THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 37, Number 4 • July-August 2007

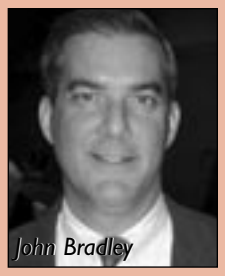
"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01 Texas Code of Criminal Procedure

'Jessica's Law' comes to Texas

HB 8 strengthens Texas' penalties against sex offenders and creates two new crimes. What you need to know about the new law.

By John Bradley
Williamson County District Attorney

Jessica Lunsford, a 9-year old Florida girl, was kidnapped, raped, and killed by John Couey, a registered sex offender and chronic burglar. He was convicted of capital murder and sentenced to death. Mark Lunsford, Jessica's father, was motivated by the case to encourage passage of tougher sex offender laws throughout the United States. Although Congress and about 30 state legislative bodies have taken different approaches, the key provisions of those laws have included a 25-year mandatory minimum prison sentence and lifetime electronic monitoring for sex offenders. Texas joined the movement by titling House Bill 8 the "Jessica Lunsford Act" and passing it in the 80th Legislative Session.


John Bradley

The evolution of the Texas version of Jessica's Law, as it has come to be known in the media, was an amazing thing to watch. Both the House and the Senate had several bills, each claiming to be Jessica's Law. Many politicians made speeches, each claiming to be tough on sex offenders. Rep. Debbie Riddle (R–Houston) and the House, however, moved first by voting HB 8 out of committee. But when it reached the House floor, so many unanswered questions were raised that the House stopped debate. Over the next weekend, Rep. Dan Gattis (R–Georgetown) helped rework the bill after consulting with prosecutors, defense attorneys, and fellow House members. He then explained the new bill on the House floor. The House approved, and HB 8 moved to the Senate for consideration.

The Senate already had a Jessica's Law (Senate Bill 5), sponsored by Sen. Bob Deuell (R–Greenville), which had been heard in committee. At that lengthy hearing, Lt. Governor David Dewhurst and Attorney General Greg Abbott testified in favor of the bill. Several groups and individuals, including myself, voiced strong opposition based on the inclusion of excessive mandatory minimum punishments for a broad range of sex offenses and a capital felony for sex offenders. SB 5 was passed out of committee but only with the sponsor's promise to consider amendments to alleviate concerns raised during the hearing. Those concerns were discussed at numerous meetings, on the Senate floor, and during conference committee meetings. Eventually, those discussions resulted in the final version of HB 8 passing into law.

So, what is Jessica's Law in Texas?[1]

Continuous sexual abuse

In 2006, Court of Criminal Appeals Judge Cathy Cochran warned criminal justice officials of a potential "train wreck in Texas law" because of the multiple, conflicting constitutional issues associated with prosecuting sex offenders who commit repeated crimes against children.[2] She then suggested, "Perhaps the Texas Legislature can address this conundrum and consider enacting a new penal statute that focuses upon a

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Tribute gifts to the Texas District and County Attorneys Foundation

Editor's note: The TDCAF continues to receive gifts in memory of our great friend, the late State's Prosecuting Attorney Matthew Paul. We are honored to accept gifts in his name from the people listed below:

The Honorable Larry Gist
The Honorable W.C. "Bud" Kirkendall
Crawford Long
Sylvia Mandel
John Stride

We would also like to share a letter from Crawford Long, an assistant prosecutor in McLennan County, who superbly sums up why we all miss Matthew:

Matthew Paul was an exceptionally talented person and public servant. I have sought his advice and counsel on many occasions and always found him to be generous with his time and willing to help us with our legal issues. In addition to his professional advice, I appreciated his personal kindness as well. A few days after I argued a capital murder case before the Court of Criminal Appeals, my district attorney showed me a letter that Matthew had written to him complimenting my argument to the court. I have a copy of that letter which I keep and treasure. Those of us who knew him and worked with him feel the loss at the same time we recognize the skill, dedication, and kindness with which he enhanced our profession.

TEXAS DISTRICT AND COUNTY ATTORNEYS FOUNDATION

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512/474-2436 • fax: 512/478-4112 • tdcaa.com

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members.

Sarah Wolf, Editor/Photographer
Diane Beckham, Senior Staff Counsel

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the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

TDCAA's new home address: 505 W. 12th St.

By the time you get this edition of the *Texas Prosecutor*, your association will have moved into some new office space. Many of you who have visited the offices at 1210 Nueces know we are shoehorned in that building. If we are going to meet the needs of a growing membership, we need more space, and we have secured a great spot right around the corner from our existing building for a five-year lease. Modest accommodations, to be sure, but plenty of space to grow with you. Our plans are still to find a permanent home in the future in the courthouse and capitol complex, and this building may very well be that home. But in the meantime, come by and visit us—our new digs are just a half-block south of the 1210 Nueces office at the corner of 12th and Nueces. We're open for business!

Have you seen what they did to your Penal Code?!

I wouldn't exactly say that the 80th Legislature ran amuck, but it sure ran. Bill filings were up 13 percent to a record high total of 5,921 bills. And more were passed—1,495—than in a long, long time.

As usual, some great stuff passed … and some not so great stuff. There are some real eye-openers this session, so we hope to see you at a TDCAA Legislative Update near you this July or August. (See page 13 for a schedule.)

And when I say "have you seen what they did to *your* Penal Code," I really mean about two-thirds of it is yours. I have learned from watching the legislature work that about two-thirds of the changes to the criminal laws are things that the practitioners—prosecutors and defense lawyers—can use when they ply their craft. The other third belongs to the legislators themselves and amounts to policy pronouncements and single-shot responses to "crime du jour" issues. That's fair enough, and prosecutors have never minded that other third—as long as it doesn't mess up our two-thirds of the code book.

So did the legislature's one-third—you know, guns, sex offenders, TYC, and juveniles—mess with your two-thirds? Come find out! (A hint: The legislature "went to the dogs" this session!)

Don't look now, but Congress is working!

It may be agony to watch legislation work its way through the process in Texas, but that's nuthin' compared to rooting for a bill in the U.S. Congress. Seems that it can take years for the same bill to get filed, talked on, killed, refiled, discussed again, killed … well, you get the picture.

So it is with guarded optimism that I report that the John R. Justice Prosecutors and Defenders Incentive Act of 2007, H.R. 916, passed the United States House of Representatives May 15. (You might recall that Congressman **Ted Poe**, a former Texas district judge, filed identical legislation and is a co-sponsor of this measure.) This bill as currently drafted would authorize a maximum of $10,000 a year, up to $60,000, for law school graduates who commit to work at least three years as a prosecutor or public defender to defray student loan repayment. It's my understanding that the cost of the bill was pared down with the insertion of some "needs based" language, but hey, it is great to see the bill moving forward. And you may need to swallow hard at some of the arguments being used to push the bill: One representative from Georgia was quoted as saying: "Many innocent people are languishing in jails because we are not addressing this issue."

Thanks to the folks at NDAA for their work on this and to our state representatives to NDAA, **Mark Edwards** (DA-Sweetwater), **Henry Garza** (DA-

Belton), and **Chuck Rosenthal** (DA-Houston).

Remember, a lot still needs to happen before this bill becomes law. Even if it passes the Senate, the next Congress will need to take up separate legislation to actually fund the bill. So realistically, we are a long way from the finish here, but it is still good to see this important issue get the attention it deserves.

"Why I want to be a prosecutor" by Mark Little

For the war stories, of course. Some of you may have recently read a great little story submitted to the Buckmeyer column of the *Texas Bar Journal* by **Mike Little**, DA in Liberty. He was trying a murder case against legendary defense attorney **Richard "Racehorse" Haynes**. Seems the defendant was having an intimate relationship with a woman, and only God knows how it was relevant to the trial, but Mike's cross-examination of the defendant wandered off into the nature of that relationship—all of which was witnessed by Mike's son **Mark Little**, who is off to UT Law this fall and was impressed enough with his dad's work to consider our trade.

Mike Little: Okay. But she gave you—she provided you—do you know what a gigolo is?
Defendant: No, sir.
Mike Little: It's when a—the woman pays the man for sex. Kind of the reverse of a prostitute. Do you understand now?
Defendant: Yeah. But she never paid me, sir.
Mr. Haynes: Excuse me, I think I'm going to object to counsel's description of what a gigolo is. There is a prominent singer who says I'm just a gigolo, and he does not suggest anywhere at all in the song that he's trading his looks or his charm for sex. Or money.
Mike Little: Well, judge, maybe I'm wrong about what a gigolo is; I've never been in the business, but I was just trying to find out what this gentleman knew about it. *[to defendant]* Without getting into a legal definition of gigolo, Mr. ____, Mrs. _____ was giving you, as I understand it, drinks, cigarettes, and lobster in exchange for you having sex with her?
Defendant: Not really, sir.
Mike Little: Not really. But she did treat you good?
Defendant: Yes, sir.
Mike Little: And that's why you continued to have sex with her?
Defendant: Yes, sir.
Mike Little: Because she wasn't pretty? She wasn't pretty, was she?
Defendant: No, sir.
Mike Little: Do you have sex with ugly women all the time?
Mr. Haynes: I'm going to object to that, if the court please.
The Court: Sustained.
Mr. Haynes: If that was a crime, there would be a lot of us in jail.
Mike Little: Speak for yourself.

I can only imagine what Mark had to tell his mom when he went home that night from court. Quick thinking there, Mike! You earned big-time bonus points right there at Mother's Day!

Meet Emily Kleine


Emily Kleine

Welcome to our newest staff member, **Emily Kleine**. Well to be precise, she works for the Texas District and County Attorneys Foundation and serves as the development director. The foundation has been growing quickly, and we need someone with Emily's expertise and enthusiasm to keep up with y'all. Emily hails from Midland by way of Amarillo and Austin, and we are very excited to have her on board. Make sure to say hello at the next TDCAA conference or event!

TDCAA leadership nominations for 2008

The TDCAA annual business meeting will be held in conjunction with the Annual Criminal and Civil Law Update in Corpus Christi Wednesday, September 26, at 5 p.m. at the Omni Bayfront Hotel ballroom. The TDCAA Nominations Committee will soon consider nominations for the following positions on the 2008 Board:

- President Elect;
- Secretary/Treasurer;
- District Attorney at Large; and
- Assistant Prosecutor at Large.

Under the bylaws, our current President Elect, **Bill Turner** (DA Bryan), will become our president for 2008, and **David Williams** (CA San Saba) will serve as our board chairman. In addition, at the annual business meeting, regional caucuses will be held to elect new regional directors for the following regions (with the current regional director listed in parentheses): Region 3 (**Tony Hackebeil**); Region 5 (**Mike Little**); Region 6 (**Joe Brown**); and Region 8 (**Henry Garza**). Any elected or assistant prosecutor is eligible to serve as a regional director, so if you have any questions about that position, just give me a call.

And a little bylaw business

Also at our annual business meeting on September 26, we will take up a couple of bylaw amendments relating to the

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association's standing committees. In particular, I anticipate a motion from the chair of the Bylaws Committee, **David Williams**, to amend Article X, Section A, to add three new standing committees to the TDCAA governing committee structure. These committees would be: the Editorial Board, which advises Sarah Wolf, our communications director, on development of the *Texas Prosecutor*; the Publications Committee, which advises Diane Beckham, senior staff counsel, on TDCAA publications; and the Finance Committee, which directs TDCAA on financial matters and reports on financial activities to the full board. Finally, the Bylaws Committee will also propose that we amend the bylaws to change the name of the Education Committee to the Training Committee, which is what we have been calling it for the last 20 years or so. This serves as your notice of these proposed changes.

the President's Column

By David Williams
County Attorney in San Saba County

State longevity pay for all assistant prosecutors

By now, you probably have heard the great news that Senate Bill 844 by **Sen. Juan "Chuy" Hinojosa** (D-McAllen) and **Rep. Dan Gattis** (R-Georgetown) passed the Texas Legislature and was signed into law by the governor May 5. The funding is included in the state budget for the 2008-2009 biennium, so this supplement will be available to all assistant prosecutors, including assistant county attorneys, beginning September 1, 2007.

Since 1979, the State of Texas has pursued a strategy to increase the professionalism of its prosecutors by encouraging the best lawyers to devote their careers to representing the State in both criminal and civil matters. The first piece of legislation along this line was the Professional Prosecutor Act, (Chapter 46 of the Government Code), which encourages elected district attorneys to forgo a private practice and focus on the work of the people by tying their salary to that of district judges. This policy has been very successful: For instance, out of the 155 elected felony prosecutors in Texas, only 11 still have the option to maintain a private practice, and that number was reduced to seven during this recent session. The second piece of the puzzle was the County Attorney Supplement, which was enacted in 1999 to provide State support for the 174 county attorneys who do work on the State's behalf. This supplement, again using a formula based on a district judge's salary, has provided a significant boost to elected county attorneys.

The third key piece was the brainchild of **Vilma Luna**, a former Harris County assistant district attorney and State Representative from Corpus Christi, who saw a need to help assistant prosecutors remain in the profession. The result was the Assistant Prosecutor Longevity Pay Act in 2001. This program is found at Chapter 41, Government Code, Subchapter D.

Senate Bill 844 corrected a shortcoming of the original longevity pay legislation, which limited coverage to assis-

tant prosecutors in offices with felony jurisdiction. Since the inception of the program, the $15 fee on surety bonds that funds longevity pay has produced sufficient excess to cover all assistant prosecutors, so the legislature agreed to extend the program to include all assistants, effective this year.

So what does this new legislation mean? Take the time to read Chapter 41, Subchapter D, of the Government Code, and SB 844 (you can find it on the Capitol website at www.capitol.state.tx.us). Assistant county prosecutors get credit for all time in which they have served as full-time Texas prosecutors. Beginning in the fifth year of service, assistants will receive $20 per month per year of service (or $80 a month) from the State. That's $960 a year at the start, which increases annually and caps at $5,000 a year in the 21st year of service. In addition, there is a bonus in this bill if you are currently an assistant felony prosecutor who has prior service credit as an assistant county attorney. Because SB 844 amends the definition of "assistant prosecutor," that time as an assistant county attorney now counts when you calculate your longevity, so you may get a boost, too.

How will this boost happen? In the middle of August, the judiciary section of the comptroller's office will send out a form to every county attorney's office in the state. This form will allow you to calculate your service credits and enroll in the program with the comptroller. Longevity pay will be delivered to your county in quarterly increments beginning in September 2007, and your county will pass it along to you in a manner of their choosing.

I want to take this moment to say thanks again to Scott Brumley, county attorney in Potter County, and Jim Kuboviak, county attorney in Brazos County, for developing this legislation and spending the time in Austin to push it through the system.

And now we are left with one more piece of this puzzle on which we all need to work: student loan forgiveness and repayment legislation working its way through the U.S. Congress this spring. For more information about that program, check out Rob Kepple's Executive Director's Report on page 4.

Introducing training sessions for VACs and appellate attorneys

TDCAA is proud to announce two summer training sessions specially tailored to victim assistance coordinators and appellate prosecutors. Both workshops will be at the Baylor School of Law in Waco, and they are free to all prosecutors and prosecutor office personnel who want to attend. Because of limited seating, pre-registration is strongly encouraged. A registration form is available by calling 512/474-2436 or at www.tdcaa.com/seminars.

Victim Services Workshop

August 8, 2007: Renowned national victims advocate Anne Seymour will speak to VACs in prosecutor offices about how to prevent (or address) burnout in a profession with the highest emotional demands. In the one-day session, Seymour will also discuss the evolution of victim services and what the future holds. Seymour is from Arlington, Virginia, and is a nationally respected public spokesperson for victims rights. She is a founding staff member of the National Victim Center (NVC), a national victims rights organization.

Appellate Advocacy Workshop

August 9, 2007: Improving writing and oral argument skills will be the focus of this one-day workshop aimed at appellate prosecutors. The morning session features Wayne Schiess, director of the legal writing program at the University of Texas School of Law, who will teach attendees how to get their points across without using dreaded legalese. The afternoon session features Gena Bunn and Ed Marshall, appellate gurus from the Attorney General's Office, who will discuss how to maximize your time in oral argument and turn appellate judges' questions to your advantage. **Attendees will earn 4 hours of CLE credit.**

Newsworthy

Gerald Summerford winner

Clarissa Bauer, an assistant county attorney in Harris County, was honored with the Gerald Summerford Award at the Civil Law Seminar in May. The award is given to the civil practitioner of the year. She is pictured above with TDCAA's training director, Erik Nielsen. Congratulations!

Investigator scholarship applications due

Applications for the 2007 Investigator Section scholarship are due August 3, 2007. Children under age 25, under legal guardianship of a current TDCAA member, who are currently enrolled in an accredited college, university, or vocational-technical school, with a cumulative high school or college GPA of at least 3.0 are eligible.

Applications are available at www.tdcaa.com. Click on the Forms and Briefs button, and search for "scholarship." This year's essay topics are: What person has had the most influence in your life? Why and what effect will that person's influence and character be in your future? How will the scholarship assist you in obtaining your goals?

Send completed applications and essays to Gail Ferguson's attention at TDCAA, 505 W. 12th St., Austin, TX 78701.

Abbott honored by NHTSA, NAPC

Our own Clay Abbott, TDCAA's DWI resource prosecutor, was recently honored by both the National Highway Transportation Safety Administration (NHTSA) and by the National Association of Prosecutor Coordinators (NAPC) for his work on behalf of traffic safety.

As you may know, Abbott travels all over the state (and indeed the country) to train officers and prosecutors how to properly investigate and try intoxication offenses to keep our roads safer. Congratulations on these two honors!

Bradley given Danny Hill Award

At the 2007 Texas Crime Victim Clearinghouse (TxCVC) conference in Austin, Williamson County District Attorney John Bradley received the 2007 Danny Hill Award as an outstanding prosecutor upholding victims' rights. The award is presented each year to a prosecutor who shows special attention to the needs of victims of crime.

During the presentation, Raven Kazen, director of victim services for the Texas Department of Criminal Justice highlighted Bradley's work as President of the Board of Directors for the Williamson County Children's Advocacy Center and his constant sensitivity to victims' needs. Bradley also has recently created a parole protest task force to provide key information to the parole board for the denial of early release of inmates who have been convicted of and sentenced for violent crimes. (See page 20 for an article on that task force.)

DWI Corner

By W. Clay Abbott
TDCAA DWI Resource Prosecutor

Skirting suppression

In a DWI case one simply *cannot* survive suppression. Almost every important piece of evidence is lost as "fruit of the poisonous tree" if the court finds the initial stop was unreasonable under the 4th Amendment. To further complicate matters, as virtually every DWI stop and arrest is warrantless, the State finds itself behind a presumption of unreasonable conduct.[1] Police officers making warrantless stops and arrests, unlike every other individual presumed innocent of wrongdoing, are presumed to have acted unreasonably.[2] In a nutshell, we start in a hole. This simple constitutional doctrine also provides a procedural means for competent defense counsel to delay discussion of their client's conduct until the officer's conduct has been fully questioned, examined, and litigated. No surprise most DWI cases are preceded by a suppression hearing of some type.

In this article I will not attempt to discuss every possible suppression issue and search and seizure doctrine. Excellent existing publications already do exactly that. (Please refer to TDCAA's *Warrantless Search and Seizure* and *Traffic Stops*, both by Diane Burch Beckham and *DWI Investigation & Prosecution* by Richard Alpert.) I will instead focus on some practical steps in approaching the suppression hearing in a DWI case.

Suggestion 1: Read the motion.

Defense motions run the gamut from detailed and researched to the dreaded blanket form objections that can be filed in any case without a moment's thought or applicability. Regardless, begin your preparation by reading the defense motion. Are the objections under the U.S. and/or Texas Constitution? Are specific statutory grounds included? Are specific evidentiary rules raised? Are objections made under the 4th, 5th, or 6th Amendment? Or does it simply invoke "federal and state constitutions, Texas statutes, and the Rules of Evidence?" Where local rules or judicial disposition allow, get the defense to articulate the motion sufficiently to narrow issues.[3] Beware of seemingly meaningless boilerplate, and never gloss over a paragraph just because you have seen it before. Very often the defense appellate attorney can find a quotable reference in all that mess you skim over and resurrect an issue you thought was not raised.

Look at your case through defense lawyer goggles. Don't wait on the defense to pick out your weaknesses; do it yourself. Have a pre-trial discussion with your officers for what is not in the reports—after all, the defendant has related the story in greater detail to the defense counsel, so you should get details from your officer. Procure a copy of the statutes from the Transportation Code on which the officer based his traffic stop. Cover all the elements with him before he climbs on the stand. Watch the video with an eye toward justifying the initial stop, making the arrest, and whether the defendant's statements were products of a custodial interrogation. Finally, pull cases supporting your legal position and copy them for the court. If the issue is a novel one or the defense motion is well-briefed, consider preparing and submitting a response brief to the motion.

Suggestion 2: Try the hearing like a JP case.

Consider it a given that the Texas Transportation Code is poorly drafted. Officers must have probable cause to believe every element of the traffic offense was committed,[4] meaning both the officer and prosecutor must know

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the elements of the offense to create a record to support the court's overruling the motion to suppress or appeal a granting of the motion. If the officer misapplies the law, there may be no saving the case, but often the failure is in a prosecutor's direct examination of the officer during the hearing.[5]

One simple way to ensure your record is sufficient is for both the prosecutor and officer to know the relevant code section and to treat the hearing like a traffic case in JP court. Put on testimony just like you are in a bench trial on a traffic citation, not a DWI. So many DWI cases are reversed for insufficient probable cause because their records from the suppression are embarrassingly cursory, even for a Class C traffic case. I remember my first few suppression hearings when I asked my cop, "What did you stop him for?" After the officer replied, "Failure to dim his headlights," I'd move on, but I wouldn't have left it that sketchy if I were trying the violation in JP court. It is important to remember that proof of the defendant's actual guilt or innocence of the traffic violation is not required, only that probable cause of each element is established.[6] While the State should present the officer's direct like it would in JP court, the issues in the hearing are a full step below guilt/innocence. Also do not forget that probable cause to make a traffic violation stop is not the only legal justification. As discussed in suggestion No. 4, always look to see if other grounds such as reasonable suspicion, community caretaking, or voluntary encounters are viable grounds for the initial contact.

Suggestion 3: Establish the officer's experience and training.

For years I gave bad advice as an adjunct professor teaching trial advocacy at the Texas Tech School of Law. I used to tell students not to spend much time developing the officer's training and experience, but rather to dig right into the case. While it is true this rather dry testimony can squander the opportunity to fully utilize the principal of primacy, it is equally true that this testimony is essential to surviving the motion to suppress and creating an effective record on appeal.

Often judges, hoping as always for expediency, will quickly tire of this topic. Yet appellate courts quickly note its absence and mention its inclusion. Officers should be encouraged to periodically print their TCLEOSE training report and provide it to prosecutors as a kind of résumé. It is pretty impressive how many hours peace officers spend in class! Stressing the officer's training and practical experience also properly develops his credibility. It is important to help officers explain that their observations are deliberate and based on the experience of other officers, NHTSA studies, and their own considerable experience observing traffic and detecting impaired drivers.

One final suggestion in this regard is to develop a back-up question to the prosecution fall back, "What happened next?" When an officer gives a detail-starved statement, give a non-leading prompt for more detail by asking, "Can you tell me more about that?" Ask any appellate attorney: More detail concerning the officer's observations never hurt her ability to write an effective brief on a suppression issue.[7]

Suggestion 4: Put every theory establishing reasonableness in the record.

If you fail to develop and argue a theory before the trial court, you can't rely on that theory on appeal.[8] Every reasonable justification for the stop, arrest, or admissibility of the defendant's statement should be developed in testimony and placed in the record and before the court. To best illustrate the merit of this position, let me resort to an analogy: If you are charged by a rabid bear and you have a gun with six bullets, how many do you use? The answer is the same as the number of theories you raise at the suppression hearing: all of them.

One simple error in this regard is to jump too quickly to the conclusion that a "seizure" has occurred. Not every interaction between an officer and a potential defendant is a seizure that requires justification under the 4th Amendment.[9] Also look at your case for justifications based on reasonable suspicion, community caretaking, and other exigent circumstances.

Conclusion

Suppression hearings in DWI cases are with us always. As long as a mechanism exists for the defense to place officers on trial instead of their clients, defense attorneys would be ineffective and would violate their oath not to use it. There simply is no substitute for know-

ing the law and creating a record that preserves our victories and reverses our unfair losses. Again, please refer to the excellent publications mentioned above for a far more exhaustive and complete discussion of legal issues and case law on this subject. In the meantime, my hope is that we will endure fewer painful case reviews by following these simple suggestions.

Endnotes

1 *Katz v. U.S.*, 389 U.S. 347 (1967).

2 *Katz*, supra.

3 Article 28.01, Code of Criminal Procedure, gives trial courts considerable discretion in requiring issues be raised seven days before the hearing. If the court is inclined to require more than general boilerplate motions, use that predisposition to help narrow issues and request the court require the defense to make more specific motions.

4 *U.S. Lopez-Valdez*, 178 F3d 282 (5th Cir. 1999).

5 For Failure to Maintain a Single Lane see: *Bass v. State*, 64 S.W.3d 646 (Tex.App.—Texarkana 2001, pet. ref'd). *Hernandez v. State*, 983 S.W.2d 867 (Tex. App.—Austin, pet. ref'd). For Defective Tail Lamp: *Vicknair v. State*, 751 S.W.2d 180 (Tex. Crim. App. 1998 [on rehearing]). Following Too Closely, *Ford v. State*, 158 S.W.3d 488 (Tex. Crim.App. 2005). Also read *Stoker v. State*, 170 S.W.3d 807 (Tex. App.—Tyler 2005, no pet.), where it was done right.

6 *Zervos v. State*, 15 S.W.3d 146 (Tex.App—Texarkana 2000, pet ref'd).

7 Read *Ford v. State*, 158 S.W.3d 488 (Tex. Crim.App. 2005) and see if you get what I mean.

8 *State v. Mercado*, 972 S.W.2d 75 (Tex.Crim.App. 1998).

9 *State v. Bryant*, 161 S.W.3d 758 (Tex.App.—Fort Worth 2005, no pet.).

Newsworthy

Harris County Victims Services celebrates anniversary

By Amy Smith
Victim Witness Division Director in the Harris County DA's Office

On April 17, the Harris County Commissioner's Court presented a proclamation to the Harris County District Attorney's Office Victim Witness Division recognizing its 30th anniversary. Harris County Judge Ed Emmett presented the proclamation to Harris County District Attorney Chuck Rosenthal and Division Director Amy Smith. Also on hand to celebrate this milestone were former Harris County District Attorney Carol Vance and first Division Director Suzanne McDaniel (all pictured below).

In 1976 there weren't any programs for victims in Texas prosecutors' offices. Mr. Vance, who was also serving as National District Attorneys Association President at the time, asked McDaniel to research the prospect. "California had a program, and I thought Harris County should have one as well," Vance explains. The program hosted one of the seven President's Task Force on Victims of Crime hearings and has grown to serve as a model in the formation of community interagency councils on sexual assault and domestic violence.

The Proclamation states: "The Harris County District Attorney's Office Victim Witness Division was established in 1977 to provide information, assistance, and support for the victims of crime in Harris County. District Attorney Carol S. Vance, along with Suzanne McDaniel, created the Division to help victims through the difficult experience of the Criminal Justice System. District Attorney John B. Holmes, Jr., with the help of Gail O'Brien, continued the Division and was awarded the Governor's Award for Outstanding Program in 1988. Today, District Attorney Charles A. Rosenthal, Jr., Division Director Amy Smith, and her staff continue to serve the people of this county who are victimized by crime. The Harris County Victim Witness Division assisted over 30,000 victims of crime last year and helped them receive $16.9 million in restitution."

Congratulations on this well-deserved recognition!

Photos from the Civil Law Seminar

Summer schedule for TDCAA's Legislative Updates

Now that the legislative session is over, we will travel to 18 Texas cities to inform our members and others about changes to the law. Don't miss this chance to find out what happened during the 80th Legislative Session and earn 3 hours of CLE/TCLEOSE credit. All sessions (except in Dallas as noted) are from 1 to 4 p.m. Sign up by calling 512/474-2436 for a faxed registration form, or go to www.tdcaa.com/seminars.

City	Date	Location
Austin*	Friday, July 20	DPS Auditorium, 5805 N. Lamar Blvd., Bldg. C
Bracketville	Thursday, July 26	Fort Clark Springs, Hwy. 90 West, Service Club
San Antonio	Friday, July 27	Bexar County Courthouse, 300 Dolorosa, Central Jury Room
Wichita Falls	Friday, July 27	MPEC, 1000 5th St., Theatre Room
Dallas	Thursday, August 2 (2–5:15 pm)	Frank Crowley Criminal Courts Bldg, 133 N. Industrial Blvd., Ste. B-4 (Central Jury Room, 2nd floor)
Edinburg	Thursday, August 2	UT Pan Am Int'l Trade & Tech Bldg., 1201 W. University Dr.
Midland	Friday, August 3	Midland College, 3200 W. Cuthbert, in the Business Training Lecture Hall (Advanced Technology Bldg.)
Beaumont	Thursday, August 9	Jefferson County Courthouse, 1001 Pearl, Jury Room, 1st floor
Houston*	Friday, August 10	University of Houston, downtown campus at One Main St., Wilhelmina Cullen Robertson Auditorium
Waco	Friday, August 10	Baylor School of Law, 1st floor auditorium
Lubbock	Thursday, August 16	Lubbock County Elections Office, 1308 Avenue G, Public Room
Amarillo*	Friday, August 17	Potter County Courthouse, 501 S. Fillmore, Central Jury Room
Llano	Friday, August 17	Ben E. Keith Bldg., 1604 Bessemer Ave. (State Hwy. 16 North)
Fort Worth*	Friday, August 17	Tarrant County Justice Center, 401 W. Belknap, Central Jury Room
Bryan	Thursday, August 23	Brazos Center, 3232 Briarcrest, Assembly 102
Jacksonville	Friday, August 24	Norman Activity Center
El Paso	Friday, August 24	Courthouse, 500 E. San Antonio, Commissioners Courtroom
Corpus Christi	Tuesday, Sept. 25	Omni Bayfront Hotel (same week as TDCAA Annual Update)

*** Includes FREE ethics training in the morning for TDCAA members**

Continued from front cover

'Jessica's Law' comes to Texas (cont'd)

continuing course of conduct crime—a sexually abusive relationship that is marked by a pattern or course of conduct of various sexual acts."

Months before the 80th Legislative Session began, Governor Rick Perry's Deputy General Counsel Mary Anne Wiley solicited ideas for improving prosecution of crimes against children. She called a meeting and invited me, staff members from Sen. Florence Shapiro and Rep. Jerry Madden's offices, and bill drafters from the Legislative Council to consider such a new law. We proposed language for a new offense of continuous sexual abuse, and each office filed a bill to create the offense. Although those bills did not pass, the language from those bills was added to HB 8 as it made its way through the House and Senate.

The punishment range for this new offense, Penal Code §21.02, is 25 to 99 years or life in prison. There is no provision for early release from the sentence. A subsequent conviction is punished by life in prison without parole.

Continuous sexual abuse involves repeated (two or more) acts of sexual abuse against a child under age 14 over a period of at least 30 days. Acts of sexual abuse include commission of any of these offenses:

- indecency with a child (by contact with genitals or anus but not breast);
- sexual assault;
- aggravated sexual assault;
- aggravated kidnapping with intent to violate or abuse the victim sexually;
- burglary of a habitation with intent to commit a sexual offense; or
- sexual performance by a child.

The sexual abuse may be committed by the defendant against one or more child victims.

Because HB 8 defines this new crime as a continuous course-of-conduct offense, jurors are not required to agree in their guilty verdict on the same acts of sexual abuse that occurred. Instead, the jury must unanimously agree that the defendant committed at least any two of the acts of sexual abuse alleged in the indictment over the minimum period of 30 days. Therefore, the indictment may allege numerous acts of sexual abuse; the child may testify he or she was abused hundreds of times; the prosecutor need not elect specific acts of abuse for isolated consideration by the jury; and the jury may convict without having to agree among themselves as to the particular acts of abuse that occurred, so long as they all agree that at least any two of the acts occurred.

This same approach to defining a continuous course-of-conduct crime has been approved as satisfying the constitutional unanimity requirement in at least five other states.[3] By defining the offense in this manner, the trial court can accommodate a child's more generalized testimony about a history of abuse and dispense with the complications associated with an election as to a specific act, all without offending the requirement that a jury make a unanimous finding that a crime was committed.

To protect against excessively punishing "Romeo and Juliet" relationships, the offense of continuous sexual abuse includes an affirmative defense to prosecution if the defendant was not more than five years older than the victim; did not use duress, force, or a threat; and was not a registered sex offender. This affirmative defense would not apply to any other sex offense, including any lesser-included offenses. (Note: There continues to be a separate three-year "Romeo and Juliet" affirmative defense for indecency with a child and sexual assault of a child.)

Super aggravated sex assault

Early versions of Jessica's Law, as presented in SB 5, sought to impose mandatory minimum 25-year prison sentences for numerous sex offenses, including the second-degree felony of indecency with a child by contact. After much negotiation, HB 8 focused on only a narrow, particularly violent form of aggravated sexual assault of a child. This mandatory minimum punishment range applies only if:

- the child victim is younger than 6; or
- the child is younger than 14 and the defendant engages in conduct that would elevate a sexual assault of an adult to aggravated sexual assault (e.g., causes serious bodily injury, threatens death, uses or exhibits a deadly weapon, etc.).

As with continuous sexual abuse, the punishment range is 25 to 99 years or life in prison, and there is no provision for early release from confinement. But unlike that new offense, a subse-

quent conviction for a "super" aggravated sexual assault is punished as a capital felony.

The death penalty

Twenty years ago, the United States Supreme Court held that it was cruel and unusual punishment to execute a defendant for raping an adult woman.[4] Louisiana immediately narrowed its law to retain the death penalty for rape of a child. Recently, the Louisiana Supreme Court affirmed the constitutionality of that punishment.[5] With the passage of HB 8, Texas joins Louisiana and a minority of states authorizing the death penalty for non-death crimes. HB 8 adds the death penalty or life without parole as the punishment range for a repeat conviction for "super" aggravated sexual assault of a child. Even though the "super" aggravated sexual assault concept is a new law, HB 8 makes the availability of the death penalty for a repeat conviction immediate by not requiring formal affirmative findings of those aggravating circumstances in the prior conviction.[6]

Anticipating litigation over the extension of the death penalty to a non-death crime, HB 8 authorizes the Court of Criminal Appeals to reform sentences of death to life in prison without parole should the U.S. Supreme Court declare the punishment of death unconstitutional. All of this may be moot, however, given a recent 5-4 opinion by the Texas Court of Criminal Appeals. In *Berry v. State*, the court held that evidence of future dangerousness (a special issue that must be answered in the affirmative to achieve the death penalty) was insufficient for a defendant who targeted only her own newborn children as victims.[7] The majority held that life in prison was sufficient to protect those victims from any future harm.[8] Lawyers representing repeat child molesters will no doubt use that same argument to claim that child molesters are no danger to the public when serving life in prison without parole.

Probation eligibility

For any felony prosecutor handling a sex offense, the most frustrating legal issue has long been the defendant's eligibility for probation despite the apparent seriousness of the crime. Such eligibility, for example, has made it difficult to qualify citizens to serve on a jury deciding punishment, given the average citizen's rejection of probation as an appropriate punishment for any sex offense. HB 8 makes three significant changes regarding probation eligibility.

The first change involves the sacred list of crimes contained in article 42.12, §3g, of the Code of Criminal Procedure. Known as the "3g" law, this list has long identified the most serious violent crimes that are ineligible for probation from a *judge* and, by reference, ineligible for parole until a defendant has served a specific percentage of the sentence. HB 8 adds a new offense to the list: sexual performance by a child.

The second change involves the formula for deciding a defendant's eligibility for probation from a *jury*. Until now, that has depended on the length of the sentence (not more than 10 years) and criminal history (no prior felony conviction). To that formula, HB 8 adds a list of sex offenses that are ineligible for probation from a jury as a matter of law. For all of these offenses, except sexual performance by a child, there is an additional condition for ineligibility that the victim be less than 14 years of age:

- indecency with a child (by contact);
- sexual assault;
- aggravated sexual assault;
- aggravated kidnapping (with intent to abuse the victim sexually); and
- sexual performance by a child.

The third change involves the "other" probation: deferred adjudication. HB 8 extends the list of circumstances that disqualify a defendant from deferred adjudication to include one new offense (continuous sexual abuse) and two enhanced punishments ("super" aggravated sexual assault of a child and a repeat sex offender).

Enhanced punishments

In a few more areas, HB 8 increased the punishment for sex offenders. The offense of sexual performance by a child (by producing, directing, or promoting a performance) was increased from a third- to a second-degree felony if the child is younger than 14. The offense of sexual performance by a child (by employing, authorizing, or inducing a child to participate) was increased from a second- to a first-degree felony if the child is younger than 14. Finally, HB 8 expands the repeat sex offender enhancement (life in prison with a 35-year minimum before parole eligibility) by adding indecency with a child (by contact) as an offense that may be enhanced under that provision.

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Parole

Two years ago, the legislature authorized life without parole for a capital felony, despite warnings that opening the door to no-parole sentences would quickly encourage the expansion of that policy to other offenses, create disciplinary problems in prison, and lead to prison overcrowding. HB 8 fulfills at least one of those predictions by expanding the no-parole policy to include sentences for "super" aggravated sexual assault, continuous sexual abuse, and a repeat sex offender.[9]

Statutes of limitations

Statutes of limitation for sex offenses have slowly been expanded over the last two decades. HB 8 continues that expansion by adding the following offenses to the list of those offenses, like murder, that have no limitation:

- indecency with a child (by contact or exposure)
- sexual assault (of a child);
- aggravated sexual assault (of a child); and
- continuous sexual abuse of a young child or children.

Limitations also were extended to 20 years after the 18th birthday of a child victim for the following offenses:

- sexual performance by a child;
- aggravated kidnapping (with intent to violate or abuse sexually); and
- burglary of a habitation (with intent to commit certain sexual offenses).

Information collection

The Texas computerized criminal history database (otherwise known as Texas Crime Information Center or TCIC) maintains detailed information about an offender's identity, arrests, and case dispositions. Now it will also include the ages of child victims of sex offenses. HB 8, however, provides no clue as to how those people entering this information will obtain it.

Tracking

In 2000, Texas began a form of civil commitment against sexually violent predators, imposing conditions of supervision as a type of civil probation.[10] HB 8 mandates constant electronic tracking of those offenders in real time as a condition of that supervision. That condition was already being applied through agency policy.

Your new office annex

Given all these new laws, you might wonder how you can prosecute them without additional resources. HB 8 provides a controversial solution: the attorney general.

Before HB 8, prosecution assistance was available from the attorney general only upon the request of an elected prosecutor; even then, the attorney general had the discretion to decline to provide the assistance.[11] In other words, both parties were required to mutually agree to the assistance, and either party could reject it. HB 8 *requires* the attorney general, solely upon the request of a county or district attorney, to provide investigative, technical, and litigation assistance in the prosecution of sex offenders who target children. So, it would seem that the county or district attorney, rather than the attorney general working in cooperation with a local elected official, controls the decision regarding assistance. This is a rather radical shift in this constitutional relationship and is likely to challenge past notions of the relationship between the attorney general and elected prosecutors.

Conclusion

There is still much to discover about Jessica's Law. Given the complexity of the new offense of continuous sexual abuse and the numerous amendments to the sentencing laws, prosecutors would do well to spend lots of time reading HB 8 before heading to court.

Endnotes

1 This article does not include footnoted references to each of the new laws. You can get a copy of the bill by going to Texas Legislature Online at www.legis.state.tx.us and entering HB 8 in the bill number search engine for the 80th Legislature list. Then, after clicking the "text" button, download the enrolled bill. Or, you can buy a copy of TDCAA's updated criminal law book and legislative update, which will be available in August.

2 *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006) (Cochran, J., concurring).

3 *State v. Ramsey*, 124 P.3d 756 (2005) (Arizona); *State v. Johnson*, 627 N.W.2d 455 (2001) (Wisconsin); *State v. Fortier*, 780 A.2d 1243 (2001) (New Hampshire); *People v. Calloway*, 672 N.Y.S.2d 638 (1998) (New York); *People v. Jones*, 792 P.2d 643 (1990) (California).

4 *Coker v. Georgia*, 433 U.S. 584 (1977).

5 *State v. Kennedy*, No. 05-KA-1981 (La. 5/22/07).

6 Presumably, proof of the existence of those prior aggravating circumstances in the prior offense could be offered during the trial of the new "super" aggravated sexual assault. For a comparable statutory circumstance, see Tex. Pen. Code §22.01(b)(2) (increasing punishment for 2nd family violence assault); *Mitchell v. State*, 102 S.W.3d 772 (Tex. App.—Austin 2003, pet. ref'd).

7 *Berry v. State*, No. AP-74,913 (Tex. Crim. App. 5/23/07) (authored by Johnson, J., and joined by Price, Womack, Holcomb, and Cochran, JJ.).

8 For a strong rebuttal to the majority opinion, read the dissent. *Berry v. State*, No. AP-74,913 (Tex. Crim. App. 5/23/07) (Hervey, J., dissenting, joined by Keller, P.J., Meyer, and Keasler, JJ.)).

9 In a somewhat perplexing addition worthy only of mention in a footnote, HB 8 also mandates that sex offenders serving time for continuous sexual abuse or "super" aggravated sexual assault must participate in and complete sex offender treatment before being released from prison. That should be an interesting trick given the absence of any authority to hold an inmate who discharges a sentence.

10 Tex. Health & Safety Code Chapter 841.

11 See Tex. Gov. Code §402.028; *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).

VICTIM ASSISTANCE

By Brad Setterberg
Assistant County Attorney in Fannin County

Leveling the playing field

How the Code of Criminal Procedure helps child victims combat their fear of testifying in front of the defendant

By all accounts, 17-year-old Joseph Lee Belt was a quiet, hard-working, well-mannered young man. He was polite to his neighbors and helped his grandmother, with whom he lived in Bailey. He held a job, raised animals for show, and never used foul language. But Joey, as his family called him, had his sinister side too, and it surfaced on the afternoon of October 21, 1999.


Brad Setterberg

The crime

Belt's cousin, Jack, was visiting for the day. Jack was 9 years old and lived with his mother just a few blocks away. While Jack was inside playing video games, Belt approached him and told Jack to come out into the backyard. He led Jack to a small storage shed and, once the boy was inside, closed the door behind them. Motioning to a .22 rifle leaning against the wall, Belt instructed Jack to pull down his pants, turn around, and bend over. He threatened to kill Jack unless he did as he commanded. When Jack bent over, he felt an intense, excruciating pain in his "backside," as Belt tried repeatedly, but unsuccessfully, to insert his penis into Jack's anus. This went on for several minutes, with 9-year-old Jack crouched on the dirt floor of the shed, crying and unable to focus on anything but the pain. Belt then instructed Jack to turn around and give him oral sex, again threatening to kill Jack if he did not comply. Although Jack cried during the assault, he never called out for help because he was afraid of what his cousin would do. When the assault was over, Belt reiterated his threat to kill Jack if he didn't keep his mouth shut.

This wasn't the first time Belt had sexually assaulted his young cousin. Years earlier, Belt had forced him to perform oral sex at their grandmother's house in south Bonham. Much as in the more recent case, Belt waited to get Jack alone and outside (this time in a rabbit pen) and threatened him with physical

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harm unless he remained silent.

The sum total of these experiences was an abiding and certain understanding in Jack that Joey Belt was capable of just about anything. For years, Jack didn't tell a soul about the abuse he suffered at the hands of his cousin. Instead, he internalized the assaults and continued to live as he always had: close to his attacker, forced to see and interact with him as if nothing had ever happened, and under the constant threat of retaliation and continued abuse.

Not surprisingly, Jack acted out. He had behavior problems and difficulty in school, and he frequently got into fights. Jack also acted out sexually, as victims of sexual assault often do. Only after a neighbor confronted him about his behavior did Jack finally break down and tell what had happened to him in the shed. The neighbor in turn told Jack's mother, who took him to the local hospital, where Jack gave a similar outcry to the attending physician. He was scheduled for an interview with CPS (Bonham did not have a children's advocacy center at this time) and for a SANE exam in neighboring Denison. The exam showed no findings, but Jack related the abuse to the examining nurse. Based on these outcries, a warrant was obtained for Belt's arrest. Five and a half years later, the case finally went to trial.

Victim issues

It is a distressing reality in our jurisdiction that some cases, even those as heinous as aggravated sexual assault of a child, can go five or six years before going to trial. Resources and funding priorities being what they are in a rural county, our trial schedule is motivated almost entirely by the desire to avoid overcrowding in our jail. Defendants who can make bond, like Belt, have a decided advantage in avoiding their day in court. And when that day finally comes, it brings with it unique challenges for the State. Over time, witnesses tend to disappear. Memories fade. Evidence gets lost. All of this happened with the Belt case. However, after locating all relevant witnesses, arranging to bring Jack and his family in from North Dakota, and resolving ourselves to the fact that the .22 rifle and forensic interview tape were lost forever, we ran into one problem we were completely unprepared for: Jack was not willing to talk.

Leading up to trial, I spoke to Jack a couple of times by telephone. He was understandably reluctant to talk but was nonetheless forthcoming with details about what happened. He understood what would be required of him: that he would come into the courtroom, take an oath to tell the truth, and then relate the most humiliating events of his life to a room full of strangers. He knew all of this would be on the record. He knew he would have to match wits with a defense attorney. He knew he would be attacked as a liar. Most importantly, he knew he would have to do all of it in front of the person who assaulted him. But somehow there was a substantial disconnect between Jack's objective understanding of his role and his emotional readiness to play it.

I discovered this disconnect for the first time less than two hours before we were supposed to be in court. We had picked a jury that morning, and defense counsel had requested a hearing to test Jack's competency to testify. While we adjourned for lunch, I met Jack face-to-face for the first time in my office. I explained the situation to him and tried to go over his testimony, but Jack wouldn't cooperate. He said he was nervous and that he didn't want to go through with it, and he refused to tell me anything but the most peripheral of facts. As I tried to probe Jack a little more, he became aggressive and at one point told me he was getting his family and going home. I could tell I was getting nowhere, so I released him for lunch, told my investigator to make sure he didn't skip town, and went back to my office to ponder our next move.

CCP to the rescue

I discussed the matter with assistant county attorney James Moss, who reminded me of a case in which we'd tried to offer the child victim's forensic interview tape in lieu of her testimony. We had been unsuccessful in doing so, but the idea got me thinking. In certain types of cases, Article 38.071 of the Code of Criminal Procedure allows the State to offer a child victim's testimony via videotape or closed circuit television when the court determines that the victim is unavailable to testify in the defendant's presence.[1] "Unavailable" in this sense means more than just uncomfortable. The child must be traumatized by the defendant's presence beyond mere nervousness, excitement, or unwillingness to testify.[2] My understanding at the time was that a counselor, family member, or someone else would have to

describe the toll that testifying would take on the victim. At this late stage, I had no such witness.

At the hearing, though, it proved not to be a problem. All of the pressure Joey Belt had brought to bear on Jack over the years still lingered when Jack took the stand. After I cleared some background questions and began to ask about Jack's relationship with his cousin, Jack came unglued. He began to hyperventilate. He complained of being lightheaded and unable to breathe. He stated repeatedly that he did not want to answer questions and that he wanted to leave. Even when the judge became involved in the questioning, Jack did not budge.[3]

The hearing lasted over an hour, with Jack vociferously declaring he would not answer questions. We never even discussed the abuse. It was obvious Jack's behavior was more than mere hysterics or teenage angst. Everyone watching could see that he was struggling with something he had hoped and tried to put behind him for years. Right before our eyes Jack reverted from the tough, strong, 15-year-old young man who walked into that courtroom to the meek and terrified little boy who was sexually assaulted in the shed so many years ago. But in between long, often stubborn pauses in which he repeatedly fought back tears, Jack gave enough information to establish his competence and lay the predicate for our outcry witness. At the conclusion of the hearing, the court, over objection, declared Jack would be allowed to testify from an adjacent room while the jury watched through live, closed-circuit television.

Testimony began the next day, and Jack was our sixth witness. Before he was brought in, the court took a 15-minute recess so we could set up the video camera. From a technical standpoint, it was really very simple. The video camera and tripod came from our children's advocacy center and connected to the TV through a 50-foot A/V cable.[4] The camera and television had matching ports, so it was just a matter of plugging the cable in and stretching it between the adjoining rooms. Plug and play at its best.

The only people in the side room were Jack, lead defense counsel, the court reporter, the judge, and me. The defendant remained in the courtroom with his co-counsel, my co-counsel, the bailiff, and the jury. Importantly, the defendant had access to one of his lawyers at all times, and defense counsel was permitted to break the proceedings whenever necessary to confer.

Procedurally, the examination went as it normally would with the exception of periodic conference breaks by counsel. There were only a few of those, and they came at natural stopping points, such as transition from direct-examination to cross and back.

Jack was much improved in this setting, though still extremely hesitant. He was quite apprehensive as the questions were posed to him, and his testimony just seemed to crawl along. I became worried the jury might find it too disjointed to follow, especially without a real live person sitting in front of them. But though he was slow, Jack was very clear. He was unwavering, and most importantly, he was believable. He related exactly what Belt had done to him in that shed, and all of my concerns about the jury following Jack's testimony evaporated once we returned to the courtroom. It seems Jack's story moved four of the jurors to tears, while the rest sat motionless and watched with rapt attention.[5]

Conclusion

Joey Belt was found guilty of two counts of aggravated sexual assault of a child and two counts of indecency with a child. He was sentenced to terms of 50 years, 25 years, 11 years, and six years, and was fined $40,000.

Jack's testimony carried the day. The jury later told me they would never have sentenced such a young defendant to such a harsh term had the severity and brutality of his crimes not been apparent.[6] They credited Jack and the raw emotion underlying his testimony with getting them to see past six years of the court's inaction, the missing rifle and video, forgetful witnesses, the defendant's benign appearance, and the recalcitrant teenager on the stand. Instead it allowed them to see the little boy who had been hurt and terrified years before.

If Jack had been forced to take the stand in front of Belt, I have no doubt his emotion would have inhibited his ability to relate what happened. In this case, the provisions of Article 38.071 made the difference between a guilty and not guilty verdict. And though it may only apply to a fraction of cases in which the facts are perfectly aligned, I have no doubt that 38.071 will continue to be an invaluable tool in the prosecution of crimes against Texas children.

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Endnotes

1 See Tex. Code Crim. Pro. Art. 38.071, sec. 3 (Vernon 2005). Basically, the article applies to assaultive and sexual crimes against children. Note that the Court of Criminal Appeals has ruled that the procedures outlined in Art. 38.071 may be used for witnesses older than 13, even though the statute states that it applies to witnesses younger than 13. See *Marx v. State*, 987 S.W.2d 577, 580 (Tex. Crim. App. 1999) (13-year-old mentally retarded child victim could testify via closed-circuit television).

2 See *Hightower v. State*, 822 S.W 2d 48 (Tex. Crim. App. 1991).

3 Prosecutor: Why didn't you tell anyone immediately after the events [in the shed] were over?

The witness: I want to leave. I—I can't breathe. I need to get out of here. I need to leave.

The Court: OK. You need to go ahead and answer the question.

The witness: I don't want to answer the question.

The Court: I'm not insensitive to the fact that you have—that you don't want to answer the question, but you need to go ahead and answer the question.

The witness: I don't want to answer the question. I want to leave. I'm not answering no questions.

The Court: You need to answer the question. [long pause] We will be here until the questions are answered.

The witness: So be it. [long pause]

The Court: You need to answer the question now.

The witness: Can you not get that I'm not going to answer any questions? I mean, what's so hard—what do you not understand about that? Answering no questions. I'm in a very uncomfortable spot. I can't breathe. I'm shaking. About to pass out. There's too many people in this room for me to say anything.

4 The one with the red, white, and yellow hookups, available at any Wal-Mart or electronics store.

5 This came from my co-counsel, Richard Glaser, who is our elected county attorney.

6 Belt was sentenced the day after his 24th birthday.

CRIMINAL LAW

By Irene Briones Odom
Victim Witness Coordinator in the
Williamson County District Attorney's Office

A time capsule for future parole hearings

Williamson County's parole task force ensures that today's crime victims still have a voice when their perpetrators come up for parole many years in the future.

My boss, John Bradley, recently gave me a letter he received from the Texas Department of Criminal Justice's Parole Division telling us who is eligible for parole. Mr. Bradley does this every week, flagging files so he can draft parole protest letters for particularly violent defendants. But this time, the notification included a name I vaguely recognized: Terrance D. Sampson.


Irene Odom

In December 1989, in Round Rock, Kelly Elaine Brumbelow, a vibrant, 13-year-old competitive gymnast, cheerleader, and honor student, was stabbed more than 97 times by her 12-year-old neighbor, friend, and classmate, Terrance Sampson, who then hid her body in his parents' backyard under a pile of firewood. Sampson was caught, tried as a juvenile, and sentenced to the then-maximum confinement for someone his age: 30 years. He began serving his sentence at the Texas Youth Commission, but at age 18, the juvenile court transferred him to an adult prison, where he has been eligible for parole four times. As usual, we planned to protest his parole, but this time it would be with the help of a new task force.

Researching the original case

I began looking for the case file so Mr. Bradley could refresh his memory of the case and provide the parole board with details of Sampson's violent acts. (Only one prosecutor in our office, Mr. Bradley himself, was working in Williamson County when this horrible crime

occurred. Back then, John had been hired as an assistant district attorney, while today he is the elected DA.) To my dismay, I discovered that the case file had probably been destroyed, no telling how long ago, by the office that originally prosecuted Sampson as a juvenile. We had to reconstruct it from other records that our district clerk's office had recovered and slides of the crime scene from the investigating officer, who now lives out of state.

All of this work would have been avoided if our office's new parole protest task force had existed in 1989. The task force is a group of volunteers, made up of concerned citizens, victims, and/or family members of crime victims, led by me, our office's victim-witness coordinator, who prepare a packet of information about a case, usually major violent crime prosecutions, immediately after sentencing. We include crime scene photos, autopsy reports, news articles, victim statements, and anything that humanizes the victims for the future parole board. We do not digitize the information because we can't be sure what technology will exist in 20 years; we want the parole board members to easily view the packets, after all. But we are considering adding a DVD that would include interviews of family members, who might not be alive or available when parole consideration comes up.

In general, the task force focuses on cases resulting in a sentence of 40 years or more. Under current law, those cases won't come up for parole review for at least 20 years. And who knows where the file will be or whether surviving victims, their families, or prosecutors will be around to discuss the crime and its impact to the parole review board. Creating a packet with all of the pertinent information is like setting aside a time capsule of the case that will be opened sometime in the future and—we hope—shed light on a long-ago violent crime and its impact on the victims and their loved ones.

We talked about our new task force to local newspapers and several TV stations, adding information on how to contact our office if citizens were interested in volunteering for it. We also talked to people who had previously voiced interest in doing volunteer work for our office. The response we got was overwhelming.

But not everyone was right for the job. We wanted people who had experienced the victims' side of the judicial system, but it was important that they had already gone through sufficient grieving and reflection and progressed in dealing with their own trauma. We believed this type of work would empower and strengthen victims who were in the active phase of their healing. One mother of a child who suffered sexual abuse stated, "I was elated when I became part of this task force. We wanted to be part of a group that would make a difference in keeping our community safe."

The volunteers were carefully screened and trained to collect information from case files. Prior to being selected, candidates were asked to fill out an application which involves criminal history checks and mandates confidentiality. We also taught them how to read the TDCJ Parole Division notices. The volunteers then prepare a packet of information that is published in book form and delivered to parole board members considering the parole eligibility of these violent offenders.

When reviewing the parole notice from TDCJ, we also check to see if the conviction and sentence have been recorded correctly. We do find errors in sentence length and detainer information, and TDCJ has been very helpful in correcting these mistakes when called to its attention.

I recently attended a conference attended by two parole board members. Both of them agreed that they look for new information not already in their files (e.g., photos of the crimes, letters from child victims who are now adults, protest letters with details, new arrests, etc.). They agreed that these things make a difference in whether a violent criminal is granted parole.

The Brumbelow case

Which brings us back to Terrance Sampson. Right about the time I was gathering information for Mr. Bradley and the parole board—and I believe it was fate—our office administrator, Sandi Andrews, attended a workshop where Kelly's mother, Judy Brumbelow, was the motivational speaker. Sandi was so impressed by Ms. Brumbelow's talk that she wanted to invite Judy to speak to our office staff—and then we received Sampson's parole notice from TDCJ. I waited a few days, then contacted Judy

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to get her input on protesting Sampson's parole, handling it delicately because I didn't want to re-victimize her. Plus, I needed to explain that we didn't have all the materials we needed and wondered if she had kept any newspaper articles we could copy. I was nervous about our meeting and how she would react to my requests for help, but I was pleasantly surprised. She is beautiful both inside and out, exuding spiritual strength that only a higher power can be given credit for. She tells me, "It truly is a privilege to be working on this packet with you and your staff." I say that the privilege is all mine!

The whole process will ensure that Kelly Brumbelow remains a living, breathing person in the minds of the parole board members considering whether her killer is released early from prison. The parole protest packet that volunteers are now preparing will supplement the information Judy Brumbelow provided. Photographs of the brutal murder will be published alongside a description of the investigation. No one looking through the packet will minimize or forget the terrible consequences of Terrance Sampson's murderous rage.

We are grateful to have found a team of volunteers willing to share this dark side of reality and trust that we will make a difference down the road. We are always taking applications for people interested in volunteering for our task force. Should you be interested in more information about the task force or how to form one, please do not hesitate to call our office at 512/943-1234.

CRIMINAL LAW

By Suzy Morton and Oshea Spencer
Assistant District Attorneys in Fort Bend County

Questioning a defendant during an agreed guilty plea hearing

Getting the defendant to admit guilt on the record, especially in child abuse cases, can go a long way toward helping the victim heal and preventing frivolous appeals.

Some felony courts in Texas do not regularly take a record during agreed plea proceedings, and many prosecutors are not in the practice of questioning defendants during pleas. It is important to both make a record of a plea and require a defendant to testify, particularly in cases involving sex crimes against children (and especially in cases where the defendant is receiving probation). Some reasons to do so include:


Suzy Morton & Oshea Spencer

1 The child victim deserves to hear the defendant admit his guilt (or be told later that the defendant admitted guilt).

2 The defendant deserves to have to admit his guilt publicly. By this we mean if he can do the crime, he may or may not do time, but he can at least face the public humiliation associated with the offense(s) he committed.

3 With admission of guilt, the defendant's family members who continue to deny he would ever hurt a child cannot continue to deceive themselves, potentially placing other children in the defendant's family at risk.

4 If the abuse occurred within the family or between families who are close friends, as it often does, those who sided with the perpetrator or who didn't know whom to believe, will know the child was the one telling the truth.

5 Even if a defendant is pleading guilty to only one or two indictments, you can question him about an ongoing course of abuse with the child, preventing the defendant from minimizing his guilt to family members or others ("It only happened once," etc.).

6 If the defendant later violates probation and is facing adjudication and sentencing, having a record of his admission to specific conduct and the ongoing course of abuse can aid in getting a harsher sentence.

7 A defendant who won't admit his guilt isn't worthy of probation, which you can argue to the judge.

8 Having the defendant articulate some of the facts of the offense protects against subsequent claims that the plea was involuntary (for example, the defendant can't claim he simply pled guilty to get a better deal).

9 Having the defendant testify regarding his satisfaction with his attorney's representation may protect against claims of ineffective assistance of counsel and/or grievances against the defense attorney on appeal.

10 And lastly, you as a prosecutor have done a lot of work preparing the case for trial (or the defendant wouldn't be pleading in the first place)—doesn't it just feel more like justice was done to hear the defendant admit his crimes in more detail that just hearing him plead guilty?

A case recently prosecuted in Fort Bend County illustrates many of the reasons above. A little boy we'll call Jeremy had a favorite uncle, whom, to protect the boy's identity, we'll call Joe Johnson. Mr. Johnson was a favorite within the extended family as well; other adults viewed him as a good role model for their children. Johnson was a licensed peace officer in the State of Texas and through the years had worked at the local sheriff's office as well as for a constable's office. Young Jeremy enjoyed spending time with Uncle Joe, even though Uncle Joe would frequently touch Jeremy on his genitals and rub his own genitals against Jeremy.

As is common in child abuse cases, Jeremy didn't tell anyone what Uncle Joe was doing to him for a long time. The sexual abuse started when Jeremy was 7 or 8, and he didn't tell until he was almost 10 years old. When he did tell, Jeremy told his little sister and another younger child in the family and swore them both to secrecy. Eventually, Jeremy's little sister told their mother, and the family was shocked—some were in disbelief. When questioned by investigators as well as his family, of course Uncle Joe denied the allegations. Due to the type of abuse, there was no physical evidence of the crimes. Therefore, as is often the case with sex crimes against children, it came down to the child's word against the adult perpetrator's word. Uncle Joe was indicted on two cases of indecency with a child by contact.

During the year and a half that the cases against Johnson were pending, Jeremy and his mother heard from time to time that Uncle Joe was telling other family members that he did not sexually abuse Jeremy and that his lawyer was going to get the cases dismissed. Incidentally, Johnson became dissatisfied with his first lawyer and complained about him in court on several occasions. He had a different lawyer at trial.

Fortunately, Jeremy was receiving therapy through the local children's advocacy center. Jeremy repeatedly expressed concern to his therapist that some family members doubted his allegations, and he worried that he would not be believed in court when the cases went to trial. He also expressed fear that if the defendant were found not guilty, everyone would think he was lying and he would get in trouble. He felt very confused because he still loved his uncle.

Jeremy's mother had mixed feelings about what should happen to the defendant. She was extremely angry about the abuse but still cared for Johnson too. She expressed that she would be better able to cope with what he had done to her son if he would just admit it and take responsibility for his crimes. She especially felt that it would help Jeremy heal if Uncle Joe would admit what he had done. Therefore, following jury selection, when the defendant requested to plead guilty in exchange for probation, the State agreed.

We required that he be placed on the maximum 10-year term of community supervision (deferred adjudication because they were CCP Art. 42.12 §3g offenses), with all the extensive conditions of probation for sex offenders that Fort Bend County judges generally order in sex cases involving children. In addition, the defendant must serve the maximum 180 days in jail as a condition of probation and write letters of apology to Jeremy and Jeremy's mother. We have policies in the Fort Bend County D.A.'s Office Child Abuse Division requiring letters of apology to the victims and some amount of jail time as a condition on pleas of probation involving sex offenders. (We figure, if DWI offenders must serve jail time as a condition of

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INVESTIGATOR SECTION

By Howell Williams
Investigator in the Williamson County DA's Office

How to reduce the number of open and active warrants in your office

A methodical, hands-on approach to tracking down fugitives that's working wonders in one county

Around November 2005, our district attorney, John Bradley, spoke to me about initiating a hands-on, proactive approach to reducing the number of open and active felony warrants pending in our office. As an investigator in the office since 1997, I could see for myself that the number of active and pending warrants had risen through the years, and no one was actively monitoring the status of many of these cases. Every prosecutor's office has drawers full of open and active warrants. A big number of these cases are just sitting in a file cabinet not receiving much attention, though every once in a while, a wanted defendant will be apprehended on a random traffic stop or for a new offense and BAM! We have our fugitive! But that's the exceptional case rather than the rule. It's important to keep up with open and active warrants to get criminals off the streets and prevent them from continuing to commit crimes.


Howell Williams

We thought we could do more. We knew that unless we took some action, the number of warrants could get out of control at some point. So we had our first meeting to discuss the issues of open warrants around December 2005. We devised a plan of action that would produce immediate results.

We have three criminal courts in Williamson County: the 277th, where I work as a trial investigator, the 368th with investigator Chris Herndon, and the 26th with investigator Stephen Allison. Our *first* mission was to get organized by categorizing our warrants to visualize the different types of warrants in our files and to prioritize our efforts by pursuing certain warrants first. New indictment and MTRP warrants need immediate and swift attention while bond forfeitures (in general) require some research, as most of those are already absconders.

Categories

We came up with four main categories of warrants. (You can go further with this in your own agency if you want, or you can go with something completely different, but this structure works for us.) Category A includes cases where the defendant had never been arrested by a law enforcement agency on a case they prepared and those never arrested on a new indictment from our office. Category B has MTRPs (probation violation) warrants. Category C includes bail jumpers and bond forfeitures, many of which also have additional felony bail jumping cases filed. And finally, category D, the easy ones. Category Ds are active warrants of defendants who are in custody somewhere with a hold placed on them. Although they are in custody somewhere else, believe me, these are warrants you want to keep up with.

Except for category D warrants (because those defendants are already in custody), category A warrants will generally be the easiest fugitives to locate and may also be your largest group of active warrants. In other counties or courts, the largest group may be the category B warrants (MTRPs). Many of these MTRP fugitives will be easy to locate as well because these defendants are usually still sitting at home or still working at that last job. Many of them won't even realize a warrant has been issued. Get someone on them quickly.

Bond forfeitures and bail jumpers (category C) will take up most of your time as far as research goes. In most cases the guys have already fled, so research is your only option.

To keep track of the lists of warrants, we put them on spreadsheets so we could easily monitor how many new warrants were added to each category and see how many defendants were arrested.

Involving law enforcement

Our second mission was to solicit help from law enforcement agencies to reduce the number of active warrants. That includes executing new warrants quickly so they don't become old warrants and reviewing old warrants regularly so they aren't just sitting in a filing cabinet.

You'll want to develop and maintain a routine to stay on top of these warrants. You can do so by having monthly meetings and discussions to keep an open and active line of communication with your local warrant officers, as well as with outside law enforcement agencies that have active warrant officers working the streets. We wanted to show law enforcement that we were willing to cooperate in any way we could to help them locate these defendants.

We currently have a warrant meeting in our office. When we first started these meetings, we were going to have one every month, but as you can guess every month rolls around very quickly, so in reality we have one of these meetings as often as possible (time permitting), usually every 45 to 60 days. Not having a definite set date each month works out well for us. The standard attendees at our meetings are each trial investigator; Assistant District Attorney

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Questioning a defendant during an agreed guilty plea hearing (cont'd)

probation, why shouldn't sex offenders?)

In Jeremy's case, the defendant was required to plead to both cases of indecency with a child, which are classified as "sexually violent" offenses under the Sex Offender Registration Program of Chapter 62 of the Texas Code of Criminal Procedure. Requiring a defendant to plead to at least two sexually violent offenses is recommended in any ongoing course of sexual abuse case because the perpetrator will be required to register as a sex offender every 90 days rather than once a year.

During Joe Johnson's plea, several of his family members, including the victim and his mother, and many of the peace officers involved in the case were present. The State called the defendant to testify and questioned him regarding his conduct during the sexual abuse and the investigation. Specifically he was required to admit that he had fondled the child's genitals and rubbed his genitals on the child's body for his own sexual gratification and arousal and that these acts had occurred on many occasions. He also admitted under questioning that Jeremy had told the truth to his mother and the forensic interviewer, and that Johnson himself was the one who lied when he denied the allegations to the family and the detectives who investigated the case.

Following the plea, Jeremy's mother gave an emotional victim-impact statement. Although nothing can change what happened to her family, she was relieved that Jeremy no longer had to worry that some people did not believe him. As prosecutors, although we knew Jeremy could do it, we were pleased that he did not have to relive the details of the sexual abuse in the courtroom.

A few things to keep in mind when preparing to question the defendant during a plea include making sure the judge is aware that you intend to question the defendant (especially if it is not common practice in that court). Remind the defense attorney that as part of the plea agreement, you plan to question the defendant, and advise defense counsel of the intended questions. The defendant must be prepared to admit the details of the offenses and to answer any other questions you may ask. That should prevent busting your plea agreement because the defendant balks at admitting the facts of the crime in front of his mama and whoever else happens to be in the courtroom.

We hope this article encourages our fellow prosecutors to question defendants during agreed plea proceedings in these sensitive and important cases.

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Robert McCabe, who handles extraditions; Linda Draper, an absconder locator for our local probation department; and District Attorney John Bradley.

In addition, we invite different law enforcement agencies with active warrant officers working the streets; sometimes we invite multiple law enforcement agencies at the same time. You'll get different results from various agencies and some have a broader jurisdiction than others. In the past, we've invited the U.S. Marshals Office, the local sheriff's and constables' departments, DPS, DPS Criminal Intelligence, and the Attorney General's Office, and we plan to invite other municipal police departments, constable departments, surrounding county sheriff's offices, and anyone else we can think of in the near future. Our office wants everyone in law enforcement to know that we are here to help arrest these fugitives.

At these meetings, we explain what we are doing and how we monitor our active warrant cases. It is, quite simply, networking and making good contacts. Something else to consider is that many times these warrant officers change jobs or rotate with other officers. It's important to remember that these officers will be different from year to year, sometimes even more frequently. That is why it is so important to stay in touch and have frequent meetings with face-to-face contact; they play a vital role in keeping the ball rolling on this program.

To prepare for each meeting, we do some research and prepare a packet of information from each file, which we give to whatever law enforcement agency is attending the meeting and is best able to execute the warrant. Spread the warrants among several agencies, and don't waste officers' efforts by assigning more than one agency to a single warrant. (That's the quickest way to get on the bad side of your supporting law enforcement agencies.) Keep a copy of the information packet in your file. Every one of the agencies that has attended our meetings has arrested one or more fugitives after we provided them with a packet of information.

Successful examples

We had an open warrant on Bobby Duane Montgomery, who was charged with aggravated sexual assault of an 8-year-old girl; the offense occurred in January 1996. The Williamson County Sheriff's Department investigated the crime not long after it happened, but before the defendant could be arrested, he fled. The case sat in our office idle for some time with no arrest. I reviewed the file in November 2006, putting it in Category A, and began making phone calls to the victim's family and the defendant's relatives. I learned through these contacts that Montgomery maintained a close relationship with his brother-in-law and sister, who were known to work in the field of corrections. I found the brother-in-law through an Accurint check that said he was possibly working in a prison in western Colorado. I made a copy of my file and gave the information to the U.S. Marshals Office, which arrested Bobby Duane Montgomery December 28, 2006—not in Colorado, but in Louisiana, living with his sister. The case just needed a solid review to make the arrest.

On another warrant case filed in July 1999, we'd filed a MTRP warrant for Lambert Sabrsula, who had received 10 years' deferred probation in 1998 for aggravated robbery. We received assistance beyond the call of duty when the defendant was taken into custody in March 2007 in Queens County, New York. He was caught after flying into New York from Ecuador. Sabrsula was taken into custody at the airport, and we were notified.

After our deputies arrived in New York, they ran into complications because the defendant could not be released into our custody without a judicial hearing. The transportation officers had the Williamson County Sheriff's office contact ADA Robert McCabe, who called the Queens County DA's office, and we received overwhelming and immediate attention. Queens County Assistant District Attorney Alix Kucker, having had to deal with similar complications from extraditions in the past, went out of her way to contact other attorneys, investigators, courthouse staff, and other outside agencies to expedite the extradition. Within an hour, Ms. Kucker had arranged VIP service for our deputies, eventually resulting in a swift hearing and a special escort to LaGuardia Airport with our defendant. This could not have taken place without the cooperative efforts of the Queens County District Attorney's office and other courthouse staff there.

Dismissals of old cases

There are others ways to lower the warrant numbers in your office. We realized

while reviewing some old open warrant cases that some simply deserved to be dismissed. You probably have dozens upon dozens of old open warrant cases that date back 15 or even 20 years that are just sitting there in a file cabinet getting absolutely no attention. Perhaps you have an old hot check case, or maybe the witnesses on an old case are no longer available for whatever reason. You have to review these ancient files on occasion, at minimum every two years. Some can be dismissed and on some, well, you could miss out on an opportunity to catch your fugitive if you don't review the file from time to time. In our office, each investigator pulls five of the oldest open warrant cases for review each month. After we review those and make our recommendations, we move on to the next oldest five for the next meeting, and so forth. Eventually we will have reviewed all our open warrant files, and you can start on the recent ones.

Prior to each warrant meeting, we review five old cases from each court and prepare a review sheet, which is extremely important. The review sheet contains detailed information, including your office's attempts to locate the defendant and what recommendations you've made to your elected DA about the next step (whether you keep the case active in TCIC and continue looking for the defendant, whether you put the warrant in NCIC, or whether you dismiss the case for whatever reason). That review sheet should remain in the file for a future investigator who reviews it again months or years down the road.

The numbers

I can show you every person who was arrested on a warrant in our court since January 2006 on a single spreadsheet. Within 15 months of starting this warrant program, I saw 246 active warrants go away (219 arrests and 27 dismissals) in my court. Obviously I didn't have a direct hand in getting all 219 fugitives arrested; most were arrested at random or through the regular efforts of our warrant officers in and outside the county. Quite a large number of these defendants actually turned themselves in after learning about the newly issued warrant, and I had a hand in at least 25 of the arrests. The 27 dismissals stemmed from my reviews and recommendations. We expect the numbers of open warrants to continue to drop over the next couple of years and eventually level off to a manageable level; there will always be an ebb and flow on these warrant numbers. The Williamson County District Attorney's Office is working to make changes to counter these numbers when they begin to rise and at least review cases on a regular basis.

Once you start a program such as ours and you can show measurable results, it may very likely help you gain support from your commissioners to get more extradition money. It may also help your law enforcement agencies procure more funding for their warrant officers or for additional investigative tools, resources, or equipment for fugitive apprehension.

The hardest part about anything is getting started. The key to success is maintaining these monthly warrant meetings. It's the *networking* that makes the difference, where you have the opportunity to encourage and praise your warrant officers for doing their jobs and to help locate these fugitives.

If you have any questions, please feel free to contact me. I would be very interested in hearing other comments or suggestions regarding this issue. If you would like an example of the three spreadsheets I use as well as my standard review sheet which stays in each file, you can e-mail me at hwilliams@wilco.org. I would be happy to share what I have, and I feel certain we can all learn from each other on this topic.

AS THE JUDGES SAW IT

By Tanya S. Dohoney
Assistant Criminal District Attorney in Tarrant County

Questions

1 Vincent Henry Flowers has multiple metroplex DWIs. After being nabbed by a Denton County officer, he was charged with misdemeanor DWI-repetition enhanced by a 1995 Dallas prior. Pretrial, the Denton prosecutor sought the certified Dallas judgment and other corresponding documents for proof. However, the Dallas County clerk responded with bad news: The file was "missing" from its off-site warehouse facility. Instead, the clerk forwarded a certified computer printout of Flowers' conviction record. This exhibit, admitted at trial over defense objection, contained Flowers' name, birth date, address, Social Security number, date of arrest, charged offense, finding of guilt, sentence, and the judicial case identification number. There was no fingerprint.


Tanya Dohoney

The prosecution also relied upon an exhibit obtained from the Texas Department of Public Safety. This six-page record included Flowers' name, sex, date of birth, age, address, driver's license number, a copy of his license with his photo, and a reference to a Dallas County DWI conviction on 8-18-95 with an offense date of 08-02-95, and that case's cause number.

When admitting these exhibits, a Denton investigator described the Dallas document as Flowers' conviction record; he also explained how the two exhibits' information matched, including the personal identifiers. The defense objected to the computer-generated Dallas County record on relevancy grounds and its lack of a fingerprint; Flowers also objected to proving a prior without a judgment of conviction.

The Fort Worth Court of Appeals found the certified documents from Dallas constituted the functional equivalent of a judgment and sentence and found sufficient evidence to support beyond-a-reasonable-doubt proof of the prior and its link to Flowers; they upheld the enhanced sentence. Correct?

2 Donnie Lee Roberts lived with Vicki Bowen. While Vicki worked as a dental assistant, Donnie Lee's pastimes included drinking and abusing cocaine. Roberts shot Vicki in the head twice when she refused his demand for money.

On direct appeal from his capital conviction, Roberts raised two complaints involving the punishment testimony of a woman he had robbed three years before Vicki's capital murder. Elizabeth Thomas testified about Roberts robbing her while she worked in Louisiana. She described the emotional toll the robbery took on her life, including having to quit her job due to her continued fear that each customer would rob and kill her. She also suffered from sleep deprivation and nightmares, and she ran out of savings while trying to find another job.

Was this extraneous offense victim impact evidence admissible in light of the court's prior holding in *Cantu v. State*, 939 S.W.2d 627, 637-38 (Tex. Crim. App. 1997), where the court ruled inadmissible the extraneous victim's mother's testimony describing her daughter and the crime's impact on the victim's family?

3 Trooper Fountain of Montgomery County clocked Justin Amador for speeding. As the trooper concluded the purpose of the stop and handed Amador a warning for speeding, she noticed alcohol on the driver's breath. A DWI investigation and arrest ensued. Everything was videotaped.

Amador later disputed the officer's legal authority in a suppression hearing. In that proceeding, Amador played portions of the trooper's in-car video for the judge. Defense counsel declined having the court reporter take down the videotaped commentary, saying that the words spoken on the tape sufficed. Subsequently, Amador failed to enter the video into evidence; the camera had recorded information germane to the disputed legal issue. The trial court ultimately denied suppression.

When Amador filed his appellate documents, he did not designate the videotape be included in the record. Indeed, later, he successfully objected to

the State's request to supplement the record with the exhibit. In its affirmance, the Beaumont Court of Appeals concluded that the missing video supported the trial court's implicit finding regarding the propriety of the trooper's actions. The court also noted that Amador had hoisted himself on his own petard by not introducing the exhibit and later thwarting supplementation. On discretionary review, Amador questioned the lower court's consideration of the videotape that was not part of the appellate record. How did the lower court's decision fare?

4 James Thomas LaPoint victimized his estranged wife in various ways and, for his actions, he faced prosecution for multiple violent crimes. During his trial, he sought to cross-examine his victim regarding her prior sexual history to purportedly explore a bias and motive for testifying. The proposed questions involved things like sex with multiple partners and her affinity for sex toys. Under Rule 412, the Williamson County district judge addressed the admissibility of these questions *in camera*—only the judge and victim were present. The court declined the defense request to participate but offered to ask any questions that the defense submitted. A request to be allowed to make a bill of exception via direct questioning was also declined. Later, the defense sought to ask similar sex-related questions of a nurse who examined the victim, too. The trial judge repeated his *in camera* consideration of these questions.

On appeal, the defendant complained of a Rule 412 violation and confrontation error. The Austin Court of Appeals concluded that the trial court's errors prevented the development of a record that allowed a determination of harmlessness; they reversed, ordering a new trial.

After the State filed a PDR, the Austin court withdrew its opinion and abated the cause for a retrospective *in camera* hearing that permitted the presence of the parties and the questioning of the witnesses. During the abatement hearing, the trial judge granted defense counsel wide latitude when examining the victim and nurse. Once the appeal was reinstated, the Third Court held that the trial court's error had been cured by the retrospective in camera hearing. Both parties sought discretionary review. Does the rape shield law embodied in Rule 412 of the Texas Rules of Evidence require an adversarial proceeding?

5 Charles Gonzalez and his juvenile buddy, Adam, sauntered into the Good Times Store in El Paso; however, a good time was not had. After Gonzalez grabbed cash from the clerk, Adams fatally shot the employee in the chest. The store's video camera captured the crime's details and, to apprehend the villains, El Paso TV stations repeatedly played the video on the news.

Pretrial, Gonzalez requested a change of venue based upon this pretrial publicity. The trial court heard testimony describing abnormally heavy coverage that included repeated telecasts of the video but withheld a ruling until after voir dire. Jury selection revealed that two-thirds of the panelists recalled seeing the coverage and one-third of the venire harbored unalterable opinions about the case. Although the trial judge refused to order a change in venue, the El Paso Court of Appeals reversed. Was the appellate court's determination that the local news' repeated broadcasts of the surveillance video undermined the fairness of the trial?

6 Code of Criminal Procedure Article 37.09(1) authorizes submission of a lesser offense where that crime is established by proof of the same or less than all the *facts required to establish the commission* of the charged offense. Applying this language, was aggravated assault by threat a lesser-included offense of murder where Aaron Junior Hall's indictment alleged that he inflicted the victim's death by shooting him with a gun while harboring either the intent to cause death or serious bodily injury while committing an act clearly dangerous to life?

7 In this Tarrant County case, Gustavo Rodriguez appealed his adverse suppression determination claiming that the search warrant affidavit used to discover 42 kilos of cocaine in his garage lacked probable cause. The affidavit revealed that experienced narcotics' officers received a tip that Rodriguez' uncle, Cantu, dealt in significant quantities of cocaine. A team of officers began surveillance of Cantu and followed him to Rodriguez's Goddard Street residence. At the home, Cantu pulled up next to a detached garage/shed in back of the house. Shortly thereafter, Cantu left the building carrying a package in his right

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hand; he nervously looked about the area and threw the item into his car's backseat. Cantu drove off only to commit a traffic violation down the road. After Cantu consented to a vehicle search, officers discovered a brown bag containing three brick-like objects which appeared to be cocaine. Although Cantu told the officers that the three cocaine kilos came from the Goddard Street garage where more than 10 kilos remained, these juicy, salient facts did not ultimately make it into the hurriedly-drafted search warrant affidavit.

After the officers at the site of Cantu's stop and arrest put the wheels in motion for the search warrant, they informed those still surveilling the Goddard Street house of their backseat discovery, too. When the officers still at Rodriguez's house heard metal-on-metal banging, they secured the premises until the search warrant was obtained. The huge cache of cocaine was ultimately seized.

On appeal to the Fort Worth court, the appellant prevailed; the court held that the facts in the affidavit may have given rise to suspicion, but they did not provide a "substantial basis" for concluding that the search would uncover evidence of wrongdoing. Did this ruling stand on PDR?

8 After dating Antonio Schmidt for several years, the unnamed victim had apparently reported information about Schmidt's questionable actions in another county to the authorities. Subsequently, one morning, Schmidt yelled and cursed at the victim using a term rhyming with "witch," grabbed her, pushed her off a porch swing, continued to kick her in the back and stomach, dragged her by the hair, and punched her in the face—all while keeping the phone from her—until she ultimately retreated to a locked bathroom for safety.

Convicted of retaliation, Schmidt's appeal to the Amarillo Court of Appeals amazingly raised a sufficiency complaint. Schmidt's specific argument focused on the indictment language that alleged he had "threatened to harm the victim by striking her in retaliation for or on account of her services as a prospective witness." Based upon the language pled and the evidence, Schmidt contended that, although the evidence proved that he harmed her, insufficient evidence showed that he had "threatened to harm" his girlfriend. The Amarillo court bit and rendered a judgment of acquittal. What says the reader?

9 When the trial court convened the venire to begin jury selection for Robert Gray's intoxication manslaughter and aggravated assault trial, the judge made some introductory remarks and mentioned that, during lunchtime, he would hear from panelists who desired to "plead economic excuses." Venireman number two responded to this invitation and explained that, as his family's sole breadwinner working for commissions as an auto parts salesman, he would be plunged into financial hardship by jury service. The trial judge excused the man. Gray's attorney said that they probably had "more than enough" jurors, but he still objected to the excusal.

On appeal, the Corpus court held that excusing the venireman's for an economic reason violated Texas Gov't Code §62.110(c) and, because it is structural error, reversal was necessary. On discretionary review, the Court of Criminal Appeals reversed and remanded so that the court could instead partake of a non-constitutional harm analysis. On remand, however, the Corpus court relied on *Ford v. State*, 73 S.W.3d 923 (Tex.Crim.App. 2002) (plurality op.) for the proposition that appellate courts should determine the right sought to be protected when considering harm for a statutory violation. Finding that Gov't Code §62.110(c) protects the constitutional right to a fair cross-section of the community, the lower court decided that it could not state with fair assurance that the error was harmless and again reversed the conviction. Was this the proper error analysis?

10 This anomalous case involved Article 21.25 of the Code of Criminal Procedure. When the Denton County grand jury returns an indictment, four "duplicate original" indictments are produced and distributed to the court, the clerk, and the parties. In 1994, the Denton County grand jury indicted Larry Don Dotson on two involuntary manslaughter cases. The pleadings were identical except for the victims' names (Tracy and Natalie). Dotson pled guilty to both charges and received 10 years' probation in each. With less than a year left on his suspended sentences, the State sought to revoke him and, at that juncture, found that the two indictments filed with the clerk's

office inexplicably bore the name of the same victim: Tracy.

Relying on Article 21.25, which authorizes substitution for an indictment which has been lost, mislaid, mutilated, or obliterated, the State sought to substitute a copy of the indictment naming Natalie for one of the indictments naming Tracy. The State produced testimony regarding the Denton County indictment procedure and hypothesized that a clerical error resulted in the two identical indictments winding up in both files, although the later cause number should have been Natalie's case. Additional evidence revealed that all parties involved in the earlier stages of the prosecution, even defense counsel, understood that Dotson faced two separate charges. Also, the copy the State sought to substitute possessed an original handwritten cause number and file stamp. Based upon all of this evidence, the trial court agreed that a clerical error took place and permitted the Article 21.25 substitution. The Fort Worth Court of Appeals found the substitution problematic, however, because no evidence showed the original had been lost, mislaid, mutilated, or obliterated. They reversed on jeopardy grounds, vacating the second involuntary manslaughter conviction. Right or wrong?

Answers

1 No windfall warranted by warehouse error; Fort Worth got it right—although, semantic-wise, the functional-equivalent language was discounted. Neither Texas caselaw nor Article 37.07 of the Code of Criminal Procedure requires a specific document or mode of proof to show the existence of a prior conviction or its link to a particular defendant. In fact, *no* document is necessary (nor is any "real" judgment). For example, a prior's proof may be premised upon a defendant's admission, stipulation, or even testimony from a person present at conviction who can make an identification. Judge Cochran aptly notes that, just as there is more than one way to skin a cat, there is more than one way to prove a prior conviction.

Because the substantive law does not require a particular means of proof, defendants are not entitled to a windfall when records are destroyed—a good thing in light of the recent devastation wrought by hurricanes on our Texas coast. Also, there may come a day when paper judgments are obsolete because some courts are going paperless. Rule 902 of the Rules of Evidence authorizes self-authentication of certified copies of public records including date compilations in any form certified as correct. This rule authorized admission of the records of Flowers' case sent by the Dallas County clerk. Relying on a practical prior decision from 1988, Judge Cochran reiterated that proving a prior offense can be akin to assembling puzzle pieces: Alone they may have little meaning, but when the factfinder fits the pieces together and weighs the credibility of each piece, the evidentiary puzzle pieces establish the existence of the prior and its link to the perpetrator, too. Thus, the evidence supported the trial judge's finding.

Judge Johnson concurred with a caution about prudent consideration of changes from non-traditional resources. *Flowers v. State*, No. PD-1081-06, ___ S.W.3d ___, 2007 WL 1135622 (Tex. Crim. App. April 18, 2007) (6:2).

2 Yes. The court defines "victim impact" evidence as testimony regarding the effect an offense has on people other than the victim and distinguished it from Thomas' testimony about the extraneous robbery's impact. Her testimony presented evidence of the effect that a different offense had on the victim of that extraneous crime. In *Cantu*, the defendant engaged in a gang rape and murder of two young girls. Cantu was charged with the capital murder of one of the girls, and his appellate error arose when the mother of the other murdered girl described the murder's effect on those who remained alive after Cantu's brutal crime. Judges Meyers, Price, and Johnson dissented to the admission of the extraneous victim's discussion of the crime's impact. *Roberts v. State*, No. AP-75,051, ___ S.W.3d ___ (Tex. Crim. App. April 18, 2007) (6:3).

3 Poorly. Judge Cochran derided the lower court's assumption/speculation that the video supported the trial court's ruling because the exhibit was not part of the appellate record and it had been the State's suppression burden to prove the propriety of the warrantless arrest. Recognizing that the court and parties had treated the video as an admitted exhibit, Judge Cochran cited authority

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for later including that exhibit in the appellate record and suggested that, when Amador objected to supplementation, the Beaumont court should have ordered the trial court to resolve the dispute utilizing Rule 34.6(d) & (e) of the Rules of Appellate Procedure. The outcome: The Beaumont decision was vacated and the cause remanded for further consideration—also known as another bite at the apple. Judge Hervey's three-vote dissent discussed, among other things, estoppel principles. *Amador v. State*, No. PD-0786-06, ___ S.W.3d ___, 2007 WL 1217267 (Tex. Crim. App. April 25, 2007) (6:3).

4 Yes. Presiding Judge Keller writes that both the rule's use of the term "hearing" and the caselaw construing the statutory precursor to Rule 412 mandate that the in camera proceeding contemplated by Rule 412 is an adversarial hearing at which the parties are present and attorneys are permitted to question witnesses. The court unanimously concluded that Rule 412's policy of protecting a victim's privacy must be balanced against a defendant's confrontation rights. The victim remains protected in that the hearing should be closed to spectators, thus limiting those who are privy to the information revealed. A trial court's failure to follow this requirement is remedied by abating for a retrospectively conducted hearing. Judge Keller affirmed the Austin Court's determination that the retrospective hearing had cured any error so, after all of this ping-pong appellate procedure, the conviction was upheld. *LaPoint v. State*, No. PD-1100-06, ___ S.W.3d ___, 2007 WL 1217340 (Tex.Crim.App. April 25, 2007) (9:0).

5 No. Review of the propriety of a change-of-venue ruling turns on an abuse of discretion standard. A trial court can consider the pervasiveness of pretrial publicity as well as the voir dire process itself; this judge relied on both determinations. No evidence described how often the video actually played or the size of the viewing audience. Nothing showed that the pretrial publicity "infected" the entire community even though a significant segment of panelists knew of the case and could not set aside their conclusions. Presiding Judge Keller noted that the absence of pervasiveness alone supported the trial court's ruling, yet she also noted that the repeated newscasts of the surveillance video—admissible trial evidence—could not be prejudicial or inflammatory without additional facts. Here, the trial judge could reasonably consider the distinction between pretrial dissemination of evidence that was inadmissible versus dissemination of evidence that the jury would ultimately hear. Indeed, Gonzalez benefitted from this voir dire discussion which enabled him to remove panelists who would decide guilt solely on the video's basis. Historically, only the media's showing of the shooting from the Jack Rubinstein (Ruby) case has required reversal of a pretrial venue ruling. *Gonzalez v. State*, No. PD-1750-05, ___ S.W.3d ___, 2007 WL 1343200 (Tex. Crim. App. May 9, 2007) (7:1:1).

6 No. Judge Womack's important decision resolved persistently conflicting law and held that the sole test for the first-prong of a lesser-included-offense analysis under article 37.09(1) of the Code of Criminal Procedure requires comparing the elements of the greater offense *as pled in the indictment* with the elements of the lesser offense as defined by statute. Commentators have labeled this the cognate-pleadings approach. The court eschewed other, more liberal evidence-based analyses because of their potential due-process problems. The cognate-pleadings theory allows instruction even when the lesser offense is not composed of a subset of the statutory elements of the greater crime so long as they can be deduced from the indictment-alleged facts. Thus, the first prong of the analysis under the theory adopted does not hinge on the evidence adduced at trial and is a question of law which can be answered pretrial.

Aggravated assault by threat elementally includes threatening another with imminent bodily injury by displaying a deadly weapon (here, a gun) along with proof of one of three requisite mental states. Comparing these to the specific elements pled (murder caused by shooting with a gun with the intent to cause death or SBI while committing an act clearly dangerous to life), the lesser's facts included two elements that are not the same (or less than) those required in the indictment. Neither threatening nor displaying are the same as the elements pled. That the trial evidence might include proof of threatening or displaying is irrelevant to the first-prong analysis.

Just as a reminder: The trial evidence still impacts the second prong of the lesser-included analysis (whether there is some evidence to support the lesser's submission). The opinion reiterated the slight standard: anything more than a scintilla of evidence gives rise to that lesser instruction.

Two dissents were filed. Although not disagreeing with the cognate-pleadings approach, Judge Keller dissented because she believed the issue should not have been reached based upon estoppel principles because it was possible that Hall's counsel requested the complained-of instruction and, if not, Hall acquiesced to the beneficial charge. Judge Hervey's dissent noted that the caselaw overruled by the majority was inconsistent with the plain language of Article 37.09(1). She lamented the court's failure to address another ground on which review had been granted regarding whether the submitted lesser-included was authorized under Article 37.09(2). The second subsection of 37.09 permits submission of a lesser offense where the difference stems from the degree of injury or injury risked. Judge Hervey believed that subsection (2) did not authorize the submitted lesser. Finally, she had also wanted the court to address the preservation issue raised by the State, especially because preservation matters should be considered systemic. *Hall v. State*, No. PD-1594-02, ___ S.W.3d ___, 2007 WL 1343110 (Tex.Crim.App. May 9, 2007) (5:4).

7 No! In typical Judge Cochran fashion, she wrote that the term "probable cause" is frequently "beauty in the eye of the beholder." She further explained that it is easier to state what probable cause is not, rather than define the term itself. In general, probable cause exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found at the specified location. Regardless of the definition of probable cause, when reviewing a magistrate's warrant decision, appellate courts must apply a highly deferential standard which gives credence to the constitutional preference for reliance on warrants. Relying on the *Davis* decision from the last term, Judge Cochran discussed the importance of sticking to consideration of the facts within the affidavit, not focusing on facts that could or should have been included. See *Davis v. State*, 202 S.W.3d 149, 150-53 (Tex. Crim. App. 2006).

In this case, the sufficiency of the affidavit's contents boiled down to the reasonableness of two inferences: The first involved whether the magistrate could determine that the package found in Cantu's backseat was the same one thrown into his car after he left the Goddard Street building. The second turned on the reasonableness of the possibility of more drugs at the Goddard Street garage. Looking at these inferences, Judge Cochran observed that there had been no mention of a second package; thus, inferring that the package seized from Cantu was *not* the same one he tossed into the back seat involved speculation. Also, while it was possible that Cantu had taken all of the stored cocaine when he left the garage, it was at least as likely that the retrieved package was only part of the stored contraband.

Because probable cause is a fluid concept controlled by the assessment of probabilities in particular factual contexts, an appellate court must defer to the magistrate's probable-cause finding when an affidavit demonstrates a substantial basis for a conclusion, and courts should not delve into consideration of facts which were omitted or might have been included in the affidavit. The court remanded the cause to Fort Worth for further consideration. *Rodriguez v. State*, No. PD-1013-06, ___ S.W.3d ___, 2007 WL 1343066 (Tex. Crim. App. May 9, 2007) (7:2).

8 No way, Jose. Judge Meyers' unanimous opinion reversed the Amarillo decision. On the heels of last year's decision in *Olivas v. State*, 203 S.W.3d 341, 349 (Tex. Crim. App. 2006), Meyers wrote that, during a prolonged assault, the aggressor's actions can include both threats and actual harm, a threat need not precede the harm, and—a big "duh" here—infliction of harm itself can be a threat of further harm, directly contradicting the lower court's cockamamie revelation that "one cannot simultaneously be threatened with harm while the threatened harm is being inflicted." While "threaten" is not statutorily defined, the bright-line rule fashioned by the Amarillo judges was too narrow. Whether a threat has been communicated is a fact-specific inquiry. The lower court's restrictive analysis disregarded the reality of an ongoing assault in which a threat of harm can be communicated during the course of the assault.

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Schmidt v. State, No. PD-0402-06, ___ S.W.3d ___, 2007 WL 1343017 (Tex. Crim. App. May 9, 2007) (9:0).

9 No. §62.110(c) prohibits a trial judge from excusing a prospective juror for economic reasons without the parties' agreement. Relying on the harmless-jury-shuffle-error decision in Ford, the court agreed that a court reviewing a statutory error should consider what right the statute meant to protect and whether the error thwarted that right. See *Ford*, 73 S.W.3d at 925. Using this framework, §62.110(c) could not have been intended to protect the right to a venire consisting of a fair cross-section of the community because it relates to the procedures that apply *after* potential jurors are summoned. §62.110(c) was, instead, designed to retain an adequate number of panelists from which to choose a petit jury. Thus, to warrant reversal for this non-constitutional error, Gray needed to prove that the error deprived him of a lawfully constituted jury. Gray did not show this, nor even voice it. In the absence of any such showing, the court presumed that the jurors who served were qualified and the erroneous excusal of the salesman did not affect Gray's substantial rights because the finally-constituted jury contained qualified jurors. *Gray v. State*, PD-1946-05, ___ S.W.3d ___ (Tex. Crim. App. May 23, 2007) (9:0).

10 Wrong. Judge Price's unanimous decision reversed the Fort Worth decision. The evidence disclosed that the grand jury had returned an indictment naming Natalie at about the same time as the Tracy case was true-billed. The evidence supported the inference that a clerical error had occurred, whereby the original indictment was mislaid and not placed in the clerk's file. The remedy found in Article 21.25 properly rectified this clerical error. *Dotson v. State*, No PD-0614-06, ___ S.W.3d ___, 2007 WL 1490539 (Tex.Crim.App. May 23, 2007) (9:0).

CRIMINAL LAW

By Lucy Cavazos
Assistant District Attorney in Kerr County

Continuing to battle the meth scourge

Kerr County investigators and prosecutors unravelled a web of 35 defendants involved in theft, fraud, weapon possession, and meth manufacturing to net a 40-year sentence for the group's leader. Here's how they did it.

On April 27, 2005, David Holland, a Kerrville resident, reported to the Kerr County Sheriff's Department that several of his checks had been forged. The case was forwarded to the Criminal Investigation Division, and Captain Carol Twiss began her investigation. Little did she know that this investigation would result in an engaging in organized criminal activity indictment with 35 named defendants and 36 overt acts.


Stephen Wadsworth & Lucy Cavazos

Upon developing suspects to the forgery, Captain Twiss interviewed five of the six people involved with the crime; one refused to cooperate. However, the five others sang like canaries and told Twiss that the checks had been forged to obtain funds to purchase pseudoephedrine and other ingredients to manufacture methamphetamine. One forged check had also bought fuel to drive a stolen vehicle to San Antonio to sell it. All five named Casey Hannah as the recipient of the meth ingredients.

The five cooperating forgery suspects mentioned the involvement of other people eventually named in the EOCA indictment. As Captain Twiss and Sgt. James Ledford interviewed those named by the original five, they were led to yet more members of the combination.

The whole operation came to a head May 20, when Capt. Twiss received information from a confidential informant that some members of the combination were cooking meth at the home of Jack and Shannon Ament. Capt. Twiss, Sgt. James Ledford, and Investigator Erik Geske, set up surveillance at the Ament residence. A little after midnight, Geske observed Ronald Smith, Shadie Baker, Les Newman, and Jennifer Donaldson leaving the house. As they drove past Twiss' location, she recognized Ronald Smith, who had an outstanding warrant. She called ahead and had a marked unit stop the vehicle to arrest Smith. As the deputy turned on his overhead lights, baggies of meth and pseudoephedrine pill wash were thrown from the window. Les Newman, the driver, also had an outstanding warrant. All were arrested for possession of a controlled substance for the items thrown from the window, and all had fresh needle tracks on their arms. The hands of all three men were heavily stained with iodine. Upon arriving at the jail, Donaldson said she wanted to speak to an investigator, so Twiss immediately returned to the sheriff's department and interviewed her. Donaldson told Twiss that "they" had been cooking meth at the Ament residence earlier that day. Based on information from Donaldson as well as the CI, Twiss obtained a search warrant for the Ament residence, which was executed during the early morning hours of May 21, 2005.

Eventually, all but three of the

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remaining defendants named in the indictment cooperated and gave detailed statements regarding the combination and its activities. Some gave more than one statement.

The combination

Beginning in January 2004, a few members of the combination began to manufacture methamphetamine (using the red phosphorus method[1]) by combining their group efforts to shop, prep, and cook. Some of them would shop for ingredients, some would prep the ingredients for the cook, and a few in the group would do the actual swirling (manufacturing of the meth). The cookers and shoppers often overlapped. Most of the ingredients were bought or stolen from local merchants and feed stores, but the group also shopped in Austin, San Antonio, and all the small towns along the way. They would then go to one of their residences to prep the ingredients and cook the meth; sometimes the cook was done at the same place and sometimes at another residence. The remnants from the cooks, such as matches, matchboxes, matchbooks, coffee filters, soft drink bottles, and other items would then be taken to the residence of one of the members who lived out in the rural area and had a burn pile.

This activity picked up drastically when Charles Les Newman was released from jail on September 14, 2004, on a child support matter. At that time, Newman met Jack and Shannon Ament when he went to see his then-girlfriend, Brandi Crider, who was staying with the Aments in their Kerrville home, which is in a very nice neighborhood where crime is almost non-existent. Immediately, the conversation turned to methamphetamine. Within a few days, Newman learned from Jack that his employer of two weeks, a silversmith, kept an anhydrous ammonia tank at the shop. Jack had already given Casey Hannah a tour of the shop and had shown her the tank. Ament then explained the layout of the shop to Newman in front of Hannah and Crider. Crider had initially agreed to assist Newman and Hannah in stealing the tank, but then backed out. Crider was awakened the next morning to Newman and Hannah whooping and hollering about having stolen the tank and cooking a batch of meth with the anhydrous ammonia.

Very quickly Newman met the rest of the people involved in the combination through Crider and the Aments. He became one of the leaders, along with Jack Ament, Casey Hannah, and Ronald Smith. From December 2004 until the bust at the Ament residence, each and every day consisted of shopping for a cook, prepping ingredients, or cooking methamphetamine. Everybody stayed high all day and cooked a batch of methamphetamine at one house or another; most cooks yielded anywhere from 10 to 60 grams of meth. Many in the combination didn't have a permanent home but jumped around to other members' houses, staying for a few days or weeks at each place. Most did not have jobs and those who did stayed at each workplace for a very short time before being fired or simply not returning to work. Each member of the combination would get a portion of the methamphetamine they cooked, and it was up to each to decide what to do with his portion. Some sold the methamphetamine while most kept it for personal use. Save for about five members, everyone had met through Jack Ament during some sort of drug encounter. The bust at the Ament residence was a huge blow to the group. Their activity drastically declined at that point.

The investigation

It would take an entire book to explain the investigation but suffice it to say it took hundreds of hours and involved many witnesses, interviews, and trips both within and outside the county. Both Capt. Twiss and Sgt. Ledford met with E. Bruce Curry, our district attorney, on numerous occasions throughout their investigation to discuss the case. Their offense report alone was over 300 pages.

Although none of the defendants were promised anything in return for the information they provided, Twiss and Ledford knew, due to working closely in the past with our office, that the statements would have to be corroborated for trial pursuant to the law of accomplice witness testimony. They also knew that the statements would be incredible without corroboration. The difficulty was that this ring had been operating for about a year and a half, and the members were high all the time so dates and crystal-clear facts were hard to obtain.

As each suspect gave his statement, Twiss and Ledford backtracked and confirmed the information. One of many examples: Three defendants, Brandi

Crider, Jennifer Donaldson, and Ronald Smith, advised that Charles "Les" Newman had contacted them at Bryan Blakely's residence and advised that he had just been stopped by the Task Force and told them to burn all the meth labs at Blakely's residence. (Donaldson was able to pinpoint the date at the beginning of April 2005 because she recalled this happening just a few days before her being "locked up" on April 11.) In a frenzy, the three burned the labs by pushing them off the deck of the house and throwing a lit match on the pile.

Immediately, Twiss and Ledford proceeded to the Blakely residence where they found a burn pile with remnants of meth labs. They also confirmed that Investigators Michael Baird and Everett Alexander with the 216th Judicial District Narcotics Task Force had in fact stopped Newman on April 6, 2005, where during a consent to search the truck, several spatulas with red phosphorus residue were located in the bed along with iodine-stained coffee filters, processed match strike plates, and a letter from "Chuck" to Jack and Shannon Ament. Also found was a trace of methamphetamine in a baggie. Further, Investigator Baird had taken photos of Newman's heavily iodine-stained hands. Newman had initially told Baird that he was a mechanic (hence the reason for his stained hands), but after further quizzing, Newman finally admitted that his hands were stained cooking methamphetamine. But he claimed he'd cooked meth in Llano two weeks prior, not recently. Baird testified during Newman's trial that Newman's hands were heavily stained and cracked, like those of someone who had been cooking methamphetamine over a long period of time. All 36 overt acts were corroborated in similar fashion by Capt. Twiss and Sgt. Ledford.

The members of the combination were indicted for EOCA by conspiring to commit and committing the manufacture of more than 400 grams of methamphetamine with the use and exhibition of a deadly weapon. My co-counsel, Stephen Wadsworth, and I tried the ringleader, Charles Newman, this spring, and we knew it would be fraught with challenges.

The trial

At trial, one concern was educating the jury panel on EOCA and the law of parties, including the fact that membership in the combination could change from time to time, that the participants need not know each others' identities, and how the law allows holding someone criminally responsible for another person's conduct. Luckily, the panel had no problem understanding the law or the concept. As a matter of fact, when defense counsel asked one panel member a hypothetical question on the law of parties—I had just leaned over to Stephen to whisper that the hypothetical was illustrating organized criminal activity, not the law of parties—the panel member exclaimed, "That looks like organized crime!"

Another potential problem at trial was that Brandi Crider was the State's most knowledgeable, intelligent, and in our opinion, honest co-defendant, but unfortunately she was also Newman's on-again, off-again lover. We were ready for her to be attacked on cross-exam. She had married another former boyfriend while in jail (who had somehow escaped under the garden fence at the time of indictment), but she and Newman had still written about 10 reams of paper letters back and forth while awaiting trial. The letters were not relevant for the most part and were not something we were eager for the jury to see. We were concerned that the trial would turn into an "As the World Turns" of the torrid love affair between defendant and witness. The letters were, for the most part, very vulgar, especially for jurors in our conservative county. At times, it appeared from the letters they hated each other while other pieces of correspondence were hot, passionate love letters. Luckily, not once in any of those letters did Brandi ever even insinuate that she would lie on the stand for Newman or anyone else. In a few of them Newman suggested to Brandi that she did not have to testify and cooperate; he said that she was so high most of the time, she could not possibly be expected to remember anything. The letters, in our opinion, had very little evidentiary value. Luckily, defense counsel filed a motion in limine regarding the letters, and I agreed to approach the bench before going into the letters in the event the defense opened the door.

On the stand, Brandi testified about the combination, how it worked, who shopped, who prepped, and who cooked. She also told the jury, step by step, how methamphetamine is cooked

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using the red phosphorus method. She never even hinted to the letters. After her testimony, I asked several of the courtroom observers what they thought of Brandi and her testimony. All said that she came across as intelligent and honest—which had been our opinion of her as well when we interviewed her—despite not being the most law-abiding citizen by any stretch of the imagination.

Six of Newman's co-defendants testified. All testified that from the time Newman came into the picture in September 2004, every day for the combination was about shopping, prepping, or cooking methamphetamine. They all testified that methamphetamine was cooked on a daily basis because they needed to keep up with their own demand for the drug. They testified that each member used anywhere from 2 to 5 grams per day; that meant that to support the group's habit, about 30 to 50 grams of methamphetamine needed to be produced per day. One co-defendant testified that they were like vultures, just waiting for the cook to be finished so that they could get their share. All testified that the only reason for their association with others in the combination was to manufacture methamphetamine. They also testified that most people in the combination were shoppers. Sometimes ingredients were bought, and other times they were stolen. Sometimes iodine was purchased at feed stores, and other times it was made from other ingredients. All agreed that the main cooks were Jack Ament, Newman, Hannah, and Smith. The jury also heard that small children were present in the Ament home while methamphetamine was manufactured. Capt. Twiss testified that when law enforcement entered the Ament residence, the couple's 5- and 7-year-old children were asleep on the couch. The children awoke briefly, lifted their heads off the couch, then went right back to sleep despite the loud noise and presence of a large number of officers.

One concern was that we did not have a large amount of actual powdered methamphetamine to show the jury because the methamphetamine was quickly consumed (or sometimes sold) by the group immediately upon its manufacture. However, there was ample evidence that members purchased or possessed chemicals for manufacturing meth, as well as trace amounts of meth itself.

During the bust at the Ament residence, which happened to be a few blocks from an elementary school and firehouse, law enforcement seized a large amount of methamphetamine in the form of "meth oil." Joel Budge testified that he did not measure the entire amount, but the top layer consisted of over 800 grams of methamphetamine. Also introduced into evidence during trial were chemicals collected from bottles found in the garage; the officer who collected them placed them in a sealed white bucket. Budge advised the jury not to open the bucket due to its toxicity; the bucket and its content were admitted into evidence, but the content was photographed so that the jury could see what was inside without unsealing it.

The jury also saw many photos from the execution of the search warrant at the Aments' house. The garage looked like a high school science lab. Two trained officers, in their blue hazmat suits (looking much like astronauts to the jury; see the photos on the opposite page), collected beakers and soft drink bottles with tubes running from them. Many yard-size trash bags full of matches, matchboxes and match books, and striker plates that had already been processed to remove the sulfur were also collected. A sawed-off shotgun, belonging to Newman, was also found. All the co-defendants testified that Newman always had firearms with him during the cooks. Blakely said that Newman had commented, while preparing to manufacture methamphetamine and in the possession of a handgun, "If the 5-0 show up, I will cap them." Danielle Click testified that on one occasion, as Newman was setting up for a cook, he was moving a sawed-off shotgun out of the way to a nearby mattress and said that he would not go back to jail for anyone.

The co-defendants also testified that when Newman arrived at the house, everyone else stepped aside and let him take over the cook. They testified that Newman didn't say anything to cause such a reaction; it was just understood based on his attitude and demeanor that he was in charge.

The jury also saw the mug shots of each of the 35 defendants from their arrests. Sadly, all but about three looked liked those "this is what you will look like if you use meth" deterrence ads often seen at high schools and probation departments. The defendants' appearances at Newman's trial were completely

different from the mug shots as most were still in custody (and not using meth) at the time. It would've been hard to recognize them by their mug shots.

And finally, the jury heard Newman's statement to Smith while sitting in the back of a patrol car waiting to be taken to jail on May 21, 2005: "I knew we would get caught sooner or later."

The verdict

The jury sentenced Newman to 40 years' confinement and a $150,000 fine on the EOCA indictment and 10 years and a $10,000 fine on the possession of a controlled substance in a drug-free zone. Pursuant to the drug-free-zone statute, the sentences must run consecutively.

It was apparent that the jury was not confused about the EOCA, accomplice witness testimony, or the law of parties. It was equally clear that the jury wanted to send a message to those who put methamphetamine on our streets, even if largely for their own use. The jury saw beyond the "personal use" excuse and realized that drugs are the root of other crime. The mug shots were very telling of how damaging methamphetamine can be to users as well.

The credit

Capt. Twiss and Sgt. Ledford worked tirelessly and never became overwhelmed by the amount of witnesses, interviews, leads, and evidence. One of the investigators with the 216th Judicial District Narcotics Task Force comment-

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ed to our office that, after the bust at the Ament residence, the Task Force saw a huge decline in methamphetamine cases in Kerr County. Many, many, thanks to Capt. Twiss, Sgt. James Ledford, and other law enforcement officers who assisted them. Capt. Twiss and Sgt. Ledford's assistance continued right up until the punishment verdict. We could not have prosecuted this case successfully but for their excellent investigation.

Endnote

1 In the red phosphorous ("red-P") method of making meth, ephedrine or pseudoephedrine is mixed with red phosphorus, iodine crystals, and water. Red phosphorus is usually procured by scraping the striking pad off of matchbooks; these striking pads are about 40 percent red phosphorus. A more common way of making meth is the "Nazi method," where ephedrine or pseudoephedrine is combined with anhydrous ammonia and lithium.

CRIMINAL LAW

By Kerry Spears
County and District Attorney in Milam County

Holding the owners of violent dogs accountable

New legislation increases the punishment for dog attacks.

In March 2007, Jose Hernandez was found not guilty in a highly publicized dog-mauling case. Hernandez was alleged to have caused the death of Lillian Stiles by allowing his six dogs to run loose; the dogs then attacked Stiles in her own front yard while she was gardening, and she bled to death from her wounds.

Despite losing the case, our prosecution efforts and the resulting media coverage may well have been an important catalyst in passing Lillian's Law, HB 1355 by Rep. Dan Gattis (R-Georgetown), during the 80th Legislative Session.

The attack

It was November 26, 2005, the Saturday after Thanksgiving. Lillian Stiles was riding her lawnmower around her beautifully landscaped yard. Her husband of 55 years, Jack, was inside watching a football game. They lived just outside Thorndale in the community of San Gabriel. Mrs. Stiles was a mother and grandmother who was enjoying her retirement years. She was 76 years old.

It appears from the evidence that Mrs. Stiles' lawnmower ran out of gas. She must have gotten off the mower to go inside when she was attacked by six dogs belonging to her neighbor, Jose Hernandez. This pack of dogs broke her neck and severed her jugular vein. The attack was so brutal that the only way her husband was able to identify her later was by her clothing. Weldon Smith and his wife, Maurita, were driving past the Stileses' home when they saw something lying in the yard. They turned around to go back and see if someone needed help, and when Mr. Smith got out of the car, he was also attacked by at least four of these dogs as he tried to reach Lillian's body. The Smiths were the first to notify Jack Stiles that his wife lay dead in their yard.

I was at home when I received the

news about Lillian Stiles. I will never forget when the sheriff's investigator, Greg Kouba, told me he was working a homicide. I was obviously concerned in that we don't have a lot of murders in our county, and we kind of like to keep it that way. It was not long into our conversation that I learned the "murderer" was not one but six dogs belonging to the victim's neighbor.

Charging the defendant

The investigator was not sure if Hernandez could be charged with a crime. At that time, I was not aware of the "dangerous dog" statute in the Health and Safety Code; it was not until Monday morning at the office that I learned the law's limits on our ability to prosecute the owner of these dogs. The law set out in §822.044 of the Health and Safety Code states that an owner of a dangerous dog commits an offense if the dangerous dog makes an unprovoked attack outside his enclosure. If the dog causes bodily injury, it is a Class C misdemeanor, and if the dog causes serious bodily injury, then it is a Class A. A magistrate may deem a dog dangerous after it has made an unprovoked attack on a person outside its enclosure. It basically means "one free bite." The dogs had to have bitten someone in the past before they were considered "dangerous." This was not the case for us. Therefore, my initial thought was charging Hernandez with criminally negligent homicide if the facts and evidence supported it; manslaughter was also a possibility if the dogs had bitten people before, killed livestock, or if the owner knew they had been aggressive with people in the past.

As the investigation progressed, we found that Jose Hernandez was a legal resident of Texas who did not speak much English. He and his family lived 700 to 800 feet away from the Stileses. The largest dog was a rottweiler mixed with a shepherd or pit bull called Peoja. She alone weighed over 100 pounds. Three of the other dogs, which appeared to be part pit bull as well, were her puppies and ranged in age from nine months to a year old; they weighed 40 to 60 pounds. The other two dogs were a male and female pit bull; the female was smaller and weighed around 35 pounds. She was called Chamaca and had been given to Hernandez by a relative who obtained her from the animal shelter. The male weighed closer to 50 or 60 pounds. He was Catalampia. Evidence at trial revealed that although Hernandez did not want all of these dogs, he purchased this dog for $100.

The Hernandezes were not home when the dogs left their property and killed Mrs. Stiles. Three of the dogs (one of the puppies, one pit bull, and the Rottweiler mix) were allowed to run loose, while the three other dogs were kept in a fenced backyard. The chain-link fencing was about 5 feet high, in poor condition, and was held up (sort of) by a T-post every 50 to 60 feet. There were several spots on the fencing where the dogs had clearly walked over it and tramped it down.

During the investigation, the investigator could find no one who had any "previous" problems with these dogs. Many people had seen them digging through garbage at the nearby church and wandering around, but no one knew of any incidents of aggression or biting. However, we did have one witness, Hernandez's friend, who gave a written statement that Hernandez had invited him to a dog fight and told him that he owned a rottweiler that he fought, but it was not one of the dogs involved in our case.

Charging this case was not an easy decision. I could find no record of a similar prosecution in Texas, though dogs had mauled and killed numerous adults and children in the state. I did find approximately 13 cases from other states involving laws similar to our criminally negligent homicide statute or manslaughter statute. The first case of record was prosecuted in Florida in 1947.

Although we had no precedent for what we were doing in Texas, what we did have was a dog owner who was aware of what dogs could do based on his knowledge and interest in dog fighting. We set out to prove the general knowledge that people have about dogs: All dogs bite. Large dogs can do greater damage than small dogs. A pack of dogs is more likely to cause trouble and cause more damage than a single dog. Dogs left to their own devices and not properly cared for are likely to be dangerous. We set out to prove that Hernandez ought to have been aware of a substantial and unjustifiable risk his dogs presented, that the risk was of such a nature and degree that his failure to perceive it constituted a gross deviation from the

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standard of care an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint, and that risk resulted in Mrs. Stiles' death.

Now, I have to admit that I have always struggled with the concept of criminal negligence. It has never been an easy concept for me to grasp. To me, it has always been one of those concepts that you just know it when you see it. But I knew I had to thoroughly understand it and be able to explain it before I could expect my jurors to do the same.

I knew there would be other difficulties at trial, and we tried to prepare for them. The most difficult obstacle other than criminal negligence was the fact that our county has no leash law. Dogs in the county are allowed to roam free. Another issue was that these dogs were considered family pets that had never harmed anyone.

The trial

We questioned our jury panel at length on issues involving criminal negligence, leash laws, general knowledge about dogs, and responsible dog ownership. Of course, we believed our ace in the hole was the evidence involving Hernandez's dog fighting interest and participation. However, as we all know, witnesses don't always say in court what they told the police at the time of the offense. Our witness softened his testimony and backpedaled quite a bit from his original statement. Even though we were able to get him to admit he had said something different earlier, it was not enough.

The defense brought witness after witness to say what lovable, sweet dogs these animals were. They portrayed Hernandez as ignorant when it came to breeds of dog and what damage they are capable of. Hernandez himself testified that he did not know what type of dogs he owned. He did not know that dogs could kill livestock although he worked on a farm with cattle where the workers carried guns to kill dogs and coyotes that may prey upon the cattle. He also stated that he did not know dogs bit people. He portrayed himself as extremely ignorant when it came to the animals he owned. We were successful to some degree in showing how irresponsible he was as a dog owner. One of the dogs had been hit by a car, and he failed to take it to the veterinarian. The dog lost weight, he said, because it could not walk to the food he placed out for it. He also did not have any of the dogs vaccinated for rabies. In fact, none of the dogs had ever seen a vet.

In the end, the jury deliberated for five hours and returned a verdict of not guilty. In speaking to some of the jurors afterwards, at least two women were holding out for guilty. It was apparent from the jurors' comments that the lack of a leash law concerned them, as did Hernandez' attempts to pen three of dogs when the law did not require him to. Also, the jurors wanted proof that the dogs had been aggressive in the past. However, one juror told me that many of them believed that Hernandez was breeding the dogs for dog fighting; they just needed the proof. They wanted proof that Hernandez knew the dogs were dangerous. While I respect their verdict, it is obvious to me at least that they wanted Hernandez to have been reckless, not criminally negligent.

Changing the law

The fact remains that the verdict proved the need for House Bill 1355. I supported this bill and believe if it had been in effect at the time of Lillian Stiles' death, Hernandez would have been convicted. The bill does two things that the current state of the law does not: One, it provides a more appropriate punishment if the dog causes serious bodily injury (it is now a 3rd-degree felony, and if the dog causes death, the crime is elevated to a 2nd-degree). Second, it provides a way around the "one free bite" rule, which remains on the books for cases involving dangerous dogs that do have a history of biting people. The new law does not require that the owner know his dog is aggressive or dangerous. It provides that if you fail to secure your dog and your dog seriously injures or kills someone, you can be held criminally liable. It does not require people in the country to secure their dogs, but it puts citizens on notice that while an owner may trust his own dogs, society does not. The truth is, responsible dog owners have nothing to fear from HB 1355.

Rep. Dan Gattis and Sen. Eliot Shapleigh (D–El Paso), the Senate sponsor, worked hard to pass this bill, and a great deal of the credit should also go to Marilyn Shoemaker, Lillian Stiles' daughter, and Lillian's husband, Jack. They have worked tirelessly since November of 2005 to make people aware of the problem with the law. They are extraordinary people who have been

able to focus their grief and pain into a law that may protect someone else from the tragedy they have suffered.

When I was asked to write this article, I tried to remember a time I read an article about a prosecutor losing a case. It is always articles about winning those cases that we seem to focus on. But sometimes, our defeats are the catalyst to greater victories. No one likes to be remembered as the prosecutor who lost a case, but I have found that as a prosecutor, just as in life, we are often challenged to step outside our comfort zone and do what we believe is right and just. We did just that. We may not have won the battle, but it looks like we will win the war.

CRIMINAL LAW

By Brandon Birmingham
Assistant Criminal District Attorney in Dallas County

15 videotapes, 131 victims, and one life sentence

Unraveling a one-man epidemic of drugs, illegal videotaping, and HIV exposure

In December of 2005, I picked up the case file against Willie Atkins and read something about a pinhole camera hidden behind a world map. Eighteen months later, we tried and convicted him for attempted sexual performance of a child[1] named John. (All juveniles' names in this article have been changed.)


Brandon Birmingham

The bus stop

John and Dewayne went to a big public high school in Dallas. Towards the end of April 2005, Dewayne's mother got a tax refund and gave him some money to spend as he chose. He called his best friend John and they did what they normally did: They headed to the bus stop to catch a ride to the mall. They were waiting at the bus stop when Willie Atkins pulled up and asked for directions. "You guys know how to get to Skyline High School?" he asked. John replied, "Yeah, head up the road a few miles and turn right." Willie said he didn't really understand. "Why don't you guys show me, and I'll take you where you need to go." John and Dewayne agreed and jumped in Atkins' car.

Atkins began the conversation: "Dewayne, I'll bet all the girls come after you. You're built pretty well. Do you play football?" Dewayne said that he did, and Willie asked him where he went to high school. As they drove down the street, Willie asked them whether they "get a lot of girls," and "how many girlfriends they've had." Just small talk to them—no alarm bells went off for either boy. But Atkins had a plan. "Well, I got a lawn mowing business and if you need a job, I could give you some work. Let me have your number." Dewayne gave him a fake phone number, while John gave him his real number.

A few days after giving Atkins his phone number, John got a phone call. Willie asked whether John knew how to drive a car because he wanted to pawn his "wife's car" and needed someone to follow him and give him a ride home. John met Atkins outside his apartment complex, and they headed east on Interstate 30. Atkins said that he had to change his clothes at home before they ran the errand, opting for something more comfortable than his slacks and business shirt, so off they went to Atkins' apartment—just as Willie mentioned something about a porno movie that he had at his place. He said nothing of the pawned car or the landscaping business. John felt a bit uncomfortable but went along with it.

When John walked into Atkins' apartment, one of the first things that he noticed was the pink couch in the living room of an otherwise cluttered apartment. Atkins told him he had the movie cued up in the bedroom and motioned for John to join him there to watch it. John sat in a chair next to the bed; it seemed like any other chair, no more than a few inches from the bed. Willie put on the commercial adult movie that included a black man receiving fellatio from a white woman: "You ever had a girl do that to you before?" Atkins asked. He then went into his closet, stripped down to his boxer shorts and a white t-shirt, and lay on the bed. He was almost 42; John was 15.

Later, at trial, we played a recording of a phone call for the jury where Atkins spelled out the conversation he then had

with John: "… That's how white people do it—get somebody to put their mouth on it for you. That's what I'm talking about: Get you a white girl. Those black girls, you up there just trying to get that pressure off of you, just like any other 18-year-old gonna do, but the thing of it is, they're already making plans on what to name the baby." As he says this, Atkins fondled himself through his boxer shorts. As the movie played, John became more uncomfortable as Atkins moved closer and closer to John's chair, continuing the sex-talk and fondling. "Let me see how tall you are," Atkins asked as he stood about an inch in front of the teenager.

That was it for John: "I dropped my keys outside," he exclaimed, an excuse to bolt from the apartment. He darted through the parking lot and down the I-30 service road and arrived at a gas station about two miles away where he called his dad for a ride home. While waiting for his father, John noticed Atkins driving around looking for him. On the way home, John told his father everything.

John's father, George Smith, went home and checked the caller ID for Atkins' phone number; he wanted to give him a piece of his mind. "A guy like that has done this before," George thought, as he told Atkins it was not right for a grown man to take a 15 -year-old to an empty apartment, watch pornography, and fondle himself. "Please don't go to the police—I'll give you money," Atkins pled. George considered taking care of the situation himself but decided instead to call the police. The case was eventually assigned to the Dallas Police Department Child Exploitation Unit.

After backtracking with John and obtaining identifying information on Atkins, Detective Vidal Olivarez served a search warrant on Atkins' apartment. He was looking for the commercial pornographic videotape to corroborate John's story. John gave him a detailed layout of the apartment: where certain furniture was, how the rooms were laid out, and that Willie retrieved the porno from the closet. Detective Olivarez found 57 videotapes in the closet exactly as John described. Detective Joe Corden worked with Olivarez; his job was to watch all of them and look for the scene John described, which he found. Forty-one of the tapes were insignificant to the investigation; the remaining 15, however, made the whole case.

"I don't even do no porno, dog"

Detective Corden couldn't believe his eyes when he saw the first of these 15 tapes: black and white, grainy, and homemade. There was no audio. They depicted Willie engaging in sexual conduct (oral, anal, and rarely with a condom) with young males in his bedroom. They smoked weed, drank beer, and exchanged money. With very rare exception, all were young black males. We couldn't say with certainty that anyone in particular was underage; all had hit puberty, but, as Detective Corden testified at trial, the overwhelming majority "were far closer to having *just* hit puberty" than having been grown men for a long time. The tapes were recorded with a pin-hole camera mounted on the wall above the TV (see the photo on the next page) whose cords were hidden by some pamphlets tacked to the wall.

As his defense team was quick to point out during the trial, there was no violence; Atkins, however, was the undeniable aggressor. He was subtle, patient, and goal-oriented; he systematically moved in on his targets with perfect success. Fifteen tapes, each six hours long, added up to 90 hours total—and there were 131 different men in the tapes. Despite all of this, during the end of the recorded phone call discussed above, Olivarez had John ask Atkins if he could borrow the porno movie he showed the teen. Willie responded, "I ain't got no porno. I ain't got no porno; I don't even do no porno, dog." He said it with all the calmness and coolness of a truth-telling man. He was a good liar.

Indictment and jury selection

The biggest problem with the case was that Atkins had never actually touched John. We had all those videotapes, but John's presence in Atkins' apartment was either never recorded or we never located the tape. John was extremely hesitant to testify, a common problem in male-on-male sex crimes, and he was soft-spoken, almost timid.

It was very clear from Atkins' actions and words that he knew John was under 18 and that he was trying to induce John to engage in sexual conduct. He asked John, for instance, if he knew where a local high school was, where he went to high school, and if he

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knew how to drive a car; he also showed a pornographic tape, talked with the teenager in a sexually explicit manner, and fondled himself. Attempted sexual performance of a child under §43.25 of the Penal Code fit the crime best[2]: "I thought he was going to rape me," John testified. That pretty much summed up Atkins' intent. Also, by making it an "attempted" offense, we made Atkins' intent a material element—we charged it that way for the sole purpose of introducing the videotapes.

During the pre-trial hearing, the State and defense argued on the issue of the videotapes' admissibility. The defense contended that the tapes were inadmissible under 404(b) because they were mere evidence of the defendant's bad character. Additionally, because we could not make any representation in front of the court or jury that the males depicted in the videotapes were underage (despite our suspicions), defense counsel argued that the State was attempting to introduce the defendant's acts that were constitutionally protected by the right to privacy as outlined in *Lawrence v. Texas*.[3] We argued in response that even though he never actually engaged in the sexual conduct with John, we had 31 occasions wherein the defendant removed his pants, lay on the bed, fondled himself through his boxer shorts, and discussed what appeared to be a pornographic movie—all of which culminated in sexual conduct. Because the defendant's intent to commit sexual performance of a child was a material element, the videotapes were the best evidence to show what the defendant ultimately wanted to happen; the tapes showed the jury his goal and "his conscious desire or objective." Finally, under the doctrine of chances as outlined in *Morgan v. State*,[4] we argued that the tapes showed that it was impossible that the defendant's acts in John's presence had any purpose other than engaging in sexual conduct. The court reserved its ruling, and we got set to pick the jury.

Assistant District Attorney Pat Kirlin stood up in front of 70 panel members at the beginning of voir dire and asked if everyone agreed that "a society is best measured by how it protects its children." He sent a loud and clear message from the first words out of his mouth that this case was going to be about much more than a crime that never actually came to fruition. He artfully outlined what the State had to prove and what we didn't have to prove. He stressed how important it was for the jury to be able to infer a defendant's intent from his actions "either before, during, or after" attempting to commit, or committing, a particular crime, and Pat committed the jurors to the full range of punishment. We seated them on Monday afternoon.

We first called John to the stand and had him tell his story. Next, Dewayne corroborated everything that happened in the car after he and John waited at the bus stop. We then called John's father to testify about his son's demeanor at the gas station and on the way home, and that he believed his son so much that he

Here is one of the stills we used at trial, taken from the pin-hole camera. Willie Atkins, seated at left, appears to be rolling a joint as a young man lays on the bed next to the chair that John sat in the day of the offense.

was willing to go to Atkins' house and handle the situation himself, despite his own criminal history that would have easily landed him in prison for a long time. And then we waited for the judge's ruling on the videotapes' admission.

The judge overruled the 404(b) and 403 objections. There could be no doubt now as to Atkins' intent. As Detective Olivarez took the witness stand to talk about finding the pin-hole camera in Atkins' bedroom, we knew the case was over. Det. Corden then outlined very specifically the 31 scenes wherein the defendant engaged in conduct that matched the acts alleged in the indictment. The judge allowed us to play one representative sample of those 31 scenes. We picked one in particular because the male did not appear too young, the scene was short, it involved only oral sex, and it showed no drug use or prostitution—in short, we felt it balanced any prejudicial effect with its probative value.

Meet the real Willie Atkins

The jury came back with a guilty verdict, and we began the punishment phase. We called the fingerprint expert first to prove up Atkins' criminal history and his enhancement paragraphs. He got a six-year sentence in 1988 for aggravated robbery and a four-year sentence in 1992 for unlawful possession of a firearm by a felon. Next, we put on Dominic (not his real name), who was 15 in 1999 when Atkins solicited him for sex and asked him to sell drugs for him. Dominic and his best friend, 14-year-old Marcus, decided that because Atkins had money to offer for sex and because he sold drugs, he would be a good target for robbery. During the course of that robbery, Atkins shot and killed Marcus. He was no-billed on the murder, but we were able to use Dominic's testimony to show that not only did he engage young men for sex, but he also recruited them to sell drugs.

We then recalled Detective Corden to tell the jury about the 100 other victims on the videos. The defense tried to make a big deal about the fact that each and every encounter appeared to be consensual and between adults. But we focused on the fact that even if each person were an adult, not a single one could have known that he were being videotaped. We had video stills made of the apparent drug use and money exchanges to show that Atkins was selling drugs and sex—illegal regardless of anyone's age or consent. We also introduced the apartment records showing that Atkins moved into his apartment in 1999, stressing through Corden that all of the scenes depicted the exact same bedroom, bed, chair, and window. Willie had been up to this surreptitious recording for at least six years. We introduced all 15 videotapes but decided to play only two scenes.

The first was of a male who looked the youngest of all 131 victims. As he and Atkins are sexually engaged, they appear to be startled by a sound. Atkins quietly shushes his partner, and they immediately jump off the bed and hur-

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riedly put their clothes on. As Atkins peeks out the window to make sure that no one knows what they're doing, his actions undeniably make clear that Atkins knew the young man was underage. As disturbing as that was, the second tape was even worse.

In the other tape, the victim appeared to be in his 20s, and he lay down on the bed as he and Atkins, wearing his ever-present muscle shirt and boxers, appear to smoke marijuana and drink something from a cup. Oddly, Atkins gives him a pedicure, cutting his toenails, and afterwards the other man appears to pass out. Just to make sure, Willie tickles the man's feet and subtly moves his hand between the man's legs, ever so slightly touching his genitals through the boxers. The man doesn't move, staying completely still. Atkins then rolls the unconscious man onto his stomach and penetrates him. He didn't put on a condom. We have no idea who the man is, but, as the jury was about to learn, this incident might be exactly when Atkins sentenced him to death.

We had Corden emphasize the specific number of victims and how often a condom was used versus how often it wasn't. Of the 131 young men, 105 engaged in unprotected sexual conduct with Atkins. The jury had no idea why we made such a big deal out of that until we introduced State's Exhibit 41.

"I had a sick feeling in the pit of my stomach"

After Corden testified, we offered State's 41, Atkins' medical records, under the business records exception,[5] and asked for permission to publish. As we read a nurse's entry from November 7, 1991, in open court to the jury, you could feel a collective gasp: "Informed [patient] that he was HIV-positive; [patient] doesn't seem very concerned … told him that he should inform those he is in intimate contact with …" A juror told us after the trial that she got a "sick feeling in the pit" of her stomach when she realized the implications. We called a doctor from Children's Hospital in Dallas to show that, given the fact that the leasing records showed he moved into the apartment in 1999, and given Detective Corden's testimony that all of the videotapes were recorded in the same bedroom, Atkins exposed 105 young men to the HIV virus. They're still out there, completely oblivious to the danger.

Now the jury knew that he invaded young men's privacy by surreptitiously filming them, solicited young men to engage in sexual conduct for money, sold drugs, recruited males whom he knew to be minors to sell drugs, and could be responsible for infecting scores of young men with a lethal disease. And we still had one more witness.

The star witness who never testified

Richard Wilson ran track. He ran everywhere he went: "I'd run just to run. I loved it," he told me at a pretrial interview in the Human Resources room at Flower's Bakery in Tyler. One day in the fall of 1991, he was out running, and Atkins pulled up next to him. "Do you know how to get to the Elm Street Jail?" Atkins asked.

"Yeah, you head down Main Street and turn right. You can't miss it," Richard replied. But Atkins didn't seem to understand the directions. "Why don't you get in and show me where, and I'll take you where you need to go." Richard got in, and they made small talk. Richard was 17; Willie was 29.

A few days later, Willie called Richard and said that he knew a girl about his age who has a daughter about Richard's age; they should grab some beer and hang out with these girls. On the way, Atkins said that he had to change his clothes, so he drove to his house in Whitehouse. (Sounds familiar, right?)

As with so many other men, Atkins asked Richard to have a seat in the chair as he put on a porno movie. "Have you ever had a girl do that to you?" Atkins asked. A few minutes went by before Atkins reached over and touched Richard's genitals through his shorts and asked, "Is it hard yet?" Richard jumped back and felt trapped. Then Atkins pulled a gun and told Richard, "This is going to happen whether you want it to or not." Richard lunged at Atkins, and they fell on the gun, which Richard then grabbed and pointed at Atkins. Atkins lunged, and Richard shot him in the gut. It didn't stop Atkins, so Richard shot him in the head, and the bullet ricocheted off of his skull. Richard tried to leave the house through the garage but couldn't open the garage door. Atkins appeared at the door, and Richard grabbed the nearest weapon, a grubbing hoe. He hit Atkins in the face and headed back to Atkins' truck to use the garage door opener. He got the door

open and drove out, except that it was a stick shift, which Richard couldn't drive. He drove a little way but abandoned the truck in a nearby ditch.

Richard was originally charged with attempted capital murder, but the charges were later reduced to attempted murder. He was tried by a jury and convicted. Atkins said then in a statement to the Smith County Sheriff's Department that he and Richard were lovers and that he would give him money every now and then to help him out. Richard has always maintained that he and Willie were friends at best and vehemently denies any homosexual relationship between the two. "I had a daughter just a few months old when they sent me to prison," he tearfully reminded me at the Flower's Bakery interview. He served about 13 years of a 16-year sentence. "When I got out, my newborn daughter was taller than me. I lost my twenties."

The defense objected to his testimony, arguing that the State was trying to overturn a jury's verdict; a jury had heard Richard testify before about his self-defense claim, which they rejected; therefore, any of Richard's testimony about the incident with Atkins would not aid our jury in assessing punishment. Defense counsel also argued that the incident was too remote in time to be relevant.

We argued in response that we were not attempting in any way to show that Richard was wrongfully convicted. We were focusing on the defendant's conduct in trying to engage in sexual conduct with yet another young man he picked up off the street and in pulling out a gun and attempting aggravated sexual assault. Furthermore, because it happened in 1991, we could prove that Atkins' conduct had gone on for so long that the only logical conclusion was that it would continue to go on unless he was in prison, unable to victimize any other young men in the community.

Our argument fell on deaf ears. The court disallowed any testimony from Richard Wilson. It was as if he never existed. Of course, had that incident never occurred, we may never have known about Atkins' HIV-positive status; the medical records in State's Exhibit 41 came from Atkins' recovery from the gunshot wounds and blunt force trauma Richard inflicted. Even though Richard didn't get to testify, his former accuser got what he deserved. A news camera filmed Willie as he came out of the holdover to sit at the counsel table for the punishment verdict reading. The bailiff must have tipped him off before the verdict was read because he turned to his mother, family, and pastor sitting in the gallery and mouthed the words, "I got life."

Endnotes

1 See §43.25 Tex. Penal Code.

2 The indictment charged the offense as follows: "Unlawfully then and there, with specific intent to commit the offense of Sexual Performance of a Child and knowing the character and content of the sexual conduct, to-wit: deviate sexual intercourse and masturbation and lewd exhibition of the genitals, do an act, to wit attempt to induce X, a child younger than 18 years of age, to engage in said sexual conduct by intentionally and knowingly in the presence of said child removing defendant's pants and fondling defendant's groin area and talking in a sexually explicit manner to said child; said act amounting to more than mere preparation that tended but failed to effect the commission of the offense intended."

3 539 U.S. 558 (2003)(ruling that §21.06 of the Texas Penal Code which prohibited "Homosexual Conduct" was unconstitutional).

4 692 S.W.2d 877 (Tex. Crim. App. 1985).

5 See 902(10) Tex. Rules of Evidence. The defense also objected that the records were inadmissible under HIPAA. The court overruled that objection. See 45 C.F.R. §164.501.

CRIMINAL LAW

By Terese Buess
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Fractured justice?

A recent film starring Anthony Hopkins as a devious murderer and Ryan Gosling as a hot-shot prosecutor begs the question: Could this onscreen trial happen in real life? How about in Texas?

In my household we try not to watch television shows about crime detection and law enforcement, especially the courtroom dramas. I'd like to tell you that it is an attempt to draw the line between work and leisure time, but that would be a lie. Quite frankly, I get so disgusted at the blatantly incorrect portrayal of the process that I can't stay quiet, and my family is tired of hearing my tirades. So going to see *Fracture*, a movie about a murder and prosecution, was a TDCAA assignment that my husband found most amusing because I was going to have to control myself at least while we were in the theater.


Terese & Allison Buess

I will try not to spoil the movie if you haven't seen it yet. It was tagged as "diabolically fun and beautifully intricate" by *Rolling Stone* magazine and "genuinely smart, pulsing with energy and sly wit" by *The Wall Street Journal*, and I have to agree. Anthony Hopkins plays a devious, evil protagonist who executes the meticulously planned and super-creative murder of his cheating wife. The prosecutor, played by Ryan Gosling, is a young, hot-shot Los Angeles deputy district attorney who has just accepted a megabucks job with a civil firm and is on his way out of the office with a 97-percent conviction rate. The usual one-dimensional portrayal of our prosecutorial community began with our hero asking to try this one last case and assuring his boss, the district attorney, "If you give me a chance and there's a way, I'll put him away." But the plot quickly thickens with a multitude of twists and turns, and the black and white images all begin to gray. It was a good watch, and I highly recommend it.

And I have to say that even after 16 years of practicing criminal law as a prosecutor, I walked out of the theater thinking that I knew what aspects of the trial, as portrayed on screen, were realistic in Texas … but after more thought, I wasn't so sure. I started digging through caselaw, but after several hours of research, I still couldn't find definitive answers for every question the movie raised, so I enlisted the aid of my daughter Allison, a second-year law student, as she can access more than just Texas cases.

Caveat: If you really want to watch the movie without me spoiling it for you, stop reading here. If you can't find the movie at a theater, don't worry: The DVD is due out August 14.

Question 1: Admissibility of the defendant's confession

One of the defining moments in the plot of *Fracture* occurs when the case detective is on the witness stand and has just completed direct testimony about responding to the murder scene, hearing the defendant make a *res gestae* statement that he had shot his wife, and obtaining a videotaped confession. The defendant, who is representing himself (and doing a pretty fine job of playing somewhat naïve in the ways of law), stands up and, before asking the detective a single question on cross, asks the judge what the legal term is when a detective is having sexual relations with your wife and that same detective coerces and threatens you

into giving a confession to her murder. There is a moment of ominous silence while all faces, especially the prosecutor's, turn to the detective on the witness stand. The silence is broken when the detective leaps over the stand and dives at the defendant, whose statement to police is eventually ruled inadmissible.

Would a Texas court rule the same way? An accused's statement may be used in evidence against him if it appears that the same was freely and voluntarily made, without compulsion or persuasion, under the rules prescribed.[1] Those rules include the *Miranda* warnings plus the extra Texas warning that the defendant can terminate the interview at any time as well as a requirement that the defendant knowingly, intelligently, and voluntarily waived his rights.[2] In addition, a confession must not be taken under circumstances condemned by the decisions of the U.S. Supreme Court as violative of the Due Process Clause of the 14th Amendment.[3] A finding of coercion does not depend upon actual violence by a governmental agent; a credible threat is sufficient,[4] and coercion can be mental as well as physical.[5]

What was missing from the movie was any kind of suppression hearing, the defendant's testimony other than his unsworn declaration to the judge, and any rebuttal testimony from the State. Had there been a suppression hearing concerning the admissibility of the defendant's statements, the court would have been the sole trier of fact,[6] and looking at the totality of the circumstances, the judge would have to be satisfied that the State had negated the accused's allegations of coercion.[7]

What might have happened in a motion to suppress? The detective would testify that although he had met the victim on several occasions at a local hotel, she had never told him her name and he

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had no reason to know that she was the victim when he responded to the "shots fired" call. He would say that as he approached the defendant, who made his *res gestae* statement, there was no hint of coercion and no threat of any kind. And although the detective knew that he probably should have not been present during the final taping of the defendant's formal confession, he would testify he felt there would be no harm because he assumed the defendant had no idea of his involvement with the defendant's wife. The two additional detectives who were present when the final statement was taken could corroborate that no threat was made and nothing was done to coerce the defendant. Is it enough to overcome the defendant's allegations? Unfortunately, the detective's lunge for the defendant did not help his credibility, but I think a trial judge could find that the defendant's original statement was freely and voluntarily made, despite the detective's previous relationship with the victim.

Question 2: Discovery rights of a *pro se* defendant

In my trial experience, those who elect to represent themselves are not the most intelligent defendants; they tend to be stubborn people who refuse the advice of not only defense counsel but also that of the trial court. We know that the 6th Amendment's right to counsel may be waived, and a defendant may choose to represent himself at trial.[8] A *pro se* defendant's right to represent himself cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice,[9] and the *pro se* defendant is held to the same procedural requirements as a defendant represented by an attorney.[10] In criminal cases, a defendant does not have a general right to discovery of evidence in the State's possession;[11] the *right* to discovery is limited to exculpatory or mitigating evidence.[12] However, if a defendant shows good cause (materiality) and provides notice to the State, the judge shall order the State to produce and permit the inspection and copying or photographing of any items the court deems material except for work product.[13] The decision on what is discoverable is committed to the trial court's discretion.[14]

So if we had a *pro se* Anthony Hopkins defendant, we would not be compelled to produce a complete copy of the State's file and deliver it to him pretrial in the county jail, as Gosling's assistant DA does in the film. Only if Hopkins were savvy enough to present an argument to the court that established good cause and materiality for further production of discovery would we have to provide what was ordered. And of course we would have a duty to produce any exculpatory or mitigating evidence.

Question 3: Double jeopardy bar

Does the gloating Anthony Hopkins, who believes he can't be tried again for an offense for which he has been exonerated (attempted murder) with a directed verdict of not guilty, win the day with a double jeopardy bar? Or will the law permit another trial, this time for the greater offense of murder after the prosecutor has obtained new evidence (an admissible confession and the death of Hopkins' wife)? My initial response was "no way," but the new evidence claim gave me pause.

The underlying idea of double jeopardy, one that is deeply ingrained in the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[15] A jury verdict or trial court judgment of acquittal is viewed as an absolute bar to further prosecution for the same offense even if it appears that the acquittal was based on an egregiously erroneous foundation.[16]

So is a trial for murder after an acquittal on attempted murder, where the underlying offense and victim are the same, barred by double jeopardy? We know the answer when the order is reversed: A conviction for the lesser-included offense of attempted murder when the original charge was murder means that the State is barred from reprosecuting the greater offense at a new trial, as this verdict is considered an acquittal of the higher offense.[17] And we know that when a jury is impaneled and sworn and the indictment read, jeopardy attaches to not only the primary charge, but to the lesser-included offenses when

the State does not pursue a conviction for any lesser (by requesting a lesser charge), which acts as an abandonment of trial on the lesser without manifest necessity.[18] But what happens in the reverse situation? Can you prosecute a *completed* offense after an acquittal for the *attempted* offense?

The primary question is whether the charges of murder and attempted murder constitute distinct statutory provisions or whether they are the "same offense" for double jeopardy purposes. The *Blockburger* test looks at if each statute requires proof of a fact which the other does not.[19] A person commits murder if he intentionally or knowingly causes the death of an individual.[20] An individual commits attempted murder if he specifically intends to cause the death of another and does an act amounting to more than mere preparation that "tends but fails to effect the commission of murder."[21] Murder requires proof that the death of an individual occurred, an element not required for an attempted murder charge. While you could say that the attempted murder statute requires proof of an "act amounting to more than mere preparation," something not required to be proven for the murder statute, the difficulty is that we are really talking about the manner and means of the act of murder, so it is an element that must be proven for both statutes. So there is one element for the murder statute not required by the attempt murder statute, but the attempted murder statute does not require proof of a fact not required by the murder statute. A defendant cannot be convicted of both a completed offense and an attempt to commit it.[22]

Is all lost? The Supreme Court's decisions have consistently recognized that the finality guaranteed by the clause is *not* always absolute "but instead must accommodate the societal interest in prosecuting and convicting those who violate the law. … [A]bsent governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect, the compelling public interest in punishing crimes can outweigh the interest of the defendant in having his culpability conclusively resolved in one proceeding."[23]

Is the possibility of a second trial, as the movie allows, beginning to shape up from the mists of fiction?

Did the author of *Fracture* come up with a scenario that provides a sufficiently compelling fact pattern that the legal community could give greater weight to the need to punish such a horrendous crime and less weight to the strictures of double jeopardy when the defendant himself has masterfully manipulated the criminal justice system to his benefit? According to one treatise, "[A] conviction of a minor included offense will bar a subsequent prosecution for a higher crime embracing the minor offense, *unless the first conviction was procured by the fraud, connivance, or collusion of the defendant.*[24] Couldn't you extend that theory to an *acquittal* of a minor included offense?

Is the possibility of a second trial beginning to shape up from the mists of fiction?

Question 4: Scheduling and second-chair prosecutors

Another puzzle in *Fracture* is that Gosling's deputy DA tried this attempted murder case all by his lonesome, without an intern or second-chair prosecutor by his side. And at the defendant's request, the trial was fast-tracked on the docket, so just a week or so separates the crime from the trial.

It is certainly *possible* to try a case within a week of the commission of the crime, but what reason could you have for doing that? Typically there would be several weeks of delay waiting for ballistic reports, the completed offense report, and final results from the police laboratory analysis of evidence, especially DNA test results. The victim in our case is in a coma in the hospital—she could come out of it as brain swelling reduces in time, persist in her vegetative state, or even die. Nothing good could come of rushing to trial, so why agree to it?

It would be ideal to always have a second chair on every trial of a serious offense. Unfortunately, for many of us, that is not reality. Most of us have learned our trade solo by the "sink or swim" method in the school of hard knocks, and having a second chair is a luxury. In my county, office policy dictates that all capital murder cases where the State is seeking the death penalty are required to have first- and second-chair

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prosecutors. At all other trials, having a second chair is discretionary.

But I suggest that if you have a *pro se* defendant with the devious, manipulative nature and cunning of Anthony Hopkins' *Fracture* character, ask for all the assistance you can get. I'd want a watcher just to keep tabs on who Hopkins is winking at—a sure sign of trouble!

Endnotes

1 Tex. Code Crim. Proc. Art. 38.21.

2 Tex. Code Crim. Proc. Art. 38.22.

3 *Collins v. State*, 171 Tex. Crim.585, 352 S.W.2d 841, 843 (App. 1961), cert. denied, 369 U.S. 881, 82 S.Ct. 1152, 8L.Ed. 2d 283 (1962).

4 *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S.Ct. 1246, 1253, 113 L.Ed.2d 242 (1991).

5 *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed2d 242 (1966).

6 *Romero v. State*, 800 S.W. 2d 539, 543 (Tex. Crim. App. 1990).

7 *Farr v. State*, 519, S.W.2d 876, 880 (Tex. Crim. App. 1975).

8 *Faretta v. California*, 422 U.S. 806, 819-20, S.Ct. 2525, 2533 (1975).

9 *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000); *Wallace v. State*, 618 S.W.2d 67,70 (Tex. Crim. App. 1981); *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976).

10 *Kent v. State*, 982 S.W.2d 639, 640-641 (Tex. App.—Amarillo 1998) (pet. ref'd as untimely filed) (holding that *pro se* appellant is held to same standard for providing record that would apply in other cases).

11 *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App. 1980).

12 Id.

13 Tex. Code Crim. Proc. Art. 39.14.

14 *Kinnamon v. State*, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990).

15 *Ex parte Granger*, 850 S.W.2d 513 (Tex. Crim. App. 1993).

16 *Sanabria v. United States*, 437 U.S. 54, 75, 98 S.Ct. 2170, 2184, 57 L.Ed. 2d 43 (1978).

17 Tex. Code Crim Proc. Art. 37.14; *Bennet v. State*, 871 S.W.2d 801 (Tex. App.—Houston [14th Dist.] 1994); *Stell v. State*, 662 .W.2d 96 (Tex. App.—Houston [1st Dist.] 1983).

18 *Ex parte Granger*, 850 S.W.2d 513 (Tex. Crim. App. 1993); *Shute v. State*, 812 S.W.2d 61 (Tex. App.—Houston [14th Dist] 1991)(holding double jeopardy bars subsequent prosecution for lesser offense of attempted murder after defendant was acquitted on appeal for greater offense of attempted capital murder of police officer where State did not request an instruction to jury on the lesser).

19 *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932).

20 Tex. Penal Code, Sec. 19.02.

21 Tex. Penal Code, Sec. 14.01.

22 Robbins, Ira P., *Double Inchoate Crimes*, 26 Harvard Journal on Legislation 1 (1989), 9-12.

23 *Garrett v. United States*, 471 U.S. 773, 796, 105 S.Ct. 2407, 2420, 85 L.Ed.2d 764 (1985) (O'Connor J., concurring).

2421 Am. Jur. 2d Criminal Law, Sec. 352, May 2007.

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