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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**

# When 'intoxicated' is a defendant's 'normal'

## How Hood County prosecutors tried a DWI case with legally prescribed drugs as the intoxicants

*By Lori J. Kaspar*
County Attorney in Hood County

We faced what seemed to be an insurmountable challenge in *State v. Brian Thomas Miller*.[1] The defendant was a disabled veteran who looked like a member of ZZ Top. He had been caught speeding and driving recklessly on a stretch of highway in Hood County. He had a 25-year history of chronic pain and anxiety. He took Soma (carisprodol), Vicodin (hydrocodone), Valium (diazepam), and Restoril (temazepam) every day. Miller's doctor claimed there was "no indication he appeared to be overmedicated, sedated, or lethargic" during his regular check-ups and said there was "no record of medication misuse."

The defense repeatedly urged us to drop the case, saying Miller was "mistakenly charged with DWI." Defense counsel even tried to argue that no one had ever warned Miller *not* to drive while on his medication. Everyone who had had regular contact with Miller told us he looked "normal" on the video. But what they were really saying was this: Being intoxicated on prescription meds was Miller's "normal."

While the defense's arguments might have sounded persuasive, the case looked a lot different from our perspective. We were convinced that Miller was a danger to himself and others and had no business driving on our roads.

### The stop and arrest

At 1:46 p.m., a DPS trooper spotted Miller's car going too fast on a two-lane road. He clocked Miller's speed at 71 miles per hour in a 60-mph zone. Miller passed another car less than a quarter mile before a stoplight, made a right turn, immediately got into the left-turn lane, and pulled into a convenience store. The trooper turned on his lights and pulled into the parking lot behind him.

The trooper immediately noticed that Miller's speech was "extremely slow and slurred." Miller had a white film buildup in the corner of his mouth and also had a white film stuck in his beard. (Our drug recognition expert [DRE] would testify that the white film indicates ingestion of a narcotic analgesic.) When the trooper asked for his insurance, Miller stared at a Discount Tire envelope as if he thought it were his insurance document.

When the trooper told Miller he was going 71 in a 60, Miller mumbled that he thought the speed limit was 70. When the trooper asked Miller why he passed a vehicle just before the intersection, Miller said his mother was sick and he needed to get back to the house. The trooper asked Miller if he worked; Miller replied he was disabled and had what sounded like "Rhome Tory Arthritis." Miller initially denied taking any medication for his disability, but later he admitted taking one 5-mil-

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# Texas Prosecutors Society welcomes new members

The Texas District and County Attorneys Foundation held a reception in December in honor of the newest members of the Texas Prosecutors Society. The reception, which was in conjunction with the Elected Prosecutors Conference, welcomed the 12 newest members who make up the 2014 class of the Society: **Alice Brown, Donna Goode Cameron, Skip Cornelius, Alan Curry, Tony Fidelie, Elizabeth Godwin, Dan Hagood, Helen Jackson, Kris Moore, John Pool, Ed Porter**, and **Roe Wilson**. (See page 15 for some photos from that evening's reception.)

*By Rob Kepple*
TDCAA Executive Director in Austin

The society, founded in 2011, is a network of current prosecutors, former prosecutors, and others with an abiding interest in our profession who are dedicated to advancing the profession well into the future. Society members are responsible for creating and growing the Foundation's Endowment Fund, which will be a cornerstone of the association's support and training efforts well into the future.

And I want to thank the sponsor of the event, the National Insurance Crime Bureau. The NICB is a nonprofit that works to identify additional resources for prosecutors who have insurance fraud cases, as one might expect Texas has its share of this crime. Its support is much appreciated, as is its work to support Texas prosecutors. ❇

## *Recent gifts to the Foundation**

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* gifts donated between October 3 and December 5, 2014

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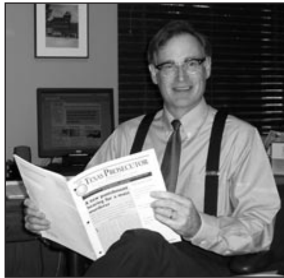
# 2017 Annual Conference in San Antonio!

You read that right. The 2017 Annual Criminal and Civil Law Update will be held at the San Antonio Convention Center on September 20–22, 2017. This is the first time we have been able to crack into the San Antonio convention market with our largest conference. It means that we will be able to hold all of the seminar's tracks, meetings, and meals in one place, which has been a challenge as our membership grows. We will contract with a number of hotels within easy walking distance of the Convention Center so that attendees can leave their cars behind. In addition, the legendary Riverwalk will provide y'all with plenty of after-hours options.



*By Rob Kepple*
TDCAA Executive Director in Austin

## Thank you for your service

It is with much appreciation that I thank the elected prosecutors who left their posts at the end of the 2014. I have personally witnessed every one of these individuals stand up and fight for the people of Texas and this profession, and they were impressive. Thanks to **Rene Guerra** (CDA in Hidalgo County); **Trey Hicks** (CDA in Caldwell County); **Doug Lowe** (CDA in Anderson County); **Judge Susan Reed** (CDA in Bexar County); **Joe Shannon** (CDA in Tarrant County); **Joe Smith** (CDA in Tyler County); **Sherri Tibbe** (CDA in Hays County); and **Craig Watkins** (CDA in Dallas County). The state has benefited from your service!

## Welcome to the Class of 2015

With 335 elected prosecutors, our profession will always have new folks to welcome. (For a list of the folks who took office on January 1, 2015, see the box below.) Our job at TDCAA is to make sure prosecutors have what they need to do their jobs, and we are anxious to serve. And if you know one of the new folks or are a neighbor, I hope you will give them a call and welcome them!

### *New elected criminal district attorneys and county attorneys as of Jan. 1*

**Christopher Baran**, CA in Young County
**Lou Ann Cloy**, CDA in Tyler County
**Rebekah Gay Filley**, CA in Lynn County
**Baldemar Gutierrez**, CA in Duval County
**Judge Susan Hawk**, CDA in Dallas County
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**Fred H. Weber**, CDA in Caldwell County
**Judge Sharen Wilson**, CDA in Tarrant County
**Judge Robert Wortham**, CDA in Jefferson County

## $35 million in asset forfeiture funds for rape kit processing

In November **Cyrus Vance, Jr.**, the Manhattan District Attorney, made quite a splash when he announced that his office would dedicate $35 million in asset forfeiture money to test the national back-log of rape kits. It seems that every jurisdiction has found untested kits that are years, if not decades, old and with the burgeoning database of offenders' DNA, someone finally snapped that it was time to test all the kits. In New York, for instance, it took four years to test 17,000 kits, with a net of 49 indictments of finally identified suspects.

The funds come from a multi-billion-dollar settlement with a French bank for violating financial regulations. The first step in the process will be to confirm that no jurisdiction in New York has a rape kit backlog. Once that is done, a procedure will be mapped out for local law enforcement agencies from around the country to apply for funding. We will keep you informed.

## Stash House Rewards Program

Something about the title of this new law enforcement program could be misleading to a drug dealer, but the Criminal Justice Division of the Governor's Office has announced a new program you need to know about. The new Texas Stash House Rewards Program is designed to combat transnational crime by

encouraging Texans to anonymously report information on stash houses used for smuggling drugs, illegal aliens, and trafficking victims. Under the program, Texas Crime Stoppers will pay up to $2,500 for information leading to those stash houses. If you want more information on the program, go to www.thetexascrimestoppers.org.

## Damned if you do, damned if you don't

This falls under the "thankless job" department, but it is pretty funny. Recently a defense attorney/blogger posted about what you'd think was a victory for him and his client. He blogged that in a pre-trial writ he challenged the constitutionality of the Texas online impersonation statute. He reported that the prosecutor agreed with him off the record, dismissed the case, and followed up with a less serious charge warranted by the facts. A win, right?

Not in the mind of this attorney. He crabbed on his blog: "What is wrong with these people? Doesn't [the DA] have an obligation to defend Texas's penal statutes against constitutional attacks? Do I have to notify the Attorney General to get some opposition? It looks as though I'll have to go to some other county to get an appealable opinion upholding or striking the Online Impersonation statute."

It is not often that a lawyer complains that a prosecutor isn't charging his client with a serious enough offense. I can just imagine the reaction of the client if his lawyer had been successful in getting the prosecutor *not* to drop the more serious charge. "Uhhhhh, thanks?"

The blog posting does validate that unique facet of our jurisprudence that requires a case be in controversy before a court may rule on the validity of a law, thus shying away from advisory opinions. And it reinforces what Abraham Lincoln once said: "The best way to get a bad law repealed is to enforce it strictly."

## Together for Safer Roads

It is not often that your business is impacted by something at the United Nations, but in November an interesting announcement took place at the UN that may be very good news.

On November 13 Anheuser-Busch InBev announced a new traffic safety initiative with some new partners: AIG, AT&T, Chevron, Ericsson, Facebook, IBM, iHeartMedia, PepsiCo, and Walmart. The new initiative is called Together for Safer Roads. Its purpose is to create an innovative coalition that brings together global private-sector companies to focus on reducing deaths and injuries caused by road traffic collisions. Why announce at the United Nations? Because traffic collisions are the eighth-leading cause of death worldwide and are expected to rise to the fifth-leading cause of global deaths by 2030. (Note that the world still has some more driving to do to catch Texas, where traffic collisions are the fourth-leading cause of fatalities.) You can read more about the program at www.togetherforsaferroads.org.

They have a pretty catchy slogan: "Let's Drive Change." And they hit the nail on the head when they observe that although death from disease gets the headlines (think Ebola), far more people are likely to suffer because of road traffic collisions.

Finally, you may recall that TDCAA had partnered with Anheuser-Busch InBev on three separate occasions to produce DWI Summits in Texas and nationally, under variations of the name "Guarding Texas Roadways." These have been great training events using the communications networks of Anheuser-Busch (complete with its own communications satellite). Stay tuned—with this new initiative, we are in a position to announce a fourth DWI Summit in November 2015!

## Are you being targeted?

Well, maybe. The American Civil Liberties Union recently announced that it had received a $50 million grant from George Soros' Open Society Foundations. The goal: to reduce incarceration by 50 percent in eight years.

Wow. That's some goal to achieve in eight years. In the last decade many of you have worked with the Council of State Governments, the PEW folks, and others to develop diversion and other programs aimed at reducing incarceration in favor of "evidence-based" alternatives. Some great stuff has happened in Texas and elsewhere, and the work is continuing. However, I can't imagine a program that can cut incarceration nationwide by 50 percent in eight years … that costs only $50 million dollars.

It appears that there may be a strategy change. Reports indicate

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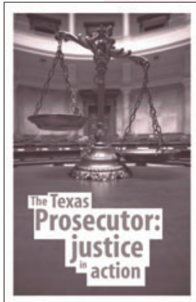
N E W S W O R T H Y

## Electronic versions of the Code of Criminal Procedure and Penal Code available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). Because of fewer space limitations in electronic publishing, these two codes include both ~~strikethrough~~ underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code and Code of Criminal Procedure—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

## *Prosecutor booklets available for members*

We at the association recently updated our 12-page booklet 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 email the editor at sarah.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. ❇

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that the money is not flowing to traditional efforts to lower incarceration rates through reduced recidivism, treatment, and "justice reinvestment" initiatives. The money is going to the political arm of the ACLU, which apparently has much more freedom to use it in a more advocacy-oriented way. It is reported that Anthony Romero, the Executive Director of the ACLU, promised to spend the money on advertising related to drug policy, mandatory sentencing, and prison re-entry. Furthermore, he promised to develop a state-by-state database describing who is in prison and then "target" local politicians and prosecutors who promote "over-incarceration." (His words, not mine.)

Not sure what that means or what form that will take in Texas. But I doubt it means you will be getting additional drug treatment beds with any of these funds.

## *Hitler's First Victims*, and a courageous prosecutor

The *Wall Street Journal* recently wrote a book review of *Hitler's First Victims*, by Timothy W. Ryback. I picked the book up at the suggestion of **Bill Torrey**, the County and District Attorney in Milam County, and couldn't put it down. The story is about Josef Hartinger, a Bavarian prosecutor who sought murder indictments against some guards at a detention center. The guards were members of the Protection Squadron (Schutzstaffel, or "SS" for short.) In the spring of 1933. When Adolf Hitler had just become Chancellor of Germany. In a then-unknown town called Dachau. Oh, and a guy by the name of Heinrich Himmler was the Chief of the Bavarian Police.

So far so good, yeah?

You might imagine the case did not come off without a hitch. Or at all, because the government passed a law in August 1933 to discontinue all criminal investigations that could harm the reputation of the National Socialist Government. But Hartinger survived the war, was absolved of any suspicion of complicity with the Nazi regime, and had a quiet if undistinguished career. With one important post-script revealed in the book: the work of that one prosecutor had a significant impact on the final resolution of the war crimes trials at Nuremberg.

## The dean of Texas county attorneys

In the last edition of *The Texas Prosecutor* journal, we honored the dean of Texas district attorneys, **Rene Guerra**. At the end of 2014 Rene had served 33 years as the elected Criminal District Attorney of Hidalgo County, and that is quite an achievement. **Bruce Curry**, a DA in Kerr County, is the current Dean of DA's at 30 years. I had asked if anyone knew who might be the longest serving of Texas county attorneys, and it looks like we have an answer. Drum roll, please.

The dean of Texas county attorneys is none other than **Joe Warner Bell**, who has ably served the citizens of Trinity County for 37 years. It is an honor to serve someone who has clocked nearly four decades of service to his community. Keep it up, Joe! ❇

# Sequential v. simultaneous lineups: Have we changed too quickly?

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

In cop shows and movies, lineups are always done in person. The live lineup usually involves several guys standing against a wall and a frightened witness peering through a one-way mirror at the suspects. In the classic movie *The Usual Suspects*, five very different-looking men are placed in a lineup. They are required to step forward and read a statement that was uttered during a robbery. Each suspect takes his turn mocking the procedure by interpreting the statement in a unique and sometimes hilarious manner. It turns out that the lineup is a ruse. These five men are all career criminals and police would never put them all in the same lineup. The real point of the arrest is to put the men in a cell together and see if they will turn on each other.

In real life, lineups are much less theatrical. Live lineups rarely happen, and police would never put five actual suspects in the same lineup. While there is less theater surrounding lineups in the real world, there is a great deal of controversy on how exactly lineups should be administered. The controversy between simultaneous and sequential photo lineup procedures is back in the spotlight, thanks to a new study published by the National Academy of Sciences.

## How we got here

In 2011, the Texas Legislature ordered the Law Enforcement Management Institute of Texas (LEMIT) to produce a model policy for eyewitness identification procedures. At the time, only about 12 percent of Texas law enforcement agencies had written policies related to photo lineup presentation.[1] Clearly, such written policies were needed. Most of the changes LEMIT recommended were non-controversial, but one suggestion was a departure from common practice in many jurisdictions.

The big change LEMIT made was the preference for sequential photo lineup presentation in which photos are shown to a witness one after another (as opposed to the more common simultaneous presentation of multiple pictures in one lineup, as in a live lineup). The change to sequential photo lineup procedures was the result of years of advocacy by criminal justice reform groups and was based in part upon studies conducted in the 1990s and early 2000s. These early studies indicated that sequential photo lineup procedures were superior at reducing the number of false identifications compared to the traditional photo array. Criminal justice advocacy groups, such as the Innocence Project, used these studies to push for policies favoring sequential presentation across the country. After all, three-quarters of all DNA exoneration cases nationally were the result of errors in eyewitness identification.[2]

In the mid-2000s, the scientific literature started to question the superiority of sequential lineups. A 2006 review of the early studies supporting sequential lineup presentation determined that nearly half were unpublished experiments, many of which consisted of undergraduate student projects with unknown methodologies.[3] However, momentum was clearly in favor of sequential lineups. By around 2011, several large jurisdictions across the state of Texas had switched to sequential lineups. This momentum shift, pushed by criminal justice advocacy groups, ultimately resulted in LEMIT favoring sequential lineup presentation in its model policy.

As a result of LEMIT's model policy advocating for sequential photo lineups, many law enforcement agencies across the state have adopted sequential photo lineup procedures. In my district, all six law enforcement agencies have moved from simultaneous procedures to sequential identification procedures.

Those jurisdictions that have not moved to the sequential procedure have been held up for ridicule by the media. The *Houston Chronicle* newspaper ran three articles in a row in January 2013 excoriating the Houston Police Department and the Harris County Sheriff's Office for

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not adopting the sequential procedure. The articles had titles like, "Area Police Are Ignoring Science on Eyewitnesses" and "HPD, Sheriff Using Questioned Photo Lineups." With headlines like that you don't need to read the articles to know that they were highly critical of Harris County law enforcement. The tenor of the articles suggested that law enforcement didn't want to change their procedures because they were unconcerned about wrongfully convicting innocent people.

## "Identifying the Culprit"

It turns out that all of this outrage may well be misplaced. Because of the interest surrounding the issue of eyewitness identification, the National Academy of Sciences (NAS) put together a special committee to review the literature and to make recommendations regarding best practices. The committee was tasked with determining if the data favored the move to sequential lineups or if caution was needed before shifting away from simultaneous lineups.

The committee met several times and heard testimony from numerous experts. In October 2014, the committee released its report, "Identifying the Culprit." In its report, the NAS notes that the relative superiority of simultaneous versus sequential lineups is unresolved. It also noted that care and caution should be used when considering changes to existing lineup procedures. (It may be a little too late on that front!) The NAS report even cites studies that support the superiority of simultaneous photo lineups. One of them, by Amendola and Wixted, determined that the identification of innocent suspects is less likely and identification of guilty suspects is more likely when using the simultaneous procedure.[4] This finding is also supported by Dr. Heather Rowe of the University of Leicester, who has done extensive research on eyewitness identification. Dr. Rowe's team has carried out hundreds of staged lineups to determine which method is more accurate. According to her research, sequential photo lineups should no longer be recommended.[5] These conclusions were also reached by Roy Malpass, longtime professor of criminal justice at the University of Texas at El Paso and head of the Eyewitness Identification Research Laboratory.[6] Malpass recommends abandonment of the preference for sequential lineups and a return to simultaneous presentation of suspects.

As you can see, even the experts differ on the best way to present lineups to a victim-witness. But there are several basics upon which proponents of both kinds of lineups can agree: Easy written instructions should be given to witnesses, the lineup should be presented by an officer who doesn't know the suspect (known as a "blind" administrator), the witness should be told that the suspect may or may not be in the lineup, an audio or video recording of the presentation is preferable if possible, and the witness should provide a "level of confidence" statement at the time of the identification.

As prosecutors, we should keep a close eye on the developments in this field. Considering the studies that have already been released, it may be time for us to start a conversation with LEMIT and our local law enforcement about switching back to simultaneous lineups. ❇

## Endnotes

1 www.shsu.edu/~pin_www/T@S/2011/eyewitness.html.

2 www.ipoftexas.org/eyewitness-id.

3 www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2976&issue_id=72013.

4 Amendola, Karen L. and Wixted, John, "Comparing the diagnostic accuracy of suspect identifications made by actual eyewitnesses from simultaneous and sequential lineups in a randomized field trial," *Journal of Experimental Criminology*, October 2014, abstract online at www.researchgate.net/journal/1573-3750_Journal_of_Experimental_Criminology.

5 www.criminallawandjustice.co.uk/comment/Reforming-Eyewitness-Identification-Evidence.

6 http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_152152.pdf.

# TDCAA Victim Services Board 2015

New members were recently elected and appointed to TDCAA's Victim Services Board for Regions 1, 3, 5, and 7. Board members for 2015 are:

**Chairperson: Tracy Viladevall**, McLennan County CDA's Office
**Region 1: Angel Morland**, Potter County Attorney's Office
**Region 2 & Secretary: Serena Hooper**, Andrews County & District Attorney's Office
**Region 3: Dalia Arteaga**, 38th Judicial District Attorney's Office
**Region 4: Eladia Rodriguez-Torres**, 81st District Attorney's Office
**Region 5: Colleen Jordan**, Harris County District Attorney's Office
**Region 6: Sue White**, Rockwall County CDA's Office
**Region 7: Adina Morris**, Palo Pinto County DA's Office
**Region 8: Wanda Ivicic**, Williamson County Attorney's Office
**Training Committee Liaison: Cyndi Jahn**, Bexar County CDA's Office

The Victim Services Board members represent a wealth of expertise in the field of victim services. The board's purpose is to prepare and develop operational procedures, standards, training, and educational programs; coordinate victim assistance programs; and address all such other appropriate matters dealing with victim assistance programs and services. The board members serve as mentors and points of contact for their regions. Congratulations and welcome!

A special thank you to our outgoing board members Mary Duncan, Jill McAfee, Beverly Erickson, Rachel Leal, and Laurie Gillespie. Your willingness, dedication, and loyalty to service on our Victim Services Board will not be forgotten. We will miss you!

*By Jalayne Robinson, LMSW*
TDCAA Victim Services Director

## KP-VAC Seminar

Our 2014 KP/VAC Seminar in San Antonio was a huge success! Over 200 members attended. TDCAA's meeting planner, Manda Herzing, outdid herself this year by securing the Sheraton Gunter Hotel on the Riverwalk! Our speakers were dynamic and by all accounts everyone went away from the seminar informed and updated on how to do our jobs better. (See page 14 for some photos from the conference.)

This seminar is held annually and is an awesome venue for key personnel and victim assistance coordinators from prosecutor's offices across Texas to network and get new ideas from others who do similar jobs in other counties. Next year's seminar will be held at the Hotel Galvez in Galveston November 4–6.

## Suzanne McDaniel Award

Michelle Permenter, Director of Victim Services at the Harris County DA's Office, has been honored with TDCAA's Suzanne McDaniel Award for her work on behalf of crime victims. This award, given by TDCAA's Victim Services Board, is bestowed on a person who is employed by a county attorney, district attorney or criminal district attorney's office; whose job duties involve working directly with victims; and who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

Michelle received her award at TDCAA's Key Personnel/Victim Assistance Coordinator Seminar in San Antonio. (She's pictured below, in the middle, with Jane Waters, Chief of the Family Criminal Law

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Division in Harris County, on the left and me, Jalayne Robison, on the right.) Michelle exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims. Congratulations Michelle!

### Victim assistance grants

Funding opportunities for General Victim Assistance—Direct Services Programs were posted on the Governor's Criminal Justice Division website at https://cjdonline.governor.state.tx.us in December 2014. Grant funding applications will be due February 27, 2015.

The Office of the Attorney General (OAG) also offers grant-funding opportunities for victim assistance programs in prosecutor's offices. Grant opportunities are posted on the website, www.texasattorneygeneral.gov/victims/grants.shtml, as well as in the Texas Register and with Texas eGrants. For additional information, contact the OAG via email at OAG-Grants@texasattorneygeneral.gov.

### National Crime Victims' Rights Week

Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 19–25, 2015. Check out the Office for Victims of Crime (OVC) website at http://ojp.gov/ovc/awareness/about_ncvrw.html for additional information. If your community hosts an event, *The Texas Prosecutor* journal would love to publish photos and information about it. Please email me at Jalayne.Robinson@tdcaa.com to notify us of plans for your event. ❇

## Newsworthy

## A new book for investigators

*Case Preparation for Investigators*, a brand-new book by TDCAA, takes readers through the steps of preparing for trial. From investigation through presenting evidence at trial, *Case Preparation* is a must-have resource for all prosecutor-office investigators and others who work on preparing cases for trial. The book contains sample forms on a CD-Rom (including sample oaths, subpoenas, pen packet requests, HIPAA requests, bench warrants, and more). Its six chapters include an overview, digital resources, getting evidence, government resources, evidence at trial, and trial preparation.

Check out www.tdcaa.com to order your copy for only $40. ❇

## *Now-retired Ray Rike honored by peers at Elected Conference*

*Ray Rike, a longtime assistant criminal district attorney in Tarrant County, frequent TDCAA Civil Committee member, and go-to speaker on civil law, retired at the end of 2014. At the December Elected Prosecutor Conference, four of his peers acknowledged Rike's many contributions to the profession over the years by making him an honorary assistant prosecutor in their respective counties. They're all pictured above (from left to right): Vince Ryan, Harris County Attorney; Jennifer Tharp, Comal County Criminal District Attorney; Ray Rike; C. Scott Brumley, Potter County Attorney; and David Escamilla, Travis County Attorney.*

# Get a warrant! The CCA weighs in on mandatory blood draws … and the news isn't good

In 2013, the Supreme Court decided in *Missouri v. McNeely* that the mere dissipation of alcohol in the bloodstream was not an exigent circumstance to support a warrantless blood draw in a DWI case.[1] As soon as *McNeely* was handed down, Texas courts began wrestling with how the case affected blood draws under Transportation Code §724.012(b), which requires blood draws in certain circumstances. The Court of Criminal Appeals finally waded into the issue just before Thanksgiving with a thorough opinion in *State v. Villarreal* and decided that such blood draws were unconstitutional.[2] Although not the decision most prosecutors were hoping for, *Villarreal* addressed all the State's arguments and gave a clear rule for the future—at least until the U.S. Supreme Court weighs in again.

*By Andrea Westerfeld*
Assistant Criminal District Attorney in Collin County

## Legal backdrop prior to *Villarreal*

Under the Texas Transportation Code, a person is "deemed to have consented" to a breath or blood test if he is arrested for an intoxication offense.[3] This consent generally may be revoked, but the consent is irrevocable if the person was involved in a wreck causing serious injury or death or if he has prior convictions for intoxication offenses.[4] This implied consent statute was generally recognized by the Texas courts as providing "another method of conducting a constitutionally valid search" where there was no search warrant.[5]

But in April 2013, the Supreme Court decided *Missouri v. McNeely*. *McNeely* dealt directly only with the argument that the natural dissipation of alcohol in the bloodstream did not create a *per se* exigency exception from the warrant requirement. It even favorably cited implied consent laws, such as those here in Texas, as ways states may expeditiously obtain blood tests in intoxication offenses.[6] But broader language in the opinion rekindled the debate as to whether the implied consent statute in Texas could overcome the warrant requirement. Specifically, *McNeely* held that warrantless searches were reasonable only if they fell within a "recognized exception" and noted that a blood draw implicated a person's "most personal and deep-rooted expectations of privacy," requiring a heavy justification.[7]

## The CCA weighs in

After several lower courts had struggled with the issue, the Court of Criminal Appeals opted to take up the question via a State's appeal from the Thirteenth District, *State v. Villarreal*. This case involved a very typical DWI investigation where the defendant was stopped for a traffic violation, the officer noted signs of intoxication, and the defendant refused all field sobriety tests and a blood test.[8] After learning Villarreal had prior DWI convictions, the officer took him to the hospital for a mandatory blood draw under §724.012(b). The officer admitted in the suppression hearing that he "could have" gotten a warrant, but he did not try to because he did not have to under the implied consent statute. The parties agreed there was no emergency or exigent circumstance, presenting a pure question of the implied consent statute.

The State raised a number of arguments to justify the mandatory blood draw post-*McNeely*, primarily arguing that the search was justified under the consent exception because of the implied consent statute. The Court of Criminal Appeals went through each argument in turn in a lengthy, thorough opinion written by Judge Alcala.

## Implied consent can be withdrawn

The State's main argument was that the consent exception applied because of the implied consent

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statute.[9] The Court's rejection of this claim was primarily based on two grounds. First, for consent to be valid, it must be freely and voluntarily given.[10] The Court questioned whether the implied consent statute could qualify as voluntary consent when a person might not even be aware of the waiver. It contrasted this situation with some of the State's examples in other areas. Other highly regulated areas, such as a U.S. Navy contractor[11] or a federally licensed firearm dealer,[12] included a contract that they "expressly" agreed to as part of the business agreement. The Court questioned whether consent could simply be assumed by a statute "in exchange for the enjoyment of everyday privileges" and may be "actually unaware" of the waiver.[13]

The second basis—but the one that the Court seemed to put the most emphasis on—was that consent by its nature requires that the person be able to "limit or revoke it."[14] The Court found simply that a defendant's "explicit refusal to submit to blood testing overrides the existence of any implied consent."[15] This leaves open the ability to rely on implied consent where a defendant has not expressly withdrawn his consent, but those cases are few and far between.

The Court also distinguished more of the State's examples in addition to the "highly regulated industries" example. Two federal cases, *Knights* and *Samson*, had held that parolees and probationers could be subject to warrantless searches based on their prior consent when accepting the terms of probation.[16] But the Texas high court concluded that these cases were examples of where the person "expressly waived" his right to refuse consent, not that it was implied from a general statute.[17] Additionally, the Court concluded that these cases were based on the general Fourth Amendment balancing test—discussed below—rather than a consent issue.[18]

A second example, where students in schools were subject to random drug testing as a condition of participating in extracurricular activities, was distinguished as applying solely in a non-criminal context.[19] The CCA also noted that all the other states with implied-consent laws that have considered the issue post-*McNeely* have found that implied consent is not sufficient, including Idaho, Nevada, Tennessee, South Dakota, and Arizona.[20]

Overall, the Court concluded that a statute that merely implies a person's consent rather than relying on his express prior waiver cannot control as consent, particularly if the person later expressly revokes that consent and refuses the search. Without consent, the State must find some other recognized exception to the warrant requirement to justify the mandatory blood draw. The State offered a number of potential exceptions, but the CCA rejected each in turn.

## What doesn't apply

### *Automobile exception*

In addition to its consent argument, the State also argued for an expansion of the traditional automobile exception to cover a blood draw of a driver. Under this exception, a vehicle may be searched so long as there is probable cause to believe it contains contraband.[21] The inherently mobile nature of the car serves as the exigent circumstance to avoid the need for a warrant. But the Court summarily rejected this argument, stating that this exception is expressly limited to the vehicular search context and cannot justify a bodily search of the driver.[22]

### *Special-needs exception*

The Court also rejected the claim that the generalized "special needs" exception could justify the blood draw. This doctrine involves situations where "special needs beyond normal law … may justify departures from the usual warrant and probable-cause requirements, such as searches of probations' homes."[23] However, the Court was not willing to apply this to the type of DWI stop at issue here. A typical DWI investigation is not one that goes beyond the issues of "normal law enforcements," and there were no unusual circumstances here that would make seeking a warrant difficult.[24] Also, the Court noted that the U.S. Supreme Court has never extended the special-needs exception where the "primary purpose" is to gather evidence for a criminal case.[25]

### *Search incident to arrest*

Another proposed exception was the search incident to arrest, which allows the police to search a person and the area within his immediate reach upon arrest.[26] But the Court noted that the justification for this rule is to ensure officer safety by finding weapons within an arrestee's immediate reach and to prevent the loss of evidence. A search incident to arrest is therefore not justified if the

search is "remote in time or place" from the arrest or lacks exigent circumstances.[27] And because *McNeely* expressly found that the dissipation of alcohol in the blood is not an exigent circumstance, the possible destruction of evidence is not sufficient justification here.[28]

### *A blood draw is a search, not a seizure*

The State also argued that a blood draw should be considered a seizure of evidence rather than a search and thus subject to different rules. The CCA summarily dismissed this claim, citing U.S. Supreme Court precedent holding that any intrusion "into the human body" is a search.[29]

### *General balancing test*

The State's final argument was that a simple balancing test under the Fourth Amendment would reveal the search was reasonable as a whole. Where special law enforcement needs are present, a warrantless search may be justified.[30] The State argued that the government's strong interest in protecting the public from intoxicated driving and the narrowly tailored rules of the implied consent statute were sufficient under the Fourth Amendment.

But the Court rejected this argument as well. It noted that *McNeely* acknowledged the strong public safety argument yet made it clear that the seriousness of the DWI problem alone was not enough to justify such an intrusive, intimate search as a blood draw.[31] The Court distinguished this from the recent *Maryland v. King* case, where DNA was collected from all arrestees, because 1) the primary purpose was for identification rather than evidence collection and 2) a buccal swab is far less intrusive than a blood draw.[32] The CCA also noted, as did the *McNeely* Court, that the ease of acquiring a warrant in most circumstances diminishes the State's justification for a special exception.[33]

The dissent, however, found this exception the most persuasive. Presiding Judge Keller wrote that collecting blood under the implied consent statute falls on the continuum between warrantless searches of probationers and *King*-type buccal swabbing of all arrestees. Because *King* held that "the mere fact that a person is arrested for a serious offense" justified a minimally intrusive search, a more intrusive but statutorily standardized search of persons arrested for DWI should also pass constitutional muster.

The dissent notwithstanding, the majority determined that none of the State's arguments were sufficient to overcome the hurdle of *McNeely*. A blood draw taken under the §724.012(b) exception does not meet any exception to the warrant requirement.

## Going forward

What lessons should prosecutors take from *Villarreal?* Although the result was not what most prosecutors had hoped for, the *Villarreal* opinion does appear to address all the State's arguments and provided a clear rule, though it does not spell out what "exigent circumstances" are (or are not). At the time of this writing, the prosecutors in *Villarreal* have filed a motion for rehearing, though it has not yet been ruled upon. Certainly a petition for writ of certiorari with the Supreme Court is possible as well. The *Villarreal* decision was 5–4, so close questions on similar issues may be decided differently.

But for now, unless and until the U.S. Supreme Court weighs in further on implied consent laws, the advice to prosecutors and police seems clear: If the case falls under the mandatory-draw statute, get a warrant for any nonconsensual blood draws—or have a strong exigency argument that depends on more than just the natural dissipation of alcohol in the bloodstream. ❇

## Endnotes

1 *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

2 *State v. Villarreal*, No. PD-0306-14 (Tex. Crim. App. Nov. 26, 2014) (slip op.).

3 Tex. Transp. Code §724.011.

4 Tex. Transp. Code §§724.012(b), 724.013.

5 *Beeman v. State*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002).

6 *Id*. at 1566 & n.9.

7 *Id*. at 1558.

8 *Villarreal*, slip op. at 3-4.

9 *Id*. at 21. The State had to first overcome the lower court finding that it had waived this argument at the hearing. Most of the lower courts had sidestepped the consent argument, leading to no clear ruling from any court on the issues of implied consent as its own exception. Let's be thankful that the Court of Criminal Appeals concluded that the overall record did not show waiver so that they could address this complaint.

10 See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), noting that consent cannot be granted "only in submission to a claim of lawful authority."

11 *Zap v. United States*, 328 U.S. 624, 627 (1946).

12 *United States v. Biswell*, 406 U.S. 311, 311-12 (1972).

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# Photos from our KP-VAC Seminar in San Antonio

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13 *Villarreal*, slip op. at 27.

14 *Villarreal*, slip op. at 23, citing *Florida v. Jimeno*, 500 U.S. 248, 252 (1991), and *Miller v. State*, 393 S.W.3d 255, 266 (Tex. Crim. App. 2012).

15 *Villarreal*, slip op. at 23-24.

16 *United States v. Knights*, 534 U.S. 112, 116 (2001); *Samson v. California*, 547 U.S. 843, 852 (2006).

17 *Villarreal*, slip op. at 27-28.

18 *Id.* at 28-29. The Court of Criminal Appeals also found it significant that parolees and probationers had already been convicted in a court of law and are subject to different considerations than a person merely detained or arrested by the police.

19 *Board of Education v. Earls*, 536 U.S. 822, 825 (2002).

20 *Villarreal*, slip op. at 29-32.

21 *California v. Carney*, 471 U.S. 386 (1985).

22 *Villarreal*, slip op. at 32, citing *California v. Acevedo*, 500 U.S. 565, 580 (1991).

23 *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987).

24 *Villarreal*, slip op. at 33-34.

25 *Id.* at 35, citing *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001).

26 *United States v. Robinson*, 414 U.S. 218, 224-26 (1973).

27 *Villarreal*, slip op. at 37.

28 *Id.*, citing *McNeely*, 133 S.Ct. at 1568.

29 *Id.*, citing *Schmerber v. California*, 384 U.S. 757, 770 (1966).

30 See *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

31 *Villarreal*, slip op. at 38, 47.

32 *Id.* at 39-42, citing *Maryland v. King*, 133 S.Ct. 1958 (2013).

33 *Id.* at 43.

# Photos from our Elected Prosecutor Conference in Austin

*Continued from the front cover*

# *When 'intoxicated' is a defendant's 'normal' (cont'd)*

ligram hydrocodone pill earlier in the day. He also tried to name three other medications, but his speech was so slurred the trooper couldn't understand what he was saying. (During the patrol video, most of Miller's words were unintelligible.)

When Miller got out of the car, he stumbled and swayed so much he nearly fell over. The trooper conducted field sobriety tests. On the horizontal gaze nystagmus (HGN), he detected six out of six clues. On the Walk-and-Turn, he detected seven out of eight clues. Miller told the trooper he couldn't complete the One-Leg Stand test. The trooper asked Miller to recite the alphabet. He hesitated after "T" but other than that, he completed the task with no hiccups. The trooper asked Miller to count from 56 backwards to 43. Miller stopped at 50 and said, "I forgot what you wanted me to count to." The trooper administered the finger count test. Miller couldn't perform the test at all.

After Miller's arrest for DWI, Miller consented to a blood draw. The results showed therapeutic levels of carisprodol, hydrocodone, diazepam, and temazepam in his system.

## The road to trial

Before trial, defense counsel continued to badger us about how Miller wasn't intoxicated and why we should drop the case. We offered a deal that involved Miller permanently relinquishing his driver's license, but Miller and his attorney refused to budge so we continued on the trial track.

We consulted with our drug recognition expert (DRE), Game Warden Joni Kuykendall. Although she wasn't called out to the scene (as we would have preferred) she was able to educate us on the effects and interactions between the four drugs found in Miller's system. She also reviewed the offense report, video, and lab report. She gave us her opinion that Miller was intoxicated on prescription drugs. Carisprodol, diazepam, and temazepam are central nervous system (CNS) depressants that slow down bodily functions (as does alcohol); CNS depressants will also cause nystagmus. Hydrocodone is a narcotic analgesic or opioid; opioids can also produce drowsiness and mental confusion. When all of these drugs are taken together, their effects can be compounded and cause extreme impairment.

We filed an expert notice, and the defense let us know that Miller's doctor and pharmacist would testify. Interestingly, that same pharmacist was someone we had used in the past to testify about drug interactions. When I called him to talk about the case, the pharmacist said he had known Miller as a customer for years and had regularly observed him. The pharmacist was adamant that Miller's demeanor and speech on the video appeared "normal." (Of course he meant "normal for Miller," not "normal normal.") We subpoenaed the pharmacist to bring Miller's records and included a request that he bring the mandatory warnings given with each prescription.

We knew the defense strategy would be that because Miller took the drugs every day, Miller was acting "normally" on the day of his arrest and thus, Miller wasn't intoxicated. We knew we'd have to get past that in voir dire. We'd have to get the jury to understand that "normal" use of faculties doesn't change from person to person; rather, it is how a normal person would act without drugs or alcohol in his system. (Defense attorneys often try to confuse juries by asking officers, "You don't know what *his* 'normal' is, do you? Then how can you testify that he lost the normal use of his abilities?")

We knew our driving facts weren't that bad, but we also knew that Miller looked and sounded terrible on the video. (I still remember my first impression when I saw Miller stumble out of his car. I thought, "Wow, that guy is *drunk!")*

I showed the jury the same statutory definition of intoxication we always use. However, this time I simplified "intoxication" as a two-part test: 1) Has the person lost the normal use of a mental or physical ability? And 2) Is that loss caused by some *substance* that he has introduced into his body? If the answer to either question is no, the person is not intoxicated. If the answer to both questions is yes, the person *is* intoxicated.

We ran through a few examples and I got the jury to buy into my "intoxication" test using these questions.

**Example 1:** I have arthritis in both of my knees and I have difficulty walking. Have I lost the normal use of a physical ability? Yes. Was the

loss caused by a substance? No. Am I intoxicated? No.

**Example 2:** My mother has age-related dementia, and she has difficulty remembering simple commands. Has she lost the normal use of a mental ability? Yes. Was it caused by a substance? No. Is she intoxicated? No.

**Example 3:** Let's say I'm having a bad day and I'm in a lot of pain because of my arthritic knees. So I take a Vicodin (prescribed to me) for the pain. The Vicodin alleviates my pain, but it also causes me to become lightheaded and dizzy. I have trouble thinking clearly. Have I lost the normal use of a physical or mental ability? Yes. Is it caused by a substance? Yes. Am I intoxicated? Yes. Should I be driving? No!

Of course, the last scenario was exactly where we were headed in this trial. I knew that if the jury bought into my two-part test, we had a chance of succeeding.

## The trial

During opening, I reminded the jury of the two-part intoxication test. I asked jurors to make mental notes of their first impressions when they watched the defendant get out of his car. (I was hoping they'd have the same reaction I did: "Wow, that guy is really *drunk!")* I asked each juror to listen closely to the defendant's speech and make a mental note of what it sounded like. (I had already prepared snippets of the video with Miller's extremely slurred speech to play in closing.)

The trial proceeded as we expected. I put on the trooper and my DRE.[2] The trooper testified about the stop and the field sobriety tests and concluded that Miller was intoxicated. My DRE testified about her extensive training and experience. She explained how DREs use different tests to determine which drug or drugs a subject has in his system. She explained that there are seven major categories of drugs; they are grouped according to the known effects they have on people. DREs are also trained in the interactions between drugs when more than one substance is ingested, and she testified in detail about CNS depressants and narcotic analgesics (the two categories of drugs found in Miller's system) and correlated the effects of each category of drug with Miller's actions and behaviors. Even though she wasn't present at the scene, she testified that after having reviewed the offense report, video, and lab report, her opinion was that Miller was impaired because of the drugs and that it was unsafe for him to operate a motor vehicle. In essence, our DRE confirmed for the jury everything they had already seen and heard on the video and from the lab report. My trial partner did such a good job with her direct of the DRE, there wasn't much left for Miller's attorney on cross.

Incidentally, we've consulted with our DRE before in drugged driving cases. She has always been helpful in explaining the effects of drugs on a person's mental and physical abilities. We had never been able to use her as a witness in trial because in our other cases, our evidence was never adequate to support her giving an expert opinion. But in this case, the officer's descriptions of Miller's behavior, white film on his mouth and beard, video depicting his extremely "drunk-like" actions, and the lab report were sufficient for her to give an expert opinion.

Ideally, DREs should be used either at the scene or at the jail. It is critical that they be able to perform their own tests on the subjects rather than rely on evidence obtained by others. DREs are the only experts who can definitively say that a suspect's behaviors are *caused by* the ingestion of particular substances. That causal link is important. A lab report isn't enough. No matter which drugs are present in a person's system, prosecutors must prove that the drugs caused the impairment (Question No. 2 in my two-part intoxication definition).

Those prosecutors without access to a DRE can educate themselves on drug interactions on www.drugs.com, though you can't enter the interaction information as evidence. Before we had our DRE, we called a pharmacist to testify as an expert. While a pharmacist cannot testify about Question No. 2 in the two-part intoxication definition, he can educate jurors as to drug interactions.

The defense put on Miller's doctor and pharmacist. Both testified that Miller *always took the four meds and he always looked and sounded like he did on the video.* They tried to claim that the stumbling and the slurred speech were "normal" for Miller. On cross, I had the pharmacist produce the mandatory warning sheets given to every person who picks up any of those four drugs. All of the warning sheets said, "May increase dizziness, may increase drowsiness, may increase difficulty concentrating, may impair thinking

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and judgment, and avoid driving or operating hazardous machinery until you know how medications affect you."

Defense counsel, however, threw us a curve ball when he asked the judge—outside of the jury's presence—to allow Miller to get on the stand and give a voice exemplar without subjecting him to cross-examination. He cited *Williams v. State*,[3] a 2003 Court of Criminal Appeals case that had originated in Hood County.[4] In *Williams*, trial counsel had asked the court to allow the defense to rebut the State's video (where the defendant exhibited slurred speech) by providing a voice exemplar of the defendant's normal speech. The defense asked to do this without waiving Williams' privilege against self-incrimination. The trial court denied the request and the jury convicted the defendant.[5] The court of appeals agreed with the trial court; however, the Court of Criminal Appeals disagreed. That Court said, "Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, does not, without more, compel him to provide a 'testimonial' response for purposes of the privilege."[6] The Court held the voice exemplar was not testimonial, reversed, and remanded the case.

I quickly scanned the case. How could I overcome this? I knew Miller's voice would be slurred because he took those meds every day. Then I scanned the court of appeals opinion. It was there I found this gem: In his bill of exceptions, Williams' defense counsel had instructed the appellant to bare his gums to his sister. The sister testified that Williams was missing a large number of his teeth! I argued that our case was 180 degrees different from *Williams*. Williams sought an exemplar because his slurred speech was due to dental problems, not drugs. In our case, the defendant's own witnesses testified that Miller took the same medications everyday, so Miller was likely intoxicated even today in court.

I said the State would not oppose a voice exemplar *as long as Miller agreed to let my trooper perform an HGN test outside the presence of the jury before taking the stand.* If the HGN results indicated Miller was not intoxicated, then an exemplar would be proper. However, if the HGN results indicated Miller was intoxicated, then an exemplar would not be probative. (I was 99-percent sure Miller would fail the HGN.)

The judge agreed with my argument. He said if Miller would consent to an HGN and the trooper was satisfied Miller wasn't intoxicated, the judge would allow the voice exemplar. Otherwise, he would not. Miller's defense counsel turned down the HGN. The defense rested without a voice exemplar.

On closing, I asked the jurors to recall their first impressions on seeing Miller exit his car. I asked them if they were thinking, "Wow, that guy is really *drunk!"* They responded with several head nods, so I knew I was on the right track. Then I played the snippets from the video where Miller's speech was extremely slurred. I asked them what they thought when they heard Miller's voice. Were they thinking, "Wow, that guy is really *drunk!"*? More nods. I reminded them that Miller had stared at the Discount Tire envelope, thinking it was his car insurance. Then I hit them with my two-part intoxication test: 1) Had Miller lost his physical abilities? Yes. Had Miller lost his mental abilities? Yes. 2) Was it caused by a substance or substances? Yes. Was the defendant intoxicated? Yes. Should he have been driving? No!

I closed by telling jurors that in a DWI case, the law doesn't care why or how a person is intoxicated. A mother doesn't care whether the driver who killed her child was "drunk" on prescription meds, methamphetamine, or a fifth of Jack Daniels. (If memory serves, that drew an objection from the defense, but it was overruled.)

The jury convicted Miller of driving while intoxicated, and Miller opted for the judge to punish him. After the judge thanked the jurors for their verdict and dismissed them, all six jurors came back in the courtroom to watch punishment. Miller took the stand to testify about his limited disability income. My cross was brief and went something like this:

> **State:** Mr. Miller, I notice your speech is much clearer today than it was on the day of your arrest. You haven't taken all of your medications today, have you?
> **Miller:** No, I stopped taking my Soma yesterday.
> **State:** Because of the trial, right?
> **Miller:** Yes.
> **State:** And today you're in pain, aren't you?
> **Miller:** Yes.
> **State:** And after the trial, you're going to take your Soma again, right?
> **Miller:** Yes.

The judge sentenced Miller to six months probated for 12 months. He also assessed a fine and court costs. Most importantly, he suspended Miller's driver's license for six months.

Was it a defense strategy to have Miller skip Soma during the trial? It's hard to say. On one hand, I'm sure the defense didn't want Miller to appear intoxicated in court. On the other hand, skipping Soma made Miller's speech almost perfectly clear. That would have surely backfired on the exemplar (that is, unless Miller planned to "fake" having slurred speech).

All in all, we got a dangerous driver off the streets and made our community safer for a little while. And in the process, we learned a lot about how to prosecute a defendant who was "drunk" on prescription meds.

## Endnotes

1 The defendant's name has been changed.

2 The defense agreed to stipulate to the lab results because they weren't contesting the drugs in his system so we didn't need our toxicologist.

3 116 S.W.3d 788.

4 The judge in our case was not the same judge as in *Williams*.

5 Trial counsel made a bill of exceptions after the trial that included a tape of the defendant reading five paragraphs from the court's charge.

6 *Williams*, 74 S.W.3d at 904.



# Gaming the government

Going after people who commit public assistance fraud means dealing with some of the best liars in the business—as well as some very satisfying outcomes in court.

*By Donna Hawkins*
Assistant District Attorney in Harris County

After handling a wide variety of cases in my decade and a half as a prosecutor—ranging from piddly traffic tickets to horrific capital murders—I thought that I was an exceptional judge of character. Not to mention that I had survived the teenage years of my two rather spirited daughters with nary a gray hair in sight (OK, Clairol may have had something to do with that). As a barometer for truthfulness, I thought I was spot-on: If you lied to me, I knew it. Then I got assigned to head up the Public Assistance Fraud division of our office. And that's when I encountered a whole new breed of liars—professional ones. And, damn, they are *good*.

My division assists federal and state agents with investigations and prosecutes thefts by people who receive public assistance benefits fraudulently or by stealing from governmental entities. You know—those cases where a woman gets food stamps for months while working her six-figure job or where a man collects unemployment benefits as he plays the stock market and tools around town in his brand-new Hummer.

At first, I was kind of disappointed working these cases because there wasn't really a victim to adore me and validate my strong inclination to fight "the bad guys." Then, when I really immersed myself into the world of fraud, I found myself absolutely indignant about the thieves who steal our money. And that's what it is—*our* money. Those of us who work for a living see the huge deductions from our paychecks that go to the government. I realized that the people engaged in this thievery are taking money and benefits away from the truly needy and using it to finance highfaluting lifestyles. And that is just plain wrong.

One of the first defendants I prosecuted for fraud was a relatively young woman who had totally convinced her seasoned defense attorney that she was wrongfully accused and completely innocent. She swore over and over with an almost religious fervor that she had never worked at Company X while receiving food stamp benefits. (By the way, to be politically correct, food stamps are now called Supplemental Nutritional Assistance Program—SNAP—benefits. Although how you can call Cheetos and Coke Zero "nutritional assistance" boggles the mind.) I told

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the woman's attorney that I would like her to be honest with me and that I would give her a better plea offer if she spoke with me truthfully. He readily agreed, cautioned his client, and we met in a back room of the court. There, she tearfully detailed the injustices against her—about the disparagement of her name and reputation by some other person who had obviously posed as her in the workplace. Why, she had never worked a day in her life, and she was certainly entitled to food stamps to feed herself and her (growing) brood of six children! She cried, carried on, and looked me right in the eyes as she swore on her mother's soul that she was the victim of identity theft.

And, to be perfectly honest, I believed her—100 percent. I found myself apologizing to her for her troubles and swore that I would find the egregious perpetrator who robbed her of her peace and dignity. Then, I happened to stumble across a supplement to the federal agent's report where the agent interviewed the "wrongfully accused," who first vehemently and tearfully denied working at Company X, but when confronted by the supervisor there, eventually admitted that yes, it was she who worked there while getting food stamps. But, hey, what's a woman to do these days? They don't give you enough to live on! She *had* to lie on the applications because she had *six children to feed*. And she needed that iPhone 5 she carried in her new Coach bag, too.

When the three of us watched the videotaped interview, the defendant became indignant and changed tactics once again. Now the government was *persecuting* her because she chose to have six kids. She was just exercising her religious freedom and was allowed to have as many kids as she wanted. Why, she could have 19 kids if she wanted to and become famous and then she would show us! Her attorney and I were both victims of her deflect-the-issues defense. Eventually, we were able to recover the stolen money and work the case out for a short probation, but I learned my first major lesson in the world of fraud prosecution: Thieves are often exceptional liars; do not believe everything that you hear!

A month later, a former chief prosecutor-turned-defense attorney approached me in court and tearfully asked to speak with me privately. Her client could not come to court that day due to a terminal diagnosis of end-stage lymphoma. The attorney showed me medical records from MD Anderson that verified that the defendant's life expectancy was only a month or two, that any further treatments would be futile, and that the defendant was going to be placed in hospice care. The defendant was a young, single woman of 32 with three small children at home. Her attorney had bonded with this particular defendant and was distraught over both her client's diagnosis and the fate of her young daughters. And, truth be told, I quickly reviewed the medical records and figured I'd dismiss the case. Everything appeared to be legitimate and in order. But as a precaution, I had my investigator call the diagnosing physician just to verify the information. And guess what? The papers were forged. The defendant was perfectly healthy and expected to live a very long time. Although she was spared her quick, impending death, we did see to it that at least a few of her remaining years would be served behind bars.

Not long after that case was disposed, another defendant presented an apology letter from her former friend in which the friend confessed to stealing the defendant's identity to receive governmental benefits. Because I had learned my lesson by then (even an Aggie eventually catches on), I checked out the letter writer and found that she had passed away from a drug overdose. I compared the signature from the apology letter to her driver's license signature and found that they were somewhat similar, so I started to believe that the letter might possibly be legitimate. That is, until my sharp-eyed investigator discovered that the apology letter had been written (and conveniently dated) three months *after* its purported writer had died.

## Verify, verify, verify

Now, don't get me wrong, I wouldn't consider myself jaded or cynical—but I do believe that some people have developed their lying skills on par with a fine machine. I have learned to verify information, double-check that information, and then check it again. And a lot of information can be tracked down simply by checking social media websites. If I had a dollar for every welfare fraud defendant who posted pictures of exotic vacations, designer purses, massive houses, and luxury cars on her Facebook page, well, suffice it to say that I'd be pretty wealthy about now. By searching Facebook, Instagram, or Twitter for public information (I *do not* "friend" a potential

defendant), I can usually find a wealth of information about, well, a defendant's wealth. I also check civil filings, as there seems to be a direct correlation between fraud defendants and civil lawsuits.

Also, I have learned not to trust the name, date of birth, or Social Security number that a potential defendant reports to the agencies. I have found that by running defendants by only their names, then checking birthdates that are similar to those the defendants provide, I can uncover entire criminal histories. One particularly wily defendant had been stopped and ticketed on a local toll road in 2009 for no insurance, no driver's license, and failure to pay tolls. Although he gave the officer the correct name and home address (necessary due to the vehicle's registration), he gave a different date of birth and a Social Security number that was one digit off his actual number. By running the defendant's name only, I was able to tie those tickets to the defendant so he could be arrested on the warrants when he appeared in court in 2014. (It was in the best interests of justice—really.)

## Fantastic punishment evidence

Many public assistance fraud cases that our office investigates and reviews come to light during other investigations. Two cases that we are prosecuting now involve women who killed their children and then continued to receive SNAP or disability benefits for them. While it might seem disingenuous to prosecute a murder defendant for public assistance fraud too, doing so can provide valuable punishment evidence at trial. Juries find it chilling that a defendant not only killed her child but also kept filing for and receiving taxpayer money on the child's behalf.

One time, a prosecutor was investigating a defense attorney for suborning perjury during a murder trial. The attorney had used a similar tactic in a previous murder case and garnered an acquittal, but this time—thanks to an on-the-ball victim assistance coordinator—the State was clued in to his scheme. Although the murder trial at issue did result in a conviction and hefty prison sentence, the defense lawyer had called to the stand a witness who lied to impeach the credibility of the State's only witness. During the investigation into the shady attorney and his practices, it was discovered that he had been collecting his father's Social Security benefits for over a decade. Oh, and the father had died 10 years earlier in Mexico. The lawyer was eventually tried for Social Security fraud (approximately $170,000 worth), and a jury convicted him. During the punishment phase, evidence of the suborning perjury case was presented before the defendant interrupted to accept plea offers on both cases, resulting in sentences of 10 and two years in prison.

To get maximum punishment evidence in fraud cases, I find two tactics particularly helpful. One is to scour Facebook and other social media sites for photos or postings that show the defendant living the good life. Nothing infuriates a jury like seeing a defendant on public assistance who posts pictures of her recent European vacation or luxurious BMW. Social media also established a husband-wife relationship in a fraud case where the defendant maintained that she was not married (and thus, entitled to benefits as a single mother) when the defendant proudly posted pictures of her wedding and "hunky hubby."

The second is to subpoena the defendant's bank records—sometimes the best way to get a jury fired up on punishment. Seeing evidence of Saks Fifth Avenue shopping sprees and casino trips will help ensure a hefty sentence for a defendant. Very little makes jurors madder than seeing their tax dollars spent on items that they themselves cannot afford. (I am still smarting over the defendant who laughed at my cracked iPhone 4 as she texted away on her 5. However, I got the last laugh in that case.) If the records look fairly clean and/or frugal, though, don't stop there. In one case, we took the additional step of subpoenaing credit card records to demonstrate discretionary expenditures such as the defendant's weekly manicures and pedicures, poodle-grooming, political contributions, and dining at fine restaurants. She wasn't quite as destitute as she appeared.

I have been absolutely amazed at the amount of money that fraud defendants can pay up front to avoid a felony conviction or jail time. Getting full restitution prior to a plea saves a great deal of aggravation in the long run—as I've already noted, these people are really, really good liars and therefore not always ideal probation candidates. It is not uncommon for a SNAP defendant to fork over $8,000–$12,000 before his plea. Yes, many defendants who

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claim to be so destitute that they need food stamps to survive can come up with several thousand dollars in a few months. (Personally, I'd have to rob a bank or go to jail.)

## Why take on such cases

Public assistance fraud cases historically have been handled by both state and federal governments, but as federal caseloads have grown, more and more of the smaller ones (i.e., less than $1–$2 million) are filtered down to state prosecutors. And defendants have become increasingly sophisticated in their methodology and technology as they commit public assistance fraud. In addition to checking defendant-provided documents carefully, you may also want to cross-check the defendant's name with other government assistance organizations. In several cases, defendants have stolen from the Texas Health & Human Services Commission (SNAP and TANF [Temporary Assistance for Needy Families] benefits), the Social Security Administration (disability, widower, and dependent child benefits), and the Texas Workforce Commission (unemployment insurance benefits).

Local district attorney's offices can open their own investigations into public assistance fraud either from citizens' tips, referrals from attorneys, other cases that indicate public assistance was utilized, or simply alerting governmental agencies that they are available. If an agency is not responding promptly to requests for records or assistance, we have found that issuing grand jury subpoenas for agency records reprioritizes these requests.

Finally, please be aware that creative charging can enhance the range of punishment and resolve statute-of-limitations issues in certain cases. Recently, we filed a tampering with a government record case that started as Class A misdemeanor perjury. We have also have filed bribery, money laundering, and forgery cases based on public assistance fraud scenarios. And we usually charge defendants with aggregate theft, resolving difficulties with the statute of limitations when the defendant stole benefits over a period of time.

Don't be afraid to toot your own horn when you indict and resolve these cases, as the public interest is generally very high. Even political extremists dislike people who steal taxpayer money. The Harris County District Attorney's Office recently worked some food stamp trafficking cases, which had been referred by special agents with the Department of Agriculture. This generated some very positive publicity for the office and the USDA as we worked together to fight the fraud.

One of the best aspects of this job is seeing a defendant who has pulled the wool over people's eyes for years get caught and have to pay for his crimes. Many have relied upon gullible pawns (and the government) for years for their support, comfort, and entertainment without accountability. Finally, they will face the music—or at least a judge!

One final thought: If the court allows it, feel free to get creative with your requests for conditions of probation or parole. Most jurisdictions have community service programs in place, and many offer anti-theft classes. (These are mandatory on all of my pleas). There is nothing more satisfying for a prosecutor than driving around while running errands and catching sight of one of your defendants on a busy street corner holding a sign that says, "I stole your money!" or "I am a thief!" Even if you're doing so in a 2004 Camry with a crack in the windshield.

Good luck in your own pursuit of justice in cases of public assistance fraud! ❇

# All in the family

A father and daughter squared off in a Jefferson County courtroom in a capital murder trial: daughter representing the State and father sitting second chair for the defense.

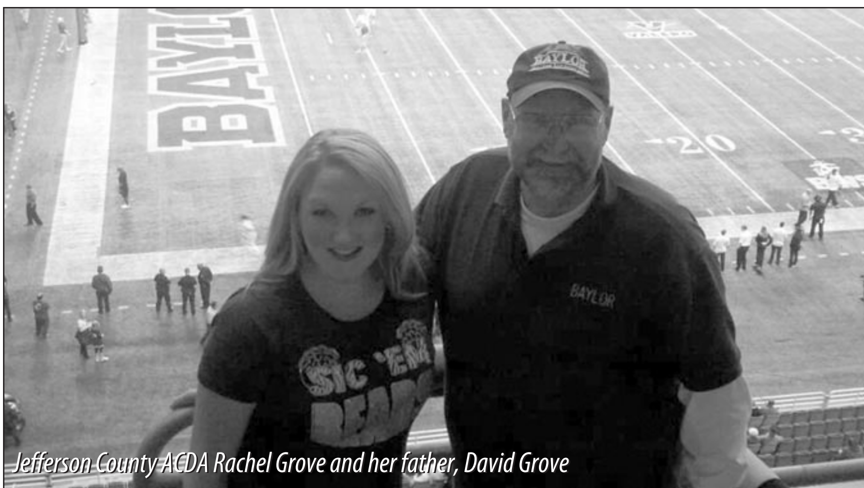
*By Rachel Grove*
Assistant Criminal District Attorney in Jefferson County

On the evening of September 8, 2014, I called my parents' house—pretty normal for me, as I see them often, and we live in the same city. My dad answered.

**Me:** Hey Dad, what are you doing?
**Dad:** Rachel, why are you calling here? We shouldn't be on the phone.
**Me:** Um, don't worry—I wasn't calling you. I was calling to talk to Mom.
**Dad:** Oh. Well, she's still at work.
**Me:** Oh, OK. … Um, so, this is awkward. I guess I will see you in court tomorrow?
**Dad:** OK, sounds good. Bye.
**Me:** Bye.

Despite how the above conversation sounds, my parents and I are close. Most weeks I have dinner with them on Sunday night and sometimes more often during the week. But for two weeks at the end of 2014, I was told that I couldn't come to dinner, and when I called, I was treated like a telemarketer by my own father—which was a little upsetting, but necessary. The reason for the shift in attitude? I was about to start a (non-death) capital murder case with my dad: me as the prosecutor and he as a defense attorney.

When I went to work for the Jefferson County Criminal District Attorney's Office in 2008, the thought of trying a capital murder was one of the furthest things from my mind. Even further from that would be trying a capital murder case with my dad sitting as second chair for the defense. Well, that is where I found myself on September 8, 2014.



Jefferson County ACDA Rachel Grove and her father, David Grove

Jefferson County has a little more than 250,000 residents, but the legal community is pretty tightknit, especially between prosecutors and the defense bar. I run into my dad most Mondays either in my court or in the halls of the courthouse. Usually when I am assigned a case where my dad has been retained or appointed, I have it reassigned to one of the two other prosecutors in my court. I am not required by law or office policy to do this, but it keeps any conflicts from arising. I usually tell people who ask that we have a great relationship—and I want to keep it that way, so I don't try cases against my father.

But in spite of my best efforts, I couldn't avoid going up against him this time.

## Different sides of the bar

Even though my dad and I practice on different sides of the bar, like most lawyers, we end up talking shop and comparing war stories. One night I was having dinner at my parents' house and I was telling them about a trial I had coming up. My dad asked me what trial I was talking about. I told him that the defendant was Batiste Breaux, and it was a non-death capital murder. "Rachel, I'm sitting second on that case," he said. Oh.

At this point I texted our first

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assistant, Pat Knauth, and let him know about the situation. His response: "We'll talk about it tomorrow." The case was filed in 2008 and I was the third prosecutor to have handled it, but when it came to the trial date, I was the one who was ready. From the prosecution's end, it was decided that so long as my dad's client waived any conflict, I would be the one trying the case. The lead defense attorney, James Makin, spoke with the defendant and his parents and informed him that I was the daughter of David Grove, the second chair defense counsel. They understood and agreed that it was OK for me to stay on as the prosecutor. (Prior to trial we put all of this on the record to avoid any possible issues on appeal.) The situation was out of the ordinary, but it worked out for both of us. I got to try my first capital case, and Dad got to sit second and apply this trial to his ongoing work to be certified to sit first chair in a capital case.

My dad's reaction to finding out I would stay on as the prosecutor on Batiste Beaux was actually not a big deal. (My first thought was, "Well, this is awkward.") Also, he was sitting second chair with an attorney against whom I have tried many cases over the years, James Makin, and who would handle most of the critical parts of the trial. And while most adults would probably be surprised, annoyed, and/or nervous if their parents showed up to observe their child at work, I realized early on that was something I had to get over. It is not uncommon for me to leave the podium after questioning a witness and spot my dad sitting in the audience. It used to make me nervous. But the more trials I have had, the more I have learned to tune out what is going on in the audience, or at least not pay as much attention to it. Even if I am used to him popping in during trial, I still want him to think I am doing a good job and be proud of me. He's a defense attorney, certainly, but first he is my dad.

## Background

My dad moved to Beaumont to take a job at the Jefferson County DA's Office in 1978 as an assistant DA, where he served until 1984 when he left the office to work at a civil law firm. He practiced primarily civil law, including asbestos and silicosis litigation, until 2000 when he left his firm to go out on his own. Since then he has practiced mainly family law and criminal defense law at the state and federal level. Interesting fact: When he was an assistant DA way back when, he tried a capital murder case and the defendant was convicted and received the death penalty.

I started attending Baylor School of Law in 2005. At some point in my first year I found myself trying to figure out what I wanted to do after law school. So many of my classmates knew—or thought they knew—what they wanted to do: be a "trial lawyer" or do complex civil litigation, contract law, etc. I kind of freaked out. So I did what I would do when facing what I thought in my 1L mind was a major dilemma: I called my dad. He told me I'd figure it out and in the meantime, "Calm down, Rachel." In spite of probably not listening to him at the time, I did figure it out. I fell in love with criminal law and graduated with a concentration in criminal law. I got hired with Jefferson County the day after I passed the bar exam.

## The defendant

Batiste Joseph Breaux was charged with gunning down two brothers at a birthday party in Beaumont. One of the victims died on his 21st birthday. The father of the victims saw Breaux at a convenience store in the north end of Beaumont around 10 p.m. The father, his three sons, and a friend of the boys had gone into the store to buy beer. Breaux remained in his car, and his female passenger got out of the car and went into the convenience store. Video of the encounter was shown to the jury: There was no fight or shows of aggression in the video.

Breaux then followed the victims to their home, where he pulled up to the house, drew a handgun, and fired at least eight shots at a group that had gathered for a birthday party. Two brothers were killed, and a third victim was shot and severely injured but survived. The female passenger in Breaux's vehicle identified him as the shooter to Beaumont police. Breaux gave a statement to police implicating himself in the shooting. No motive was ever established.

## Trial

The week of trial went smoothly even though at one point my mom came to watch us and sat in the middle so as to not show favor. We picked a jury on Monday and began testimony on Tuesday morning. Prior to voir dire, I asked our judge if I should bring up the fact that the two

Grove attorneys are related. Judge Scott brought it up in voir dire. It elicited a few gasps along with some "aww, isn't that adorable" looks from the jurors, but did not affect jury selection. As expected, James Makin, the lead defense attorney, conducted voir dire, gave the opening and closing statements, and questioned most of the witnesses. The victims' father testified as an eyewitness to the events prior to and during the shooting, but my key witness was the passenger in the defendant's car when he shot the victims. She did a decent job on direct but didn't hold up as well on cross-examination. That's probably because my dad handled her cross. At one point I found myself getting annoyed with him because he was being tough on her and getting her to change details of the story. I wondered if it was because I was being tough on my dad or easily offended, but then it dawned on me: This was the same feeling I had had dozens of times before in trial when I can feel myself getting mad or annoyed at the defense attorney. I was annoyed because he was not only doing his job, but he was also being effective. And like I have found in many trials, I was learning something by watching opposing counsel.

After almost four days of trial, the case was turned over to the jury. After trial I shook James's and my dad's hands and we went to our separate places to wait on the jury. After three hours the jury came back with a guilty verdict. Obviously, I was very pleased with their decision, while the defense considered it a victory that we had waived the death penalty (one main consideration in the waiver was the defendant's low IQ). After trial my dad patted me on the back and told me, "Good job," but it didn't feel right for some reason. After the verdict, the news interviewed the defense attorneys and myself, press releases came out, and conversations were had with both families involved. I didn't talk to my dad much that day. In fact, things didn't seem normal until lunch on Sunday after church. I know it wasn't because either of us was mad or upset with the other, but I think it was more trying to walk the fine line between being adversaries in court and also being family.

By the following week, life was back to normal. I had my usual huge Monday docket, and in fact started an indecency with a child trial that Tuesday. Also, I was invited back to dinner at my parents' house. The local paper ran a story about us, the father and daughter going head-to-head in court, so that was neat. It was also rather amusing talking to people about how I "beat" my dad in trial. I think my aunts gave him the hardest time about it.

I learned a lot from the experience, especially reflecting on it from a personal perspective, not a professional one. I have a great relationship with both of my parents. I am an only child, and I was a daddy's girl growing up. Now I'm 31 years old and practicing law on a different side of the bar (but in the same legal community) as my father. This brings a whole different dynamic to our relationship, but at the end of the day, we are very close as father and daughter. I respect my father as a lawyer but even more so as a person.

As a prosecutor I took an oath to see that justice is done. As a defense attorney, my dad is required to zealously represent his client. These obligations seem contrary, but in the end, we both are seeking justice whether for the community, a client, or a victim. I present the evidence to a jury, argue and defend my theory of the case, and once the case has been turned over to the jury, the community decides what happens.

After the trial was over and after a few days of awkwardness, my dad and I were able to talk about the case. We never got in to too many details, but I think both learned from the experience and have a new respect for each other both on a personal and professional level. One thing I took away from the whole experience is that it does not matter who is sitting at the defense table. Justice will be served whether trying a case against a close friend, your least favorite defense attorney, or even your father—as long as you believe in the facts of the case, you sufficiently prepare, and you effectively present the evidence. ❇

# You can't say that!

## The perils of improper final argument

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

We prosecutors long for final argument. It is the reward for days, weeks, or even months of thanklessly slogging through trial. When the time for final argument arrives, prosecutors get to become the stars of the trial for a brief moment and release all of their pent-up angst from the trial in an explosion of impassioned oratorical brilliance.

However, there are limits to what we may say in final argument, and exceeding those limits can have dire consequences because Texas courts have specifically restricted what prosecutors may properly engage in during final argument. This article is designed to give a brief overview of permissible argument as well as those areas of argument courts have held improper so that prosecutors might sidestep these potential pitfalls.

### What arguments are permissible?

Prosecutors are entitled to strike "hard blows, but not foul ones" in closing argument.[1] "The purpose of closing argument is to facilitate the jury in properly analyzing the evidence presented at trial so that it may 'arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence.'"[2] There are four permissible areas of jury argument: 1) summation of the evidence, 2) reasonable deductions from the evidence, 3) answer to the argument of opposing counsel, and 4) pleas for law enforcement.[3] These permissible areas of argument apply both at the guilt/innocence and punishment phases of trial.[4]

While the Texas courts have generally defined the areas of permissible jury argument, it is *impermissible* jury argument that has been more specifically defined. Because it is impermissible jury argument that presents potential problems for prosecutors, an examination of some areas of impermissible jury argument is in order.

### What arguments are impermissible?

Impermissible jury argument is anything that does not fall within the four broadly defined categories of permissible argument. This definition provides little practical guidance for prosecutors in trial; however, one can glean from an examination of caselaw addressing impermissible jury argument the general categories of improper argument, as well as specific factual situations that can serve as a guide to permissible argument. The following is a non-exhaustive list of general areas of impermissible jury argument with case citations to specific factual scenarios.

#### *Arguing facts not in evidence*

When discussing the facts of the case and what the jurors should glean from those facts, prosecutors must necessarily confine their argument to facts in the record and reasonable deductions from those facts.[5] The Court of Criminal Appeals has held, "Argument injecting matters not in the record is clearly improper. …"[6] Texas courts have taken this further in holding that argument inviting speculation is also improper, and in particular, implying that there was additional evidence of guilt that was not shown at trial is not only improper but reversible error.[7]

#### *Comment on the defendant's failure to testify*

The prosecutor may not reference a defendant's failure to testify in closing argument.[8] A comment by the prosecutor on a defendant's failure to testify violates both the state and federal constitutions and is also contrary to statute.[9]

While the Texas courts have made clear that any comment by the prosecution that could be interpreted as a comment on the defendant's failure to testify is to be treated with suspicion, there are scenarios where comments by prosecutors along these lines may be proper. For example, "implied" or "indirect allusion" to the defendant's failure to testify are not a violation of the defendant's rights.[10] However, in practice, defining what is a direct versus an indirect allusion to the defendant's failure to testify is difficult to determine and will doubtless be even more difficult

to a prosecutor in the heat of an emotional argument.[11] In that light, the best policy is to avoid any potential reference to a defendant's failure to testify.

It should be noted, however, that while comments even alluding to a defendant's failure to testify should be avoided, commenting on the defendant's refusal to present evidence is generally proper and may even be essential to rebut defense counsel's final argument. The Texas Court of Criminal Appeals has held that "the prosecutor may comment on the defendant's failure to produce witnesses and evidence so long as the remark does not fault the defendant for exercising his right not to testify."[12] For example, Texas courts have upheld prosecutors' final arguments where those arguments commented on the defendant's failure to produce expert testimony or medical records[13] in response to a defense attack on the State's evidence. However, as with any final argument potentially touching on the defendant's refusal to testify, this general rule must also be used with caution. This is because where there is no evidence before the jury that there were any witnesses who could have, or would have, testified on the defendant's behalf about the issue in question, a prosecutor's argument mentioning the defendant's failure to call any such witnesses can still be reversible error.[14]

### *Stating law contrary to that contained in the court's charge*

Argument is improper where it states law contrary to that contained in the court's charge.[15] While the Court of Criminal Appeals has held that arguing law contrary to that contained in the court's charge is improper, it has also held that "there is no error in correctly arguing the law, even if the law is not included in the court's charge."[16] This rule insulates a prosecutor from a complaint that his argument went beyond the court's charge, but it does not address the situation where the court's charge contains a misstatement of the law.

### *Applying parole law to the defendant on trial*

The prosecutor may give an accurate summary of the parole law applicable in a given case.[17] However, the prosecutor may not specifically apply that parole law to the defendant on trial.[18] Essentially, the prosecutor can and should do no more than restate the parole law given in the court's charge, which should track the language in the Texas Code of Criminal Procedure.[19]

### *Striking at the defendant over the shoulders of counsel*

The Court of Criminal Appeals has treated arguments attacking a defendant's counsel personally both as obviously improper and as worthy of particularly close scrutiny. The Court of Criminal Appeals has held that it "maintains a special concern for final arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney."[20] "It is axiomatic that the State may not strike at a defendant over the shoulders of his counsel or accuse defense counsel of bad faith and insincerity."[21] In interpreting these general statements, the Court of Criminal Appeals has generally allowed attacks on defense counsel's theory of the case but has regarded with much greater suspicion any attack on defense counsel personally.[22] The Court of Criminal Appeals has looked particularly negatively on arguments contrasting the duties of prosecutors and defense counsel.[23]

### *Name-calling*

The prosecutor may not call the defendant derogatory names[24] (no matter how much he wants to). "A prosecutor should not refer to a defendant by any name other than his given name or nickname. It is improper to refer to a defendant by a derogatory term designed to subject him to personal abuse."[25]

## Conclusion

Final argument is perhaps the most enjoyable part of trial practice. This is in part due to the latitude the prosecutor enjoys in making argument. However, it still is not without limitations, which should be taken seriously. Prosecutors should enjoy closing argument, but with moderation. There is no worse sensation than snatching appellate defeat from the jaws of trial victory because of an overreaching final argument. ❇

## Endnotes

1 *United States v. McPhee*, 731 F.2d 1150, 1152 (5th Cir. 1984).

2 *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. 1980) quoting *Stearn v. State*, 487 S.W.2d 734, 736 (Tex. Crim. App. 1972).

3 *Campbell*, 610 S.W.2d at 756.

4 *Harris v. State*, 996 S.W.2d 232, 237 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

5 *Freeman v. State*, 340 S.W.3d 717, 728 (Tex.

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Crim. App. 2011); *Berryhill v. State*, 501 S.W.2d 86, 87 (Tex. Crim. App. 1973).

6 *Id.*

7 See *id.; Watts v. State*, 371 S.W.3d 448, 459-61 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (argument "inviting speculation into future events—including the fates of untried criminals" improper).

8 *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007).

9 *Randolph v. State*, 353 S.W.3d 887, 891 (Tex. Crim. App. 2011); U.S. Const. amend. V; Tex. Const. art. I, §10; Tex. Code Crim. Proc. Art. 38.08.

10 *Randolph*, 353 S.W.3d at 891.

11 *Id.* at 892 (giving examples of scenarios where allusions to a defendant's failure to testify would be proper or improper).

12 *Jackson v. State*, 17 S.W.3d 664, 674 (Tex. Crim. App. 2000) (prosecutor's statement that defendant would have called his own DNA expert if he really believed State's DNA evidence to be faulty was not an improper comment on defendant's failure to testify).

13 *Id.; Zavala v. State*, 401 S.W.3d 171, 183 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

14 See *Garrett v. State*, 632 S.W.2d 350, 353 (Tex. Crim. App. 1982) (prosecutor's final argument that defense could have called appointed expert was erroneous, though not reversibly so, where there was no mention of that expert in front of the jury).

15 *Mauldin v. State*, 628 S.W.2d 793, 795 (Tex. Crim. App. 1982).

16 *State v. Renteria*, 977 S.W.2d 606, 608 (Tex. Crim. App. 1998).

17 *Hawkins v. State*, 135 S.W.3d 72, 84 (Tex. Crim. App. 2004).

18 *Id.*

19 *Taylor v. State*, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007); Tex. Code Crim. Proc. Art. 37.07 §4 (requiring the jury to be given certain parole eligibility instructions).

20 *Mosley v. State*, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998).

21 *Fuentes v. State*, 64 S.W.2d 333, 335 (Tex. Crim. App. 1984).

22 *Mosley*, 983 S.W.2d at 259; *Williams v. State*, 417 S.W.3d 162, 174 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

23 *Wilson v. State*, 938 S.W.2d 57, 62 (Tex. Crim. App. 1996) abrogation on other grounds recognized by *Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002).

24 See, e.g., *Duran v. State*, 356 S.W.2d 937, 291 (Tex. Crim. App. 1962) (case reversed where prosecutor called defendant a "punk"); *Ponce v. State* (299 S.W.3d 167, 175 (Tex. App.—Eastland 2009, no pet.) (improper, though not reversible, for prosecutor to call defendant a "monster").

25 *Ponce*, 299 S.W.3d at 175, citing *Schumacher v. State*, 72 S.W.3d 43, 49 (Tex. App.—Eastland 2009, pet. ref'd) (indirectly calling defendant a "scumbag" during voir dire).

# Understanding U-visas

These documents can be extremely helpful for crime victims who aren't legal U.S. residents or U.S. citizens, but they can also be tricky. Here's how Harris County handles them.

*By Michelle Permenter*
Director of the Victim Witness Division, Harris County District Attorney's Office

While Alicia (not her real name) attempted to remove her 18-month-old son from her ex-boyfriend's truck, he grabbed her by the arm and pulled her in to the vehicle. While holding Alicia down, he began to drive, stabbing her in the chest, arms, head, and legs in the process. Then he contacted his brother-in-law, who wanted nothing to do with the incident, and advised him to take Alicia to the hospital. He gave the child to his brother-in-law and drove Alicia to another location, dragged her out of the vehicle through the passenger side door, and left her for dead on the pavement.

A passerby called 911, and Alicia was transported to a hospital, where she underwent surgery for puncture wounds to her lung and heart valve and received stitches for 46 stab wounds. She was cooperative with law enforcement, but once the case was filed with the Harris County District Attorney's Office she decided to return to her home country, Mexico, for family support.

As her ex-boyfriend's jury trial approached, two issues became central to the case. First, how would we bring Alicia back to Houston to testify? And second, how could we help and support her once she returned? After discussing the options, one of our investigators assisted in Alicia's return to Houston by submitting a request for Significant Public Benefit Parole (SPBP, sometimes called just "parole"). Parole may be used to bring an alien witness, defendant, or cooperating source into the United States for up to a year. (It must be noted that SPBP will be granted only for the minimum period of time required to accomplish the purpose of the request.[1]) Parole does not constitute a formal admission to the United States and confers only temporary authorization to be in the U.S. without having been admitted.[2]

Additionally, I contacted an attorney at a local immigration law center to provide Alicia with a clear understanding of what services were available to her and how those services would help her. Specifically, we gave her a direct link to legal aid so she could apply for a U-visa, which gives a crime victim legal immigration status for up to four years, permitting the person to live and work in the U.S. so she can participate in the criminal trial against her abuser.

The day that Alicia sat in my office after her return was a powerful indicator of just how valuable the U-visa can be as a tool for assisting crime victims. Our office was able to certify the form that needed to go with her application for the U-visa, so she was available to testify against her ex-boyfriend at trial. Alicia's presence and her testimony brought justice quickly against her abuser: He pleaded guilty to 20 years in the Texas Department of Criminal Justice for the aggravated assault of a family member.

Three years later, I was talking about another case to the immigration attorney who was instrumental in assisting Alicia, and I asked about her. I learned she was approaching the adjustment of status, which would allow her to become a legal permanent resident of the United States. I cannot think of any better outcome for a young woman who was determined to excel against seemingly insurmountable odds.

## What is a U-visa?

The U-visa was established under the Trafficking Victims Protection Act of 2000 (TVPA),[3] and was subsequently reauthorized in 2003, 2005, and 2008 (Trafficking Victims Protection Reauthorization Act, or TVPRA).[4] It was created as a humanitarian relief to help a vulnerable population and encourage reporting of crime, and it

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is intended to increase trust in rather than fear of law enforcement agencies. It provides legal immigration status for up to four years; at the end of the third year, the U-visa recipient may be able to apply to adjust her status to legal permanent residence (that is, get a "green card"). Another possible benefit is the ability to retain nonimmigrant status for family members.

There are many steps in applying for a U-visa, and a certification from local law enforcement (the form is called the I-918, Supplement B) is a mandatory piece of evidence that the immigrant is responsible for submitting with the application. The signature of a designated certifying official confirms to the United States Citizenship and Immigration Services (USCIS) that:

- the victim suffered substantial physical or mental abuse as a result of having been a victim of one or more qualifying criminal activities;
- the victim possesses information concerning the criminal activities;
- the victim was helpful, has been helpful, or is likely to be helpful to a federal, state, or local investigation or prosecution of the criminal activity; and
- the criminal activity violated the federal or state laws of the U.S. or been perpetrated in the U.S. or its territories and possessions.

When completing the I-918, Supplement B, qualifying criminal activity is another area that is reviewed by the certifying official. The list includes rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit any of the above.

Certified immigrant victims cooperative at any stage of a past or present investigation or prosecution may be eligible for a U-visa, provided they meet all requirements. The certifying agency provides this information to USCIS, and the ultimate decision to grant the U-visa rests with USCIS.

In 2008, I was designated as the certifying official for our office. At the time very few people were aware of the U-visa, and many did not know how to submit a request for a certification of the I-918, Supplement B. (Supplement A, by the way, is the petition for a qualifying family member of the U-visa applicant.) Even if they did know, submitting a request for a certification was difficult because there was no clearly defined process or guidelines. This was an issue in Harris County in 2008, and as word about the U-visa spread through immigrant communities, the number of certification requests grew rapidly. Our office needed a policy to guide us in fielding these requests, and I share our procedure in the hope that it might help others across Texas.

## How Harris County does it

We implemented specific guidelines for reviewing U-visa requests. Over a few years' time, we decided to review pending cases and disposed cases not more than three years post-disposition,[5] which immediately decreased the backlog of requests by facilitating quicker review time and responses to the immigration attorneys representing the applicants. This decision also improved communication with legal aid agencies and private attorneys and gave them better direction on how to submit requests to our office.

In Harris County, people seeking a U-visa contact our office regularly. In 2013 our office received 157 requests for a U-visa certification; of those, 69 were signed, 45 were denied, 29 certifications remain pending, and 14 were requests for recertifications. We had far more requests the year before (338 in 2012); this reduction between 2012 and 2013 can be attributed to a policy implemented in 2013 (see Endnote No. 5).

Requests come from various places: 1) community legal aid agencies, private attorneys, or *pro bono* attorneys working to help crime victims, 2) crime victims already working with our office on a case, 3) an assistant district attorney who refers a crime victim to the Victim Witness Division, or 4) on occasion, someone will walk into the Victim Witness Division with a U-visa certification request after being referred by an outside agency. In each scenario, the initial consideration of the request is the same. The individual's request must be connected to a legal aid agency that works in immigration law. If not, they are referred to one of the several legal aid agencies within the community. This results in the victim receiving the best possi-

ble assistance when addressing her immigration status and allows our office to work directly with staff attorneys or private attorneys knowledgeable in immigration law. In fact, the district attorney's office will accept a request for certification only when an immigration attorney submits it.

Once a qualifying certification request is received, it goes to a U-visa coordinator for review. In our office there is one coordinator, Debra Schield, assigned to review all requests. (I do the final certification.) The review involves the following:

- If the criminal case is pending, an email will be sent to the prosecutor handling the case asking if the certification can be signed. Signing is based on, as mentioned earlier, verifying the victim has been, is being, or is likely to be helpful in the prosecution of the case. If the prosecutor says the U-visa can be signed, the coordinator will complete the I-918, Supplement B form and forward it to the certifying official for signature. If the prosecutor says the U-visa cannot be signed, the coordinator will complete a response letter, including why the certification was denied, and forward it to the certifying official to sign.
- If the case is disposed and falls within office policy (that is, it is within three years post-disposition), the coordinator will request the case file and review it to determine if the victim was helpful during the prosecution. If the prosecutor who handled the case is available, he will be contacted for input. (During this particular review, it is important to recognize that a guilty plea does not mean the victim was helpful.) If the victim was helpful, the coordinator will complete the I-918, Supplement B form and forward it to the certifying official. If the certification is denied, the coordinator will complete a response letter, including why the certification was denied, and forward it to the certifying official to sign. Once a certification is provided and returned to the attorney representing the victim, our office does not receive notice from USCIS regarding the status of the applicant's application. However, there are instances when USCIS will call to verify the victim's continued helpfulness and current status of the criminal case.

There are several reasons a denial letter may be sent:

- The case is still under investigation by the law enforcement agency. Our office will review only those cases that are being or have been prosecuted. If the case is still with law enforcement, we send victims requesting a U-visa to that law enforcement agency.
- The request has been submitted to our office by mistake and should be sent to another agency in another county.
- The victim was not helpful during the prosecution of the case.
- The case is more than three years post-disposition. This response occurred more often before the office implemented a policy. In short, there simply was not enough information available on older cases to determine the victim's helpfulness.
- The case was no-billed. In this instance the victim will be referred back to the law enforcement agency. If the victim was cooperative through the investigation, the agency can sign the I-918 Supplement B, certifying that she was cooperative, so she can submit the U-visa application to USCIS.

Three years after receiving U-visa status, recipients may file for a green card (adjustment of status/permanent residence) if they meet certain requirements, including:

- They have been physically present in the United States for a continuous period of at least three years while in U nonimmigrant status, and
- They have not unreasonably refused to provide assistance to law enforcement since they received their U-visa.

When the victim applies for adjustment of status, the district attorney's office will receive a re-certification request. The same guidelines as the initial submission apply and, if applicable, our office will indicate that the victim's assistance is no longer needed when completing the I-918, Supplement B.

## Conclusion

In a county as large as Harris, the influx of requests can be overwhelming, but establishing guidelines has greatly streamlined the review process. It is also important to note that signing a U-visa certification does not grant lawful status or make a determination of the applicant's eligibility for a U-visa. An approved certification request is given significant weight, but USCIS will not consider it conclusive evidence that

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the applicant has met all of the eligibility requirements.[6] USCIS will look at the totality of the circumstances surrounding the application in determining whether the petitioner will be granted the U-visa.[7]

The United States Citizen and Immigration Services make available a fact sheet, which we've put on the TDCAA website for viewing. Just look for this story in this issue of the journal. And if you have any questions, please feel free to call me at 713/755-6655 or email me at permenter_michelle@dao.hctx.net. ❇

## Endnotes

1 Immigration & Nationality Act (INA), §212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

2 Tool Kit for Prosecutors (2011), retrieved from www.ice.gov.

3 Pub. L. No. 106-386, 114 Stat. 1464 (2000). The U-visa was incorporated in the section of TVPA known as the Battered Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518 (2000).

4 Pub. L. No. 108-193, 117 Stat. 2875 (2000), Pub. L. No. 109-164, 119 Stat. 3558 (2006), Pub. L. No. 110-457, 122 Stat. 5004 (2008); Immigration & Nationality Act (INA) §101(a)(15)(U).

5 In 2008 when I moved into the director position, we accepted U-visa requests for all cases, pending or disposed. In 2012 we shifted to accepting requests only for pending cases, and the following year we included cases up to three years post-disposition.

6 72 Fed. Reg. 53014 at 53,024. 24.

7 See Form I-918, Supplement B, Instructions (01/15/13) at 3.