or keep checking the other two in case of cancellations.

Key Personnel Seminar, Nov. 5–7, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Elected Prosecutor Conference, Dec. 3–5, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

DVD on DNA evidence available for free from NDAA

The National District Attorneys Association (NDAA) has produced a training program on DVD that's available for free to prosecutors who request it. The topic is "Preparing and Presenting DNA Evidence." (As funding permits, NDAA will produce more such training disks, and TDCAA will alert you to their availability in the future.)

If you want a free copy of the DVD, please e-mail the editor at wolf@tdcaa.com with your name and mailing address by February 15, 2008; type "request for DVD" in the subject line. All Texas prosecutors' requests for the DVDs will be submitted in one batch, then mailed.

Welcome to Manda Helmick, our new (new) meeting planner!

A stute readers of this publication will remember that we introduced Jen Matney as our new meeting planner in the last issue. It turns out that Jen's husband, Andrew, was transferred out of state for his job, so Jen left us for the considerably colder climes of Colorado. D'oh!

But through some magical stroke of luck and legwork, we found another fantastic meeting planner in a New York minute: Manda Helmick, who comes to TDCAA by way of Chicago and Manhattan.

Manda moved to the Austin area several weeks ago from Chicago, where she was an event planner for a marketing firm for three years. Before that, she was a meeting planner for MTV Networks in New York City, where she dealt with people from all over the world who were, shall we say, a tough crowd to please. "With them, I could have planned an event at a five-star resort in Miami, and all I heard were complaints," Manda says. "With TDCAA, it's a pleasure to accommodate grateful attendees, as opposed to demanding ones." Grateful attendees of December's Elected Prosecutor Conference have already seen her in action, as she drove to Galveston on her very first day at work and helped the seminar run ultra-smoothly. (Talk about dedication!)

When she's not planning or traveling to seminars, Manda is immersed in music—she sings and plays both guitar and piano—and rides horses on her parents' ranch in Smithville, where she's staying until she finds more permanent digs in Austin proper. Until that happens, though, she is reveling in the association's location in the heart of downtown and looking forward to exploring its live music scene.

Welcome, Manda!

Continued from front cover

victims not just of a civil fraud but also of a crime. It made sense for our office to pursue criminal charges in these cases.

What is a criminal deceptive business practice? How it is different from a civil deceptive trade practice?

The Texas Deceptive Trade Practices Consumer Protection Act, §17.41 et. seq. of the Texas Business and Commerce Code (hereinafter referred to as the DTPA [Deceptive Trade Practices Act]) and the deceptive business practice provisions of Texas Penal Code §32.42 (hereinafter referred to as the DBPC [Deceptive Business Penal Code]) appear to be similar statutes. Both statutes are similarly titled, and both enumerate laundry lists of prohibited bad conduct.

Incidentally, district attorneys and county attorneys, as well as individual consumers, are authorized by statute to bring DTPA actions. A district or county attorney may want to file a civil DTPA case when 1) the wrongdoer is solvent, 2) restitution for victimized consumers is the primary goal, 3) more discovery (for instance, of identifiable victims) is desired, 4) injunctive relief (a "cease and desist" order) is sufficient to remedy the misconduct, and/or 5) criminal prosecution would be difficult or inappropriate.

In El Paso, the county attorney works collaboratively with the Texas Attorney General's Office to file civil DTPA cases in appropriate situations. Indeed, the DTPA statute requires collaboration because a district or county attorney must give the Attorney General's Office notice of intent to file a DTPA suit before doing so unilaterally. Furthermore, the AG is expressly authorized to obtain remedies that may not be available to district and county attorneys. When in our jurisdiction the Attorney General chooses to join in the litigation, the county attorney and the AG both prosecute the suit, but the Attorney General's El Paso Regional Office assumes primary responsibility for it.

The DTPA and DBPC statutes are in fact very different. The DTPA is a civil statute and is liberally construed. It is a "buyer protection" statute. Most sections of this act hold the seller to a strict standard of truthfulness in marketing property and services. In only a few situations is the buyer required to prove, as a predicate to recovery, that the seller intended to act in a particular manner.

It is not legal to take Peter's money to pay Paul or to repair Paul's house.

The DBPC, on the other hand, is in the Penal Code and is construed narrowly. It is a "buyer protection" statute, but because "sell" and "sale" are defined to include "solicit and offer to buy," it is also a "seller protection" statute. Because it is penal in nature, the State must prove its case beyond a reasonable doubt. Pretrial discovery is limited. The complaining witness must exit the courtroom during trial when the defendant invokes "the rule" and may thereafter be compelled to return to the courtroom to rebut testimony that he or she never heard.

How does "deceptive business practice" differ from "theft?"

Deceptive business practice is defined by §32.42 of the Texas Penal Code, while theft is governed by §31.03 of the Texas Penal Code. The two statutes have different elements. The Court of Criminal Appeals has held that the offense of deceptive business practice is not a lesser-included offense of theft.[1] Concomitantly, theft is not a lesser-included offense of deceptive business practice.

It is possible to prosecute contractors and landscapers for theft.[2] However, it's easier to prove a deceptive business practice case than a theft case. In theft, the intent to steal must exist at or before the time of the initial transaction. By contrast, the crime of "failing to deliver" is committed at the time of delivery, not at the time of the initial solicitation. The prosecutor does not have the burden of proving that intent occurred at the time of or simultaneously with the taking of property or payment. It is only necessary to prove that the defendant intended "not to deliver" when he had a duty to.

There are few reported deceptive business practice cases involving material misrepresentation in the sale of property or services. There are no reported cases dealing with failure to deliver property and services. Therefore, the statuto-

ry language is perhaps the most important guide to understanding the law of deceptive business practices at this time.

A defendant violates §32.42 of the Penal Code if he commits one or more specified deceptive practices in the course of business. The statute sets forth 12 prohibited practices. However, there are really two fundamentally distinct ways the statute can be violated: first, by lying about property or services being sold (sometimes, but not always, the specific nature of the lie is defined in the statute), and second, by failing to deliver property or services that a seller has sold, that the seller has a duty to deliver, and that the seller has failed to deliver.

How can "failure to deliver" property or services be a crime?

Section 32.42 (a)(9) of the Penal Code defines "selling," *inter alia*, as "delivering after the sale." Section 32.42 (b)(2) defines a deceptive business practice as "selling less than the represented quantity of a property or service." When the two subsections are read together, the Penal Code makes it clear that the crime of "deceptive business practice" can be committed when a seller sells a property or service and then delivers to a buyer less than the represented quantity of that property or service.

While many cases arise out of what the parties to the transaction may believe are contracts, §32.42 never mentions the word "contract." It is not necessary to prove a "contract" or the breach of a contract to prove that the defendant has committed a deceptive business practice. This distinction may be important in cases where the parties never entered into a written agreement or where the terms of the original agreement were frequently changed.

To illustrate the nature of a "failure to deliver" deceptive business practice case, consider the following hypothetical. You go to a store and purchase two pounds of beef; you pay for the meat. Thereafter, the butcher delivers one pound and eight ounces of meat but at the same time does not offer a refund for the eight ounces of meat he failed to deliver.

The butcher delivered less than the represented quantity of beef that was sold. He should have delivered all the beef that he sold, or at least offered to reduce the price to reflect the failure to deliver two pounds of beef. The butcher "sold," and then "delivered after the sale … less than the represented quantity of a good or service." He committed a deceptive business practice.

Our office has prosecuted hundreds of cases involving landscapers, home improvement contractors, and other businesses. The facts in these cases are often a bit more complex than the facts described in the hypothetical "failure to deliver" case. Similar principles, however, apply.

Assume, for instance, that a builder contracts to repair a homeowner's porch. The builder asks for $4,000 to perform the work, $2,000 of which he requests up front. If the contractor does less than half the work and fails to return to the homeowner the difference in value between the amount paid and the property and services delivered, he may have "sold" less than the represented quantity of a good or service (i.e., failed to deliver). If, however, the builder delivers half the property and services and thereafter walks off the job, the homeowner may have a claim for breach of contract—but probably does *not* have a "deceptive business practice" complaint. The consumer received property and services equivalent to his payment, even if he did not obtain the "benefit of his bargain."

A deceptive business practice is committed when the defendant intentionally, knowingly, or recklessly fails to deliver property or services that he has a duty to deliver. It is not necessary to prove that the defendant intended to steal the consumer's money before the initial sale or at the time of the initial sale. It is the "failure to deliver" that constitutes the crime. Criminal intent can attach before the defendant has a duty to deliver or at the time he has a duty to deliver.

If the builder asked for $2,000 up front for materials and did not promptly use the $2,000 to purchase those materials, the State should argue that the defendant's failure to do what he said he'd do regarding purchase of materials is evidence of bad faith.

Sellers with marginal financial capital sometimes take money from consumers for porches or yards or whatever, use the money for "operating expenses" or other jobs, and end up unable to perform all their obligations. Some of these defendants file for bankruptcy. Others try to excuse their conduct at the time of trial by pleading indigence.

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Is bankruptcy, or paucity of money, a defense to a "deceptive business practice" case?

No. It is a crime in Texas to take money in advance for a particular property or service, then fail to deliver that property or service. Consumers give sellers money in advance of performance to pay for the designated property or service and for no other purpose. Sellers have a duty to use that money for those properties or services, and for no other purpose. It is not legal to take Peter's money to pay Paul or to repair Paul's house—unless, of course, Peter parted with his money for those reasons.

Why should prosecutors make deceptive business practice prosecutions a priority? Why aren't civil remedies sufficient?

When the civil remedies are effective (usually when the sums of money involved justify the retention of private counsel and the sellers are solvent), the victims of this crime may be satisfied with that remedy. But we must remember that this misconduct is also a crime, and there are many interests at stake. We want to recover restitution for our victims if we can, but we also want to deter and punish wrongful conduct. In the absence of criminal prosecution for this crime, the offenders get to play an endless game of "heads I win; tails, you lose." "Catch me if you can" is the con artist's motto.

If your office decides to make deceptive business practice cases a priority, what challenges will you face?

Law enforcement personnel and prosecutors often view economic disputes as civil in nature. If the police don't identify a crime and treat it as such, prosecutors are not going to learn about it.

Our office meets regularly with law enforcement agencies, sometimes several times a month. We explain deceptive business practice law and encourage police officers and sheriff's deputies to investigate cases that appear to violate the law. In training, we have sometimes provided the officers with our own screening sheet forms, which in "failure to deliver" cases ask the complaining witness to provide information about the original transaction, the amounts of money paid, and the amount of work performed and not performed. In addition, we encourage officers to accept cases when they have reason to believe the complaining witnesses have paid for property or services they did not receive. A case can be accepted as a "non-arrest" and referred to the prosecutor for screening. If a case comes to the prosecutor's office and is probably a crime but not *clearly* a crime, the prosecutor is ultimately responsible for deciding how to proceed. As a result of this training, our caseload has been steadily increasing. (Incidentally, complaining witnesses have included judges, attorneys, and police officers.)

In a few cases it may be difficult to assess the amount of restitution owed by a defendant to a consumer. Can a prosecutor, sitting in her office, assess the value of property or services that have been delivered? If a prosecutor can't rationally make this assessment, how can she, in a close case, write a responsible plea recommendation prior to trial?

The solution to this problem is to allow the defendant to arbitrate the value of the property and/or services delivered (usually by the Better Business Bureau) at the defendant's cost (in this jurisdiction, $500). The rest of the deal then goes as follows: The defendant pays the complaining witness what the arbitrator says is due, if anything, and the State allows the defendant to plead to a lesser-included offense, a fine, or a dismissal. If the arbitrator concludes that the seller has delivered value for the monies paid, the State dismisses.

In fiscal year 2006-07, the El Paso County Attorney referred 16 cases to the Better Business Bureau for arbitration, 10 of which were actually arbitrated. The consumer prevailed in nine cases, and awards totaled $155,950. In one or two cases, the defendant failed to pay the arbitration fee as required by the plea agreement and the case thereafter proceeded to a plea or trial. A few cases referred to arbitration in fiscal year 2006-2007 remain to be arbitrated.

Although an arbitration award can be enforced civilly, as a practical matter it is enforced by our office. The "plea agreement" requires the defendant to arbitrate and for the State and defendant to thereafter abide by the award. If the defendant prevails, the State agrees to dismiss. If the complaining witness pre-

vails, the defendant must pay the complaining witness the amount of the award. If the defendant cannot comply with the terms of the award prior to the court's deadline (i.e., pay the complaining witness the amount of money awarded), the plea agreement should require that the defendant plead guilty and pay the victim the amount awarded as a condition of probation.

If the defendant thereafter refuses to honor the plea agreement, the State must try the case. In this jurisdiction, defendants have either complied with the arbitrators' awards prior to entering guilty pleas or they have pled guilty and were placed on probation and ordered to pay the complaining witnesses the amounts of monies awarded.

With repeat offenders or in egregious cases, arbitration is not recommended because it delays prosecution. With repeat offenders, it is usually unrealistic to hope for rehabilitation or for restitution. The priority should be protection of the public. In the long run, recidivists and the worst offenders need to be locked up or run out of the State of Texas.

Endnotes

1 *Lasker v. State*, 573 S.W. 2d 539, 542 (Tex. Crim. App. 1978).

2 Playton, Christina L., "A Breach of Trust," *The Texas Prosecutor*, Vol. 37, No. 2, March-April, 2007, pp. 14-18.

Advertisement

CRIMINAL LAW

By Kris Moore
Assistant District Attorney in Harris County

Truth and consequences

A Harris County program aims to educate juvenile offenders on the criminal justice system and to keep them from returning to it.

"How can I get my son to go to school?"

"Are Chinese throwing stars illegal weapons? What about butterfly knives and switchblades?"

"What can I do to discourage my child from befriending bad kids? He won't listen when I tell him."


Kris Moore

These are just some of the questions people asked me at the latest Juvenile Consequences Partnership Program, which is aimed at informing young offenders and their families about the consequences of their involvement in the juvenile justice system. Other partnership members are the Houston Bar Association, Houston Police Department, and Harris County Juvenile Probation Department.

The history

After Harris County opened its new Juvenile Justice Center in 2007, the space and facilities were available for some new and effective programs to help juveniles with their rehabilitation efforts. At the same time, the Houston Bar Association wanted to begin a program to provide juveniles and their families education and skills to avoid further involvement in the legal system. The Bar Association and the Juvenile Probation Department got together with the Houston Police Department and the DA's office, and the Juvenile Consequences Partnership was created.

Some of the ideas for the new program were borrowed from a now-defunct probation initiative called the Laws Program, which had a 75–80 percent success rate for the juveniles who had attended it. It should be noted that this old program had a different audience (juveniles who were adjudicated and on probation), but both the old Laws Program and the new one aim to educate juveniles and their families on the law and deter them from committing new crimes. (The Laws Program was discontinued because the old juvenile justice facility was cramped and in sorry disrepair. The hope was that once a new juvenile center was built, an improved program aimed at juvenile offenders could be founded, which is exactly what happened.)

Most of the children attending the new program are first-time misdemeanor offenders charged with possession of marijuana or small quantities of drugs, theft offenses such as stealing a bicycle or shoplifting, evading arrest, assault, criminal mischief, or burglary of a motor vehicle. The group also includes some first-time non-violent felony offenders. All of these juveniles have one thing in common: They are all in Deferred Prosecution, a diversion program offered through the Harris County Juvenile Courts. Juveniles and their parents voluntarily enter this rehabilitative program for not more than six months, and they are supervised by a probation officer. No guilty plea is required, and successful completion allows the juvenile to avoid being adjudicated delinquent in the juvenile court. A youth is placed into Deferred Prosecution by either a judge or by agreement of the prosecutor, and placement is limited to those with the potential to benefit from the experience and who have family support. Failure to complete the program or committing a subsequent offense returns the case to the juvenile court for adjudication and appropriate disposition.

After four or five months of plan-

In a photo taken at a program planning session, representatives from various agencies met to discuss Harris County's juvenile program. Seated from left to right are Tommy Proctor, President of the Houston Bar Association (and former Harris County prosecutor); Harold Hurtt, City of Houston Police Chief; and Chuck Rosenthal, Harris County District Attorney. Standing from left to right are Harvey Hetzel, Executive Director of the Harris County Juvenile Probation Department, and Tom Radosevich, Chairman of the Houston Bar Association Juvenile Consequences Partnership.

ning, the very first presentation of the Juvenile Consequences Program was held in September 2007. It will continue once each month, always on a Tuesday evening, at the Harris County Juvenile Justice Center in the first floor courtroom, from 6:30 p.m. until 8:00 p.m. Partner agencies chose this time so people can eat dinner after work and school and travel to downtown Houston from all over the county.

Program officials get the word out by telling children and their parents during their first meeting with a supervising probation officer after a child is placed in the deferred prosecution program. If they can't come to that month's program, they can arrange to attend another program—the juvenile is on deferred prosecution for six months. About 75 to 80 families are invited to each session, resulting in attendance of about 120 people. The number invited to each presentation is limited because of the available space, but at any given time, about 1,300 children are on deferred prosecution in Harris County.

At the program, a representative from each of the partners talks for about 20 minutes regarding their respective role in the juvenile justice process. Although each speaker is provided a list of suggested topics, there is far more to discuss than the time allows. The program is presented in the same chronological order as a case would follow. The police department representative speaks first about the role of the police officer in taking the juvenile into custody, probable cause for arrest, taking the child for magistrate's warnings, processing him at a juvenile processing office, preparing the offense report, releasing the child to parents or placing him into the juvenile detention facility, and making the referral to the juvenile court. Some speakers have handouts to distribute, while others just stand up at the front of the room and talk. We don't need microphones; we gather in a courtroom with good acoustics.

Following the police department speaker, a representative from the district attorney's office discusses prosecutors' role, protection of the public, how charges are filed, the difference between a felony and a misdemeanor, the law of parties, juvenile records, the State's burden of proof, and the parents' possible liability.

Naturally, after the assistant district attorney is finished speaking, it's the defense attorney's turn to talk about her role in the juvenile court, including the requirement that all juveniles must be represented by counsel, how the attorney evaluates the case and presents the evidence, the possible outcomes of a juvenile referral, the effect of a juvenile adjudication for delinquent conduct, and what happens if the juvenile wants to appeal his case.

Last, but certainly not least, a representative from the Juvenile Probation Department talks about how that agency fits into the juvenile justice system, what happens after the child has appeared in court, what to expect from the probation department during each step of the process, and what is expected of juveniles under PO supervision.

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A recent program

At the program presented in October, I was the designated speaker from the district attorney's office. I hadn't spoken at this program before, but I had many times at the old Laws Program before it was discontinued. All of our office's senior juvenile prosecutors—our division chief, two senior attorneys who are board-certified in juvenile law (I'm one of them), and three senior-level juvenile district court chiefs—share the presentation duties.

In thinking about how to approach my presentation, I decided to keep it short and simple and to make just a few points, rather than try to cover too much. I wanted to prevent future offenses as well as address the role of the DA's office in my talk. Trying to keep it light, easily understandable, and a bit humorous, I told them that I was going to share some "secrets" with them, and if they would just follow my advice and tell their friends too, it would keep a lot of kids out of our juvenile courts.

I tried to tell a funny anecdote and use true stories from my own experience, and I urged them to follow my advice so they wouldn't have to be coming back to juvenile court. In addition, I provided some written material on the juvenile system that I left at the table by the door, in case anyone wanted to take it and read it later. My anecdotes got some laughs, and the audience seemed engaged.

I offered four "secrets":

1 **If you aren't supposed to have it at school, don't take it to school.** You are most likely going to get caught. Schools today all have police officers on campus, and if you get caught with something you shouldn't have, the schools must, by law, refer those cases to the justice system.

When I went to school, there weren't police on every campus, and there hadn't been any school shootings like we hear about today. Today some of the schools have "zero tolerance" policies where they refer anything that looks like a risk to school safety to law enforcement. We all want our schools to be safe and for the children to be able to learn without distractions.

2 **Don't let your friends get you into trouble, and choose your friends carefully.** If you hang out with troublemakers, people will think you are, too.

I told the audience about a case where a group of boys had driven across town for some reason; then one of them pulled out a gun and suggested that they "jack" a convenience store. All agreed, except one kid who was just adamant that he didn't want any part of that. He berated the others and then just got out of the car and walked away—in a strange part of town in the middle of the night and without knowing how he might get home. When the others proceeded with their plans and the store clerk was shot and killed, this boy ended up having to testify against his friends. It was very hard for him, but today he is the one who has finished school, has a family, and lives a normal life. The others are still in prison. I told them how much I admired that boy's courage in defying his friends and following his own conscience and how hard it must have been for him.

3 **You are always under surveillance.** Electronic surveillance is in stores, at school, on the school bus, in parking lots, and in shopping malls. If you see the camera, it's because authorities mean for you to see it; often it is concealed.

I told the audience about a videotape I had seen of a shoplifting situation in a local department store, how the video could follow the kids from department to department, watch them from several angles, and zoom in to show what they had in their hands. The next weekend I found myself in that particular store, realized that it was the very place I had seen in the video, and I looked all around for the cameras—and I couldn't see one of them! I looked and looked (and realized how silly I must've appeared to the security people—I guess they watched me pretty closely the rest of the time I was in the store) but still saw no sign of any cameras, which made me a believer in unseen surveillance.

4 **Be polite and cooperate.** This is always good advice. If you aren't doing anything, you need not fear the police, so don't run. I assured my audience that I had seen many, many cases where kids were skipping class but not doing anything illegal, and when police approached, they panicked and ran away. Those kids might have been in trouble for truancy, but they would not have been charged with breaking the law if they hadn't run.

I also told them that police could stop them and ask their name, and they were obligated to identify themselves. I told a story about another prosecutor who had had a flat tire on the way home late at night and who had gotten all

dirty and dropped the jack on his foot while trying to change to tire. He had dozed off while sitting on the curb waiting for his girlfriend to pick him up, and the police came along. He was really grubby and had a bleeding foot, and he awoke to the police car's red emergency light flashing in his face. They asked him who he was and what he was doing. They asked to see his driver's license, and he started to get mad (his bad night was getting worse) and say, "But I wasn't driving!" when he realized the cops had no idea who he was and that he had to cooperate and explain himself. When he did, the officers understood and they helped him change the tire.

The program seemed to be a great success with most of those who attended. For the most part, they seemed to be paying attention and afterwards, several of them took the time to approach me and the other speakers with good questions. Parents mostly asked how to get their kids to do what they should be doing and keep them out of trouble. The juveniles, on the other hand, seemed to have questions along the lines of "What would happen if …," asking about the consequences of various circumstances and behaviors.

We hope to provide an opportunity for kids and parents to meet and interact with representatives of the various parts of the process. They meet a real person who tells them how the system works, and they have an opportunity to ask questions about what they have experienced so far and what might happen in the future. We hope to educate families so they can provide the support and guidance their child needs, and we want to point out to the kids the consequences they face in the justice system if they make bad choices and continue on the wrong track. We want to help them successfully complete their program and to deter them from committing subsequent offenses.

I tell them I hope I never see them again in the courthouse—unless someday when they have finished their education and they come back to help us as a juror, police officer, lawyer, probation officer, or maybe even a judge!

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AS THE JUDGES SAW IT

By David C. Newell
Assistant District Attorney in Harris County

Questions

1 Mark Anthony Zapata was charged with sexually assaulting each of his three daughters. He pled guilty to one count of aggravated sexual assault of a child and was sentenced to 15 years in prison. He admitted to the probation officer conducting the PSI report that he had committed the various offenses against his daughters. On the day of sentencing, he moved to withdraw his plea. The trial court denied the motion. Zapata filed a writ of habeas corpus alleging that his plea was involuntary because at the time of his plea he did not know that the complainants had recanted their accusations and would not have testified against him at trial. He learned that they had recanted after his plea but before sentencing, though the recantations were not originally listed in his motion to withdraw his plea. Zapata claimed he could not produce their testimony for the court to support his motion to withdraw his plea because the children's mother had driven up from Corpus Christi and taken them away with her. Zapata also explained that he had fabricated his admissions in the PSI because he thought it would help him get a more lenient sentence.


David Newell

At the hearing on the writ, two of the three daughters testified that Zapata had never touched them inappropriately or had sex with them. They explained that they were angry at Zapata for his decision to divorce their mother, and they claimed they were misled during interviews with sexual assault investigators. The third daughter had recanted earlier but had planned to testify for the State. However, Zapata prevented her from testifying because she had been in the courtroom throughout the proceedings. The trial court found the witnesses credible.

Should Zapata be allowed to withdraw his plea because it was involuntary?

yes _____ no _____

2 Rhonda Renee Jones and Marcus Benner were sitting in a car making crystal meth (which is not a new euphemism for sex). They were about three-quarters of the way through when two deputies responding to a suspicious vehicle call pulled up behind them. Jones drove off to avoid arrest while Benner threw some of the meth-making materials out the window. In a panic, Benner poured the liquid methamphetamine into a bottle of bleach because he thought that might make the meth "go away." If the methamphetamine had "powdered out," it would have yielded seven to 10 grams.

At trial, the State's expert testified that the bleach bottle contained a total of 2,375.8 grams of liquid (some methamphetamine and some bleach). The defense expert testified that he found two substances, both in trace quantities, consistent with the oxidation of methamphetamine. He also explained that bleach and methamphetamine do not mix well.

Was the State required to prove that Jones and Benner "mixed" the bleach with the methamphetamine or that pouring the drugs into a bottle of bleach resulted in a "mixture?"

mixed _____ mixture_____

3 On the morning of the first day of trial on a misdemeanor DWI, defense attorney Christopher N. Hoover presented the trial court with an oral motion for continuance and a written motion to recuse. Hoover based his request for continuance on the perceived need for an expert to assist in the preparation of a defense. The written motion for recusal alleged that the trial court had "appeared to personally attack" Hoover in a prior case and that Hoover was in the process of filing a complaint against the judge with the Judicial Conduct Commission. The trial court

denied both motions. Hoover announced "not ready" for trial and said he would not participate because he could not effectively represent his client, Darryl Cannon. Hoover did not participate in jury selection; he did not have his client enter a plea; he did not make an opening statement. He did, however, make a motion for instructed verdict, which was, of course, denied. The jury found Cannon, the defendant, guilty in 15 minutes.

Did Hoover's conduct constructively deprive his client of his 6th Amendment right to effective assistance of counsel?

yes _____ no _____

4 Lawrence Preston Miles crashed his purple Corvette into a limousine. Miles and the limousine driver exchanged driver's license information, but the limousine driver demanded that Miles wait for the police when Miles revealed that he did not have proof of insurance. As they waited, several tow trucks arrived, and one of the drivers, Joseph Moore, got out of his truck and approached to offer help. Moore noticed that Miles had slurred speech and seemed under the influence of something. Then Miles got back in his car and drove away before the police could arrive.

Out of concern for public safety, Moore led a vanguard of six tow trucks in pursuit. At one intersection, the wrecker drivers attempted to box Miles in to stop him. Miles, however, escaped the blockade by driving onto a curb and cutting through a parking lot at what Moore described as a "very high rate of speed." The wreckers continued to follow Miles, who drove down a one-way street with Moore in pursuit. Miles then drove down the wrong side of a divided road and turned into the parking lot of a commercial establishment, where he came to a stop. After positioning his wrecker in a manner that effectively blocked in the appellant, Moore approached the appellant's Corvette and attempted to remove his keys from the ignition. As Moore reached for Miles' keys, the appellant placed a gun to Moore's head. Houston Police Department officers arrived moments later and took the appellant into custody under suspicion of drunk driving. Miles was ultimately charged with UCW and DWI.

Because Moore violated various traffic laws while trying to effect a citizen's arrest on Miles, Miles filed a motion to suppress under article 38.23, claiming that Moore's traffic law violations rendered the seizure of any evidence illegal.

Should the trial court have suppressed the evidence?

yes _____ no _____

5 Two Hood County sheriff's deputies, Sonny Frisbie and Robert Young, stopped a vehicle for having an inoperative license plate light. After getting the driver's identification, Deputy Frisbie asked the only passenger in the car for identification. The passenger indicated that he had a driver's license, but it wasn't with him. He initially said his name was John Michael St. George and his date of birth was December 16, 1975. The warrant checks on the driver were clear, but the dispatcher reported that there was no record of a driver's license matching the passenger's name and DOB. Deputy Frisbie issued a warning citation to the driver for the license plate light.

While he was doing that, Deputy Young again questioned the passenger about his identity. After further inquiries, the deputies learned that the passenger's name was really Jeffery Michael St. George. When they ran this name, the deputies found that he had outstanding warrants for speeding and not having insurance. The passenger was arrested 10 minutes after the citation was issued to the driver. In the search incident to arrest, the officers found marijuana in a pack of cigarettes in St. George's pocket. St. George filed a motion to suppress the evidence, claiming that the detention, questioning, and investigation was pursued without a warrant and without probable cause or reasonable suspicion.

Should the trial court have suppressed the evidence?

yes _____ no _____

6 Officer Clinton Stewart pulled over Roxanne Lavender for a traffic violation. After a consent search, Officer Stewart discovered that Lavender possessed several "buds" of marijuana in a baggie. Having no formal narcotics training, Officer Stewart took Lavender to the station to see if she could assist the police as a potential informant. Stewart interviewed Lavender with the assistance

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of Detective Terry Weed. Lavender agreed to assist the officers, and Weed agreed to discuss the situation with the county attorney. Lavender asked whether some of the marijuana could be returned to her, and Weed said no, it would either be used as evidence against her or destroyed. As Officer Stewart was transporting Lavender back to her car, she asked him to give her back part of the marijuana. Apparently having just seen *Training Day*, Stewart returned one "bud" of the marijuana to Lavender.

Lavender did not work out as a confidential informant, and the State decided to prosecute her. Upon learning this, Stewart realized that the discrepancy between what was originally confiscated and what remained could come to light, and he told Weed what had happened.

Did Officer Stewart tamper with physical evidence?

yes _____ no _____

7 Nancy Neesley veered into oncoming traffic and collided with a car driven by Cynthia Perez. Neesley was taken to Hermann Hospital to be treated for her injuries while rescue workers struggled to remove Perez from the wreckage. She died before they could free her.

A deputy at the scene noted that Neesley smelled of alcohol and informed two other deputies that Neesley's blood needed to be analyzed at the hospital. The two deputies went to the hospital and, after determining that Neesley was probably intoxicated, got a nurse to perform a mandatory blood draw. Unfortunately, Neesley had an intravenous line of saline solution attached to her left wrist, which contaminated the blood sample. The nurse then performed a second blood draw at the request of law enforcement.

Neesley was charged with intoxication manslaughter and promptly filed a motion to suppress the evidence obtained through the second blood draw. The trial court granted the motion, and the State appealed.

Did the trial court properly suppress evidence of the second blood draw?

yes _____ no _____

8 DPS Trooper Charles Cannon stopped Jermaine Murphy for speeding. Cannon detected the odor of marijuana coming from Murphy's car, so he asked to search. Murphy consented. Cannon found a cigar containing marijuana in the vehicle console, a small bag of marijuana inside a black luggage bag, and approximately a kilogram of cocaine in a rear compartment of the vehicle. Cannon arrested Murphy for possession of drug paraphernalia and possession of a controlled substance. He did not issue a speeding ticket.

Then, he submitted the drug paraphernalia case to the JP who set the case for trial. Cannon did not show up for the trial. Faced with a complete lack of evidence, the JP entered a written order acquitting Murphy on the drug paraphernalia case stating, among other things, that the State had failed to establish probable cause to stop Murphy for speeding and that Murphy had consented to the search. Prior to Murphy's trial on the cocaine case, Murphy filed a motion to suppress and dismiss the indictment alleging that the JP's order of acquittal and finding of no probable cause collaterally estopped the State from introducing evidence seized during the traffic stop.

Can the State introduce the evidence?

yes _____ no _____

9 Joshua Joel Moore pled guilty to manufacturing more than four but fewer than 200 grams of methamphetamine. The plea bargain required Moore to plea guilty, and in return the State would agree to a six-week postponement of the sentencing so that Moore could prepare himself for incarceration. Moore promised to appear for his sentencing and to refrain from committing any criminal offense during the six-week reprieve. If Moore abided by these terms, the State agreed to recommend a punishment of 25 years in prison. If, however, Moore failed to abide by these terms, the State would not recommend a punishment and the case would become an open plea to the trial court based upon the full punishment range. After discussing the terms of the plea agreement with Moore in open court, Moore agreed to the bargain and the judge accepted Moore's plea as well as the terms of the plea agreement. Then, Moore assaulted someone.

At the sentencing hearing, the State put on proof that Moore had assaulted someone during his six-week reprieve. The State informed the trial court that, pursuant to the plea agreement, the State would not make any recommenda-

tion as to punishment. Despite Moore's request that the trial court assess the original 25-year sentence from the plea agreement, the trial court sentenced him to 40 years' incarceration. The court of appeals determined that the State was allowed to withdraw its participation in the plea bargain, but Moore should have been allowed to withdraw his guilty plea.

So which is it? (Three choices? Good God, man!)

25 years _____
withdraw the plea _____
40 years _____

10 Gerald Herrera and some members of his family were involved in a fight outside the Mia Mar Bar in Lockhart after some men insulted Herrera's sister. During the fight some people were stabbed or cut. An officer stopped Herrera's car and found a lockblade knife in the backseat on the floorboard. (Herrera was sitting in the backseat while his parents drove him.) Ultimately, Herrera was arrested on an outstanding warrant and taken to Caldwell County jail. The next morning Investigator Powell went to the jail to talk with Herrera about the fight. Herrera told Powell that he had a knife in his pocket, and he tried to get it out to defend himself, but someone was kicking and hitting him, so he just curled up in a ball. Powell didn't *Mirandize* Herrera before he spoke to him, nor did he record the conversation. When questioned about the details of his conversation with Herrera, Powell denied that Herrera was a suspect when they spoke. Powell said he did not have a clear picture of what happened, and while he knew the Herreras were involved, Powell did not know the extent of their involvement. Herrera moved to suppress the statements.

Were Herrera's statements the product of "custodial interrogation"?

yes _____ no _____

Answers

1 Um … yes? In a per curiam opinion, the Court of Criminal Appeals held that Zapata was unable to present the recantation testimony of his daughters "through no fault of his own," so his plea was not knowingly or voluntarily entered. It would be nice to provide some legal analysis to explain the court's decision, but the court didn't provide any for this published opinion. The trial court held that Zapata had satisfied his burden under *Ex parte Tully*, 109 S.W.3d 388 (Tex. Crim. App. 2002), and the Court of Criminal Appeals held that "the trial court's findings are supported by the habeas record." So, presumably, this case is an "actual innocence" case if you read the court's adoption of the trial court's findings as an adoption of its rationale. Of course, that would mean this opinion expands *Tully* (which had previously held that a mere guilty plea was not a bar to a claim of "actual innocence") to hold that a defendant's admittedly false confession to a probation officer does not undermine a showing of "actual innocence."

The dissent pointed out, however, that this case is an involuntary plea case and not an actual innocence case. Judge Hervey, joined by Judge Keasler and Presiding Judge Keller, authored a detailed dissent that first explained that the record did not support a holding that the plea was involuntary. Then, Judge Hervey detailed how Zapata had failed to meet the "Herculean task" of establishing a bare claim of actual innocence: "The record supports findings that [the] applicant pleaded guilty as part of a strategy to get probation and that, when this failed, he attempted to withdraw his plea while pursuing a new or dual strategy of pressuring the girls to recant." *Zapata*, 235 S.W.3d at 794. Consequently, the dissent would not have granted relief "based on, as even applicant has put it, 'the circus that was put together in this case'." *Id.*

So, even though the court could not apparently justify a holding based on "actual innocence" and didn't perform an involuntary plea analysis, the court still held that Zapata's plea was involuntary based upon the trial court's belief in the recantation of the victims. Judge Meyers dissented without an opinion. *Ex parte Zapata*, 235 S.W.3d 794 (Tex. Crim. App. 2007).

2 Mixed. The Court of Criminal Appeals held that the literal meaning of the legislature's adulterant and dilutant definition includes any substance that is mixed or added regardless of when, how, or why the substance is added. Thus, the State had to prove only that Benner added the meth to the bleach, not that the two substances had chemically combined. The court had previously held in 1992 that the definition of "controlled substance" required

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proof that the controlled substance actually dissolved in or otherwise combined in some way with the adulterant or dilutant. Though the legislature changed the Health and Safety Code to define "adulterant" or "dilutant," the definition of controlled substance had been untouched, which was key to the defendant's claim that the corrosive effect of the bleach had destroyed the methamphetamine rather than actually mixing with it. The court rejected this argument, however, noting that the evidence showed the methamphetamine was "added to or mixed with" the bleach. Moreover, the court explained that the jury was free to accept the testimony of the State's expert that bleach was an adulterant or dilutant over that of the defense expert who said it was not. *Jones v. State*, 235 S.W.3d 783, 786 (Tex. Crim. App. October 10, 2007).

3 Yes. Hoover's intentional refusal to participate resulted in a failure to subject the State's case to meaningful adversarial testing. Consequently, Hoover constructively denied Cannon his 6th Amendment right to effective assistance of counsel in the courtroom. The majority set out the standard for the two types of ineffective assistance claims. The first, under *Strickland v. Washington*, required a showing that Hoover's conduct prejudiced Cannon. The second, under *United States v. Cronic*, does not require a showing of prejudice when the defendant demonstrates that his counsel entirely failed to subject the State's case to meaningful adversarial testing. This case was decided under the *Cronic* standard.

Additionally, the majority chose not to speculate about Hoover's motives for his actions. Taking him at his word that he was unprepared, the majority distinguishing this case from the legion of ineffective assistance cases that are rejected because the record is silent regarding trial counsel's strategy. According to the majority, Hoover was physically present, but he essentially boycotted the proceedings and caused the trial to lose its character as a confrontation between adversaries. Moreover, the majority rejected the idea that the holding would encourage other counsel to engage in Hoover-esque tactics. They noted that this type of situation can be avoided by ascertaining whether the defendant understands the implications and probable consequences of his counsel's conduct and whether the defendant is knowingly, intelligently, and voluntarily waiving his right to the effective assistance of counsel. Also, this type of behavior opens an attorney up to potential disciplinary proceedings and civil malpractice liability, which the majority feels is a sufficient deterrent to such conduct.

So remember Christopher Hoover because seeing his name in the bar journal is probably about the only satisfaction to be gained from this decision. *Cannon v. State*, ____ S.W.3d ____; 2007 WL 3010417 (Tex. Crim. App. October 17, 2007).

4 No. Moore, the wrecker driver, had probable cause to arrest Miles for DWI, and the traffic violations did not implicate article 38.23 because a police officer in the same situation would be allowed to violate those laws to effect an arrest. The court laid the groundwork for its opinion by examining the history of the Texas exclusionary rule that would ultimately become article 38.23 of the Texas Code of Criminal Procedure. (And, just for the sake of completeness, article 38.23 of the Texas Code of Criminal Procedure prohibits the use of evidence seized by the police or private citizens if the evidence was obtained through the violation of any provision of the Constitution or laws of the State of Texas or the Constitution or laws of the United States.) The court posited that the "core" rationale for this provision is the deterrence of police illegality. This, according to the court, leads to the inescapable conclusion that an ordinary person cannot search or seize evidence if the police cannot do so. So, the court reasoned, the converse must also be true: If the police can do it, so can the private citizen. Just like that, a new rule is born. And, as Bill Parcells says in one of the most annoying beer commercials ever to contribute to humanity's collective annoyance, "That's not a bad thing. That's a good thing."

This new rule focuses the inquiry on privacy interests instead of whether a particular "law" is implicated by 38.23. To prove that this new rule "works," the court detailed several 38.23 cases to show how it is consistent with previous holdings interpreting article 38.23 and the purpose behind it.

Then, armed with its new rule, the court considered whether Moore had the authority to arrest Miles for DWI. He did. Several witnesses at the scene of the initial accident said Miles looked

intoxicated, and his dangerous driving after a three-car accident only made Moore's concern that much more well-founded. Finally, the court held that Moore did not violate any of Miles's privacy rights by relying upon the recent Supreme Court case *Scott v. Harris*, which held that the 4th Amendment was not implicated by a police officer engaging in a high-speed chase. Because a police officer would not have been required to stop, neither was Moore.

Judge Price authored a concurring opinion that strongly disagreed with the new rule announced by the majority because it does not refer to the plain statutory language in article 38.23. But, he and Judge Johnson agreed with the opinion because they would also hold that violation of laws do not impact the personal or property rights of the accused. Presiding Judge Keller concurred without an opinion. (She probably felt that none of the evidence was "obtained" in violation of the law because it did not exist at the time of the illegality but chose not to say it because she's already done so in other opinions such as *Chavez v. State*.) *Miles v. State*, ____ S.W.3d ____; 2007 WL 3010420 (Tex. Crim. App. October 17, 2007).

5 Apparently, yes. The deputies lacked specific, articulable facts to continue the detention of the passenger once they had issued a warning citation to the driver. Citing *Terry v. Ohio*, the court noted that an officer's actions must be justified at its inception and must be reasonably related in scope to the circumstances that justified the interference in the first place. Under the second part of this test, the court concluded that the officer's continued questioning of St. George was not reasonably related in scope to the circumstances that justified the initial interference. Thus, the officers could not continue to detain the passenger without independent reasonable suspicion.

According to the court, St. George's nervousness and the fact that the dispatcher could not find any records on the given name and date of birth (despite St. George's claims that he had a driver's license) did not amount to reasonable suspicion. Moreover, the police could not rely upon St. George's admission that he had lied because they obtained that information while the police were detaining him illegally. As the court put it, "Giving a false name when the officers did not know it was false could not give them reasonable suspicion to investigate further."

Perhaps a saving grace can be found in the underlying opinion, though. There, the Fort Worth Court of Appeals noted that none of the witnesses explained the significance of the dispatcher finding "no record" of a driver's license under the given name and date of birth. This could suggest a different outcome if an officer in a future case were to explain that the lack of a driver's license record on a person who had admitted to having a driver's license was an indication that the passenger was giving a false name. However, that is a pretty big "if," and the Court of Criminal Appeals did not suggest the record was undeveloped. The court also determined that continued detention was not consensual as the police questioned St. George for several minutes after they had issued the traffic warning. And, to add insult to injury, the majority never addressed the State's argument that St. George's outstanding warrants attenuated the taint of any illegal detention, even though the State clearly raised it. *St. George v. State*, ____ S.W.3d ____, 2007 WL 3171746 (Tex. Crim. App. October 31, 2007).

6 No. The evidence was legally insufficient to show Stewart had altered, destroyed, or concealed the evidence with the intent to impair its availability as evidence in an investigation or official proceeding. Presiding Judge Keller, apparently a fan of *Training Day* as well, authored a majority opinion holding that the court of appeals erroneously focused on whether Stewart *knew* his conduct would impair the availability of the marijuana, not on whether it was his conscious desire to do so. According to the majority, the remaining marijuana was enough to convict Lavender, and the evidence showed Stewart gave the "bud" to Lavender only to cultivate her as an informant, not to make the evidence unavailable as evidence in an official proceeding. Thus, it appears from the majority's reasoning, a defendant must intend to effect a change on an investigation or proceeding when he makes evidence unavailable. Because the record did not support the inference that Stewart so intended, the court reversed the case and ordered an acquittal.

Judge Womack, writing for the dissent, felt that whatever Stewart's ultimate motivation, the evidence showed Stewart clearly gave Lavender the "bud"

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with the intent to make it unavailable. The dissent also criticized the majority for grafting a requirement that the evidence tampering actually change the punishment of the offense or otherwise have an effect on the proceeding. Apparently Judge Womack preferred *Internal Affairs*. *Stewart v. State*, ____ S.W.3d ____; 2007 WL 3171640 (Tex. Crim. App. October 31, 2007).

7 No. While the state is statutorially permitted to draw only one blood specimen pursuant to the Transportation Code, that sample must be a "usable" sample, and the first one in this case was not usable. §724.012(b) of the Transportation Code requires a peace officer to take a blood sample from a suspect involved in a collision where a person was killed or suffered serious bodily injury. The problem the trial court and the court of appeals had was with an apparent conflict between §(a) of 724.012, which allows for taking "one or more specimens," and §(b), which allows for taking "a specimen." According to the court, this discrepency allowed for three possible interpretations: 1) only one specimen is permitted, 2) the number of specimens is unlimited, save for due process concerns, and 3) only one "usable" specimen is permitted. Reading §§724.012 and 724.013 (the breath/blood refusal statute) together compelled the court to include that in cases where a mandatory blood draw is required, only one specimen can be drawn.

But the court then had to determine the definition of "specimen" because the term wasn't defined. Because the statute was ambiguous, the court looked to extratextual factors to determine whether "specimen" means a "usable" sample. The legislature enacted the law to decrease the number of deaths cause by drunk drivers. The court reasoned that the legislature must have meant the "specimen" had to be usable because an unusable sample provides no useful information in determining whether an accident was caused by a drunk driver. Thus, the trial court erroneously suppressed the evidence because the deputy was allowed to take as many blood specimens as he needed to get a usable sample.

Presiding Judge Keller and Judge Hervey agreed with the majority but wrote separately to opine that the term "a specimen" clearly did not refer to the number of specimens because that phrase "one or more" in subsection (a) is meaningless. Judge Johnson dissented because the majority read a "usable" requirement into the statute without explaining what "usable" meant. Ultimately, eight judges believed the evidence was admissible, so this opinion is on pretty solid ground. *State v. Neesley*, ____ S.W.3d ____; 2007 WL 3276430 (Tex. Crim. App. November 7, 2007).

8 Yes. The JP's order of acquittal did not prevent the State from admitting the seized evidence because the doctrine of collateral estoppel does not extend to issues of evidentiary admissibility. Speaking for a unanimous court, Judge Johnson explained that collateral estoppel can bar the re-litigation of an ultimate fact issue but only if that ultimate fact issue is an essential element of the offense at issue in the subsequent prosecution. So the State is required to prove reasonable suspicion to stop and probable cause to search in both cases. However, these issues are merely evidentiary ones, not essential elements to the offenses of possession of drug paraphernalia or possession of a controlled substance. As the court ultimately put it, "allowing a litigated fact that is merely evidentiary to act as if it were an essential element of the second offense would overstep the doctrine's limits."

Judge Meyers also offered a concurring opinion that agreed with the majority's rationale and added that probable cause is a legal determination and collateral estoppel deals with previous litigation of issues of fact. But everyone agrees: The evidence comes in, and this case should finally put the issue to rest. *Murphy v. State*, ____ S.W.3d ____; 2007 WL 3276328 (Tex. Crim. App. November 7, 2007).

9 Forty years. Moore had agreed to an enforceable plea agreement which the trial court correctly followed. In a unanimous opinion, the court held that plea agreements are generally contractual arrangements between the State and the defendant. Here, both sides obtained advantages from the agreement, and the trial court bound itself to the terms of that agreement. According to the court, once a plea agreement is finalized and the trial court binds itself to the terms, both the defendant *and* the prosecutor are entitled to the benefit of the agreement.

When one side fails to abide by its part of the agreement, two potential

remedies exist. First, the defense can withdraw its plea. Second, the non-breaching party may demand specific performance of the remainder of the plea-agreement. Here, the State and Moore had negotiated what the remedy would be if Moore failed to live up to his part of the bargain, namely the State's withdrawal of its 25-year recommendation. Thus, the State was not required to recommend the 25-year sentence.

The court also rejected the court of appeals' position that Moore should have been allowed to withdraw his plea. Unlike a situation where a defendant merely agrees to plead guilty in exchange for an agreed recommendation, here Moore and the State had specifically pre-negotiated the consequence for Moore's failure to comply with his covenants that he would not commit any more crimes during the six-week reprieve and that he would show up for sentencing. It was not contemplated in the negotiations that Moore would ever be relieved of his ultimate, agreed-upon obligation to enter a guilty plea. Because Moore knowingly and voluntarily entered into a plea agreement that included remedies for his failure to comply with the terms of that agreement, Moore was not entitled to withdraw his guilty plea. *State v. Moore*, ____ S.W.3d ____; 2007 WL 4146342 (Tex. Crim. App. November 21, 2007).

10 No. Herrera failed to carry his burden to present evidence that he was "in custody" for *Miranda* purposes despite the fact that he was incarcerated. The court first noted that the State is not required to show compliance with Miranda until the defendant *clearly establishes* that the defendant's statement is the product of custodial interrogation. The court acknowledged that the United States Supreme Court seemed to hold under *Mathis v. United States* that *Miranda* applies whenever a defendant is "in custody," even if he is in custody on a case unrelated to the subject matter of the questioning. However, the court explained that several federal courts had acknowledged that a defendant's incarceration was not always dispositive of whether he were in custody. Thus, the court held that *Miranda* warnings may be required before questioning an incarcerated defendant, but they are not necessarily required before all inmate interrogations.

The court then tried to determine whether Herrera was in custody, looking to these factors: 1) the language used to summon the inmate; 2) the physical surroundings of the interrogation; 3) the extent to which the inmate is confronted with evidence of guilt; 4) the additional pressure exerted to detain the inmate or a change in his surroundings which results in an added imposition on his freedom of movement; and 5) the inmate's freedom to leave the scene and the purpose, place, and length of the questioning. According to the court, "beyond the purpose of the questioning—to gather information about the fight—the record [was] devoid of any facts relating to the factors relevant to determining "custody" for purposes of *Miranda* in this context."

Consequently, the court affirmed the trial court's ruling admitting Herrera's statements. Judge Cochran wrote a concurring opinion to reiterate her belief that the record in this case was simply not developed enough for the court to determine whether Herrera were in custody. There were no details regarding where in the jail the conversation took place or any of the circumstances under which Powell spoke with the defendant.

Judge Johnson and Judge Holcomb each wrote individual dissenting opinions joined by Judge Price. Judge Johnson believed Herrera was a suspect when Powell went to speak with him, and that he was in custody because he was questioned at the jail by an officer who was not employed by the jail. Judge Holcomb also believed Herrera had satisfied his burden to show he was in custody at the time of the questioning. *Herrera v. State*, ___ S.W.3d ___; 2007 WL 4146707 (Tex. Crim. App. November 21, 2007).

VICTIM ASSISTANCE

By Aaron Setliff
Chief Prosecutor of the Domestic Violence Unit in the El Paso District Attorney's Office

Help, hope, and healing

One jurisdiction's creative strategies for fulfilling prosecutors' duty to help crime victims

Amy Lujan, executive assistant to Jaime Esparza, the District Attorney in El Paso County, came up with the idea to offer a conference for crime victims two years ago. We often think of conferences as a chance for people in an industry to come together to learn about the latest trends. We realized that crime victims deserve the same kind of forum to learn about various aspects of the criminal and civil justice systems, to find out they are not alone, to find out about their rights, and to receive information they can use to make themselves monetarily, physically, and emotionally whole. Giving victims a voice in our community brings attention and activism to the plight of often forgotten crime victims.


Aaron Setliff

Starting from scratch in 2006, we slowly developed our purpose, message, and plans. Mr. Esparza brought together a coalition of crime victims and their service agencies to discuss the idea of having a conference. In the end, the value of the project became clear, especially if we presented the conference in a careful and compassionate manner.

The words "help, hope, and healing" kept coming to the forefront of our intentions. Offering *help* to crime victims in the form of information and support has certainly been a key goal for our office in general. Fostering *hope* must be a key component. And of course, while final *healing* cannot always occur, we think the goal of starting on a path *toward* healing offers the greatest chance for crime victims to pick up the pieces. That's how we came up with the title of our event: The Help Hope Healing Victims Conference.

And somewhere along the way, some idiot—OK, it was me—thought up the idea that we should walk a really long way in solidarity with crime victims. When we first started talking about the conference, we worried we would hold this big event and no one would attend it. To combat that possibility, I thought we could combine the conference with a walk across the entire city of El Paso, about 22 miles. And Jaime is the kind of leader who listens to good ideas and runs with them—or, in this case, walk with them. So he agreed to walk. That first year, we organized the Help Hope Healing Victims Walk Across El Paso the week before the conference. We invited victim service agencies to participate also; they walked two-mile increments along the way.

Overall, we were very pleased about the success of the 2006 Help Hope Healing Conference and Walk. We organized mercilessly and were extremely impressed when the events went off without a hitch. Among other great speakers, our keynote speaker, Carolyn Thomas, recounted her experiences as a victim of domestic violence at the hand of her ex-boyfriend. After getting out of prison, her ex-boyfriend went to her house, shot Carolyn in the face, then killed her mother. You may have seen Carolyn tell her story on "Larry King Live," the Discovery Channel, or "The Oprah Winfrey Show." This powerful story galvanized the conference attendees as well as the community.

2007's walk and conference

The week before the conference, we completed the Second Annual Walk Across El Paso. In preparation for this year's 22-mile walk, we knew we would need to train. A "core group" of walkers that intended to walk the whole way

began weekly practice sessions in September. These practices progressed from a leisurely 9-mile jaunt to less leisurely 15-mile journeys. Although we might have complained a little about mosquitoes, sunburn, aching feet, and a little too much togetherness, the Core Walkers enjoyed these practices.

On October 28, we left bright and early at 8 a.m. from Franklin High School. We made our way across the west side of El Paso stopping along the way at a 7-Eleven, JB's Restaurant, Smith Barney, and Kinley's House to pick up and drop off victims service agencies walkers along the way. As many as 89 walkers joined in one segment.

At the 9-mile point, we stopped at the courthouse for an exciting victims rally. Victims joined service agencies and members of the public to hear the stories of three victims of crime. These included Tish Times, herself a victim of domestic violence and a recipient of this year's Help Hope Healing Award; Manny Corral, brother of Mary Corral who was murdered by her partner; and Richard Barraza, cousin to Andrew Barcena, a police officer slain in the line of duty. The District Attorney from Las Cruces, Susana Martinez, joined Jaime, El Paso Police Department Chief Richard Wiles, and the Center Against Family Violence's Gloria Terry to address the large crowd.

From the courthouse, we made our way up Paisano, Alameda, and North Loop to Bowie High School, a Circle K, a Big 8, a Family Dollar, the Catholic Diocese, and finally to the El Paso Police Department's Mission Valley Regional Command Center. At each stop, we dropped off tired walkers and picked up new ones, and of course the Core Walkers made the whole journey.

On November 3, 2007, we held the Second Annual Help Hope Healing Conference. Victims learned about the criminal justice system from our DA, Jaime Esparza. They learned about protective orders from Assistant County Attorney Gabriella Edward. Victims heard techniques for managing their money from Alex Rascon from Greater El Paso Credit Union. Grieving, especially for children, was addressed by Dr. Dee Esparza; the Center Against Family Violence's Jodi Chestnut discussed helping child victims using play therapy. Representatives from the Texas Attorney General's Office, Doris Contreras and Robert Rodriguez, informed victims about Crime Victims Compensation. Raul Martinez of the DA's office gave victims computer-related information so they can track cases online. Dr. Martha Duffer offered victims upbeat methods for staying physically healthy. We showed a Help Hope Healing video which included the stories of victims of violent crime; they explained their experiences, offered advice, and gave examples of hope for healing.

At left, walkers show their support of crime victims on a 22-mile walk across El Paso. Below, Robin Givens, actress and herself a victim of domestic violence, was the keynote speaker at this year's conference.

In the afternoon, we bestowed this year's Help Hope Healing Award to three extremely worthy recipients. Jaime assembled a blue-ribbon committee of community leaders; they gathered prior to the conference to vet a list of potential recipients. Esther Chavez Cano, perhaps the premier domestic violence activist in Juarez, Mexico, received the award. Marcia Wheatley, whose daughter, Desiree, was brutally murdered by a serial killer, and who blazed a trail for changes to the way crime victims are

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treated in the El Paso area, also received the award. Finally, Tish Times received her award. Bestowing these awards to such worthy women was as great an honor for us as for these ladies.

And of course our keynote speaker, Robin Givens, addressed a rapt audience with her stories of abuse at the hands of her ex-husband, boxer Mike Tyson. She said her time helping and offering hope at the conference underscored her journey toward her *own* healing, as well as that of the attendees. Hearing that a successful, talented, and beautiful woman could suffer abuse at the hands of a man she loved made a valuable connection with the victims at the conference. Robin's earnest words left many in tears—precisely the reason we provided counselors to all who needed them.

Our overall effort

For the last two years, we have seen that this project garners attention to the cause, invigorates those of us in the day-to-day fight, and offers a voice for crime victims. We seek to address victims' needs and rights in new, innovative, and heartfelt manners. Bringing victims of crime together to learn about the resources available, encouraging them to interact, and developing a coalition for the rights of victims have been high priorities for our efforts.

INVESTIGATOR SECTION

By Chris Herndon
Investigator in the Williamson County District Attorney's Office

Officer training

One county's efforts to train its local law enforcement on tough cases.

If you are completely happy with the way that the officers in your jurisdiction conduct investigations and interviews, read no further. If you are in fact frequently frustrated with small and large mistakes that have to be fixed at trial, I may have a solution for you.

About three years ago, at the behest of our DA, John Bradley, Assistant DA Todd Nickle, Assistant DA Shawn Dick, and I began a training program for our local agencies to update them on caselaw, investigative protocols, and emerging technology for conducting investigations. Within a relatively short time, and for almost no cost at all, we have trained approximately 1,600 officers, and we have had to move into a room capable of holding over 100 students for our classes. The officers appreciate hearing the actual prosecutors who are prosecuting the cases they file, and it is a great way for the elected DA to remain in touch with the local law enforcement in his community.

How it started

We decided to conduct this training because of two areas of frustration with incoming cases: how child abuse investigations were conducted by different agencies and non-custodial police interviews beginning with the officer reading *Miranda* warnings to the suspect. In addition, agencies tend to have turnover in the CID units, and new detectives are often thrust into child sexual abuse investigations and other crimes against persons with little or no idea of the methods available to them. It always amazes me how officers shake their heads in our classes and think to themselves, "I wish I had thought of that before." We offer a mechanism where these new detectives can come and hear what our preferences are in their investigative protocols and how they can make their cases better from the start.

The prosecutors are responsible for the material and teaching, and I handle TCLEOSE requirements, registrations,

and logistics. My first task was to find an agency to be our training provider for TCLEOSE-reporting purposes. Lt. David McGarah at the Williamson County Sheriff's Office agreed to act as our training provider, and he has reported many hundreds of hours to TCLEOSE for us in that capacity.

The next task was to build an e-mail database so we couuld advertise the training. I began with the training officers at our county agencies and expanded to the constables and other officers we deal with. Shortly thereafter, I found out that the training announcements were going out on a statewide law enforcement e-mail. That was a great benefit in terms of advertising our training, but then we wondered whether we were straying from our original intention of providing the training for officers in our county. In retrospect, it has turned out well, allowing officers from other jurisdictions to attend, and I have never had to turn away an officer from our county because we did not have room. In addition to the great rapport that we built with other agencies, allowing outside officers to attend has actually been a great benefit to our investigators when we need something from outside of our area. It's not uncommon for me to have a business card of a contact in another city or another county when one of our investigators needs something. The e-mail list continues to grow, and we have had officers from as far away as Fort Worth attend our training. We have even had our local TCLEOSE field agent attend and introduce himself as an additional resource that officers probably did not know existed in their area.

A learning process

We began with a class we call Confessions, which covers custodial and non-custodial interviews, video and audio tape interviews, in-car cameras as interview tools, controlled phone calls, and jail phone calls. It is amazing how many officers do not realize what a valuable tool they have in their car for recording confessions at the scene of an offense, especially before the defendant has had time to formulate a story. Our audiences were fairly small at first, and we promised an individual class to an agency more than one time where only three people attended (and two of them had to leave to take calls).

We learned that the key to getting officers to attend was to have a great PowerPoint, to show lots of actual video clips of scenes and interviews, and to conduct the training at a central location. We keep our classes short, normally about three to four hours, and the training is free. I can't tell you how many evaluations I have read where the comments are extremely grateful for offering this training for free; many law enforcement agencies feel that it is the officers' responsibility to get their necessary training hours, so they don't provide it readily. Our training program not only helps the officers receive the training that we wish they had, but it also helps to build really positive relationships with our officers and to make them feel comfortable when they need to call us. One other benefit is that the training hours we provide does not subtract from their training budgets. Every officer in this area has a chance to receive almost their entire 40 additional training hours, free of charge, with training that is reflective of current caselaw. This year we will have reported approximately 30 hours of training for 600 officers, with some additional hours added through DWI training conducted by TDCAA, again at no cost to the agencies.

Assistant District Attorney Jennifer Earls joined our training team the second year, and her enthusiasm and experience prosecuting child sexual abuse cases was invaluable. Our classes rapidly expanded to other topics, and we now have classes on confidential informants, advanced search and seizure, adult sex crimes, criminal interdiction, and traffic stop.

One of the other benefits that we have seen is the ability to make officers aware of the technology available to assist them in their investigations. We cover protocols in using controlled phone calls, jail phone calls, visitation recordings, and in-car camera usage. One of our most popular clips is from an officer who had attended our training and used his camera to record three suspects dividing the blame for the running disturbance that they had just created. We also play incriminating clips from jail phone calls and controlled phone calls and point out how these recordings made our cases so strong at trial. The actual phone call and video clips used in the PowerPoint are very powerful to get our message across, and the officers really enjoy seeing someone from their agency used as a great example in our class.

We have also had the opportunity to bring in guest speakers for our classes,

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and they have been well received. Lt. Walt Goodson from the Texas Department of Public Safety taught the polygraph segment of our Investigating Adult Sex Crimes class, and registered nurse Vangie Barefoot did a section on SANE exams in that class as well.

We have a bold plan for 2008, and one of the projects we have in mind is to conduct a Crimes Against Children school, incorporating speakers from the Shaken Baby Alliance and our Child Advocacy Center (CAC). Through the efforts of Bonnie Armstrong at the Shaken Baby Alliance, we are also going to expand our credit for training to Child Protective Services as well. We have plans to expand our Crimes Against Children school so that it brings in law enforcement agencies from across the State, as well as CPS and CAC staffs.

You might ask yourself how we have time to do this. It is an organized effort that we begin in January. Jennifer, Todd, and I sit down with our trial calendars and plot out dates that will work for the three of us. Jennifer and Todd have opposing trial weeks which make this even harder, but our goal is to have one class a month. The training staff also receives a salary stipend paid through asset forfeiture funds to help offset a great deal of the after-hours work required to put everything together. Through trial and error, we have found that Fridays tend be better for the officers and for us. Again, we try to keep our class length three or four hours, so that even if an officer has worked all night, he can usually make it to class. (For those having a hard time, we even serve Starbucks coffee and donuts.) We give a test and evaluation after every class to comply with TCLEOSE requirements, and the Williamson County Sheriff's Office training staff assists me with our reporting and record keeping. We spend very little money to conduct our classes, and in fact the largest portion that we spend is on refreshments. We use one of the larger courtrooms in our building, and it comfortably seats more than 100 officers. We also encourage participation with giveaways of the Quick Law laminated guides (sold by TDCAA) and other books from TDCAA to maintain interest and expand officers' access to good legal advice.

If you are thinking of starting a program in your area, don't be afraid. The program can be as large or small as you like. The important thing is that officers see that we are actually doing something to help them and their cases, and that pays off for everyone in the end. I continually see comments on evaluations where officers are grateful to know that we want to help them, and you will definitely see the training pay off in the cases that are filed.

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