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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

Forensic sciences under scrutiny

A comprehensive look at the state of forensic science and a starting-point resource for prosecutors with questions on the subject

By John Stride
TDCAA Senior
Appellate Attorney

It is fashionable to criticize forensic science evidence and, hyperbole aside, the criticism is not always unfounded.

For years, prosecutors have been challenging the admission of defense "expert" testimony, but, as prosecutors, we have not always been as careful as we should have been in presenting our forensic science evidence. Not all the evidence presented has been reliable or, at least, demonstrated as reliable. Also, the development of the various forensic science disciplines has not been parallel, and this unevenness has highlighted the strengths and weaknesses of the various forensic science disciplines. The reliability and value of DNA testing has far outstripped much longer-living forensic science disciplines and in some cases, such as microscopic hair comparisons, demonstrated their limitations. Coupled with the rapid growth of the actual innocence industry and identification of wrongful convictions, DNA testing has probably served as the catalyst for the current focus on forensic sciences. Now, the doors of the forensic science industry have been wedged open for the purposes of penetrating inquiries, analyses, and reports and, in these early stages of reflection, the feedback is frequently negative.

Currently, the courts, commissions, any number of law school innocence programs, and the media are sharply focused on the testimony and opinions of the State's forensic experts. In the past, of course, courts scrutinized forensic science evidence when called upon to do so, and they will continue to. But of late we have learned that the State has presented unreliable testimony on future dangerousness[1]; relied too much on dog-scent evidence to secure a capital murder conviction[2]; and presented at trial arson investigation evidence that has since evolved.[3] Inquiries have also been made as to whether the State has shown that the testimony it has offered as a valid or potentially valid science is sufficiently reliable. For example, courts have issued opinions declaring the State has failed to show the reliability of LIDAR[4] and the testimony of a sexual assault nurse examiner (SANE) on anal dilation rates.[5]

Should the regular business of the courts be insufficient to examine forensic science evidence, in at least one case, a court of inquiry has also re-examined a criminal case. Because of the burgeoning interest in the forensic sciences, we must expect appellate courts to increase their scrutiny of such evidence. In response, trial courts can reasonably be expected to refine their approach to admitting it.

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Welcome to our new TDCAF Board

The Texas District and County Attorneys Foundation will kick off the New Year with a new Foundation Board. The TDCAA Board of Directors voted on the new Board at the December 1st meeting. The TDCAA Board proposed this idea to the association staff back in March as a way to enhance the foundation's ability to develop financial support for TDCAA.

Thank you to the Planning Committee for their efforts in strategic planning for the new foundation board: Tom Bridges, Bert Graham, Pete Inman, Helen Jackson, Tom Krampitz, Barry Macha, and Mindy Montford. We are also adding a few new Advisory Committee members; we will list those folks in the next issue of *The Texas Prosecutor* journal. And thank you to the outgoing TDCAF Board for their leadership and support over the last four years.

We are honored to present the 2011 TDCAF Board of Directors:

From the TDCAA membership

Bobby Bland
Kathy Braddock
John Bradley
David Escamilla
Judge Susan Reed

From the community

Dan Boulware
Tom Bridges
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Pete Inman
Helen McDaniel Jackson
Tom Krampitz
Greg Laughlin
Barry Macha
Mindy Montford

By Jennifer Vitera
TDCAF Development Director in Austin

Working together to make TDCAF a success

2010 was a very busy and exciting year for the foundation. With your help and the generosity of our fellow Texans, the foundation has accomplished the following in the last year:

- raised more than $270,000 in support of the foundation (nearly $130,000 in unrestricted funds and over $140,000 in restricted donations);
- hired a senior appellate attorney, John Stride, and victim services director, Suzanne McDaniel, whose salaries are fully funded by the foundation;
- secured major support from the Anheuser-Busch Companies to produce the second DWI Summit that recently took place on November 12; and
- honored former Harris County District Attorney Carol Vance at the third annual Champions for Justice event.

Annual Campaign news

Congratulations to the winners of the 2010 Annual Campaign Fundraising Competition: Thank you to our investigator membership on a job well done. They will receive a reception in their honor at the Investigator School in February along with a special award presentation at the 2011 Annual Criminal & Civil Law Update in September. We are also proud to announce that 100 percent of the Investigator Board participated in this year's fundraising effort.

Thank you to all of our elected prosecutors, assistant prosecutors, investigators, key personnel, and victim assistance coordinators who participated in this year's Annual Campaign.

We also thank the Bee, Hidalgo, and Williamson County DA's Offices for 100-percent support to the 2010 Annual Campaign.

Spotlight on latest fundraising effort

As we look to 2011, there are many more opportunities for the foundation to enrich the training and educational resources for TDCAA members through publications, seminars, and more. In each issue we will feature an area the foundation is looking to support in the near future. We ask that you please think about organizations and people in your community who might have an interest in partnering with the foundation.

DV training

Sometime in 2012, TDCAA will host a three-day seminar targeting the unique role of prosecutors' office personnel in combating domestic

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violence. Domestic violence crimes affect all prosecutors—misdemeanor- and felony-level, rural and urban. Information in this seminar is aimed at prosecutors, investigators, and victim assistance coordinators to help them effectively investigate and prosecute domestic violence crimes as well as more compassionately and effectively provide assistance and information to victims. TDCAF is reaching out to individuals, corporations and foundations to support the Domestic Violence Training Program. For more information on how you can help, please contact me at vitera@tdcaa.com.

Thanks to our DWI Summit supporters

One more round of thanks to the sponsors and donors of our DWI Summit. We raised $25,000 in support of this year's satellite-broadcast training on November 12.

Thanks so much to the following companies:

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Thanks to those who have served

November led to many changes in our state's political leadership, as well as some changes in the state's prosecutor leadership. Criminal district attorneys run in gubernatorial election years (whereas district and county attorneys run in presidential election years), and so through retirement, the election, or the special election process, a number of prosecutors will step down at the end of December. They deserve our thanks for their work protecting the public: **Geoff Barr** (CDA in Comal County); **Bill Bennett** (CDA in Madison County); **Joe Black** (CDA in Harrison County); **Richard Clark** (CDA in Yoakum County); **Leslie Poynter Dixon** (CDA in Van Zandt County); **Rick Harrison** (CDA in Kaufman County); **Anna Jimenez** (DA in Nueces County); **Barry Macha** (CDA in Wichita County); **Judge John Roach** (CDA in Collin County); **John Segrest** (CDA in McLennan County); and **Kurt Sistrunk** (CDA in Galveston County).

By Rob Kepple
TDCAA Executive Director in Austin

And another farewell to **Joe Grubbs** (C&DA in Ellis County) and **Bobby Lockhart** (CDA in Bowie County), both of whom are taking a seat on the bench in their respective jurisdictions.

We hope that you all will continue as associate members of the association and honored alumni!

And welcome to these newly elected prosecutors

A number of new prosecutors will take office in January: **Richard Countiss** (CDA in San Jacinto County); **Bill Helwig** (CDA in Yoakum County); **Christopher Martin** (CDA in Van Zandt County); **Michael McLelland** (CDA in Kaufman County); **Abelino Reyna** (CDA in McLennan County); **Brian Risinger** (CDA in Madison County); **Jack Roady** (CDA in Galveston County); **Jerry Rochelle** (CDA in Bowie County); **Maureen Shelton** (CDA in Wichita County); **Mark Skurka** (DA in Nueces County); **Coke Ward Solomon** (CDA in Harrison County); **Jennifer Tharp** (CDA in Comal County); and **Gregory Willis** (CDA in Collin County). I also want to congratulate **Jo Anne Bernal** (CA in El Paso County), who has been appointed to replace **Jose Rodriguez**, who will begin his first term in the Texas State Senate. If you haven't already done so, take time in January to welcome the new prosecutors in your neighborhood. I am sure it will be appreciated, and I bet there will be a few questions for you as the new folks get their offices running at full speed.

The Prosecutors' Encyclopedia

Our prosecutor friends at the New York Prosecutor Training Institute (NYPTI) have been working on technology to support their prosecutor community through the Web. As their project developed in the last couple years, they realized that their vision of a Web-based home for prosecutor resources was bigger than just one state.

This fall NYPTI has launched the Prosecutors' Encyclopedia, which you will find at www.MyProsecutor.com. The PE is a free resource to prosecutors in the "wiki" format, with two major differences: It is open only to prosecutors, and it cannot be edited anonymously.

To date, the PE contains thousands of expert witness transcripts, commentaries from fellow prosecutors, cases summaries, discussion forums, and briefs. The key, of course, is that any prosecutor can add additional information to be shared across the country.

The Web platform is powerful. The Prosecutors' Encyclopedia contains every federal and state criminal case since 1970 in a searchable format powered and updated by VersusLaw; features a database of expert witnesses with videos of actual testimony; auto-detects case citations in any articles, memos, or briefs uploaded to the site; and serves as a nationwide directory of prosecutors and expert witnesses.

To join the PE, go to the website and click on "request an account." You will need to complete the user information as instructed. Once you have logged in and given it a spin, let us know what you think!

DWI Summit in review

On November 12, TDCAA, with the generous partnership and work

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of folks at the Anheuser-Busch Companies, put on the second DWI Summit, Guarding Texas Roadways. This live and interactive training took place all around the state at local Anheuser Busch facilities that had the Busch Satellite Network feed, and more than 1,100 Texas prosecutors and law enforcement officers attended. In addition, this year's summit included some 400 prosecutors and cops in New Mexico and Missouri.

As many of you recall, the first summit in 2008 energized folks across Texas to be more proactive in DWI enforcement and to actively explore blood draws in securing vital evidence of suspects' intoxication. The 2010 summit built on the success of the first, with our faculty focusing on the growing strategy of no-refusal weekends and best practices to fight DWI as we head into the holiday season.

I want to thank **W. Clay Abbott**, TDCAA DWI Resource Prosecutor, **Richard Alpert**, assistant CDA in Tarrant County, and **Warren Diepraam**, assistant DA in Montgomery County, for doing an outstanding job in front the cameras. And I want to extend a big thanks to **Sarah Wolf**, our communications director; **Michael Bomar**, assistant meeting planner; **Dayatra Rogers**, registrar; and **Andrew Smith**, book sales manager, for flawlessly executing the game plan that registered attendees, shipped off books and supplies, and readied the "talent" for broadcast. It was a monster job, and they made it look easy! Y'all have a great team working for you.

Thanks, Michael

The one downside to having such a talented group around here is that they tend to get noticed and snatched away. It didn't take long for the folks at the Wichita Falls Anheuser Busch distributorship to notice that their hometown girl, **Michael Bomar**, was pretty dang good at her job at TDCAA. She is fairly new and all, but the term "diamond in the rough" comes to mind. They made her an offer that she just couldn't refuse, so she is leaving TDCAA to start her new job in Wichita Falls in December. Thanks, Michael, for your excellent work!

Calling the usual suspects

Every now and again the news media shows an uptick in interest in the death penalty. There was a big push to expose flaws in the system in the 1990s which culminated when then-Governor George W. Bush ran for president in 2000. The advance of post-conviction DNA testing has spurred on the anti-death penalty people in their quest for the Holy Grail: the innocent person who has been executed. With it has come another spike in media coverage.

Here is how it plays out at TDCAA. We get a phone call from some writer (the most recent was from someone doing a story for the International Bar Association's publication) who is seeking a comment from a prosecutor in response to "all of the problems with the death penalty." Invariably, the article is already written and the writer is on a deadline (we are usually given an afternoon to respond) to get some comments to provide the necessary "balance."

Our response is two-fold. First, as you know, TDCAA does not speak for prosecutors. A reporter may want one-stop shopping when it comes to prosecutors, but we have 335 independently-elected prosecutors who can speak for themselves. If journalists want to know what you think, they need to take the time to ask you. We encourage them to call their local prosecutor and others around the state. My bet is that doesn't happen much because doing so takes a lot of work, and your comments aren't really central to the story, are they? The writer is just looking for a throw-down comment or two.

Second, I encourage the reporter to ask *our* bosses—ordinary citizens—how *they* feel about the death penalty these days. After all, our job is to enforce their law, and we take the job seriously. Isn't the important opinion that of the general public?

And that may be the last thing they want to do. Even with all of the recent publicity concerning DNA exonerations, Gallup reports that 64 percent of Americans continue to support the death penalty for those convicted of murder, while 29 percent oppose it. Significantly, that trend has not changed in the last seven years, when exonerations have been the most frequent. When given the choice between death and life without parole for murder, the public tilts in favor of death by a narrow 49- to 46-percent margin. Again, this number has not changed in the last seven years. Finally, 49 percent of Americans believe that the death penalty is not used enough, while 18 percent say it is used too much. Twenty-six percent fall into the "just

right" category. For the full Gallup report, go to www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx.

One other poll I'd like to mention is one from the Angus Reid Public Opinion service, which reports in its survey that 83 percent of Americans support the death penalty for murder. What is significant about this poll is that 81 percent of those polled—those who overwhelmingly supported the death penalty—believe that innocent people have been executed in the United States. (So much for the Holy Grail?) You can find the Angus Reid poll at www.angus-reid.com or on our user forums at www.tdcaa.com.

Prosecutors standing up for the State

Speaking of the quest for the Holy Grail, you may have heard about the awkward affair that took place in an Austin district court a couple months back regarding the Cameron Todd Willingham case. That is the death penalty case out of Navarro County that has drawn a lot of attention over arson investigations and the related science.

Out of the blue, a proceeding styled as a court of inquiry was filed in an Austin court. The fact that a judge in Austin would entertain a court of inquiry regarding a death penalty case out of Navarro County in which the execution took place long ago should raise some red flags for those committed to following Texas criminal procedure, but hey, they don't call it a "court of injury" for nothing. The lawyers handling the case saw fit to serve the CDA in Navarro County, **Lowell Thompson**, who was not the prosecutor in the original case, and "invited" some other state officials to attend if they wanted to.

I'd like to congratulate Lowell for stepping up and doing his job as the attorney for the state. It was pretty clear that the judge and the attorneys who filed the petition were hell-bent on having a public show—indeed one observer correctly predicted that no matter what, if a certain out-of-state celebrity lawyer and cameras were present, there would be some speechmaking. In the face of the throng, Lowell presented his motions asking that the law be followed and that a different judge be appointed to the case. Not surprisingly, the court ruled that Lowell, although served in the case, didn't have the right to represent the State after all. He was summarily dismissed as the attorney who could formally represent the state. As the popcorn was being served to the eager audience (I made that up), Lowell went to the Third Court of Appeals and filed a petition for writ of mandamus halting the show. After all, it was more of a show than a real courtroom proceeding.

On the heels of the Austin court of inquiry came the odd pre-trial hearing in Houston in the death penalty case of John Edward Green. A district judge in Houston decided to allow the defense to graze the anti-death penalty landscape with general testimony and speechmaking concerning past exonerations across the country. District Attorney **Patricia Lykos** seemed to shock the defense and the judge by simply asking that the hearing be confined to things relevant to the case at hand. When the judge took the position that "the show must go on," the state's attorneys refused to take part, standing mute. It did not take long for the Court of Criminal Appeals to halt this hearing as well, inviting the parties to brief the court on the propriety of the procedure.

Thanks to Lowell and Judge Lykos for being the calm and cool voices that simply ask that the law be followed. It may not seem popular or expedient to do that at times, but it is the duty of the state's attorney to ask that the law be followed as we examine individual cases. These prosecutors stepped up.

Changes with the AG's prosecutor assistance

The Attorney General has announced some changes at the Prosecutor Assistance Unit. Deputy Attorney General for Criminal Justice **Eric Nichols** has announced that he is leaving the office to return to private practice. He will be replaced by **Don Clemmer** as the Acting Deputy Attorney General for Criminal Justice. Many of you know Don from his days as a prosecutor in the Harris County DA's Office, as well has his work for the last 15 years with the AG.

Nichols, the 2010 recipient of TDCAA's Lone Star Prosecutor Award, has long been a friend of Texas prosecutors and has done a great job of helping y'all when you most needed it. Thanks, Eric—you will be missed. ❇

Photos from the Key Personnel Seminar in El Paso

Photos from the Elected Prosecutor Course in Austin

A taller, louder sheriff in town

By Mike Fouts
District Attorney in Haskell, Stonewall, Kent, and Throckmorton Counties

My first attempt at a column, and I should say this ain't fair. The prior President, F. Scott Brumley, was editor of the *University Daily*, the liberal wipe-rag of my double alma mater, Texas Tech. I barely passed my English classes, so if you are expecting Shakespeare, put the magazine down now. My preferred medium is oration laced with poor grammar and profanity—the written word in its refinement and eloquence is better left to the pencil-neck geeks like Brumley who are really just frustrated accountants. (I write this with the greatest affection for Scott. It's not often a man of his mental prowess retains some dignity and is a fun guy.)

But let's get this straight, there is a new sheriff in town, albeit one who is heavier and louder.

Unlike some within our esteemed organization, I can't say that my dream was always to be a prosecutor. In my formative years a more realistic dream was probably, "I want to avoid being prosecuted." After passing the bar exam and 10 years of private practice, I was elected District Attorney of the 39th Judicial District, serving Throckmorton, Haskell, Stonewall and Kent Counties in Texas. The 39th District has been described as the "big empty" and is populated by lots of cows but not so many people. It is, however, the best place on earth to live.

While being a prosecutor may not have been my dream, it is a dream job. We may not make the most money and we may go to an office adorned with county-issue particle board furniture—and in my case one without heat—but at the end of the day, we get not only the opportunity to seek justice but also the satisfaction that comes when that justice is meted out. We get the opportunity to tell crime victims that we will do all we can to see that the perpetrator pays for the crime committed against them and that they have nothing to fear because the resources of the State of Texas will be at our disposal to protect them. The satisfaction that comes from this job is immense.

I had handled many criminal matters as a defense attorney and, at least in my opinion, was well-prepared to take a criminal case to trial; however, I had no experience in a prosecutor's office. I remember shortly after my election receiving an invitation from the Texas District and County Attorneys Association (TDCAA) to attend the Elected Prosecutor Course in Austin. I will reluctantly admit that I considered not attending. While I had many friends that were prosecutors, heading to Austin on my own nickel to meet with folks, most of whom I didn't know, frankly did not seem too appealing to me. My good friend Joe Lee Rose, the newly elected District Attorney in Coleman County, persuaded me to attend, and what a difference in my life and career that decision made!

On the first morning, we newly elected prosecutors left the Omni Hotel and were bused to the La Quinta (Spanish for "next door to Denny's") for a morning orientation meeting. The bus ride and lavish setting of the La Quinta banquet hall provided great insight into the life of opulence and luxury I would enjoy as a prosecutor. (For my less refined Panhandle buddies, the previous statement was an attempt at sarcasm and not an example of the pretentiousness that you find so deplorable.) In any event, I am a man of simple taste and La Quinta suited me fine.

Then-TDCAA Executive Director Tom Krampitz welcomed all into the profession and the organization. We were provided a wealth of information, ranging from resources TDCAA could provide and funding sources for our offices, to details on retirement and insurance and too much other immensely helpful information to name. At the end of the meeting I approached Rob Kepple, now the executive director, and inquired about a number of civil cases I had pending and what I should do about them. Rob provided a concise answer then, and I cannot count the number of times since that I have called upon Rob and the rest of the staff for their help, input, and advice. I know clichés are thrown around with impugnity, but I can say without hesitation that TDCAA is the best, best, and I repeat best service organization in existence. The staff of our organization are always available to help with any matter. If they

cannot provide you with an answer, they know the person who can, and they will put you in touch with them. I encourage every member to take advantage of the knowledge and experience of the TDCAA staff. They are available to serve you and are happy to do so. For their commitment to our profession, I genuinely thank them and remind all our members to give them a pat on the back the next time you run across them.

On the afternoon the conference began, I sat at a table and met Michael Ward, County Attorney in Crosby County. Within 10 minutes Mike gave me a business card and told me to call him anytime with anything I needed, and he would do his best to help me or point me in the right direction. How many times over the years have I enjoyed a similar outreach from prosecutors with a helping hand? I would like to think I have repaid the favor a few times myself with a word of advice to fellow prosecutors or their staffs. The connections formed within TDCAA are an invaluable resource in the prosecution of cases. If you need help or advice, pick up the phone, call another office, and I can almost guarantee you they will take the time to give you that helping hand or get you the information you need. I can't put my finger on it, but prosecutors as a group are undoubtedly the most helpful, selfless individuals I have encountered, and for that I say thanks.

That evening a reception was held in the hotel, and while I might be described as introverted with a serious nature (is the sarcasm too obvious?), I attended the social. Mike Ward was there and was sitting with a group of other attendees. I was introduced and thought we had a good time. Evidently I did not make much of an impression as the next September at the Annual Criminal & Civil Law Update I was left standing on the curb as they casually drove off to the dog track. I humbly shouted as they drove away, "Shane, come back!" They have since confessed that at that moment they just didn't know what to make of the loud guy who sounded like Gary Busey. I'll stop here and not bore you with details of karaoke at the Holiday Inn that evening, except to say I was brilliant. You better believe that they don't have the guts to leave me standing on the curb anymore, and we have since made more than a few trips to the dog track. (FYI, if you take a cab to the track in Corpus Christi and your cab driver, Cornbread, gives you a hot tip, don't risk the kids' college fund.)

The people I met through TDCAA are incredible and some have become a few of my best and closest friends. The next time you go to a seminar or TDCAA event, take the time to enjoy the good company of your colleagues across the state and meet some new people.

Our organization so impressed me that I wanted to be more involved than as just a member. At the Annual, I ran to serve as a regional director of TDCAA, and while it was not as expensive as my other election, it did involve more mud slinging. Actually I think I ran unopposed. I was elected and have served since then as a director, representative to the Texas Association of Counties (TAC), and executive officer. The experience has been fantastic and has provided me with an ever-greater appreciation for what TDCAA and its staff do for prosecutors. I encourage every member to become involved in TDCAA; your service on committees and the board will be rewarding to you and helpful to the association.

I am honored to serve as president of this wonderful organization. I value its staff and all of its members, and while I don't know every member, I would love to meet everybody. So the next time you are at a TDCAA event and you see a loud, large guy who wants to dominate the conversation, that's me. Don't be shy—come on over. ❇

Helping hands across Texas

Best wishes for the new year! Since the last issue of this journal, we have hosted both the Key Personnel and Victim Assistance Coordinator Conference and the Elected Prosecutor Seminar with a focus on victim assistance. It was wonderful to reconnect with old friends as well as to meet new ones. I am awed by the interest from prosecutors, coordinators, and key personnel in improving victim services and to help their colleagues throughout Texas. I was delighted, for example, to hear Mark Yarbrough, the County and District Attorney in Lamb County, credit his VAC and TDCAA Victim Services Board Member Laney Dickey with keeping their office running and implementing victim rights. It is this kind of teamwork where everyone is involved and valued that shines as an example for all.

By Suzanne McDaniel
TDCAA Victim Services Director

Also exciting is the willingness of offices to share solutions and resources with others. Thank you to El Paso, Bell, and Atascosa Counties for providing their materials as examples for our membership. Thank you also to Jaime Esparza, the District Attorney in El Paso County, and his staff for mentoring other offices on the El Paso Family Violence Initiative. Bee and Wood Counties have adapted portions of the program for their communities, and I hope will provide us with an article on how they did it (hint, hint) to inspire other small jurisdictions to make similar changes.

Professional Victim Assistance Coordinator (PVAC) Recognition

The VAC Recognition program is designed to recognize professionalism in prosecutor-based victim assistance and acknowledge a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of TDCAA.

Applicants must have either three years of experience providing direct victim services for a prosecutor's office or five years of experience in the victim services field, one of which has to be providing prosecutor-based victim assistance. Applicants must show that they have already received 45 total hours of training in victim services (which is equivalent to the number of hours in the National Victim Assistance Academy program created by the U.S. Department of Justice's Office for Victims of Crime). Training must include at least one workshop on the following topics:

- prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure;
- the rules and application process for Crime Victims' Compensation;
- the impact of crime on victims and survivors; and
- crisis intervention and support counseling.

Five professional references are required from individuals not related to the applicant. One of the letters must be from the elected prosecutor in the jurisdiction where the applicant has been employed, and at least one of the letters must be from someone at a local victim services agency who has worked with the applicant for a year or longer. The remaining three letters can be from other victim services agencies, victims, law enforcement representatives, assistant prosecutors, or other criminal justice professionals who have knowledge of the applicant's skills and abilities in victim services.

Detailed requirements and the application may be found on the TDCAA website; search for PVAC. Those approved will receive recognition at the Annual Criminal and Civil Law Update in September.

Victim assistance grants

Victims of Crime Act (VOCA) and Violence Against Women Act (VAWAA) funding opportunities are posted on the Governor's Criminal Justice Division website, www.governor.state.tx.us/cjd. VOCA applications will be posted in January 2011 and due in March.

The Office of the Attorney General (OAG) also offers grant funding for victim assistance programs and positions in prosecutor's offices. This cycle, it is adding $2 million in funding to the Victim Assistance Coordinator/Liaison category. The OAG's funding applications will be posted in February or March 2011, and the deadline for the funding period of September 2011 to August 2012 will be sometime in the summer of 2011. The OAG grants website is www.oag.state.tx.us/victims/grants.shtml.

2011 National Crime Vic-

tims Rights Week Resources

This year's observance will be April 10–16, and the theme is "Reshaping the Future, Honoring the Past." All those interested must register to receive a complimentary copy of the Resource Guide and poster, as well as notifications on the electronic availability of the Resource Guide and details about the annual prelude events. The resource guide has everything from sample press releases, proclamations, and speeches to suggested activities and graphics. Please sign up at http://ovc.ncjrs.gov/ncvrw.

As Cyndi Jahn, Victim Services Board Chair, shared with us at in her rave-reviewed El Paso workshop, Victim Rights Week is a unique opportunity for your office to honor victims of crime and provide victim rights awareness for the public. It can be as simple as asking your commissioners or state representatives to proclaim Victim Rights Week in your community or as elaborate as Bexar County's week-long observance. Please send us your activities and photos so we can print them in this journal.

Victim assistance training online

The Office for Victims of Crime; Training and Technical Assistance Center is offering free, online basic training at www.ovcttac.gov/views/TrainingMaterials/dspOnline_VATOnline.cfm

The seven-course modules cover:

- goals and how to navigate through the online training;
- basic issues, such as ethics and cultural competency, that provide the foundation for victim services;
- characteristics, prevalence, and other information about 14 types of crimes;
- core skills needed by victim service providers, such as establishing rapport, problem-solving, and crisis intervention;
- information about specific topics and skills needed to provide services to specific populations;
- information about and skills needed to collaborate with various types of systems, such as community-, criminal justice-, faith-, and reservation-based systems; and
- challenging situations faced by victim service providers.

New and improved CVC database

My thanks to Dwight Peavy at the Office of the Attorney General for the following information on the updated Crime Victims Compensation (CVC) database.

The Office of the Attorney General's Crime Victim Services Division (CVSD) provides access to our Crime Victims Compensation (CVC) Claims Management System as an information source for claim and bill status.

Victim advocacy groups, law enforcement agencies, prosecutor offices, and medical and service providers who assist and serve Texas crime victims are eligible to become users. Users may access the CVC Claims Management System via a web browser (Internet Explorer, for instance, or Mozilla Firefox) to view basic claim and billing information.

CVC continually strives to enhance the ease of access to and the amount of information available via this online system, and we are proud to announce that we have enhanced our current system, which is also called remote user access. System users with appropriate security clearance can now view additional medical bill information for each claim.

For example, if you are a medical service provider, you will now be able to see all bills related to your Tax ID number and their statuses instead of just the paid bills. Victim advocates and law enforcement agencies can view all bills related to a claim and their statuses instead of the just the paid bills.

We are also now displaying the total paid to date on each claim on the bill details screens. Furthermore, we have added a screen for law enforcement and prosecutor offices related to the restitution process.

To get an ID and password, call 800/983-9933, ext. 61738 or e-mail CVCRemoteUsers@oag.state.tx.us. Training and support are both available for users.

Apply for National Victim Assistance Academy

The National Victim Assistance Academy (NVAA) sponsored by the Office for Victims of Crime is accepting applications for the Academy held March 14-18 in Albuquerque, New Mexico. The application deadline is February 25, and scholarships are available. Following a formal evaluation in 2003, the NVAA was redesigned to better address the skills and abilities required of victim service profession-

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als. The revised NVAA was launched in 2007 and includes three distinct tracks tailored to the needs of each participant:

- **Track 1, Foundation-Level Training**, is general training for those who have less than three years of experience serving crime victims. Its goal is to provide entry-level professionals and volunteers with skills, knowledge, and resources to serve crime victims and survivors effectively.
- **Track 2, Professional Skill-Building Institute**, is designed to address several timely topics that confront victim service providers on a daily basis and that have direct impact on service providers' work with victims. The training is targeted for those who have been in the victim services field for at least two years.
- **Track 3, Leadership Institute**, consists of courses on management issues, such as leadership and strategic planning. Track 3 is intended to help victim service administrators and leaders develop and refine the skills and abilities to manage and sustain their victim service programs.

For more information,please access the NVAA website at www .ovcttac.gov/nvaa/index.cfm.

Thank you all for all your ideas, questions, and solutions last year. Let's keep 'em coming in 2011. ❇

Continued from the front cover

Forensic sciences under scrutiny (cont'd)

Scrutiny from many sides

Both nationally and locally, commissions have been established to examine and report on the forensic sciences. In 2009, the National Academy of Sciences (NAS) issued its report to Congress on the state of the forensic sciences in the United States. Also, the Texas Forensic Science Commission (TFSC)—currently chaired by Williamson County District Attorney John Bradley—and the Texas Criminal Justice Integrity Unit (TCJIU)—founded by Judge Barbara Hervey of the Court of Criminal Appeals—are actively examining the forensic sciences.

Further, many law schools around the nation have created innocence groups, including Barry Scheck's Actual Innocence Project attached to the Benjamin N. Cardozo School of Law. While investigating and seeking to free those they believe are improperly incarcerated, these groups will thoroughly pick apart the State's evidence and, to obtain their ends, are only too happy to highlight any dubious-looking forensic evidence. Under the microscope at this very moment is the reliability of eyewitnesses, arson investigations, fingerprints, autopsies, confessions, and future dangerousness testimony. The study of these sciences is spawning the study of other sciences.

In addition, the media—with the goal to be the first to report the news, with limited understanding, or with political agendas—rushes to print or broadcast stories indicating failings of the criminal justice system. And on top of that, various elements of society are all too willing to fuel the fires, fan their flames, and even blow smoke to pursue their agendas.

Finally, TV shows like "CSI," which have fostered the so-called "'CSI' effect," have unrealistically elevated public expectations in the forensic sciences. Viewers-turned-jurors want quick tests with dispositive results all lucidly explained. When the criminal justice system does not fulfill their expectations, they can be disappointed and can even take it out on the State's case.

Any negative feedback about forensic sciences has serious consequences. If the State's evidence is unreliable, not only does it risk undermining the particular conviction, but it also raises the much more dangerous specter of eroding public confidence in the criminal justice system. But if forensic science evidence is reliable, we are making our own work harder if we do not defend and promote it for the value it affords us in resolving criminal cases.

As prosecutors who offer forensic evidence to support our cases at trial, we need to take heed and actively assist in developing the forensic science disciplines and resolving the arising issues.

What disciplines are "forensic sciences?"

The National Institute of Justice, the research, development, and evaluation agency of the U.S. Department of Justice, has categorized the forensic sciences as including 13 disciplines:

- general toxicology,
- firearms/toolmarks,
- questioned documents,
- trace evidence,
- controlled substances,
- biological/serology screening (including DNA analysis),
- fire debris/arson analysis,
- impression evidence (e.g., fingerprints and shoe and tire prints),
- blood pattern analysis,
- crime scene investigation,
- medicolegal death investigation, and
- digital evidence.[6]

Of this broad spectrum, DNA analysis provides the most advanced—and some of the most reliable—evidence and has set the bar for the other disciplines. DNA analysis has also received heightened scrutiny and funding. But DNA analysis comprises only about 10 percent of case work.[7] Thus, significantly more work needs to done for the greater number of forensic disciplines.

National Academy of Sciences Report

Congress authorized the National Academy of Sciences (NAS) to conduct a study on forensic sciences in 2006. Senate Report 109-272, recognizing the plethora of analysis on DNA and the dearth of analysis on other disciplines, triggered the study.

Among other items, the NAS study proposed to:

- assess the present and future resource needs of the forensic science community,
- make recommendations for maximizing the use of forensic technologies and techniques,
- identify potential scientific advances to assist law enforcement,

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- make recommendations for programs that will increase the number of qualified forensic scientists and medical examiners, and
- disseminate best practices and guidelines for collection and analysis of forensic evidence to ensure its quality and consistency.

The NAS committee acknowledged that the value of DNA as a reliable science is inestimable in securing convictions but observed that using other forensic sciences has provided less certain results. At worst, imperfect testing and results have resulted in wrongful convictions and, at best, resulted in misleading evidence admitted at trial.

In preparing the report, the committee consistently heard that, for example, "The forensic science system, encompassing both research and practices, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country."[8]

The committee found that:

- there are enormous disparities of staffing, funding, equipment, and qualification between existing forensic science operations at national, state, and local levels;
- the term "forensic sciences" encompasses a broad range of disciplines with significant variability in those sciences;
- the forensic sciences lack mandatory standardization, certification, and accreditation;
- there is a diversity of interpretation between disciplines and within disciplines;
- a body of research is required to establish limits and measures of performance; and
- the judicial framework cannot adequately discover the "scientific truth."

Based on its findings, the committee concluded that the forensic science disciplines operate within a greatly "fragmented system." Therefore, it proposed the creation of a new federal agency, the National Institute of Forensic Sciences (NIFS), with funding to oversee the development of forensic sciences. The committee recommended that the NIFS should be empowered to:

- establish standard terminology for reporting and testifying on forensic sciences,
- fund peer-reviewed research,
- allocate incentive funds to state and local jurisdictions so that administrative control of forensic science laboratories becomes independent of law enforcement,
- encourage research on human observer bias and sources of human error,
- work with and fund the National Institute of Standards and Technology,
- establish a national code of ethics for all forensic science disciplines,
- attract students (with funding) to the physical and life sciences to pursue graduate studies in forensic sciences,
- allocate funds to state and local jurisdictions to establish medical examiner systems to replace coroners,
- launch (with funding) a nationwide fingerprint data interoperability, and
- work with and fund the Centers for Disease Control and Prevention, the FBI, forensic scientists, and crime scene investigators for purposes of homeland security.

In addition, the committee recommended mandatory accreditation of laboratories and certification of forensic science professionals, and quality assurance and quality control procedures for laboratories.

The full report of the NAS, "Strengthening Forensic Science in the United States: A Path Forward," is available from the National Academies Press.[9]

It will take considerable dedication, time, and money to accomplish the NAS' recommendations. Meanwhile, other Texas organizations are aware of the recommendations and are analyzing the forensic sciences within the state, but their roles are more limited in scope.

The Texas Forensic Science Commission[10]

The Texas Forensic Science Commission (TFSC) was created in 2005 by enacting Code of Criminal Procedure art. 38.01 through House Bill 1068. Two years later, funds for the TFSC were appropriated to Sam Houston State University to provide administrative support to the commission. The university houses the TFSC's office in Huntsville.

The TFSC's mission is to strengthen the use of forensic science in criminal investigations and courts by:

- developing a process for reporting professional negligence or misconduct,
- investigating allegations of professional negligence or misconduct,
- promoting the development of professional standards and training, and
- recommending legislative improvements.

But the TFSC has a very limited role in comparison to that proposed for the NIFS. For the most part, the TFSC investigates complaints that allege professional negligence or misconduct by a laboratory, facility, or entity that has been accredited by the director of the Texas Department of Public Safety (DPS) that would substantially affect the integrity of the results of a forensic analysis, but it does *not* investigate complaints involving any laboratory or forensic scientist lacking DPS accreditation.

Moreover, the TFSC reaches only some of the commonly recognized forensic science disciplines. The term "forensic analysis," as used by the TFSC, means a medical, chemical, toxicological, ballistic, or other examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term does not include latent fingerprint examinations, a breath test specimen, or the portion of an autopsy conducted by a medical examiner or licensed physician. The TFSC, then, largely provides a grievance procedure with a narrow field of operation.

The TFSC has three standing committees: Complaint Screening, Forensic Development, and Legislative. The Complaint Screening Committee reviews complaints, conducts preliminary investigations, and makes recommendations for disposition. If the TFSC accepts a complaint for investigation, it creates a panel to coordinate an investigation into the complaint. This panel recommends whether to dismiss the complaint or to proceed with a full investigation. If a full investigation is conducted, the panel prepares a full report for the TFSC, which is available to the public.

The Forensic Development Committee develops, subject to the approval of the full TFSC, plans to strengthen the use of forensic science in criminal courts in Texas. Such plans include implementing a reporting system through which accredited laboratories, facilities, or entities are required to report professional negligence or misconduct. Such plans may also include the collection and dissemination of funding opportunities for forensic science, support for training and the development of professional standards, and the collection of information that supports programs for strengthening forensic science.

The Legislative Committee studies the ongoing work of the TFSC and is prepared to monitor legislation and testify on the application of statutes within the TFSC's purview. The committee also reviews and recommends a legislative appropriations request to the full TFSC and monitors the appropriations process as it affects the commission.

The TFSC website references the NAS report and comments that the efforts of the NAS committee "are recognized and applauded by the Texas Forensic Science Commission. As an independent body created by the Texas Legislature, the commission remains steadfast in its commitment to promote justice through science and is encouraged by the recommendations set forth in the report."

As most of you are aware, the TFSC is currently investigating and preparing a report on the arson investigation in the Todd Willingham death penalty case. On the same case, a Travis County district judge has also held a court of inquiry under the auspices of Code of Criminal Procedure art. 52.01. At the time of writing, however, the latter proceedings were put on hold by the Third Court of Appeals in a mandamus proceeding filed by Navarro County District Attorney Lowell Thompson.[11] In a 2-1 decision, the intermedicate court ruled that Judge Baird had to either recuse himself or refer the motion to the local administrative judge.[12]

Texas Criminal Justice Integrity Unit[13]

In June 2008, Judge Barbara Hervey of the Texas Court of Criminal Appeals created an ad hoc committee called the Texas Criminal Justice Integrity Unit (TCJIU). The TCJIU was created to review the strengths and weaknesses of the Texas criminal justice system. Furthermore, the TCJIU's purpose is to bring about meaningful reform through education, training, and legislative recommendations. It is not a forum for any particular group, nor does it embrace the plan of one particular political party.

According to press reports at the time of its creation, the TCJIU intends to focus on issues relating to wrongful convictions, including:

- improving the quality of defense counsel available for indigent defendants;
- implementing procedures to improve eyewitness identification;
- making recommendations to eliminate improper interrogations and to protect against false confessions;

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- reforming the standards for collection, preservation, and storage of evidence;
- improving crime lab reliability;
- improving attorney practices and accountability;
- adequately compensating the wrongfully convicted;
- implementing writ training; and
- establishing local, "home rule" protocol for the prevention of wrongful convictions.

Thus, the TCJIU also anticipates that it has a role to play in the development of the forensic sciences. But the TCJIU lacks a legislative mandate, so in many ways serves more as a think-tank.

State appellate courts

Recent cases from our state appellate courts demonstrate that the State should be taking extra care when introducing forensic science evidence. Of course, many cases with forensic science evidence become final without any challenge to that evidence, but even a pattern of a few cases—especially high profile death penalty cases—can skew perception.

Future dangerousness and Coble v. State[14]

In 1990, the State retained Dr. Richard Coons, a forensic psychiatrist, to testify about Coble's future dangerousness. On appeal, however, the trial court's judgment was overturned. Eighteen years later, Dr. Coons testified at the retrial. Once again, although he had lost his notes from an earlier face-to-face interview with Coble, had no independent memory of the interview, and relied solely on information provided by the DA's office, he opined that Coble was a future danger. He dismissed Coble's absence of any intervening prison disciplinary reports as a function of an inmate's incentive to behave while his case is pending on appeal. In response, Coble put on the testimony of a number of witnesses who related his compliance with and contributions to the prison environment. He also presented a forensic psychologist, Dr. Mark Cunningham, who testified that Coble had a low probability of committing acts of violence while in prison.

But before Dr. Coons even testified, the trial court conducted a *Daubert/Kelly* hearing. Dr. Coons explained his qualifications and extensive experience in the field of psychiatry. He testified that he employed psychiatric principles in evaluating a defendant's future dangerousness but used his own specific methodology of five overlapping factors. He did not know whether others in his field relied on the same method and was unaware of any written authorities that used his factors or any peer studies on the accuracy of long-term future dangerousness predictions or error rates. Moreover, he had never reviewed the accuracy of his own predictions. And, on cross-examination, he admitted unfamiliarity with a list of articles on the topic.

The Court of Criminal Appeals held that, while an expert may well be able to testify on the topic of future dangerousness, the prosecution had failed to satisfy its burden of showing the scientific reliability of Dr. Coons' methodology. Nevertheless, the erroneous admission of the testimony was harmless, and the lower court's judgment affirmed.[15]

Canine scent-discrimination lineups and Winfrey v. State[16]

Deputy Sheriff Keith Picket was brought in by the Texas Rangers to perform a dog scent-discrimination lineup three years after a murder. The test involved "pre-scenting" the dogs on the victim's clothing worn at the time of his death, then putting the defendant's clothing and that of five other males in separate containers. As they walked along the line of containers, all three of Deputy Picket's bloodhounds alerted on the container holding the defendant's clothing. During his testimony, however, Deputy Picket acknowledged that this test demonstrates only that there is some relationship between the scent and the objects and does not necessarily indicate person-to-person contact.

The Court of Criminal Appeals, acknowledging that dog scent-*tracking* evidence is of a superior caliber, did not reach the reliability of dog scent-*discrimination* lineup evidence.[17] Indeed, finding that dog scent-discrimination testing has been questioned, it held that such evidence alone, or as the primary evidence, is never enough to support a conviction. The Court of Criminal Appeals reversed the judgment of the intermediate court and entered a judgment of acquittal. If you don't understand from the opinion that the court has serious reservations about dog scent-discrimination lineup evidence on grounds of its reliability, take another look at Judge Cochran's concurrence. She highlighted that, because Winfrey did not object at trial, the evidence's admissibility had not been reviewed under *Kelly/Nenno,* but, even if it had been held admissible, the evi-

dence would still have been legally insufficient to support the conviction. Surely the only reason to write the concurrence was to alert readers that any future proffer of dog scent-discrimination evidence requires no less than a fully developed hearing on its reliability. And, given the analysis of this type of evidence referenced in the lead opinion, the outcome does not look promising.

LIDAR in Hall v. State[18]

A Venus officer used a Light Detection and Ranging device (LIDAR) as the sole basis to establish a vehicle was traveling 11 miles per hour over the posted speed of 65 mph. He pulled over the vehicle and, after the observing the usual symptoms of intoxication on the FSTs, charged the driver with DWI.

At a pretrial suppression hearing, the officer testified that when he turned on the LIDAR, it performed a self-test and indicated it passed all functions. To operate the LIDAR, the officer lines up the sight to place a red dot on the target vehicle. When he presses the trigger, a laser is emitted and reads the vehicle's speed. The officer also explained that he was not certified to use the LIDAR, and he was uncertain whether anyone maintained it to ensure its reliability and accuracy.

The trial court denied Hall's motion to suppress. The intermediate court, holding that the trial court should have conducted a Rule 702 hearing and that the State had failed to prove the reliability of LIDAR technology, reversed.

The Court of Criminal Appeals agreed, although it also noted that the intermediate court improperly required the application of Rule 702 during the suppression hearing. The court found there was no evidence establishing that 1) the LIDAR was used to confirm the officer's independent, personal observation that Hall was speeding, or 2) using LIDAR technology to measure speed supplies reasonably trustworthy information or that the trial judge took judicial notice of this fact, including his basis for doing so. Accordingly, the State failed to establish that the officer relying on LIDAR alone had probable cause to stop the defendant. Note that the court does not foreclose the State from establishing the reliability of LIDAR in the future.

SANE testimony in Escamilla v. State[19]

In *Escamilla*, America Garza, a sexual assault nurse examiner (SANE) testified that upon examining a 2-year-old girl, she discovered a tear close to the child's anus and wide dilation of the child's anus within seven seconds after retraction of the child's buttocks. In her opinion, both findings are consistent with sexual abuse.

The majority of the appellate court, addressing the rapid dilation evidence, concluded that the State had established Garza's qualifications and Garza could explain her methodology. Nevertheless, Garza was unable to "elaborate on the extent to which the underlying scientific theory and technique are accepted as valid; … could only make vague references to the literature supporting her underlying scientific theory and technique; and did not appear to understand the concept of the potential rate of error of the technique." When asked to explain the reasoning or methodology she employed in reaching her opinion about the rate of dilation constituting sexual abuse, she simply replied "based on my training," "my readings and stuff," the conferences she attended, and "research and the peer reviews." To her, peer reviews meant SANE nurses sharing information. On inquiry about the known or potential rate of error for the application of the theory on anus dilation, she responded, "We base ourselves on what the patient tells us, the history, and our findings." Although she asserted that she based her opinion on literature by Dr. Nancy Kellogg, she was unable to name a specific article or study by Dr. Kellogg. Fortunately, the improper admission of the testimony was harmless and the trial court's judgment was affirmed.

In his dissenting and concurring opinion, Justice Steven Hilbig (former Bexar County District Attorney) took issue with the majority's conclusion that the State had failed to establish adequate foundation for the reliability of Garza's opinion. After a far more comprehensive recitation of the testimony, he opined that given the testimony and the flexibility of the reliability inquiry here (which should be more akin to that for a latent print rather than DNA), the trial court did not err in admitting Garza's testimony.

Offering forensic science evidence in court

A trial court must serve as a "gatekeeper" when a party proposes to offer expert testimony. The Court of Criminal Appeals laid out the duties of the gatekeeper in *Kelly v. State*,[20] and the Supreme Court of the United States did something similar in *Daubert v. Merrell Dow Pharmaceuticals*.[21] The framework in these cases

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replaced the more demanding framework formerly controlling in *Frye v. United States*,[22] which required proof that the scientific community had accepted the evidence as reliable.

The test for admissibility is more stringent for soft sciences. The differences between the two are illustrated thusly:

Hard sciences[23]**:** precise measurement, calculation, and prediction; examples include mathematics, calculation, prediction, physical science, earth science, and life science.

Soft sciences[24]**:** based on experience and training; examples include psychology, economics, political science, anthropology, and sociology.

To admit any expert testimony, the trial court must find that 1) the expert's testimony is *relevant*, 2) the expert is *qualified*, and 3) the expert's testimony is *reliable*. This three-part test applies to *all* scientific evidence—whether novel or accepted.[25]

The steps in the box at right lay out the scope of the current gatekeeping inquiry.

Please note that the 2010–2012 edition of TDCAA's *Predicate Questions Manual* authored by Williamson County District Judge Ken Anderson and Williamson County District Attorney John Bradley contains excellent sample scripts for various experts and a useful list of suggestions on how to handle defense experts.

Parts 1–3 (for hard and soft sciences)

1. Testimony must "assist trier of fact" (that is, be relevant).[25] "Expert's testimony must take into account enough of the pertinent facts to be of assistance to the trier of fact on a fact in issue."[27]

and

2. Expert must be "qualified" "by knowledge, skill, experience, training, or education."[28]

- "Is the field of expertise complex, how conclusive is the expert's opinion, and how central is the area of expertise to the resolution of the lawsuit?"[29]
- An expert must also have "sufficient background in a particular field, but a trial judge must then determine whether that background goes to the very matter on which the witness is to give an opinion."[30]

and

3. The expert's testimony or opinion must be reliable. The underlying scientific theory is valid; the technique applying the theory is valid; and the technique was properly applied on the occasion in question.[31]

Kelly provided the following non-exhaustive list of factors that can determine whether the reliability criteria are met:

- the extent to which the underlying scientific theory and technique are accepted as valid in the relevant scientific community (if the relevant community can be determined);
- the qualifications of the expert testifying;
- the existence of literature supporting or rejecting the underlying scientific theory and technique;
- the potential rate of error of the technique;
- the availability of other experts to test and evaluate the technique;
- the clarity with which the underlying scientific theory and technique can be explained to the court; and
- the experience and skill of the person who applied the technique on the occasion in question.[32]

Part 4 (for soft sciences only)

The proponent must establish—in addition to the *Daubert/Kelly* test—that:

- the field of expertise is a legitimate one;
- the subject matter of the expert's testimony is within the scope of that field; and
- the expert's testimony properly relies upon and/or utilizes the principles involved in the field.[33]

What prosecutors should do now

- Know the *Kelly/Nenno/Daubert* requirements. *Coble* and *Escamilla* sum them up.
- Develop a checklist for the requirements of forensic science evidence.
- Understand where the various disciplines fall within the spectrum of reliable scientific evidence (e.g., DNA, fingerprints, confessions, eyewitness testimony).
- Do not take shortcuts in establishing reliability. Go all-out and remember that persuading the trial courts is only a start—the appellate courts grade their rulings.
- If you can, introduce the record of an expert's testimony from a previous trial where the expert's opinion testimony was admitted after a *Kelly/Nenno/Daubert* hearing. It is too late to offer the prior record to sup-

port your expert on appeal.

- That said, do not rely on the record in a previous case alone. Courts do not grandfather-in expert testimony simply because it has previously been admitted.
- Avoid relying on tenuous sciences, at least as the primary evidence to secure convictions. Do not taint reliable evidence with unreliable evidence.
- Have your expert identify the relevant literature—journals, articles, books, studies—and demonstrate their knowledge.
- Have your expert identify other experts in the field.
- Have your expert explain the principles upon which he relies.
- Show that the expert's factors have been empirically evaluated.
- Be alert to developments in the sciences: Studies, perspectives, and recommendations evolve. Encourage your expert to share his knowledge.
- If you need a starting place, look at the TDCAA *Predicate Questions Manual* and the TDCAA user forum on experts. Communicate with each other.

Going the extra mile

- Put on in-house presentations with prosecutors with experience in a field.
- Coordinate with other offices about the forensic science disciplines.
- Participate in organizations reviewing forensic science evidence. Or create your own—be proactive.
- Educate potential jurors, school children, and the public at large on the benefits and limitations of forensic science.

Make no mistake that the forensic science disciplines are under a microscope in a way that they have never been before. As prosecutors under a duty "not to convict, but to see that justice is done," we must react accordingly, taking every opportunity to show the courts the reliability and relevance of the experts we put on the stand. ❇

Editor's note: This article was the basis for a presentation at TDCAA's 2010 Elected Prosecutor Conference.

Endnotes

1 *Coble v. State*, No. AP-76,109, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. Oct. 13, 2010).

2 *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010).

3 *In re Thompson*, No. 03-10-00689-CV, 2010 Tex. App. LEXIS 10270 (Tex. App.—Austin Dec. 21, 2010, orig. proc.)(Judge Baird required to act on State's motion to recuse filed during Willingham court of inquiry).

4 *Hall v. State*, 297 S.W.3d 294 (Tex. Crim. App. 2009).

5 *Escamilla v. State*, No. 04-09-00530-CR, 2010 Tex. App. LEXIS 8227 (Tex. App.—San Antonio, Oct. 13, 2010, no pet. hist.).

6 Status and Needs of Forensic Science Service Providers: A Report to Congress, 2006 National Institute of Justice. Available at www.ojp.usdoj.gov/nij/pubs-sum/213440.htm.

7 Strengthening Forensic Science in the United States: A Path Forward at 38-41, 2009 National Academy of Sciences.

8 NAS Report at xx.

9 www.nap.edu.

10 The website for the Texas Forensic Science Commission is www.fsc.state.tx.us.

11 *In re Thompson*, No. 03-10-00689-CV, 2010 Tex. App. LEXIS 10270 (Tex. App.—Austin Dec. 21, 2010, orig. proc.)(Judge Baird required to act on State's motion to recuse filed during Willingham court of inquiry).

12 As of the start of the year, Judge Baird is no longer a presiding judge in Travis County.

13 The website for the Texas Criminal Justice Integrity Unit can be found on the Courts Online website for the Texas Court of Criminal Appeals at: www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp.

14 In light of the successful challenges made to the State's future-dangerousness experts such as Drs. Grigson, Coons, and Quijano, prosecutors should reflect carefully before sponsoring any expert's testimony on future dangerouness.

15 No. AP-76,109, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. Oct. 13, 2010).

16 No. PD-0987-09, 2010 Tex. Crim. App. LEXIS 1167 (Tex. Crim. App. Sept. 22, 2010).

17 The opinion recognizes that there are at least three variations of dog scenting employed in forensic science: tracking, scent discrimination lineups, and narcotics. I would add one other: explosives.

18 297 S.W.3d 294 (Tex. Crim. App. 2009).

19 No. 04-09-00530-CR, 2010 Tex. App. LEXIS 8227 (Tex. App.—San Antonio, Oct. 13, 2010, no pet. hist.).

20 824 S.W.3d 568 (Tex. Crim. App. 1992).

21 509 U.S. 579 (1993).

22 293 F. 1013 (D.C. Cir. 1923).

23 *Nenno v. State,* 970 S.W.2d 549 (Tex. Crim. App. 1998).

24 *Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000).

25 *Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997).

26 Tex. Rules of Evidence 401.

27 *Jordan v. State*, 928 S.W.2d 550, 556 (Tex. Crim. App. 1996).

28 Tex. Rules of Evidence 702.

29 *Rodgers v. State*, 205 S.W.3d 525, 528 (Tex. Crim. App. 2006).

30 *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006).

31 *Kelly v. State*, 824 S.W.3d 568, 573 (Tex. Crim. App. 1992).

32 *Kelly*, 824 S.W.2d at 573.

33 *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

Jury selection in FV assault cases

How to engage the venire panel in discussion, strike panelists for cause, and select a jury that will carefully consider your case at trial

Editor's note: This article is taken from the upcoming publication Family Violence Resource Notebook for Prosecutors, *which will be available in spring 2011. The notebook will include sample forms and information on investigation, pretrial issues, and trial issues in DV cases. In addition, TDCAA will publish another domestic violence resource,* Investigating & Prosecuting Domestic Violence Cases *by Patricia Baca and Ellic Sahualla in fall 2011.*

By Dana Nelson
Assistant District Attorney
in Travis County

Jury selection procedures are infinitely varied within a courthouse, a county, and certainly this state. Use the information in this article like a buffet of choices to include in jury selection on a family violence case. The goal of jury selection is to give potential jurors information, build their trust with the prosecutor, and let the court know what issues may come up in trial. While prosecutors can provide some information about the criminal justice system and family violence, voir dire is not an appropriate forum to effectively change any panel member's beliefs about family violence.

The basic format of voir dire is to engage the panel in discussion. Panel members should do most of the talking. Always ask strike-for-cause questions as an issue is discussed if your judge will permit. The most useful strike-for-cause question is: "The law is X. Can you follow that law?" If a juror can be struck for cause, do not attempt to change her mind or persuade her to your point of view. Invite others who agree with that juror to identify themselves. Let them go.

Some parts of jury selection are the same for every case. Each prosecutor has to find his own way to handle these basics. Start with a set opening that is the same for every jury selection. This helps get a basic feel for the panel and prompts questions to be sure to cover with every group of potential jurors. This set includes:

Identify everyone in the well of the court.

- Do any panel members know any of those people?
- Do any panel members know each other?
- Potential challenge for cause: "Can you make your decision based on the evidence and law from the court and not based on your personal relationship?"

Read the list of witnesses.

- Do any panel members know any of those people?
- Explain the purpose of jury selection.
- Create an opportunity for privacy so that panel members may identify themselves to discuss personal matters in private.
- Orient the panel to the court and the case.

Explain that this is a criminal case, not a civil case.

- "Who can tell us the differences between a civil and criminal case?"
- "What happens to the loser of a civil case?"
- "What happens to a person convicted of a crime?"
- "Whom do the lawyers represent?"
- "Who is the prosecutor's client?" (Be sure to make the point that prosecutors are not required to do what a victim asks us to do.)
- "Will anyone require the State to prosecute the case the way the victim wants?"

Proof issues

Next, address the types of issues that arise in all criminal cases, especially those issues relevant in the family violence context.

Burden of proof

While most prosecutors cover this in every case, the discussion in a family violence trial should identify panel members who will hold the State to a higher burden of proof. Very few panel members are aware that they may do this, but it happens frequently. After trial this is expressed as, "There just wasn't enough evidence."

Here, it is most important to preempt the defense voir dire that

will characterize "beyond a reasonable doubt" as impossible to attain. Often the defense will describe "clear and convincing" as "the burden necessary to take your children away." The prosecutor can preempt this description before the defense gets the chance to address the panel by describing the same burden as the one necessary to protect abused and neglected children. This depersonalizes the issue for panel members and lets the prosecutor determine the language for trial. The most important idea for a jury panel to understand is that the burden is not "beyond all doubt" and is not "100 percent." Sample questions might include:

- "Is there any person who cannot sit in judgment of another? Not that you would prefer not to but who, for personal moral or religious beliefs, cannot sit in judgment of another?"
- "Is there any question you have not been asked that you should have been asked?"
- "Any questions for the prosecution?"

Elements

After the opening set of jury selection, move to the elements of the offense. Ask the panel how one person can commit the offense against another. Avoid asking questions in a personal way, for instance: "How would you, panel member No. 2, assault panel member No. 3?" Both panel members have been put in the position of mentally defending themselves instead of thinking about the question. Instead ask, "How can one person assault another?" At this point, avoid discussing the family violence aspect.

Often the panel will respond with a diverse set of assaults including some behavior that is not criminal. Use this opportunity to narrow their examples to the offense in the case. For example, sexual assault does not require injury; statements that are demeaning or rude, like emotional abuse, are generally not crimes; offensive touching that does not cause injury is a lesser crime; aggravated assault requires serious bodily injury or a deadly weapon. During this discussion, explain how serious bodily injury is different from injury.

After the open discussion of possible elements, provide the elements of the offense in your case, including the *mens rea*. Ask the panel how can a jury know what the *mens rea* is. Balling a fist or statements made just before or after can indicate the person's intent. Remember that "intent" is different from "plan."

Next discuss the element of injury. Emphasize that pain is enough to satisfy this element. Is a hair pull painful? Think back on the well-publicized case in 2010 when one female soccer player pulled another player down by her hair. Consider playing the clip or showing panelists a still photo from this clip, and ask panelists if they have seen this video clip. Then ask a panel member who has seen it to describe it to the other panel members. Then ask:

- Would it satisfy the element of for assault?
- How can a jury know about whether a person experienced pain? Can the panel members follow that law?
- Does anyone disagree with this law? Can everyone follow this law?
- This is a family violence case. What are your thoughts about prosecuting family violence as a crime?

Evidence

Ask the panelists what kinds of evidence they wish the prosecution would present to prove the elements of your case. Later ask what they would require the prosecution to present. Panel members who require specific evidence can be struck for cause. Their wish list usually includes:

- offense reports
- video of offense
- medical records of injury
- photos
- a third-party witness, preferably unrelated to either party
- victim to testify
- defendant to testify
- criminal records of defendant and victim
- entire history of the relationship
- character witnesses
- forensic evidence

Here are suggestions for how to address each of these issues:

1. Offense reports: Explain how these are not admissible because the officers must come to testify for the jury. This gives the jury an opportunity to judge the credibility of the witness. This may lead to questions about the discovery process and how the jury will know if there are discrepancies between the report and the testimony. This also presents an opportunity to discuss officer credibility.

2. Video of offense: Do any panel members keep a video camera recording in their homes at all times just in case a crime is committed there?

3. Medical records of injury: Most

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jurors *want* this, but some *require* it. Do panel members go to the doctor for every scrape and bruise? What if you do not have health insurance? Is the ambulance free? (The ambulance, of course, is not free and the cost can be a major factor.) Some panel members expect a doctor visit "in anticipation of litigation" or the issue goes to the victim's credibility.

4. Photos: Ask the panelists to think of types of assaults that meet the elements already discussed that would cause pain but no visible injury, such as a punch to the stomach. Here, they can agree that there was injury but there would be no photographic proof. Also consider asking about how injuries appear over time. Have any panelists seen a bruise on their body yet couldn't remember how it got there? What other types of evidence can prove injury: victim testimony, third-party witnesses, limping, a statement about pain at the time, such as "ouch"?

5. A third-party witness: Similar to video cameras, do any panelists keep a neutral third party sitting in their living room just in case they are assaulted at home?

6. The victim to testify: What are some feelings a victim in a family violence case would have about testifying at trial? Jury panels usually raise common feelings such as fear, embarrassment, anxiety, and love for the defendant. They may also raise feeling remorseful about reporting the crime, including exaggerating to get defendant in trouble. This may be an opportunity to discuss witness credibility in general.

7. The defendant to testify: Many panel members very much want the defendant to testify in a family violence case so the defendant can explain any justification for the offense. What does our constitution say about an accused person testifying at his trial? Explain the 5th Amendment right not to testify. Why do we have this right? What are some reasons a defendant might choose not to testify? The law requires that jurors not discuss at all during deliberations whether a defendant testified. Can you follow that law? This discussion provides an opportunity for a broader discussion of the defendant's rights.

8. Criminal records of defendant and victim: Consider using an example from a non-family violence offense like robbery. If a jury hears evidence about seven other robbery convictions of a defendant, they would be more likely to convict based on the record rather than the evidence in the current case. (Be sure to refer to "a" defendant not "this" defendant.) Considering the defendant's record in determining his guilt would not be fair. The prosecution is interested in presenting a fair trial. Explain how the law permits jurors to know criminal history information only under certain circumstances. Then ask the panel why. What policy could be served by this rule? Can they follow that law? This is also an opportunity to discuss the judge as a gatekeeper.

9. Entire history of the relationship: This issue is unique to family violence cases. The jury really wants to know everything about the relationship as though it will be deciding a family law matter. Explain that the prior conduct in the relationship can be presented to the jury only in very limited circumstances. Ask jurors to presume that they will not have this information.

10. Character witnesses: Some panel members think this is very important. Explore why this is so. Whom would a witness choose to be a character witness for them? Are those people objective and unbiased? How credible are they?

11. Forensic evidence: Prosecutors understand that the primary purpose of forensic evidence is to prove the suspect's identity. In family violence cases, identity is seldom an issue. Consider asking the panelists to raise their hands if they watch "CSI" once a week. Keep their hands up if they watch twice a week. Three times? Or more? Then discuss what is different about real life from the TV show: The panelists' tax money is not spent to buy Hummers for crime scene technicians; they are often not licensed peace officers; they do not arrest suspects; they do not interview witnesses or interrogate suspects. Also, consider asking how many family disturbance calls they believe local law enforcement respond to in a year. Then tell them the actual number. This comparison makes it hard to maintain that the State should do DNA testing on the victim's fingernail scrapings in every family violence case.

Credibility of witnesses

The jury alone decides the credibility of the witnesses and the weight to give each piece of evidence. When judging the credibility of a witness, all witnesses must start off with an equal footing. Then after you begin to hear about their experience and training and see them testify, jurors determine how credible they are.

- Is that fair?
- Has any panel member been responsible for hiring at their work or conducted an interview? To those panel members, how important is the interview?
- How do they determine if the person interviewed is being truthful?
- "Do you compare what that person says with their application or resume?" This is similar to cross-examination based on a prior written statement. How consistent does the panel expect the person to be? Is there anything wrong when it is too consistent?
- What about references? What can be learned from them? (These are comparable to corroborating evidence and character witnesses.)

Conflict in testimony

Consider discussing the panelists' attitudes towards victims during selection. This can contribute to your theme of the case, anticipate difficulties, and avoid jurors who have difficulty with certain victims. Generally, juries want the case presentation to meet their expectations. This is true about the types of evidence the prosecution presents as well as how a victim behaves throughout the process, including at trial. Jurors' expectations are based on their own experiences and images presented in the media. For better or worse, jurors expect victims of family violence to be very afraid all of the time, to leave the perpetrators immediately after an assault, and to continue appearing meek and timid without any self-confidence indefinitely. But victims who still love the perpetrator and are willing to tell a preposterous lie like the stereotypical, "I fell down the stairs," also fit into the TV movie version of a victim. Consider asking the panelists what feeling they expect a victim in a family violence case to have about testifying at trial against her loved one. Emphasize the characteristics that are present for the victim in the particular case.

For a case with an uncooperative victim, emphasize responses like fear, love, and economic dependence. If the victim stayed with the perpetrator, talk about how many victims are unsheltered in your jurisdiction or note how there is more shelter space in the United States for pets than for victims of family violence. For cooperative victims, emphasize how the victim of a stranger would feel coming to court.

- Are cooperative victims entitled to want the defendant held accountable?
- What does the panel think about family violence victims, who are more likely to be uncooperative? Are they also entitled?

Imperfect FV victims are like all victims: They are chosen by the perpetrators. Whatever their imperfections, can the panel refrain from holding them against a victim? Can they follow the law even if they do not like the victim?

Panel busters

Family violence history or experience

Family violence experience is the single most important topic to cover with panelists. If the format of jury selection permits only limited examination of the panel, this is the only topic that should be covered.

This is a question for the entire panel: "Have you, a family member, friend, or coworker had experience with family violence?"

Explain the question to the panel and clarify any questions panelists may have. Ask any panel members for whom the answer is "yes" to raise their hands. Then ask each potential juror for an explanation. Remind the panelists that if they would like to answer privately, they should let the court know now.

Some panel members will ask if this includes sexual abuse, and it should. Be ready for many panel members to answer this question "yes." In my experience, roughly one third to one-half of every panel does so. The follow-up question for each juror is, "Based on your experience, can you serve as a fair and impartial juror in this case, meaning, can you base your decision solely on the evidence you will hear during trial?"

Some of the responses will include panel members looking for a way out of serving on the jury. However, the majority of panel members who say they cannot be fair have a legitimate reason. This group will include prior victims of family violence, child witnesses of abuse in their homes, friends and family of "wrongly" accused perpetrators, and perpetrators. Be prepared for a wide range of responses. Be sure to demonstrate empathy for the panel members' experiences. Consider concluding this section by reminding the panelists that they have probably thought they were alone in their experiences or perhaps felt very different from other people because of it, but looking around in the room with a randomly selected group from their community, you can see that

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they are not alone.

If any panel member has expressed she cannot be fair because of her personal experience with family violence, let her go. Victims of family violence are very difficult to predict as jurors in these cases. Some victims are very judgmental of the victim in the case. Their experience is compared to the current victim usually not to the State's favor: "This victim should have left like I did" or "This victim was not abused as badly as I was." The trial can also be emotionally difficult for victims of past violence and result in a traumatic experience for a juror.

A helpful hint: Be on the lookout for victims who become really upset during jury selection. If possible, have a victim/witness counselor or coordinator available just in case.

One-witness rule

Do not discuss the one-witness rule with a panel unless there will actually be only one witness testifying at trial. The question that establishes a potential challenge for cause on this issue in most criminal cases is: "Assuming you believe one witness beyond a reasonable doubt, would you vote not guilty just because the State presented only one witness?"

This misses the mark in family violence cases because some panel members will say they could not ever believe one witness beyond a reasonable doubt, assuming that the single witness would be a victim. In reality, the single witness would more likely be an officer, but the prosecutor is not able to clarify that for the panel in the jury selection context. Therefore, avoid discussing the one-witness rule in voir dire unless it is relevant to your case.

Limiting instruction of prior family violence conviction

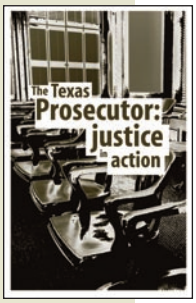
In cases of Assault/Family Violence Enhanced and Assault/Strangulation Enhanced where a prior conviction or multiple convictions are alleged in the indictment and are part of the case in chief, the jury charge will include a limiting instruction. This instruction states that evidence of the prior conviction cannot be used to prove whether or not the defendant committed the current offense. This instruction will be in the jury charge even if the defendant stipulates to the prior. However, many panel members are determined to not follow this instruction. Some panel members have said that if they know the defendant has been convicted before, they cannot set that aside. (Also note this really complicates qualifying a jury on punishment.) This issue is such a panel buster, consider leaving it to the defense. Oftentimes they will not cover it. If they do, the prosecutor can object to any mischaracterization of the law.

Challenges for cause

In addition to the previous potential challenges for cause for panelists who say they cannot be fair and follow the law, remember that a conviction or active case for any panelist for an assault/family violence by a man against a woman is a crime of moral turpitude, which will subject that panelist to a challenge for cause. ❇

News Worthy

Prosecutor booklets available for members



We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others who are considering jobs in our field.

Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

Warrantless search and seizure

Distinguishing exigent circumstances from community caretaking

Editor's note: This article is taken from the 2011 edition of Warrantless Search & Seizure*, which is now available for purchase on the TDCAA website (www.tdcaa.com) or by calling 512/474-2436.*

Navigating the Fourth Amendment and the law of warrantless searches and seizures largely involves caselaw rather than statutes, and today's principles are the results of more than 200 years of judicial evolution. For instance, does an officer's subjective intent in making a traffic stop matter? Today, no, but 25 years ago, it did. Which of the officer's five senses can he use to detect things about a suspect that will lead to probable cause? Our five senses haven't changed over the years, but our ability to use them lawfully has, according to the courts.

By Diane Burch Beckham
TDCAA Senior Staff Counsel in Austin

Without question, federal and state law contains a decided preference for warrants. The advantages of having a warrant are: 1) the officer or prosecutor drafting the affidavit can discuss the facts and craft a statement of probable cause with care; and 2) a magistrate reviews the information from the officer or prosecutor before deciding to issue the warrant. When a case involving a warrant goes to court, the presumption is that the seizure was lawful, and the burden is on the defendant to show the warrant was deficient.[1]

Nonetheless, courts recognize that it is not always practical or desirable to ask an officer to stop what he's doing to get a warrant, and for this reason, federal and state constitutional law recognize several exceptions to the rule requiring a warrant for any search. This article will address two of those exceptions that are similar: exigent circumstances and community caretaking. Understanding the differences between the two is important and could mean the difference between evidence being admitted or not.

Keep in mind that the root of any Fourth Amendment question goes back to the Fourth Amendment's protection against unreasonable searches and seizures. Virtually every question will begin by looking at the reasonableness of the officer's actions, as well as the reasonableness of the defendant's belief that he shouldn't have been the subject of that search or seizure.

Exigent circumstances

Probable cause along with exigent circumstances may justify a search or entry without a warrant.[2] This is also known as the "emergency doctrine." Article 14.05 of the Code of Criminal Procedure also includes a provision that authorizes officers to enter homes without a warrant with exigent circumstances.[3] Exigent circumstances cases typically involve:

- protection of life (first aid; extracting children who appear in danger; protecting an undercover officer or informer; or making a protective sweep);[4]
- protection of property (such as extinguishing a fire or stopping a burglary);[5]
- preventing destruction of evidence;[6] and
- pursuing a fleeing felon ("hot pursuit").[7]

Remember that exigent circumstances may justify the initial entry in the house, but because the purpose of the exception is to aid someone in distress or to secure safety, once the crisis is contained, further searching is not permitted.[8] A warrant or another exception may authorize continued searching of the premises, however, and officers can secure the scene for the time it takes to get a warrant. The exigent circumstances doctrine also does not include a general murder scene exception that would authorize unlimited search of the premises, although officers may enter a home to provide immediate aid or to search for other victims or a killer.[9]

Because the exigent circumstances exception is typically applied in cases where officers need to make a warrantless entry rather than a warrantless stop or detention, the exigent circumstances exception typically will not be relevant in a traffic stop. It may become relevant, however, if a driver flees police, abandons his vehicle, and runs into a house or building.

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Protection of life

Four circumstances must be present when officers enter a home, without consent or warrant, to search under these circumstances:

- the offender might escape if police do not make an immediate entry;
- the offender has demonstrated that he poses a danger to the community (for instance, the crime just committed is a crime of violence);
- the offender has been pursued into the house continuously from the crime scene; and
- the warrantless arrest would be lawful if accomplished in a public place but that cannot be done because of the suspect's decision to retreat into a private place.

In *Warden v. Hayden*,[10] the Supreme Court held the entry into a house by officers in pursuit of an armed robber was justified because any delay to secure a warrant would place the lives of others in danger. The information must be fairly specific, however; merely investigating a potential danger may not justify warrantless entry.[11]

Information about someone the defendant has harmed may be sufficient to justify entry into the place where officers reasonably believe the victim to be.[12] Search of a person police find unconscious is reasonable and necessary for purposes of identification and possible discovery of relevant medical information.[13]

Exigent circumstances may allow officers to improve their ability to view inside the defendant's residence, for instance, by placing a ladder against the building.[14]

Destruction of evidence

Officers commonly use the exigent circumstances doctrine in situations in which they reasonably believe the defendant is about to destroy contraband.[15] In determining whether the entry was reasonable, courts will look at factors including:

- the seriousness of the offense;
- the strength of the probable cause; and
- the likelihood that the evidence will not be in the house if the search is delayed until a warrant is obtained.[16]

In *Welsh v. Wisconsin*, the Supreme Court found this exception did not authorize a warrantless entry into a DWI suspect's house to seize blood evidence before any alcohol metabolized and evidence of the suspect's potential intoxication was "destroyed."[17] However, DWI was not a jailable offense in Wisconsin at the time, and Texas courts have distinguished *Welsh* by noting the non-jailable offense was not serious enough to warrant the intrusion.[18]

Hot pursuit

Under the related "hot pursuit" doctrine, officers can search for both the suspect and any weapons they have reason to believe the suspect may have secreted where he is found.[19]

Protective sweeps

Protective sweeps are limited to a cursory search of the premises to assure that they do not contain people who endanger the officers' safety.[20] Officers performing a sweep must actually believe that dangerous people are on the premises, based on specific and articulable facts.[21] Police must have objective evidence that the house contains someone who poses a danger to those present during the arrest of the defendant.

Besides searching the suspect, officers may also include accomplices or others who reasonably could present a danger in a protective sweep.[22] Once inside the house under the justification of the emergency doctrine, another exception to the warrant requirement—such as plain view or consent—may allow officers to remain inside and potentially seize evidence.[23]

These prerequisites establish exigent circumstances as an exception to the requirement for a search warrant:

- entry into a constitutionally protected place is necessary to investigate or prevent a dangerous situation, and
- immediate action is necessary to prevent harm to individuals or the community

Community caretaking

A variation on the exigent circumstances doctrine, the community caretaking exception allows an officer to stop a person when the officer reasonably believes the person needs the officer's assistance.[24] This exception recognizes that "police officers do much more than enforce the law, conduct investigations, and gather evidence to be used in criminal proceedings. Part of their job is to investigate vehicle collisions—where there is often no claim of criminal liability—to direct traffic, and to perform other duties that can be best described as 'community caretaking functions.'"[25]

An officer does not need any basis for believing the suspect is

engaging or about to engage in any criminal activity under the community caretaking stop.[26] Instead, the circumstances create a duty for the officer to protect the welfare of a person or the community. The potential for harm must require immediate, warrantless action.

The Court of Criminal Appeals has held that a police officer may stop and assist an individual whom a reasonable person, given all of the circumstances, would believe needs help. In determining whether a police officer acted reasonably in stopping an individual to determine if he needs assistance, courts consider the following factors:

- the nature and level of the distress exhibited by the individual;
- the location of the individual;
- whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and
- to what extent the individual, if not assisted, presented a danger to himself or others.[27]

A community caretaking stop does not include the right to search incident to the stop. Whether an officer may search for weapons will depend on whether she has an independent reason to believe the suspect is armed.[28] *Wright* involved an officer-citizen encounter on public property. The *Wright* court suggested that the community caretaking exception might also apply to private property (including homes), but "[o]nly in the most unusual circumstances."[29]

Although the Court of Criminal Appeals and the U.S. Supreme Court both initially held that the community caretaking stop can apply to both passengers and drivers,[30] other courts since have indicated that passenger distress signals less of a need for law enforcement intervention.[31] Several courts have addressed the question of when weaving in a lane and drifting out of a lane of traffic is enough to give rise to reasonable suspicion or justify a community caretaking stop and have concluded:

- driver distress is a more compelling justification than passenger distress;
- more drivers on the road in potential danger present a more compelling justification for a community caretaking stop; and
- the elements for the crime of weaving are different from weaving as an element of a decision to pull over a driver based on community caretaking or reasonable suspicion of DWI.[32]

One other note about the community caretaking exception: This is the only exception to the warrant requirement where an officer's subjective motivation is significant. An officer must actually be motivated by safety or concern for someone's well-being. The officer's belief must also be reasonable.

The prerequisites that establish "community caretaking" as an exception to the requirement for a search warrant include:

- circumstances create a duty for the peace officer to protect the welfare of an individual or the community,
- potential for harm requires immediate action, and
- the officer has insufficient information to prepare a valid warrant affidavit. ❇

Endnotes

1 See, e.g., *Swearingen v. State*, 143 S.W.3d 808 (Tex. Crim. App. 2004) (discussing Fourth Amendment's strong preference for searches conducted pursuant to a warrant and the need for an incentive to encourage police to use the warrant process). For more information on drafting and executing warrant documents, see *Warrants Manual for Arrest, Search & Seizure* by Tom Bridges and Ted Wilson (TDCAA © 2009).

2 *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Brimage v. State*, 918 S.W.2d 466 (Tex. Crim. App. 1996).

3 Tex. Code. Crim. Proc. art. 14.05(2) ("[A]n officer making an arrest without a warrant may not enter a residence to make an arrest unless … exigent circumstances require that the officer making the arrest enter the residence without the consent of a resident or without a warrant").

4 *Brigham City v. Stuart*, 547 U.S. 398 (2006) (police can enter home without warrant when they see fighting inside); *Maryland v. Buie*, 494 U.S. 325 (1990) (officer may make protective sweep during an in-home arrest upon reasonable belief that the area could harbor individuals posing danger to those on the arrest scene); *Mincey v. Arizona*, 437 U.S. 385 (1978) (authorizing warrantless entries based upon a reasonable belief that someone needs immediate assistance); *Shepherd v. State*, 273 S.W.3d 681 (Tex. Crim. App. 2008) (entry into defendant's home justified under exigent circumstances when police entered defendant's home through front door that, according to 911 call from neighbors, had been standing open for an unusual amount of time); *White v. State*, 201 S.W.3d 233 (Tex. App.—Fort Worth 2006, pet. ref'd) (emergency doctrine allows warrantless entry into house to ensure domestic violence victim's safety and to investigate potential domestic violence assault); *Stewart v. State*, 681 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) (exigent circumstances justifying a warrantless entry include: 1] rendering aid or assistance to persons whom the officers reasonably believe are in need of assistance; 2] preventing the destruction of evidence or contraband; and 3] protecting officers from persons whom they reasonably believe to be present, armed and dangerous).

5 *Michigan v. Tyler*, 436 U.S. 499 (1978) (officer's reasonable belief that a building is burning provides exigent circumstances to justify a warrantless search or entry); *Barocio v. State*, 158 S.W.3d 498 (Tex. Crim. App. 2005) (fact that burglary is in progress or has recently been committed provides exigent circumstances to authorize warrantless entry).

6 *Cupp v. Murphy*, 412 U.S. 291 (1973); *Schmerber v. California*, 384 U.S. 757 (1966); *McNairy v. State*, 835 S.W.2d 101 (Tex. Crim. App. 1991); *Bass v.*

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State, 732 S.W.2d 632 (Tex. Crim. App. 1987); *Covarrubia v. State*, 902 S.W.2d 549 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd); *Sanders v. State*, 855 S.W.2d 151 (Tex. App.—Houston [14th Dist.] 1993, no pet.) (officer justified in making defendant spit out matchbox from mouth to avoid possible destruction of evidence); *Spears v. State*, 801 S.W.2d 571 (Tex. App.—Fort Worth 1990, pet. ref'd).

7 *Warden v. Hayden*, 387 U.S. 294 (1967).

8 *Bass v. State*, 732 S.W.2d 632, 635 (Tex. Crim. App. 1987); *Martinez v. State*, 792 S.W.2d 525, 528 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (an officer cannot continue searching once he determines there is no fire).

9 *Flippo v. West Virginia*, 528 U.S. 11 (1999); *Thompson v. Louisiana*, 469 U.S. 17 (1984); *Mincey v. Arizona*, 437 U.S. 385 (1978).

10 *Warden v. Hayden*, 387 U.S. 294 (1967).

11 See, e.g., *Gonzalez v. State*, 148 S.W.3d 702 (Tex. App.—Austin 2004, no pet.) (insufficient information to justify entry into defendant's apartment following defendant's call to 911 about stab wounds where he gave evasive answers about what happened); *White v. State*, 201 S.W.3d 233 (Tex. App.—Fort Worth 2006, pet. ref'd) (emergency doctrine allows warrantless entry into house to ensure domestic violence victim's safety and to investigate potential domestic violence assault).

12 *Tuffiash v. State*, 948 S.W.2d 873, 877 (Tex. App.—San Antonio 1997, pet. ref'd) (warrantless search allowed for defendant's wife when officers were told defendant had hit her on the head with a hammer); see also *Janicek v. State,* 634 S.W.2d 687, 691 (Tex. Crim. App. 1982); *Bolden v. State*, 634 S.W.2d 710, 713-14 (Tex. Crim. App. 1982).

13 *Janicek*, 634 S.W.2d 687; *Perez v. State*, 514 S.W.2d 748 (Tex. Crim. App. 1974).

14 *U.S. v. Gill*, 354 F.3d 963 (8th Cir. 2004) (while attempting to capture defendant who had fled inside, the plain-view sight of a handgun in the residence justified a warrantless sweep to secure the apartment and ensure no victims were present).

15 *Ker v. California*, 374 U.S. 23 (1963) (plurality op.); *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991) (authorizing entry into house to prevent "the possible destruction or removal of evidence" of meth lab); *Barocio v. State*, 158 S.W.3d 498 (Tex. Crim. App. 2005); *Effler v. State*, 115 S.W.3d 696 (Tex. App.—Eastland 2003, pet. ref'd) (distinguishing *State v. Steelman*, 93 S.W.3d 102 (Tex. Crim. App. 2002)).

16 *Ker*, 374 U.S. 23; but see *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless entry into a house not authorized to seize DWI suspect before blood metabolized and became "destroyed").

17 *Welsh*, 466 U.S. 740.

18 See, e.g., *Gallups v. State*, 151 S.W.3d 196, n.7 (Tex. Crim. App. 2004); see also *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002) (valid warrant for DWI suspect's blood eliminates need for consent).

19 *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (search permissible for suspect and weapons); *Rue v. State*, 958 S.W.2d 915, 918 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

20 *Maryland v. Buie*, 494 U.S. 325 (1990); see also *Reasor v. State*, 12 S.W.3d 813 (Tex. Crim. App. 2000); *Beaver v. State*, 942 S.W.2d 626, 629-30 (Tex. App.—Tyler 1996, pet. ref'd).

21 *Reasor v. State*, 12 S.W.3d 813 (Tex. Crim. App. 2000); see also *Davis v. State*, 74 S.W.3d 90 (Tex. App.—Waco 2002, no pet.); *Newhouse v. State*, 53 S.W.3d 765 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *U.S. v. Gould*, 364 F.3d 578 (5th Cir. 2004).

22 *Johnson v. State*, 68 S.W.3d 644 (Tex. Crim. App. 2002); *Davis*, 74 S.W.3d 90; *Torrez v. State*, 34 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

23 *Johnson v. State*, 226 S.W.3d 439 (Tex. Crim. App. 2007).

24 *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Laney v. State*, 117 S.W.3d 854, 861 (Tex. Crim. App. 2003) (exigent circumstances applies when "police are acting in their 'crime-fighting role.' … On the contrary, the emergency doctrine applies when the police are acting … in their limited community caretaking role to 'protect or preserve life or avoid serious injury.'"); *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999); *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998).

25 *Wright*, 7 S.W.3d at 151, citing *Cady v. Dombrowski*, 413 U.S. at 441.

26 *Wright*, 7 S.W.3d at 148.

27 *Wright*, 7 S.W.3d at 151-52; see also *Travis v. State*, No. 06-09-238-CR (Tex. App.—Texarkana Aug. 5, 2010, no pet. h.) (community caretaking did not justify stop after the driver's brother, who did not want to pursue charges, told an officer that the driver had assaulted him and left the scene intoxicated); *Chilman v. State*, 22 S.W.3d 50, 55 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (officer detention appropriate for car stopped at 2 a.m. in front of barricade at entrance of university); *State v. Ross*, 999 S.W.2d 468 (Tex. App.—Houston [14th Dist.] 1999), *aff'd*, 32 S.W.3d 853 (Tex. Crim. App. 2000) (officers had sufficient grounds for safety concerns for two children sleeping in truck parked in front of a bar after midnight on a cold night); *Sweeney v. State*, 6 S.W.3d 670, 671 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (community caretaking stop permitted under *Hulit* for driver traveling 40 mph in the rain with flat tire); *Bilyeu v. State*, 136 S.W.3d 691 (Tex. App.—Texarkana 2004, no pet.); *Eichler v. State*, 117 S.W.3d 897, 901 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("The first factor, nature and level of distress, is given the greatest weight").

28 *Horton v. State*, 16 S.W.3d 848, 852 (Tex. App.—Austin 2000, no pet.) (officers conducting a community caretaking stop have only the same ability to make a weapons search as during a *Terry* stop).

29 *Wright*, 7 S.W.3d at 152.

30 *Wright*, 7 S.W.3d at 152, citing *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Franks v. State*, 241 S.W.3d 135 (Tex. App.—Austin 2007, no pet.) (encounter at a rest stop became an impermissible detention when officer told defendant, crying in her car, that she could not go).

31 *Corbin v. State*, 85 S.W.3d 272 (Tex. Crim. App. 2002); *Andrews v. State*, 79 S.W.3d 649 (Tex. App.—Waco 2002, pet. ref'd) (defendant driver pulling to the side at 1:00 a.m. so that his wife could vomit out the passenger side of the car didn't justify stop based on community caretaking exception).

32 See e.g., *Corbin*, 85 S.W.3d 272 (crossing over side stripe onto shoulder of road for 20 feet and driving 52 mph in a 65 mph zone insufficient to justify stop under community caretaking); *Tyler v. State*, 161 S.W.3d 745 (Tex. App.—Fort Worth 2005, no pet.) (discussing weaving versus "straddling a lane"); *Bellard v. State*, 101 S.W.3d 594 (Tex. App.—Waco 2003, pet. ref'd) (causing another vehicle to take evasive action is sufficient); *Wright v. State*, 18 S.W.3d 245, 247 (Tex. App.—Austin 2000, pet. ref'd) (on remand) (vomiting by passenger did not justify reasonable suspicion for officer to make stop); *Ehrhart v. State*, 9 S.W.3d 929 (Tex. App.—Beaumont 2000, no pet.) (weaving did not justify community caretaking stop); *State v. Arriaga*, 5 S.W.3d 804, 807 (Tex. App.—San Antonio 1999, pet. ref'd); but see *Gibson v. State*, 253 S.W.3d 709 (Tex. App.—Amarillo 2007, pet. ref'd) (community caretaking did not justify stop of specific car matching mother's description when police were trying to locate her missing teenaged daughter, but the daughter, as a passenger in the car, did not exhibit nature and level of distress sufficient to independently justify the stop).

U.S. v. Texas treatment of exceptions to warrant requirement

Exception	U.S. Supreme Court	Texas Courts
Search incident to arrest	May be done shortly before, during, or after arrest of things within "wingspan." *Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 129 S.Ct. 1710 (2009)	Same rule but relevant period runs from just before arrest to release on bail. *Rogers v. State*, 774 S.W.2d 247 (Tex. Crim. App. 1989); *State v. Oages*, 227 S.W.3d 397 (Tex. App.—Eastland 2005, pet. ref'd) (Texas follows *Belton* in interpreting Tex. Const. art. I, §9)
Consent	Consent must be voluntary and intelligent as proved by preponderance of evidence. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *U.S. v. Hurtado*, 905 F.2d 74 (5th Cir. 1990).	Consent must be proved by clear and convincing evidence. Tex. Const. art. I, §9; *State v. Ibarra*, 953 S.W.2d 242 (Tex. Crim. App. 1997).
Inventories	Police must have valid policy in place and search must follow that policy, including locked vehicles and closed containers. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976).	Same rule. See e.g. *Hatcher v. State*, 916 S.W.2d 643 Tex. App.—Texarkana 1996, pet. ref'd); *Trujillo v. State*, 952 S.W.2d 879 (Tex. App.—Dallas 1997, no pet.), disavowing *Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (plurality op.) (inventories of closed containers prohibited under Tex. Const.).
Automobile searches ("*Carroll* doctrine")	Requires probable cause to believe the vehicle contains contraband or evidence of a crime. Can search containers that could hold the contraband/evidence. *Carroll v. U.S.*, 267 U.S. 132 (1925). Includes passengers and their property. *Wyoming v. Houghton*, 526 U.S. 295 (1999).	Same rule; no exigent circumstances required. *State v. Guzman*, 959 S.W.2d 631 (Tex. Crim. App. 1998).
Exigent circumstances	Probable cause plus an emergency, such as protecting life or property, preventing destruction of evidence, or pursuing fleeing felon. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).	Same rule. *Brimage v. State*, 918 S.W.2d 466 (Tex. Crim. App. 1996); *Laney v. State*, 117 S.W.3d 854 (Tex. Crim. App. 2003).
Community caretaking	Circumstances create a duty for a peace officer to protect the welfare of a person or the community, and the potential for harm requires immediate action. *Cady v. Dombrowski*, 413 U.S. 433 (1973).	Same rule. *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999); *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998).
Plain view	May seize item when: 1) officer has legitimate presence in place where he sees and seizes evidence/contraband; and 2) the thing seized is immediately recognizable as evidence or contraband. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).	Same rule. *Joseph v. State*, 807 S.W.2d 303 (Tex. Crim. App. 1991); *State v. Haley*, 811 S.W.2d 597 (Tex. Crim. App. 1991).
Border searches	Reasonable suspicion (if on actual border) or probable cause (if at functional border equivalent) to believe suspect has contraband. *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976).	Same rule. *Aycock v. State*, 863 S.W.2d 183 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd)
Terry stops	An investigatory stop may include a pat-down for weapons when officers have reasonable suspicion that suspect is armed. *Terry v. Ohio*, 392 U.S. 1 (1968).	Texas Constitution no more restrictive than U.S. Constitution with regard to detentions. *Davis v. State*, 829 S.W.2d 218 (Tex. Crim. App. 1992).

Into the great unknown: *Sanchez v. State* and pleading the "unknowable"

So, you have a case where you can prove that the defendant actually murdered someone, but you can't prove how he did it. No problem, you think, you just plead that the manner and means of death was unknown to the grand jury. Well, after the Court of Criminal Appeals' opinion in *Sanchez v. State*, that may not be adequate. Moreover, you could even find yourself in a pretrial hearing to ensure that the manner and means was truly "unknown" to the grand jury rather than merely "unknowable." I hope that an analysis of this case will provide practitioners some insight into how to resolve this pithy metaphysical dilemma.

By David C. Newell
Assistant District Attorney in Harris County

Don't tase me, bro

Two guests in a motel room heard a woman screaming in an adjoining room and called the police. When the police arrived on the scene, they heard a stun gun go off inside the room in which the woman had screamed. Police entered the room and found Orlando Sanchez and his dead, naked girlfriend. Her neck was bruised and there were distinctive marks of a stun gun on the skin of her neck and chest. The windows in the room had been painted shut and the only door to the room was barricaded by a piece of furniture. The police recovered a stun gun in the room.

The only medical expert to testify in the case listed "asphyxia by strangulation" as the cause of death on the autopsy report. He explained at trial that it was his opinion that asphyxia had caused the victim's death either by strangulation or the stun gun. He indicated he wasn't completely sure whether it was strangulation or the stun gun that caused the asphyxia, but he maintained that the cause of death was asphyxia.

The State charged Sanchez with murder. The indictment alleged that Sanchez had 1) intentionally and knowingly caused the death of the victim by choking her with his hand; 2) committed an act clearly dangerous to human life with the intent to cause serious bodily injury by using a stun gun on the victim; 3) intentionally caused the death of the victim in a manner and means unknown to the grand jury; and 4) committed an act clearly dangerous to human life and caused the victim's death in a manner and means unknown to the grand jury. The jury charge tracked the indictment allowing the jurors to consider each manner and means in the disjunctive. Sanchez objected to the two "manner and means unknown" theories, claiming that they were unsupported by the evidence.

The Thirteenth Court of Appeals reversed for jury charge error.[1] Judge Baird, sitting by assignment, explained that a trial court errs in authorizing a conviction under a legal theory where there is insufficient evidence to support a conviction under that theory. For example, when the State alleges that the manner and means of death is unknown, there must be some evidence to support this allegation. Applying the rule set out in *Hicks v. State*, Judge Baird noted that the State makes a *prima facie* showing to support this allegation when the testimony does not establish a cause of death, but the State must prove that the grand jury used due diligence in attempting to ascertain the cause of death when trial testimony does establish a cause of death.[2] In this case, the medical examiner *did* give an opinion about the cause of death (though he was uncertain about the mechanism of death), so the trial court erred in authorizing the jury to convict Sanchez under a theory that the manner and means of death was unknown to the grand jury.

Hicks v. State is no longer good law

The Court of Criminal Appeals reversed, though perhaps not in the way anyone anticipated. Judge Womack, joined by everyone except Presiding Judge Keller and Judge Meyers, began by explaining that adoption of the "hypothetically correct" jury charge in *Malik v. State* rendered the *Hicks* rule no longer viable.[3] Though it's not explained in the opinion, the thinking here appears to be that *Malik* considers

the sufficiency of the evidence to establish the elements of the offense (in this case, the "unknown" manner and means) under a hypothetically correct jury charge.[4] Looking at the elements of the offense, the State is required to prove merely that the defendant either caused a death or committed an act clearly dangerous to human life that caused a death.[5] Requiring the State to affirmatively prove something like a lack of diligence on the part of the grand jury seems to add an element to the offense and increase the State's burden in contradiction of *Malik*.[6] In this case, the evidence established that Sanchez had caused the victim's death, the only sticking point was *how* he did it.

And there's the rub. The court went on to explain that *Hicks* was bad law for other reasons. *Hicks* started out as a guide for "unknown" manner and means allegations and had morphed into a rule that affects both jury charges and the assessment of sufficiency of the evidence. The rule had lost its intent and focus, leading to easy misapplication.

See, *Hicks* was really about *notice*, according to the court. The basis for *Hicks* is that a defendant should not be surprised at trial by evidence without having had the time to properly prepare a defense. Additionally, the State should not be able to use "unknown" allegations "as a substitute for full investigation or as an adversarial ploy." Because the Texas Constitution requires that "no person shall be held to answer" a felony charge without indictment by a grand jury, a rule that postpones an inquiry into the unknown until the trial is ineffective.

From there the court constructs a pre-trial evidence testing procedure with the manic precision of Bob Geldof piecing together a diorama made of various fragments of debris from his trashed hotel room in Pink Floyd's *The Wall*. According to the court, a defendant may challenge the propriety of an "unknown" allegation contained in an indictment before trial, then later at the conclusion of evidence, though before the charge is read to the jury. The court explains that this will ensure that "unknown" allegations are truly "unknown" by allowing the elicitation of all evidence that is "now known" so that the "unknown" aspect of the case can be minimized or eliminated by amending the indictment or presenting a superseding indictment.

Clearly the court was concerned with a scenario where the State knows how a defendant caused a victim's death but simply refuses to allege the manner and means in the indictment to keep all possibilities open. Of course, that is exactly the opposite of what the prosecution did in *Sanchez*. Remember, the prosecution alleged two different manner and means in the indictment before including the "unknown" allegations. Moreover, the court even recognizes in the opinion that there are statutory provisions that require a determination of a manner of death by either a justice of the peace or a medical examiner.[7] Thus, it does seem that the court's fears that the prosecution will be able to surprise the defense with a manner and means of death not alleged in an indictment are not present in *Sanchez* and may be completely unwarranted.

But more importantly, the court crafts this new pretrial evidentiary testing procedure to allay these concerns without any legal support. The court cites no authority, statutory or otherwise, that requires or even allows a pretrial hearing to determine if the State has evidence to support a possible manner and means allegation. Nor does the court attempt to square this holding with its own precedent that clearly prohibits a defendant from challenging the sufficiency of the evidence supporting an allegation in an indictment prior to trial.[8] In essence, the court now appears to have created a pretrial hearing for the sole purpose of discovery. Yet, this aspect of the opinion isn't the most confounding part of it.

Unknown or only *mostly* unknown

Turning to the question of whether there was jury charge error, the court started off by drawing a distinction between the cause of death, an element of the offense murder, and the manner and means of death, an adverbial phrase that is neither the gravamen of the offense nor an element that requires juror unanimity. From there, the court considered the "unknown" manner-and-means allegation and explained (in almost Miracle Max fashion) that there are really two kinds of "unknown."[9] There's "unknown," and then there's "unknowable." A manner and means of death is "unknown" when there is evidence that cannot be or has not yet been ascertained. A manner and means of death is "unknowable" when all the evidence has been ascertained, but you still can't figure out

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how the murder was committed. So when the manner and means is unknown because there's still evidence out there, then a jury charge on "unknown" is proper. In contrast, when the State has gathered everything it can and still can't put its finger on how the death was caused, the jury should be instructed on the different possibilities for causing the death because there the manner and means is merely "unknowable." As the court put it, "It is the difference between an open-ended question and a multiple-choice question" with "unknown" being the former and "unknowable" being the latter.

This distinction raises two obvious questions. First, is an unknown answer to a multiple choice question any less unknown than an unknown answer to an open-ended question? The repeated use of the word "unknown" in the question should suggest an answer. Sure, on a multiple-choice question you can try to game out some of the choices through elimination,[10] but in the end a distinction between unknown and unknowable activity provides about as much guidance as a map drawn by M.C. Escher.[11] The court allows the use of an "unknown" allegation where a medical examiner has not discovered all the evidence necessary to give a definitive statement regarding the manner and means causing a death. Yet the court does *not* allow an "unknown" allegation when the medical examiner has uncovered every possible explanation but still cannot definitively narrow down those explanations to one manner and means. The medical examiner in the former situation possesses no greater quantum of knowledge than the one in the latter, as neither can give a definitive explanation for how a defendant caused a victim's death. Surely this new rule is as capable of being misunderstood and misapplied as the *Hicks* rule the court disavowed.

Second, and perhaps more practically, can this distinction be completely avoided by having the medical examiner acknowledge the possibility that the death could've been caused in some other manner unknown to him? Here, the medical examiner gave a very clear opinion that death had been caused either by manual strangulation or the use of a stun gun. However, had the medical examiner simply been asked if it were possible that the defendant caused the victim's death in some other manner than those two possibilities, it appears that the inclusion of the "manner and means unknown" language in the jury charge would not have been error.

It's also interesting to note that the court may have already been down a similar path before. In *State v. Carter*, the Court of Criminal Appeals noted that there are really "two types" of DWI offenses, a "loss of faculties" and a "*per se* offense."[12] The court got these two "types" from the legislature's definition of the single word "intoxication." After *Carter*, the court held that an indictment provided insufficient notice where it did not allege a specific definition of intoxication.[13] However, the court also held in *State v. Winsky* that the State could plead each allegation in the disjunctive.[14] But at least one court of appeals noted that pleading every possible "means of committing" the intoxication element of DWI provided no greater notice of the criminal behavior than a general allegation of a violation of the statute.[15] It is no wonder that the court finally overruled *Carter* and held that simply pleading the word "intoxicated" provided sufficient notice to a defendant.[16] Admittedly, the court reached this decision by drawing a distinction between intoxication offenses and other offenses, but the unworkability of the *Carter* distinction between types of intoxication does not bode well for this latest distinction between types of unknowns.

No harm, no foul

Ultimately, the Court of Criminal Appeals held that the trial court erroneously included the "unknown" allegations in the jury charge. However, the court also held that any error was harmless because there was sufficient evidence to support a jury verdict on at least one properly submitted alternate theory of prosecution. The medical examiner testified that he was 95-percent sure that the asphyxia was caused by manual strangulation. Sanchez was the only one in the room besides the victim and there were no other ways in or out. Under these facts, the court determined that any error in submitting the erroneous, "unknown" theories of prosecution did not result in actual harm to Sanchez. How, you ask, would this type of error ever result in harm to a defendant where the trial court includes at least one viable manner and means allegation in the jury charge? Better to ask how many licks it takes to get to the center of a Tootsie Pop. The world may never know. ❇

Endnotes

1 *Sanchez v. State*, 221 S.W.3d 769, 780 (Tex. App.—Corpus Christi 2007), *rev'd*, 2010 WL 3894640 (Tex. Crim. App. Oct. 6, 2010).

2 *Hicks v. State*, 860 S.W.2d 419, 424 (Tex. Crim. App. 1993). This is that rule that requires the State to call a member of the grand jury to testify about the actions the grand jury undertook to determine the cause of death.

3 *Rosales v. State*, 4 S.W.3d 228, 231 (Tex. Crim. App. 1999).

4 *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

5 Tex. Penal Code Ann. §19.02 (Vernon 2003).

6 *Malik*, 953 S.W.2d at 240 ("Hence, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.").

7 See e.g. Tex. Code Crim. Proc. Ann., art. 49.04 (Vernon 2006); Tex Code Crim. Proc. Ann., art. 49.25 (Vernon 2006).

8 See e.g. *State v. Rosenbaum*, 910 S.W.2d 934, 948 (Tex. Crim. App. 1994)(op. on reh'g).

9 The *Princess Bride*, 20th Century Fox (1987)("Whoo-hoo-hoo, look who knows so much. It just so happens that your friend here is only *mostly* dead. There's a big difference between mostly dead and all dead. Mostly dead is slightly alive.").

10 The answer is almost never E.

11 See e.g. http://en.wikipedia.org/wiki/Relativity_(M._C._Escher).

12 *State v. Carter*, 810 S.W.2d 197, 200 (Tex. Crim. App. 1991).

13 See e.g. *State v. Flores*, 878 S.W.2d 651, 653 (Tex. App—Corpus Christi, 1994), *aff'd*, 896 S.W.2d 198 (Tex. Crim. App. 1995).

14 *State v. Winsky*, 790 S.W.2d 641, 642 (Tex. Crim. App. 1990).

15 *State v. Torres*, 865 S.W.2d 142, 144 (Tex. App.—Corpus Christi 1993, pet. ref'd).

16 *State v. Barbernell*, 257 S.W.3d 248, 256 (Tex. Crim. App. 2008).

Letter to the Editor

Dear Editor,

We appreciate *The Texas Prosecutor* keeping us apprised of changes in the law and of appellate decisions which impact the law in this state. We were glad to see the article on the *Brooks* case, which successfully challenged the factual sufficiency of the evidence standard set out in *Clewis* ("Worth the Wait," in the November–December 2010 issue).

We would like readers to know that the appellate work in the *Brooks* case was done by our appellate attorney from the McLennan County Criminal District Attorney's Office, John Messinger. John worked extremely hard on this case and achieved the difficult task of getting a long-time precedent overruled. In fact, his appellate advocacy so impressed the State Prosecuting Attorney that he was offered and has accepted a position representing the State before the Court of Criminal Appeals.

In addition to his appellate work, John has been a great resource for us on issues that arise during trials in our county. We are happy to see his talents recognized and wanted to make the readers of *The Texas Prosecutor* aware of the work that he has done.

Sincerely,
Crawford Long, First Assistant D.A., McLennan County
Susan Shafer, Assistant Criminal D.A., McLennan County

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