THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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

Get it in the record!

Top 10 tips from the "warranties and repairs department" (the appellate division) for preserving the record

By Andrea Westerfeld
Assistant Criminal District Attorney in Collin County

"Let the record reflect …" Most of us have spoken those words in court, but unless you handle appeals, it is difficult to understand just how important what you put in the record can be. As a transfer from the trial division to handling "warranties and repairs" in appeals, I was surprised at how many simple ways prosecutors can make a clear, defensible appellate record that you simply might not think of in the heat of trial. This short guide offers several ways to preserve a clear record that will have your appellate section thanking you and help the appellate courts know exactly what went on during your trial.


Andrea Westerfeld

1 Record "off the record" conversations. This tip sounds like a contradiction in terms, but it is really very simple. Quite a bit of what happens in any trial goes on "off the record," whether in quick conferences at the bench, discussions in the judge's chambers, or conversations in the courtroom before the reporter arrives. There are definitely benefits to having informal conversations without having to drag the court reporter in or dismiss the jury to have a recorded hearing, but if something important occurs during those conversations, it is vital to get that on the

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Also in this issue:

PLUS…

Annual Campaign has kicked off!

By now, I hope you all have received the Annual Campaign letter, our new brochure, and your invitation to be a part of the Texas District and County Attorneys Foundation. The foundation is committed to continuing, and improving, the excellence TDCAA provides in educating and training Texas prosecutors and law enforcement. TDCAA regional directors have made a leap in their leadership by reinforcing the goal of 100 percent participation from *all* elected prosecutors across the state. We have already seen a phenomenal showing from many TDCAA members as well as friends of the foundation. Thank you—and keep it up! We invite every member of TDCAA to contribute any amount to show his or her support of the work that TDCAA does to protect crime victims and keep Texas safe.

By Emily Kleine
TDCAF
Development
Director

A *big* thank you to two recent donors: The Abell-Hanger Foundation (Midland) and the Prairie Foundation (Midland) made significant gifts to TDCAF to further enhance the training, education, and resources that West Texas prosecutors and law enforcement receive from TDCAA. Both Abell-Hanger and the Prairie Foundation realize the importance of supporting the Texas District and County Attorneys Foundation's effort to provide Texas prosecutors and law enforcement with the best possible resources to keep Texas protected. Thank you!

I will be on the road again soon, heading ultimately to Wichita Falls by way of Decatur, Graham, Vernon, and other stops. I am contacting several electeds and TDCAF supporters to make connections along the way. If you have potential donors within your community who would like to be a part of the foundation's dynamic growth and leadership, please call me at 512/474-2436. I look forward to meeting and visiting with you all soon! ✤

For a list of recent gifts to TDCAF, please turn to page 7.

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What do you know now that you wish you'd known *then*?

Rebecca Gibson
Assistant District Attorney in Midland County

It isn't personal. I learned that the hard way. A defense attorney picked a fight with me, not a big one, but a war of words in misdemeanor court. I was so insulted that he didn't think my plea offer was fair. It took me many months and conferences to learn that an attorney may be picking a fight with you because his client is in the courtroom, the case isn't looking good for the client, and the attorney has to go back and say, "The prosecutor's tough. That's the only rec she'll give, so we'd better decide if we're going to trial."

I also had a trial where the defense attorney was a maniac. He didn't listen to the judge, suggested that I didn't know what I was doing (he was right, by the way)—you name it. And he won a losing case. I told him on the elevator, the day after the case, that I thought he was the "most unethical trial lawyer." To his credit, he didn't hold that against me; he understood that I was new. In time, I came to understand that in trial, it's war. A defense attorney is fighting for his client, not to insult the prosecutor's position. In the end, we are all just a bunch of lawyers arguing for a cause in the courtroom. It's just not personal. Every new prosecutor needs to know that.

Editor's note:
This issue marks the debut of a new column, War Stories, where TDCAA members are encouraged to e-mail their answers to a new question every issue; the question will solicit collegial advice and information.

For next month: **What was your proudest moment in court?** Send your stories to the editor at wolf@tdcaa.com. Put "War Stories" in the subject line, and keep it under 500 words.

John Rolater
Assistant Criminal District Attorney in Collin County

You should have a place to keep all the knowledge you acquire, such as a notebook or journal. You will probably be able to remember the details of each big case or trial for a number of years, and then, all of a sudden, you won't remember Smith or Jones anymore, and you won't be able to put your hands on the case file. A uniform way of tracking that info will be invaluable. Now that we are really getting computerized, you can keep track using a word-processing file, and then you can text-search it (or even Google search it using Google desktop). If you are a Mac user, try the program Notebook by Circus Ponies. I use a Word file on my PC, but Microsoft OneNote looks like it has promise. These clipping or notetaking applications give you enhanced search features and the ability to store web pages.

I also keep a daily log in a Word file that contains notes about what I do and lots of legal questions and answers. When the file becomes too big, I peel off the oldest year or so and save it to another file. It is a great help when some opponent says you didn't do something, and you can search your notes and say, "Yes, on October 7, 2002, I offered to agree to X in exchange for Y, and you told me where to stick it." I learned this from a great chief of mine, Lori Ordiway.

Greg Gilleland
Assistant Criminal District Attorney in Bastrop County

When you bring caselaw to court, bring two extra copies, one for the court and one for defense counsel. And always, always, always shepardize those cases. If it is totally good law, you might bring only one copy of the shepardization—until the defense attorney tells the court that it is bad law, in which case you can whip out your good law-indicating shepards.

On the other hand, if the case has been distinguished, be the first to tell the judge and point out why it's distinguishable from those cases that might alter its holding. This will tell the judge you are an honest advocate, and the next time that a defense attorney questions a case you are presenting to the court, the court will know already that you present information adverse to your position to the court if it is out there.

Terry Breen
Assistant District Attorney in Goliad County

Ride with the cops. It will give you a lot of insight as to how situations go down, and that will help you screen cases and will assist you at trial. This is especially true if you are handling a lot of DWIs. As an important by-product, riding with the police increases your stock with the cops.

David Newell
Assistant District Attorney in Harris County

Track down every answer. If you are in a hearing and something crazy gets thrown at you, go back and find out what the law is so that you can answer it should it happen again. Do this regardless of the result in your case but particularly if you win. Winning is good, but knowing how you got there makes you a better attorney, and correcting mistakes for the judges enhances your credibility. And don't shy away from tracking down the answers to things that seem obvious. Just because "that's the way it's always been done" doesn't mean it's been done the right way. All of this will, I hope, establish a base of knowledge from which you can answer the most esoteric questions.

And enjoy your knees. You'll miss them when they're gone.

W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Remember the stuff you learned in kindergarten as well as the stuff you learned in law school. Courtesy matters. My first day in misdemeanors, Rebecca Williams, the misdemeanor legal assistant, dropped into the chair in my office and told me, "I can make you look brilliant or I can make you look stupid." She was right. We all work in a very closed environment. We see the same folks day after day. A kind word is a most valuable tool. It is amazing how little a "please" or "thank you" costs but equally amazing how it pays off. Remember that your legal assistants, investigators, and victim assistants have been in the office a long time and, like Rebecca told me, can make you look brilliant or stupid.

When you receive praise, spread it around. No one in this line of work succeeds solely on his own efforts. When you receive criticism, shoulder it yourself. Never pass the blame, make excuses, or retaliate. There is something to be learned by even undeserved criticism. If you blew it, and you will, admit the error, apologize, and promise to do better. It is amazing how much shorter a sincere "I'm sorry" makes these unpleasant events. Acting courteously makes you a better person and a much more effective prosecutor.

Scott Brumley
County Attorney in Potter County

Refer to everyone in court by the appropriate title (Your Honor, Mr. Smith, Ms. Jones, Deputy Johnson, Officer Doe, etc.). Resist the urge to use familiar modes of address with those you like or are comfortable with, because your use of formal titles with others will convey that there is a dichotomy between the ins and the outs. Regardless of whether that's OK in social circles, it's not acceptable in court.

Andrea Westerfeld
Assistant Criminal District Attorney in Collin County

Your most valuable asset is your reputation. No matter how big a county you work in, it's still a small world. Everyone works together and knows each other, and people *talk*. So rest assured that every deal you cut and every trick you pull in court will be known by every defense attorney, judge, and prosecutor sooner or later. Be sure that the deals are fair and the tricks are honest. Once you get a bad reputation with local counsel or the judiciary, you'll have an uphill battle to fight in every case. But if you have a good reputation, people will be more willing to work with you and won't be suspicious of everything you say. ✤

How do you keep victims in the loop on what's happening in their cases?

Jill Hargrove
VAC in Bell County

When we send out the initial letter to victims, we say several times it is their responsibility to request notification. We include a final sentence stating if we do not hear from them, we will assume they do not want to be notified.

Both victim advocates in our office are assigned by even or odd DA numbers, and when we receive a request for notification, the VAC assigned to that case adds it to her docket. When the attorneys get setting letters, the advocate assigned to that case gets a copy of that letter so we can update our docket and notify the victim. We prepare victims from the beginning that there will be numerous settings before we go to court so not to just show up—always call ahead.

Nancy Holmes Ghigna
VAC in Montgomery County

I am honest and upfront from the beginning with victims, and I tell them to forget any ideas of what *should* happen with their case. There will be numerous docket settings that they are welcome to attend, but they can always call me after docket for a recap. If their presence is required, our office will notify them. If they can't afford to miss work or it's a hardship to attend, they should save their time for a trial or plea.

Our coordinators in felony cases contact all "crimes against a person" victims prior to the docket setting as a reminder. Misdemeanor coordinators don't have that luxury because of the sheer volume of cases, but if there will be a plea on an injury case, they will call. Of course, all victims are notified about the VINE program, and anyone is welcome to call us for an update.

Ellen Halbert
VAC in Travis County

When we talk to victims, we tell them we cannot call about every court setting, but we educate them about how they can find out the date of each setting. We tell them to call us a couple of days after a setting for information.

Some prosecutors let us know what happened at each setting—if it was important—and some don't. However, we have a computer system where we can look up a case to check on its status. It's called FACTS, and it has a history of the case as it pertains to court. It shows court settings, resets, when the defendant was indicted, all about bond—that kind of thing. There are no narratives, but we can get that info (if needed) from the prosecutor.

If a case has an important hearing, a plea has been offered, or there is a possible trial date, counselors always call the victims for an update. Sometimes we can handle issues over the phone but if not, we set up meetings so the victim can talk to the prosecutor. In our office, we have a victim counselor for each court who works closely with victims and prosecutors.

Editor's note:
This new column, The Way We See It, is based on TDCAA members' input. In every issue, we'll ask for your office's perspective on a legal, investigative, or administrative topic, and you can e-mail the editor at wolf@tdcaa.com with your response. Put "The Way We See It" in the message's subject line, and keep your response under 500 words.

For the next topic, tell us how the legislature's changes to the Texas Youth Commission (TYC) have changed the way your office treats juvenile cases. We'll print a sampling of answers in the next issue.

Cynthia Jahn
VAC in Bexar County

Always be honest with a victim or family member. I give them an idea of the worst possible scenario and help them understand that that may be the reality of their case. If it is not, then everything looks brighter; if it is, then they are not blindsided. Always tell them that the reality of the system is not portrayed on TV. In fact, it's nothing like TV, which is usually their only reference for what they are about to undergo.

All of our advocates make it a priority to contact our victims (at least in the person-on-person crimes) by the first docket setting. We explain the basic timeline and how long it can take to get a case through the system. We explain what a docket call is and how busy and confusing it can be. Some folks really want to be there. This usually lasts for one docket call. When they realize that

they have to take off from work, pay for parking, can't even find a seat in the courtroom, and realize that the prosecutor is too busy to talk with them, they would much rather rely on the advocate to call and give them updates on the next setting. Advocates call and/or subpoena each victim and witness on every case to get ready on the docket. They also call back on many cases and let them know when it is reset. As the case moves up on the docket, we begin to alert the victims that their case is getting close to the time when it may be selected for trial.

Allan Hubbard
VAC in Lamar County

I just straight up tell them that some hearings are formalities that can take 30 seconds or less and that they might wait three or four hours only to discover the defense attorney is not present or asked for a pass or continuance. I always tell victims they are never bothering me, that they can just call and find out what happened in a hearing; if there's no new information to tell, I will say so.

I call victims on cases where they need to be aware of possibilities (bond reductions, etc.). A calendar in our copy room makes everyone aware of what's coming up and keeps me in constant communication with prosecutors (as we're a small office—only five attorneys). Our prosecutors make much use of my office to contact and play "good cop" with victims so they've come to rely on me and keep me in the loop on case and trial prep. ✤

Recent Gifts to TDCAF

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Nancy Firebaugh Arthur, County Attorney, Coke County
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Jaime E. Esparza, 34th Judicial District Attorney
Deborah L. Falcone, Criminal District Attorney's Office, Tarrant County, *in honor of Tim Curry*
James A. Farren, Criminal District Attorney, Randall County
David L. Finney, Assistant District and County Attorney, Ellis County, *in memory of Judge John Vance*
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Kebharu H. Smith, Assistant District Attorney, Harris County, *in appreciation of TDCAA's work*
Jeffrey S. Stewart, Attorney at Law, Fort Worth
Cindy Stormer, 235th Judicial District Attorney, *in honor of Rob Kepple*
The Honorable Thomas B. Thorpe, Friend of TDCAF, Dallas
Sherri Tibbe, Criminal District Attorney, Hays County, *in honor of my parents, Ed and Bobbie Tibbe*
Curtis R. Tomme, Assistant Criminal District Attorney, Taylor County
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Martha Warren Warner, 156th Judicial District Attorney
Rainey Webb, Assistant Criminal District Attorney, Tarrant County
Andrea L. Westerfeld, Assistant Criminal District Attorney, Collin County
Edward L. Wilkinson, Assistant Criminal District Attorney, Tarrant County
David M. Williams, County Attorney, San Saba County ✤

There's something about *The Texas Prosecutor* ...

The Texas Prosecutor has been the flagship publication of the Texas District and County Attorneys Association since the early 1970s. It has been through many phases, and we have always been proud of the substance of this journal.

By Rob Kepple
TDCAA Executive Director in Austin

The credit for the outstanding journals of the past several years goes to our editor, **Sarah Wolf**, her guiding editorial committee, and to, well, **you**. The strength of the journal is the tremendous commitment that you, Texas prosecutors, have made to telling others about your cases—the triumphs and the failures—so others can learn from your work. It is a tribute to Sarah's work and the strength of the journal that every edition features new contributors with timely information, from articles about high-profile cases to As the Judges Saw It, our legal quiz written by **David Newell** and **Tanya Dohoney**.

The last edition in May-June 2008 hit an all-time high in popularity with the front-page cover article, "There's something about Mary." That article, written by San Antonio prosecutors **Bill Pennington** and **Tamara Strauch**, recounted the fascinating case of Ted and Mary Roberts, two lawyers who were prosecuted for theft involving an intricate blackmail scheme. It's made-for-TV-movie stuff—the kind of article that you'd expect to see in *Texas Monthly* magazine. Thanks, Bill and Tamara, for contributing. Keep the good ideas coming!

The biggest threat to you and your family

Since our statewide DWI summit in March, many of y'all have been taking what you learned and applying it with new energy. A number of jurisdictions have been running "no-refusal weekends," whereby every DWI suspect provides a breath or blood sample with the encouragement of a search warrant. We know that two criminal district attorneys, **Judge Susan Reed** in San Antonio and **Matt Powell** in Lubbock, ran no-refusal weekends over the Memorial Day holiday, and I am sure there were many others.

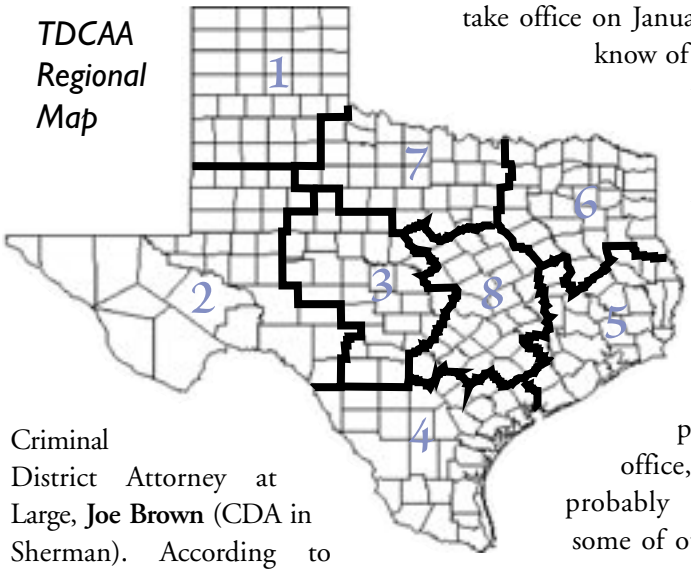
And these programs work. Here is a comment by **Tom Brummett** of the Lubbock CDA's office posted on the TDCAA user forums: "We did a trial run in April before opening it up on Memorial Day. The first D through the door was a total refusal (0.16 BAC). Later that night, we had a D resist, and we found out why: 0.32 BAC with three prior DWI convictions. Our average was 0.20! I can't say enough good things about the practice, and we will share anything you need." (Which is good, because I just advertised him here as a good resource!)

Why do y'all go through this extra effort? Well, to paraphrase **Warren Diepraam**, an ADA in Houston and a National Traffic Center Resource Prosecutor, the biggest danger to you and your family isn't the serial rapist or murderer, it's the drunk driver. Thanks to all of you who are putting in the extra effort to keep intoxicated drivers off the streets.

TDCAA Annual Business Meeting

As always, the association will hold its annual business meeting in conjunction with the Annual Criminal and Civil Law Update. This year's meeting will take place at the Galveston Island Convention Center at 5222 Seawall Blvd., next to our host hotel, the San Luis, at 5:00 p.m. on Wednesday, September 17. On the agenda will be the election of officers, the Criminal District Attorney at Large and County Attorney at Large positions, and directors in regions 1, 2, 4, and 7. (See the map on the opposite page for the regions.)

The Nominations Committee has forwarded the following leadership nominations for consideration of the full membership at the meeting: for President Elect, **Scott Brumley** (CA in Amarillo); for Secretary/ Treasurer **Mike Fouts** (DA in Haskell); for County Attorney at Large, **Jaime Tijerina** (CA in Sarita); and for



Criminal District Attorney at Large, **Joe Brown** (CDA in Sherman). According to TDCAA bylaws, this year's President, **Bill Turner** (DA in Bryan), will move up to the Chairman of the Board spot, and **Barry Macha** (CDA in Wichita Falls) will become the TDCAA President.

If you want more information about the upcoming elections or the regional board positions, just give me a call at 512/474-2436.

New records in long-distance campaigning

After the November elections we will officially post the list of newly elected Texas prosecutors who will take office on January 1, 2009. We know of at least 23 folks who will take office in January because they won a primary contest with no general election opponent. We are already serving them as they prepare to take office, and you will probably meet them at some of our seminars this year.

Well, all but one of them. You see, shortly before the run-off election for the position of 38th Judicial District Attorney for Medina and Uvalde Counties, **Danny Kindred** was called to active duty in Iraq. But being halfway around the world did not stop Danny from winning the election.

Right now, Danny works in the office of the Staff Judge Advocate. His mission is training, mentoring, and equipping the Iraq security forces, including standing up for the Iraq military courts. The job involves quite a bit of travel around the country, and Danny makes the trip from Basra to Mosul on a regular basis. He used the word "adventure" to describe the trips by convoy. (He is pictured below left.)

Stay safe, Danny, because we need you to be standing up for the State of Texas come January!

Notables

Congratulations to **Joe Shannon, Jr.**, the Chief of the Economic Crimes unit in the Tarrant County Criminal District Attorney's Office. Joe has been elected Chair of the Board of Directors of the State Bar of Texas. He took the reins at the State Bar annual meeting in Houston in June.

And welcome **Becky Gregory** to the ranks of prosecutors. In April Becky was appointed and confirmed to serve as the United States Attorney for the Eastern District of Texas. She has served as a federal prosecutor and a state district judge, so she knows the ropes. Good luck!

The education of TDCAA

It's with great pride that we congratulate two of the TDCAA staff family on earning their degrees. **Dayatra Rogers**, our registrar and assistant database manager (pictured below), earned her Bachelor of Science degree in business administration from the University of Phoenix— no small feat for a full-time working mother of two. Her studies in Metarie, Louisiana, were rudely interrupted two years ago by someone named Katrina, but Dayatra got back to it once she became a Texan. Well done!

In addition, **Noel Ramos** has

just received his degree from UT. Many of you remember Noel (pictured below with Marnie Parker, our former financial officer) as our production supervisor in the late 1990s. Noel worked himself through school as a TDCAA employee and DPS trooper, earning a Bachelor of Arts

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degree in government with a minor in history. Another proud moment!

Finally, **John McMillin**, our

publications sales manager, couldn't stand having just one degree, so he is leaving us in July to seek his J.D. at Texas Tech. His acerbic wit and dry delivery will be deeply missed around these parts, but those traits will serve him well in law school. Y'all, take this as advance notice that one really good law student will be looking for a prosecutor job in three years, so you might want to start those recruiting visits to his parents' house soon. Thanks, John, for your hard work, and best of luck in law school!

Ciao, Lara Brumen

It is with joy and sadness that I say goodbye to our long-time membership director and database manager, **Lara Brumen**. Lara is making an exciting move with her husband, Barry, and baby son, Luca, to Washington State, where Barry has gotten a new job.

Lara has been at the association for about 12 years. She started as a part-timer in membership and slowly grew, as did our membership, into the backbone of our membership and database services. I only half-joke that our membership database is stored about two-thirds in a computer and one-third in Lara's brain. It has been my joy to work with such a great person, and I know that our members have enjoyed working with her as well. The great part you missed, of course, were the wonderful sounds of the conversations Lara had on the phone with her family … in Italian! Best of luck to you, Lara! We will miss you dearly.

Preserving discretionary funding

On page 24 of this issue, you will find an article outlining the permissible uses of prosecutor discretionary funds (hot check and asset forfeiture). If you are the person who administers these funds, it is definitely a clip-and-save article.

In the last edition of *The Texas Prosecutor*, I discussed how counties supply a large chunk of prosecutor budgets around the state. The second-largest contributor to prosecutor budgets is the state, which ponies up about $35 million a year in DA salaries, CA supplements, apportionment funding, and assistant prosecutor longevity pay. Following in a distant third is discretionary funding, which it is fair to say is used to fill the gaps left in your budgets and help support your offices in ways the county and state just can't.

In a recent hearing before the Senate Criminal Justice Committee, the Attorney General, who is charged with keeping your audits concerning asset forfeiture funds, reported that in 2007 y'all collected about $9.84 million in asset forfeiture funds and spent about $13.3 million. (That is just for DA offices and excludes law enforcement's share of the proceeds. And for a little perspective, keep in mind that the county budget for the Harris County DA's Office alone is around $45 million.)

The Senate hearing involved frank discussions of some perceived abuses of the asset forfeiture fund. At the hearing, our state senators had no quarrel with the good uses to which prosecutors put the funds: "rainy day" spending, training, forensic testing, leasing office equipment and space, paying expert witnesses, supplementing salaries, and supporting non-profit corporations affiliated with the criminal justice system. But there was concern that at least some funds have been used in ways that don't neatly fit the "official purpose of the office" test.

Fair enough. We have no quarrel with the notion that prosecutors must be good stewards of state funds. We can expect to see some reforms regarding accountability and reporting requirements during the next legislative session. In the meantime, if you have any questions about the management or use of your discretionary funds, just give us a call here at the association.

The bottom line is, discretionary funds will never run your office, but they will help you do your job. So it is equally important that you budget the use of those funds wisely. ✤

Eileen Begle wins Gerald Summerford Award

Eileen Begle, Assistant County Attorney in Harris County, was honored with this year's Gerald Summerford Award at the Civil Law Seminar in May. She is pictured above with Erik Nielsen, TDCAA's Training Director, and John Dodson, County Attorney in Uvalde County and the Civil Committee Chair. Congratulations!

A note from the editor

This issue of *The Texas Prosecutor* journal introduces some new features. Two columns make their first appearance; see pages 4 and 6 to read 'em. Both require input from you, our valued members, so take a few minutes to submit your own story. It just might run in the next issue!

You may also notice layout tweaks: wider gutters (the gap of white space between two facing pages), wider margins, skinnier text columns, and revamped folios (where the page number and issue date run on every spread). These changes are our attempt at better legibility, more efficient use of space, and a cleaner layout. We hope you like them!

Victims of family violence, stalking, and sexual assault can register for anonymous addresses

Texas Attorney General Greg Abbott recently announced that family violence, stalking, and sexual assault victims may be eligible to participate in a new, state-sponsored address confidentiality program. Eligible Texans can register for an anonymous address that will appear on voter and school registration cards, driver's licenses, and most government documents, including court records.

The Attorney General's Crime Victim Services Division will designate a substitute address for eligible victims; receive service of process and mail for the participants; and forward mail to participants' actual address. During the 80th Legislative Session, Sen. Eddie Lucio authored legislation creating the Address Confidentiality Program (ACP), which authorizes the attorney general to provide this service to crime victims.

"Texas family violence, stalking and sexual assault victims can now obtain a confidential address that will help them protect their privacy and keep them secure," Attorney General Abbott said. "We are grateful to the victim assistance organizations that partnered with us to ensure this program provides the meaningful protections intended by the legislature."

Applicants must meet with a local domestic violence shelter, sexual assault center, law enforcement, or prosecution staff member to discuss a safety plan and learn more about the enrollment process. To get contact information for local shelters, access the Texas Council on Family Violence Web site at www.tcfv.org or call the National Domestic Violence Hotline at 800/799-7233. To contact local sexual assault centers, access the Texas Association Against Sexual Assault Web site at www.taasa.org or the National Sexual Assault Hotline at 800/656-4673. Meeting with a victim advocate is vital to this process and required by law.

For more information about the Address Confidentiality Program or to learn more about the eligibility criteria, contact the program at 512/936-1750 or 888/832-2322, or visit the agency's website at www.texasattorneygeneral.gov. ✤

Stop the insanity! Meet with your cops after trial

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

This past April, I was teaching on cross examination at Life Savers, NHTSA's annual conference, in Portland, Oregon, when I learned something wonderful. I was discussing meeting with your officer before trial—material I brazenly lifted from my dear friend and former Denton County prosecutor Jimmy Angelino—when an officer raised his hand and made a terrific suggestion. I am ashamed to say I did not get his name and cannot give him proper credit.

He told the group of about 80 prosecutors and peace officers from across the country about a technique he used with new and old officers he supervised in a DWI unit. He explained that he tried to observe every time one of his officers testified. He and the officer then stayed for closing argument, and once the trial concluded, he asked for a little of the trial prosecutor's time for a post-trial conference. He detailed things he observed during direct and cross that went well, as well as parts that went poorly—things that could be improved in the courtroom, in the reports, and during the investigation—and he solicited similar observations from both the testifying officer and the prosecutor. Whether the trial resulted in a conviction or an acquittal, he used each one as a training lab. For one of the very few times in my life, I was speechless, albeit only for a brief moment. What a great idea!

I could not begin to count the number of awkward directs and disastrous crosses I have been part of or observed in DWI cases. I often saw the same awful techniques and bad habits applied by trial attorneys, myself included, and officer witnesses in the very next outing—it was the very definition of insanity (as Albert Einstein put it, "doing the same thing over and over again and expecting different results"). As I stood there in Portland, speechless, my brain raced. Professional sports teams begin practice every week looking at film of the last game. Why do we not use the same strategy? Of course, I know the answer: As prosecutors we are already thinking about the next case. If we won, we are ready to go back to the office to brag. If we lost, we just want to disappear. The long and short of it is that we squander an excellent chance to improve our skills and the abilities of our officer witnesses.

Don't make that mistake anymore. Make sure part of your routine is sitting down after trial with your officers and discussing what went wrong and right. Invite everyone who was part of the trial. Never forget the tremendous resource you have in your investigators and victim assistance folks who all suffer silently in trial as they see the same mistakes repeated year after year. Give a fair critique and graciously receive fair critiques. When you lose, listening to them will be harder, but you will learn even more from those cases.

Here is a partial list of topics you should consider:

- direct questioning by the prosecution
- direct testimony by the officer
- use of visuals and demonstrations
- defense strategies
- testimony on cross
- witness demeanor
- report writing
- videotaping and presentation of the video
- questioning and other investigative techniques
- traffic stop issues

I constantly have officers and prosecutors ask me to create mock exercises, which are fine, but we all have a *real* educational opportunity at the conclusion of every single trial. There are no abstract or hypothetical situations here. Each side is presented with so many practical and memorable examples of what worked and what did not. There is also a true opportunity here for supervising attorneys. Grab officers and junior attorneys alike and give timely advice to both at a time they should be most able and motivated to absorb it.

Post-trial discussions should be discussions, not brow beatings. Officers have something to teach prosecutors, and prosecutors need to

train officers if justice is to be achieved. Learning from capable defense counsel is preferable to repeated defense drubbings. After losses, a cooling-off period is advisable. My practice for years after a colleague lost a case was to send him home and discuss it after a good night's sleep. I think this is wise.

When critiquing trial performance or trial testimony I have several suggestions.

Prepare for this meeting. Sure, time is a luxury, but plan what you want to say anyway. Don't waste this opportunity with a freeform flood of half-developed ideas. Organize, prioritize, and create practical suggestions and solutions. Be detailed and specific so that you can replay as close to verbatim what happened at trial. Give examples, and if the situation allows, practice what you suggest. When you take your time, real and lasting learning takes place.

Never critique what you can't fix. This kind of help is no help at all, it is just placing blame. No one needs to be told they sweat a lot or have a stuttering problem. Trust me—they know. Pointing it out is counter-productive and only hurts feelings, hinders improvement, and destroys relationships. If you can't think of a way to fix the problem you noticed, leave it alone.

Resist the urge to fix everything. Simply put, too much critique locks down an earnest recipient and alienates a less receptive one. No one can change every bad habit they possess at once. Prioritize your points, curing problems that are reversible first, "case losers" second, and personal peccadilloes last. When I used to critique mock trials, client counseling, and moot court at Texas Tech School of Law, I violated this suggestion as badly as ever. My long critiques were as legendary as they were ineffective. My poor captive audiences sat politely with glazed eyes learning nothing as every suggestion I could think of battered their brains. Brevity produces clarity and retention. If your officer or new prosecutor can't remember what you said, his mistake will be repeated. As someone much smarter than I once said, such repetition is insanity.

Listen as well as talk. I can't tell you the number of times I have had officers at my schools say to me, "I just wish my prosecutors told me exactly what they want." Post-trial meetings are an unparalleled chance to get on the same page. Make sure officers and new prosecutors get to ask questions, and help them work through your suggestions. We all learn more by talking than by passively being talked *to*. By listening as much as you talk, you will also very quickly learn if the point you were trying to make was received. Applying this rule will also make the things you have to say a learning experience, not just a gripe session.

Conclusion

Officers generally don't go through the effort to make an arrest when it is not justified. Prosecutors don't generally try defendants who should be acquitted. But investigative, advocacy, and trial mistakes explain most of our losses at trial. If we fail to correct those mistakes when we identify them, we are doomed to suffer more such losses, resulting in injustice. And repeated injustice is insanity. ✤

Take TDCAA's online survey

We want to know what you think of *The Texas Prosecutor* journal! What articles do you like? What articles deserve an update? Do you want to write? We need to hear from you!

Please visit www.tdcaa.com/survey to fill out your answers—we promise it won't take long—and you will be eligible to receive an exclusive, fabulous prize! Plus, your input will let us craft the journal into something even more relevant, informative, and timely to help you do your job day in and day out. So throw in your two cents today!

Photos of the Train the Trainer seminar

Photos of the Civil Law Seminar

Continued from the front cover

Get it in the record! (cont'd)

record at your next opportunity.

If you had a bench conference in the middle of questioning a witness where the defense attorney withdraws his objection, the next time the jury is dismissed and you have a moment, just say, "Your Honor, for the record, we had a bench conference during my re-direct of Susie Smith, and Mr. Matlock withdrew his hearsay objection." Without putting this point on the record, the defense could raise this point on appeal.

2 Describe visual aids. Maps, PowerPoint, and other displays are all wonderful tools for making matters clearer to the jury. Unfortunately, things are not very clear to the appellate court when all the judges read is, "I saw the defendant traveling down this road. He turned here, and I intercepted him here."

If your witness gives a similar narration when drawing a map or tracing his route, you must find a way to translate his actions onto the record. You may choose to be explicit: "Let the record reflect the witness is moving a laser pointer from east to west along the area marked as Main Street on the map." If you feel that is too jarring to the jury, question the witness more specifically. "So you were traveling on Main Street? Which street did you turn onto?"

If you use PowerPoint or other tools to supplement a witness's testimony, consider introducing a paper copy of the slides as an exhibit for record purposes after the trial is complete. Be sure to include any "before and after" slides—if your initial slide was an autopsy photograph and the medical examiner placed arrows or makings on it during his testimony, introduce copies of both the original slide and the marked version.

3 Describe demonstrations. Demonstrations and reenactments can have a powerful effect on the jury. The victim showing the jury how the defendant touched her or the defendant's unrealistic demonstration of how he accidentally shot the victim can be the turning point in convincing the jury to convict. But there may be sufficiency issues on appeal where the appellate court cannot tell precisely where or how the victim was touched. You can solve this problem by describing the demonstration into the record.

For example:

Q. Did Susie actually demonstrate with her fingers what she meant by the pinching of her tee-tee?
A. Yes, she did that. [indicating]
Q. For the record, the witness is putting her thumb and forefinger together.

Demonstrations are also important where your child abuse victim is using an anatomical doll or drawing to indicate where the defendant touched her. After the victim has demonstrated with the doll, you should state into the record, "Let the record reflect that Susie pointed to the doll's vagina."

4 Don't forget about gestures and non-verbal communication. This tip is a corollary of the last two rules, but it is important enough to repeat. They say that 90 percent of communication is non-verbal, so if you leave that out of the record, you are leaving the appellate court to decide your case based on only 10 percent of what happened at trial. It may be rare, but cases can turn on whether a witness's gesture is described for the record.

In a motion to suppress, the officer may testify that the defendant "went like this" at him, and the officer entered the house. Without describing what "went like this" means, your case may not survive appeal. But if you clarify the defendant's actions, you can clearly establish the consent to enter for the appellate court as well as the trial court.

For example:

Q. How did the defendant motion for you to come in?
A. He went like this, so I entered.
Q. For purposes of the record, you have your hand being extended out and coming back towards you. What did his gesture mean to you?
A. That I could come in the house.

It is impossible to describe every time non-verbal communication is important, so try to keep an ear out for when your witnesses (or the attorneys) mention something that will not be visible on paper. It can mean a lot to your child sexual assault case when you clear up on the record that the police did not just find the victim's picture "in here," they found it tucked inside the case of a pornographic video.

And of course, don't forget about, "Let the record reflect that the witness pointed to the defendant."

5 Don't forget about distance and size. When your witness is describing the distance between objects or people, he frequently uses distances in the courtroom that are easy for everyone present to understand, such as "from here to the table." But appellate courts do not take field trips, so the justices will have no idea how large your courtroom is. Be prepared to add distances to clarify that "from here to there" is really 6 feet.

The same rule applies to sizes of objects, which can be particularly important when establishing that a knife was a deadly weapon. If your witness testifies that the knife was "about this long," be prepare to estimate or even measure the distance yourself. If all else fails, simply have the witness *draw* the blade and introduce that drawing into evidence.

6 Make sure all admonishments are on the record. You know that the defendant has a long familiarity with the justice system and knows exactly what he is getting into with this plea bargain. His attorney knows that he has talked to the defendant about all the consequences and rights. And the judge knows that the defendant has been sitting in the courtroom long enough to hear six other pleas with full admonishments in each one. But all the appellate court knows is that the record shows the defendant stood up and pled guilty. If you do not make certain that the defendant is given all admonishments on the record, you are inviting a reversal on habeas for involuntary plea. So listen to make sure the defendant is admonished on the record and discretely remind the judge if he is not. Cases have been reversed on appeal when the defendant, whom everyone in the courtroom knows was born and raised in Wisconsin, is not admonished about deportation. And do not forget that admonishments must be given on *all* guilty pleas, including slow pleas to the jury.

A similar rule applies if the defendant chooses to waive his constitutional rights. Whether it is the right to a trial or the right not to testify, make sure that the defendant is admonished on the record so he cannot later complain about it on appeal.

7 Obtain an interpreter or waive the right on the record. The Confrontation Clause requires the court to provide an interpreter for a defendant who cannot speak English. The defendant may waive this right, but he must do so affirmatively. Merely not requesting an interpreter is not enough. Therefore, if your defendant does not speak English well or seems to have trouble understanding, have the judge question the defendant on the record and determine if he needs an interpreter or if he wants to waive his right. If the record indicates that the defendant did not understand English and did not have an interpreter, the case is coming back for another trial.

Be wary when the defense attorney offers to translate. While doing so may work in an agreed plea, during voir dire or trial the defense attorney cannot do his job *and* translate for the defendant the entire time. Insist on a separate interpreter when necessary.

8 Make the record clear in *Batson* hearings. Appellate courts are becoming more active in evaluating *Batson* claims, so just giving one quick reason for striking a juror may no longer be enough on appeal. The best way to avoid problems down the road is to simply make a record of every factor you considered in striking a particular juror, so that if one factor is discredited you still have something to stand on. In particular, remember to describe physical mannerisms such as crossed arms, eye-rolling, a disrespectful tone of voice, or a marked difference in how the juror spoke to the State and the defense. These are factors that the trial court will recall when deciding if you have provided race-neutral reasons for striking, so you should be sure the appellate court is able to consider them as well.

Another way to protect yourself is to compare the juror you struck with other similar strikes, such as, "The State struck Juror Four because he is a young man and we're concerned he will be lax on drug enforcement. We struck Juror 11, who's a similar age, for the same reason." You can also compare jurors you struck with others who gave similar answers but were *not* struck, a practice that has been of particular concern to some appellate courts. Explain the differences between the two, such as, "We're striking Juror Two because of her opinion that drug laws are too harsh. Although Juror Eight gave a similar answer, we don't think that opinion will affect him here because his family was recently a victim of drug-related crime."

It can be valuable to note the races of the jurors who were not struck as well as the races of those

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who were, if you are challenged. This information is usually not reflected in the record, but the knowledge that you struck two minority jurors but left three on the jury is obviously helpful on appeal. Do not simply read a list of juror races into the record! This is inappropriate and unnecessary. Focus on what was specifically challenged.

9 Speak up if the defense mischaracterizes events. When an attorney makes a statement in open court without being contradicted or disputed by opposing counsel or the judge, the statement provides some evidence of the fact asserted. This means that if a defense attorney makes a statement that is detrimental to your case and you stay silent, the appellate court may find the defense attorney's statement to be true. For example, if the defense objects that a juror was sleeping during the case, the prosecutor should say that she was watching the jury and never saw any jurors asleep. Even if all sides are aware of the issue or the trial court immediately overrules the objection and moves on, it is important to establish the true facts in the record.

This rule balances out the other rules for preserving the record. If the defense describes a witness's gesture or demonstration for the record but gets it wrong, the prosecutor should be aware of and object to the discrepancy. Otherwise, the defendant's gesture waving the police into his home could be turned into waving them away.

10 Special advice for dealing with child witnesses. Although the rest of these tips apply in every case, prosecutors should be especially aware of them when dealing with child witnesses. Children do not describe things as precisely as adults and may have a difficult time in the courtroom. But it is just this demeanor that can be most convincing to the jury. You should try to include as much information as possible about a child's demeanor on the record, such as when the young victim of sexual assault turns the witness chair around so she does not have to look at the defendant while testifying. To make it less jarring, you can include this information through questions such as, "Susie, did you just move your chair? Why did you do that?"

Children are also more likely than other witnesses to use gestures to get their meaning across, so the tips on non-verbal communication are very important. A child's gesture pointing to exactly what part of the body is her "front private" may make the difference in a sufficiency review.

Children also may not be able to answer a question out loud, whether due to fear of the defendant or simply of the courtroom. You may consider asking the child to write the name of the person who touched him or mark on a drawing of a body where he was touched. If you do, be sure to mark the paper as an exhibit and introduce it into evidence so the appellate court can consider it.

Bonus tip: Speak clearly! Because "top 11" lists don't sound as good as top 10 lists, just consider this one a bonus. Make friends with your court reporters and ask to look over a transcript of one of your trials sometime. It can be horrifying to see how your eloquent arguments and devastating cross-examinations translate on the record! Always be aware that the court reporter is trying to transcribe the words of everyone in the courtroom, so try to make it easier on her to record just how brilliant you are. Remember to speak slowly and clearly, and do not talk over witnesses—or neither of you will be transcribed correctly. Be sure to clarify "uh-huh" or a head shake as "yes" or "no" answers, and pause between questions and answers to make sure the record does not read like one long question. Allow extra time for witnesses who have a hard time speaking or are using interpreters. Even though those in the courtroom may understand the gist of the testimony, the reporter has to record every word.

Conclusion

There are far more tips about preserving the record than could be put into a short article. But these guidelines should carry you through the most common situations. A good rule of thumb is to *listen* to your case as well as see it. Consider what the court reporter is able to record and what you can say to make the true situation clear to the appellate courts. Your appellate section will thank you. ✤

They pieced together a puzzle, and a disturbing picture emerged

Charming, respectful, good-looking—potentially the first Hispanic President of the United States. It's not the usual description of a serial killer, but it was the picture of Rosendo Rodriguez painted by his family, friends, and victims. How Lubbock County prosecutors methodically uncovered this defendant's dark side and secured a death sentence.

By Matt Powell
Criminal District Attorney in Lubbock County

The first thing I remember were the smells. We had been called to the Lubbock landfill where a worker had discovered a suitcase containing the naked body of a young woman. At first, the worker had thought it was a practical joke. Apparently, it is common to find mannequins in the landfill. The worker initially chalked it up to another college prank but quickly learned this discovery was not funny in the slightest.

Investigators were left with an unclothed body, few clues, no identification except an ankle tattoo, and a crime scene that didn't lend itself to finding any physical or biological evidence. After the body was removed, detectives started running down what few clues they had. They were able to identify the victim through the tattoo and fingerprints. Her name was Summer Baldwin. She was a local drug addict who had turned to prostitution to fund her habit.

Several things were learned at the autopsy. Summer had been severely beaten, had signs of asphyxiation, and had been anally and vaginally raped. She was also approximately 10 weeks pregnant.

Detectives believed that the suitcase in which Summer had been placed was new. The plastic tag on the handle was still there, and the interior was very clean. A small paper with what appeared to be a UPC number was hidden inside. From there, detectives determined the possible places someone could purchase this particular suitcase in Lubbock. I have always said that Lubbock is blessed with great law enforcement, and the next few days of the investigation put an exclamation point on that statement. After talking to several merchants, detectives concluded that the suitcase was bought from Wal-Mart. From there, Wal-Mart employees determined that two of those suitcases had been purchased over the past couple of days. Video was obtained of those two purchases. One buyer was a woman, and one was a Hispanic man with a close-cut hairstyle and a green shirt. The man had also been videotaped driving a red, full-size pickup truck. We didn't have a name for this guy, but we noted that the purchase was at 3:30 a.m, and the buyer was extremely calm and collected, even ripping the paperwork off the suitcase for the cashier. (Remember, the plastic tag was still on the suitcase where this information would have been).


Rodriguez

Here was the defendant's first mistake. He purchased the suitcase and a package of latex gloves with his debit card. Through a federal subpoena, we determined his name: Rosendo Rodriguez. He had attended Texas Tech and was now living in San Antonio. He was in the Marine Corps reserves and had come to Lubbock for his monthly training the weekend Summer was murdered.

Warrants were issued for his arrest, and detectives went in many directions: to San Antonio, Midland, a Holiday Inn in Lubbock, and elsewhere to collect evidence. In San Antonio, the defendant was arrested, and he invoked his right to counsel. Several items were taken from the house he shared with his parents: his computer, his phone, a bus ticket receipt, a rental car agreement for a red pickup, and a green shirt that we

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had all seen before in a Wal-Mart surveillance video.

In Midland, the red truck that Rodriguez rented was photographed and processed.


Summer Baldwin

Through the debit card information, detectives learned that the defendant stayed at the Holiday Inn downtown. He was the only one of his unit who stayed at that particular hotel; everyone else stayed at a different Holiday Inn. We found blood in the room and, in a trash can outside the room, latex gloves with the victim's blood and the defendant's DNA on them. (I'm sure folks are wondering how the hotel maid didn't see the blood. I remember some years back listening to Williamson County DA John Bradley say that the first thing he does when he stays in a hotel is take off the bedspread. Let me add to your nightmares. We learned the term "express cleaning," which, in fact, is no cleaning at all. A maid has to be in and out of a room within seven minutes. No surprise the blood wasn't discovered.) We also learned that a report is generated when a key card is used for a particular room. The report showed that Rodriguez had entered his room around 12:30 a.m. the day Summer was killed. We knew from a witness that Summer had been seen with a Hispanic man with a short haircut driving a red full-sized pickup at about midnight that morning. The key card also showed the defendant entering the room again at approximately 3:50 a.m., about 20 minutes after buying the suitcase. He left again at some point and returned to the room later that morning. He finished off the day eating two No. 1 combo meals at Chick-fil-A and watching a movie in his room.

On the defendant's computer, we found searches for "Summer Baldwin" and stories relating to her body's discovery in the landfill. We also found hits for websites involving searching for singles, military singles, and many others. We were discovering what type of individual we were dealing with.

Approximately two weeks later, the defendant's attorney turned over two knives that belonged to Summer Baldwin and stated that the defendant wanted to speak with investigators. The defendant's story in a nutshell was that he and the victim had consensual sex and that afterwards she started smoking crack. The defendant, being the good citizen he is, took offense. He stated that he grabbed the crack pipe, and the victim came at him with two knives. It was at this point, the defendant stated, that he put her into a choke hold and she died while he was protecting himself. As the infamous line in *My Cousin Vinny* goes: "What that guy said is B.S." However, we just wanted him down on video with some story—especially the part where he was with Summer when she died.

The plea deal

When all of this investigation was going on, I couldn't help but think of a 16-year-old Lubbock girl who had been missing for about two years before we found Summer. Her name was Joanna Rogers, and she had last been seen around midnight in her parents' home the night she disappeared. Rosendo Rodriguez's name had surfaced during that investigation but only because he had been on an online chat page with Joanna.

Everyone reading this article who has been doing this job for a long time knows that feeling you get in the pit of your stomach that a defendant is involved in a crime. Even though you can't prove it, you know he did it. This is the way I felt about Rodriguez with regard to Joanna Rogers. I thought that it was extremely important for her family and for our community to find her if at all possible. Therefore, after speaking with both the Rogers and Baldwin families, I made what I characterized as a deal with the devil. I told Rodriguez's attorney that if the defendant had anything to do with Joanna Rogers' disappearance and we could find her, I would offer him a life sentence in the Baldwin case and waive the death penalty. It is important to note that both Summer's family and Joanna's family were great throughout this process. They were in full agreement with this offer, trusting us 100 percent to do the right thing, and as we all know, having that support is a tremendous help.

The defendant agreed to the deal and told detectives how he met Joanna Rogers in the early morning of May 4, 2004, for what he said was consensual sex. He went on to say that after the victim demanded money, he choked her to death. He then went up to his room, found a suitcase, put Joanna in it, and threw her in a dumpster. He told this story like you and I talk about getting a

cup of coffee. I was sick to my stomach. Never before did I feel someone was more deserving of a death sentence, but once again, we felt that the plea bargain was the only way we were ever going to find out what happened to Joanna. And the hard part was just beginning.

Searching for Joanna

Believe it or not, the landfill keeps pretty good records of where trash is taken. Detectives figured out which dumpster would have contained Joanna's body and then the approximate area of the landfill where that dumpster would have been emptied. The problem was that we were talking about an area several football fields in length with two years' worth of garbage stacked over it. Searching for Joanna Rogers' body was like trying to find a needle in a haystack.

Our sheriff, David Gutierrez, along with Pam Alexander, victim advocate extraordinaire, secured a grant from the governor's office for $100,000 to help with the cost of searching the landfill. The real heroes were the men and women who risked illness and endured shots, 100-degree temperatures, and body suits to search for the young woman. I will not elaborate on what they had to go through, but you can use your imagination. Two months into the search, we were running out of money and were in our last pocket of landfill to go through. In fact, the search was very close to being called off. Then we got our miracle from God. He used men to do it, but that is what it was, a miracle. We found our needle in a haystack: another black suitcase that contained a girl with beautiful red hair, Joanna Rogers. Nine hundred four days since she had gone missing, we brought her home.


Joanna Rogers

I found a great deal of contentment seeing the Rogers family get to bury their daughter. It is hard enough to lose a child, but not knowing what happened or where they are is unbearable.

Only one thing was left, and that was to plead the defendant. On the day of his plea, defense counsel told me that he wasn't sure it was going to happen. Rodriguez, a highly intelligent, college-educated Marine, stated he didn't understand what was going on and would not enter a guilty plea.

All bets were off. I withdrew the offer and filed notice of intent to seek the death penalty that day. We were going to get the best of both worlds: We found Joanna, and we would let a jury decide if the defendant should get the death penalty for his crimes.

Change of venue

As you can imagine, these two crimes generated a great deal of publicity in our city. In fact, there were not many places you could go without seeing a missing poster for Joanna, one of which caused my youngest child to ask me one day when we were going to find that girl and what happened to her. We tried to seat a jury in Lubbock, but after reading the first 60 or so questionnaires, it was clear that was not possible. About 90 percent of the folks had already made up their mind, and there were even a couple of "I can't do it during the week, but I can get down there on a Saturday" responses to whether they could assess a death penalty. The judge moved the case to Randall County, where District Attorney James Farren and his staff couldn't have been better. The whole county, from the clerk's office to the sheriff's department, treated us great. Other than the expense of travel and not being at your home base, it was as good a situation as we could have asked for.

The trial

We picked a jury in approximately four weeks and started the trial. We had indicted the defendant on multiple paragraphs: Paragraph one alleged the murder during a course of sexual assault. Paragraph two alleged the murder of two or more individuals, naming the unborn child as a victim, and paragraph three alleged killing a child under the age of 6. We waived paragraph three and proceeded on the first two.

The obvious issues were convincing a jury that you could in fact sexually assault a prostitute and that the defendant didn't have to know that the victim was pregnant to convict him of murdering the unborn fetus. We also had to deal with the self-defense claim.

To prove the first paragraph, the sexual assault, we relied on the physical evidence and the pathologists' testimony. The victim had more than 70 blunt force injuries on her body, blows to her back, stomach, legs, face, and head. She had deep blunt force injuries to her vagina and anus as well. She had suffered severe

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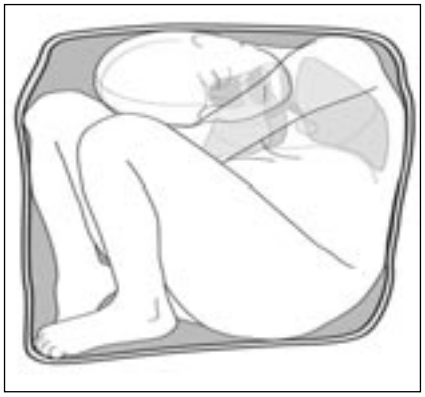
enough injuries to lose consciousness but no specific injury that would have caused her death. This fact lead Dr. Sridhar Natarajan, the pathologist, to the conclusion that because of the way Summer was stuffed in the suitcase, she died of positional asphyxiation. In other words, Summer was alive when she was put in the suitcase. (We showed the diagram, below, to demonstrate.)



It was the first time the jury heard this bit of horror, and based on their reactions, the first time the defendant and his attorneys heard it as well. Obviously, this testimony destroyed the self-defense claim, especially because the defendant had only one small scratch on his entire body.

In the second paragraph, we relied on the definition of "individual" from the Penal Code which includes an "unborn child at every stage of gestation from fertilization until birth" and a great couple of cases on transferred intent. The best case on point was *Norris v. State* out of the Court of Criminal Appeals.

Closing argument was easy. If you can't argue these facts, you're in the wrong business. My chief investigator, Todd Smith, who can compete with the best of them in PowerPoint, created some great slides for closing. I remember everyone not wanting to touch the suitcase because of how dirty it was and where it had been, but I grabbed it and talked about us being afraid to get our hands or suits dirty and that this suitcase was meant to be the final resting place for Summer Baldwin. I ended my argument by placing three roses on Summers' coffin, the suitcase. One was for Summer, one for her child, and one for a victim the jury never got to hear about, Joanna. Most of the jury was crying, which was more emotion than the defendant ever showed.

They were out about three hours before returning a verdict of guilty on both counts.

Punishment

While getting ready for this trial, we were constantly contacted by folks who had dealt with the defendant. These included his first high school girlfriend whom he had sexually assaulted and four other women he had terrorized and raped during his time at Texas Tech. None of these rapes had been reported to law enforcement.

The defendant's friends also testified about a man who didn't have any problems "getting" women and who described sex as "a handshake." They also stated the defendant bragged about having prostitutes and killing kids in Iraq with the Marine Corps. (The only problem with that claim was that the defendant had never been deployed anywhere, much less Iraq.) Anyway, what kind of individual brags about killing kids?

My trial partner, Tray Payne, prepared and did the direct examination on all the sexual assault victims. He did an excellent job. If there were any doubt in the jurors' minds that the defendant was a predator and a future danger, Tray removed it. The rape victims told basically the same story: The defendant would use his charm and looks to get them to have sex with him. However, the sex would quickly turn violent, and each victim testified how the defendant would continue to rape them despite their fighting and pleading with him to stop. The victims testified that they did not tell anybody about these rapes because they were terrified of Rodriguez. He had a great ability to pick "perfect victims" who wouldn't report his crimes.

One of Rodriguez's victims told a completely different story. This young lady worked three jobs and lived at home when she attended Tech. She decided during her senior year that she needed to experience some of the "fun" aspects of college, so she joined the Chi Rho fraternity where she met the defendant. Being very naive, she quickly fell in love with him. He had said and done all the right things, even asking her father permission to date her. After she learned the defendant was cheating on her, she went to his apartment to confront him and end the relationship. It was there that the defendant held her down on the couch and raped her—her first-ever sexual experience. He then walked her to the car, patted her on the head, and told her "she would be all right." The victim said that the trip home was the longest 30-minute drive of her life. She went in the

house, told her parents good night like she always did, then went upstairs to her room where she lay in her closet, curled up in the fetal position, and cried herself to sleep. After seeing just this witness's testimony, a prosecutor from the Randall County DA's office remarked about the jury, "They are going to kill that S.O.B." That was the only witness she saw.

One of the best pieces of evidence was from the defendants' phone. Detectives had taken all the text messages and pictures off the phone, and there was one picture in particular we wanted to show the jury (the one at the right). It was of the defendant in mirrored sunglasses smiling; he had taken the picture of himself. He was in the same green shirt he wore in the Wal-Mart video and was on a bus back home to San Antonio. This picture was taken the day after he killed Summer. This smiling picture clearly showed the defendant's true character; in his mind, he had simply taken out the garbage.

We were never able to put on the defendant's confession regarding Joanna's murder. The law is clear that his statement was not voluntary because it was part of a plea agreement. Even though the defendant backed out of the plea, it was still inadmissible. I can't tell you how much we researched this subject and cussed and discussed it. This is a messed-up area of our law.

After we rested, the defense put on multiple family members who described a very loving, caring, and intelligent defendant. They also described a pretty good home life but that it included a drunk, abusive father who beat all the kids and their mother—the same man who had been a defense attorney for 20-plus years and was in the courtroom all week holding hands and hugging all these people who hated him so much, including his wife of 36 years. Finally, the defense put on the same old experts to show that the penitentiary is really a safe place to live. Of course, our expert, A.P. Merillat, ended that discussion pretty quickly.

The jury took about 2½ hours to give the death penalty and almost shouted "yes" when polled about their verdict. Justice was finally obtained for Summer and Joanna. Even though we had to get there in a roundabout way, we got Joanna home and the verdict that the defendant clearly deserved.

During the victim impact statement, the jury learned for the first time from Joanna's father that the defendant had killed his daughter. A couple of them wanted to come over the rail. Some of the family members said that they will be there when the defendant is put to death. For the first time in all the death penalty cases that I have tried, I might join them. ✤

TDCAA's upcoming seminar schedule

Prosecutor Trial Skills Course, July 13–18, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Advanced Trial Skills: Homicide, August 11–15, at the Baylor School of Law in Waco.

Annual Criminal & Civil Law Update, Sept. 17–19, at the San Luis Resort in Galveston. The host hotel, the San Luis Resort and Spa, is sold out, but rooms may become available if cancellations occur before the room rate's cut-off date, August 16. Call 800/392-5937 to check availability.

Additional hotel rooms are available at the Hilton Galveston (located at 5400 Seawall Blvd.), 409/744-5000 for reservations; the Holiday Inn on the Beach (located at 5002 Seawall Blvd.), 409/740-3581 for reservations; and the Hotel Galvez (located at 2024 Seawall Blvd.), call 800/505-1947 for reservations.

Key Personnel Seminar, Nov. 5–7, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Elected Prosecutor Conference, Dec. 3–5, at the Omni Southpark in Austin. Call 512/448-2222 for reservations. ✤

Hot check and asset forfeiture funds

An updated list of approved expenditures for these office monies

As the research attorney here at TDCAA, I get a lot of questions from prosecutors; they run the gamut from whether the punishment range for aggravated sexual assault of a child can be enhanced if the defendant has a prior family violence assault, to who is responsible for getting cows off a county road. But one question that I get repeatedly is whether an office can use asset forfeiture funds or hot check funds to purchase all manner of objects ranging from office supplies to a new car for an investigator.

By Sean Johnson
TDCAA Research Attorney in Austin

We thought it was a good time to give a little refresher to everyone on the use of those funds. The following is a brief overview, which was originally written by Markus Kypreos, TDCAA's previous research attorney, for the July-August 2005 issue of this journal, of the common problems offices run into when spending their hot check and asset forfeiture proceeds; it's been updated to cover changes from the last legislative session and new Attorney General opinions.

Hot check fund

The legislature did not make any big changes to CCP art. 102.007 during the last session. The fee schedule for prosecutors collecting on hot checks is still the same:

- $10 if the face amount of the check or sight order does not exceed $10;
- $15 if the face amount of the check or sight order is greater than $10 but does not exceed $100;
- $30 if the face amount of the check or sight order is greater than $100 but does not exceed $300;
- $50 if the face amount of the check or sight order is greater than $300 but does not exceed $500; and
- $75 if the face amount of the check or sight order is greater than $500.[1]

The holder of a dishonored check may also charge the drawer or endorser a reasonable processing fee of not more than $30.[2] In addition, the defendant is also liable for the costs of delivering notification by registered or certified mail; this new fee must be collected anytime a defendant is prosecuted for theft, theft of service, or issuance of bad check.[3] Note that if a defendant has written several hot checks, there is nothing to prohibit you from collecting a fee on each check.

The statute gives the elected prosecutor sole discretion over expenditures from the hot check fund; the elected is not required to get approval from the commissioners court to use the funds. However, the expenditure of funds is still subject to audit by the county auditor.[4] Also, there is no requirement that a prosecutor spend the entire fund each year. However, any positive balance carried forward remains subject to the "official business" restrictions of art. 102.007 and any interest that accrues must be severed from the principal and given to the county.[5]

The statute provides that the fund can be used to defray the salaries and expenses of the office but not to supplement the elected prosecutor's own salary.[6] Originally, the legislature envisioned the money would be used to defray the costs directly attributable to the prosecution of hot check writers, but the spending guidelines have expanded over the years.

Asset forfeiture fund

For simplicity's sake, this article focuses on just the use of asset forfeiture funds. If you would like more information on the procedure used to forfeit contraband, *Guide to Asset Seizure & Forfeiture* is available from TDCAA.

Generally, CCP art. 59.06 allows a district attorney to use forfeited property "for the official purposes of his office." The proceeds from the sale of forfeited property go into the state's general revenue fund unless there is a local agreement between the attorney for the state and law enforcement agencies, so be sure to make a written agreement with your local enforcement agencies so your office can get those proceeds.[7]

If there is a local agreement, there are three ways forfeited property may be distributed. First, the attorney for the state may convey property to a law enforcement agency, which may "maintain, repair, use and operate the property for official purposes."[8] Statutory bidding requirements do not apply to the

prosecutor's authority to administer forfeited property.[9]

A new way to distribute property, created during the last legislative session, is for law enforcement agencies to loan or transfer forfeited property to another municipal or county agency or to a school district for that agency or district's use.[10] There are no restrictions on the use of the loaned property, so presumably, it could be put to use for anything. However, the commissioners court or the governing body of the municipality may revoke the loan of a vehicle at any time with proper notice to the receiving agency or district.[11]

Third, after deducting certain costs to which the district clerk is

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Hot check fund

Can I use hot check proceeds to…	Yes or no	Authority
Defray the salaries and expenses of the prosecutor's office?	Yes	JM-313
Pay for employee parking (as additional employee compensation)?	Yes	JM-313
Pay State Bar dues for assistants (as additional employee compensation)?	Yes	JM-313
Make an employee a notary public if the office needs one?	Yes	JM-313
Pay CLE costs if the program is substantially related to the office's "official business?"	Yes	JM-313
Pay college tuition on courses to train the employee for a different position or additional duties that are part of the office's official business?	Yes	JM-313
Reimburse for "official business" travel?	Yes	JM-313
Pay for a vacation retreat as part of a pre-established employment compensation contract?	Yes	JM-313
Pay to conduct a formal educational or training program at a retreat?	Yes	JM-313
Pay for computerized security devices?	Yes	JM-313
Pay for office furniture, carpet, office supplies, and equipment?	Yes	JM-313
Hire an investigator without commissioners court approval if the salary is paid entirely by the fund?	Yes	JM-738
Pay salary supplements without the commissioners court reducing an employee's salary to offset the hot check increase?	Yes	JM-313
Pay assistants' employment taxes on salary supplements?	Yes	JC-0397
Sponsor a children's book related to the attorney's official business?	Yes*	GA-045
Pay for coffee, doughnuts, lunches, or framed photographs for members of a grand jury?	No	JM-313
Pay for general college education?	No	JM-313
Supplement the salary of the elected prosecutor?	No	JM-313
Pay an automobile allowance?	No	JM-313 (unless the vehicle is necessary to the actual performance of an employee's "official duties").
Reimburse restitution to a merchant?	No	JC-0168
Pay a multi-year contract such as a car loan?	No	GA-053

** if no other law prohibits such expenditure.*

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entitled under CCP art. 59.05(f), the attorney for the state must deposit "all money, securities, negotiable instruments, stocks or bonds, or things of value, or proceeds from the sale of those items" into special funds solely for the official purposes of the office or law enforcement purposes, respectively.[12] Before money from the asset forfeiture fund may be used, a detailed budget for the expenditure must be submitted to the commissioners court or governing body of the municipality. The budget is not required to list details that would endanger the security of an investigation or prosecution. And unlike hot check funds, the attorney for the state may not use the existence of an award to increase a salary, expense, or allowance for an employee who is budgeted for by the commissioners court without the court's approval. But the commissioners court cannot offset or decrease salaries, expenses, or allowances, either.[13]

Asset forfeiture fund

Can I use forfeiture proceeds…	Yes or no	Authority
To maintain, repair, use, and operate the property for official purposes?	Yes	CCP 59.06(b)
To pay for the prevention of drug abuse and persons with drug-related problems?	Yes, but…	See CCP 59.06(j) for a limitation of 10 percent for expenditures in a 59.06(c)(4) fund.
To pay bonuses or increase salaries in the prosecutor's office?	Yes, but…	JM-1253. The payment is contingent upon commissioners court approval. Bonuses are prohibited unless approved as part of compensation before services are rendered. Art. III, §3, Tex. Constitution.
To take title to a building to house the sheriff's anti-drug task force?	Yes	Letter Opinion 96-012
To purchase helicopters for counter-drug activities?	Yes	Letter Opinion 96-096
To pay salaries and overtime pay for officers?	Yes	CCP 59.06(c)(2)
To pay for officer training?	Yes	CCP 59.06(c)(2)
To pay for specialized investigative equipment and supplies?	Yes	CCP 59.06(c)(2)
To purchase items used by officers in direct law enforcement duties?	Yes	CCP 59.06(c)(2)
To lease forfeited property itself?	Yes	GA-0122
To help the commissioners court purchase or lease a juvenile detention facility?	No	GA-0613
From the sale of tangible property whose value is increased by the notoriety gained from the conviction of an offense?	No	CCP 56.09(k)(2). The increase in value from the notoriety must be sent to the Attorney General, and the remainder of the proceeds that represent the item's fair market value should be transferred to the property's owner. GA-0298.
From movies, books, magazine articles, tape recordings, radio, or television presentations, Internet websites, etc., in which a crime is reenacted?	No	CCP 56.09(k)(1). These proceeds must be sent to the Attorney General.
If forced by my city council to purchase vehicles?	No	JC-0005; see also DM-72

Conclusion

If you can't decide whether the use of hot check funds or asset forfeiture funds is appropriate, use the lists on these pages as a guide and ask yourself the following questions:

For hot check expenditures:

- Is the expenditure related to the official business of the office?
- Are there any other constitutional or statutory provisions prohibiting the expenditure?

For asset forfeiture expenditures:

- Is the expenditure for an official purpose of the office?
- If the forfeited property is real or personal property, will the law enforcement agency maintain, repair, use, and operate the property for official purposes?

Prosecutors are always going to have questions about expenditures. If these charts don't answer your questions, call the association at 512/474-2436, and we'll be happy to track down an answer. ✤

Endnotes

1 Tex. Code of Crim. Proc. Art. 102.007(c).

2 Tex. Bus. and Com. Code §3.506.

3 Tex. Code of Crim. Proc. Art. 102.007(e).

4 Op. Tex. Att'y Gen. GA-0053 (2003).

5 Tex. Loc. Gov't Code §114.002.

6 Op. Tex. Att'y Gen. JM-313 (1985).

7 Tex. Code of Crim. Proc. Art. 59.06(a).

8 Tex. Code of Crim. Proc. Art. 59.06(b).

9 Op. Tex. Att'y Gen. GA-122 (2004).

10 Tex. Code of Crim. Proc. Art. 59.06(b).

11 Tex. Code of Crim. Proc. Art. 59.06(b-1).

12 Tex. Code of Crim. Proc. Art. 59.06(c).

13 Tex. Code of Crim. Proc. Art. 59.06(d).

A horrific case of 'medical child abuse'

Also called Munchausen Syndrome by Proxy and Pediatric Condition Falsification, this type of child abuse requires mountains of evidence and careful examination to prosecute. Read how Harris County prosecutors were the first to try a mother for injury to a child based solely on unnecessary surgeries.

By Mike Trent
Assistant District Attorney in Harris County

On February 28, 2006, two women who hardly knew each other, Darcy Wall and Susan Owen, walked into the Harris County Constable, Precinct Four substation together. Darcy is a mother of two children and the wife of a pastor at a local Bible church. Susan is a nurse in a pediatrician's office. They had both been close friends and supporters of Laurie Williamson, the mother of three terminally ill children. They had little else in common other than a growing fear that the children were in danger and the courage to do something about it. They had come to report their friend Laurie for child abuse.

Sgt. Mike Johnson of the Domestic Violence Unit listened to the two women patiently. He could see that their concern was genuine and seemed legitimate, but he was initially uncertain of what to do. Darcy and Susan believed that Laurie had Munchausen Syndrome by Proxy (MSBP) and that she was pretending her children were sicker than they really were. It sounded to Johnson like a problem for CPS to handle, but the women had already reported the matter to CPS, to no avail. After researching MSBP on the Internet, Johnson determined that it was indeed a form of child abuse that could result in permanent injury or even death. His search turned up a news article about a local case of MSBP that had recently been prosecuted; Kimberly Sue Austin was the defendant. Johnson decided to contact the prosecutor who handled the case, and that's where I came in.

I had tried Austin less than six months earlier for injury to a child. She had injected her infant son with insulin, almost killing him. Further investigation had determined that she had murdered another infant son in 1993 by either suffocating him or injecting him with insulin. At trial I had shown that the two children, as well as two other Austin children, were victims of MSBP, also known as "factitious disorder by proxy," (FDP), "pediatric condition falsification" (PCF), and, most recently "medical child abuse" (MCA).[1] All of these acronyms describe the same conduct: the intentional exaggeration, fabrication, or induction of illness symptoms in a child by the child's caretaker, resulting in unnecessary and harmful or potentially harmful medical care.

'I hope you're ready to work'

Realizing the danger posed to the children after discussing the case with Sgt. Johnson, I told him that we needed to take swift action, and I offered to help him with the investigation. But I also had a warning for him: "I hope you're ready to work." MCA prosecutions are notoriously difficult and time-consuming.

We began by issuing grand jury subpoenas to every health care entity we knew of that had seen the children. Then Johnson started taking statements and collecting letters from various friends, family members, and other people who had knowledge of what was going on in the Williamson household. The picture that emerged was disturbing.

Laurie Williamson had three children: Tom, age 11, Roger, 9, and Chrissy, 6.[2] They wore diapers because none of them were toilet-trained, and Tom and Chrissy were confined to wheelchairs and had "g-buttons" (gastronomy tubes) through which liquid formula could be pumped directly into their stomachs. Laurie told everyone that the children had mitochondrial disease and a regressive neurological disorder, among other ailments, and that they were not expected to live beyond their teens. The Williamson household was dark, with heavy shades on the windows, and Laurie

set the temperature at 62 degrees because she said the children were sensitive to heat and light. Consequently she kept them indoors and rarely allowed them outside to play. All three children were on numerous prescription medications meant to control a host of different problems. Chrissy's medicine had to be administered through her g-button as she was never allowed to eat or drink anything by mouth. Her mother said she had a swallowing disorder and would choke.

One of the first things Sgt. Johnson obtained was a pair of letters from the children's pediatrician. The first, dated January 10, 2006, and addressed "to whom it may concern," listed all the problems with which the three children had supposedly been diagnosed. Tom, for instance, had "mitochondrial disorder, metabolic disorder, neurological regression syndrome, global developmental delay, seizure disorder, hypotonia, status post history of failure to thrive, gastrointestinal malabsorption, gastro-esophageal reflux, esophagitis, status post gastric-button placement, hypothyroidism, hypotension, urinary incontinence, stool incontinence, heat intolerance due to poor thermoregulation from the metabolic disease state, attention deficit/hyperactivity disorder, Tourette's syndrome, decreased acoustic reflexes in the right ear, obsessive-compulsive disorder, anxiety disorder, pragmatic language disorder, decreasing IQ scores, sensory integration disorder, auditory processing disorder, and poor immune function." Her assessment of Roger and Chrissy was similar.

The second letter, written just a few weeks later on March 1, represented a 180-degree turn. "It has recently come to my attention that there are several extremely serious issues in regards to the health of the children and the possibility of Munchausen's Syndrome as well as Munchausen's Syndrome by Proxy with this family."[3] Now even the pediatrician, who had been fooled by Laurie for eight years, could finally see that things were not adding up. The children, still in Laurie's care, were in grave danger. The situation called for immediate action.

I asked Sgt. Johnson to contact CPS and remove the children from Laurie's custody. Prosecuting MCA cases requires a multi-disciplinary team approach, with cooperation between law enforcement, health care workers, and CPS. CPS had investigated at least five previous referrals that Williamson was neglecting or abusing her children, but each time, she had been able to convince the caseworker that her children were genuinely ill and that she was doing the best she could to take care of them. If we were ever to prove that Williamson was medically abusing her children, we would have to enforce what pediatricians refer to as "therapeutic separation" to see if the victims got better once they were out of the perpetrator's care. Therapeutic separation is always the ultimate proof of MCA. If the children's health problems abruptly resolved themselves away from Laurie, it would be the most powerful piece of evidence I could offer in court.

On March 20, 2006, after an emergency meeting that Sgt. Johnson and I attended with CPS officials and caseworkers, CPS took emergency custody of Tom, Roger, and Chrissy. Shortly thereafter, they were admitted to the hospital for observation. With MSBP as their working diagnosis, the attending physicians weaned the children off of a multitude of prescription drugs their mother had been giving them, ordered the removal of the g-buttons from Tom and Chrissy, and eventually discharged them all in excellent health, having ruled out almost all of the diagnoses their pediatrician had mentioned in her January 10 letter. Chrissy ate solid food for the first time in her life without any problem swallowing. Other than some (understandable) behavioral issues, they were in perfect health.

How to charge Williamson

The question now was: With what offense could we charge Laurie Williamson? "Munchausen syndrome by proxy" and "medical child abuse" are not offenses. After reading the final discharge report from the hospital and the statements taken by Sgt. Johnson, I was confident I could prove that she had endangered her children according to the broad definition of §22.041 of the Penal Code. But the state jail felony punishment range hardly seemed appropriate in this situation. In most cases of MSBP, the perpetrator is caught personally harming the children in some way: smothering them, injecting or poisoning them, tampering with medical equipment, or even deliberately trying to infect them. Sometimes—if doctors are suspicious—the offense may even be

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covertly recorded on video. These acts usually fit the definition of injury to a child under §22.04.

But in Williamson's case, we did not even have an affirmative *act*, much less one caught on video. Clearly, the children had suffered unspeakably at her hands, but how could we hold her responsible? I discussed the case with Dr. Reena Isaac, a pediatrician specializing in child abuse and a member of the Child Protection Team at Texas Children's Hospital. Dr. Isaac proved to be my right hand, an indispensable help throughout the prosecution. I explained my charging dilemma, and she pointed out that the children had undergone numerous unnecessary tests and even surgeries under their mother's care and with her consent. As we brainstormed, an idea began to form: Could an unnecessary surgery constitute injury to a child? I went over the legal definitions with Dr. Isaac, including "serious bodily injury." Her response was swift and certain: Any procedure involving general anesthesia created "a substantial risk of death," and the surgery itself could cause "serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[4]

But doctors had actually performed the surgeries, not Laurie Williamson. Were we going to claim their conduct was criminal, as well? I turned to a little-used subsection of the law of parties, Texas Penal Code §7.02(a)(1).

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
>
> (1) acting with the kind of culpability required for the offense, he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense.

My theory of culpability for Laurie would therefore involve proving three things:

- that the surgeries were medically unnecessary;
- that the surgeries met all the elements of injury to a child with serious bodily injury; and
- that Laurie Williamson intentionally and knowingly caused the surgeries.

This case would mark a first in medical child abuse prosecution: attempting to secure a conviction based solely on unnecessary surgical procedures.

Mountains of paperwork

The first step was to subpoena all medical records for all three children and Williamson herself. I included her records because a significant number of MCA perpetrators also exaggerate, fabricate, or induce symptoms *in themselves*. This would turn out to be true in Williamson's case as well. For the next several months, I issued grand jury subpoenas and Sgt. Johnson dutifully served them. To minimize duplication and confusion, we agreed that CPS, represented by the Harris County Attorney's Office, would serve as a central repository for all records we obtained, and that Sgt. Johnson would have his office scan in the records as PDF files and put them on CD-Roms. The process was time-consuming and exhaustive, but eventually we got most of the records we wanted. They totaled over 40,000 pages.

I then began going through the records to create a chronology of medical contacts in the form of a Microsoft Excel spreadsheet. I owe a debt of gratitude to several interns, most notably Amanda Johnston, who assisted in this tedious, eye-straining, mind-numbing task. On the spreadsheet, I entered the date, name of the patient, type of event (phone call, office visit, admission, etc.), provider, and complaint and diagnosis, if any. When I finished, I had documented nearly 600 doctor visits, hospitalizations, phone calls, and other contacts for Williamson and her children. I did not even include the speech, occupational, and physical therapy all three children received at home three times a week.

Next, I catalogued the records for easy reference and had Sgt. Johnson scan almost three dozen statements and letters from various witnesses. To prove my case, I was going to need experts, specifically, pediatricians specializing in the recognition and treatment of child abuse. They would need to review all of the records to form opinions on whether the children were victims of medical child abuse and whether the surgeries in question were necessary. If I was going to ask a jury to send Williamson to prison based on expert testimony, then I needed that testimony to come from some of the foremost pediatricians in the country.

I did not want to rely solely on experts, however. After reviewing the records, I began tracking down the actual doctors who had recommended and performed surgeries on the

children. After talking to Dr. Isaac, I was targeting three procedures: a g-button placement/muscle biopsy and a vagal nerve stimulator (VNS) implantation performed on Tom, and a g-button placement/nissen fundoplication performed on Chrissy.

Going into the case, like many people, I believed that there would always be some "test" or other objective basis before a doctor would perform a surgery. When I contacted the treating physicians, I asked them for any objective data that supported the surgeries, independent of information that came from the mother. To them, the question made no sense. Pediatricians rely almost exclusively on the history given by the child's caretaker. They assume that the caretaker is telling the truth because the caretaker wants the child to get better. Clinical tests, while useful, are seldom as conclusive as we would hope and will almost never by themselves justify a surgery. The history from the caretaker and any objective results or observations are given equal weight and are considered indistinguishable.

In the case of the Williamson children, I discovered that there were almost no test results or objective bases for the surgeries that their mother could not have somehow manipulated. The g-button surgeries, in which Tom and Chrissy had feeding tubes implanted into their stomachs to supply them with formula, had been performed because they were failing to thrive. Although the children had been losing weight and were not growing and developing properly, this problem could have been caused by simple malnutrition rather that some rare metabolic disorder. The vagal nerve stimulator had been implanted in Tom to help control persistent epileptic seizures. But, while a few EEGs had been abnormal and *suggestive* of seizures, no actual seizure had ever been recorded, despite repeated and lengthy tests. Instead, the surgery had been performed due to Williamson's reports that Tom was having up to 10 seizures a day despite taking powerful anti-seizure medications. Dr. Isaac and other physicians confirmed that none of the surgeries appeared to have been medically necessary and that Williamson appeared to have been pushing the doctors to perform them.

Even more experts

In April 2007, once satisfied that the evidence met all the elements, I presented the case to a grand jury, which indicted Williamson for two cases of injury to a child with serious bodily injury and three cases of endangering a child. The injury cases represented two of Tom's surgeries, while the lesser endangering cases covered the broad mistreatment each child had experienced. To give the charges teeth, I alleged the surgical scalpel as a deadly weapon in the injury cases, which seemed appropriate as it was the instrument used to inflict needless suffering on Tom. Sgt. Johnson and I tracked down Williamson, who had moved into a shelter for battered women[5] after losing her children, and arrested her—at a doctor's office, of course.

With the defendant in custody, preparation for trial began in earnest. After obtaining supervisors' approval to hire experts, I recruited two teams composed of some of the foremost experts on child abuse in the nation. The first team represented Texas Children's Hospital and Baylor College of Medicine and consisted of Drs. Reena Isaac and Joan Shook. The second team represented Children's Memorial Hermann Hospital and the University of Texas Medical School and consisted of Drs. Rebecca Girardet, Margaret McNeese, Sheela Lahoti, Kim Cheung, and Christopher Greeley. The teams would operate independently and form their own opinions after reviewing the records. Within the teams, I allowed the physicians to consult with each other, share opinions, and divide the responsibilities however they saw fit.

Each team member received a packet of materials: seven CD-Roms containing all the medical records on Williamson and her children; the completed chronology of events spreadsheet summarizing the contacts; a catalog of the CD-Rom contents; a page of legal definitions; a brief set of instructions, and a list of questions they were to answer. I included on the CD-Roms copies of all the letters and statements Sgt. Johnson had collected and asked my experts to review them and give them whatever weight they wanted in arriving at their opinions. Just like a forensic pathologist trying to determine a cause of death, they would not be confined to looking at the body only; they could consider outside sources of information as well. The goal was to have the experts base their opinions as closely as possible on the same body of evi-

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dence with which the jury would be presented.

In an effort to streamline the process, I gave the experts a six-month deadline and made a proposal to the defense that had worked well in the Austin case: I would give them CD-Rom copies of everything: Medical records, witness statements—*everything*. In return, all I asked was that they stipulate to the authenticity of the records under Texas Rule of Evidence 902. This agreement served two purposes: First, it would save me the trouble of filing the records with the clerk 14 days in advance of trial, and, second, it would satisfy my duty to disclose exculpatory evidence. While the records held no earth-shattering proof of innocence, they contained many facts that could be *argued* to be exculpatory. Perpetrators of MCA are clever, and often they merely exaggerate symptoms that are really present in the child. The Williamson children had undergone countless tests, the vast majority of which were normal, but some of which were either abnormal or inconclusive. Finally, on some occasions, they really *had* been sick. The last thing I wanted was to be accused of hiding evidence. The defense would be stipulating only to authenticity; they reserved the right to object to items within the records.

Going to trial

It took more than a year for the case to come to trial, but on April 4, 2008, we began. I was privileged to have sitting with me Kate Dolan, a veteran prosecutor in our office and one of my colleagues in the Major Fraud division. Kate brought fresh insight and experience to the table and was vital to the case's success. The trial lasted four weeks, and we called over three dozen witnesses. Many were former friends of Laurie who had helped and supported her over the years. These were churchgoing, traditional, stay-at-home mothers, some of whom had special needs children of their own, and all of whom had felt compassion for Williamson. When I contacted them prior to trial, I expected them to be ambivalent, perhaps even tearful about the prosecution, and I tread delicately. When I asked if they were comfortable with the fact that I would be asking the jury to send their friend Laurie to prison, their cool, matter-of-fact responses left an indelible impression upon me. To a woman, every one of these Bible-studying soccer moms firmly and resolutely wanted Williamson locked up—for as long as possible. While their support was a welcome surprise, I was still taken aback at the cold-blooded, dispassionate attitude. Only later would I understand why they showed no mercy for Williamson: They knew firsthand what she had done to the children. And it was awful.

At trial, the evidence proved that for about six years, Laurie Williamson had systematically starved and overmedicated her children in an effort to simulate and induce the symptoms of various illnesses. At the same time, she had failed to teach, train, and nurture her children, while exposing them to countless unnecessary tests and invasive procedures. The result was that Tom, Roger, and Chrissy appeared to be chronically ill and developmentally disabled, unable to perform basic tasks or physically take care of themselves.

The defendant told people that her children were terminally ill, that they had a mitochondrial disorder, and that they were not expected to live beyond their teens. She often said these things in their presence. The motive for the abuse was to gain sympathy, support, and financial contributions from various people and entities, including the government. Williamson, who was unemployed, lived off a combination of child support, disability benefits for her children from the Social Security Administration, and donations from her friends. From 2000 to 2005, she received more than $150,000 from fellow church members (at different churches) and even more than that in donated goods and services. In 2004, with the help of the children's pediatrician, she had even gotten a free trip to Disneyworld, paid for by the Make-a-Wish Foundation. When the investigation began, she was in the process of trying to raise over $300,000 to purchase a new wheelchair-accessible home and van.

The only problem was that none of it was true. The children were not terminally ill, they did not suffer any kind of mitochondrial disorder, nor did they have any of the absurd list of illnesses she recited during her fundraising efforts. This list of ailments, which she had her pediatrician include in the January 2006 letter quoted above, were *possible* diagnoses she had "collected" over the years from various physicians and specialists. She represented them as confirmed when in fact, in many

instances they had actually been ruled out.

Williamson's deceptions did not go completely unnoticed. As far back as 2000, teachers and counselors at Tom's school became concerned that the once bright, playful preschooler became thin, malnourished, and lethargic. They testified that he seemed "zoned-out" and that they were concerned that his mother was overmedicating him, especially after he improved during a stay with his grandparents. During a meeting about Tom, these school officials discussed the possibility of MSBP. They decided to begin weighing Tom on a regular basis and even took the extraordinary step of drafting a letter to two of his physicians expressing their concerns.[6]

Williamson responded in the same way she always did when suspicions arose: by cutting contact with the suspicious party. She transferred Tom to a different school and ultimately withdrew him entirely, saying she was going to home-school him. She repeated this pattern with anyone who questioned her: her ex-husband, her friends and neighbors, her parents and sister, and her fellow church members. And while few doctors ever doubted her, if they did she moved on quickly, using HIPAA as a shield and refusing to sign information releases. In 2002, for instance, after physicians at Texas Children's Hospital became suspicious of possible MSBP, Williamson moved on to specialists at Children's Memorial Hermann Hospital.

Many who had regular contact with the Williamson family, particularly the therapists who saw the children twice a week and measured their progress, noted that Williamson seemed to seek out new equipment and diagnoses for the children and consistently downplayed and minimized their progress. She was adamant that Roger needed a g-button like his siblings, even though he ate normally when allowed to.

For two years, neurologists, geneticists, and other specialists in the UT system puzzled over the Williamson children, baffled by the wide array of symptoms their mother described. In August 2004, Williamson, who had undergone a biopsy, received good news: She did not have mitochondrial disorder herself, and therefore she could not have passed the maternally inherited disease to her children. She continued, nevertheless, to represent the opposite to everyone else.

And she experienced a series of major health crises herself, culminating in some seizures that, despite being diagnosed as psychosomatic, somehow resulted in her almost complete paralysis.[7] It was at this point, in the spring of 2005, that her scheme fell apart. Now that she was pretending to be disabled, the defendant and her children needed 24-hour care. A platoon of supporters began coming into the house to cook and clean for Laurie. With these kind-hearted women feeding the children and making sure Chrissy had plenty of formula in her feeding pump, the Williamson children thrived at long last. Chrissy, a 5-year-old who wore size 18 month or 2T clothing, doubled her weight, gaining 25 pounds in six months.[8] It became impossible to hide the fact that the kids were not disabled and did not need all the expensive medical equipment that Williamson had obtained for them.

The defendant, however, was still trying to raise funds, soliciting TV shows like "Extreme Makeover: Home Edition" and others to build a new house. Donations poured in as generous people offered to pay bills. Concerned that the government might see the donations as income and cut off her disability benefits, the defendant asked one supporter, Paula Pedrick, to open a second, secret bank account in which to hide cash contributions. Alarmed and uncomfortable, Pedrick refused. As the inconsistencies and lies piled up, some of the women began comparing notes. Finally, a few of them, led by Darcy Wall, approached Laurie with a proposal: Laurie should select a "wisdom team" of people she trusted. They would organize help in the home, provide emotional support, and assist in raising and directing funds. All they asked in return was financial transparency and accountability. Laurie refused.

Shortly thereafter, Susan Owen, a nurse for the Williamson family pediatrician and longtime friend of Laurie, visited the house for the first time in several months. Her friendship with Laurie had cooled recently as Susan saw things that disturbed her. Now she was astounded to see Tom and Chrissy, who were supposed to be wheelchair-bound, running and playing. With the help of their physical therapists and without their mother around to hinder and undermine them, all three children had made progress by leaps and bounds.[9] Susan realized at long last that her friend had been lying to her.

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A few weeks later, she and Darcy went to the police and set in motion the string of events that led to the trial.

At the trial, the trial judge allowed the jury to see the big picture, including extraneous offenses and bad acts the defendant had committed against all three children, as proof of her motive to make the children sick.[10] The State's experts testified that the children were the victims of MCA, that the surgeries were medically unnecessary, and that they fit the legal definition of injury to a child. Even the doctors who had prescribed and performed the surgeries acknowledged that they would not have done so knowing then what they knew now. The experts further testified that Williamson had simulated cyanotic episodes in Chrissy by smothering her when she was just six weeks old, and that, essentially, she had used the health care system to torture her children.

With the help of Juan DeAnda, a graphic artist in our IT department, I created a timeline, based on the chronology of events spreadsheet that represented all of the nearly 600 medical contacts for the Williamson family from the birth of each child. The timeline chart vividly illustrated how the contacts increased in frequency as the years passed, especially after Chrissy's birth in 1999 and Laurie and her husband's separation and divorce in 2000. (The couple separated in 1999, and she did not allow him to see the children.) In 2001, when the surgeries in question had taken place, Tom had spent a total of more than two months in the hospital. The hospitalizations and office visits had continued, usually at least one per week, until 2005, when they abruptly tapered off after Laurie Williamson's supposed medical problems began. In March 2006, I noted the removal of the children by CPS with a bold, red line. In the two years since their removal, the children had combined for a grand total of four office visits to doctors, three of them for routine checkups. The point was obvious: Therapeutic separation had worked. The children were completely healthy.

The verdict

At last, after nearly a month of trial, it was time for the jury to decide the case. Following about seven hours of deliberation, the jury convicted Williamson of both cases of injury to a child for the g-button and VNS surgeries performed on Tom. During closing argument on punishment, I appealed to the jurors not to give Williamson a "mother's discount" just because she had harmed her own children. My fellow prosecutor Kate Dolan pointed out that the scars the abuse had left on the outside of the children were nothing compared to the scars it had left on the inside, that they would be dealing with the trauma of the abuse for years to come.

I also reminded jurors of the testimony from the trial that neither MCA, MSBP, nor any of the other acronyms they had heard about represented any kind of mental illness. Many people assume that anyone who harms their own children must be "crazy." But Laurie Williamson had been evaluated multiple times by psychologists and psychiatrists and had been found completely sane and mentally competent. Even her own experts agreed she was rational, intelligent, and free of any psychosis or mental disease. Whether you called it medical child abuse or Munchausen Syndrome by Proxy, the conduct was simply another form of child abuse. Like other MCA perpetrators, Williamson knew exactly what she was doing but chose to engage in the behavior to satisfy her greed.

The jury returned a verdict of 15 years. Undoubtedly some of the women who had trusted and supported Williamson over the years were disappointed in the verdict and thought she deserved more time—15 years seemed a paltry sentence compared to the years she stole from her children. Instead of a time filled with joy and wonder, the Williamson children spent their childhood filled with tubes, wires, needles, and the hopeless, looming prospect of an early death. But I reminded Darcy, Susan, Paula, and the others that, had it not been for their courage, the Williamson children would still be in that house today. And I told myself that with no criminal history, Williamson was parole-eligible—and somewhat sympathetic because she sat in court in a wheelchair.

And with an affirmative deadly weapon finding, Laurie Williamson will have plenty of time in prison to reflect on that fact. ✤

Endnotes

1 "Medical Child Abuse" is a term coined by Dr. Carole Jenny, a noted pediatrician and child abuse expert. Both MCA and PCF are diagnoses made *in children* exclusively, as opposed to MSBP and FDP, which contain psychological components relating to motivation and are sometimes (confusingly) used to diagnose perpetrators.

2 Pseudonyms.

3 Munchausen's Syndrome is defined as the intentional exaggeration, fabrication, or induction of symptoms by a person *in themselves* to receive unnecessary medical treatments.

4 Tex.Pen.Code §1.07(46).

5 While there is no evidence to suggest Williamson was ever a victim of domestic violence, she frequently claimed to be the victim of physical, sexual, and emotional abuse at the hands of various people, including her ex-husband, parents, and sister.

6 The letter was never sent due to school administrators' concerns about liability.

7 Multiple witnesses saw Laurie Williamson using limbs she earlier had claimed were paralyzed, and a lengthy EEG during her hospitalization detected no seizure activity. During one supposed seizure, a friend who was present asked a nurse at Williamson's bedside if she was going to do anything to help her. "She'll breathe when she needs to," replied the nurse and walked away.

8 Chrissy weighed 15 pounds on her second birthday. Experts testified that, with a feeding pump to regulate her nutrition intake 24 hours a day and in the absence of a metabolic disorder, the only explanation for Chrissy's small size and failure to thrive was that her mother was starving her.

9 The therapists testified that the children consistently behaved worse when the defendant was around, and that, rather than excited, the defendant appeared unhappy when they reported the achievement of a goal or milestone, often making the excuse that the child was "having a good day" and minimizing the progress.

10 *Austin v. State*, 222 S.W.3d 801 (Tex.App.—Houston [14th Dist.] 2007); *Reid v. State*, 964 S.W. 2d 723 (Tex.App.—Amarillo 1998).

The state of gambling law in Texas

An update on gambling laws, poker tournaments (both private and charity), and dog-fighting

While every state bordering Texas, as well as Mexico, has casinos within 50 miles of the Texas border, such establishments are illegal here. But district and county attorney's offices in Texas aren't exactly light on cases when it comes to gambling. Criminals continue to attempt more intricate schemes, including the use of technology, to protect themselves and (more importantly) to elude prohibitions in the Penal Code. Here is an overview of what is happening in the gambling arena.

By Markus Kypreos
Former TDCAA Research Attorney, now in Fort Worth

8-Liners, video lottery terminals (VLTs), and slot machines

They may not be as sexy as underground poker rooms, but these cases are much more prevalent around the state. There has only been one Texas Court of Appeals case involving gambling in the last two years, and it concerned 8-liners. In *Pardue v. State*,[1] J.J's Game Room in Lacy Lakeview (near Waco) operated 8-liners, but instead of paying out cash to the players, it distributed gift cards to various stores, such as Wal-Mart, as rewards (a very common practice to circumvent the Penal Code). The owner of J.J.'s argued that under Texas Penal Code §47.02, gift card payouts qualify for the "fuzzy animal" defense to prosecution applicable to "noncash merchandise prizes, toys, or novelties that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or five dollars, whichever the lesser amount." The appeals court rejected her argument, and her conviction was affirmed.

Texas Penal Code §47.01(4) provides a hypertechnical definition of "gambling device" that has been the subject of litigation like this for over a decade. The key to the problem can be found in the exclusions from the definition, which include "any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less."

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Herein lies the difference between, say, illegal 8-liner operations and a video arcade that hands out candy and coffee mugs in exchange for tickets.

There appears to be a belief among game room operators that as long as they don't pay out cash, their operation is perfectly legal—or at least they won't raise suspicions with local authorities. This argument has been struck down several times, most clearly by the Texas Supreme Court in 2003, holding that "devices, known as '8-liners,' that dispense tickets redeemable for cash, even if used only for additional play, or for gift certificates redeemable at local retailers do not, as a matter of law, meet the gambling device exclusion under §47.01(4)(B).[2] *Pardue, One Super Cherry*, and *Hardy* are three good cases to review when presented with an 8-liner case involving a game room.

It's also important to note that the McLennan County Criminal District Attorney's Office charged the owner of J.J.'s with engaging in organized criminal activity as well, arguing that the employees, in combination with the owner, committed or conspired to commit the underlying offense of gambling promotion by handing out gift cards and earning bonuses for the performance of the business. The employees testified that they did not believe their activities were illegal and/or that the law was unclear. The court held that despite receiving instructions from an employer, an employee can still agree to collaborate to commit criminal activities.[3] The lesson here is that should your office ever be presented with an 8-liner case, always check to see if the owner/operator had at least two other employees who committed an overt act to satisfy the organized criminal activity statute.[4]

Eight-liner manufacturers and electronic gaming companies are pushing the limit in Texas. (See Potter County Attorney Scott Brumley's upcoming nuisance case against Aces Wired, a manufacturer and operator of electronic 8-liners). While the Texas Courts of Appeals and the Texas Attorney General seem to be in agreement on why these non-cash payouts are illegal, hundreds of thousands of dollars are spent on lobbying and personal meetings with state and county officials to convince them otherwise. Though operators of gaming rooms are using creative payouts and unconventional prizes to avoid prosecution under a very specific gambling statute, now more than ever, prosecutors will need to use just as much ingenuity in applying the Penal Code to the ever-changing technologies and schemes of these operators. The more 8-liner cases that are affirmed by the Texas courts of appeal concerning non-cash and unconventional payouts, the easier it will be for prosecutors to overcome defendants' "gift card" arguments in the future.

Dog fighting

As Michael Vick brought national attention to the underground sport of dog fighting, it's important to remember the available avenues of prosecution when presented with a dog fighting case. The obvious criminal offense relating to dog fighting falls under Texas Penal Code §42.10 (dog fighting). The punishments for this crime were revamped in the last legislative session. Specifically, 1) attending a dogfight as a spectator or 2) owning or training a dog with the intent that the dog be used in a dog fight changed from Class C misdemeanors to Class A offenses. Causing a dog to fight with another dog, participating in the earning of or operating a facility used for dog fighting, or using or permitting another to use any real estate (building, room, tent, arena, or other property) for a dog fight are now state jail felonies.

But don't forget that the motivation behind dog fighting is money. Organizers of these fights often serve as the "casino," taking wagers on the dogs and violating §47.02 by keeping a gambling place (§47.04) and committing the offense of gambling promotion (§47.03). Also, as described in the 8-liner analysis, should the operator of a dog fighting ring employ at least two others or have partners in organizing the fights, you may be able to prosecute them under the organized criminal activity statute (§71.02).

Poker

It would seem the poker craze has somewhat died down. Attendance at the 2007 World Series of Poker Main Event dropped by 27 percent from 2006.[5] A large part of that decline is believed to be a result of the 2006 federal Unlawful Internet Gaming Enforcement Act (UIGEA) which prohibits the transfer of funds from a financial institution to an Internet gambling site. Many Internet gambling sites offered entry into the World Series of Poker as

prizes; with the enforcement of the UIGEA, these sites saw a decline in online participation, as well as an inability on their part to offer as many entries.

Another consequence of the UIGEA is that it has forced poker players to seek other venues, often in private card rooms or clubs. On its face, a private card game in someone's home does not violate the Texas Penal Code, as long as the participants follow the exceptions listed under §47.02(b)(1-3), namely, that the gambling is in a private place, that no person received any economic benefit other than personal winnings, and except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

If you're a prosecutor in Houston or Dallas or the surrounding areas, you've probably experienced cases with SWAT raids of underground poker rooms. Those games in "back rooms" of public businesses are the easiest to prosecute because the defendant has clearly violated the private place exception; putting a bouncer in front of a curtain and monitoring who goes in and out doesn't make the establishment or room private when the business itself is open to the public.[6] Poker games in private residences are a little more difficult. It's conceivable that million-dollar hands could legally be played in the living room of someone's house, but such a scenario is unlikely. The higher the stakes, the more people want a piece of the action, whether it's for organizing the game, hosting, or promoting.

Poker in restaurants and bars

The Texas Attorney General has stated that as long as participants do not risk money or anything of value to try to win any prize, the game is not illegal under §47.02, which is how bars and restaurants hold legal tournaments.[7] Texas Penal Code §47.02(a)(3) states that a person commits an offense if he plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

On more than one occasion, I have been confronted, while playing poker, with the question of what purpose law enforcement serves when they crack down on high-stakes poker games.

On more than one occasion, I have been confronted, while playing poker, with the question of what purpose law enforcement serves when they crack down on high-stakes poker games. Whether gambling should be legalized in Texas is a separate argument from why gambling should be regulated. Regulation of gambling can be best supported by the necessity of the recent number of card room raids throughout Texas. Converting a home into a card room and inviting strangers to play is asking for trouble, especially when large amounts of money are involved. Further, those who operate the card rooms frequently charge or take a percentage of each hand as a fee for their hospitality, a clear violation of the §47.02(b) exception. A quick search of news stories relating to crime in poker rooms in Texas over the last few years shows that assaults, murders, and robberies related to the games themselves are all too common occurrences among these underground poker rooms.[8] Consider this a counterargument for the defendant who argues that the police are wasting time and taxpayer money by raiding their home, or 8-liner game rooms for that matter, to break up a friendly game that happens to have tens or hundreds of thousands of dollars lying around in one place. Odds are the next time a person breaks down the defendant's door and is armed with a shotgun, he'll wish he was just being arrested.

Charity poker

The Charitable Raffling Enabling Act in Chapter 2002 of the Texas Occupations Code will rarely, if ever, apply to Texas Hold 'Em fundraisers. Often, the business or association holding the event does not meet the requirements of a qualified organization (non-profits, fire departments, emergency medical services, and education). Even if the organization meets the stipulated requirements, the charity exception requires that a raffle be conducted to award prizes. Because a raffle is defined as "the award of one or more prizes by chance at a single occasion

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among a single pool or group of persons who have paid or promoted a thing of value for a ticket that represents a chance to win a prize,"[9] players are prohibited from receiving prizes based on how far they advance or what place they finish in a poker tournament. Additionally, the code prohibits cash as a prize. The Attorney General has also made it clear that even nonprofit organizations that sponsor a "poker run" violate gambling statutes.[10] Therefore, unless the raffle results are completely separate from the outcome of the poker tournament—begging the question, why play at all?—charities and other groups should not rely on Texas Hold 'Em tournaments to raise funds.

Online gambling

As mentioned above, the UIGEA has significantly reduced the number of online casinos and available forums to gamble. Putting the UIEGA aside, Texas law still prohibits online wagering for a variety of reasons. First, sports wagering is clearly illegal under §47.02(a)(1), making a bet on the partial or final result of a game, contest, or the performance of a participant in a game or contest illegal. In addition, all sportsbooks charge a certain percentage for every wager made (commonly known as vig, juice, the take, the rake, commission, etc.). When the sportsbook takes that percentage of the wager, it receives an economic benefit, thus negating the defense under §47.02(b)(2).

A quick note on office pools is appropriate here because the same analysis applies: Technically, all office pools are illegal in Texas because you're wagering on the final result of a game or contest, a clear violation of §47.02(a)(1). The real issue is whether the exception applies, specifically whether your office is a private place. Office pools that don't involve the outcome of a game or contest are usually not illegal under the statute. For instance, wagering on how many smoke breaks a coworker in your office will take in the next four hours is perfectly legal and at times, entertaining. However, unless you shut your doors to the public in March for college basketball, April for the Masters, May when TDCAA Director of Operations John Brown races in the Congress Avenue Mile, June for the U.S. Open, fall for college football, and January for the Super Bowl, you will almost certainly run afoul of Texas gambling law.

When placing a bet online, a defendant may argue that the bet itself is placed in the confines of his home—a private place—and thus the exceptions under §47.02(b)(1-3) apply. Attorney General Opinion No. DM-344 addresses this argument directly and states:

> "Just as a private residence would not be a 'private place' for purposes of the defense if the public has access to gambling there, neither would it be consistent with the defense here if, for example, anyone who knew the proper 'telephone number' and had a computer with a modem could join the games."

The opinion also notes that the physical presence of bettors at a game is not required. Most online poker sites operate in a similar way. Players log in and join any table they wish. Tables are open to the public as long as participants have registered and deposited money to gamble. Thus, using the analysis above, the privacy defense under §47.02 would not apply, and players violate the gambling statute by participating in online poker games.

Perhaps in an attempt to circumvent this law, most sites offer the opportunity to establish private rooms in which the creator can control who may participate in a game. While this act might be sufficient to establish privacy under §47.02(b)(1), it also defeats the purpose for many poker players simply looking for a game, those trying to make money in tournaments, or those trying improve their skill in bigger games. Private rooms, as well as those open to the public, also usually cost each entrant a percentage of each hand raked or an entry fee, thus creating an economic benefit other than personal winnings and violating §47.02(b)(2).

Conclusion

At the end of the day, gambling cases, while exciting, are not as easy to prosecute as they may initially seem. Prosecutors must overcome defendants' technology and creativity using a somewhat archaic and, at times, unhelpful Penal Code statute. Further, juries may be less than enthusiastic about convicting an operator of a game room or card room when, in their minds, no one was injured and no victims were involved. Of course, these operators are violating the law and making thousands, if not hundreds of thousands, of dollars off of their own illegal enterprise. It's only a matter of time before this criminal activity invites myriad related crimes such as assaults, robberies, and murders, none of which are "victimless."

Endnotes

1 2008 Tex. App. LEXIS 2421 (Tex.App.—Texarkana, 2008).

2 *State v. One Super Cherry Master 8-Liner Machine*, 102 S.W.3d 132 (Tex. 2003)(citing *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003)).

3 *Pardue* at 26.

4 Tex. Penal Code §71.02.

5 www.worldseriesofpoker.com.

6 See A.G. Opinion No. DM-112 explaining that "private place" as defined by §47.01(7) is a place "to which the public does not have access." See also A.G. Opinion No. DM-344 (1995) (holding that whether a place is private for such purposes has been determined by the scope of access by others. Citing *Comer v. State*, 10 S.W. 106 (1889) (private room at inn); *Heath v. State*, 276 S.W.2d 534 (Tex. Crim. App. 1955)). See also A.G. Opinion No. H-489 (1975) (whether the quarters of clubs or other organizations are "private places" for purposes of the gambling laws depends on whether the public in fact does not have access).

7 A.G. Opinion No. GA-0385 (2005).

8 Twenty-two trips to Las Vegas and counting, and I've never been assaulted, shot at, or robbed in a casino poker room … coincidence?

9 Tex. Occupations Code §2002.002(1).

10 A.G. Opinion No. GA-0385 (2005).

Questions

1a Barney Fuller found happiness with a warm gun. He was so fond of shooting on his rural Houston County property that his pastime repeatedly peeved his neighbors, including the Copeland family. After Barney shot the Copeland's electric transformer to smithereens, the ensuing dispute led the Copelands to seek terroristic threat charges against Barney. When the court notified Fuller about the case, the hothead first sought solace with firewater, then with firepower. Sporting several weapons including his AR-15 rifle, Fuller fed about 60 rounds into the side of the Copeland home, changing his magazine three times. After entering the house, Barney hunted down the Copeland adults and killed them. The 9-1-1 operator heard "Party's over, bitch," then a popping sound, right after Mrs. Copeland called. Next, Barney sought to kill the two Copeland kids, but they survived. Barney ultimately surrendered to a SWAT team later that day.

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

After killing his neighbors but before turning himself in, Barney called his papa a few times for advice. They discussed the need to contact a member of the family, Houston criminal defense attorney Steven "Rocket" Rosen. Unbeknownst to Barney, papa went ahead and called to enlist Rocket Rosen's aid. About the same time as Barney's arrest, Rocket Rosen faxed the sheriff notifying him that Rocket represented Barney; the fax admonished the authorities not to interview Barney without Rocket present.

In the meantime, a Texas Ranger interviewed Barney at the sheriff's office, videotaping the statement and obtaining the appropriate waivers. However, neither the Ranger nor Barney heard a peep about Rocket Rosen's faxed instructions until after completion of the taped statement. Similarly, Rocket Rosen had no conversation with Barney until after the caged bird had sung his confessional cantata.

Did Rocket Rosen's faxed instructions undermine the validity of Barney's waivers and taped confession?

1b Returning to Fuller's capital case, on the morning of his trial, he decided to plead guilty to the jury, sometimes known as a "slow plea." After admonishments, the trial court accepted his plea and found him guilty of capital murder. The judge instructed the jury that it no longer needed to resolve the issue of guilt, only that of punishment. After hearing substantial evidence over nine days and following the submission of punishment instructions, the jury returned a death sentence, but no verdict form ever formalized Fuller's guilt. Was this error?

2 Anissa, Larry Hayes' on-again-off-again girlfriend for more than a decade, again moved to her mother's home to get away from Hayes. Anissa opened the door one day to have Hayes greet her with a fist to the face. She luckily got back inside and locked the door, but she peered out to see her off-again boyfriend heaving a brick through her car window.

He was charged with felony assault of a family member, and the indictment contained a prior domestic violence enhancement conviction and two prior felonies. Looking at a habitual punishment range while sitting in jail, Hayes wrote Anissa telling her how sorry he was and promising to change his abusive ways "for real this time." Anissa testified against Larry. At the close of the evidence, the Harris County trial judge submitted a charge under an inapplicable section of the Family Code that permitted Anissa to be considered a member of Larry's household based upon her previously living with Larry. (Family Code §71.005, the correct provision, defines "household" as a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.) Neither side requested the lesser-included offense of straight assault. After conviction, the trial judge assessed the minimum of 25 years' confinement for Hayes' conduct.

On direct appeal, Hayes obtained a legal sufficiency reversal/acquittal because the evidence did not prove that Anissa was a member of his household at the time of the offense. On PDR, the State requested that the court revisit its prior decision in *Collier v. State*, 999 S.W.2d 779 (Tex. Crim. App. 1999). *Collier* narrowly held that an

appellate court may reform a sentence to reflect a lesser offense only when insufficient evidence supports the greater offense and the jury received an instruction on the lesser charge. The State's PDR sought to expand this doctrine to include similar reformation of cases where the lesser-included instruction is supported by the evidence but was not requested. Does the court bite on this request?

3 Officers observed Darryl Moseley driving a blue Neon that had been reported missing. Shortly thereafter, Moseley parked the car and fled on foot. After the officers tracked him down, returned to the car, and arrested him on an unrelated warrant, they popped the car's trunk and discovered a woman's body. Officers took Moseley to the homicide division of the San Antonio police department for interrogation. A pinhole camera captured everything that could be seen or heard in the interrogation room on DVD. Signage in the room admonished occupants of the presence of recording devices.

While in the room, officers questioned Moseley in intervals; sometimes they left him alone in the room, and he was also allowed to make phone calls while there. Moseley eventually confessed that he had killed the woman found in the trunk. Also, during his telephone conversations, he admitted the offense, attempted to elicit alibi assistance, and acknowledged the possibility that he was being recorded. The DVD contained Moseley's side of these conversations but not the comments of those to whom he spoke. After leaving the station, Moseley also bragged to reporters about the killing.

In a pretrial suppression motion, Moseley unsuccessfully sought to thwart the State's admission of the DVD into evidence. Claiming that the recording of his telephone conversations was illegal, Moseley argued that the DVD constituted an interception of a wire communication in violation of Penal Code §16.02 and was rendered inadmissible under Code of Criminal Procedure art. 18.20, §2(a)(1). Did the DVD contain an illegally intercepted wire communication?

4 While patrolling in Conroe at 4:00 a.m., Officer Okland drove down a narrow, somewhat secluded, dead-end street. Pacific Avenue was bordered by two houses on one side and railroad tracks on the other and hemmed in by high-grass and trees at the street's end. When turning into the street, Okland saw a green Ford pickup parked at the end of the road; its dome light exposed the presence of two seated passengers. As the officer pulled up, he activated his patrol car's spotlight for his own safety and to let the truck's occupants know it was a police officer behind them. He also switched his in-car camera on, but Okland did not turn on his overhead emergency lights. When pulling behind the vehicle, the officer—at a minimum—limited its ease of departure.

Wanting to see what the people were doing in the parked truck in the middle of the night, Officer Okland shouldered his long flashlight and advanced on the truck. He saw some movement among the occupants. The officer directed his light over the driver's side and inquired, "What are you doing here?" Driver Candelario Garcia-Cantu hopped out, met the officer in the roadway, and explained that he lived two blocks away and was waiting for a friend to come out of one of the homes (which happened shortly thereafter). Additional facts apparently led the officer to ultimately arrest Garcia-Cantu for two misdemeanors.

After hearing these facts and questioning whether the area was actually one known for high crime, the trial court granted the defense motion to suppress without entering any written findings of fact. Was the trial judge's ruling correct? Did this stop necessitate a reasonable suspicion or merely a consensual encounter not invoking Fourth Amendment protections?

5 During the wee hours of the morning, a Houston-area Denny's was hopping with those seeking late-night grub. Kimberly Allen and her girlfriends created a disturbance by being loud, raucous, and profane. When a waitress asked them to leave and tried to expedite their departure by clearing the table, some food spilled on Kimberly, and she kindly responded by throwing a beverage at the server. These goings-on caused another patron to tap 9-1-1 hurriedly into his phone. Next, as Allen's bunch sought to pay their tabs, they again found discontent, this time with the cashier who mentioned something about the ladies having over-imbibed alcohol. Still exhibiting delicate sensibilities,

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Allen hurled abusive language at the fellow. Moments later, when a woman named Jackie left the smoking section to stand in line to pay, she did not learn from the cashier's plight and also shared her insight, letting those present know that she was not impressed by Allen's antics. True to her own sense of style, Allen bellowed that she "sure the f--- ain't trying to impress you … [and that Kimberly] ought to walk over there and slap the f--- out of [Jackie]." It only gets better. Jackie spread her arms out and announced, "Then slap me!" Unable to resist, Allen whacked Jackie across the face, tearing a metal ring out of Jackie's pierced eyebrow.

Charged with assault, Kimberly testified that she struck Jackie, but she relied on self-defense and consent to excuse her conduct. The jury received instructions on both theories, but the charge failed to correctly inform the jury that it must acquit should it have a reasonable doubt with respect to the issue of consent. Because Kimberly's attorney did not object to this omission, did the erroneous charge rise to a level of egregious harm requiring reversal?

6 Two eyewitnesses observed Alberto Cantu's truck racing a red Camaro lickety-split down a Harlingen roadway. Officers later found Cantu still behind the wheel after he had lost control of his truck and embedded it in a chain-link fence. Cantu posted bond the next morning on this charge, his second DWI, but he did not face formal charges for 16 months because the Harlingen police apparently lost the file. Two months after the charges were filed, Cantu didn't seek a speedy trial but instead an outright dismissal on speedy trial grounds.

Hearing his speedy trial motion, the trial court quickly found the first two *Barker v. Wingo* prongs favored Cantu—that is, the length of the delay and the reason for the delay. See *Barker v. Wingo*, 407 U.S.514 (1972). However, the final two factors—assertion of the right and prejudice to the accused—did not, so the judge denied the dismissal request.

Regarding Cantu's assertion of his speedy trial rights, the judge discounted the defense attorney's account of calling the DA's office. Also, when informed of an impending DWI-law change during the period of the delay, Cantu intentionally chose not to prod the State into filing charges before the law went into effect. As for the prejudice prong, Cantu testified about having to contact his bondsman each week and suffering anxiety and even ulcers, but the trial court noted that the ulcers could have actually been alcohol-induced. The trial judge also discounted Cantu's claims that finding the missing Camaro driver had become harder over time because Cantu deliberately chose not to look for him initially and police had already identified two independent eyewitnesses. After the trial court denied Cantu's dismissal, he pled guilty and appealed. Will the trial court's ruling on speedy trial hold up in spite of the lengthy delay induced by the lost file?

7 Attorney James Vasilas signed and filed an expunction petition containing false information on a client's behalf. Collin County charged Vasilas with making, presenting, and using a government record with knowledge of its falsity pursuant to Penal Code §37.10. Vasilas sought to quash the indictment and claimed that §37.10 was *in pari materia* with Rule 13 of the Rules of Civil Procedure. (Rule 13 authorizes contempt as a sanction for attorneys filing false pleadings.) Vasilas argued that Rule 13 trumped the penal statute because it was devised to punish his specific misconduct. He also claimed that civil suit pleadings are not "governmental records" defined under §37.01(2)(A). Judge Sandoval of Collin County quashed the indictment without filing any findings or conclusions.

The Dallas Court of Appeals initially poured out the State appeal by holding that the expunction petition was not a governmental record under Penal Code §37. On discretionary review of the what-constitutes-a-government-record issue, the Court of Criminal Appeals sent the case back to the intermediate court after readily concluding that the legislature's definition of a governmental record unambiguously included a court record such as a civil petition for expunction.

Still in appellate orbit, the Dallas court on remand applied the *in pari materia* doctrine and this time held that the trial judge erred by quashing the indictment because the two provisions do not run afoul of this legal principle. On his second helping of discretionary review, Vasilas contested the lower court's application of this legal doctrine. Will the prosecution of this attorney

ever go forward in the trial court?

8 Osvaldo Lopez decided to testify during his trial on two cocaine delivery charges. The State sought to impeach Lopez with a prior felony conviction and two extraneous drug-possession offenses that had been considered in the prior felony plea pursuant to Penal Code §12.45. The State justified this impeachment with the extraneous 12.45 offenses because the circumstances surrounding them—the defendant's admission of guilt during the punishment phase of another case—essentially made them prior convictions for impeachment purposes under rule 609 of the Rules of Evidence. Correct?

9 Charged with child-sex offenses in El Paso, David Morales asked for a jury trial. The jury venire included a local assistant district attorney. During voir dire, the prosecutor maintained that she could be fair and impartial and that she had no involvement in Morales' case. Defense counsel did not strike this prosecutor, and she served as the presiding juror, convicting Morales and sentencing him to penitentiary time.

In their motion for new trial, both defense counsel filed roll-over affidavits and also testified that they had been ineffective in leaving the prosecutor on the panel. They admitted not having read her questionnaire, which specified significant family law enforcement ties and prior instances of victimization. Defense counsel said they assumed that she would be automatically struck because of her employment status. They also denied that the decision to retain the prosecutor on the panel had been a strategic one.

The State rebutted this testimony with that of the elected trial judge. In a mid-deliberation conversation, the lead defense attorney told the judge that they had made a conscious decision to leave the prosecutor on the panel to remove another juror whom they felt it was more important to strike. Also, the judge recalled the attorney explaining that he believed that this prosecutor was as fair as anyone they had ever dealt with, so the defense was comfortable with her presence on the jury. Recalled to the stand after this revelation, lead counsel contended that he might have been less candid with the judge because he wasn't actually testifying.

On appeal, Morales claimed that the trial court should have granted his challenge for-cause (unpreserved by the failure to use a peremptory strike) because the assistant district attorney was impliedly biased as a matter of law. What outcome is appropriate?

10 Incarcerated when his indecency-with-a-child indictment issued, David Maldonado requested a court-appointed attorney, and the trial judge complied. Within days, a Nueces County detective called the jail and arranged for Maldonado to be brought to a common jail area. The officer, completely unaware of the indictment and of the appointment of counsel, arrived shortly thereafter to visit Maldonado. When the two met, the detective introduced himself and his partner to Maldonado, who instantly handed over a folded letter and exclaimed that he had been waiting to talk to somebody. He had voluntarily written the letter before meeting with the detective. The officer asked what the letter was, and Maldonado replied that it explained "what happened that night." The officer asked if Maldonado wanted to talk to him about what happened, and Maldonado said yes. The group departed for the police station where, after additional warnings and waivers, Maldonado gave a videotaped statement. The day after giving this confession, Maldonado met with his attorney for the first time.

During a pretrial suppression hearing, Maldonado contended that the officer violated his Sixth Amendment right to counsel; the trial judge agreed. The State appeal that ensued focused on when a represented suspect may communicate with police in his counsel's absence and whether Maldonado's custodial behavior constituted an initiation of communication with the police. Under these facts, who initiated communication? And will the State's appeal successfully return the case to the trial court for further prosecution?

Answers

1a No. *Fuller v. State*, AP-74980, 2008 WL 1883441, ___ S.W.3d ___ (Tex. Crim. App. April 30, 2008) (Price) (8:1:0). Without Fuller's knowledge, Rocket Rosen could not swoop in to intervene on Fuller's behalf. Officials are under no duty to cease an interview based solely upon an attorney's request; only the accused may invoke the right to counsel. Furthermore, Fuller's lack of knowledge of the

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Rocket's faxed instructions did not undermine the voluntary nature of his videotaped statement. Events that happen outside a defendant's knowledge have no bearing on his capacity to comprehend and knowingly waive his rights. See *Moran v. Burbine*, 475 U.S. 412 (1986).

Judge Meyers concurred, believing that Fuller waived consideration of his challenge to the trial court's pretrial confession ruling by pleading guilty before the jury.

1b No. *Fuller v. State*, AP-74980, 2008 WL 1883441, ___ S.W.3d ___ (Tex. Crim. App. April 30, 2008) (Price) (9:0). Article 1.13's jury-waiver language does not apply to a death case based on the statute's express exemption regarding capital cases. Tex. Code Crim. Proc. art. 1.13. Nevertheless, jury waiver may still occur in the guilt phase. A defendant's guilty plea before a jury acts as the functional equivalent of a jury verdict on guilt, whether in a capital or noncapital scenario. Hence, there is no requirement that the jury return a formal verdict of guilt—the guilty plea in front of the jury is itself a conviction and conclusive.

2 No, although the various opinions are rather biting. *Hayes v. State*, PD-1923-06, 2008 WL 1883463, ___ S.W.3d ___ (April 30, 2008) (Hervey) (5:1:3). Hayes gets his windfall acquittal. Writing for the majority, Judge Hervey belittles the State's attempt to revisit *Collier* saying that the only changed circumstances involve the composition of the court. Judge Johnson's flowery concurrence describes the sort of rationale behind the original *Collier* decision. She opines that wise prosecutors allege only what the evidence supports, and they make a conscious gamble when they choose not to request lesser offenses in spite of weak evidence. Take a look at this quote:

> The prosecutor who gambles that the jury will convict on weak evidence and so does not hedge the bet with a lesser-included-offense instruction has chosen a path that may indeed cause a defendant who is guilty of some crime—one of the lesser-included offenses—to go free. If the prosecutor chooses to cling to the wreckage of that particular *Titanic* instead of choosing the lifeboat of a lesser-included offense, then he or she must also accept the consequences that follow.

In her dissent, Judge Cochran describes how the court assumes prosecutors partake of Machiavellian overreaching strategies and are constantly playing a legalistic game of "chicken." While not using the word, she clearly believes this theory is nothing short of hogwash. Judge Cochran points out that citizens suffer—as here—when the State was not prescient enough to anticipate a successful appellate legal-sufficiency challenge. The total-acquittal windfall defendants obtain in these instances do not comport with common sense or justice. Other states have adopted the "direct remand rule" which is logically grounded on the fact that guilt of a true lesser-included offense was implicitly found in the jury's verdict on the greater offense. Judge Cochran thinks that the court should do so as well and end this type of disservice to its citizens.

Presiding Judge Keller also dissents, reciting well-known caselaw holding that a jury's verdict on a greater offense necessarily constitutes a finding on every essential element of a lesser-included offense. Judge Womack dissented without opinion.

3 No. The court unanimously held that this is simply not a phone-tapping case. *Moseley v. State*, No. PD-479-07, ___ S.W.3d ___, 2008 WL 1883450 (Tex. Crim. App. April 30, 2008) (Johnson) (9:0). The DVD camera captured and recorded Moseley's statements that were spoken into the telephone receiver and heard in the area surrounding him without electronic assistance. Hence, no wire communication interception occurred. Overhearing and recording one end of a phone conversation without actual interception of the communication passing through the wires does not fall within the terms "intercept" or "wire communication." The trial court properly admitted the DVD, so the murder conviction was affirmed. Can you hear Moseley now?

4 On these specific facts, a stop occurred. The court upheld the trial judge's decision to suppress (and overturned the Beaumont court's reversal). *Garcia-Cantu v. State*, Nos. PD-0936/0937-07, ___ S.W.3d ___, 2008 WL 1958956 (Tex. Crim. App. May 7, 2008) (Cochran) (6:3). This decision's outcome hinges on the application of the appropriate standards of review. The totality of the suppression evi-

dence, when considered in the light most favorable to the ruling, revealed that Officer Okland boxed in Garcia-Cantu's truck with his patrol car and spotlighted the truck as soon as the officer pulled up; additionally, the officer approached the truck in an authoritative manner while inquiring what was going on. Based on this scenario, Judge Cochran ruled that the trial judge did not err in concluding that a reasonable person would not have felt free to terminate this police-initiated contact.

At the intermediate appellate level, the Beaumont court had reversed the trial judge by focusing on the officer's spotlighting Garcia-Cantu's truck and holding that this detail alone did not transform a citizen encounter involving an already stopped vehicle into a detention. However, the lower court's conclusion ignored application of the totality-of-the-circumstances test. The devil is in the diverse details of any police-citizen contact because there are myriad ways that these scenarios occur. Looking just at the spotlighting aspect ignored the applicable totality-of-the-circumstances standard.

Another standard significantly undermined the State's success in this case. Because the trial court ruled without entering findings of fact, the standard of review opened the door to consideration of implied findings supporting the court's ruling on appeal. It is unclear whether this suppression hearing took place post-*Cullen*, but findings might have saved the day, and the outcome of the decision highlights the need for obtaining solid findings of fact to succeed in a state appeal. See *Cullen v. State*, 195 S.W.3d 696 (Tex. Crim. App. 2006) (requiring trial courts to enter findings when requested after June 28, 2006). Judge Cochran pointed out that the State did not quarrel with the law or its application but simply had a different view of the facts and inferences drawn from the record. Yet, without findings nailing down the facts, the court was required to consider contested facts in light of the suppression ruling. These findings and inferences included, for instance, that the appellant's vehicle was legally parked, that the patrol car actually blocked the truck, that Officer Okland's manner walking toward the truck was authoritative, and that the officer used a commanding voice and demeanor that brooked no disagreement. Specific findings could have significantly changed this outcome.

Despite the State-appeal loss, the opinion includes some useful language and research. For instance, consider Judge Cochran's discussion of officer demeanor. When delving into the distinction between an officer's conduct that implies an air of "He Who Must Be Obeyed" versus mere social interaction, she opines that an officer may be as aggressive as the pushy Fuller-brush man, an insistent street panhandler, or even the grimacing street-corner car-window squeegee guy so long as the demeanor does not involve official coercion. The mere approach and questioning of someone does not constitute a seizure unless it includes a show of authority when the officer's conduct and the attendant circumstances are considered objectively. So an officer's insistent yet friendly or neutral inquiry does *not* convert an encounter into a detention in a totality-of-the-circumstances analysis, but an official command *would* do so.

Also note the videotape's impact: Officer Okland's report described the truck as illegally parked on the wrong side of the road. Instead, the in-car video showed the car on the right side of the street. The backup officer could not make up his mind; he said it was legally parked on the right side but illegal because it was too far from the curb. The court assumes the truck was legally parked based on the video. Also, the court opines that the videotape supported the trial judge's implied finding that the officer had used a demanding tone of voice. Judge Cochran's assessment of the video repeatedly bolstered her implied findings that support of the trial court's suppression ruling.

Judge Keller dissented and disagreed with, among other things, the majority's reliance on the video to back up implied findings. Judge Keasler also dissented in writing. He suggested that Garcia-Cantu was "boxed-in" by his choice of a narrow thoroughfare, not the officer's action. But see *Bostick v. Florida*, 501 U.S. 429 (1991) (finding a bus's cramped confines was simply a factor, not dispositive, in evaluating whether contact constituted an encounter versus a detention).

5 No reversal required, even though the issue of consent was hotly contested. Although nothing in the remainder of the jury charge ameliorated the deficient consent

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instruction, the court noted that the prosecutor's argument correctly pointed out that the jury should find that Allen did not reasonably believe that Jackie consented. Viewing the record as a whole, Judge Price found it implausible that Jackie's bravado meant that she literally wanted to be slapped. Instead, Jackie's statement was more of a backhanded warning of potentially dire consequences to the threatener. Allen's own testimony revealed that she did not truly believe that Jackie harbored masochistic desires and wanted to be walloped. Even a properly instructed jury would not have found that Jackie consented to the assault or that Allen reasonably believed the same. Therefore, in spite of the charge error involving the most contested trial issue, the court found that Allen did not suffer actual egregious harm warranting reversal. The First Court's reversal on that basis was overturned. *Allen v. State*, PD-468-07, 2008 WL 1958939, ___ S.W.3d ___ (Tex. Crim. App. May 7, 2008) (Price) (9:0).

6 Yes—no speedy trial violation found. The Court of Criminal Appeals reversed the Corpus court's reversal of the trial judge's ruling because the evidence supported the trial judge's finding that Cantu did not really want a speedy trial, only a dismissal of his second DWI. Cantu's complete failure to assert his speedy trial right strongly undermined his claim that a depravation of this right occurred. Cantu never asked for a speedy trial, only an outright dismissal. And his silence during the entire pre-indictment period reflected a lack of personal prejudice. Unlike other speedy trial cases that exposed substantial prejudice resulting from the delay, Cantu reported experiencing only minor inconveniences. The court affirmed the trial judge's conclusion that Cantu was not denied his Sixth Amendment right to speedy trial. *Cantu v. State*, PD-1176-07, 2008 WL 1958983, ___ S.W.3d ___ (Tex. Crim. App. May 7, 2008) (Cochran) (9:0).

7 Yes. The Court of Criminal Appeals affirmed the Dallas Court's second opinion but for a different reason. *In pari materia* does not even apply when comparing a statutory provision to a court-made rule such as Rule 13. Being a doctrine of statutory interpretation, *in pari materia* seeks to discern legislative intent and harmonize different legal provisions passed by the same governmental body. The justification for applying this doctrine fails when juxtaposing provisions from two diverse legal sources. Indeed, the maxim about comparing apples and oranges applies to Vasilas' erroneous attempt to invoke *in pari materia* to undermine his prosecution. Thus, the court of appeals correctly determined that the trial court erred in granting the motion to quash, albeit for a different reason. *State v. Vasilas*, PD-1473-06, 2008 WL 1958986, ___ S.W.3d ___ (Tex. Crim. App. May 7, 2008) (Holcomb) (8:0).

8 Nope, no impeachment allowed with 12.45'd cases because they are not prior "convictions." *Lopez v. State*, PL-1124/1125-07, 2008 WL 2081616, ___ S.W.3d ___ (Tex. Crim. App. May 14, 2008) (Keller) (9:0). Considering the confluence of the two provisions (that is, §12.45 and Rule 609) and the plain language of each, Presiding Judge Keller holds that, in a general sense, for there to be a conviction, there must ordinarily be a judgment of guilt for the crime in question. The court found the State's claim even less meritorious than prior cases that sought to utilize a deferred adjudication for impeachment purposes under Rule 609. Deferred cases are not considered convictions even though their proceedings clearly involve a trial court's acceptance of a guilty plea.

Also, Judge Keller noted that the State had a choice which, unfortunately, assumes that the same county is making each decision. According to this perceived choice, if the State wants to use an extraneous crime as a prior conviction in the future, the State need not consent to a §12.45 procedure and, instead, should seek a conviction on that case.

9 The El Paso Court of Appeals reversal was reversed. Code of Criminal Procedure article 35.16 permits challenges for-cause if a potential juror has a bias or prejudice in favor of or against the defendant. Because no showing of actual bias occurred, the only argument supporting bias stemmed from the prosecutor's employment. While article 35.16 covers some forms of implied bias (i.e., relationship within the third degree of consanguinity or affinity to any prosecutor in the case), this provision does not include an assistant district attorney who has not been personally involved in the case. From a purely statutory view, the trial judge did not abuse his dis-

cretion by denying the article 35.16 challenge for-cause. However, the court contemplated that the Sixth Amendment promise of an impartial jury might warrant such a challenge in spite of article 35.16. The El Paso court relied completely on the doctrine of implied bias, finding that the prosecutor's employment status automatically rendered the jury impartial. Consideration of Justice O'Connor's comments in her concurrence in *Smith v. Phillips*, 455 U.S. 209 (1982) weighed heavily in the implied-bias analysis. In that case, Justice O'Connor found implied bias resulted from a prospective juror's subsequent application to the district attorney's office for employment as an investigator, especially because defense counsel did not learn of this fact until the trial ended.

In spite of delving into an enlightening discussion of the implied bias doctrine, toward the end of the opinion, Judge Price put the brakes on deciding whether the Sixth Amendment embraces this doctrine. Instead, the court wrote that, even assuming that the implied bias doctrine required exclusion from jury service of a prospective juror who is a prosecution employee, defense counsel was also entitled to make a legitimate tactical decision not to exercise a peremptory challenge. Trial counsel may make difficult choices between exercising a scarce peremptory strike to preserve a challenge issue versus striking another veniremember to obtain a perceived advantage at trial. Such tactical decisions do not violate the Sixth Amendment right to effective assistance of counsel. Therefore, the Court of Criminal Appeals overturned the lower court's reversal of this case, and the cause was remanded to consider other related, yet unaddressed, issues. *Morales v. State*, PD-0462-07, 2008 WL 2081617, ___ S.W.3d ___ (Tex. Crim. App. May 14, 2008) (Price) (8:1:0).

10 Maldonado initiated communications with the officer and, thus, the Court of Criminal Appeals affirmed the Thirteenth Court's reversal of the trial court's suppression ruling, reinstating prosecution. *State v. Maldonado*, PD-1552-07, 2008 WL 2261776, ___ S.W.3d ___ (Tex. Crim. App. June 4, 2008) (Keller) (5:3:1). Because the issues before the Court involved mixed fact/law questions not dependent upon demeanor, *de novo* review applied. Relying heavily on several Supreme Court cases and their progeny, Presiding Judge Keller centered her consideration on *Patterson v. Illinois*, 487 U.S. 285 (1988) which found that law enforcement officers could validly initiate communication and seek waiver of counsel after a defendant's Sixth Amendment right to counsel had attached when the defendant had not invoked his right to counsel and was not yet represented, either. Yet *Patterson* has also led to the decision that the Sixth Amendment does not permit police-initiated interrogation of an indicted accused who has retained or been appointed defense counsel—absent notice to the defense attorney. Steering between the proverbial Charybdis and Scylla (monsters on either side of a waterway Ulysses encountered on his odyssey), an existing Sixth Amendment attorney-client relationship does not prevent a defendant's unilaterally waiving his right to counsel so long as he initiated the communication because nothing in the Sixth Amendment prevents a represented suspect from choosing, on his own, to speak to authorities without his attorney's presence.

With this backdrop, Judge Keller's analysis also considered the "deliberately elicited" test arising out of *Massiah v. United States*, 377 U. S. 201 (1964), to conclude that a Sixth Amendment violation arises where police took some action, beyond mere listening, designed to deliberately elicit incriminating remarks. Applying these concepts to the instant facts, the court questioned whether the detective engaged in conduct designed to elicit incriminating information by simply introducing himself. Although it is true that the detective appeared on the verge of violating the Sixth Amendment, he did not have the opportunity to do so because Maldonado handed him the letter and essentially beat him to the punch. Because Maldonado was entitled to unilaterally waive his Sixth Amendment right to counsel, his subsequent confession was not tainted.

Judge Holcomb's dissent imbues the detective with imputed knowledge of Maldonado's invocation of his right to counsel and characterized the detective's affirmative steps of having Maldonado brought out into an open jail area as contrary to Maldonado's Sixth Amendment rights because it set up an encounter outside his attorney's presence. ✤

New rule from the CCA on DP and other filings

To ensure that all appropriate state and federal courts, officials, and parties shall have an adequate opportunity to review and resolve legal and factual issues concerning an impending execution, the Court of Criminal Appeals has adopted Miscellaneous Rule 08-101, effective Monday, June 23, 2008. This rule is modeled upon an analogous rule adopted by the Fifth Circuit Court of Appeals, and its text follows.

Miscellaneous Rule 08-101

Procedures in death penalty cases involving requests for stay of execution and related filings in Texas state trial courts and the Court of Criminal Appeals:

1 **Time requirements for habeas petitions or other motions.** Inmates sentenced to death who seek a stay of execution or who wish to file a subsequent writ application or other motion seeking any affirmative relief from, or relating to, a death sentence must exercise reasonable diligence in timely filing such requests. A motion for stay of execution, or any other motion relating to a death sentence, shall be deemed untimely if it is filed less than 48 hours before 6:00 p.m. on the scheduled execution date. Thus, a request for a stay of execution filed at 7:00 p.m. on a Monday evening when an execution is scheduled on Wednesday at 6:00 p.m. is untimely.

2 **Special requirements for untimely petitions or other motions.** Counsel who seek to file an untimely motion for a stay of execution or who wish to file any other untimely motion requesting affirmative relief in an impending execution case must attach to the proposed filing a detailed explanation stating under oath, subject to the penalties of perjury, the reason for the delay and why counsel found it physically, legally, or factually impossible to file a timely request or motion. Counsel is required to show good cause for the untimely filing.

3 **Sanctions.** Counsel who fails to attach a sworn detailed explanation to an untimely filing or who fails to adequately justify the necessity for an untimely filing shall be sanctioned. Such sanctions include but are not limited to: 1) referral to the Chief Disciplinary Counsel of the State Bar of Texas; 2) contempt of court; 3) removal from the list of Tex. Code Crim. Proc. Art. 11.071 list of attorneys; 4) restitution of costs incurred by the opposing party; and (5) any other sanction allowable under Tex. R. Civ. P. 215.2.

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