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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

At the intersection of hard work and a little luck

Good old-fashioned creativity, attention to detail, and shoe leather propels Harris County's Cold Case Fugitive Apprehension Section to find defendants and criminals who long ago disappeared.

By H. Ramsey Cook
Community Liaison for the District Attorney's Office in Harris County

Fugitives from justice flee to other parts of the state or country, change their names, alter their appearances, and take on entirely new lives. But a team in Houston works hard each day to track them down and return them to the Harris County Criminal Justice Center to face their charges.

The team that has caught 53 Harris County murder fugitives in the last three years is District Attorney Investigator Chuck Lowery and Extradition Administrator Kim Bryant. They make up the Cold Case Fugitive Apprehension Section of the Harris County District Attorney's Office. This year alone, Lowery and Bryant's efforts have resulted in 28 arrests—five of them in a six-week period. In the three years the unit has existed, the team has also been able to confirm that 19 defendants are deceased, helping to resolve a backlog of murder cases.

Harris County District Attorney Patricia Lykos formed the section shortly after taking office in 2009. Under the guidance of then-assistant district attorney Russell Turbeville, the section was charged with the arduous task of assembling all the old case files spread out among many different sections and file drawers in the state's largest county—637 files in all—and began the tedious work of reviewing them for leads. Lowery gives Turbeville the credit for the formation of the section he now heads. "We could not have initiated this cold-case round up without Russell's attention to detail," Lowery ntoes. "He vetted all the original cases and set up the system to allow us to move forward."

The section's goal is to capture criminals who have avoided justice by actively searching for them and aiding other law enforcement agencies with support and information. For years, fugitives accused of violent crimes were not actively sought by the office; prosecutors relied solely on law enforcement to locate and arrest fugitive felons. "I investigate the trail and Kim gets them back to Harris County," Lowery says. "We work side by side."

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Remembering Arthur "Cappy" Eads

By Jennifer Vitera
TDCAF Development Director in Austin

The Texas District and County Attorneys Foundation lost a true hero and friend with the death of former Bell County District Attorney Arthur "Cappy" Eads on November 1. The Foundation is stronger for Cappy's outstanding leadership on the TDCAF Advisory Board, of which he'd been a member since its inception in 2006. He was so dedicated to and excited about the Foundation and its mission that he even asked that friends donate to TDCAF in his memory. He will be greatly missed.

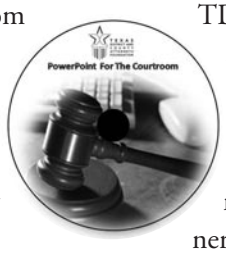
Cheers to a wonderful 2011 and successful 2012

2011 was a very busy and exciting year for the Foundation. With your help and the generosity of our fellow Texans, we have accomplished the following in the last year:

- raised more than $205,000;
- elected a new TDCAF Board of Directors and added new members to our existing Advisory Committee;
- created an endowment (which has raised $150,000 in pledges as of December 11, 2011) through generous donations from our Founding Fellows of the Texas Prosecutors Society, which will ensure long-term financial support for the Foundation and TDCAA;
- underwrote and mailed the *Family Violence Resource Notebook* to every prosecutor office in the State;
- assisted with underwriting the cost of handing out helpful books at two Prosecutor Trial Skills Courses; and
- defrayed expenses for the annual Train the Trainer seminar and the Advanced Trial and Appellate Advocacy Courses, thus freeing up grant funds for reimbursement to prosecutors and staff for travel and hotel expenses.

PowerPoint for the Courtroom CD

Here's your chance to polish your courtroom presentation skills while supporting the Foundation! This CD walks through almost every element of PowerPoint, from creating new slides to importing and editing video clips. It's a must-have for every office, and it's on sale for only $20!



Please visit our website, www.tdcaf.org, for details.

And the winner is …

It was a close race this year between Investigators and Key Personnel Sections in the 2011 Annual Campaign Membership Challenge, but in the end, the investigators pulled ahead with the win! Congratulations to the winners on a job well done; the Foundation will sponsor a happy hour at the Investigator School in February as a thank-you for all your support.

More gratitutde

A big thank you to the Coastal Bend Community Foundation for its donation of a $2,500 grant in support of the Domestic Violence Training Initiative. Thanks to TDCAF Board Member Tom Bridges for attending the awards ceremony in Corpus Christi in August and representing the Foundation.

COASTAL BEND COMMUNITY FOUNDATION

Support your Foundation in 2012

As we look into the new year, there are many more opportunities for the Foundation to enrich the training and educational resources for TDCAA members through publications, seminars, and more. We ask that you please think about organizations and people in your community who might have an interest in partnering with us.

Visit our website at www.tdcaf.org and make your donation to the 2012 Annual Campaign in advance before we kick of this year's campaign in April. ❇

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* Gifts received from September 16 to November 30, 2011
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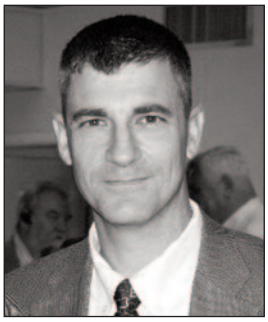
Conducting ourselves with civility

As I begin the year 2012 as your new TDCAA president, I would first like to say how honored I am for the trust that has been placed in me and how much I look forward to working with the TDCAA board, staff, and membership in our effort to continue to improve our profession. Although it was 16 summers ago, it seems like only yesterday that I was attending Baby Prosecutor's School in Austin—still giddy with excitement that I was finally going to get into the courtroom and try cases for the best client in the world: the State of Texas. I remember so well the uplifting comments by (now Congressman) Ted Poe about the joys and rewards of being a criminal prosecutor.



By William Lee Hon
Criminal District Attorney in Polk County

In the years that have passed, I have made so many friends on both sides of the bar, and especially among the membership and staff of TDCAA. What a great group of professionals! Lately, however, I have begun to notice a certain lack of civility which seems to be becoming pervasive in our profession. This "testiness" is not only manifested at times between the defense bar and prosecution, but also between prosecution and law enforcement and even among prosecutors themselves. For example, I recently noticed a thread on the TDCAA user forums where a prosecutor from a smaller jurisdiction was seeking advice. The tone of some of the responses was less than helpful and supportive. That bothered me and made me wonder if the pressures of our jobs and a lot of the adverse media scrutiny we've been getting of late has caused some of us to forget the importance of being nice to each other.

My first job upon completing Ole Miss Law School was with a small civil firm in Greenville, Mississippi, a town on "The River" in the heart of the cotton fields of the Mississippi Delta. The two senior partners in that firm, Roy D. Campbell Jr. and Fred DeLong, were among the best and kindest lawyers and professionals I've ever known. When I hear the term "Southern gentleman," both of these fine attorneys come to mind. To this day, some of the most valuable lessons I've learned about being a lawyer and how to conduct myself toward the courts, opposing counsel, and office staff were learned from these two good men. For example, I learned to:

- be respectful and appropriately deferential to judges even though you may not always agree with their rulings. Jurors, especially, like judges and will hold it against you in a second if you act like you're being disrespectful to the court;
- treat your adversaries and opposing counsel with kindness, professionalism, and respect. Like you, they are just trying to make a living and you will likely cross paths with them again; and
- not be hard on your secretary and your office staff or colleagues. They probably know more about how your office functions than you do and can make life very difficult for you if you treat them badly.

In the years that have followed, I first noticed in the area of civil litigation how lawyers began engaging in "hardball litigation" tactics, filed unnecessary motions, and seemed to constantly want to sanction the other side. In my county, our district judges have concurrent civil and criminal jurisdiction, and I've frequently watched with amazement at how heated these confrontations have become between so-called civil lawyers. I suspect that a lot of these arguments and disagreements stem from posturing for their clients or generating billable courtroom hours. Regardless of the cause, though, it's unfortunate and tarnishes the public's perception of the legal profession. For the most part, I've taken a lot of pride in the fact that we, as prosecutors and criminal justice practitioners, have been able to avoid that kind of unnecessary back-biting and bickering.

With that said, I understand that prosecutors are under a lot of pressure in our jobs. The very nature of the work we do and being regularly exposed to the bad things people do to one another can cause our nerves to become frayed. In my opinion, it becomes even that much more important that we just try to be nice. People are watching us daily. Don't believe it? Just look at the editorial columns recently published in several major Texas newspapers where it seems that our very profession is

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under attack. I wonder how much of that negative public perception could be avoided if we could just conduct ourselves civilly and try to have a friendly, positive attitude.

Just because we work in an adversarial system doesn't mean we can't be nice to the other side. How many of our discovery disputes and *Brady* disagreements could be avoided if we just treated defense counsel with professional kindness and respect?

The same goes for dealing with the media. I think many of us have become almost conditioned to the idea that the media is our enemy. That's not the case. If you take an adversarial approach with a reporter, I can almost guarantee you she will take an adversarial approach with you. But in my experience, more often than not, if you treat reporters with professional courtesy and respect, they will treat you the same way. After all, they are just trying to make a living.

In our dealings with law enforcement, I have found that if you're not careful, it's also very easy to become disagreeable and condescending. We like for things to be done the way we want for them to be done. And when they're not, we can become jerks. I routinely encourage my assistants to give constructive criticism in a kind and friendly way. People aren't perfect and they make mistakes—but we certainly don't need to burn bridges with law enforcement.

Most importantly, I think, is how we relate to each other as prosecutors. It is our job to lift up our profession and do our best to make sure that prosecutors in Texas are portrayed in a positive light. How can we do that if we're not supportive of one another? One nice thing about being a prosecutor in a medium- to rural-sized county is that over the years, I've become friends with my neighbors. There's no telling how many times I've called David Weeks in Walker County, Mike Little in Liberty County, Clyde Herrington in Angelina County, or Joe Smith in Tyler County seeking help or just needing their advice. They've always been very positive and helpful, although I'm sure some of the questions I've asked might have seemed stupid to them at the time. We're neighbors and we need each other.

TDCAA fosters those kinds of friendships and relationships. The Web-based user forums, the prosecutor's directory, and our TDCAA training and CLE programs offer our members invaluable opportunities to reach out to one another to ask questions or seek advice. When allegations of prosecutor misconduct or malfeasance are becoming all too common, shouldn't we be doing as much as we can to help and encourage one another? That's not to say that we shouldn't be policing ourselves or that we should excuse bad behavior. Far from it. But at the same time we need to be looking in the mirror and asking ourselves if we're doing as much as we can to be a resource and positive example to young prosecutors or prosecutors from jurisdictions that have fewer resources than our own.

In summary, I still believe being a prosecuting attorney for the State of Texas is one of the greatest jobs in the world. On a daily basis we have numerous opportunities to make a positive difference in our communities and in the lives of the people we professionally interact with. I've been doing this for 16 years now, and I still enjoy coming to work—I see something new and different each and every day. Although the pressures of the job are real and constant, I strive to remember how a kind word, handshake, smile, or positive comment can make all the difference in terms of how others perceive us. Let's all try a little bit harder to enjoy our jobs, relax a little, and just be nice to each other. ❇

John R. Justice Loan Forgiveness, Round 2

The best news about the John R. Justice Student Loan Forgiveness program may be summed up in a famous line by John Clease in *Monty Python and the Holy Grail*: "I'm not dead yet!" Federal funding for the program has been preserved, but it has been reduced from $10 million to $4 million for 2012. In these difficult times the priority was to keep the program in place in hopes of a better future.

By Rob Kepple
TDCAA Executive Director in Austin

I'd like to thank **Lesa Moller** and all of the folks at the Texas Higher Education Coordinating Board, who have done a terrific job in getting the program up and running. In response to the drastic cut in the program, she keenly observed that under the current program rules that guarantee every applicant jurisdiction a minimum of $100,000, large states like Texas would take the biggest hits. She noted in a recent memo on the subject that the territory of the North Mariana Islands, whose population is 0.02 percent of the total population under the grant program, will receive an amount equal to 34 percent of the Texas award—the state with 8 percent of the population. If you'd like some information on how to apply for a prosecutor job in the North Mariana Islands, you will need to go through the Department of Justice at www.justice.gov/usao/ career.html.

Forensic Science Commission gets new members

Governor Perry has made some new appointments to the Texas Forensic Science Commission. Congratulations to **Richard Alpert**, ACDA in Tarrant County, who was appointed as the prosecutor representative to serve through September 2013. The governor also appointed **Vincent Di Maio**, a forensic pathology consultant and former chief medical examiner from San Antonio, **Robert "Bobby" Lerma**, a criminal defense attorney from Brownsville, and **Nizam Peerwani**, the chief medical examiner for Tarrant, Denton, Johnson, and Parker Counties.

Journalist "shield" protects child abuser from prosecution

This goes firmly in the "sour grapes" or "told you so" category, but many of you probably had the same reaction to ESPN's disclosure that it had tape-recorded evidence of suspected child abuse by a Syracuse University basketball coach Bernie Fine almost 10 years ago but never turned it over to or otherwise alerted the police. The tape is of a conversation with Fine's wife, who apparently acknowledges the suspected abuse. It was certainly information worthy of more investigation, but it was never given to authorities, and any state prosecution is barred by New York's statute of limitations laws.

The reason: Journalists have no duty to help the police, and citizens wouldn't tell journalists about certain sensitive matters if they thought the police may find out. So evidence of a horrible crime sits, neither offered to the public in the daily fish-wrap nor shared with the people charged with the duty of protecting children from abuse.

Now you won't find the national media outlets beating themselves up over this ethical or moral lapse, but some people have expressed their dismay at ESPN's conduct, especially in light of the institutional problems unearthed at Penn State. In the end, who should get the information: people who talk about the crimes or people who have the duty to do something about the crime? How about both? We know that Texas has a relatively new journalist shield law, so perhaps the media here will take a different view of the issue than ESPN did. For some insight into the problem, check out these two articles: online.wsj.com/article/APae9da9ad67214182aadfc8dd95177a22.html and www.sportsgrid.com/ncaa-basketball/dan-patrick-espn-bernie-fine.

The Troy Davis "doubt campaign"

We don't normally talk much about capital cases out of other states, but most of us saw the media blitz in September over the pending execution of Troy Davis in Georgia. If you watched the countless reports of recantations and flawed physical evidence, you must have begun to wonder how our prosecutor friends in Georgia could justify seeking execu-

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tion. It being a case in litigation, the Georgia prosecutors stayed true to their ethical duties to refrain from litigation by press conference.

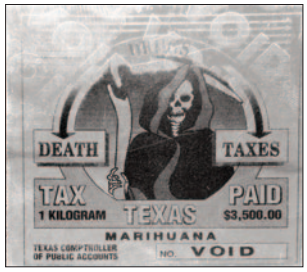
But following the execution, lead prosecutor Spencer Lawton issued a detailed rebuttal of the "Troy Davis Is Innocent" media blitz. It is worth a read. Mr. Lawton allows that he is no fan of the death penalty himself, but when it's applied to the Troy Davis facts, such a penalty is fair. You can find Mr. Lawton's piece at www.dailyreportonline.com/Editorial/News/singleEdit .asp?l=101389509041.

Electronic PC and CCP

They are here! For those of you who prefer your law served in an "app" world, you will now find the TDCAA Penal Code and Code of Criminal Procedure available as a Kindle, Nook, or an iPad app. And in the electronic format, the books incorporate both the vital annotations and the ~~strikethrough~~ and underline format that clearly shows the most recent legislative changes. Just go to Amazon, Barnes and Noble, or Apple to find your favorite criminal law author, **Diane Beckham**!

A blast from a past drug war

I recently had an inquiry from a prosecutor who was working with a police officer on a drug possession case. The officer was seeking to charge the defendant not with possession but with the third-degree felony of failure to pay the proper tax on the drugs. (You will find that statute in Chapter 159 of the Tax Code.) The idea of charging under that section will send some of you back in time, as will the photographs of the Drug Tax Stamps, below. The initial concept in the 1990s was that we would hit the drug dealers not only with pen time and forfeitures but with a tax crime as well.



Only one little hitch in the plan: What if the drug dealer actually paid some or all of the tax and stuck the tax stamp on his bag of merchandise? And worse, what if the guy got arrested for possession, and *then* paid his tax? The Court of Criminal Appeals answered that question relatively quickly: Even a partial payment of the tax barred a subsequent punishment for the possession of the illegal substance. (See *Stennett v. State*, 941 S.W.2d 914 (Tex. Crim. App. 1996).) The comptroller quickly shut the tax stamp program down, but the statutes remain on the books.

It's great to have an enterprising officer who is looking for different ways to approach a case, but think twice if your officer brings you one of these.

Welcome new staffers!

Welcome to two new additions to the TDCAA Staff. The first is **John McMillin**, our new research attorney. (He replaces **Seth Howards**, now an assistant DA in El Paso County.) John is a recent graduate of the Texas Tech Law School. Many of you may recall John's friendly voice from the past when you ordered your books from TDCAA. John served a tour of duty as our Sales Manager before going to law school. Apparently, y'all treated him well enough that he wanted to be just like you when he graduated! Welcome back, John.


John McMillin

Second, please welcome **Kaylene Braden** when you next call our offices. Kaylene is our new receptionist. She takes over for **Naomi Williams**, who left to go to school full-time in an effort to finish her master's degree in social work. As with John, you may recognize Kaylene's voice when you call, because she was a member of our Key Personnel Section when she worked for the Matagorda County Attorney's Office. We are glad you are here! ❇


Kaylene Braden

Lone Star grand jury selection and independence

"Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[1]

From the public perception, grand juries are a largely overlooked step in the criminal justice system. Usually, they do not attract attention. Most of them complete their work diligently and unremarkably. But occasionally, even seasoned prosecutors can be surprised by their conduct. Certainly, a grand jury's decision to "true bill" or "no bill" can be bewildering, but a grand jury can alarm in other, more public ways.

By John Stride
TDCAA Senior Appellate Attorney

Over the last few years, several grand juries across the State have attracted uncustomary attention. As illustrations, in a politically charged case arising from the last Denton city mayoral race, the process of selecting grand jurors came to the forefront.[2] Additionally, a few years back, a Willacy County grand jury investigated a former district and county attorney.[3] So what gives with our grand juries?

Before we jump up excitedly identifying "witch hunts" or "captured," "rogue," or "runaway" juries, all of which may or may not be true at some time or other, let's look at two aspects of our state grand jury system: the methods by which our grand juries are selected and their degree of independence. Most of the time, not much thought may be given the former because its practice is long-established, and little consideration may be given to the latter because, normally, grand jurors are busy enough with cases presented by the prosecution and are not exactly looking for any extra work in exchange for their meager pay.

These two topics will be delivered in two separate issues: this first article addressing the empanelment of the grand jury and a second, upcoming piece on the authority of the grand jury. As you might expect, our state grand jury law has been strongly influenced by federal and English grand jury law, but within that context, Texas has adopted its own statutes governing the selection and operations of a grand jury.

Impanelment

The Code of Criminal Procedure provides two methods by which a grand jury can be selected. Under the first method, a district judge appoints between three and five "jury commissioners" who in turn select the grand jurors.[4] The chosen jury commissioners—aided by the princely sum of $10 a day for their services—must be intelligent and literate, qualified jurors in the particular county, have no suit requiring a jury in the impaneling court, be residents of different portions of the county, and not have served as a jury commissioner more than once within any 12-month period.[5] Alternatively, under the second method of selecting grand jurors, between 20 and 125 citizens are summoned in the same manner as petit jurors.[6] Whichever method of grand jury selection is employed, between 15 and 40 citizens are chosen as grand jurors.[7]

To serve as grand jurors the citizens gathered under either method must satisfy the same qualifications. A grand juror must be: a citizen of the state and county in which the citizen is to serve, able to vote in the particular county, of sound mind and of good moral character, literate, not accused or convicted of a crime, not related to another grand juror within the third degree of consanguinity or second degree of affinity, not have served within the previous year as a grand juror or jury commissioner, and not a complainant in any matter to be heard by the same grand jury.[8]

While the identical minimum qualifications are required of serving grand jurors, the two methods used to select grand jurors obviously invite two different pools of citizens to become grand jurors. The jury commissioner selection method is often called the "key-man" system and the petit juror selection method the "random" or "wheel" system. Collin, Dallas, Denton, and Tarrant Counties, as do most others, use the key-man system but Bexar, El Paso,

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and some Harris County courts employ the random system. Maybe other counties or their courts use the random system, but almost certainly not many.

With two selection systems in play it is natural to ask whether there are any practical differences in using them and whether one system furthers justice better than the other. In fact, the existence of the two methods of grand jury selection in Texas reflects what the majority of states might perceive as an incomplete transition. In the federal system and most of the states today, the random system of grand jury selection prevails. The random system has replaced the key-man system in all but California and Texas.

Key-man system

Back in 1977, the Supreme Court warned that, although it has upheld the facial constitutionality of the key-man system, the Texas system is "highly subjective" and "susceptible of abuse as applied."[9] Indeed, it observed later in the same opinion, "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[10] *Castenada* was the last of the Court's series of six opinions—the first issued in 1940 and the last in 1977—involving the selection of grand jurors in Texas.[11] In each of these cases, the defendants challenged the racial composition of the grand juries. Nearly a half century has passed since the High Court's last opinion on the Texas key-man system but, in light of the random selection system adopted in most of the nation, Texas continues to taunt Washington by its reluctance to either adopt the random system or prescribe that the key-man system result in grand juries that are representative of the community.

The key-man system attracts challenges on grounds that it is subject to abuse. The principal complaint is that the jurors are drawn from those directly connected with the criminal justice system including attorneys, bailiffs, court reporters, probation officers, and the like. Also, many jurors are drawn from those persons who are considered "pillars of the community," and retirees. Many of these may have strong ties with law enforcement officers who bring their cases and appear before a grand jury. It is argued that all these selections are inherently more likely to buy into whatever the judge, prosecutor, or officers say. Subject to the bar on repeated service within a twelve-month period, the recycling of jurors also occurs. In this manner, a large slice of the community can be overlooked or ignored for grand jury selection. Worse, the selection of "repeats" can be viewed as effectively disenfranchising portions of the population, i.e., those elements that the judge and commissioners don't know. Accordingly, it is argued that those grand jurors selected under the key-man system inadequately reflect a fair cross-section of society.

But perhaps it is the appearance of impropriety, which is fostered all too easily by the key-man system, that remains its principal fault. As a single judge selects a limited number of jury commissioners and the jury commissioners chose the grand jurors this method has been interpreted as engendering nothing better than a "pick-a-pal" process. This can lead to strong ties between the grand jurors and elected officials or government employees who are investigated by the grand jury and also with police officers. With this information, the critical public is, perhaps, left believing that "where there's smoke, there's fire"—that favoritism and cronyism infect the criminal justice system from the very start of formal proceedings.[12]

The principal advantage of the key-man system is that it can be a more expedient method of picking grand jurors. It is much easier on the judges than calling in and questioning large panels as they must for regular petit jurors. The system avoids problems of trying to press into service those citizens who would not volunteer because of disagreements with the system, lack of interest, economic, family, or health reasons. Conscientious judges can use the key-man system to ensure that a fair cross-section of society is represented by its grand jurors—something that the random selection system cannot guarantee, simply because of its fortuitous nature.

If, as the Supreme Court has stated, "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community," are our grand juries selected by the key-man system "truly representative of their communities?"[13] The honest answer is, on occasion at least, no.[14]

Because defendants have little to no ability to challenge the selection of grand jurors, it is important that

whatever system a county select, the judges ensure fairness in the process.[15] Many jurisdictions have demonstrated that the random system is workable, and by adopting it, they have also managed to eliminate in great part the appearance of impropriety.

Apparently lending its endorsement to the proposition, the Supreme Court has observed, "It has been said that random selection methods similar to the federal system would probably avoid most of the potential for abuse found in the key-man system."[16] Not only that, but if the grand jurors are truly independent they serve as your basic and/or preliminary conviction integrity unit—a valuable filter between the investigation and charging processes. (I'll write more on that in the next article.)

Counties are already in the business of selecting petit jurors for trial, so the task of switching to the random system for grand jurors is simply one of calling more or larger pools. It is almost axiomatic that, if we truly have an interest in seeking justice, it is vital that justice is also seen by the public. If, under the key-man system, judges carefully select their commissioners to gather grand jurors so they are "truly representative of society," there should be minimal danger of running afoul of constitutional law. Otherwise, the random-selection system offers the community and the judges the best protection. ❇

Endnotes

1 *Liteky v. United States*, 510, U.S. 540, 565 (1994), quoting Lord Chief Justice Hewart in *Ex parte McCarthy*, [1924] 1 K.B. 256, All E.R. 233 (U. K. 1923).

2 Grand jury system questioned, *Denton Record Chronicle*, Oct. 16, 2011 at www.pretrial.org/NewsAndArticles/PretrialPressDocuments/DentonRC.pdf.

3 See, e.g., *In re Guerra, District and County Attorney of Willacy County*, 235 S.W.3d 392 (Tex. App.—Corpus Christi 2007) (orig. proceeding).

4 See Tex. Code Crim. Proc. art. 19.01(a).

5 Id.

6 See Tex Code Crim. Proc. art. 19.01(b).

7 See Tex. Code Crim. Proc. art. 19.06.

8 See Tex Code Crim. Proc. art. 19.08.

9 *Castenada v. Partida*, 430 U.S. 482, 497 (1977) (denial of Equal Protection by exclusion of Mexican-Americans from Hidalgo County grand jury).

10 *Id.*, at 499.

11 See *Castenada*, 430 U.S. 482; *Hernandez v. Texas*, 347 U.S. 475 (1954); *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945); *Hill v. Texas*, 316 U.S. 400 (1943); *Smith v. Texas*, 311 U.S. 128 (1940).

12 See, e.g., Larry Karson, The Implications of a Key-Man System for Selecting a Grand Jury: An Exploratory Study, *The Southwest Journal of Criminal Justice*, Vol. 3, No. 1 (2006), at www.utsa.edu/swjcj/archives/3.1/Karson.pdf.

13 *Smith*, 311U.S at 130.

14 No one supporting the random selection system could seriously argue that it is a total panacea. Of course it can be improved, but it should as a matter of course provide more heterogeneous and less subjective results than the un-tailored key-man system.

15 See Tex. Code Crim. Proc. art. 19.27. But, as the Texas cases in the Supreme Court have demonstrated, constitutional challenges may still be raised on appeal.

16 *Castenada*, 430 U.S. at 497, n.18.

As the judges saw it … literally: *Tillman v. State* and the admissibility of expert testimony regarding out-of-court identification

As the ancient Vulcan proverb goes, "Only Nixon could go to China."[1] This truism is essentially used in situations where someone with an unassailable reputation among a group of people takes dramatic action that would be roundly criticized by supporters had the action been taken by someone else. And judging by the reaction of some,[2] *Tillman v. State* marks the point where the members of the Texas Court of Criminal Appeals downloaded nine copies of *The Little Red Book*[3] on their respective Kindles and booked a collective flight to the Far East. But a closer reading of the opinion itself reveals that perhaps a unanimous decision was quite justified because the legal decision in that case—that expert testimony regarding the reliability of pre-trial identification procedures can be relevant and reliable—was not all that remarkable.

By David C. Newell
Assistant District Attorney in Harris County

Now you see him, now you don't

On December 21, 2005, Amandre Wilson and Joseph Liebetreu were shot and killed in their home after attending a charity ball. Richard Avila, who lived across from Wilson's townhouse, heard two gunshots from the direction of the victims' home. He heard Liebetreu yell, "Hey, you, get out of here," and then heard two more shots. Avila saw an "extremely tall" black man wearing a black, mid-thigh-length coat and a gray knit cap run out of the victims' front door. The lights to the front porch and garage were working, as well as a street light, so he could see the suspect's face and noticed the suspect had no facial hair. Avila estimated that he was about 62 feet away from the suspect when he viewed him, and he called 9-1-1. He later assisted making a composite sketch that was published on a newscast.

Dan Christoffel, who lived in the same complex as Wilson, saw a tall black man who appeared to be running away from the victim's home. Christoffel was in a car driven by his brother, and the tall black man slowed when he saw the car's headlights. Christoffel described the man as having a baby face and wearing a knit cap and a dark, long, thigh-length coat. Christoffel passed within 4 to 6 feet of the suspect and the two made eye contact.

Shortly after the victims were murdered, Bobby Williams was at an apartment complex talking to some people when three black men entered. Williams saw and heard one of these individuals, a "big guy," discussing that the victims, who had been dressed in ballroom clothing, looked like "easy picks." This person explained that he was prevented from attacking the couple in their garage, so he went to the front door. When Wilson would not open the door fully, he forced his way in. Wilson fought back, so he shot her. He then shot Liebetreu, who had seen his face. Williams also saw the three men pull items from a garbage bag that included a purse, jewelry, and Christmas presents.

Williams called Crime Stoppers and later "tentatively" identified Larry Tillman to a couple of police officers while they were driving around Tillman's neighborhood in an unmarked car. Avila and Christoffel looked at a total of six separate photo spreads, and neither could identify Tillman. Williams, however, identified Tillman in the photo spread. Twelve days later, Avila and Christoffel separately viewed a five-person live lineup. Tillman was the only person cleanly shaven, and he was also the only one whose picture had been in one of the previously viewed photo spreads. Avila positively identified Tillman, and Christoffel "tentatively" identified him. Christoffel testified that it was either Tillman or the No. 2 person but that he felt confident that Tillman was the suspect based on his face. Christoffel's brother was shown a videotape of the lineup, and he thought the suspect could be either the third or fourth person, but the detective explained that he did not expect the brother to be able to identify the suspect because the

brother's focus had necessarily been on driving. Indeed, the State offered other testimony through the detective that it was not unusual for a witness to be able to identify a suspect more easily in a live lineup than through viewing a photo spread.

Tillman proffered the testimony of Dr. Roy Malpass as an expert on eyewitness identifications. A professor of psychology at the University of Texas at El Paso, Dr. Malpass was on the editorial board of one of the better psychology journals, *Law and Human Behavior*, and had helped to create the Department of Justice's publication entitled *Eyewitness Evidence, A Guide for Law Enforcement*, which provide a set of guidelines for good practice in eyewitness-identification procedures. Dr. Malpass also lead the Eyewitness Identification and Research Laboratory at the university and explained that the study of eyewitness identification, as an area of psychology, is a field of study using repeatable techniques and calculated error rates to test a working hypothesis. Having heard the testimony in the case, Dr. Malpass stated that the type of photo spread used by the police was the same kind examined in the experiments using simulated crimes he has studied. Malpass also acknowledged that his testimony has been disallowed several times by trial court judges in criminal cases and one well-known researcher had opined that "our knowledge is not sufficient" for experts to be able to testify.

Dr. Malpass emphasized that he was not there to render an opinion about the accuracy of a particular witness's testimony, nor did he intend to tell the jury about the specific lineup or photo spread used in the *Tillman* case. Rather, he proposed to testify as to the manner in which the lineup and photo spread were employed to explain that the use of a photo spread prior to gaining identification in a physical lineup is a biasing fact against Tillman. Additionally, he also would have testified that having a witness point someone out while driving through a neighborhood and then showing him a photo spread with that person's picture in it is also suggestive. Neither of these types of identification procedures would be approved by the standards set out in the *U.S. Department of Justice Eyewitness Evidence Manual*. Finally, he also would have testified that having an eyewitness work with a sketch artist can change a witness's original memory.

The trial court excluded the testimony. First, the trial court explained that Dr. Malpass had not performed any studies regarding a lineup procedure following a photo spread or on seeking a defendant and then a photo spread later. Second, the trial court questioned Dr. Malpass's credibility because Dr. Malpass testified that he had not fallen asleep during the detective's testimony during the trial even though the trial court had personally seen him nodding off several times and the bailiff had had to prod Dr. Malpass to wake him up. The court of appeals affirmed on the ground that Dr. Malpass's testimony would not help the jury understand the evidence because Dr. Malpass did not tie the pertinent facts of the case to the scientific principles at issue.

Don't let the gate hit you …

Overriding the trial court's role as "gatekeeper" for the admissibility of expert testimony, a unanimous Court of Criminal Appeals held that the trial court should have allowed Dr. Malpass to testify because his testimony would have been both reliable and relevant.[4] Writing for the majority, Judge Hervey explained that for expert testimony to be admissible it must be based upon a reliable scientific foundation and relevant to the issue in the case. Applying the standard set out in *Nenno v. State*, the court first explained that psychology is a legitimate field of study and that the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology. The court relied upon the broad consensus of the scientific community detailed in a recent opinion by the Supreme Court of New Jersey to reach the conclusion that the study of eyewitness identification is a reliable field of research that continues to grow.[5] The court even noted that in the New Jersey case, a 10-day hearing on admissibility of such testimony was held and Dr. Malpass testified as an expert for the State. Thus, the court held that reliability of eyewitness identification was a legitimate subject within the legitimate field of psychology.

Having resolved the first two prongs of *Nenno* in favor of admission, the court then considered whether Dr. Malpass's testimony properly relied upon and utilized principles involved in the relevant field of psychology. The State argued that Dr. Malpass did not make the principles he relied upon clear, but the court disagreed. Dr. Malpass

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specifically detailed one of the studies he relied upon as well as the psychological explanations leading to the primary conclusion that showing a witness a photo spread and then a lineup could be suggestive. Ultimately the court held that Dr. Malpass's extensive experience and knowledge gave them confidence that Dr. Malpass had relied upon and utilized the principles in the relevant area of psychology. Thus, the court concluded that Dr. Malpass's testimony was reliable.

The court also held that Dr. Malpass's testimony was relevant because it sufficiently tied the facts of the case to the scientific principles that were the subject of his testimony. The court first noted that it had already previously decided similar evidence was relevant in *Jordan v. State*, though in that case expert had been told the facts of the case and specifically applied his theories to those facts.[6] The court explained that it was not necessary for Dr. Malpass to have heard the testimony of the officer conducting the identification procedure because his testimony took into account enough of the pertinent facts to be of assistance to the trier of fact. Moreover, Dr. Malpass's testimony was still relevant even though he was presented facts of the case only in hypothetical questions. Relying upon *Cohn v. State*, the court explained that there can be a sufficient "fit" between expert opinion and the facts of the case where witnesses other than the expert testify to facts that are later identified by the expert in his testimony.[7]

Additionally, the court distinguished its previous cases where it had upheld the exclusion of eyewitness expert testimony. The court noted that this was unlike the situation presented in *Pierce v. State*, where the expert could not say if any factors that he discussed regarding cross-racial identification were applicable to the case or to what extent they might undermine the witnesses testimony.[8] Similarly, the court distinguished *Tillman* from a case where the expert would have testified that the entire identification process is flawed without reference to any factors that may have applied to the testifying witnesses.[9] In both of those previous cases, the court noted that the experts had not examined any of the eyewitnesses, but in *Tillman*, that did not appear to be a bar to admissibility of the evidence as the court appeared to opt for a looser fit than it had previously required.[10] However, the court did reiterate that the hypotheticals posited to Dr. Malpass mirrored the facts of the case, suggesting his opinion testimony was sufficiently tied to the case.

Finally, the court also noted that Dr. Malpass's testimony would have assisted the trier of fact. The court noted that eyewitness identification has continued to be troublesome and controversial and has been a major factor behind wrongful convictions.[11] The court pulled examples of juror responses in voir dire in unrelated cases to note that awareness and concern surrounding mistaken identifications among jury members. The court cited the new laws regarding improvement and standardization of photograph and live lineup identification procedures.[12] Given that jurors might have their own notions about the reliability of eyewitness identification, the court explained that Dr. Malpass's testimony could also have educated the jury about an area in which it lacked a thorough understanding, much like the educator-expert testimony discussed in *Coble v. State*.[13] And the State's offer of the detective's testimony about his experience with identification procedures made it necessary for the jury to hear from Dr. Malpass to receive a more balanced picture of the reliability of these procedures.

Knee-deep in the hoopla

A casual reading of the opinion demonstrates that despite how generally unassailable the court's ultimate conclusion was, the opinion was crafted to achieve a particular result. For example, there is no real discussion of the fact that Tillman, the proponent of the evidence, had the burden to prove by clear and convincing evidence that Dr. Malpass's testimony was sufficiently reliable.[14] Equally inconspicuous is any mention that the State, as the prevailing party on appeal, was entitled to every adverse inference or that Tillman could not rely upon any articles or treatises not presented to the trial court. However, the court cites to a lot of swell stuff without making it clear whether those articles were ever presented to the trial court. I do not mention this to denigrate the court or quibble with the ultimate conclusion that Dr. Malpass's testimony was admissible. Rather, I point this out to show how ready the court was to bend over backwards to support its conclusion that such evidence should be presented to the jury. Given the court's apparent

predilection, prosecutors should be careful about trying to keep out expert testimony regarding the reliability of eyewitness identification.

Of course, as we go forward, it is also important to note what the opinion does *not* say. Nothing in this opinion undermines the current legal standards for suppression of in-court identification. The test is still whether, under the totality of the circumstances, an identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.[15] This case holds only that the jury should have heard the defense's expert testimony, not that the in-court identification should have been suppressed. What prosecutors must be mindful of, however, is that the court does take time to note that the identification procedure employed in this case "was not usual" and "involved many layers of suggestiveness." So if you are dealing with identification procedures similar to those in this case, expect the defense to cite this language to prove up its suppression case.

Similarly, this is not a case where the expert was opining about the visual acuity of the witnesses. In *Ex parte Spencer*, the Court of Criminal Appeals considered expert testimony that witnesses could not have identified the facial features of an individual involved in the crime.[16] There, the court addressed the issue of actual innocence rather than the admissibility of evidence, but the court did note that there would be no way for a forensic visual expert to test the conditions as they existed at the time of the offense. *Tillman* certainly gives the defense some good precedent to urge when offering new expert testimony, but the language in *Spencer* could suggest that a forensic visual expert's testimony may need a tighter fit for admissibility given the inability to replicate the lighting conditions during the offense. At the very least, it suggests that the Court of Criminal Appeals did not announce a new per se admissibility rule regarding eyewitness reliability in *Tillman*. As with all things evidentiary, the court will still take them up on a case-by-case basis.

And finally, the court itself acknowledged the new identification procedure legislation that will, we hope, significantly reduce the number of flawed identification procedures and wrongful convictions. Nothing succeeds like success, and as officers receive more and more training regarding proper identification techniques we hope the need for expert testimony in this area will decrease. That said, prosecutors should be prepared to counter expert testimony on eyewitness reliability in the aftermath of *Tillman* as it seems likely trial courts will become more reluctant to exclude defensive evidence in related areas. Just how far trial courts and courts of appeals may stretch this opinion and whether it leads to a change in standards of review for suppression of in-court identification remains to be seen. As is usually the case, such answers lie in the undiscovered country. ❇

Endnotes

1 *Star Trek VI: The Undiscovered Country*, Paramount 1991.

2 See e.g. Editorial, Texas seeks to enhance the reliability of convictions, *Fort-Worth Star-Telegram*, Oct. 6, 2011; Steve McGonigle, Texas court's ruling makes it easier for juries to hear about witnesses' fallibility, *Dallas Morning News*, Oct. 5, 2011.

3 *People's Liberation Army Daily,* 1964. According to Google translation, the Chinese-character version of the name means, "Ain't no party like a Communist Party."

4 *Tillman v. State*, 2011 WL 4577675 (Tex. Crim. App. October 5, 2011)(9:0).

5 See *New Jersey v. Henderson*, 27 A.3d 872 (New Jersey 2011).

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

7 See *Cohn v. State*, 849 S.W.2d 817 (Tex. Crim. App. 1993).

8 *Pierce v. State*, 777 S.W.2d 399 (Tex. Crim. App. 1989).

9 *Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993).

10 And really, skinny jeans are not very flattering.

11 *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification").

12 Tex. Code Crim. Proc. art. 38.20. Note that at the time of the writing of this article, the draft of the statewide model policy for eyewitness identifications was available for viewing and comment at www.lemitonline.org/publications/eyewitnessid.html. Even if comments are closed by the time you read this article, it may still be available for viewing.

13 *Coble v. State*, 330 S.W.3d 253, 288 (Tex. Crim. App. 2010)(holding that A.P. Merillat could testify as an educated expert on the opportunities for violence in prison).

14 *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003).

15 *Loserth v. State*, 963 S.W.3d 770 (Tex. Crim. App. 1998).

16 *Ex parte Spencer*, 337 S.W.3d 869 (Tex. Crim. App. 2011).

Continued from the front cover

At the intersection of hard work and a little luck (cont'd)

Lowery and Bryant sit in an office surrounded by old case files, some dating back to the 1970s. The job is not glamorous. They rely on computer databases and paper trails. In some cases the trail is cold; in others, investigations had hardly begun. They speculate that case files can become "cold cases" for a variety of reasons: All potential leads ran into dead ends, previous investigators were simply too busy for the immense case load and had to prioritize which cases to pursue; and some may have been more suitable "pocket warrant" cases that just got caught up in the system.

Extradition Administrator Kim Bryant and and DA Investigator Chuck Lowery (second from right and far right), both with the DA's Office in Harris County, were recently honored by the U.S. Marshal's Gulf Coast Violent Offender Fugitive Task Force for their outstanding efforts in investigating, locating, and prosecuting cold-case fugitives. They are pictured with District Attorney Pat Lykos, far left, and U.S. Marshal Elizabeth Saenz, second from left.

Regardless of how the files ended up on his caseload, Lowery reviews each one for something—anything—that could have been missed the first time around. Lowery is a former Houston Police Department sergeant and retired in 2003 after 23 years of service. Two years later he joined the DA's office as an investigator. He reviews each case file by looking at every piece of evidence, scrap of paper, and photo in the file. He keeps the ones that have enough information to try to identify the suspect and in some cases he sends the file back to the original law enforcement agency for further work. For the files he keeps, he begins by looking in public and law enforcement databases for leads and says one of the most important things any investigator can do is to enter any and all aliases and identifiers into databases. Lowery says, "If you don't have the right name, the right identifiers, it makes it nearly impossible for law enforcement to find suspects.

"Many times the original people interviewed in a case don't give correct information. They give incomplete names or incorrect names, or they provide only a rough description. I look for the moment when a piece of information in a file or database jumps out at me—a matching set of prints or a photo, for instance. Even if I can't catch them this time, I update their information in the databases to increase the chances someone outside Harris County will be able to use it."

Here are a couple of stories about criminals who fled from Harris County—only to be tracked down by the Cold Case Unit's dogged investigation.

Anatomy of a case

"How did you get me? I didn't leave a paper trail!" Lowery remembers Theodore Dominguez saying as law enforcement arrested him in 2010 in New York after 21 years on the run. Dominguez was originally arrested in a Harris County stabbing in 1989, made bond, then absconded to Puerto Rico, Florida, and New York before authorities caught up with him.

How Lowery and Bryant caught up to Dominguez and many of the other fugitives is a combination of old fashioned police work, boots on the ground, technology, and luck. When Lowery opened Dominguez's file in 2010, he obtained a current copy of the offense report and pulled and reviewed all related files from the DA's office. The defendant's Pre-Trial Sentence Investigation information revealed that he was born in Puerto Rico and at the time of his

1989 arrest, he had lived in Katy with his second wife and his sister. He also had three children. His first wife was found to have lived in Brooklyn, New York.

The file also contained information stating the original DA's investigator was contacted by one of Dominguez's relatives around 1990 or 1991. Notes were made of the interview and revealed that the defendant was possibly using four or more variations of his brother-in-law's name. He was possibly using "Carmelo (Carlos) Marrero" or "Carlos Badillo," along with a similar date of birth while working as a mechanic in New York. The relative described Dominguez's physical appearance and reported that he was preparing to move from the New York area. As a result, the investigator at the time contacted the FBI, and an Unlawful Flight to Avoid Prosecution (UFAP) warrant was filed with the alias information and other identifiers in 1991. Then the trail ran cold.

In 2010, Lowery re-researched all the information utilizing several commercial and law enforcement databases. While researching one of the several aliases Dominguez was using, Lowery located three men who could possibly be his defendant: one with Florida and Pennsylvania ties; one with Florida, Ohio, Puerto Rico, and Texas ties; and the other was "Carmelo Marrero," who still appeared to reside in the Houston area and did not have a criminal history. Lowery further researched the identifiers through commercial databases, looking for any transposed numbers. He got a hit on "Carlos Badillo" with a similar date of birth and Social Security number as the real Carmelo Marrero, Dominguez's brother-in-law. It showed three addresses in Brooklyn and employment at a local mechanic shop. While cross-checking these addresses, a woman's name was found during the same time frames. The woman had relocated to Florida, and it appeared she had a daughter with the same last name, Marrero, with a 1994 birth date.

In August 2010, Lowery met with a member of the FBI Task Force to discuss the findings of the previously filed UFAP investigation to see if any information matched his current investigation. The FBI investigation found that in 2001, Dominguez was working as a mechanic in New York, and his wife had the same name that kept turning up in Lowery's investigation. They had a 6-year-old daughter. There were other aliases associated with Dominguez's first wife in New York, and the current database research connected to Carlos Badillo as an alias that Dominguez was using.

After compiling this information, Lowery met with Sergeant Clarke of the Houston Police Department and Detective Harry Fikaris of the Harris County Sheriff's Office, who were assigned to the Houston-area FBI Task Force. They were able to obtain the New York driver's license of "Carlos Badillo" and upon comparison, it was determined "Badillo" was, in fact, Dominguez. Clarke and Fikaris traveled to New York, met with the local FBI Task Force, and arrested Dominguez, who confessed to his involvement in the 1989 crime. As of press time, he is still awaiting trial.

Juan Carlos Tejeda and Jorge Tejeda Magdalena

In 1994 Juan Esparza was beaten and stabbed to death at a Houston-area apartment complex. The investigation revealed that several Crip Cartel gang members attacked Esparza and beat him with their hands, feet, and a bat before stabbing him and stealing his shoes. In the case file, three of the assailants were identified as Juan Carlos Tejeda, Jorge Tejeda Magdaleno, and Edwardo Tejeda Reyes. Tejeda and Magdaleno were thought to have fled to Mexico, while Reyes was arrested, pled guilty, completed a probated sentence and was living in the Houston area.

During Investigator Lowery's review of the case, he noticed something was missing. Tejeda's prints had never been forwarded to DPS for entry into TCIC/NCIC. Lowery contacted the Harris County Sheriff's Department AFIS and requested that the defendant's prints be forwarded to DPS and the FBI. A match was made with a subject by the name of Francisco Bautista (a.k.a. Francisco Baustista-Cardenas). Bautista had previously been handled by ICE in 1995 and was deported to Mexico.

Offense report supplement entries indicated that both defendants fled to Mexico with the help of Juan Carlos Tejeda's mother, Amelia Tejeda. Further research indicated that in 1995 Amelia Tejeda returned to the U.S., possibly with the defendants, and obtained DPS identification using false information. With this new information along with Juan Carlos Tejeda using an alias

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after the murder, Lowery believed that both Tejeda and Magdaleno possibly attempted re-entry into the U.S. with Amelia Tejeda.

Lowery conducted further painstaking research on the defendant's names and aliases as well as on Amelia Tejeda (who was also listed as Magdaleno's aunt in arrest records) and Juan Carlos Tejeda's father, Carlos Tejeda. Amelia Tejeda was found to possess a current Texas ID, and Carlos Tejeda showed to have a current Texas driver's license. Research through numerous databases produced six addresses for the two since the mid-1990s. Additionally, the offense report listed "Alberto Tejeda" as a possible alias for Magdaleno. Lowery was unable to find any hits using "Alberto Tejeda" but by searching for the name "Albert Tejada," he got a hit on an address associated with Amelia Tejeda.

On a hunch, Lowery conducted database search dropping the "o" in "Albert" and changing the "e" into an "a" in "Tejeda," pulling up different search results of several corresponding male names with similar dates of birth (DOBs) in the 1970s. Upon locating Texas driver's licenses and/or identification cards corresponding to the new results, Lowery ordered photos for comparison and discovered two men who were very similar to the arrest file photo of Juan Carlos Tejeda provided by HPD and the 1994 HCSO mug shot of Magdaleno (both in his original cold case file). "Albert Tejada" was similar in appearance to Jorge Tejeda Magdaleno, and a "Carlos Antonio Smith" looked a lot like Juan Carlos Tejeda.

Lowery then contacted DPS AFIS and requested to compare the thumbprints from the IDs to the respective arrest prints for his fugitives. DPS responded that both previous arrest histories matched the newly discovered IDs. Lowery then researched the newly confirmed "Albert Tejada" and "Carlos Antonio Smith" aliases. "Tejada"'s Texas driver's license was current. He had two current Harris County vehicle registrations along with employment at a landscaping service in Houston. He was married and it appeared his current address was in Northeast Houston. A 2008 HPD offense report listed him as the reportee from a tire shop located in Houston.

"Carlos Antonio Smith"'s Texas driver's license was expired, and the most recent identifier was a 2001 HPD auto theft report where he listed his home address as the same Northeast Houston address where Magdaleno (a.k.a. "Albert Tejada") currently resided.

Lowery conducted surveillance at addresses associated with Amelia Tejeda and the two defendants. After surveillance at several different locations with the assistance of the Gulf Coast Violent Offender Task Force, Jorge Magdaleno was arrested as he left his house one morning for work. When he was arrested, Lowery asked him his name and he identified himself as "Albert Tejada"—he denied ever having used any other name.

When Lowery further confronted him, he finally admitted that he had used the name Jorge Magdaleno as a kid. When questioned about Juan Carlos Tejeda, Magdaleno said he had fled to Mexico when he got into "some trouble" back in the '90s. He was questioned about the family tire business and nervously explained that they had sold the business some time back.

Surveillance was then established at the Tejedas' tire shop. Investigators approached a man who identified himself by producing a Mexican chauffer license bearing the name "Carlos Mendez Menendez." Lowery remembers, "The photo on the license matched the man we were talking to, but it also matched the defendant we were looking for. We now had yet another alias in the mix." Lowery approached a female employee and asked her if she could identify the suspect, and she said he was Juan Carlos Tejeda. Tejeda was handcuffed and transported to the Harris County Sheriff's Office jail, and AFIS verified both men as the cold case murder defendants.

As with Dominguez, both men are now awaiting trial.

The love of the job

Lowery and Bryant say they can't do their jobs without close coordination with the U.S. Marshal Service, U.S. Immigration and Customs Enforcement, FBI, Department of Justice, and many local and state law enforcement agencies across the country and world that assist in apprehending suspects who have fled to other jurisdictions.

Suspects may have fled to another city, county, state, or country. Sometimes the hard work and investigation can lead to a deceased suspect and a dismissal of the case. It takes detailed investigative work by the Cold Case Fugitive Apprehension Section to find the fugitive and resolve the outstanding case.

Lowery and Bryant love their

jobs. They both say at times the hunt can get confusing and head down numerous trails, but they never stop looking. They are very meticulous, organized, and creative in their research and believe if they can't find a fugitive and extradite them now, they will eventually. "The fugitive is usually found at the intersection of hard work and a little luck. It's difficult to catch these guys without both," says Lowery.

Bryant says thoughts of the victims' families keep her focused and determined to catch up to the fugitives and return them to Harris County. "I'm always putting myself in the victim's shoes or the family's shoes," Bryant said. "I want to make sure we are doing everything we can to bring them to justice because they have been waiting so long." ❇

Endnote

1 A pocket warrant, as described in TDCAA's *Warrants Manual for Arrest, Search & Seizure* by Tom Bridges and Ted Wilson, is issued based on an affidavit (or "complaint") but not formally filed with the magistrate. It acts like a sealed indictment or sealed complaint that does not initially appear on the magistrate's docket. With a pocket warrant, only the officers seeking the warrant, the magistrate issuing it, and the district attorney's office know it exists. This way, law enforcement can control details of the arrest and keep the suspect from finding out about it in advance. Note that within 48 hours of arrest, however, the defendant must be formally charged with a crime, brought before a magistrate, or released. For more information on these and other warrants, see our *Warrants Manual*, available for purchase at www.tdcaa.com.

Photos from our Key Personnel & VAC Seminar

Oscar Sherrell winner

Congratulations to Linda Poe (center) of the Llano County Attorney's Office, who was honored with the Oscar Sherrell Award at the seminar. She is pictured with Llano County Judge Wayne Brascom (left), and Cheryll Mabray (right), the County Attorney in Llano County.

Three's the key … but you'll need more

Factors to consider when charging an Engaging in Organized Criminal Activity (EOCA) case

It's been said that two heads are better than one. If true, then it's only logical that three are preferable to two. In Texas, three may also be the key to ensuring that when criminals are caught, they can be charged with the crime of engaging in organized criminal activity (EOCA). While three makes for a crowd, it does not necessarily correlate to a "combination." When it comes to proving an EOCA case in Texas, there is more required than just proving that three or more persons committed a crime or even multiple crimes. The law requires proof of an ongoing course of criminal activity.

By Ben Hoover
Assistant Criminal District Attorney in Wichita County

At first glance

The decision to charge a defendant under Penal Code §71.02 (Engaging in Organized Criminal Activity) begins with the arresting agency. Often, the arresting officer may believe that EOCA applies to an offense listed under that section because three or more people either committed the crime or were involved in some way. Additionally, the enhanced charge typically results in a higher bond when the defendant makes his initial appearance before the magistrate. As with all cases, however, it is imperative for the prosecutor to carefully analyze the facts. Many times, the evidence is insufficient to prove that a combination existed despite evidence of multiple persons who have committed multiple crimes.

Consider the following scenario: Officers respond to a theft in progress on a residential street. They locate three men in a vehicle matching an eyewitness's description. Inside the vehicle, officers find three cast-iron garden pots. The eyewitness says that he observed the three men stop at multiple houses. At each location, all three men exited the vehicle, dumped the plants and soil from the pots, and loaded them into the car. The victims identified their property and estimated the aggregate value of the pots to be $750, a Class A misdemeanor amount. The arresting officer charges the men with state jail EOCA-theft and seizes the vehicle as contraband (asset forfeiture requires commission of a felony offense). The officer states in his report that "the offense was enhanced to a state jail felony by the participation of three subjects involved for profit of items stolen." Despite evidence of three different thefts by three or more individuals, the report offers no other indication that the defendants intended to continue in their activity.

Now's the moment when you reach for your brand spanking new edition of the Annotated Criminal Laws of Texas and flip to Penal Code Chapter 71 ("Organized Crime"). "Combination?" "Collaborate?" "Conspire to commit?" Even though some of these terms are defined in §71.01 (Definitions), a review of the pertinent caselaw may be necessary. Many of the fact scenarios encountered in EOCA cases are close calls when it comes to the charging decision. I hope the following summary of opinions will aid you in that process.

Insufficient to establish EOCA

A review of the cases that did not qualify under the EOCA statute provides a good starting point. Many of them have common factors: multiple offenses committed within one criminal episode, participation by three or more persons during the commission, and ultimately, lack of a coordinated action or continuous course of conduct.

In *Nyugen v. State*, the Texas Court of Criminal Appeals found the evidence was insufficient to support an EOCA conviction.[1] In *Nyugen*, a group of friends attended a party sponsored by the Asian Cultural Committee at the University of Texas. Afterward, Nyugen and a group of people met at a restaurant for breakfast where they encountered a group of men who had attended another party sponsored by the Latin American Students Association. One of the men from the other group,

Morena, heckled a woman from Nyugen's group as she walked by their table. Nyugen's group then confronted the others about the comment. A disturbance erupted and Nyugen's group was asked to leave the restaurant. Upon leaving, Nyugen and three other men decided to return and fight but first retrieved a .22 semi-automatic rifle. The four waited outside the restaurant and then ambushed Morena and two friends as they stood in the parking lot. Nyugen fired the rifle and shot Morena in the head and leg, fatally wounding him. One of Morena's friends was also wounded. At trial, Nyugen admitted that he was the triggerman, that a friend drove the car, and that another man passed the gun to him from the backseat. He was convicted of murder and EOCA, but the Austin Court of Appeals reversed the EOCA conviction and the Court of Criminal Appeals affirmed.

The Court of Criminal Appeals determined that: 1) to prove a "combination," the State must prove that a group of three or more intended to work together in a continuing course of criminal activities; 2) the evidence was legally insufficient to show a "combination"; and 3) the evidence need not prove that members of a combination committed more than one criminal act as long as there is intent to establish a combination. In *Nyugen*, the court outlined that you can prove your case with only one criminal offense, but the trick is proving the continuity of the group. Although murder was committed with intent and by agreement of the group, there was no evidence that the group would work together in continuing a course of criminal activities.

One of the more difficult tasks in an EOCA prosecution is proving intent, which raises several questions. First, how do you prove intent, and secondly, whose intent must you prove? *Arredondo v. State* helps to answer the question of how to prove the existence of a combination and confirms that direct evidence is not needed. In that case, two men at a party sexually assaulted a minor female. After a wild night of drugs and alcohol, the victim awoke with little memory of the previous night. A medical examination, however, revealed the presence of the appellant's semen in the victim's vagina. The State offered evidence that Arredondo raped the victim while others watched and cheered him on. Afterward, another man raped the victim and others physically assaulted her. A jury convicted Arredondo of aggravated sexual assault and EOCA. The Eastland Court of Appeals said that a jury may infer intent from "any facts that tend to prove the combination's existence, including the defendant's words, acts, and conduct, and the method of committing the enumerated offense." The court added that it is permissible to infer an agreement to work on a common project when each person's action is consistent with realizing the common goal. However, the court determined that a single *ad hoc* incident is insufficient for EOCA purposes. Arredondo's aggravated sexual assault charge was affirmed but his EOCA conviction reversed.

In *Hart v. State*, the Texas Court of Criminal Appeals outlined the requisite mental states for an EOCA conviction. Two parts were identified: 1) whether the defendant intended to commit the underlying enumerated offense; and 2) whether he intended to establish, maintain, participate in, or participate in the profits of a combination. In *Hart*, the Houston police busted an auto theft ring that had targeted a local dealership during a 15-month period. The theft ring was shown to have multiple participants: a leader, one who ran the body shop, one who ordered cars, an inside man who provided keys, and someone who obtained the keys. The evidence at trial proved that the appellant joined in only one theft with people who had been participating in a theft ring. It was not shown that the appellant knew of the theft ring's existence or that he intended to participate in it. As the Eastland Court did in *Arredondo*, the Court of Criminal Appeals in *Hart* observed that direct evidence was not required because the jury could infer intent from any of the facts which tend to prove its existence. Nonetheless, the EOCA conviction was reversed due to insufficient evidence.

Two years before *Hart*, the Amarillo Court of Appeals in *Munoz v. State* identified two types of *mens rea* that are required in an EOCA case. One is that of the defendant and the other is that of the group. In *Munoz*, the appellant was convicted of EOCA based on the sale of approximately 27 pounds of marijuana. It was shown that the appellant unwittingly negotiated with an undercover officer and two other people to distribute the marijuana. At trial, it was undisputed that Hart

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participated in a group of three of more and that he unlawfully distributed or delivered a controlled substance. However, he did dispute the existence of a combination, and the court agreed with him. Even though one of his co-defendants had previously sold drugs to the undercover officer, the appellant had supplied drugs only on the occasion in question. There was no evidence of the appellant having provided drugs to these individuals in the past or of discussions about future transactions.

Two other cases worth reviewing are *Roberson v. State* and *Ross v. State*. In *Roberson*, the Eastland Court of Appeals found the evidence to be legally insufficient for EOCA when the defendant was present in a vehicle with two others and a number of forged checks. Although considerable evidence established the defendant's guilt for forgery and also implicated another passenger, there was no evidence linking the three in a continuing course of criminal activity. Similarly, in *Ross*, evidence was found to be insufficient when the appellant and two others chased down a female driver and assaulted her during a fit of road-rage. The appellant and his cohorts committed a series of assaults against the victim as they pursued her down IH-35, including several vehicular assaults and an eventual physical beating. The court determined that the assaults were a spontaneous, retaliatory series of actions that were all part of the same criminal episode and not a continuing course of criminal activity.

Opinion	Does it qualify as EOCA?
Nyugen v. State 1 S.W.3d 694 (Tex. Crim. App. 1999)	No
Arredondo v. State 270 S.W.3d 676 (Tex. App.—Eastland 2008, no pet.)	No
Hart v. State 89 S.W.3d 61 (Tex. Crim. App. 2002)	No
Munoz v. State 29 S.W.3d 205 (Tex. App.—Amarillo 2000, no pet.)	No
Roberson v. State 311 S.W.3d 642 (Tex. App.—Eastland 2010, no pet.)	No
Ross v. State 9 S.W.3d 878 (Tex. App.—Austin 2000, pet. ref'd)	No
Barber v. State 764 S.W.2d 232 (Tex. Crim. App. 1989)	Yes
Mast v. State 8 S.W.3d 366 (Tex. App.—El Paso 1999, no pet.)	Yes
Campbell v. State 18 S.W.3d 914 (Tex. App.—Beaumont 2000, pet. ref'd)	Yes
Mayfield v. State 906 S.W.2d 46 (Tex. App.—Tyler 1995, pet. ref'd)	Yes
Armstrong v. State 18 S.W.3d 928 (Tex. App.—Beaumont 2000, pet. ref'd)	Yes
Barrera v. State 321 S.W.3d 137 (Tex. App.—San Antonio 2010, pet. ref'd)	Yes

Conclusion

A good way to know how to proceed is to first know how *not* to. The aforementioned cases are all examples of situations in which EOCA convictions were reversed based on insufficiency of the evidence. A thorough search will uncover troves of opinions outlining scenarios where EOCA convictions were upheld. There are additional factors to consider that are not discussed here, such as overt acts and the law of parties. The main thing to gain from this discussion is an awareness that an EOCA charge can appear solid at first glance but may lack the requisite criteria necessary to withstand scrutiny on appeal. The table on this page provides a quick reference guide to the EOCA opinions that are outlined herein. Also included are a few cases that were not discussed but that illustrate scenarios in which EOCA convictions were affirmed.

Endnote

1 For cites to each case mentioned, please see the chart on this page.

A new way to face the world

After she was shot in the face, a Burnet woman was left with disfiguring scars. A miracle from God (via the Discovery Channel) restored her appearance and helped heal the trauma of the awful crime.

On May 1, 2004, Mary Cirilli's life changed forever. It was her weekend for visitation with her son, Zeke, who was 11. They had plans to watch a movie with a neighbor and were laying on her bed waiting for their friend, so the door to the house was unlocked. When they heard the door open, they were expecting their friend, but instead it was Mary's estranged husband, Andrew Hankins, with a gun. He had been released from a Dallas jail for a DWI just the week before, and Mary had a protective order in place. She can only assume he followed her home from her job at Wal-Mart because she had relocated to Burnet using Crime Victims Compensation (CVC) funds to get away from him. (Their relationship had been violent in the past.)

By Kathy Dixon
Victim Assistance Coordinator in the District Attorney's Office in Burnet County

That day in May, Hankins entered the house and began to kick and beat Mary as Zeke watched. The boy was scared and managed to hide. Then Hankins fired the gun, shooting Mary in the face before running out the door. Zeke managed to call 9-1-1, and help arrived. Mary was Star-flighted to Brackenridge Hospital in Austin in serious condition. She had a severe head injury, broken ribs, a collapsed lung, fractured bones in her face, and broken teeth.

To repair some of the damage, she had plastic and oral surgery May 5, which left her jaw wired shut. Mary was able to return to work in early June, but she didn't look like the same woman. The scars on her face reminded her daily of the assault.

Our office's involvement

Victim Services became involved with Mary while she was in the hospital when a social worker called our office. Mary was very concerned about Zeke and how witnessing this attack would affect him, and Zeke's father (not the shooter, obviously) completed a CVC application so that the boy could start counseling. We worked with the Attorney General's Office to move Mary to another apartment in the complex and have her old apartment cleaned. She needed lost wages, travel reimbursement to doctor appointments, and new eyeglasses, and Mary continued to have dental procedures to repair the damage to her teeth.

It was not long before she reached her $50,000 maximum with CVC. She wanted to have plastic surgery on her face but needed additional funding. The AG's Office required a letter from a plastic surgeon stating that Mary had a permanent disfigurement that would not improve in her lifetime without surgery and that she is at a disadvantage in the workforce because of her disfigurement. Mary never got the letter.

Andrew Hankins was indicted for aggravated assault with a deadly weapon enhanced with two prior convictions and faced a minimum of 25 years to life. At a pre-trial meeting, prosecutor Tom Cloudt and investigator Henry Nolan (who has since passed away) learned that Mary did not remember any details of the assault other than seeing the defendant come in the door. Mary did not want Zeke to testify, and his counselor advised against it. But thankfully, Hankins entered a guilty plea before Judge Gil Jones and his sentencing hearing happened in May 2005, about a year after the attack. The State was able to put on excellent punishment evidence, and Judge Jones sentenced him to life in prison. After that, Mary stopped by the office occasionally to drop off travel forms for me to mail to the AG's Office, but as with most cases, her life went on without needing our help.

A miraculous phone call

One afternoon I was checking my work messages when I heard one from the Discovery Channel. Some-

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one there was calling victim coordinators around the United States looking for victims who had suffered face trauma. If selected, the victim would have plastic surgery pro bono. I immediately thought of Mary and her desire for plastic surgery! I knew she was the perfect candidate.

Amazingly, Mary has remained in the same apartment and has had the same phone number all these years so I called her. She did not hesitate to say that she was interested! I called the Discovery Channel back, offered Mary's name and phone number, and it went from there. Mary was selected to fly to New York City and a plastic surgeon named Dr. Andrew Jacono would perform her reconstructive surgery.

Mary before surgery

Mary after surgery

A little while later, Mary called and said the Discovery Channel was coming to Burnet to meet her, and she asked if I would come out for a family dinner, which the TV network would film for the show. I accepted, and my husband and I drove out to the lake to meet Mary's family. They were as gracious as Mary and could not thank me enough for giving the Discovery Channel her name. I remember Mary's boyfriend Leo asking me if I had thought it was a legitimate call and I said I didn't even think about it, I was too excited! It did not take long to know this was a strong Christian family who believed in miracles and I was only the tool God used to make it happen. My boss, Sam Oatman, has said many times we are doing God's work. It is times like this that we can see Him moving.

Mary underwent a two-hour surgery to repair her face. She stopped by the office after the surgery, and I could not believe how good she looked. She still had some healing to do, but I could see the change. Mary's story was filmed and the show, called *Facing Trauma*, aired on the Discovery Fit and Health Channel. I was at the Key Personnel and Victim Assistance Coordinators Seminar in Houston when it aired so I recorded it on my DVR, and I could not wait to get home to see it. (A short clip of Mary is on the website at this location: http://health.discovery.com/ videos/facing-trauma-season-1-im-wounded-but-not-down .html.) When I heard Zeke tell about how the scarring on his mother's face reminded him daily of the assault, I just cried. Not only Mary but also Zeke and her family had been living with this constant reminder. I could not believe how beautiful she looked when they showed her picture.

I have worked as the Victim Coordinator in our office for 10 years, and I have seen many people injured from violent crime. Many cases move through the system, yet how many of the victims never have the opportunity to get rid of their scars, both mental and physical? I know from Mary's story that it is very important for victims to be completely restored. Maybe one day the CVC fund will see plastic surgery as necessary for a victim's complete healing, and maybe more surgeons like Dr. Jacono will offer their services on their behalf. As people who deal with victims everyday, let us not forget what it would feel like to see a person you don't recognize in the mirror and know that face is not going away during your lifetime. ❇

Criminal punishment for violating a civil commitment order

How Tarrant County prosecutors tried a sexual predator in front of a jury and won prison time for "technical" violations of his civil commitment

As I sat anxiously waiting to hear the punishment verdict on the trial of Edward Russell, a sexually violent predator we prosecuted for violating the terms of his civil commitment, I wondered if 12 strangers saw the deception and deviance in this man.

By William A. Vassar
Assistant Criminal District Attorney in Tarrant County

It turns out, they certainly did. On October 12, 2011, the jury foreman read the punishment verdict, finding Russell guilty and assessing a 20-year sentence. A wave of relief came over me.

Russell was not the type of defendant I was used to handling. He was unusual: a 44-year-old, three-time convicted felon who, by his own admission, had molested more than 20 children (depending on the day you asked him). Their innocence was forever stolen, and for the vast majority of those kids, justice was never done.

After Russell had served prison time for sexual assault of a child, he was civilly committed as a sexually violent predator (SVP), a post-prison form of intensive supervision and treatment reserved for only the most extreme criminals. (Read more about such civil commitments at www.tdcaa.com/node/6860.) The intention behind such commitment is to prevent SVPs from hurting more victims and to treat their deviant behavior.

But what if a defendant doesn't follow the requirements of his civil commitment? With Russell's case, we tested whether a jury would agree that "technical" violations of a civil commitment order—Russell's doing things that are legal for the average citizen—deserved an additional prison sentence.

An unforgettable defendant

I had just finished a four-year term in our Crimes Against Children Unit where I handled cases involving physical and sexual abuse of children. Many child abusers are ingrained in my memory. Don Martin, for example, molested his 7-year-old granddaughter and took explicit photos of her; Kimball Hailey murdered his girlfriend's 2-year-old son. There were countless others I will never forget. However, I never thought I would see someone as deviant, sick, and manipulative as Edward Russell.

The road to his civil commitment began in June 1990 when he was sentenced to one year and a day in prison for the sodomy of a boy under 12 in Alabama. (He later admitted during a psychiatric evaluation that he had molested two brothers, ages 10 and 12, the younger one about 10 times but the older boy "maybe twice because he wasn't really open to it.")

In 1993 he moved to Canton in East Texas where he rented a room from an unsuspecting family with two young sons. He didn't tell the family he was a convicted sex offender—and he struck again. He was accused of molesting the younger boy while his mother was at work, but he denied the allegations. However, he pled guilty to the charge and received 10 years' probation in 2000, saying, "I agreed to anything they said so I could get probation." However, in a Texas Department of Criminal Justice (TDCJ) Parole Case Summary, he stated that he knew the victim for approximately four years and had abused him four times. "I don't know why I have these urges," Russell stated at the time. He also admitted in his Parole Case Summary that he viewed pornography and had multiple sexual partners during incarceration. He also admitted to abusing more than 14 child victims.

In February 2005, Russell's probation was revoked because he picked up a new case, this time for Failure to Register as a Sex Offender. He was sentenced to four years in prison.

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While in prison, Russell was targeted as a candidate for civil commitment. After going through the process on February 25, 2008, Russell was civilly committed by the 435th Judicial District Court in Montgomery County. He was also given a copy of the Final Judgment and Order of Civil Commitment, which explained the terms and conditions of his civil commitment. He was ordered to "strictly comply with the commitment requirements of Health & Safety Code §841.082 … or be charged with a felony of the third degree." Sexually violent predators who are civilly committed after serving their prison sentences must follow certain conditions, such as completing a daily thought journal (called "doing their homework"), not cussing, not having casual or anonymous sexual encounters, and taking their medication. Abiding by these conditions gives SVPs structure and sets appropriate boundaries for them, while violating these standards might indicate to case managers that an SVP isn't taking his treatment or commitment seriously or, worse, that he might be vulnerable to committing another crime. Though these conditions describe behavior that is legal for the average citizen, they are illegal for an SVP; indeed, Russell signed and affixed his thumbprint on the judgment and order, affirming that he had read and understood them.

On September 5, 2008, Russell was released from TDCJ to Fort Worth, where he moved to the Avalon Half Way house (which, incidentally, is down the street from the Fort Worth Police Department's training academy). There, he met with his case manager, Wesley Griffin, who spent three hours going over the terms and conditions of his civil commitment order.

Within a month of arriving at the Avalon Half Way house, Russell committed several violations, which ranged from not taking his prescribed medication to having casual or anonymous sex. Again, though these actions are not illegal to the average law-abiding person, the importance of complying with the conditions of his civil commitment was clearly spelled out in Russell's order. He was arrested, and his case landed on my desk.

Worth another bite at the apple?

At first glance, I felt like we were trying to get another bite at the apple. Were we really going to prosecute a criminal who actually served his full prison term—even though the United States Supreme Court upheld the process of civil commitment in *Kansas. v. Hendricks*[1]—for not doing his homework and cussing?

Despite the "technical" nature of Russell's violations, we had a very strong case thanks to a mountain of records collected by ACDA Page Simpson; they came from Avalon Half Way house, Montgomery County, psychotherapy, Tarrant County Mental Health and Mental Retardation, and the Council on Sex Offender Treatment (CSOT).

Russell was charged with three counts of failing to complete his thought journal; two counts of separating from his Global Positioning Service (GPS); one count of failing to take prescribed medication; one count of having casual or anonymous sex; one count of using obscene or threatening language; one count of masturbating to the thought of little boys; and the final and most important count: his discharge from treatment.

We had a repeat offender paragraph in our indictment for Russell's failure to register as a sex offender conviction, which upgraded his punishment to a second-degree felony. Pre-trial, I offered 15 years in prison in exchange for a guilty plea. Realistically, I expected the defense would counter with 10 years and we would settle for 12 to 13. His defense attorney, Dan Pitzer, explained to me that Russell felt like no matter what he did, the State of Texas would not stop pursuing him until he was imprisoned. According to Russell, the State was trying to "railroad him" and insisted on going to trial.

Alana Minton, chief prosecutor in the Crimes Against Children Unit, tried the case with me. She stressed that we were trying to put someone in prison for technical violations of his commitment order—rather than, say, molesting another child—so we needed to frame it so as to convince 12 jurors that Russell should return to prison for doing things that seemed small and were, in fact, legal for most people to do. We lined up a few experts, including Russell's case managers, a licensed psychologist who had evaluated Russell, and a treatment provider for SVPs, to testify why following these conditions is so important for SVPs.

This jury trial was going to be a first for our office. Other prosecutors had handled civil commitment violation cases, but the defendants pleaded guilty in one and went through a bench trial in the other

(and received a 45-year sentence). Russell's case would be a first for us.

Fingerprint snafu

A vital piece of evidence was the certified copy of the Civil Commitment Order from Montgomery County. I had foolishly assumed the fingerprint on it was good enough to match to Russell. The judgment and order was our link that the person sitting at the defense table was the same as the person who was civilly committed.

Two weeks before trial, I met with Deputy John Pauley of the Tarrant County Sheriff's Office. He is a fingerprint expert and routinely testifies on behalf of our office. I walked over to his desk in the bowels of the Tarrant County Jail. And when I say bowels, I mean that his desk is under the street, surrounded by glass holding cells containing several inmates.

Deputy Pauley looked at the print through his magnifying glass and then told me he couldn't make an identification, that the print was no good. I began to sweat profusely and nausea built in my stomach. If I lost this trial because I couldn't get the most important piece of evidence admitted, my chief would make me sit in one of those holding cells as punishment.

After a few tense hours, I called the Special Prosecutions Unit (SPU) in Walker County; one of its divisions initiates and pursues civil commitment proceedings. I wanted to find out if Gardell Hatley, the prosecutor who handled Russell's original civil commitment trial, still worked for SPU and might remember—and be able to identify in court—my defendant. Hatley had left the SPU, but with the help of Investigator Mindy Allen, I tracked him down.

He remembered Russell well for two reasons: one, because Russell was supposed to be Hatley's first jury trial, and two, because Hatley had had to use a spreadsheet to keep track of all the children Russell had molested. He agreed to drive to Fort Worth to testify in my case.

The trial

Hatley was our first witness. What was so interesting about his testimony was the picture he painted for the jury about the actual civil commitment trial. Hatley was just an intern at the SPU waiting for his bar results when he was handed the Russell case file. The morning of February 5, 2008, Hatley was driving into work when his cell phone rang. The caller informed him that Russell changed his mind and was actually going to agree to civil commitment. (There went his first jury trial, he thought.) Through Hatley, we introduced the final judgment and order of civil commitment, which contained the line, "Edward Russell agrees to civil commitment in accordance with Health & Safety Code, chapter 841." But most importantly, Hatley pointed at Russell and identified him as the same individual who was civilly committed on the judgment and order.

Our second and third witnesses were Wesley Griffin and Lawrence Daniels, Russell's case managers during his civil commitment. We called them to show that they had discussed the terms and conditions with Russell; that he understood those conditions; what conditions he violated and how; and that case managers can ask the Department of Public Safety for an arrest warrant on every violation. Although in practice, case managers rarely get an arrest warrant when SVPs commit small violations, technically, SVPs have committed a third-degree felony the first time they use obscene language or don't do their homework.

If an SVP fails to complete his homework or leaves the halfway house at an undesignated time, the case managers address the situation and let the SVP know what is expected. It is akin to the idea of progressive sanctions. If an SVP violates one of his conditions, his case manager may have him do an additional assignment. If that doesn't work, the manager can move him from the halfway house to a more secure place, such as the Cold Springs facility in Fort Worth. In Fort Worth, an SVP must commit multiple violations over an extended period before his case managers ask DPS for an arrest warrant.

Griffin and Daniels both testified to the timeline of Russell's violations. Russell was read his terms and conditions on September 5, 2008, and within five weeks, he violated them. His first three violations in 2008—on October 13, October 15, and November 10—were for failing to complete his thought journal. Every SVP in treatment must complete a daily thought journal. This allows treatment providers to address any deviant or unhealthy thoughts that the SVP might have. Griffin and Daniels testified that on November 29, Russell failed to take his Zoloft; on December 12, he had a GPS violation; on January 1, 2009, he had casual sex with a halfway house resi-

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dent; on January 4, he had another GPS violation; and on July 5, he used obscene and sexual language to a fellow resident. After committing eight violations, his case managers decided to place him in the Cold Springs Unit on August 7, 2009, as a punishment.

But the violations didn't stop there. While at Cold Springs, Russell committed more violations: On February 1, 2010, he masturbated to thoughts of little boys (which he later admitted to his case managers) and, three days later, he failed to keep his thought journal. Russell left Cold Springs on April 21, 2010, and the following month, he was discharged from treatment. Case Manger Griffin testified that Russell wasn't vested in his treatment, wasn't taking it seriously, had a poor attitude, and wasn't working the program.

Our next witness was Dr. Stephen Thorne, a licensed psychologist who is in private practice in Austin. He does contract work for TDCJ on evaluating sex offenders for behavioral abnormalities. On June 13, 2007, he had conducted an evaluation of Russell for civil commitment as a sexually violent predator. He testified that he went over the terms and conditions of his evaluation with Russell; he further explained the evaluation would not be confidential or privileged and the evaluation may not be helpful to Russell's current legal case.

Even with these caveats, Russell agreed to talk to Dr. Thorne. Russell described his upbringing and education and admitted to being a victim of sexual abuse by a female cousin when he was 4 years old. Dr. Thorne told the jury that people have a misconception about child molesters and their own victimization. He testified there is no correlation between being the victim of sexual abuse and becoming an abuser. Dr. Thorne testified that Russell had a history of sexually deviant behavior with multiple young male victims. He explained his antisocial orientation and his difficulty complying with probation conditions. He told the jury that Russell committed multiple acts of sexual deviation on several victims and has a limited history of healthy or successful interpersonal and romantic relationships with adults. Dr. Thorne explained how Russell still has sexual thoughts about adolescent males. Finally, he told the jury that, in his opinion, Russell suffers from a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence.

We ended our case with Lawrin Dean, co-owner and clinical director of Psychotherapy Services and Yokefellows in Fort Worth. She has a master's degree in counseling, is a licensed professional counselor, and is a licensed treatment provider for sex offenders. She and her partner, Ezio Leite, another of Mr. Russell's counselors, are two of 12 treatment providers for sexually violent predators in Texas.

She explained why the rules and regulations are important and why, even though some violations seem trivial or unimportant at first glance, they are serious when dealing with an SVP. She testified about the importance of keeping a thought journal and why participating in treatment is important. A thought journal forces an SVP to look at himself and gain an understanding of the cycle of abuse. It is a fundamental tool in looking at how SVPs rationalize their behavior and, most importantly, it helps treatment providers know what thoughts the SVPs have and how to address them.

She testified that SVPs shouldn't use obscene or sexual language because they need to have clear boundaries. SVPs often use sexual language as "bait" with another person, and treatment providers "don't want them to engage in sexual behavior that reinforces their deviance." When asked about the importance of an SVP abstaining from anonymous or casual sex, she explained that SVPs have no previous healthy sexual relationships. Counselors want to stop the type of behavior to which an SVP is accustomed to "teach" them what a healthy sexual relationship is. She also testified how Russell flirted with the "youngsters" (men in their late 20s) in the halfway house. This concerned her because these "youngsters" were the closest to children Russell had access to at the halfway house.

Dean testified that deviant masturbation "strengthens that attraction" and when you "masturbate to fantasies of male children, you reinforce that attraction." Dean said her goal was for SVPs to have "healthy" masturbation. She testified that Russell minimized his behavior and was not "getting it." She thought the defendant was "manipulative and deceptive" and "he wasn't taking it serious."

Dean also testified about what ultimately caused Russell's unsuccessful discharge. After returning from a stint in the Cold Springs

facility, Russell returned to the halfway house, where he took a maintenance polygraph. The polygraph showed he was deceptive when answering questions about his masturbation log. Russell was supposed to keep a log of the thoughts he had during masturbation. In a group session on May 25, 2010, Russell disclosed how he had been "hunching" his mattress while fantasizing about young males. He told the group that he thought he could get by with not reporting this as deviant masturbation because he was not using his hands.

The defense cross-examined all witnesses on the fact that none of these violations are listed in the Penal Code. A normal person could not be arrested for these types of behavior, defense counsel noted. But the jury wasn't buying it. Within 20 minutes of closing arguments, jurors delivered guilty verdicts on every count. The jury would assess punishment, and it was time for them to know just how deviant Russell really is.

Punishment

At punishment, we again called Dean as well as Russell's other counselor, Ezio Leite. We went through specific admissions Russell made in treatment. Granted, we had hundreds of pages of therapy records, each page more disturbing than the last, but we wanted to focus on the most deviant admissions, including his number of victims. Depending on what day you asked him, Russell had a different answer about how many children he molested. One day it was 10; another it was 15. By the end of his treatment, the number was as high as 25.

Dean testified about a group session on November 20, 2008, when Russell stated he would continuously fantasize about abusing his victims. He told the group he would picture them to be accepting of his sexual advances and how they would love him in return. Dean further testified about an individual session on May 28, 2009, when Russell admitted he sexually abused his ex-fiancée's 12-year-old son for two years. He also disclosed that he missed the child more than he missed his former fiancée. During another individual session on March 11, 2010, Russell admitted to abusing 18 male and two female children. He stated he accessed these children by first becoming friends with their parents and then gaining their trust.

The coup de grâce was when Leite took the stand. He testified that, during a group session on January 27, 2009, Russell stated that one summer, he got so obsessed with pornography he broke into homes to steal it. He also told the group that around the same time, he touched the vagina of a 1-year-old baby. This is a depravity that most of us can never imagine.

The jury came back in 45 minutes and handed down the maximum on each count: 20 years. I always watch how a defendant reacts to a verdict. Over the years, I have seen grown men break down into tears, pass out, become angry, fake heart attacks, and cry for their mothers. Russell had no reaction; he just stood there. As Alana and I left the courtroom, we started talking about the verdict and Russell's reaction (or lack thereof). We both agreed that in reality, TDCJ is easier for Russell than civil commitment. Within prison regulations, he can masturbate, doesn't have to keep a thought journal, and isn't attached to a GPS device. When he is released from prison and once again civilly committed, I have no doubt he will end up back at the defense table. My hope is for Russell to stay in prison where he belongs.

Lessons

I learned many things from this trial. I learned I am not a certified fingerprint expert. I learned that this process truly targets the worst of the worst sex offenders. I learned the system tries to work with these people and that their case managers and therapists truly want them to succeed. I discovered it is imperative for any prosecutor handling a case like this to have the SVP's counselor or therapist testify so that a jury can understand why seemingly technical violations are so significant. Kendall Novak, a Special Crimes Investigator with the DA's Office, interviewed several SVPs at the halfway house. Through him, I learned that the SVPs he interviewed believe there is a light at the end of the tunnel and that the system does work.

Lastly, while most men watch ESPN, I learned that these sex offenders prefer to watch *The Suite Life of Zack and Cody* on the Disney Channel.

As a side note, I would like to thank ACDA Alana Minton and Investigator Novak. Tarrant County is safer because of their hard work and dedication.

Endnote

Estoppel by judgment

If you ever find yourself in the muddy mess of an illegal regular probation, the doctrine of estoppel just might help you clean it up.

By Richard Mitchell
Assistant Criminal District Attorney in Wichita County

A brand-new felony ADA—you—just inherited a big caseload from a departing coworker. There is a looming indecency with a child by contact trial on the docket where the defendant has no criminal history but a sad story, and the victim is a family member. No one in the family wants to go to trial or the young defendant to go to prison. You are green and want to be tough on crime, so when the defense attorney suggests straight probation to meet in the middle, you agree. And with the judge's signature, you have set up yourself—and maybe some other prosecutor—for an appellate brief. It will not come right away, but it will come because community supervision is tough and many probationers fail. And if the defendant fails, the new attorney on his revocation case will trot into court wearing that silly grin we all dread. He will look at you and say, "You need to dismiss this revocation because the community supervision was illegal."

You may not even remember the case. You stare at the paperwork, hoping that you are in the World of Wizardry whereby some white hat magic would print the words "deferred" on the paperwork. It doesn't happen, so you berate yourself on the rookie mistake. Your first instinct is to think that the sentence might have been wrong, but the defendant got a great benefit out of it. You try to think back to law school about estoppel. Why should a defendant complain that the bargain was illegal when, with his signature, he stated he read, understood, and accepted as fact that he could be granted probation? You know it's fair, but that knot in your stomach will just get bigger unless you get to the antacid that is Westlaw/Lexis. There you will find some cases, but not many, that may ease your pain.

Heath v. State[1] is a great starting point on the journey through the muddy mess of illegal regular probations. The defendant in this case pled guilty to aggravated robbery and was placed on regular probation.[2] After he was revoked and sentenced, he complained that the probation was not authorized. The court first held that both the order granting probation and the later revocation were void.[3] However, the court struggled as to where the parties stood after the cause was remanded to the trial court. The State offered *Popham v. State, Hartley v. State, Tritt v. State*, and *Branch v. State*.[4] The first three cases all held that the defendant cannot complain upon revocation about an illegal plea-bargained probation, while in *Branch*, the illegal probation was granted by the judge after the jury found the defendant guilty,[5] but the holding was the same as in the other cases.

The *Heath* court in a plurality opinion decided to overrule itself, holding that illegal punishments are void.[6] They also held that a defendant cannot be estopped from complaining about the punishment even though he agreed to it; therefore, a defendant's guilty plea in bargained cases should be withdrawn. Ten years later, this court returned to this issue in a re-examination of *Heath*.

In *Ex parte Williams*, the defendant was granted an illegal regular probation that was later revoked.[7] The majority held that without the defendant showing harm from the illegal probation, no relief can be given. However, Judge Keasler in the majority opinion abrogated the *Heath* decision, suggesting that it extended the law against illegal sentences too far. The court held that the illegal community supervision was not an illegal sentence because suspending a sentence and granting probation is not considered part of the sentence. Therefore, a defendant cannot challenge the punishment at any time in any forum. Presiding Judge Keller in her concurrence helps the cause of the unknowing prosecutor and defense attorney the most; there she concluded that

because the defendant accepted the plea agreement and received a bargained-for benefit, he should be estopped from challenging the trial court's authority.[8]

Finally, in *Rhodes v. State*, the Court of Criminal Appeals answered the question of estoppel.[9] It comes as no surprise that Presiding Judge Keller wrote the opinion. In *Rhodes*, the defendant was convicted of and sentenced to 10 years for escape. However, the 10-year sentence was not ordered, as required, to run consecutively.[10] (There was not conclusive evidence as to whether the sentence was entered as a plea bargain.) The defendant later committed more felonies, which were enhanced by his prior felony offenses. One of the prior enhancement offenses was the escape, which was not ordered to run consecutively. The defendant complained that because the escape conviction was void, it could not be used to enhance his later convictions.[11] In the first part of its analysis, the court concluded that if there were no agreement, then Rhodes' escape judgment would not be void.[12] Because the sentence containing the irregularity could have been reformed on appeal or by *nunc pro tunc*, it cannot be void.[13] The court then turned to the doctrine of estoppel.

Because there isn't much Texas caselaw on estoppel in the criminal world, the court looked to the holdings of high courts in other states. Judge Keller concluded that a defendant should not be able to enjoy the benefits of a lighter punishment than the legal punishment, then attack the legality of the lighter punishment when it is in his interest to do so. This opinion, however, refused to take up the issue of punishments that are illegally harsh and whether estoppel would bar a direct attack on an illegal lenient punishment.[14]

Good news?

Yes, in our situation the young ADA would be able to cite *Williams* and *Rhodes* for the proposition that the defendant benefitted from an illegal punishment. Now some may argue that a deferred would have been a more beneficial punishment for a defendant without an extensive criminal history. In this case the prosecutor would have to convince the judge that a cap on punishment was the benefit that the defendant had in mind when he agreed to the probation, rather than be exposed to the entire range upon revocation. If the judge agrees, the defendant gets sentenced—but your troubles may not end there.

Fast forward a few years to the same defendant on trial for a third-degree felony, which the prosecution wants to enhance to a second. Can this defendant complain again about the void sentence? Yes, he will. Will he win? All the signs say no. ❇

Endnotes

1 *Heath v. State*, 817 S.W. 2d 335 (Tex. Crim. App. 1991)(en banc).

2 *Id.* at 336.

3 *Id.* at 337.

4 *Popham v State*, 154 Tex. Crim. 529, 228 S.W.2d 857 (1950); *Hartley v State*, 169 Tex. Crim. 341, 334 S.W.2d 287 (1960); *Tritt v State*, 379 S.W.2d 919 (Tex. Crim. App. 1964); *Branch v. State*, 477 S.W.2d 893 (Tex. Crim. App. 1972).

5 *Branch*, 477 S.W.2d at 893.

6 *Heath*, 477 S.W.2d at 339.

7 *Ex Parte Williams* 65 S.W.3d 656, 657 (Tex. Crim. App. 2001).

8 *Id.* at 660.

9 *Rhodes v. State*, 240 S.W.3d 882 (Tex. Crim. App 2007).

10 *Id.* at 884.

11 *Id.* at 885.

12 *Id.* at 888.

13 *Id.* citing *Ex parte King* 240 S.W.2d 777 (Tex. Crim. App. 1951).

14 *Id.* at 892.

Going to CLE halfway around the world

An investigatory-attorney pair from Williamson County traveled 31 hours to put on a conference for police and prosecutors in Micronesia. Here's their story.

On November 10, 2011, Assistant District Attorney Robert McCabe and I began a leap of faith and started what would ultimately be a 31-hour one-way airline journey to Chuuk State in the Federated States of Micronesia. Our destination was Weno Island, the largest and most populous island in Chuuk (pronounced "chook"). Our mission was to provide training to police and prosecutors there.

By Chris Herndon
District Attorney's Investigator (above at left), pictured with
Robert McCabe,
Assistant District Attorney (above at right), both in Williamson County

The two questions that I was always asked prior to us leaving were, "Where is Micronesia?" and "How did they find you?" Micronesia is made up of four independent states on more than 600 islands that total less than 250 square miles but spread over a million square miles of Pacific Ocean. The island we were on, Weno, was formerly known as Moen when it was occupied by the Japanese and is known mainly for Truk Lagoon. Truk Lagoon became famous in February 1944 when the U.S. Navy sank an entire Japanese fleet in the lagoon during a two-day battle in World War II known as Operation Hailstorm. Micronesia is still one of the premier diving destinations in the world because of the water clarity and the wreckage that litters the ocean floor from the battle. The water in the lagoon is crystal clear, and wreckage as far down as 60 to 80 feet is visible to the naked eye. Micronesia is a federation of independent states, and almost everyone we encountered spoke English. The U.S. dollar is the only currency used on the island; however, one of the islands, Yap, is famous for having used stone money.

A Micronesian contact

This project began approximately seven months ago when John Bradley, Williamson County District Attorney, called me to his office and asked if I was interested in going to Micronesia to do some training. John had been speaking at a conference in San Francisco and met one of the assistant attorneys general of Chuuk, Micronesia, who was interested in bringing John's material and other topics to his jurisdiction. I began researching the project by contacting the National District Attorneys Association (NDAA), which had previously sent trainers to the island for a similar conference. Shortly after that, I emailed our contact in Chuuk, Aaron Warren, and began one of the toughest logistical battles to do training that I had ever experienced. Aaron is the Legal Trainer for the Chuuk Attorney General's Office and was really excited about finding someone to come to Chuuk.

One of the challenges that the police and prosecutors face there is the cost of bringing training to the island, finding the right mix of personalities to adapt to their lifestyle, and any potential challenges during the training. As a trainer for our office, there are a lot of things I have taken for granted, from the ease of providing handouts, to other things such as always having electricity, the prevalence of computers and other technology. These were all things that would ultimately be challenges for us in Chuuk.

As the planning for the training moved forward, I quickly figured out that the 16-hour time difference, rolling electrical blackouts, lack of computer access for attendees, and the inability to call Aaron on the phone for small issues was going to take some patience. Aaron and I spent a great deal of time emailing pertinent topics for the training, mulling over relevant handouts, and discussing the conference location. One of the specific topics that Aaron wanted to include in the training was a block on how prosecutors and police can use a team approach to prosecution. This would ultimately guide the curriculum that included Criminal Investigations; Evidence Collection and Processing; Arrest, Search, and Seizure; Case Studies; Joint Investigations; Confessions; and Ethics.

Approximately eight weeks before the conference, John Bradley learned that he was not going to able

to attend. Our planning moved forward, but then the issue of who was going to take John's place began. There was a lot of interest among the prosecutors in the office, and as each one began researching what we were going to encounter, only one remained. Assistant District Attorney Robert McCabe, another member of our training team, was on board, and we got to work. Our original plan had been to provide our material on a CD, but Aaron pointed out to me that not all of the attendees had access to a computer, and paper copies would be needed. The contract provided for the costs of reproduction and shipping, which ended up costing $1,700. (Materials took two weeks to get to Chuuk.) Aside from handout materials, we also had to plan for a projector, screen, refreshments, and how to deal with the fact that the island experiences unpredictable rolling blackouts—we never anticipated that some our presentation would be done in the dark. These were all things that we learned to deal with, and our students were extremely gracious and understanding.

Our journey

We set out November 10, 2011, and ultimately arrived in Chuuk three days later. Our trip went through Hawaii, two stops in the Marshall Islands (Majuro and Kwajalein), and two additional stops in Micronesia (the states of Kosrae and Pohnpei) before we reached Chuuk. Aaron and some staff from the Attorney General's Office met us at the airport. It was good to meet him in person after the amount of communication that we had had over seven months. On Sunday, the AG's office staff picked us up and took us to a private island in the lagoon where we ate lunch and were introduced to ocean kayaking. Most of the lunch supplies were provided by the staff, and a lot of items they had brought for us to enjoy were not readily available or cheap to purchase. Robert and I were extremely grateful for everything that they did for us to make us feel welcome, and they continued to treat us this way the entire time that we were there.

Above, the dock at the hotel from which diving excursions left everyday. It is also used for fishing because in the mornings hundreds of fish surrounding the dock are visible to the naked eye. At left, the private island where Herndon and McCabe were taken for their initial welcome party.

Fresh reef fish, sashimi tuna, fried pork knuckle, and Spam made up a lot of the foods that are eaten on the island, and rice is served with almost every meal including breakfast. My favorite breakfast on the island was a selection of fresh fruits and a plate of rice, with a soft shell coconut as my drink. Surprisingly, Spam is very popular in Micronesia because it was so prevalent on the island during and after World War II as a staple of the American service member diet. I tended to stick with steak and fish at other meals, but often you would find that the restaurant was out of beef, and fresh vegetables arrive only once a month.

The following day, Aaron picked us up again and took us on tours of the Attorney General's Office, State Supreme Court, and District Court. Interestingly enough, the criminal codes and evidence statues in Micronesia closely mirror ours, although they do not have jury trials. One of the other differences that we found was that their criminal code allows for an oral search warrant, due to the fact that the distance between islands can prove to be a challenge to

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get a search warrant signed. Unfortunately, this has some severe drawbacks. In some serious cases such as sexual abuse and murder, the police and prosecutors may not know about the case until a boat arrives from an island and the news is brought to the authorities. Obviously, notification that a crime has been committed and chain of custody issues can lead to potentially serious evidence and victim difficulties. Robert and I were diligent to incorporate relevant issues from the Criminal Code of Micronesia into our training, and that extra effort was especially well-received by our audience. We had lunch that day with the director of the Public Defender Office, and that was an enlightening conversation. The defense bar has issues that they feel strongly about, and those were shared with us to provide some contrast to those of the prosecutors.

Our training began on Tuesday, November 15, and the turnout was more than we had planned for: 40 attendees. Originally we had planned for 30, but there was a great deal of interest in the training as people began finding out that it was available. The Forensic Communication Specialist in our office, Su Knight, designed an incredible binder cover for our materials, and it became highly sought-after by attendees who registered at the last minute. The audience was a mixture of police, prosecutors, public defenders, and judges. Most of the attendees were from Chuuk, but we also had a police officer from Yap who flew in for the training, and some people traveled to Chuuk by boat from outlying islands. It was interesting to see boats gathering as people began their commute every morning. It was intimidating as an instructor to see so many faces waiting anxiously to hear what we had brought more than 7,000 miles to teach them. We were treated to lunch that day by the chief justice of the Supreme Court, and he shared with us his thoughts about Micronesia, and I showed him how to use his iPad as a word processor.

The training continued on Wednesday and Thursday, and each day our audience stayed with us through electrical blackouts, language barriers, and the fact that we were doing the training outside the hotel bar. It was interesting to speak to an audience that was largely unfamiliar with Facebook and technology used in crimes. The police and prosecutors in Chuuk solve and prosecute crimes on a daily basis through hard work and without the benefit of a lot of the technology that has made our jobs in the United States so much easier. The evidence collection block seemed to be the most difficult because the police on the island have very few resources for collecting evidence, and fingerprint evidence is one of the things that the police are trying to incorporate.

On Wednesday the director of the Department of Public Safety took us on a tour of the jail. It was quite different than any other jail I had ever been to, and one of the most interesting things was that there was no separation or classification of the inmates. Each cell had a mix of juvenile, felony, and misdemeanor suspects. We were presented with hand-carved wooden turtles and patches from the Department of Public Safety, and again, they were extremely great hosts.

That evening we went to the Jesuit High School, Xavier High, that sits on top of the island. The interesting point about the structure is that during World War II the buildings served as the communications headquarters for the Japanese Army, and it still bear scars from shelling. The view from atop the school is breathtaking with palm trees, the ocean, and other islands as far as you can see.

The training ended on Thursday with a reception for us hosted by the attorney general and his staff. It was important to Robert and me that we bring something unique from Texas to give our hosts. Larue Tactical in Leander donated fantastic gifts for us to exchange, and our hosts now all have Texas T-shirts, hats, and armadillo beverage entry tools (bottle openers). The gifts we received included hand-carved turtles, flags, and fertility sticks. (You will have to call or email me if you want to hear the history behind this gift.) In addition, our hosts met us at the airport the next day with leis and crowns made from the most beautiful flowers we had ever seen or smelled.

Robert and I look forward to the opportunity to return to Micronesia and to see our hosts. The value and experience of planning and executing an international conference has brought a huge benefit to our office. The Chuuk State Attorney General's Office did a great job in finding the funding for our trip, and they were some of the best vacation days that I have ever taken in the office. Meeting the challenges of breaking through language barriers, electrical blackouts, and an international audience have been instrumental in our development as instructors, and we can't wait to do it again. ❇

A not-so-standard termination trial

How Wichita County prosecutors went a few extra miles to ensure the safety of a 3-year-old boy

Back in May, we wouldn't have guessed that a standard termination trial to the CPS magistrate would teach us the wisdom of basketball great Michael Jordan's advice: "Obstacles don't have to stop you. If you run into a wall, don't turn around and give up. Figure out how to climb it, go through it, or work around it."

By John Gillespie
First Assistant Criminal District Attorney, and
Grace Pandithurai and Stephani Logue
Assistant Criminal District Attorneys, in Wichita County

Our goal was simple: to secure termination of 3-year-old Zachary's parents' rights for endangerment so the little boy could be adopted by his foster mother into a stable, loving family. We had no clue then of all the obstacles that would stand in our way.

The background

Zachary's parents, LuAnn and Mario (not their real names), met at a local homeless shelter and had slept together the first day they met. Both suffered from serious mental illnesses and were chronic marijuana abusers. Zachary was born in October 2008. In August 2009, CPS removed Zachary because of severe domestic violence in the home and because both parents were not taking their psychiatric meds and were smoking pot, which exacerbated their mental illnesses.

In September 2010, the child protection court magistrate ordered a monitored return, but two months later, the monitored return was disrupted because both parents endangered Zachary when they took the toddler on a 2 a.m. joyride through the city on a cold November morning.

LuAnn, the mother, was driving, even though she was impaired from her medication. During their joy ride, they had a flat tire. When police arrived for a welfare check, Mario, the father, fled the scene because he was in possession of marijuana. LuAnn was then arrested for DWI, which left Zachary without anyone to care for him. Following this incident, LuAnn was given two months to get back on her meds and go to counseling, but she did neither. So the plan changed from reunification to termination.

Termination bench trial

At the May termination bench trial before the magistrate, both parents admitted to their endangering conduct around Zachary. They both conceded that they had been told that marijuana use worsened their mental illnesses but that they continued to smoke pot anyway. They also admitted that Mario had repeatedly physically abused LuAnn with Zachary present.

Both the attorney ad litem for Zachary and the child advocate advised termination. All parties rested and closed on May 11. The CPS magistrate took the case under advisement. (Because every child deserves a permanent, stable family, the Family Code mandates strict timelines that every CPS case must follow. All CPS cases must have a final order within 12 months from the date CPS was named temporary managing conservator or within 18 months if an extension is granted. The Family Code allows no temporary orders after the drop-dead date. If the drop-dead date is missed, CPS is automatically dismissed from the case and the child is sent home to the parent who had legal custody before the removal.)

Our drop-dead date was May 15, but the Texas Family Code permits a final order in a case to be entered after the drop-dead date so long as the final trial on the merits started before the drop-dead date.

Nine days after we closed, the magistrate announced that she would not make a decision. The magistrate stated on the record, "I have a real problem ruling out straight in this case" and said that she "would reserve a ruling of any kind on the final hearing." She proceeded to order another monitored return, then she proposed to rule on the

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bench trial at the end of a six-month period. The magistrate also announced that at the end of the six-month period, she would permit the parties to re-open to allow evidence "for matters that transpire after the last date evidence was admitted in the trial so far." The magistrate entered her written monitored return order on June 10, almost a month after the expiration of the drop-dead date set by the Family Code. This six-month wait on the magistrate's decision was very unusual: A typical jury in a termination trial will deliberate and reach a verdict in a matter of hours. And not only was the delay extraordinary, but the temporary order was also untimely because the magistrate missed the all-important drop-dead date by a month.

The first appeal

We immediately obtained a stay from the referring court to prevent Zachary from being sent back to that chaotic environment. Procedurally, we were unsure of our next step. While the Family Code provides a *de novo* appeal of an order by the magistrate to the referring court, the magistrate had refused to rule. We saw three viable options: 1) ask for a *de novo* appeal before the referring court, treating the magistrate's non-ruling as a ruling; 2) ask the referring court to order the magistrate to rule; or 3) seek a mandamus from the court of appeals.

To be safe, we decided on a hybrid approach: We would ask the referring court to treat the magistrate's non-ruling as an appealable ruling and ask for a *de novo* decision; alternatively, we would ask the referring court to order the magistrate to rule. We also discovered that both district and county courts-at-law possess mandamus power to enforce their jurisdiction—so a referring court wields mandamus authority over a magistrate.

We were convinced that once all parties rested and closed, the magistrate had a non-discretionary duty to rule on the termination petition. The magistrate had also placed us in a dangerous procedural position: The monitored return order after the dismissal date was void and did not extend the timeframe. If the order was not overturned, then six months later, attorneys for Zachary's parents could argue for the case to be dismissed because our time had expired.

After a hotly contested hearing, the referring court adopted the magistrate's decision on July 7 and ordered Zachary returned home by 5:00 p.m. on July 8. This was our second major setback.

Mandamus to the court of appeals

To prevent Zachary from being sent back to his parents, we sought a mandamus from the court of appeals. We received the referring court's ruling late in the afternoon on July 7. So four of us (we three recruited Jonathan Ellzey, another prosecutor, to help) divided the task of putting together the mandamus petition. As we pulled an almost all-nighter, we had flashbacks of cramming for law school finals. When we filed our petition for mandamus on the morning of July 8, the referring judge graciously stayed his order.

Our petition for mandamus had two points. First, we argued that the magistrate abused her discretion by failing to issue a final ruling after all parties rested and closed. The Texas Supreme Court, in *Texas State Bd. of Examiners v. Carp*, explained that once a case has been "fully developed in the trial court and is ripe for judgment," then "a judgment should be rendered and such action may be compelled by mandamus."[1] While appellate courts will not tell inferior courts how to rule, they will order them to issue a decision.

Second, we argued that the monitored return order issued after the dismissal date was a void order. While §263.401 of the Texas Family Code permits the court to enter a final order after the dismissal date when the final trial on the merits began before the dismissal date, we argued that a monitored return was a temporary order that was not authorized under §263.401.

On August 11, the court of appeals granted our petition for mandamus on our second point, holding the magistrate lacked the power to order a monitored return after the dismissal date.[2]

The court of appeals declined our first point because the magistrate was operating under the misimpression that "the case was ongoing and not yet ripe for judgment because she had ordered a monitored return." The court of appeals declined to order the entry of a ruling when the court had not yet refused to rule. Interestingly, in concluding its opinion, the court of appeals echoed the language from the Texas Supreme Court case, that by setting aside the illegal monitored

return order, it left "the case ripe for a final judgment." We suspected that the court of appeals was saying it now expected a final ruling from the magistrate.

We also learned that the court of appeals lacks direct mandamus authority over a magistrate, but it possesses mandamus jurisdiction over the referring county court. To invoke appellate court mandamus jurisdiction, CPS must first appeal to the referring court and obtain an order from the referring court.

Once the mandamus issued, the referring judge immediately vacated the monitored return order and directed the magistrate to rule.

Third time's not the charm

Just as we were coming off the high of a rare mandamus victory, we received word that the magistrate was sending Zachary home with his mother. While we believed adoption was in the child's best interest, we had been prepared for the magistrate to order permanent managing conservatorship. We were not willing to accept Zachary being returned to his mentally ill mother who had endangered him in the past, so we filed for a de novo appeal and requested a jury trial. We decided it was time to see what six average citizens thought about the evidence.

Calling in the closer

In baseball, managers call in closers to protect the lead late in the game. We decided it was time to call in a closer of our own: Versel Rush. Versel works as a "traveling terminator" for CPS, primarily handling termination trials in small counties. Her record in termination trials is unmatched.

When Mario, Zachary's father, took the stand, he was visibly disturbed. His wild eyes gyrated out of sync with the rest of his body. Mario had trouble recalling any of the events in question, stating "I don't know" repeatedly. He testified that he had been a paranoid schizophrenic since age 9. He admitted to repeatedly using marijuana, even though doctors advised him that it worsened his mental illness.

Mario acknowledged assaulting his wife, LuAnn, many times with Zachary present, repeatedly strangling, scratching, punching, screaming at, and throwing things at her. At one point while Versel was grilling him about his abuse toward LuAnn, Mario turned to the judge and said, "Do I have to answer that? It's incriminating!"

Mario proudly declared he was a member of a criminal street gang and bragged he was wearing gang colors. He also admitted he was a hustler and a dealer. Finally, he conceded that he had endangered Zachary with his drug use and his violence toward LuAnn with his son present.

Mario also testified that his apartment was infested with rats. To catch them, he would spill some Coca-Cola on the floor. When the rats would come to drink the Coke, he would stab them with a fork. Following his testimony, he was taken by a deputy to a mental health respite unit.

LuAnn's testimony

Compared to her husband's erratic demeanor, LuAnn displayed a flat affect. She took a long time to answer basic questions, beginning her answers with, "I'm gonna say …" This sounded more like an indecisive person ordering food at a restaurant than someone testifying truthfully from memory. Versel forced LuAnn to admit she had lied twice to the jury.

LuAnn testified that even though she was schizophrenic, she continued to smoke pot. She admitted to both repeated pot use and to sporadic use of psychiatric meds since Zachary's birth, which endangered her child.

At the bench trial, both parents had admitted to two joint episodes where their violence and pot use had endangered Zachary. At the jury trial, Versel again confronted them with these incidents.

LuAnn also testified that she was going to Alcoholics and Narcotics Anonymous, but she couldn't describe anything about the programs, she didn't have a sponsor, and she had stayed on Step 1 for 18 months. Both parents also admitted that CPS had repeatedly tried to help them with all their issues to provide a stable environment for Zachary.

Some of the strangest testimony at trial related to LuAnn's sexual relationship with a man known as Cali. LuAnn testified that Cali was a stranger she had met on a city bus in September 2011, about a month before the termination trial. She testified that she did not know his name, but that they had sex the first day they met. She also testified that he then stole her car.

The DV counselor

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Once the department rested, LuAnn's attorney called a domestic violence counselor who had worked with LuAnn. On direct, the counselor testified that LuAnn was doing well in counseling and making real progress. On cross, she acknowledged that counseling was based on self-reporting, which LuAnn had repeatedly failed to do. "You can't even tell this jury that LuAnn has been truthful to you in counseling?" Versel asked. Hanging her head, the counselor said, "No, she has not been truthful to me."

The closer closes

In closing, Versel noted that 3-year-old Zachary had spent every birthday in foster care. While the jury could not make the parents take their meds, stop smoking pot, or stop having violent outbursts in front of their son, Versel argued that they could decide what bed Zachary wakes up in each morning. Going through a list of all the ways CPS had attempted to help the parents, Versel pointedly asked the jury, "What more could we do?"

"Children don't have time for their parents to grow up," she declared. After three years, Zachary didn't have any more time to wait for his parents to get their act together "someday" or "maybe." But Zachary had a foster mother who loved him and who wanted to adopt him.

Finally, Versel noted Einstein's definition of insanity as doing the same thing over and over and expecting different results. "When they ask you to send Zachary home into that chaotic environment, they are literally asking you to be insane," she concluded.

After just 13 minutes of deliberations, the jury returned a unanimous verdict, finding that both parents had endangered Zachary and that their rights should be terminated. Significantly, the jury's termination verdict was based on essentially the same facts that we proved at the bench trial in May.

While we ran into plenty of walls in this case, we found out Michael Jordan was right: "If you run into a wall, don't turn around and give up. Figure out how to climb it, go through it, or work around it." Knowing that Zachary wakes up each morning in a safe bed in a stable house with a loving foster mom makes all of our legal wall-climbing and all those procedural workarounds worth it. ❇

Endnotes

1 388 S.W.2d 409 (Tex. 1965).

2 *In Re Texas Dept. of Fam. & Protective Serv.*, 348 S.W.3d 492 (Tex.App.—Fort Worth 2011, no pet.).

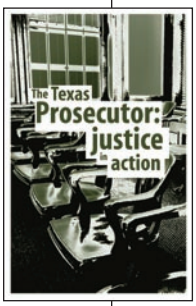
Law & Order Award winner

Senator Joan Huffman, second from left, was honored with TDCAA's Law & Order Award at our Key Personnel & Victim Assistance Coordinator Seminar in Houston in November. She is pictured with (left to right) Galveston County Criminal District Attorney Jack Roady, Galveston County ACDA Kevin Petroff, Bexar County ACDA Katrina Daniels, and Fort Bend County District Attorney John Healey.

E-books are here!

TDCAA announces the launch of two new e-books, now available for purchase on Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both ~~strikethrough~~ underline text to show the 2011 changes *and* annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; $20) and Code of Criminal Procedure (2011–13; $25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can only be purchased from the retailers. TDCAA is not directly selling e-book files. ❇

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 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. ❇

A note about death notices

The Texas Prosecutor journal will begin accepting information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at wolf at tdcaa dot com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

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