THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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

Also in this issue:

New dog-mauling statute tested

Prosecutors in Stephens County tried a heartbreaking case where a 7-year-old boy was mauled to death by four dogs.

By Stephen Bristow
Former District Attorney in Young and Stephens Counties

In 2007, the Texas Legislature passed "Lillian's Law," which holds owners accountable for serious injuries or death caused by their dogs. It is named after Lillian Stiles, who was attacked and killed by dogs in her front yard as she tended her garden.

To charge a dog owner with Attack by Dog Resulting in Death, §822.005 of the Health and Safety Code requires that the dog attack was unprovoked, occurred off the owner's property, and resulted in serious bodily injury or death. Prosecutors must also prove that the owners were criminally negligent in failing to secure their dogs. These elements seem simple at first reading, but they proved challenging in this case.


Stephen Bristow

The gruesome crime

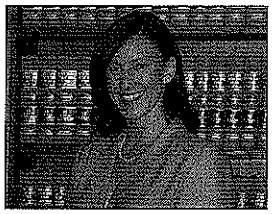
Tanner Monk was a typical 7-year-old boy who loved sports. His mother described him as very outgoing and a good friend to all. Tanner and his family had recently moved to their rural house, which is around the corner from Crystal Watson and Jack Smith's house. Tanner frequented the Watson-Smith residence where he played with one of their daughters and her cousin.

One fateful Sunday in May 2008, Tanner had been to his

Continued on page 16

Foundation to flourish in 2009

2008 was a booming year for the Texas District and County Attorneys Foundation, with many growth spurts and goals accomplished. As we look into 2009, there are many more opportunities for the foundation to enrich the training and educational resources for TDCAA members through publications, seminars, a new appellate attorney on staff, and more.



By Emily Kleine
TDCAF Development Director

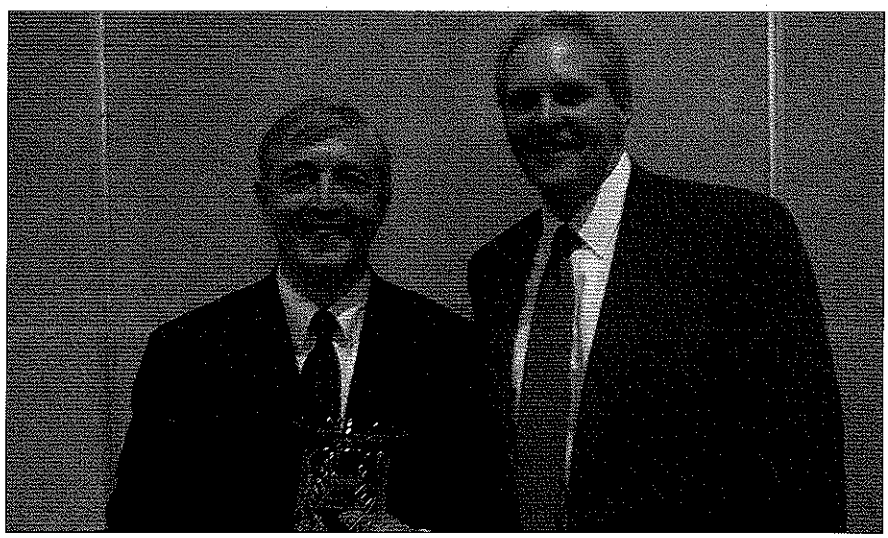
The recent TDCAA Elected Prosecutor Conference (December 3–5 here in Austin) brought much momentum to the foundation's current activity. The TDCAF Advisory Committee met and committed themselves to bringing the foundation to the next level of excellence in 2009 by teaming up with members of their own community who have a distinct interest in supporting our mission and that of TDCAA. Thank you to those attending the Advisory Committee meeting: **Dan Boulware (Chair), Tom Bridges, Dean Bob Fertitta, Mike Guarino, Tom Krampitz, Barry Macha, Sherri Wallace Patton, Judge Susan Reed, Bill Turner**, and **David Williams.**

A successful Champions for Justice event was held in honor of retiring Travis County DA, **Ronnie Earle**, on December 4 at the Omni Southpark Hotel in Austin. Friends, colleagues, and family members gathered to enjoy food and drink and to honor Ronnie for his outstanding 32 years of public service to Travis County and the state of Texas. **Ken Oden**, former Travis County Attorney, introduced Ronnie in a heartfelt way, while **Barry Macha**, new TDCAA President, and **Rob Kepple**, TDCAA Executive Director, presented Ronnie with an award. TDCAF benefitted greatly from the evening, and we are planning two other Champions for Justice events in the near future.

Kudos to the following individuals for making generous contributions to TDCAF in recent weeks: **Joseph D. Brown** (Criminal District Attorney, Grayson County), **Robert N. Floyd** (Austin), **Lee Walker and Jennifer Vickers** (Austin), **Stan Schleuter** (Austin), **Linebarger Goggan Blair & Sampson, LLP** (Austin), and **Joe Turner** (Austin). Also, a big thanks to the attendees of the TDCAA **Key Personnel Seminar** (November 5–7 in San Antonio) for making contributions to the foundation. We appreciate your support!

Please remember TDCAF as you contemplate honoring or memorializing a loved one. Making a contribution to the foundation in the name of a friend, family member, loved one, or colleague is an exceptional way to show your appreciation. The foundation staff will send a special note to the family members or living honoree that states your gratitude and also explain how the gift will help ensure the future excellence of prosecution and law enforcement in Texas. ✤

To see a list of recent gifts to the foundation, turn to page 8. To see photos from December's Champions for Justice event honoring retired Travis County DA Ronnie Earle, see page 9.



Retiring Travis County District Attorney Ronnie Earle and TDCAA President Barry Macha, Criminal DA in Wichita County, paused for a photo at the Champions for Justice reception in Earle's honor.

Table of Contents

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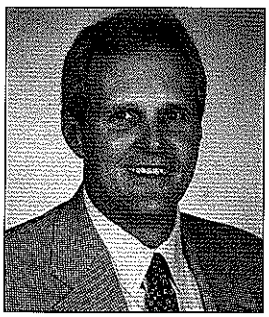
Where we've come from and where we're going

Thank you, members of TDCAA, for the honor and privilege of serving as your president in 2009. I am extremely grateful for your membership, helpful cooperation, and readiness to respond to any call to service. You are the lifeblood of our association. Our continued success depends on your participation.



By Barry Macha
Criminal District Attorney in Wichita County

The TDCAA staff is devoted to its work and possesses a deep sense of pride in the association's accomplishments. Executive Director Rob Kepple is a great leader and has assembled a very talented team. To them goes a vast amount of the credit for making our association tick. They are true team players committed to our members and mission and always willing to stay late or go the extra mile to get the job done.

I had the good fortune of serving as TDCAA president in 1998. In one of my columns back then, I wrote about how TDCAA was doing and where we were headed by comparing TDCAA statistical data for 1997 to 1987. Comparing that information to where we are today is even more telling.

In 1987, TDCAA had 1,687 dues-paying members out of 2,838 potential members (59.4 percent); in 1997, 3,134 out of 4,659 (67.3 percent); in 2008, 3,907 out of 5,374 (72.7 percent). Thus, since 1987 we have added over 1,000 members with a 13-percentage-point increase in people who join.

The breadth and caliber of the training that TDCAA provides is unsurpassed. During 1997, the association put on 10 full seminars (three more than the seven we had in 1987) plus 15 regional legislative updates. In 2008, we put on 10 full seminars and three DWI seminars (plus the DWI Summit), five in-house trainings (where TDCAA staff travels to one of the larger offices to do training there), and 12 regional seminars.

The 1997 TDCAA staff of 15 employees almost doubled the eight we had in 1987. By 2008, the association had added only one more employee for a total of 16—but it has served 700 more members and trained almost 5,000 more people.

TDCAA had 10 publications in 1987. Diane Burch Beckham joined TDCAA's staff in 1996 and by 1997 she had increased our publications to 29. In 2008, TDCAA offered 42 different books. Diane's tireless efforts have been nothing short of spectacular. We clearly have the best publications on the market. That also applies to *The Texas Prosecutor*, TDCAA's official journal. Since joining our staff in 2002, Sarah Wolf has taken our journal to an even higher level and made it the industry standard by which all others are measured. Each issue is chock-full of articles with timely and cutting-edge information that provides invaluable assistance to members and their staffs.

Our association continues to serve as a legislative resource in criminal law and government representation matters. In 1987, the legislative resource duties were primarily handled by our executive director at that time, Tom Krampitz. Tom passed that duty on to Rob Kepple when Rob was hired as TDCAA general counsel in 1990. When Tom resigned in 2002, Rob became executive director; he promptly hired Shannon Edmonds who has served as our primary legislative resource since then. We are the beneficiary of the respect and goodwill earned by Tom, Rob, and Shannon for their work in the legislative process. They are the best of the best, and their value to our association cannot be overstated. But their efforts to keep us informed about events in Austin do not supplant our individual responsibility to provide input directly to our legislators when they need help with criminal justice or government representation matters. We have been fortunate over the years that some of the larger DA offices have consistently sent personnel to help with legislative matters. Tim Curry, Tarrant County Criminal District Attorney, in particular comes to mind, but Dallas and Harris Counties have also been significant long-time contributors.

That's a brief look back to see how TDCAA has been doing for the last 20 years. So what's on the horizon? To secure the future excellence of Texas prosecution and law enforcement, TDCAA created a charitable foundation in June 2006 to meet the association's growing need for training and assistance,

including specialized and consistent training in DWI, domestic violence, and child sexual abuse; expanded legal assistance in trial, appellate, and child advocacy support; and comprehensive victim/witness coordinator training, resources, and support. The foundation's advisory committee includes some former district attorneys who are also past TDCAA presidents who will build on the solid foundation they were instrumental in creating: Dan Boulware (chair), Tom Bridges (also a current TDCAA book author/instructor), Cappy Eads, and Carol Vance.

I believe that in many ways the past holds the direction for our future. If TDCAA is going to continue to grow and meet the needs of its members, we need *your* membership, input, and support. Working together, we can achieve the stated purpose of our association: to promote the improvement of prosecution and government representation in the State of Texas by providing educational and technical assistance to prosecutors and their staffs, by providing educational and technical assistance to the law enforcement community, and by serving as a legislative resource in criminal law and government representation matters.

Thanks again for the wonderful opportunity to serve as your president. I look forward to seeing each of you soon. ✤

EXECUTIVE DIRECTOR'S REPORT

Diversity training

There, I said it. I read in a *Newsweek* article that those two words were guaranteed to make people roll their eyes and squirm in their seats. When they see this subject on a conference agenda, folks think to themselves: "OK, what idiot in what office said something wrong to prompt *this* discussion?"

By Rob Kepple
TDCAA Executive Director in Austin

I will confess that in my 18 years at TDCAA, it never occurred to me that our association should be talking about how race impacts our offices, our profession, and ultimately the work we do in our communities. Even though most law enforcement agencies and many other organizations and businesses regularly provide diversity training, we as prosecutors didn't—until the Elected Prosecutor Conference in December.

Why should we? The answer is simple: It is a service to our members. A growing number of assistant district attorneys and prosecutor office staff don't look like me, a 50-year-old white guy. We don't keep demographic numbers for our service group, but you need only come to one of our Basic Trial Skills Courses to see an ever-more diverse group of young prosecutors. That really hit home when 2008's President, **Bill Turner**, organized a meeting last March of a number of black and Hispanic assistant prosecutors to talk about race in our profession. We had a great discussion with a group of dedicated prosecutors who were anxious not to complain about anything but who wanted to do four basic things: encourage minority law students to enter the profession, retain minority prosecutors and staff, better connect prosecutors' offices with the community at large, and enhance the image of our profession in the community—goals we *all* want. In addition, as that 50-year-old white guy with the firmly established home field advantage, it never occurred to me that many comments, jokes, and thoughtlessly chosen words that swirl around a prosecutor's office everyday may seem fine to me but can leave other folks scratching and shaking their heads. It's time to talk about this subject with the goal of making us a more effective team.

In a recent issue of *The Texas Prosecutor*, Bill Turner talked about beginning a dialogue within our Texas prosecutor community on race and how it impacts our offices, profession, and community. At our Elected Prosecutor Conference, **Sharon Jones**, a former Assistant United States Attorney and now a principal at Jones Diversity Group LLC, led a discussion about how we might create an inclusive office environment and a positive force in the communities we serve.

Continued on page 6

Continued from page 5

In the future, we plan to establish better ties with Texas law schools and their minority students who have an interest in prosecution. In the past, we haven't done much as a profession to approach students while they're still in school, and I have a feeling we'd attract a lot more law-school graduates if people knew how rewarding prosecution is and how many jobs come open during any given year. (More on recruiting law students later in this column.) In 2009, we will organize focus groups at some of our conferences and begin some affinity groups, such as the Black Prosecutors Caucus, to develop communication and feedback on our efforts.

The goal is to improve our profession over the long haul and avoid the mistakes of mandated and justifiably maligned "annual diversity training." We are talking about cultivating an inclusive office environment, the type of place in which everyone wants to work and employees stick around for awhile. We are talking about connecting with your community, with the people you serve. We are talking about identifying promising minority law students and educating them about the opportunities they can find at a prosecutors' office.

But mostly, we are talking. And that's a good start.

Victim witness services

We are now in the second year of TDCAA's Long Range Plan. As you have read in past editions of this journal, TDCAA operates from a plan that is revised every five years; the purpose is to be sure that we are doing all the things that you want us, as your support organization, to do.

One goal high on the list is increased support for victim-witness services. Since 1989 each prosecutor office has been mandated by state law to employ a victim witness coordinator, but that mandate came without any funding. (A unified state funding source has never appeared.) Many of you have found the resources to provide these services to victims, even if it means doing the job yourself.

TDCAA has offered victim assistance training and certification for those in the profession, but many of our members have often had to seek outside resources for consistent, in-depth training. TDCAA's leadership decided at the last long-range planning meeting to devote substantial time and resources through the association to support your offices' victim witness services. Whether you practice in a big office with lots of victim assistance coordinators (VACs) or are a county attorney who does double-duty as a victim assistant too, we hope to find the resources to help you do your job well.

The centerpiece of the plan calls for the creation of a statewide victim assistant trainer at TDCAA. This person will operate much like **Clay Abbott** does in the world of DWI: as a great resource who will bring training directly to your office. Funding for this position isn't firmed up yet, but the Texas District and County Attorneys Foundation is playing the lead role in getting the position up and running. Our first step will be to develop guidelines for operating a victim witness program so we all can agree on how this new position will operate across the state. If you have any ideas you'd like to contribute, just give me a call at 512/474-2436. I'd love to talk with you about this part of your long range plan.

2009 TDCAA leadership

The Annual TDCAA Business Meeting was held in conjunction with the Elected Prosecutor Conference in December. Your executive leadership for 2009: President: **Barry Macha**, CDA in Wichita Falls; Chairman of the Board: **Bill Turner**, DA in Bryan; President-Elect: **Scott Brumley**, CA in Amarillo; Secretary/Treasurer: **Mike Fouts**, DA in Haskell; CDA at large: **Joe Brown**, Sherman; CA at Large: **David Escamilla**, Austin; Assistant Prosecutor at Large: **Nelson Barnes**, Assistant DA in Belton.

Your regional directors are: Region 1: **Lynn Switzer**, DA in Pampa; Region 2: **Bobby Bland**, DA in Odessa; Region 3: **Cheryll Mabray**, CA in Llano; Region 4: **Martha Warner**, DA in Beeville; Region 5: **Lee Hon**, DA in Livingston; Region 6: **Elmer Beckworth**, DA in Rusk; Region 7: **Staley Heatly**, DA in Vernon; and Region 8: **Elizabeth Murray-Kolb**, CA in Seguin. Congratulations to all of these new board members!

The Tom and Ted Show

Most of you have had the pleasure of sitting in on a search and seizure training conducted by **Tom Bridges**, former DA in San Patricio and Aransas Counties, and **Ted Wilson**, a former Harris County Assistant DA (now retired). Tom and Ted have

contributed mightily to the training of Texas prosecutors and continue to do so.

They have also continued to lead: Tom Bridges is a former President and Chair of the Texas Prosecutor Standards Guidelines Commission, a group appointed by **Governor Ann Richards** that produced a set of Texas-specific prosecutor ethics guidelines in 1993, and is still active as a member of the TDCAF Advisory Committee. Ted has served on numerous committees and has been a great addition as the sole lawyer member of the Investigator Section Board. They also co-author the definitive guide for police and prosecutors on search and seizure.

What do you give guys who have it all and who have done it all? Well, the pleasure of our company in perpetuity. At the annual business meeting in December, the TDCAA membership awarded Tom and Ted life memberships in TDCAA—a very rare honor reserved for those who have done it all, done it well, and done it a lot. Their life memberships guarantee they can come and visit with us every year at the conference of their choice and guarantees we can continue to enjoy their company!

Congratulations to our good friends.

The first prosecutor combine

Say you work in a midsize or smaller office, so you don't have job openings that often. Don't you wish that when you did need to hire a new prosecutor you could get a better feel for the talent out there? Do you ever get frustrated that you can't offer a job to a great prospect until that person passes the bar in November—and by that time some of the best candidates have gone to the big private firms? And what about trying to hire minority lawyers who are already snatched up come November?

We as a professional association hope to address these concerns on February 4 and 5, 2009, when we participate in a statewide job fair at the UT School of Law. Some prosecutors' offices will interview at the fair on their own, but the purpose of this "prosecutor combine" is to identify talented law students who are interested in prosecution but who don't have a good feel for what jobs are available and what chance they have of getting a job once they pass the bar. To that end, prosecutors from around the state have volunteered to interview students for two days, not for a certain job in November but for the prospect of getting on the "hot prospects" list that we can share with all offices looking for a good assistant. If you are interested in being involved in the process, please give me a call.

No refusal weekends gaining steam

Since TDCAA hosted the DWI Summit sponsored by the Anheuser-Busch Companies this past March, DWI "no-refusal" weekends, where police, prosecutors, and judges join forces to secure search warrants for blood draws when suspected intoxicated drivers refuse to provide breath samples, have started to catch on across the state with a lot of success.

As a citizen of Travis County, I want to take time out to thank our Austin Police Chief **Art Acevedo** for holding the city's first no-refusal weekend at Halloween. The numbers are in, and of the 26 refusals that led to search warrants, *all of them* tested over 0.11 BAC, and half were over 0.16. The guy with the highest tested at 0.29, which might explain why he crashed into a home occupied by young children sorting their Halloween candy, barely missing them, after which he fled the scene on foot only to be detained by parents of other trick-or-treaters until police could arrive. In addition, five of the drivers who refused to give a voluntary sample were involved in collisions, and three had prior DWI cases pending in court at the time of their arrests over Halloween.

The results of this weekend are consistent with reports we've received from other jurisdictions that have blood search warrant programs, namely, that some of our most dangerous drivers are the ones most likely to refuse to submit voluntary samples. Congratulations to the Austin Police Department and Travis County Attorney **David Escamilla** whose office assisted with this initiative. Great job! ✤

Recent gifts to the TDCAF

ABC Bank, Friend of TDCAF, Lubbock
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Dan Boulware, Chair of the TDCAF Advisory Committee, Cleburne
Tom Bridges, Former District Attorney (retired), San Patricio County
Joseph D. Brown, Criminal District Attorney, Grayson County
Judge Richard W. Carter (retired), Crime Stoppers USA, Arlington, *in memory of Danny Hill*
The Honorable Cathy Cochran, Court of Criminal Appeals, Austin
James R. Cochran, Friend of TDCAF, Austin
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David Escamilla, County Attorney, Travis County
Mary Margaret Farabee, Friend of TDCAF, Austin
David L. Finney, Assistant County and District Attorney, Ellis County
First Bank & Trust, Friend of TDCAF, Lubbock, *in honor of Matt Powell*
Patrick L. Flanigan, 36th Judicial District Attorney
Timothy M. Flathers, Assistant District Attorney, Midland County, *in memory of Imajean Gray*
Robert N. Floyd, Friend of TDCAF, Austin
The Honorable Larry Gist, Senior Criminal District Judge, Beaumont
Richard E. Glaser, County and District Attorney, Bonham
H.E. Bert Graham, former Assistant District Attorney, Harris County
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Rick Harrison, District Attorney, Kaufman County
P. Michael Hebert, Friend of TDCAF, Austin
Herring Bank, Friend of TDCAF, Vernon
Charles R. (Chuck) Kimbrough, Friend of TDCAF, Austin
The Honorable W.C. "Bud" Kirkendall, Seguin
Mr. and Mrs. William D. Kleine, Friends of TDCAF, Midland
Linebarger Goggan Blair & Sampson, LLP
Mike Little, District Attorney, Chambers & Liberty Counties, *in honor of Cheryl Swope Lieck, the Honorable Jerry Sparks, the Honorable Jimmy Sylvia, and the Honorable Carroll E. Wilborn, Jr.*
Stephen R. Lupton, 51st Judicial District Attorney
Gail McConnell, Assistant District Attorney, Montgomery County, *in memory of Matthew Paul*
Kenneth Magidson, former District Attorney, Harris County
Bill Milburn, Friend of TDCAF, Austin
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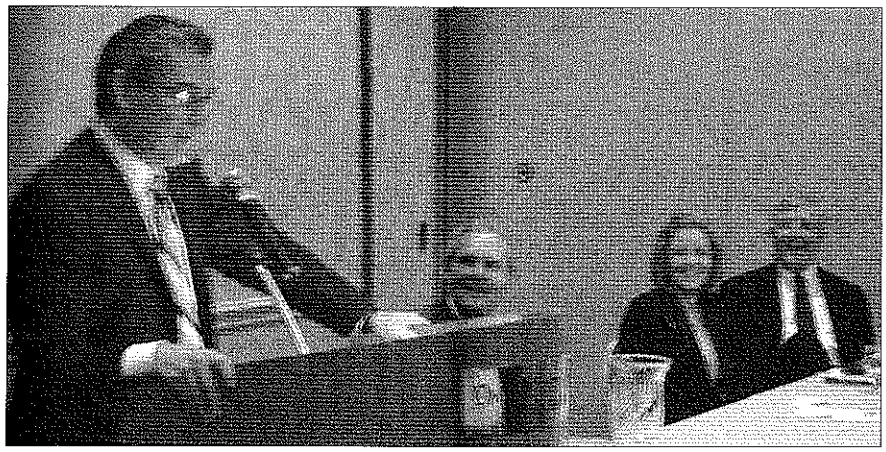
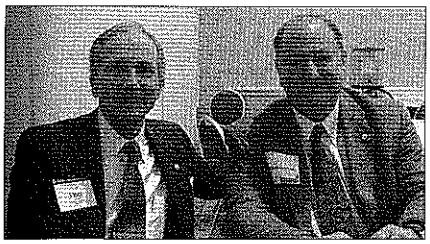
Tim Sulak, Friend of TDCAF, Austin
John E. Terrill, 266th Judicial District Attorney
Joseph A. Turner, Friend of TDCAF, Austin
E. Lee Walker, Friend of TDCAF, Austin

Note: In the last issue, John Hubert was incorrectly listed as the 105th Judicial District Attorney. John Hubert is actually the District Attorney for Kleberg and Kenedy Counties. We regret the error. ✤

Champions for Justice highlights





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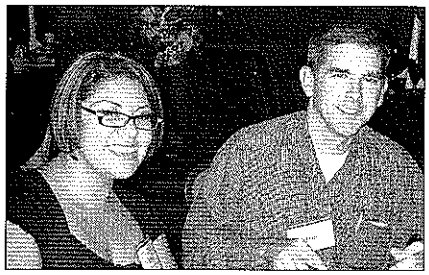
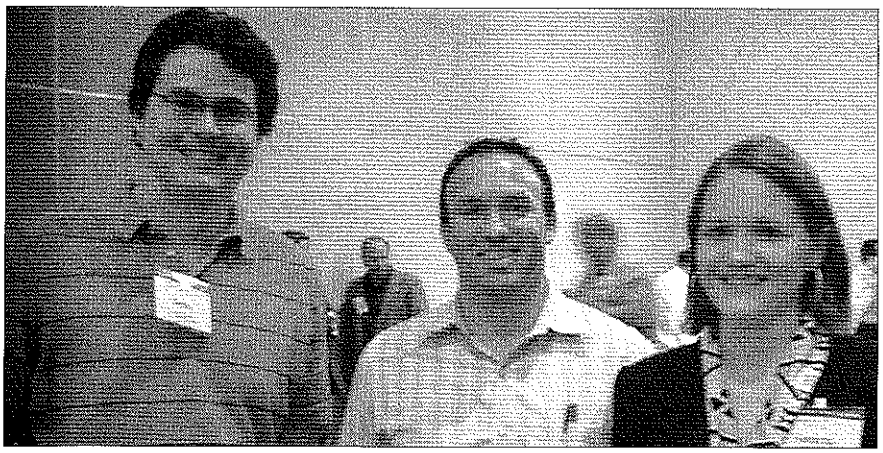
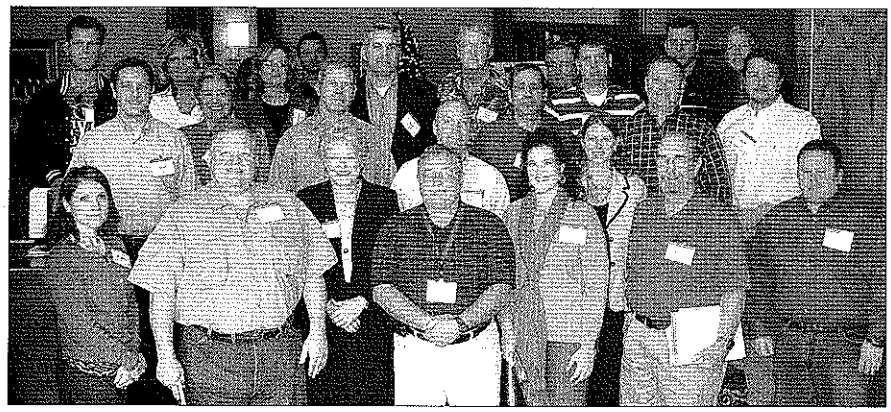
Lynn Nabers
Woody Roark
Gary Rodgers
Vincent Ryan
Tim Sulak
David Weeks
David Williams

Photos from our Key Personnel Seminar



Photos from our Elected Prosecutor Conference





What book, legal or otherwise, has taught you more than any other?

Trey Hill
Assistant Criminal District Attorney in Lubbock County

Being a cradle Episcopalian, growing up with Roman Catholics, and going to college with Baptists and Church of Christ folks, I have experienced the liturgical rituals, incense, smells and bells, bowing, kneeling, and hand-waving, foot-stomping revivals of several religions. I find many extra-Biblical books to be enlightening and helpful. Three in particular, *The Screwtape Letters* by C.S. Lewis, *Life of Christ* by Bishop Fulton Sheen, and *The Case for Christ* by Lee Strobel have influenced me and taught me more than the others.

The Screwtape Letters was truly my first reading of anything by C.S. Lewis. It affected me quite a bit, making me conscious of the spiritual warfare going on around and in us. This book helped me to be more aware of how easily I (and all of us) can slip into ungodly thoughts and actions.

I picked up *The Case for Christ* on a whim. It details an unbeliever's investigation into the truth and plausibility of Christianity's claims. The author articulated very well the bits of information and insights he came across through his interviews of scholars, which caused him to move from faithlessness to belief. When I debate Christianity's truth with antagonists, I often use some of the discoveries and revelations Mr. Strobel wrote about, so I find this book very helpful in my own amateur attempts at apologetics.

My first really big theological book, other than the Bible, was Fulton Sheen's *Life of Christ*. His book is very long and very detailed, but it captured my attention and probably contributed to my eventually getting glasses. Bishop Sheen draws parallels between Biblical events, which had never occurred to me, and contrasted Christ's life on earth and founding of a religion with the founders of other religions and us regular humans. Most striking was his claim that the cross of the crucifixion cast its shadow backward through time and overshadowed all aspects of Christ's earthly life. Bishop Sheen's insights helped me see some things more clearly and also gave me talking points for my own feeble efforts at persuasion.

All of these books emboldened my faith as I read and thought about what I'd read. It was not what I read by itself that convinced me of the truth, but rather, the books articulated aspects of life and religion that I found to be true based on my own experiences. All of these books continue to help me try to walk the narrow path, to grow as a Christian and mature as a man made by God.

In the next issue, tell us about a crime victim you remember. Email your anecdote to the editor at wolf@tdcaa.com and write "War Stories" in the subject line.

Cathy Cochran
Judge, Court of Criminal Appeals in Austin

The book that means the most to me is my dog-eared, marginalia-filled copy of the complete plays of Shakespeare from my college days. Some 45 years later, I love it as much as I did then. Shakespeare reminds us that love, life, death, and the law haven't changed much, if at all, throughout human history. We keep adding new twists, technology, and terms, but it's the same human condition with all tragedy leavened by laughter and all comedy coating a serious purpose. Throughout, "the play's the thing" wherein the conscience of the law and the lessons of life are found. The law was developed by elders sitting around the campfire telling simple stories of truth and justice. Shakespeare turned those same stories into immortal art, and modern lawyers turn them into pedantic, plodding prose. We should all spend more time breathing life and poetry into our law so that it will command the hearts, as well as the minds, of our countrymen.

Valerie Bullock
Assistant Criminal District Attorney in Bastrop County

Prior to becoming an attorney, I was a voracious reader. I remember many a summer vacation spent with great books from all kinds of genres. After law school and law practice, some-

thing has changed regarding how I choose to spend my free time these days. Of the hundreds, if not thousands, of books I have read throughout my life, I would have to say the one book that has taught me more than any other is the Bible. I know that probably sounds trite to some; however, for me, the Bible is my foundation for living. Because I choose to believe it contains the essence of truth, my life is lived in accordance with that truth. I have endeavored always to integrate my faith in my practice. I know I am not always successful, but it is my desire to practice what I preach; that is, being a Christian is not something I do but it is who I am. One of my longstanding favorite passages of Scripture seems to speak directly to my position as an assistant district attorney and comes from the book of Micah, Chapter 6, verse 8: "What does the Lord require of you but to do justly, to love mercy, and to walk humbly with your God."

Lisa McMinn
Assistant State Prosecuting Attorney in Austin

Other than TDCAA publications, which have taught me all I need to know about being a prosecutor, the most educational and inspiring book I have read in recent memory is Barbara Kingsolver's *Animal, Vegetable, Miracle*. It's a smart, often funny, non-fiction account of how a family of four decided that for one year they would eat only what they or someone they knew had grown or raised. Dedicated to eating chemical-free vegetables and meat from animals that were humanely raised, they planted a large garden, raised their own chickens, and bought everything else from local farms.

This book inspired my inner farmer and made me more conscious of what I eat, where it came from, and how it got to me. I do at least some of my food shopping at the Austin farmer's market, which sells produce from local family farms and meat from animals that grazed, pecked, or rooted around in a pasture instead of being cramped in a cage or feedlot. I still eat my share of genetically-modified, hormone-injected, preservative-enhanced, pesticide-laden junk that has traveled hundreds of miles to reach my plate, but I buy what I can directly from the source, and I have even planted my own vegetable garden. For a city girl like me, it's gratifying to go out into the yard to "harvest" something for dinner, even if it's just a couple of squashes or sprigs of rosemary.

Jack Choate
First Assistant Criminal District Attorney in Walker County

I must admit that I have been quite bookish lately. With a 6-year-old and a 3-year-old at home, I have delved quite deeply into the world of Clifford the Big Red Dog. Despite the big pretty pictures and sometimes multi-syllabic words, sadly, Clifford is barely relevant for any discussion here.

Caleb Carr's *The Alienist* is a great read for prosecutors. The art of profiling a sado-masochistic serial killer is born in a turn-of-the-previous-century thriller. I regularly torture my students at Sam Houston State University with this book and its application to modern investigation methods. Its gruesome detail is also handy at keeping them awake not only during my class but every night for an entire semester.

Surely Diane Burch Beckham's *Annotated Criminal Laws of Texas* deserves to be among the finalists in this beauty pageant. What this particular book lacks in plot, it more than makes up for in life-saving techniques. You can see my career progress through the covers of the various editions on my bookshelf. My first edition, for example, is hardly recognizable due to the drips of acidic sweat from holding that book like a warm blankie every time I had to address the court as a new attorney for the State of Texas. I have found over the years that sometimes finding a quiet moment and reading a little bit of law can truly come in handy for us *law*yers. Go ahead and open to any page. Assuming Diane's book agrees with you, no other tome will help you make it through the day with ease as this must-read.

All of that said, I suppose, in the end, my literary soul search has led me to one work that rises above all others as an influence on my approach to this legal career: *The Prehistory of the Far Side* by Gary Larson. No book has prepared me more for my daily routine as a prosecutor than the works of Larson. (Plus, like Clifford, the book is full of pictures.) When confronted with some of the ridiculous situations we find ourselves in on a regular basis, I constantly ask myself, "What would Larson have drawn if ...?" What would Larson have drawn when a

Continued on page 14

Continued from page 13

certain local citizen frantically called to report an intruder in his house, but upon kicking in the doors, the police ninja team found only the complainant's meth lab? What would Larson have drawn when the police officer received the written statement from the eyewitness, noting, "I saw the stick and heard the lick"? What would Larson have drawn when a particularly creative but highly intoxicated college student told a police officer among many other memorable things, "I'm gonna eat you like bacon"?

When the people around you get down on this job, Larson can be a great help. Would Larson's version of this particular defense attorney have arms and legs, or would he just slither around? Imagine, as a pontificating judge festers into a ridiculous tirade, how big Larson would draw his head. Larson's creative process also teaches us a little about putting our case together. He could take an idea and turn it on its head to make it better. In the end, he makes his point, and we want to read more. Isn't that what we want to elicit from jurors too?

I can only imagine what Gary Larson would have made of himself had he found a job as a prosecutor. Everyday, I seem to have an out-of-body experience, laughing quietly at the insanity of the world confronting us. No matter how silly, insignificant, morose, or macabre our jobs can be, we as prosecutors can never lose our sense of humor.

Angela Albers Converse
Assistant Criminal District Attorney in Wood County

The Bible is the most treasured book I have ever read. It is the book I turn to in my personal life and professional life over and over. It is always there to guide me when I need it most and to comfort me when I am uncomfortable.

I became a prosecutor in 2000 right out of law school, and I have turned to God's word many times to help me deal with the stresses in dealing with the kinds of people and cases we as prosecutors handle.

I will never forget turning to my KJV Bible in one of my first trials when I came to work for Wood County after being in Rockwall County for several years. I was the new girl to East Texas with a lot of expectations. My first cases to go to trial involved the repeated raping of three little boys by their grandfather over several years. The father of these boys was in prison; he too had been abused by his father and had been a perpetrator of sexual abuse. These little boys, all under 9, suffered severe post-traumatic stress disorder. Whenever I tried to ask the two youngest boys, who were so precious, about their grandfather, they would shut down. I talked with them on several occasions, but even the morning of testimony they had still not talked to me about what happened. Right before I went in the courtroom, I sat down with the oldest boy. I told him how important it would be for him to tell his story and how it would help him deal with what had happened to him now and in the future. He still did not say much.

When it was his turn to testify, I was blown away and had to control my own tears (especially as the mom of twin boys) when he told every little detail to that jury. He told things he had never told anyone before. Needless to say, his testimony was compelling. When he finished, I could see some of the weight fall off of his shoulders.

I finished the trial out by quoting Psalm 82:3 to the jury ("Defend the poor and fatherless, do justice to the afflicted and needy"). I reminded the jury that these little boys who were fatherless and who had been so horribly violated, deserved justice. When the jury returned life sentences on each case, some of my faith in humanity had been restored.

The Bible is timeless and will be guiding people long after I am gone. It is my biggest source of inspiration.

Staley Heatly
District Attorney in Wilbarger, Foard, and Hardeman Counties

In *Living Poor: A Peace Corps Chronicle*, author Moritz Thomsen chronicles his life as a Peace Corps volunteer in a small village on the Ecuadorian coast in the 1960s. He ably describes the exalted hope and crushing frustration felt by almost each and every volunteer who has served in the Peace Corps. I read the book after my wife and I had already been accepted to serve in the Peace Corps. At that time, I did not know that we would also be serving in a small Ecuadorian village.

Living Poor is not just a book for

Peace Corps volunteers. It is for anyone interested in exploring the human situation. The book is at times hilarious and at others deeply sad, but it is always extremely honest. While the book is over 40 years old, its insights into the lives and culture of the impoverished, the difficulties of fully integrating into another community, and the struggles associated with development work, still ring true today.

Through his writing, Thomsen transports the reader to Rioverde, Ecuador. The reader feels the same sense of urgency Thomsen felt to bring about positive change and the same sense of despair at his failures to do so. In the end, the reader receives a fascinating glimpse of life in a developing country and the struggles faced by people trying to make a difference.

In his book, Thomsen writes, "Living poor is like being sentenced to exist in a stormy sea in a battered canoe, requiring all your strength simply to keep afloat; there is never any question of reaching a destination. True poverty is a state of perpetual crisis, and one wave just a little bigger or coming from an unexpected direction can and usually does wreck things."

Gabrielle Schmidt
Assistant Criminal District Attorney in Tarrant County

"Women do not need to read this book. They are born with this talent." That is how my late father, Bob Guthrie (a very skilled plaintiff's lawyer his entire career), inscribed *How to Argue and Win Every Time*, the Gerry Spence book I asked him to buy me the year I started law school. As it turned out, however, I learned more from this book than from any other I have ever read. Amazingly, its advice can be put to use not only against your opponent in the courtroom or during negotiations, but also in all of your life relationships, whether business or personal.

Spence teaches how to break through self-made barriers and how listening to your opponent must be fine-tuned to deliver the winning argument. Listening is the foundation for the technique and structure of the argument, and casting that skill aside will always weaken your position.

Getting on your opponent's side of the argument is the logical next step. Repeat his major points to disarm him, giving credence to what is deserving. Then, rather than using carefully crafted words to attack your opponent and lay him out, choose words that reveal the justice or logic of your position.

I recall a particular DWI case near the top of the trial docket early in my career, and during docket call a couple of weeks before, the defense attorney approached me in his usual arrogant manner and told me that he was going to do me a favor and let me dismiss the case against his client. Rather than cutting him off and jumping into an all-out war of words, I smiled and said nothing. The silence was just what he needed to continue his favorite pastime, listening to himself argue. In the next few minutes he gave me enough information about his defense (the defendant's claims of prior head injuries and brain mapping) to do some very valuable research over the next couple of weeks, which in turn, led me to a big win. My favorite part of that trial was when the defense expert left the stand, stopped at my counsel table, shook my hand, and within earshot of the jury, congratulated me on my cross-examination.

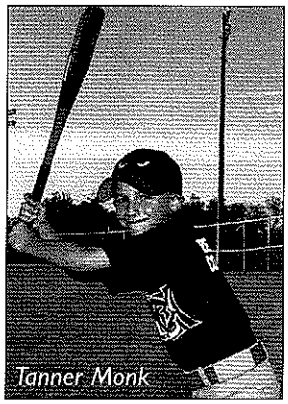
Had I jumped right into the gun-ready position two weeks before at docket call, I doubt I would have ever gotten the kind of information from my opponent that enabled me to thoroughly prepare for that cross. This little war story highlights one of the most important points that I learned from Mr. Spence, and that is, whenever possible, win without arguing.

The book is very empowering, and if there is someone out there who has not read it (besides my opponent in that DWI trial), I would highly recommend adding it to your library. It is one that I have truly put to good use over the years. ✤

Continued from the front cover

New dog-mauling statute tested (cont'd)

friends' house in the morning, and after lunch the kids played at Tanner's house. Late in the afternoon, the girls were called home, and Tanner followed. It was the last time Tanner's mother saw him alive.


Tanner Monk

About an hour after Tanner left his house, a neighbor, Sharon Rogers, was on her way home and saw what she believed to be a little boy in the bar ditch, approximately 100 feet from the gate of the Watson-Smith residence. When she attempted to get out and see if something was wrong, she was attacked by four pit bulls that forced her back into her car. She contacted law enforcement and stayed by the child in her car. When peace officers arrived and got out of their cruiser, they too were attacked by the dogs, and two deputies drew their weapons and killed two of the pit bulls. The other two dogs took off running toward Watson and Smith's house.

An ambulance arrived and checked Tanner, but it was clear he was already dead. The defendant, Jack Smith, who heard the deputies' gunshots, walked to his open gate and asked why the deputies shot his dogs. When told that they had just killed a little boy, Smith's only response was "Oh." When Smith was confronted a little later about recovering the other two dogs, he lied to the deputies and said that he did not have a fourth dog; he then changed his story and said that the fourth dog was his "inside" dog. (We think he knew how vicious this dog was and was attempting to hide it from the deputies.) These two surviving dogs (and the bodies of the other two shot by deputies) were taken by authorities, and DNA testing found Tanner's blood on all four dogs. The investigation also revealed that the dogs were never secured; the 12-foot gate at the property's entrance had not been closed for at least six months. These dogs ran free through the neighborhood.

There were no witnesses to the attack on Tanner. Through circumstantial evidence, we determined that the fatal mauling occurred where the body was found. There was no blood anywhere else, nor any drag marks. One of Tanner's shoes was found in the defendants' front yard (see the photo of the scene, below). A small amount of Tanner's blood was on the side of the sole. (The other shoe was never found.) We figured that one of the dogs carried the shoe to the yard from the ditch where Tanner was killed.

Police contacted me that day, and I arrived about an hour after the first call to police. I always like to be called to major crime scenes because it helps me when I prepare for trial, and I can answer questions that might arise in the investigation. I have worked fatal wrecks and assisted in murder scene investigations in the past, but nothing can prepare you for the death of a child. This manner of death was obvious and I sensed shock to all involved. The shock carried over to trial too.

The crime scene. Tanner's shoe is circled in yellow.

The statute

When we determined which statute fit the crime, we started thinking about the elements. One element that stands out is the term "unprovoked." The statute has no definition of the word so I turned to Black's Law Dictionary. "Provoke" means to excite, stimulate, arouse; to irritate or enrage. Using that definition, I provoke dogs every morning that I walk by my neighbor's house! I learned talking to Rob Kepple at TDCAA that when the law was drafted at the legislature, preliminary discussions focused on how to handle the issue of provocation. Because this element of the crime was included in the old dangerous dog statute in §822.041 of the Health and Safety Code, it was left in this new crime. In addition, the law's sponsors elected to leave the term undefined and rely on the common definition of "provoke" articulated above rather than argue with various animal behavior experts who testified on the bill about what constitutes provocation to a dog. With no witnesses to the crime, we had to depend on circumstantial evidence that these dogs were not provoked. Mrs. Rogers, the woman who found Tanner's body, and the first deputies to respond to the scene did nothing to provoke the dogs, yet they were attacked. There were no sticks or other items around Tanner that would indicate he was teasing the dogs. Plus, Tanner weighed 45 pounds—two of the dogs outweighed him. It did not seem logical that he provoked the animals. Evidence showed that one of the dogs had been at the house only a few weeks, and it had a history of aggressive behavior. (More on that later in the article.)

Another issue was the term "attack." If Tanner were attacked on the defendants' premises and later attacked off their premises, is the term "attack" a continuing event or a series of individual attacks? The single shoe found on the defendants' property might have supported a defensive theory that Tanner was bitten on their premises, though evidence also showed that he was certainly attacked in the bar ditch about 100 feet away from the property line. Tanner could not have been so savagely attacked in the defendants' yard and able to run 100 feet to where his body was found.

We chose not to obtain probable cause arrest warrants and simply convened the grand jury for consideration of the evidence. There was so much pretrial publicity while the evidence was being gathered for processing that I did not want to put the probable cause affidavit on file. After indictment, the court, on the judge's own motion, placed a gag order on the parties and immediately set a trial date for October.

Prior to trial, we obtained samples of blood from the coat of each dog for DNA testing; it turned out that Tanner's blood was on all four dogs. The two surviving dogs were ordered euthanized after a hearing in JP court. We also obtained the other two dogs' skulls through Texas A&M for bite comparisons, but the bites on Tanner were so close together that we could not isolate individual bite marks to compare them to the dogs' teeth.

We unearthed information that one of the dogs had a history of aggressive behavior. We interviewed people in Eastland County, where this dog came from, and found out that it had killed two other dogs and chased people into the safety of their cars. This dog had also knocked down an elderly man by growling and attempting to bite him. I subpoenaed the dog's previous owner, who testified at trial that the dog was somewhat aggressive and not kept in a secured area; the former owner had told defendant Crystal Watson about the dog's history before she adopted it. This prior knowledge, while no longer required by the statute, was compelling evidence against Ms. Watson because she was not home during the attack.

Most of the witnesses—the deputy, EMT, and even the forensic dentist—broke down on the stand because of the victim's tender age and how he died (the medical examiner said he had bled to death). I had a picture of Tanner blown up to 11 by 16 inches and placed on an easel. He was in his baseball uniform; the photo was taken about one month before he died. The forensic dentist later told my office that he saw the baseball picture and lost his composure. I received a sustained objection when I commented that he was not the first one.

The defense tried to show that an attack may have taken place on the defendants' property and that the term "attack" constitutes a continuing process (meaning that Tanner may have been attacked first on the defendants' property, then the boy ran or was dragged (during the same attack) to the ditch. The defense also argued that the State never proved that the attack was

Continued on page 18

Continued from page 17

"unprovoked." These defensive theories failed. When I spoke to the jurors after the trial, they said there was no doubt as to guilt. It did not make any sense that this little boy, who had played with these dogs before, could provoke them to the point of such a vicious attack. They deliberated about 55 minutes before returning their verdict.

Neither defendant was eligible for probation because both had previous felony convictions, and only one juror lamented the lack of probation as an option during the punishment phase. The seven-year sentence on both defendants was a compromise after about two hours of deliberation. Many jurors later said they wanted 10 years, but they also felt that without intent, it was not a 20-year case. I chose not to call any witnesses during punishment because the jury had seen enough. Between the emotions of the witnesses, the pictures from the crime scene and autopsy, and testimony from Tanner's mother, enough was enough. I could just tell from the jurors' emotions that anything additional would have been too much.

Lessons for future cases

One of the things learned from this trial was prior knowledge of aggressiveness helps in finding guilt. This fact is somewhat bothersome because the statute is designed so that criminal negligence applies only to failing to secure one's dogs. My understanding of the Lillian Stiles case was that the defendant's lack of prior knowledge of his dogs' aggressiveness contributed to the not-guilty verdict on the charge of criminally negligent homicide. (Read about that case in the July-August 2007 issue of *The Texas Prosecutor* journal, which is online at www .tdcaa.com/newsletter.) Anyone looking at this statute must be prepared to answer the defense's claims of a provocation and to define the term "attack." Some people walk with sticks or mace, for example, and if these items are found at the scene of a dog mauling, even if they weren't used to provoke the dogs, there is room for a defensive argument that these items could be used for provocation. There may also be no eyewitnesses to this kind of attack, so we prosecutors cannot count on people testifying that an attack was unprovoked. My recommendation is that we revisit the statute and discuss whether the provocation element is even necessary, and if so, whether it should be turned into an affirmative defense which the defense must raise and prove by a preponderance of the evidence. In our case, quickly securing these dogs and DNA testing for Tanner's blood proved their involvement. There were other dogs in the area, and we were fortunate that the deputies had the forethought to check them for blood to rule them out as attackers.

Conclusion

The image of a little boy who was bitten no fewer than 75 times by four dogs on a killing frenzy will be forever in all our memories. The sad thing is this attack could have been prevented by simple restraint—a locked gate and sturdy fence. That said, the premise of the new law is good. We need to hold accountable those who do not secure their dogs. If we include in the law that only those owners whose dogs are known to be aggressive are accountable, then we have defeated the purpose of the statute. ✤

Drug intervention in Jefferson County

Background on the oldest judicially supervised drug treatment program in Texas

By Ann Manes
Assistant Criminal District Attorney in the Appellate Division in Jefferson County

Lacey and Isabel are real clients of the Jefferson County Drug Intervention (JCDI) program, but their names have been changed to protect the guilty. They both entered the program young, addicted to drugs, and facing criminal charges, but that's where their paths diverged.

Lacey stood, pale and shaking, before the judge. She had failed a urinalysis, testing positive for cocaine. Knowing that she faced expulsion from the program for this most recent violation, she had gone straight to an independent lab and had another urinalysis done at her own expense, which showed no trace of cocaine. She had no explanation, she told the judge, for the "false positive" on the same day at the JCDI lab. She had brought the independent lab technician to court that evening as a witness that her urinalysis showed no evidence of cocaine. The technician showed his credentials and averred that the UA he had performed on Lacey's sample showed no drugs. However, he also told the judge the sample itself was inconsistent with human urine.

Lacey did not go quietly. She screamed, moaned, clung to the bench, and pleaded for another chance, another UA. She played the ultimate sympathy card: Her baby needed her. (Not only was it arguable that a child needs a mother who cannot stay away from drugs, but the "baby" in question was a teenage stepdaughter for whom Lacey had hired another teenage girl to "teach her to fight.") The judge was not persuaded. He sent Lacey straight to the county jail to await placement in our Substance Abuse Felony Punishment Facility, the in-prison, you've-got-nothing-but-rehab facility for the otherwise hopeless addict. Our constable, Charles Wiggins, who is a big, strong man, dragged her with difficulty down the hall. I followed them to make sure I could say otherwise should she later claim he had manhandled her.

It marked the end of Lacey's third time through JCDI, and Lacey, who is either 25 or 26 years old (depending on which of her jail screens is correct) is now a guest of the state at our SAFPF. Probably once an attractive young lady, she is now an example of the expression "rode hard and put up wet." She has been booked into the county jail 22 times and is a sorry failure who was given every opportunity to live a clean and sober life.

Then there is Isabel. When she got into the program as a condition of her probation, her drug of choice was meth, and her use was serious. Isabel, a pretty little goth-type 20-year-old with short dark hair, had gotten to the point where drugs were beginning to run her life when she was arrested for possession of meth. Not anywhere near as haggard as drug addicts can be, you could still see a human being in her eyes. Isabel straightened out and paid attention to the program when she found out she was pregnant. Unlike Lacey, she had not invested in the "gangsta" lifestyle so conducive to drug activity. She divested herself of the relationships that encouraged drug use and, more importantly, she wanted to be clean. The night she graduated from the program was also the night she gave birth to a healthy, drug-free baby girl, who is now 18 months old and doing well. Isabel not only raises her child, but she also has a good job and is going to college. She attends Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings regularly. In a few months her probation will be complete, and there is a better-than-average chance our office will never see her again—which is just how we like it.

Isabel's early choices were every bit as bad as Lacey's, whether they were a result of medical care gone awry, depression, rebellion, or just youth. The difference is that Isabel decided to work the program, while Lacey believed she could work the system.

The program

Jefferson County was the first county in Texas to have a judicially supervised drug intervention program. It started in 1993 under Justice of the Peace Vi McGinnis. Now run by JP Ken Dollinger, it is still thriving.

Continued on page 20

Continued from page 19

Since the program started, over 2,000 clients have participated, with some 300 currently in the program. So far, more than 650 people have successfully graduated, translating to a success rate of almost 40 percent, which according to Dena DeYoung, a licensed chemical dependency counselor who has worked with the program since its inception, is the standard for the field.

Perhaps drug diversion works because it takes care of a lot of people who would otherwise have fallen through the cracks. Ms. DeYoung believes combining treatment with probation/punishment is what makes the difference. People who have never been held accountable, faced with this program's rigors, must answer for their actions. With drug intervention, they have a true support group for the first time, comprising not only their counselor and probation officer but also their peers. They can reach out for help and it is there, where before, they were addicted in isolation. With drug diversion, a full year of their lives is dedicated to addressing problems they might not have known they had, including, for instance, lack of self-esteem, past physical abuse and neglect, and struggles with education. These are difficult enough for the healthy among us to address; the escape of drugs only exacerbates them. Without a respected and respectful mentor to tell them so, many simply do not comprehend what we all know about being a productive member of society. If there is judgment, it is from a peer, not from a judge or an attorney whom many addicts perceive as never having walked in an addict's shoes.

Part of the JCDI program is Moral Recognition Therapy, or MRT. Not everyone in JCDI can attend MRT, as classes are limited. It is a judicial sanction option for those who need extra strength when it comes to some issues. MRT is peer-driven, which cuts down on lying to an extent not possible otherwise. (It is hard to sneak a lie by people who are themselves expert liars.) People delve deeply into their issues and come out able to cope in a way they could not before. They learn to recognize destructive behavior in themselves and either move past those issues or accept them. In short, they learn to cope and accept responsibility for their actions, possibly for the first time in their lives, because they are not being told what to do by those educated in rehabilitation, but rather by the rehabilitated. Other sanctions the judge can impose include verbal reprimands, essay assignments, attending 30 AA meetings in 30 days, and jail time. Clients attend court either once or twice a month, depending on what phase of the program they are in.

Getting into the program

Basically, the program takes place at the probation office, where people are assessed and their urine and/or hair analyzed for drug use, and where they attend group or individual classes and meetings. They attend AA or NA meetings at the location of their choice and hand in proof they have attended at least three meetings every week. When real trouble hits (relapse is expected), clients may be sent to full-time programs as well as halfway houses. Graduation is contingent upon their having paid program fees in full.

There are five ways a person can get into the program in Jefferson County. Most are in as a condition of probation ordered by the trial court. Some come in as a condition of bond through the pretrial bond office. Others are clients of the Women's Center or attend as a follow-up to their stay in SAFPF. Still others are approved by the district attorney's office, usually at the request of a defense attorney. Our elected DA, Tom Maness, has been a proponent of the program from its inception and has set up criteria that allow appropriate candidates into the program on a pretrial, and sometimes pre-indictment, basis. Acceptable candidates have little or no criminal history—young people particularly, who would not have been in other trouble but for drug use. The probable cause affidavit is always checked, as are more detailed police reports. If we suspect the potential client is a dealer rather than an addict, application is denied; the last thing program clients need is a supplier!

Once conditionally accepted, the client is sent for an interview and assessment. If drug addiction exists and the person agrees to cooperate, a year-long commitment to the program under contract with the district attorney's office begins. Once the client who has been admitted through this office successfully completes the program, the case is dismissed (if it was filed) or refused back to the applicable law enforce-

ment agency (if the client was admitted pre-indictment). If the client does not successfully complete the program, she is placed back in the system as if the case had never been interrupted by admission to JCDI. Admission through this office is a single chance and the client will either succeed or be back at square one with the criminal charges. The client could come back to the program as a condition of probation or as a follow-up to SAFPF; while our office is firm on this, the program is not. Speedy trial consequences are waived by contract.

Benefits of drug intervention

Life goes on for people in the program. Eight healthy babies were born to women in the program in 2007; one of them tested positive for amphetamine. CPS took custody of the child but has since returned him to his mother. Five clients earned their GEDs that year and five others enrolled in school. Of the 66 people who graduated, 65 were employed full-time at graduation; the remaining graduate is disabled.

One of the greatest benefits to society is that recidivism is demonstrably lower among the population of graduates. Recidivism in Jefferson County is 29 percent, compared to nearly 60 percent nationwide[2] and over 31 percent statewide.[3] According to the program's own figures, recidivism for successful JCDI graduates over the last three years has averaged just over 11 percent. This lowered recidivism rate mitigates the program's cost to the county, which pays just under $190 per client per year compared to some $19,000 per prisoner per year (based on the $52 per day the sheriff's office charges law enforcement agencies) for the incarcerated, though some costs as well as program fees of $500 are paid by the participant. (For example, attendees have to pay for the books if they are placed in MRT, and they have to pay their probation fees if they are in treatment as a condition of probation.) A study by Southern Methodist University showed that for every dollar spent on drug court in Dallas, $9.43 in tax dollar savings was realized; this savings includes court time, jail time, wages earned (with taxes paid), and lower mental health care costs.[4] Even if one sets aside the aspects of compassion and concern for the life of another human being and the bottom line is purely financial, drug intervention programs save money as well as lives.

Drug use cannot be ignored, whether it be illicit drug use or prescription medication abuse. Jonesing for one's drug of choice leads addicts to theft, assault, robbery, burglary, fraud, murder, intoxication manslaughter, and a host of other offenses. Will we get rid of crime by developing and utilizing drug diversion programs? No. A resounding no. Consider, though, if we could turn three of every 10 drug users into productive members of society. Think of the costs avoided for otherwise keeping those people in jail, on probation, and in court, not to mention reducing habitual or repeat drug crimes and prosecutors' time that could be re-routed into other important cases.

Isabel and Lacey were each given a chance. Only they could decide what to do with that chance. One is home caring for her daughter and turning her life around; the other is in jail. All we can do is provide the opportunity. ✤

Endnotes

1 According to its website, www.bettyfordcenter.com.

2 According to the United States Department of Justice, Bureau of Justice Statistics website, www.ojp.usdoj.gov.

3 According to the Legislative Budget Board report of 2005, available at www.llb.state.tx.us.

4 Fomby, Dr. Thomas B. and Vasudha Rangaprasad, *Divert Court: Cost Benefit Analysis*, Southern Methodist University Department of Economics, 2002.

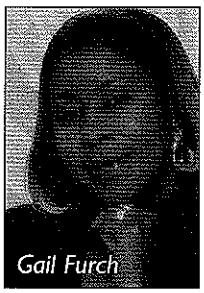
Missing person vs. murder victim

Tarrant County prosecutors tried a defendant for murdering Glenda Gail Furch, whose body was never found. Here's how they investigated her disappearance, determined that she had been killed, and convicted the man responsible.

By Bob Gill and Rainey Webb
Assistant Criminal District Attorneys in Tarrant County

Glenda Gail Furch was a creature of habit. A hard-working mother of two, she worked the same shift at the same General Motors plant for nearly 28 years. She was a dependable employee involved in the local labor union who enjoyed talking with her colleagues about work conditions and pay. She lived in the same apartment complex in Fort Worth for over 20 years. She took her grandson to school every day and had lunch with her family after church on Sundays. Even when she couldn't attend the church where she had been a member for over 50 years, she personally tithed each week. She talked to her 89-year-old father, Johnnie, who had recently been diagnosed and treated for cancer, every day.

These consistent patterns came to an abrupt halt the last weekend of September 2007. On the 27th, Gail returned to work at GM after a short union strike, enthusiastic about some new changes and eager to get back in the swing of things. According to her time card, she clocked out of the plant just after midnight on Friday. At about 12:24 that morning she bought gas at a convenience store close to her house. That purchase would be her last known act.



Gail Furch

Gone missing

Gail's daughter LaTisha Furch was home with her son that Friday and didn't talk to her mother. She tried several times to get in touch with her Saturday but thought she might just be resting after her late shift or out shopping. Unable to reach her mom by Sunday, LaTisha became concerned and went to her apartment to check on her. As she went inside, things seemed relatively normal and not out of place. She continued to call and leave messages with no answer. By Monday, LaTisha's curiosity turned to concern. She went back to her mother's apartment and made her way through the rooms as she talked on the phone to a friend. As LaTisha got closer to her mother's bedroom, she was struck by an overwhelming smell of bleach. Her concern turned to fear when she saw a large bleach stain on the carpet of her mother's bedroom and noticed the comforter and top sheet of her mother's bed were missing. She called police.

As soon as Crime Scene Investigator Ernie Pate from the Fort Worth Police Department walked inside, he realized he was standing in a crime scene. He and his team meticulously combed the entire apartment and made some striking discoveries. Gail's car, purse, and keys were missing. As Pate dusted the surfaces he noted that the house was what he described as "chillingly" clean. There was not a fingerprint to be found, which is very unusual for a home. He also noticed the large bleach stain and recent vacuum marks on the carpet. Further investigation revealed that the vacuum cleaner was missing and all of the trash cans in the house had been removed. Someone had obviously taken the time to clean up whatever they had done to Ms. Furch.

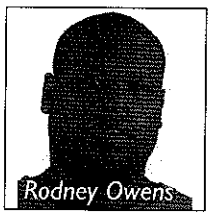
Detectives Sarah Jane Waters and Brent Johnson arrived at the scene shortly thereafter. As they canvassed the area for possible witnesses, one bit of information led them to look in the large dumpster right outside the apartment. A man walking through the apartment complex told the detectives he had seen a man putting items into the dumpster, but he could not remember exactly when he saw him and could not give a very clear description of the person. In one of the least glamorous acts of her career, Crime Scene Investigator Nelwyn Russell climbed into the dumpster and began combing through what seemed like month's worth of trash. What she discovered

came to be a key to solving the case. Among the random piles of trash from the apartment complex were five trash bags filled with items that matched other things in Ms. Furch's home, plus empty containers of cleaners, empty soda cans, used rolls of duct tape, and electrical wires that had obviously been cut and tied in what appeared to be ligatures. Police officers were convinced something horrible had happened. Now they had to find Ms. Furch and her assailant.

Detectives Waters and Johnson embarked on a dual investigation. Where could Gail Furch be, and who was the main suspect in her disappearance? Comparing their task to finding the proverbial needle in a haystack would be an understatement. They began talking to the people she knew to ascertain who might want to harm her. They found that Gail didn't date a lot, and the men she did date had nothing but kind things to say about her. Gail did not go out much and spent most of her time with the same group of people. When those close to her had no answers, detectives cast the net even wider. They looked at other employees at General Motors and investigated registered sex offenders. They went through Gail's recent calls on her cell and home phones. Many people confirmed what detectives were quick to discover: Gail was a caring person who stayed in touch with friends and didn't engage in questionable activities. No one had seen or heard from Gail since that Thursday night when she last worked. Without any leads or a suspect, everyone continued to focus on finding her. The local news ran stories and pictures hoping that someone had seen her or her car. The family passed out fliers and a reward was offered for information. Search dogs were called in and the area around her apartment was scoured.

Stumbling upon a suspect

As family members and law enforcement officials continued to search for Gail, a chain of seemingly unconnected events drew Rodney Owens closer into detectives' field of vision. Owens had been discharged from the army after he was convicted of aggravated assault at a general court martial. His longtime girlfriend and mother of his son, Nekishia Baldwin, had recently ended their relationship, and Owens did not deal well with people telling him no or interfering with what he wanted. After their breakup, Owens confronted Nekishia in mid-September by trying to run her off the road. A week later, Owens was driving another car (stolen, it turned out), when he saw Nekishia's new boyfriend, Reggie Lucien, whom Owens followed for nearly 20 minutes before finally losing patience and knocking Reggie's car across three lanes of traffic into a grocery store parking lot. Owens would stop at nothing to find Nekishia and Reggie and threaten them; they were both convinced he had the potential to hurt or even kill them. The next time Nekishia was aware of Owens following and harassing her was Tuesday, October 2, almost a week after Gail Furch went missing. Nekishia and her friend Kirsten Parker went to the neighborhood Wal-Mart, where they both worked, to pick up a paycheck. Once Nekishia went inside, Kirsten saw Owens driving a Mazda Millenia, which police later discovered was owned by Gail Furch. The women called police, but by the time they arrived, Owens was gone.


Rodney Owens

In the early morning hours of Wednesday, October 3, the Dallas Fire Department was called to an abandoned car wash on the southeast side of town. They arrived to find a Mazda Millenia engulfed in flames. Arson investigators determined the fire was intentionally started and towed the car to the city impound lot for further investigation. The car had no plates so auto theft investigators located the VIN, which told them the car belonged to Glenda Gail Furch.

Less than 24 hours later, within a mile and a half of the car wash, Jessie Crawford drove to her local church for some donated groceries. As she sat in her car in front of the church, a man pointed a gun in her face and demanded the keys to her car. She described him to Dallas police and noted he was wearing a light-colored hoodie sweatshirt. The gunman left in her silver Ford Focus. Approximately one hour later, Reggie Lucien was standing outside of his house in Arlington when Owens drove up and threatened that he better leave Nekishia alone. During this altercation Owens brandished a gun and fired two shots toward Lucien as he was driving away. Lucien later told police that Owens was driving a silver Ford Focus that morning.

Continued on page 24

Continued from page 23

On Sunday, October 28, Officer William Snow was on patrol, training a rookie officer; as part of his regular routine he ran the license plates of cars in the area to see if any came back as stolen. Officer Snow happened to run the plate of a silver Ford Focus parked outside a convenience store. As he was doing so, Owens came out of the store, walked to the back of the car, appeared to place something in the trunk, then got behind the wheel. As soon as the plates came back as stolen from Jessie Crawford in Dallas, Officer Snow attempted to stop Owens, who started the car and took off without turning on his lights. Thus began a high-speed pursuit throughout Fort Worth and Forest Hill involving many officers and a police helicopter. Owens' reckless disregard for others was captured on a police video in vivid detail. The pursuit ended when Owens attempted to take the exit ramp onto I -35 North at 75 miles per hour. He lost control of the car, which flipped and landed on its side on a bridge. As officers approached the car, Owens started to run down the bridge and at one point tried to jump off the side. Police eventually apprehended him.

Because the car was stolen out of Dallas, Fort Worth officers contacted the detective in charge of the carjacking case and told him the Ford Focus was at the Fort Worth impound lot. Dallas Detective Douglas Jones opened the trunk and found many items, including computer equipment, a microwave, and a backpack. As a former military man himself, Dallas Detective Jones recognized the items he saw in the backpack. It contained clean underwear, a camouflage jacket with Owens' name printed on the front, a toothbrush, non-perishable food, a birth certificate, and a Social Security card. Owens was a man on the move. What troubled Detective Jones most were cut phone cords tied together into ligatures, duct tape, and rubber surgical gloves. During trial Detective Jones referred to these items as Owens' rape kit. Additionally a handgun was found with the backpack.

Detective Jones contacted Sergent John Ost, the officer who arrested Owens after he wrecked the car on the bridge. Ost had a hunch that led to detectives tying all of the pieces of the puzzle together; he was the supervising officer over the Woodhaven area, which included Gail Furch's apartment. He remembered seeing a report of an additional burglary on Saturday, September 27 in the same complex where Gail lived. The items missing from that burglary matched the computer and microwave found in the silver Ford Focus Owens was driving. Additionally, Ost, who was familiar with some of the details of Gail's case, began to inquire about the proximity of the car wash where Furch's car was burned to the church where the Ford Focus was carjacked. He suggested Jones talk to the homicide detectives working the Furch case about the additional information. Jones took a photo lineup to Jessie Crawford, who tentatively identified Owens as the person who carjacked her.

With a suspect in custody, the next step was comparing Owens DNA with the DNA found on the items collected in the dumpster outside of Gail's apartment. Testing revealed that each of the five trash bags in the dumpster contained at least one item linked to Gail and one item linked to Owens by DNA, fingerprints, or both. For example, one bag contained a Diet Dr Pepper can with Owens' DNA around the rim, a blue bath mat matching other textiles in Gail's bathroom with Owens' semen on it, a soap dispenser matching other items in Gail's bathroom, a camera with film depicting Gail and her family, and a necklace identified as Gail's. Another bag had a Coca-Cola can with Owens' DNA on the rim and mail addressed to Gail Furch. The next sack contained a maroon towel that matched towels in Furch's apartment with Owens' DNA and what was shown to be Gail's DNA. (Without a known sample, the DNA was determined to be Gail's through testing her daughters). The last bag had a Red Bull can with Owens' DNA, a receipt for gas purchased the night Gail was last seen at work, and a roll of duct tape with Owens' fingerprint (it was an unusual brand, which matched duct tape in the backpack in the Ford Focus).

Armed with the connection of Owens' DNA to Gail's property, witnesses seeing Owens in Gail's car, Gail's car being burned within a mile and a half and 24 hours of where Owens carjacked Jessie Crawford, and Owens' high-speed flight from the police, there was enough to indict Rodney Owens for the murder of Glenda Gail Furch. We still did not have a body, though.

Preparing for trial

Getting past the grand jury was one thing. Convincing 12 citizens beyond a reasonable doubt was a whole different ballgame.

A key objective during voir dire was measuring the panel's attitude about convicting someone of murder without a body. What type of evidence would the jurors require to deflect any reasonable doubt that Gail was actually dead without knowing how or when the murder occurred? Surprisingly, the panel was quick to get past the issue of believing a person is dead even without a body. The timing could not have been better for the State. The week before trial, reports surfaced that millionaire pilot and explorer Steve Fossett's wallet and other belongings had been found by a hiker not far from where his plane went missing. One member of the venire was quick to point out that Fossett had actually been pronounced legally dead months before this discovery. He explained that Fossett's lifestyle and connection to family and friends left little doubt that he was dead—if he were alive, someone would have seen or heard from him. The same potential juror who offered the Fossett example worked for the Federal Aviation Administration and was the eventual foreperson of the jury.

After getting over the initial hurdle of not having a body, the panel struggled with the idea that a person could be charged with committing murder by a "manner and means unknown to the grand jury." TV crime dramas once again played into the minds of otherwise trusting citizens. The panel wanted DNA, a large amount of blood, a confession, or some type of evidence to clearly show that the death was intentional, but their concern did not rise to the level of being excusable for cause. The majority of the panel seemed satisfied with the idea that a person could be dead even in the absence of a body, but potential jurors wanted more evidence to show that the death occurred by the defendant's intentional actions. In fact, few potential jurors were struck on any of the guilt-innocence issues. The trouble arose when they began to consider the full range of punishment in a case they were now assuming would not include a body as proof. Several jurors had problems considering life in prison when they would not know how the victim was killed. We also had several on the panel who had personally dealt with a murder in their family and could not consider the minimum of five years, an issue not uncommon to any murder case.

In one of the least glamorous acts of her career, Crime Scene Investigator Nelwyn Russell climbed into the dumpster and began combing through what seemed like month's worth of trash. What she discovered came to be a key to solving the case.

Legally, we felt confident about going forward with the case because we were supported by caselaw. In the infamous case of killer Kenneth McDuff, the defendant was tried and sentenced to death without a body. There were many distinctions between McDuff's case and ours, the biggest being the eyewitness testimony of McDuff's co-defendant, which narrowed down the manner and means of the death and gave evidence of additional felonies, thus allowing McDuff to be tried for capital murder. In our case against Rodney Owens, we were forced to rely on physical evidence with no explanation for the manner and means of death. Part of the physical evidence was Owens' semen on Gail's bathmat found in the dumpster indicating a possible sexual assault and potential motive for killing her, but the DNA evidence alone was not enough to determine if the semen was left as a result of sexual assault. We could not prove beyond a reasonable doubt that Ms. Furch didn't consent to any type of sexual encounter or if the semen was left on the bathmat after Ms. Furch had been murdered. The risk of including an additional charge or increasing the charge to capital murder was too great. We found some limited support when a jailhouse informant contacted the Tarrant County DA's office with some information that he claimed Owens told him while they were incarcerated together in the county jail. Detective Sarah Jane Waters met with the informant at the Beto Unit of the Texas Department of Criminal

Continued on page 26

Continued from page 25

Justice and obtained a statement from him. He gave information about the murder that was not released to the public and matched the evidence police had gathered. Owens knew Gail's hours at the plant, that she lived alone, that he believed she would let him in the door because she had seen him around the apartment complex, and that he had used bleach to clean up the scene after he killed her. The informant had already pleaded guilty to his offense and agreed to testify without any benefit from the DA's office; he asked only to be moved to a unit closer to his ailing mother, which eased any fears that he might be making up the information for preferential treatment. Like many prosecutors, we would much rather have solid DNA and fingerprint evidence than eyewitness accounts that could change over time, so we were confident that the DNA and fingerprint evidence would prove far stronger than eyewitness testimony. Equally powerful would be how Gail's very regular activities came to a halt.

The trial

During trial we were grateful to have the assistance of our in-house technology specialist, Rhona Wedderien. She organized the volumes of photographs of the items taken from the trash bags in the dumpster and the multiple locations important to the case into a chronological slideshow that help the jury follow along. Additionally she prepared large maps that depicted the distance from the car wash where Owens dumped Gail's car to the church where he carjacked Jessie Crawford; a second aerial map showed the apartment complex where Gail lived with pointers to her apartment, Owens' mother's nearby apartment where he stayed from time to time, the apartment from which the items in the trunk of the Ford Focus were stolen, and the convenience store where Officer Snow began his pursuit of Owens. Along with the maps, Rhona crafted large boards with photographs of the items that came out of each trash bag. The boards made it clear to the jury that it was more than mere coincidence that Owens' DNA was connected to Gail's belongings. We also used a timeline during opening and closing arguments to specifically show the dates and times of key events.

The jury began deliberating on Wednesday afternoon and took a break for the evening. Jurors came back in a little over three hours Thursday morning with a guilty verdict. During punishment the jury got the full picture of the timeline and how Owens' escapades with Nekisha Baldwin and Reggie Lucien tied him even more directly to the crime spree and showed how little regard he has for human life. One difficulty was in presenting perhaps the most offensive aspect of this murder: How could we emphasize to the jury that not only was Owens cold enough to kill, but he was also callous enough not to tell where he had hidden Gail's body? Would the jury fully appreciate how much this family longed to know where Gail was and how Owens was choosing not to give them that peace of mind?

Within two hours of closing arguments, the jury answered by assessing a life sentence. Speaking with several members of the jury after the verdict, we found out they never had a problem believing Owens was guilty of the murder. They had their verdict Wednesday night but wanted to sleep on their decision, realizing the effect it would have on not only Gail's family but on Rodney Owens as well. Once they were privy to his true character through additional punishment testimony from Baldwin, Lucien, and others, it was clear that this man was a danger to anyone who got in the way of what he wanted. When defense counsel asked Nekisha Baldwin if she thought he could be saved or changed, she quickly responded, "No, he will never change."

We made is clear through Owens' attorney that we would welcome any further information on the whereabouts of Gail's body, but we haven't gotten anything from Owens. While Glenda Gail Furch's family may spend the rest of their lives wondering what ultimately happened to her, they have found some peace in knowing Rodney Owens will spend the rest of his life paying for taking her away from them. ✤

Court of Criminal Appeals update

Questions

1 Carlos Landrian hosted a Christmas party at the clubhouse for the Camino Real Apartments. Luis Brizuela went to the party to pick up his cousin who worked at the apartment complex. Brizuela had a couple of beers and went outside when he got a call. As the party ended, Landrian and a drunk "party-crasher" got into a fight outside. At some point, Landrian threw a broken bottle at or in Brizuela's direction. Glass from that bottle hit Brizuela and caused him to lose his left eye.

By David C. Newell
Assistant District Attorney in Harris County

The State charged Landrian with the aggravated assault of Luis Brizuela by either 1) intentionally or knowingly causing bodily injury by using a deadly weapon, a bottle, or 2) recklessly causing serious bodily injury by throwing a bottle in his direction. Should the jury be charged in the conjunctive or disjunctive?

_____ conjunctive
_____ disjunctive

2 Maria Del Carmen Hernandez, along with Cassandra Leffew and Dolores Rodriguez, kidnapped and murdered Robert Fernandez, the father of Hernandez's youngest son. Hernandez, Leffew, and Rodriguez had previously met at a women's shelter, and Hernandez had moved in with Leffew. Leffew thought that Mr. Fernandez had assaulted her daughter, and the woman convinced her friends to help her confront him. Leffew drugged Fernandez with alcohol and prescription drugs to get him to confess to assaulting her child. He maintained his innocence and eventually passed out, at which point the three women tied his hands and feet and put him in the trunk of a car. Hernandez and Rodriguez dropped Leffew off at Leffew's home. Then, Hernandez and Rodriguez went to Rodriguez's house. According to Hernandez, Rodriguez told her to smother Fernandez by putting a bag over his head. When that did not work, Rodriguez strangled Fernandez with pantyhose and drove away with the body.

At trial, Hernandez called two inmates to testify that Leffew had talked to them and taken credit for the murder. On rebuttal, the State introduced portions of Leffew's statement to police wherein she told the police that Hernandez had strangled Fernandez. This hearsay statement, introduced pursuant to Rule 806, impeached the hearsay statements of Leffew that Hernandez had introduced through the two inmates. Does *Crawford* apply?

_____ *Crawford*
_____ No *Crawford*

3 Jared Littrell, who was driving a loud, older, two-toned Chevy pickup truck with a hood ornament of a bulldog, approached Kissy Stiger, a prostitute, and asked where he could obtain some cocaine. Kissy, accustomed to such requests from such men driving such trucks, hopped in, and the two drove away. While doing so, they passed Anthony Gilbreath, a friend of Kissy's and a fellow seeker of cocaine. Littrell and Kissy stopped so Gilbreath could get in. Kissy, Littrell, and Gilbreath drove around town making several purchases of cocaine because it was apparently a seller's market. Then, when the coke ran out, Littrell asked if there was anyone they could "jack" (rob). Kissy told him of a customer she had serviced earlier in the evening, Eric Seuss. Kissy knew Seuss had a large amount of money, and the trio drove to his hotel. Littrell forced his way into the room and began to fight with Seuss. During the brawl, Kissy grabbed Seuss's wallet, ran from the room, and left the area. Littrell attempted to flee as well. As he did, Seuss followed. Littrell, while fleeing, shot at Seuss. A .22 caliber bullet struck him in the abdomen and killed him.

The State charged Jared Littrell with both felony murder and aggravated robbery. Eric Seuss was the victim in both cases. Count One charged Littrell with felony murder for committing an act clearly dangerous to human life (that resulted in Seuss's death) in the course of committing or attempting to commit aggravated robbery. Count Two charged Littrell with the completed aggravated robbery from Count One. Does the charge violate Littrell's rights against double jeopardy?

_____ yes _____ no

Continued on page 28

Continued from page 27

4 In 1986, Rosa Clark came home after running errands to find her 11-year-old daughter, Vanessa Villa, lying comatose on her bed. The child had been raped and strangled.

In 2000, a prison nurse took a blood sample from Juan Segundo, and his DNA profile was entered into the CODIS system. In 2005, a DNA profile from the semen sample collected from Vanessa's body was entered into the CODIS system. Two days later a routine computer test matched Segundo's DNA with the DNA from the semen. Additional testing confirmed the match. While Segundo had not been a suspect in the 1986 crime, he had known the family; he had even attended Vanessa's wake and signed the guestbook.

During the guilt-phase of the trial, the State introduced evidence of another rape-murder that Segundo had committed in 1995 under the theory that the 1995 crime demonstrated Segundo's M.O. The similarities between the two crimes were the fact that both Vanessa and the 1995 victim had been raped and strangled and the fact that Segundo's DNA had been recovered in the victims' vagina or mouth. Is this extraneous offense admissible to show identity?

_____ M.O.
_____ N.o.

5 What about the admissibility of Segundo's DNA test results? The blood sample was seized without a warrant while he was in prison pursuant to §411.148 of the Texas Government Code.

_____ admit it
_____ suppress it

6 Michael Reed got into a wrestling match with his twin brother Christopher over the installation of a deadbolt lock on a bedroom door in a home they both shared. At one point in the argument, Michael drew a gun (he was a security guard) and ended up firing into the hallway wall. The State charged Michael with deadly conduct because he discharged a firearm "at or in the direction of a habitation." Does a person have to be outside of a house to commit deadly conduct by firing a gun "at or in the direction" of it?

_____ yes _____ no

7 Alfredo Pecina stabbed his wife and then himself. His wife's sister found them and called the police. Police visited Pecina at the hospital and brought a magistrate with them to give him his Article 15.17 warnings. He was arraigned at the hospital. The magistrate told him in Spanish that the police wanted to speak with him and he nodded or said yes. Then the magistrate read him his rights and asked if he wanted an appointed attorney. Pecina said yes. The magistrate asked him if he still wanted to speak with the officers. Pecina said yes. Pecina also signed an Adult Warning Form, and a Spanish-speaking detective wrote on the form "I asked for a lawyer, but I also wanted to speak with the Arlington police." At the suppression hearing, the magistrate testified that she had asked Pecina if he still wanted to talk to the police even after requesting court-appointed counsel and Pecina had said yes.

Can the police talk to Pecina without an attorney and without violating his Sixth Amendment right to counsel?

_____ yes _____ no

8 Marcus Tucker got into a physical fight with his business partner. Tucker was known to carry a two-inch folding knife. When police arrived after the fight, they saw the victim's shirt was soaked in blood. The victim had a puncture wound to the back of her neck near her spine and a through-and-through laceration in her arm suggesting that Tucker had stabbed her through the arm. The victim testified she didn't see Tucker use anything other than his fists during the fight, but the officer on the scene said the injuries were inconsistent with fists. The knife was not collected, though the officer described a knife with a two-inch blade that the victim said Tucker often carried with him. The State charged Tucker with aggravated assault by using a deadly weapon.

Did the State prove that Tucker had used a deadly weapon even though no weapon was introduced and no one could say what weapon was used?

_____ yes _____ no

9 Arthur Williams was riding in a car with his buddy Darrell Fields who stopped in front of a known crack house in a high-crime area. Unfortunately for them, Fields parked the car on the wrong side of the road. An officer saw this and pulled up behind the car. As the officer approached, he saw Williams move his hands around his waistband, which made the officer suspect that Williams had a weapon. The officer performed a pat-down on Williams during which a crack pipe hit the ground. Both the officer and Williams looked at it. Then Williams stomped on it.

The jury convicted Williams of tampering with evidence. Williams argued that he could not have intended to prevent the use of the pipe in the investigation because the State alleged he was being investigated for weapons and the crack pipe wouldn't be evidence in *that* investigation. Did the State have to prove that Williams had evaluated and correctly assessed the pipe's evidentiary status upon its destruction to convict Williams of tampering with evidence?

_____ yes _____ no

10 Police stopped Roy Bob Bartlett for speeding. The officer suspected intoxication. Bartlett, a repeat DWI offender, refused to take a breath test without his attorney. The State charged Bartlett with felony DWI.

At trial, the court charged the jury that it was permitted to consider Bartlett's refusal to submit to a breath test. The first paragraph of the court's charge said the State can introduce evidence of a breath test refusal. The second paragraph described generally what the State and the defense wanted the jury to infer from the refusal evidence. The State wants the jury to infer guilt, and the defense wants the jury to *not* infer guilt. The third paragraph said the evidence standing alone wasn't sufficient to establish guilt, but it could be considered by the jury. However, the charge ended with a statement explaining that the significance of the refusal is for the jury to determine. Should the trial court have given this instruction?

_____ yes _____ no

Answers

1 Disjunctive. A jury was not required to unanimously decide that Landrian either intentionally or knowingly caused *bodily* injury with a deadly weapon or that he recklessly caused *serious bodily* injury. *Landrian v. State*, No. PD-1561-07, 2008 WL 4489254 (Tex. Crim. App. October 8, 2008)(Cochran) (5:2/3:0). In Landrian's case, the jury was charged in the disjunctive so the jury wasn't required to agree on whether Landrian had intentionally assaulted Brizuela with a deadly weapon or recklessly caused serious bodily injury.

Judge Cochran, writing for the majority, upheld the jury charge by applying the eighth-grade grammar test (which will have to be adjusted to a sixth-grade grammar test in 10 years thanks to the Flynn effect). Based upon grammar rules, the gravamen of aggravated assault is merely causing bodily injury to one person. The use of a deadly weapon or causing serious bodily injury are aggravating factors that the jury does not have to agree upon. Thus, there was only one criminal act regardless of which facts the jury believed, namely blinding Brizuela with a beer bottle (pardon the alliteration).

Judge Womack concurred along with Judge Keasler and Presiding Judge Keller to note that there was no way for the jury to reach a non-unanimous verdict because there's no way to cause serious bodily injury without using a deadly weapon. Judge Price also authored a concurring opinion that Judge Meyers joined to express reservations about the use of the "eighth-grade grammar" test to resolve jury unanimity issues. Despite these reservations, however, the jury's affirmative answer to a deadly weapon special issue insured that the jury unanimously agreed that Landrian had intentionally assaulted Brizuela with a deadly weapon. That is why Judges Price and Meyers concurred with the majority's result.

2 No *Crawford* problem here. The use of hearsay statements to impeach other hearsay statements does not violate a defendant's Sixth Amendment right to confront the witnesses against her because they are not offered for the truth of the matter asserted. *Del Carmen Hernandez v. State*, No. PD-1879-06, 2008 WL 4569865 (Tex. Crim. App. October 15, 2008)(Womack) (8:0). The court first noted that Leffew's statements to police during custodial interrogation were clearly testimonial under *Crawford* and *Davis v. Washington*. However, the court unanimously held that the

Continued on page 30

Continued from page 29

statement was admissible over a *Crawford* objection because it was not offered for the truth of the matter asserted. The court noted that the Supreme Court expressed its approval in *Crawford* of its prior decision in *Tennessee v. Street*, which held that use of testimonial statements for purposes other than the truth of the matter asserted does not violate the Confrontation Clause. Here, Leffew's statement was redacted to include only those portions of Leffew's police statement that were inconsistent with the hearsay offered by Hernandez's jailhouse witnesses. According to the opinion, Leffew's prior statement was not offered for the truth of the matter asserted and the jury could have looked at the two inconsistent statements and discounted both of them.

3 Yes. Charging Littrell with felony murder based upon a predicate aggravated robbery *and* that same aggravated robbery against the same victim violated Littrell's double jeopardy rights. *Littrell v. State*, No. PD-1555-07, 2008 WL 4569886 (Tex. Crim. App. October 15, 2008) (Price)(8:1). The majority explained that the aggravated robbery in Count Two was a lesser-included offense of the felony murder in Count One because all of the elements of the aggravated robbery were subsumed in the elements of the felony murder. The majority also noted that had the State charged Littrell with intentional murder (instead of felony murder), then aggravated robbery would not have been a lesser-included offense and therefore would not have violated double jeopardy. Moreover, the court found no legislative expression that a defendant could be punished for both offenses. The court set aside the aggravated robbery because it was the lesser sentence and affirmed felony murder.

Presiding Judge Keller dissented because the State had to prove a completed aggravated robbery in Count Two, but the State had to prove only an *attempted* aggravated robbery in Count One. Thus, the dissent reasoned, Count Two was not a lesser-included offense of Count One because each count required proof of different elements.

4 M.O. The Court of Criminal Appeals upheld the admission of the extraneous rape-murder to show that Segundo had raped and murdered Vanessa Villa consistent with his *modus operandi* of raping women and then strangling them. *Segundo v. State*, No. AP-75,604, 2008 WL 4724093 (Tex. Crim. App. October 29, 2008)(Cochran)(9:3:0). The court ultimately decided that identity was contested because Segundo had requested lesser-included offense instructions under the theory that his cross-examination called the identity of the murderer in question. Then, the court noted that generally a *modus operandi* theory of admissibility relies upon an accretion of seemingly small, sometimes individually insignificant details that show the crime to be the handiwork of a particular criminal. If the similarities are generic, then they don't constitute a signature crime. If the similarities center on a remarkably unusual fact, that single detail suffices to establish identity through a calling card. (Judge Cochran compares this to "The Mark of Zorro.") Here, Segundo's calling card was his DNA profile, and, under the doctrine of chances, it is extraordinarily implausible to think that the two victims would've had sexual intercourse with him and that someone else had strangled them shortly afterwards.

Judge Price concurred along with Judges Meyers and Holcomb to note that while the relevance question wasn't close, the Rule 403 balancing presented a more difficult question. According to Price, showing previous rapes that ended in murder tended to suggest the defendant had murdered the victim in this case, but the DNA calling card evidence only tends to establish sexual assault. Also, the State's need for the evidence wasn't great, according to the concurrence, because the medical examiner said the murder occurred contemporaneously with the sexual assault. Nevertheless, given the substantial efforts of the defense to argue that the State's evidence did not establish that the appellant both raped *and murdered* the victim, Judges Price, Meyers, and Holcomb reluctantly agreed that the trial court did not abuse its substantial discretion in admitting the evidence.

5 Admit it. Though taking the blood was clearly a search, the court held the search was reasonable under the totality of the circumstances. *Segundo v. State*, No. AP-75,604, 2008 WL 4724093 (Tex. Crim. App. October 29, 2008) (Cochran)(9:3:0). First, the court noted that all 50 states and the federal government have some form of

statutory scheme designed to collect evidence for a DNA database to be used in situations just like this. Other jurisdictions interpreting Fourth Amendment challenges to the warrantless taking of blood pursuant to such statutes have been nearly unanimous in upholding such seizures. Given the government's interest in the evidence, the search was reasonable because the intrusion was minimal and Segundo's status as a prisoner when the blood was taken gave him a lesser expectation of privacy.

Moreover, the court rejected Segundo's claim that the evidence should've been suppressed because a prisoner's DNA can be kept in the DNA database even after the prisoner finishes his term of confinement. If the initial search complies with the Fourth Amendment, the storage of the obtained information does not give rise to a separate constitutional claim. Finally, the court also rejected Segundo's claims centering on the nurse who took the sample. The blood sample card listed the woman taking the sample by name and agency, but it did not specify that she was a registered nurse. However, the woman looked like a nurse (in Segundo's own words), worked in the prison infirmary, and stated on the card that her agency was the Texas Tech University Health Science Center, all of which supported the trial court's implicit finding that she was a nurse. (Note: If you have a "cold case" like this one that is based upon a CODIS hit, reading *Segundo* is a good starting point as it addresses several of the types of challenges you may face.)

6 Yes. A person must be outside the house he is firing at to commit deadly conduct for firing at or in the direction of a house. *Reed v. State*, No. PD-366-07, 2008 WL 4724117 (Tex. Crim. App. October 29, 2008)(Johnson)(5:2/1:3) The majority looked at the deadly conduct statute and determined that the plain meaning of the phrase "at or in the direction of" contemplates that the firearm is discharged from some location other than the habitation itself. There's really not much more analysis than that other than the court's opinion that taken in context, "at or in the direction of" contemplates being outside. Judge Cochran (joined by Judge Womack) authored a colorful concurring opinion that dilates upon the meaning of the preposition "at". (Yes, I just ended my sentence with a preposition.) Noting that you can fire "at" a person as well as "at" a habitation, Judge Cochran explained that the person shooting "at" must have the same spatial relationship to the individual that the person shooting "at" the habitation must to commit deadly conduct. So, the person cannot be "inside" an individual and still shoot "at" him or her, and neither can a person be "inside" a house and still fire "at" it. Moreover, if we look at the ordinary usage of "at," the word usually refers to a point, while "in" refers to an enclosed space. Thus, shooting "at" a house must mean shooting at a point called a house. Finally, Reed could've still been prosecuted for deadly conduct (though not under the enhanced-punishment provision as was done in this case) for recklessly engaging in conduct that places another in imminent danger of serious bodily injury. Judge Cochran suggests that this provision was the appropriate deadly conduct charge for Reed's conduct. (Note: Judge Cochran cites to TDCAA's Diane Beckham for support that the provision dealing with shooting at houses is designed to criminalize "drive-by shootings.") Presiding Judge Keller concurred without an opinion. Judges Keasler, Hervey, and Holcomb dissented without an opinion.

7 No. The court held that Pecina's statement to police should've been suppressed because the police questioned him after his Sixth Amendment right to counsel had attached and he had invoked that right by requesting a court-appointed attorney. *Pecina v. State*, No. PD-1159-07, 2008 WL 4724214 (Tex. Crim. App. October 29, 2008) (Meyers)(8:1). The majority rejected the State's argument that Pecina's request for court-appointed counsel only referred to representation at a future legal proceeding and wasn't an invocation of his right to have counsel present during interrogation. The court noted the same argument had been suggested and rejected by the United States Supreme Court in *Michigan v. Jackson*, 475 U.S. 625 (1985). In short, the court held that Pecina invoked both his Fifth and Sixth Amendment rights to counsel by requesting court-appointed counsel despite the fact that he had also indicated his desire to speak with the police. Moreover, Pecina's Sixth Amendment right to counsel had attached when he was arraigned by the magistrate, so the only way the statement could come in would be if

Continued on page 32

Continued from page 31

Pecina had initiated contact with the police. The court held that Pecina did not initiate contact with the police by merely responding "yes" to the magistrate's question of whether he wished to speak with the police. Therefore, the statement should not have been admitted.

Presiding Judge Keller dissented on the ground that the only way to make sense of Pecina's conflicting answers was to regard his invocation as an ambiguous request that merited clarifying questions from the magistrate. Those clarifying questions revealed, according to the dissent, that Pecina did not wish to have counsel present during interrogation, though he may have wanted counsel to assist him at trial. (Note: The majority relies upon the recent Supreme Court case of *Rothgery v. Gillespie County* in determining that Pecina's Sixth Amendment right attached when he was "arraigned" by the magistrate at the hospital. It appears this was an Article 15.17 or "magistration" hearing as Pecina was merely being arrested pursuant to a warrant rather than being taken before a magistrate after being formally charged. In light of both this opinion and *Rothgery*, it appears the court regards this as a distinction without a difference. Whether a defendant is "arraigned" or "magistrated," if he requests court-appointed counsel at either hearing, he has invoked his Sixth Amendment right to counsel and *he* must be the one to voluntarily initiate contact with law enforcement.)

8 Yes. A unanimous court held that there was sufficient evidence that Tucker had used a deadly weapon that was capable of causing serious bodily injury even though 1) the weapon was never introduced; 2) no one testified to what was used; and 3) the weapon didn't actually cause serious bodily injury. *Tucker v. State*, No. PD-0742-07, 2008 WL 5047699 (Tex. Crim. App. Nov. 26, 2008)(Keller)(9:0). As many frequenters of the TDCAA user forums know, even a frog can be a deadly weapon, so long as the person uses the frog in a way that is capable of causing serious bodily injury. According to the court, the court of appeals failed to appreciate that the nature of the injuries themselves suggested that the object had been used in a manner capable of causing death or serious bodily injury. The court explained that the through-and-through wound to the victim's arm could've severed a major blood vessel or nerve. The injury to the back of the neck caused a great deal of pain and, given the location of the wound, carried the potential of causing paralysis. Though these wounds didn't result in such worst-case-scenario injuries, they showed that the weapon used was capable of causing them. Moreover, the court observed that both of the officers involved in the investigation agreed that whatever weapon was used it was capable of causing serious bodily injury or death.

The lower court had focused on the lack of detail about the weapon. Consequently, it failed to account for the possibility that the nature of the object could be inferred from the injuries themselves. Thus, the court held the evidence legally sufficient to establish that Tucker had used a deadly weapon during the assault.

9 No. To prove that a defendant tampered with evidence to impair its availability as evidence in an investigation, the State is not required to show that a defendant knew the title of the investigation in progress. *Williams v. State*, No. PD-0470-07, 2008 WL 5047674 (Tex. Crim. App. November 26, 2008)(Meyers)(5:1/1/2:1). The quirky thing about this case was that the State had specifically alleged that the crack pipe had been destroyed to prevent its availability in a "weapons" investigation. The majority appeared to regard this labeling of the type of investigation as mere surplusage. The majority specifically rejected Williams' argument because §37.09 has only two culpable mental state requirements. The State must show the defendant knows he's being investigated and that he destroyed evidence to impair its availability in that investigation. Basically, Williams' argument sought to graft an extra culpable mental state onto the statute, namely that Williams knew what he was being investigated for. The majority didn't go for it.

The court also held that Williams had destroyed the pipe by crushing it under his foot. Even though the State ultimately introduced the broken pieces of the pipe at trial, it was still ruined and useless and had lost its identity as a crack pipe. Judge Womack wrote a separate concurrence to note that under the statute "destroyed" and "altered" are not mutually exclusive terms.

Presiding Judge Keller joined the majority, but not as to footnote 2, which seems to intimate that the allegation of the type of investigation was surplusage and that any discrepancy between the pleading and the proof should be analyzed under the fatal variance doctrine. However, the footnote also goes on to explain that there was not a fatal variance between the proof and the charging instrument because the State proved that the evidence was collected during a "weapons" investigation. Presiding Judge Keller did not explain why she did not join this part of the opinion, though. Judges Price and Cochran concurred in the judgment without an opinion. Judge Johnson dissented without an opinion.

10 No. The Court of Criminal Appeals reversed because the breath-test refusal instruction singled out a particular piece of evidence for consideration. *Bartlett v. State*, No. PD-1461-07, 2008 WL 5047703 (Tex. Crim. App. Nov. 26, 2008)(Price)(8:1:1). Unlike statutorily required instructions such as the accomplice-witness instruction, this instruction singled out a piece of evidence for special attention when no statute required refusal evidence to be given particular weight or special consideration. While the Transportation Code makes the evidence admissible, the court explained that the statute doesn't attach any weight to that refusal. This type of statute also does not authorize a jury instruction. Because the trial court singled out this type of evidence, it had the potential to obliquely or indirectly convey some sort of judicial opinion on the weight of the evidence by singling it out and inviting the jury to pay attention to it. Thus, the trial court should not have included it in the jury charge.

Judge Johnson concurred to say that the first paragraph of the instruction was fine because it properly set out the law, but the second two paragraphs were comments on the evidence. Judge Hervey dissented to say that the instruction did draw attention to the evidence, but it was nevertheless neutral because the instruction gave no indication of what weight the jury should give the refusal evidence. ✤

A note about this journal

Anytime you don't receive a copy of this journal, please notify us by phone at 512/474-2436. We try to keep our database updated with address and personnel changes, but we sometimes need your help. Thank you! ✤

Save the date for our Advanced Appellate Advocacy Seminar this summer

Coming this August to the Baylor Law School: TDCAA's Advanced Appellate Advocacy Seminar. This intensive, four-day course will include excellent instructors advising on both oral and written appellate advocacy, sample arguments, brief writing, and seasoned faculty advisors for unsurpassed one-on-one critiques, advice, and counseling. Plus, the unbelievable facilities at Baylor Law School have four courtrooms complete with audio and video recording.

And the best part: It's totally free! TDCAA reimburses every attendee for travel, pays $30 per diem for meals, and requires no registration fee. Class size is limited to 32, and registration will be open only to appellate advocates with three years' experience.

Watch TDCAA.com and upcoming issues of this journal for further updates, and mark your calendar for mid-August in Waco with TDCAA. ✤

"You got to know when to hold it"

A guide to retaining evidence after criminal trials and how to destroy it once it's no longer needed

Prosecutors and evidence technicians often ask how long they have to keep evidence for various criminal trials. The next questions are usually, "How do I get rid of it, and whom do I have to ask for authorization?" This article (and a follow-up in an upcoming issue) will answer those questions and might prompt you to evaluate your office's position on evidence destruction for your county. It is not as complicated as it looks—in spite of the language in the statutes—and you *don't* have to keep evidence forever.

By Jana K. McCown
First Assistant District Attorney in Williamson County

It is important to realize from the beginning that not every item in an evidence room is really "evidence." Law enforcement agencies have a lot of discretion in deciding what to collect at a crime scene, and most operate under the "more is better" mode. After all, who wants to hear a prosecutor or defense attorney ask why they *didn't* collect the weapon, drugs, clothing, junk on the ground, etc.? By picking up everything that might show anything, evidence rooms fill up with junk that isn't helpful to anyone in the long run. Getting rid of it later practically takes an act of Congress because everyone is afraid to "destroy evidence."

There are several reasons why we should not keep evidence when it is no longer needed, starting with the most obvious one: storage space. Aside from practical considerations, it is unreasonable and unrealistic to expect a law enforcement agency to hold onto everything in perpetuity. Ninety-nine percent of criminal cases are resolved without a trial, either by a plea, referral, dismissal, or no-bill; in 99 percent of all criminal investigations that result in charges, the evidence that was collected was never used in court. Add to that the evidence collected by law enforcement where charges are never filed, and it's easy to see why evidence rooms fill up.

Unless the specific item has future evidentiary value, there is no reason to hold onto it once the case has been disposed. When law enforcement requests to dispose of evidence, whether that request is made to a magistrate directly or through the prosecutors' office, if everyone understands why we hold onto certain categories of evidence, then the stigma attached to destruction can be removed. It's important that every prosecutor's office have a review process that can be explained and understood so that the public knows we are not hiding anything.

Very few statutory guidelines exist to tell us how long we should keep evidence and how we should destroy it. The best answer (or maybe the smart-aleck one) is to keep it until you don't need it anymore, but how do you decide how long that is? Each individual office will have to decide for itself, but a few recommendations may be helpful. Knowing which law requires you to keep evidence will guide you in disposing of other evidence and non-evidentiary items when you don't need them anymore.

Evidence containing biological material

The most well-known evidence retention law is the DNA statute in the Code of Criminal Procedure, Article 38.43. The statute never actually uses the term "DNA" but rather the phrase "evidence containing biological material," but we all know what the legislature meant. This particular statute mandates the longest holding period for any type of evidence available—and rightly so. When technology allows evidence to be examined and linked with a specific person, then it is only right that this kind of evidence be maintained essentially until all uncertainty is gone.

To determine whether Article 38.43 requires evidence preservation for a specific time, ask the following questions.

- Has a defendant been convicted?
- Was the evidence in the State's possession when the case was prosecuted?
- At the time of conviction, did

prosecutors know the evidence contained biological material that, if tested, would more likely than not establish the perpetrator's identity or exclude a person as the perpetrator? If the answer to all three questions is yes, then you must preserve that evidence for a specific period of time (details about how much time appear later in the article) *unless* you follow the procedure in the statute to give notice and receive authorization to destroy it earlier. A "no" answer to any one of those questions may release you from a statutory mandate, but you should still evaluate the decision to destroy evidence containing biological material differently from any other kind of evidence.

In a capital murder case, biological material evidence must be preserved until the defendant is executed, dies, or is released on parole, whiever is earlier. In any other case involving a sentence of confinement or imprisonment, the biological material evidence must be preserved until the earliest of the dates on which the defendant dies, completes the sentence, or is released on parole or mandatory supervision. Evidence containing biological material may be hanging around an evidence room for a very, very long time.

In spite of these mandated retention periods, evidence may be destroyed earlier only if:

1) the prosecutor, clerk, or other officer in possession of the evidence notifies by mail the defendant, the defendant's last attorney of record, and the convicting court of the decision to destroy the evidence, *and*

2) no written objection is received by the prosecutor, clerk, or the officer in possession of the evidence before the 91st day after the later of the following two dates:

- the date proof is received that the defendant received notice or
- the date the notice is mailed to the last attorney of record.

After the notice of intent to destroy is given and no objection is received within the statutory time frame, there is no requirement that any further authorization be given by the court. Prosecutors could simply inform the law enforcement agency that they can now dispose of the evidence. The better practice, however, is to obtain a court order authorizing the destruction so that an impartial judge has reviewed the process. To cover all the bases in a felony case, file a Notice of Intent to Destroy Evidence with the district clerk, send certified letters to the last attorney of record and the inmate in prison, then return to the court approximately 120 days later with an order for destruction. In the order for destruction, detail sending the notice letters to the defendant and the last attorney of record *and* have the court make a finding that there has been no objection received within the statutory time frame.

When can you be comfortable with seeking the early destruction of evidence containing biological material? When the evidence has been fully tested and the DNA belongs to the defendant who was convicted! The statute was designed to address post-conviction testing to insure the integrity of convictions. When the defendant who has been convicted is confirmed as the source of the biological material, the purpose for retention is no longer as critical. It is also much easier to give notice of intent to destroy the evidence when there is a DNA match as soon as all appeals are completed. Why wait years down the road when the prosecutor's knowledge about the case has faded and somebody new has to read the entire file and decide to destroy? When the evidence containing biological material came from an identifiable source, especially if the source was the defendant or victim, my recommendation is to follow the steps for early destruction as soon as you feel comfortable after the case is disposed, especially if the disposition involved a guilty plea. If there was a trial, however, additional retention guidelines apply.

It is important in the evaluation of whether to retain evidence that the prosecutors and evidence technicians be aware of future improvements in technology. So-called touch DNA, the possibility that a person may deposit skin cells on an item by touching it, is such an area. If items, such as a piece of clothing, have been swabbed, for instance, it may be acceptable to preserve the swabs and not the clothing itself. Remember, the threshold question is whether at the time of conviction, prosecutors knew the evidence contained biological material that, if tested, would more likely than not establish the perpetrator's identity or exclude a person as the perpetrator. This does *not* mean that nothing should ever be destroyed because of the possibility that someone touched it. Evidence collection is a skill that combines the educated guess about where evidence may be found with the knowledge of how to preserve that evidence for testing.

The best answer is to attempt

Continued on page 36

Continued from page 35

collection of all possible DNA evidence at the very beginning. It may be an oversimplification, but the longer an item is held somewhere, the greater the potential for deterioration or loss of evidence containing biological material in any form.

Evidence actually introduced as an exhibit

When some item has been marked as an exhibit and introduced in court during a trial or other hearing, Article 2.21 of the Texas Code of Criminal Procedure controls the post-trial disposition of that exhibit. At the conclusion of a criminal proceeding, Article 2.21 designates the clerk to receive all exhibits from the court reporter. The clerk shall then release any firearms or contraband (drugs) to either the sheriff or the law enforcement agency from which the evidence came.[1]

All other "eligible exhibits"[2] must be held for one year after the conviction becomes final in a misdemeanor or a felony case with a sentence of five years or less. If the case was a non-capital felony with a sentence of more than five years, the clerk must keep it for at least two years from the date the conviction becomes final.

Remarkably, the statute does not specify a time for capital felonies when the evidence does not contain biological material. Given the shorter time periods until execution today, I recommend following the guidelines in the DNA preservation statute when a death sentence is imposed and retain the evidence in the clerk's office until the defendant dies, is executed, or is released on parole. In the event of a capital life sentence,[3] wait a reasonable amount of time and apply to the court for authorization to destroy the evidence. Ten years should be ample time for all appeals to be completed and any writs filed.

The DNA preservation statute trumps Article 2.21, which means that even the district clerks' must either comply with the procedures for early destruction of evidence in Article 38.43 or keep any evidence containing biological material for the longer time periods specified in that statute. Consequently, it is important that prosecutors' offices and clerks' offices work together on these issues. In a county with a population of 1.7 million people or more, the clerk is not required to notify anyone before disposing of eligible exhibits.[4] It is important, therefore, for the trial prosecutor to somehow identify for the clerk which exhibits should be preserved for a longer period of time because they contain biological material. Such identification should be done immediately following the trial or hearing, again, because it is fresh in everybody's mind. The clerk in a county with a population of fewer than 1.7 million people *is* required to provide written notice to the prosecutor and defendant before disposing of an eligible exhibit.[5] One alternative for the clerk, which would allow him to dispose of evidence containing biological material at approximately the same time as the rest of the evidence, would be to notify the defendant (as well as the prosecutor and defense attorney) and extend the time for receiving a request or objection related to the destruction to 90 days instead of the required 30 days for ordinary evidence. If no objection is received, then all exhibits, biological and otherwise, may be disposed of by the clerk. Again, no further authorization by the court is required; however, a simple application and order for destruction may better protect everyone involved.

Notice what a short time the legislature authorized for the destruction of evidence that was *actually used as evidence* in court. Why should a law enforcement agency be required to hold onto evidence that never made it to the courtroom longer than the evidence that did? It all comes down to the discretionary decisions made by prosecutors and law enforcement agencies about their individual comfort level related to when evidence is no longer needed.[6]

Evidence that can be destroyed before trial

Certain kinds of evidence would be dangerous to keep in an evidence room, so the legislature has recognized that their early destruction is appropriate when safety is an issue. For example, explosive weapons[7] and chemical dispensing devices[8] may be photographed and destroyed without ever putting the item in the evidence room if prosecutors follow the procedures set out in Article 18.181 of the Code of Criminal Procedure. Fortunately, we don't have too many bombs in Georgetown, but if we did, the nearest bomb squad would be contacted to handle the destruction.

Excess quantities of controlled substance property or plants may

also be forfeited and destroyed before the disposition of a case as long as representative samples are taken and preserved for discovery.[9] While safety is not the primary consideration, the storage of very large amounts of narcotics is unnecessary in many cases. At least five random and representative samples must be taken from the total amount and a sufficient quantity preserved to provide for discovery by the parties. The statute also requires taking photographs that reasonably show the total amount of the property or plants, and the gross weight or liquid measure of the property or plants must be determined, either by actually weighing or measuring or by estimating the weight or measurement after making dimensional measurements of the total amount seized. If the property is liquid in a single container, only one representative sample is required.

Although the statute allows for this destruction without a court order or the consent of the prosecutor's office, the Williamson County District Attorney's Office has asked that our agencies follow this procedure for excess quantities of controlled substances or marijuana:

- A request for destruction of the excess quantities should be submitted to our office *with* a flag that the case is still pending.
- The prosecutor handling the case will be consulted and, if destruction is appropriate, a motion and order will be submitted to the judge so that the defense may have an opportunity to raise any objections.
- If the court authorizes the destruction, the process of taking the random and representative samples will be scheduled. At the discretion of the prosecutor and the law enforcement agency, the defense may be given the opportunity to be present.
- The destruction of the excess quantity should be handled according to all applicable statutes and department rules.

The primary reason we ask law enforcement to take these steps is so that the prosecutor who may be trying the case can be involved in the decision to destroy. While it may not be practical to bring 700 pounds of marijuana into the courtroom, five 10-pound samples will still be more impressive than five two-ounce samples. In a county with larger numbers of big drug seizures, one could certainly discuss the standards with law enforcement for amounts to keep generally instead of on a case-by-case basis. Again, court intervention is not required, but it may help resolve potential issues that could otherwise be used by the defense at trial.

For hazardous materials (i.e., meth lab byproducts or similar chemicals), I suggest this procedure:[10]

- Before seizing and destroying hazardous wastes, take photographs that reasonably show the total amount of the materials seized and the manner in which they were physically arranged or positioned before seizure.
- At least two witnesses should view the items and determine that it is unsafe to store the items in the evidence room. These witnesses should be able to testify about why keeping these items is unsafe.
- At least two witnesses to the destruction of the items should be available at trial to testify.
- If it is safe to do so, any physical evidence capable of being properly packaged and stored safely should be preserved for use at a trial.

The early destruction of "hazardous waste, residuals, contaminated glassware, associated equipment, or byproducts for illicit chemical laboratories or similar operations that create a health or environmental hazard or are not capable of being safely stored" is also governed by §481.160. Again, Williamson County asks for a little more than the statute requires to attempt to minimize the issues at trial, but we do *not* interfere with law enforcement's determination that hazardous materials are unsafe to put in the evidence room.

Evidence that can be returned to the rightful owner before trial

Chapter 47 of the Code of Criminal Procedure governs the disposition of stolen property and authorizes the return of stolen property to the true owner. Think of all the shoplifted property or stolen cars that would be in evidence rooms and on impound lots if we were required to hold onto that stolen property until the case was disposed[11]—nor does the law prevent us from burying a deceased victim, allowing an injured victim to seek medical attention, or returning items that have no evidentiary value. Fortunately, Article 47.01 requires that the officer hold the property only if ownership is contested or disputed.

Continued on page 38

Continued from page 37

Conclusion

A little common sense and an examination of the statutes reveals that evidence is required to be held only as long as it is useful. With a little thought, you can determine when it is important or required for law enforcement, prosecutors, and clerk's office to hold evidence. Stop being afraid of cleaning out evidence rooms! ✤

Editor's note: Copies of the Williamson County DNA destruction notice letters and a motion for destruction can be found on the TDCAA website at www.tdcaa.com/newsletter. The next article in this series will discuss the disposition of evidence at the completion of a case by court order.

Endnotes

1 For counties with a population of less than 500,000, the sheriff holds firearms or contraband for safekeeping after it has been introduced as an exhibit in court. For counties with a population of 500,000 or more, the exhibit is returned to the law enforcement agency that collected, seized, or took possession of the firearm or contraband or produced the firearm or contraband at the proceeding.

2 An "eligible exhibit" is an exhibit filed with the clerk that is not a firearm or contraband, has not been ordered by the court to be returned to its owner, and is not an exhibit in any other pending action (co-defendant cases). Tex. Code Crim. Pro. art. 2.21.

3 Life with or without parole, whichever was imposed by law at the time of conviction.

4 Tex. Code of Crim. Pro. Art. 2.21(f).

5 Tex. Code Crim. Pro. Art. 2.21(g).

6 Perhaps the packrat in your office should not be the person making these decisions.

7 An explosive weapon is defined as "any explosive or incendiary bomb, grenade, rocket, or mine, that is designed, made, or adapted for the purpose of inflicting serious bodily injury, death, or substantial property damage, or for the principal purpose of causing such a loud report as to cause undue public alarm or terror; and includes a device designed, made, or adapted for delivery or shooting an explosive weapon". Tex. Penal Code §46.01(2).

8 A chemical dispensing device is a "device, other than a small chemical dispenser sold commercially for personal protection, that is designed, made, or adapted for the purpose of dispensing a substance capable of causing an adverse psychological or physiological effect on a human being." Tex. Penal Code §46.01(14).

9 Tex. Health & Safety Code §481.160.

10 Step 1 is required by Tex. Health & Safety Code §481.160(e). Steps 2, 3, and 4 are recommendations for law enforcement in Williamson County.

11 Not to mention cattle or other livestock.

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