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

In memoriam

Tim Curry, the dean of Texas prosecutors, passed away April 24, 2009. Here, his friends and colleagues remember a quiet man who shunned the spotlight but nevertheless shone brightly.

Deborah Falcone
Executive Administrator, Tarrant County Criminal District Attorney's Office

The photo to the right is one of my favorite pictures of Tim and one of the many ways I'll remember him. Until I got to know him a little better I was always so nervous when I had to go into his office to tell him something. As was his usual routine, he'd remove his glasses, rub his hands across his face, and get very serious. Yikes! I knew I'd better get to the point fast. But he was patient, looked you directly in the eye, and genuinely listened. I consider myself so fortunate to have worked for such an amazing man.

Tim Curry

Joe Shannon
Tarrant County Criminal District Attorney

Tim Curry, the longest serving district attorney in Texas, passed away April 24, 2009. He had served as Criminal District Attorney of Tarrant County continuously since November 27, 1972. During that period Curry instituted policies and procedures which have been adopted by prosecutors around the state. He took seriously the admonishment in Art. 2.01 of the Code of

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Introducing Jennifer Vitera

I am pleased to announce that our foundation has a new development director. **Jennifer Vitera** comes to us from the Richardson Regional Medical Center, where she served as the major gifts officer for the last few years and oversaw a very successful campaign to support its annual fundraiser and cancer center. Many of y'all in the Lufkin area may recall Jennifer from on-air news reports at the ABC affiliate. A graduate of Southern Methodist University and Texas Woman's University, Jennifer holds a Bachelor of Arts Degree in Communications and Master's in Business Administration. In the near future you will be getting to know Jennifer and her plans for the growth of our foundation. Welcome!

Jennifer Vitera

Annual golf tournament

In the past, we have organized a golf tournament the week of our Annual Criminal & Civil Law Update, but it's always been separate from the conference and from the association. This year, we are hosting our first golf tournament to raise money for the foundation. Watch your mailbox for the brochure trumpeting our Annual conference; inside will be a flyer with information on the golf tournament. We hope y'all can join us for a morning on the links that will benefit a good cause.

By Rob Kepple
TDCAA Executive Director in Austin

In memory

I am truly honored and humbled when folks in our profession make a gift to the foundation in memory of a loved one. It is even more significant when that loved one is one of our leaders.

Even when I arrived at the association in 1990, Tim Curry was widely recognized as the dean of Texas prosecutors: tough, even-handed, and professional. He brought a quiet strength to his office that simply can't be underestimated in its value. It was with great pride that the Foundation Board of Trustees recognized Tim with the first-ever Champions for Justice Award a little over a year ago.

The Tarrant County Criminal District Attorney's Office have seen fit to make a substantial contribution in Tim's memory, and for that we are grateful and mindful of our responsibility to grow the profession we love well into this next century.

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Randall C. Sims
Lynn Switzer
Betty Arvin & Mark A. Thielman, *in memory of Tim Curry*
The Honorable F. Duncan Thomas
Larry M. Thompson, *in memory of Tim Curry*
The Honorable Thomas B. Thorpe
Armando R. Villalobos
David K. Walker
Bradford Wheeler, *in memory of Tim Curry*

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Texas District & County Attorneys Association

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Remembering Tim Curry

Texas prosecutors lost a true hero with the death of Tim Curry on April 24. He was a genuinely modest and humble man who was a real difference-maker in his own quiet and conscientious way. All of Texas, not just Tarrant County where Tim served as the criminal district attorney for over 36 years, is richer for his shining integrity and outstanding leadership.

By Barry Macha
Criminal District Attorney in Wichita County

The breadth of Tim Curry's career of sustained excellence is even more noteworthy than its length. I totally agree with the assessment that there is not another district attorney's office in Texas that has been so consistently out front on important issues for so many years, so forward-looking on procedures and openness that will ensure justice, or so strong an advocate of justice and victims' rights. An open file policy, second chances for youthful offenders, electronic case filing, and a strong victims' assistance program (among the first established in the state) are vintage examples of Mr. Curry's leadership in action.

Tim often reminded me that the greatest resource in his office (and mine) were the employees. His philosophy was to hire the best people he could and to let them do their job. He expected them to do the right thing and always told them, "Do what you think is right." And from all accounts he always supported them when they tried to do that. Tim's staff was second to none.

Over the years I looked to Tim and his outstanding staff for help and guidance on problem cases and in crafting my own office's policies and procedures. I will always be grateful to Tim for his generous and exceptional assistance and that of assistants such as Alan Levy, Marvin Collins, Ann Diamond, Richard Alpert, David Montague, Miles Brissette, Tracey Kapsidelis, the late C. Chris Marshall, Steve Chaney, and Mitch Poe.

Tim was always a devoted friend and loyal supporter of TDCAA. He and his staff have taken leadership positions within our association, helped provide outstanding training, and authored numerous publications. We are especially fortunate and grateful that over the years Tim provided outstanding assistants including Amy Mills and J. D. Granger to help out in Austin during the legislative sessions.

Tim Curry represented all that is good and honorable about our profession. He leaves behind a record of dedicated and distinguished public service as the longtime Tarrant County Criminal District Attorney. To many he was a friend, mentor, and a role model to be emulated. I am proud and honored to have known and to have been associated with someone who served the public like Tim Curry.

Photos from the Civil Law Seminar

Gerald Summerford Award winner

Leigh Aune Shapleigh, Assistant County Attorney in El Paso County, was named the 2009 Gerald Summerford Award winner. She is pictured with Michael Hull, Assistant County Attorney in Harris County and Chair of the Civil Committee, and Erik Nielsen, TDCAA's Training Director. Congratulations!

Legislative Updates on the way!

The Legislative Session is a busy time at the association. Keeping up with the huge number of proposals that would impact criminal justice can at times be overwhelming. But the fun is only beginning when the session ends because that's when, in the span of a month and a half, **Diane Beckham** and her publications team will write, edit, and ship out the best Penal Code and Code of Criminal Procedure in the business. In addition, **Shannon Edmonds** will somehow find the energy to write his terrific *Legislative Update* book, compile a PowerPoint presentation to tell you about the 81st Legislative Session, and head out for our whirlwind tour of Texas.

By Rob Kepple
TDCAA Executive Director in Austin

On page 16 of this journal is the list of locations for this year's Legislative Updates. This is the real pay-off for us at TDCAA because we enjoy the opportunity to come to your neck of the woods and visit with you. And it promises to be a big show this year: From the journalist shield law to new laws on mandatory blood draws, there are plenty of things that will affect your daily practice. So register online today and bring your popcorn!

DIVO: Defense Initiated Victim Outrage?

In quick succession last month, I received three complaints from victims' advocates, victim witness coordinators, and prosecutors about something called DIVO, which stands for Defense Initiated Victim Outreach. The complaints were that their victims and survivors in some pretty horrendous cases had been further traumatized by contacts from people identifying themselves as victim advocates … working for the defense team.

In the first case, a horrified family member whose loved one was a victim in a capital murder received a letter from a defense attorney saying that she would be contacted by a "DIVO," who is not a member of the defense team. The "DIVO" then sent a letter explaining that she had been hired by the defense team to be a "liaison" to the victim and was being paid by the court. The stated purpose: to be responsive to questions or concerns that the survivor may have that can most easily be addressed by the defense. Clear as mud so far.

The second letter I recently read was to the surviving family members in another capital murder case. Same stuff about meeting the victims' "unique" needs, but this DIVO went further and attached a letter that had been written by some other victims as a way of providing a testimonial about the DIVO's services. Significantly, this attached letter contained the following sentence: "Eventually my family and I decided on our own—with no pressure from the DIVO—that we did not want to suffer through a trial, but we also wanted assurance that the murderer would be in prison forever."

The whole concept that the defense team should have direct contact with crime victims was a little confusing to me, so the first thing I did was a little Internet research. Indeed, the National Association of Criminal Defense Lawyers appears to have initiated this effort to get involved more directly with victims of crime. Find a basic description of the program at www.criminaljustice.org (search for DIVO). The program's stated purpose is to "reduce the trauma to victim-survivors that often results from the adversarial and technical nature of the legal process." My first response is, "Like, what—the defense team wants an 'advocate' to apologize to the victim's family when the defense attorney trashes their dead loved one in court to get the defendant off?"

Furthermore, it appears to me that there may be a link between this DIVO concept and defense strategy in death penalty cases. Read this passage from a defense attorney website:

> DIVO should not be avoided solely due to an unrealistic and unsubstantiated fear of the victim. While the needs of the victim-survivors should be addressed regardless of benefit to the defense, the fact remains that few defense attorneys are going to engage in a process that has no advantage to their client or case. Fortunately, there is a benefit to the defense as Pamela Blume Leonard poignantly describes: "A defense attorney who compassionately acknowledges the terrible loss victims have suffered and stands with them in their quest for restoration and restitution, has far greater credibility when asking for the life of his client to be spared."

We would expect a defense attorney to act only in the best interest of his client—that is his moral and ethical duty. So it is no wonder that we should be suspicious of a victim advocate hired by and aligned with the defense team.

Finally, you might want to check out this site on "restorative justice" that touts the DIVO program: www.gcrj.org/Site/DIVO.html. One passage at the end of that page concerns me a little: "To guard against misuse or unintended consequences, DIVO practice should be regularly evaluated and victim-survivors and/or victim advocates should be on oversight committees." I am quite curious about the misuses and unintended consequences that the DIVO proponents are worried about, and I would sure like to know which victim advocates are performing oversight functions in Texas.

Here is what else I recently found out. The Federal Bureau of Justice Assistance has funded pilot programs for DIVO in three states: Georgia, Louisiana, and Texas. A number of folks are jumping into the DIVO business without much training or guidance from the BJA-funded efforts, so a careful rollout of the program with the proper ethical and legal boundaries in place may not be happening just yet. Although there are folks with the best interests of victims running the BJA show, the opportunity for mischief abounds at this point.

Please keep me informed of your experiences with the new DIVO program in Texas. We need to know what is happening out there. We have a lot of folks looking at it with a mind to preparing a more formal response from our victim-witness professionals.

An update on Richard Wintory

Many of you have had the good fortune to hear a presentation at one of our seminars by **Richard Wintory**, an Assistant United States Attorney in Tucson and former assistant DA in Oklahoma City. Richard is pretty much an honorary Texan and normally refers to Texas as "Prosecutor Disneyland." To show you how dedicated Richard is to our state and to the profession, I'll tell you that a few years back he was a speaker at our Advanced Trial Skills Course in Waco when his flight from Tucson was cancelled due to bad storms. Undaunted, Richard—on his own—booked a late night flight to Dallas, rented a car, and drove through the storms to Waco in time for his talk. He is a dedicated fellow!

Richard Wintory

Not long ago Richard fell from a ladder and sustained a terrible head injury. It looks like he is on his way to a full recovery, but the road will be long and he will be struggling to support his young child and disabled wife. Not a good circumstance. So when the call went out that Richard needed help, y'all came through in a big, big way. Barry Macha, TDCAA's President, put out a request seeking contributions; we hoped to collect $1,000 to send to Richard to defray his bills once he's home from the hospital. But Texas prosecutors, like Richard, are a dedicated bunch: Y'all responded by sending in over $4,500 to Richard's support fund. I can pass along to you today the appreciation and amazement of the folks in Arizona for your generosity.

Me, I see this only as enlightened self-interest. We need Richard Wintory back in the fight as soon as possible!

Laugh of the day

The TDCAA User Forums is a great place to ask a legal question, read discussions on cutting-edge topics, and share your "best of" topics, such as how a frog can be a deadly weapon or what a capital murderer's last words were.

It is also a spot to share courtroom stories. Take this one from **Robert DuBoise** of the Parker County District Attorney's Office:

"In one of our district courts, the judge usually has the court coordinator sit immediately to his right (in the witness box) to assist him with the files and docket. Today, a defendant was going to have a bond hearing. Before the hearing, the coordinator moved from the witness box into the jury box so as not to interfere with the witnesses. The hearing began, and several witnesses were called. Halfway through, the defendant leaned over and asked his counsel:

"How come I only get one juror?"

His defense counsel's response: "Because the other 11 have already decided you're guilty."

Continued from the front cover

In memoriam (cont'd)

Criminal Procedure that the duty of a prosecutor is "not to convict, but to see that justice is done."

Tim was affectionately referred to as the Dean of Texas Prosecutors, but he never sought the limelight or accolades. He avoided press conferences for the most part. He was a private person and virtually apolitical. He often said that he was just a lawyer who had to run for office. He referred to himself as the manager of the "biggest law firm in town." The Tarrant County Criminal District Attorney's office employed 156 attorneys at the time of his death. Even though he disdained public acclaim, he was named the recipient of the Oscar Sherrell Memorial Award for Distinguished Service to the Profession in 2001. He also served as president of the Texas County and District Attorneys Association in 1979.

Curry invariably gave credit to his assistants for a successful prosecution rather than accepting it for himself. When he was introduced at a public function (which he rarely attended), he would say, "Tim Curry, District Attorney's Office," as though he were but a cog in a big wheel. Curry said his management style was to surround himself with "people smarter than me." He was in his office for virtually every day of the 36 years, four months, and 28 days he served the people of Texas. He was accessible to the office personnel, lawyers, and the public.

Shortly after winning an election for an unexpired term in 1972, Curry assembled the lawyers in Tarrant County who practiced criminal defense. Most were apprehensive about the approach the 34-year-old newly elected prosecutor would take. He readily assured the lawyers that there would be a fair and level playing field. He also told them that his word was his bond and that the same would also be the creed of all of his assistants. He asked to be informed if any of his prosecutors went back on an agreement; likewise, he advised the defense bar that he would ask the same of his prosecutors. He further emphasized that under such an arrangement, the good lawyers would rise to the surface and the bad ones would slowly move on to other endeavors. The lawyers left the meeting with a degree of comfort even though many were still not sure what to expect.

After taking the oath of office, Curry instituted an open-file policy, which permitted defense attorneys access to all materials generated by police agencies except the attorneys' work product. He reasoned that if the defense knew the true facts surrounding an incident rather than just those recited by their clients, more negotiated pleas would result. Time proved him correct. Judges were pleased not to referee discovery disputes. Dockets moved more rapidly and prosecutors could concentrate on those cases that really required a trial. The open-file policy continues today and has been adopted by other offices around the state.

Curry's office established one of the first Victims' Assistance Units and recently implemented the first electronic case filing system, which permits police departments to submit cases digitally without leaving their offices. The system permits defense attorneys to view the open files via computers in their offices without a trip to the courthouse. Tim was also an avid supporter of TDCAA and in particular its efforts to promote constructive legislation to aid law enforcement and prevent passing bills designed to hamper it. He regularly assigned a front-line prosecutor to assist in that work during each session of the legislature. He was a strong supporter of the TDCAA Foundation from its inception.

Curry was diagnosed with cancer in August 2008, and he underwent an aggressive course of treatment. He fought courageously during his illness with the same perserverance with which he had managed his "law firm." Shortly before his passing, the Tarrant County Commissioner's Court recognized his years of outstanding service by renaming the Tarrant County Justice Center building, which houses the district attorney's office, the Tim Curry Criminal Justice Center. This honor is a fitting tribute to a man who was small in physical stature but had a giant influence on the practice of criminal law in Tarrant County for over a third of a century.

I am both honored and humbled to be asked to complete Tim Curry's term. His shoes cannot ever be completely filled, but his legacy will go forward. He will always be

Dedicatory Resolution

TIM CURRY

WHEREAS, Tim Curry was first elected as Tarrant County Criminal District Attorney in November 1972 and has served in that position for over 36 years with rare distinction and honor, having been re-elected for nine subsequent terms in office; and

WHEREAS, immediately after his election in 1972, he put in place measures to insure that persons guilty of criminal activity were vigorously prosecuted, but also to insure that charges were not brought until clear evidence was presented demonstrating guilt beyond a reasonable doubt, resulting in a remarkable record of both protection of the public as well as the protection of the innocent; and

WHEREAS, Tim Curry has brought innovation to the operation of the Office, including:

- ***the institution of a countywide electronic case filing system for all the law enforcement agencies of the county, the first of its kind in the State of Texas;***
- ***the first Victim's Assistance programs in Texas, which has since been used as a model by many other prosecutors' offices in the State;***
- ***the first in the 1970's to recognize the devastating effect on lives of driving while intoxicated, implementing ever stronger and more effective measures to firmly, but fairly, prosecute those who offended, resulting in recognition of the Office as one of the leaders in the State of Texas in this regard; and***
- ***started one of the first dedicated Gang Units in the State of Texas in the 1980's to address the growing scourge of violent youth and juvenile criminal activity; and***

WHEREAS, he has engendered the respect of the entire law enforcement community for his selfless leadership of the Tarrant County Criminal District Attorney's Office; and

WHEREAS, Tim Curry routinely gave prosecutors throughout his career unwavering support, with his customary advice being to "do whatever is right", engendering respect and support not only among career prosecutors, but the many law enforcement agencies served by the Office; and

WHEREAS, Tim Curry throughout his career has earned the respect of his fellow attorneys, who honored him with the coveted Blackstone Award in 2007 — the first and only time a Blackstone Award was ever given by the Tarrant County Bar Association to a prosecutor in its 46-year history, reflecting the high esteem in which he is held in the Tarrant County legal community; and

WHEREAS, in 2001, he received the Oscar A. Sherrell Memorial Award for Distinguished Service to the Profession from the Texas District and County Attorneys Association, the highest honor given by the statewide association of Texas prosecutors; and

WHEREAS, the Tarrant County Commissioners Court wishes to pay homage and respect to Tim Curry for his years of distinguished service to the citizens of Tarrant County and the State of Texas, and to provide a permanent tribute to his stature as the finest prosecutor in Texas.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED that henceforth the Tarrant County Justice Center be named the Tim Curry Criminal Justice Center in his honor, and that the appropriate steps are immediately taken to implement this Order and Resolution.

IN WITNESS WHEREOF, we have hereunto set our hands and caused the Seal of Tarrant County to be affixed this 5th day of May 2009.

The former Tarrant County Justice Center was renamed the Tim Curry Criminal Justice Center after Mr. Curry's passing.

remembered for the advice he regularly gave his assistants when they were confronted with a problem: He would say, "Just do what you think is right."

Several months ago we were talking about the time when we would leave the office. He said to me, "The only thing any of us will leave here with is our integrity." Tim Curry did just that. He will be

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missed but never forgotten.

Judge Pat Ferchill
Probate Court No. 2, Tarrant County

For all who have unsuccessfully tried to improve county government, read this and weep! In the mid-1980s, Judge Robert M. Burnett of my sister court and I decided that the volume and complexity of the incoming civil commitment cases required a dedicated prosecutor instead of the rotation system then in place. Having different prosecutors come in and out jeopardized continuity and never allowed a particular prosecutor to become familiar with the numerous repeat clients and their circumstances. It was also difficult for a bevy of prosecutors to learn about community programs, medications, outpatient options, and the like.

I went to Tim and furnished him with the above information, and without hesitation, he said, "Let's do it." A joint proposal from him and the probate courts to the commissioners court for a new position of mental health court prosecutor was approved, and Rose Romero (now federal attorney for the Securities and Exchange Commission based in Fort Worth) became the first such state's attorney.

We will miss Tim, not only in the large-scale reforms he brought forward but also in the little ways he helped make a better Tarrant County for everyone.

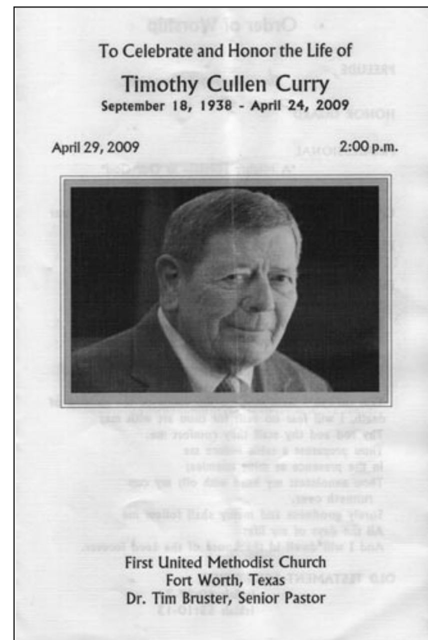
Gabrielle Schmidt
Assistant Criminal District Attorney, Tarrant County

My late father, Bob Guthrie, used to tell me the about the time that he and my mother volunteered for Tim Curry's first campaign in 1972 by driving around Fort Worth in a car with a loudspeaker, encouraging voters to "Vote for Tim Curry, District Attorney." Little did Dad know that 28 years later, his daughter would find herself interviewing for an ADA position with Mr. Curry. I was quite nervous before the interview, but I recall that Mr. Curry put me instantly at ease. The interview ended up being quite enjoyable, and whenever I had the opportunity to visit with Mr. Curry after I was hired, I walked into his office with the same ease that I would walk into the office of any other colleague.

On one occasion he called me in to discuss a couple of my cases and ended the meeting with the same words that I know many other prosecutors heard: "Do what you think is right." These words of advice will long be associated with one of the greatest prosecutors this state has ever seen. He was a man who served three generations of citizens and whose legacy we will all strive to carry on in his honor and memory.

Betty Arvin
Assistant Criminal District Attorney, Tarrant County

The interview process within the Tarrant County Criminal District Attorney's Office included a face-to-face meeting with Mr. Curry. He stood up when I came in, offered and then fixed me a cup of coffee, and talked with me about the ethics of criminal practice. Your word is your bond in this business, and your honorable reputation is something you can never regain if lost, he told me. In my 20-year association with him, Tim Curry never failed to live by these maxims. He was then and remained until the end, a gracious gentleman. You will be missed, Mr. C.


To Celebrate and Honor the Life of

Timothy Cullen Curry

September 18, 1938 - April 24, 2009

April 29, 2009 2:00 p.m.

First United Methodist Church
Fort Worth, Texas
Dr. Tim Bruster, Senior Pastor

From Mr. Curry's memorial service

Elizabeth Cottingham
Assistant United States Attorney in Austin

Tim Curry established an excellent framework at the Tarrant County District Attorney's Office that taught his employees to value integrity, open discovery, and teamwork. He hired well-qualified assistants and gave them the freedom to do their jobs to the best of their abilities. Prosecutors were encouraged to hit hard blows but always fair ones, resulting in the office's reputation as

the premier place for any prosecutor to begin or end his career.

It was difficult to even contemplate leaving the office after five inspiring years. When I did resign, I took with me many lessons on how to be a good team member, treat your opponent fairly, and effectively convey a message to a jury. Although I have been a federal prosecutor for 17 years, I still feel bonded to my experience and the friendships I formed as an assistant district attorney in Tarrant County. Clearly, Tim Curry has left a legacy that any elected prosecutor could envy.

Tom Krampitz
Former Executive Director of TDCAA

First time I met Tim, I was struck by his unassuming manner. He didn't seek or enjoy the limelight of public office. Even though he served in many leadership capacities for the association, I don't recall him ever making a speech. Last year when I told Tim he was to be honored at an event for the foundation, he said, "That might not be a good idea because I don't think anyone will come just because of me."

When I once asked him the secret to his longevity, he told me it was because he had "a good picker," explaining that he was blessed to have chosen so many good folks to work alongside him. And he never identified himself as "the district attorney" but rather always said, "I work in the DA's office."

Late one Friday afternoon I called Tim at his office, figuring he'd be gone for the day. But sure enough, he was there to take my call. When I commented that I was surprised to find the boss still at work, he simply said, "Tom, if there's one thing I've learned in all my years in office, it's this: If something crazy is gonna happen, it usually happens right around quittin' time on Friday afternoon."

Tim was a not a man of large stature—in fact, someone once referred to him in a newspaper story as "diminutive." But for all who knew him, he was a quiet giant in our profession.

Greg Miller
Deputy Chief of the Criminal Division, Tarrant County Criminal District Attorney's Office

Tim not only gave me my first job as a prosecutor but also my second. I had been a misdemeanor prosecutor for about two years, and there had not been much movement in the office. A group of defense attorneys that I had clerked for made me an offer that I really could not turn down from a financial standpoint. So I left the DA's office, and I was miserable.

After about six weeks I decided to go and see Tim. As I walked into his office he said hello, and I replied, "Tim, I have f——d up. I'll take any job you want me to do if you'll just take me back." Tim was actually chuckling and told me to go see Bob Gill, then the misdemeanor chief, who asked me, "When can you start?"

Tim could have told me "no" out of pride, and there would be no telling how my legal career would have ended up. As it turned out, I have been here almost 22 years, and I owe it all to Tim. What a great man and boss he was.

D. August Boto
Executive Vice President and General Counsel, Executive Committee of the Southern Baptist Convention in Nashville

Viewing Tim from afar, so to speak, I could only have a view that is iconic rather than personal, fitting the mold of Henry Wade, Ronnie Earle, and Johnny Holmes of the metropolitan counties or Cappy Eads, Marc Taylor, and Jack Skeen in the more rural. I am talking about men for whom prosecution is a calling and who prefer the company of others similarly inclined. For such men, there is no better service to be rendered, no more worthy occupation undertaken, than to see justice done fairly, competently, and persistently. Variations of personality or technique aside, the strain of character running through such men that causes them to devote so much of their lives for so thankless a task as prosecution makes them noble. We need more such prosecutors who see protection of the weak and preservation of the rule of law as not only a duty, but a joy.

J. Greg Shugart
Business Manager, Tarrant County Criminal District Attorney's Office

I have been the business administrator for the DA's office for over seven years. I tell the staff here that I'm the person who keeps their copiers working and their legal pads and

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paper clips supplied so that they can do their work. But I also worked daily with Tim Curry to keep our $33-million-budget office ticking efficiently. I saw firsthand how Mr. Curry diligently sought to save jobs in our narcotics and check departments as grant funds and check fees dwindled. Many of my administrative tasks required sophisticated negotiations with the commissioners court and county administration. Although I often felt clumsy when accomplishing his goals, Mr. Curry always backed me up, just as he supported any of his staff following his directives.

Mr. Curry's strong work ethic and humble style repeatedly reminded me of Plato's Greek classic, *The Republic*. His style emulated the guardians of civic justice that Plato described. Mr. Curry stayed informed; he always focused on what was right and just; his loyalty was legendary. And Mr. Curry never sought praise for any of the myriad deeds he accomplished. Those of us who worked for him will strive to follow his example.

Tim Curry, second from left, with attendees at one of TDCAA's Civil Law Seminars

Dan Boulware
Former 18th Judicial District Attorney and Chair of the TDCAF Advisory Committee

On April 24, Texas lost a great prosecutor and many of us lost a great friend when Tim Curry passed away.

I had the good fortune to know Tim for over 30 years. During this time, Tim served as President of TDCAA and received many awards, but he never cared about public acclaim. He put the public and law enforcement first, and politics came in a distant second. Tim was a public official who did not like politics, events, and public speaking, but he was elected district attorney as a reform candidate in 1972 and re-elected nine times because the public recognized him as an honest, hard-working prosecutor whose integrity was beyond question.

Tim was a great prosecutor but more importantly, he was a good man, a dear friend, and an example to all those who worked with him over the years. He will be missed and remembered fondly by all of us who knew him.

Judge Robert Mayfield
County Court-at-Law No. 1 in Johnson County and Former Assistant Criminal District Attorney in Tarrant County

Tim Curry was a powerful man. As the Criminal District Attorney of Tarrant County, he made decisions and set policies that directly impacted the lives of people all over the state. Yet he never sought the spotlight or felt the need to have a media presence. Instead, he remained in his office and spoke in a soft, measured drawl that always cut to the heart of the matter concerned. His manner was the same regardless of the rank of the person speaking with him. He would listen, ask pertinent questions, then give guidance.

Tim Curry was a politically adept man. His unblemished record of successful elections covered four decades and two political parties. However, when he died, the *Fort Worth Star Telegram* newspaper wrote that he was known for keeping politics out of the district attorney's office, and a well-known defense attorney called him a "nonpolitical politician." "Do what's right" and "honor your agreements" were the philosophical touchstones he imparted to his staff.

Tim Curry was an uncommon man, one who spoke little but accomplished much. After 36 years, he has now left the district attorney's office, and we are all better for him having been there.

Richard B. Roper
Former U.S. Attorney, Northern District of Texas, now at Thompson & Knight

I started at the Tarrant County District Attorney's Office as a college volunteer intern, later returned as a law clerk, and finally was lucky enough to be one of Tim Curry's prosecutors. Tim built an office grounded on professionalism and ethics and gave his prosecutors the discretion and strong support needed to achieve justice. Working for Tim simply made us better lawyers. I can attest that his legacy of professionalism followed me as a federal prosecutor and later served as my guide during my term as United States Attorney.

Judge Scott Wisch,
372nd District Court, "Tim Curry School for New Lawyers, Class of '81"

I remember the first time I met Tim Curry. I was in Arlington visiting family and got a call to come interview with the Tarrant County DA's office. After an initial interview with the hiring committee, which included prosecution innovators Chris Marshall, Steve Chaney, and L.T. "Tolly" Wilson (all of whom sadly preceded in death the man who hired them), I was snagged as I was leaving the building and asked if I could come back later for an interview with the "boss." I agreed and was taken to the office of Tim Curry.

Having heard while a law student in Austin of Tim's pioneering policies and reform of the Tarrant County justice system, I expected to meet a larger-than-life man of steel in a Hart Marx suit. Instead, I met a man of average stature in blue jeans and a Western work shirt who extended his hand as if greeting a longtime friend. During the half-hour conversation, Tim didn't talk prosecution; he talked about ethics, responsibility, and personal initiative, about having the courage to make tough decisions, about knowing you can't *be* right 100 percent of the time but that you can always try to *do* right 100 percent of the time. After a little talk about hunting (his office at the time *did* look somewhat like Cabela's), he offered me a job. I took it and have never since made a smarter professional decision.

Davy Crockett had a motto: "Be sure you're right, *then* go ahead." In his own way, the boss emphasized that same motto in the practice of law. Tim's encouragement to evaluate, then to make the tough decisions served me well as a prosecutor, defense attorney, and now as a criminal trial judge. I will always appreciate and honor that legacy.

Mike Adair
Assistant Chief Investigator, Tarrant County Criminal District Attorney's Office

When Tim Curry was elected Tarrant County Criminal District Attorney in 1972, I had just recently been promoted to detective at Arlington Police Department. At that time the law enforcement community in Tarrant County had suffered through some pretty tough times under a couple of very weak, and some even considered corrupt, district attorneys. Local law enforcement had a big hand in electing Mr. Curry, and I think he always felt a special bond with peace officers.

In 1979 I came to work in the Special Crimes Unit of the Tarrant County Criminal District Attorney's Office, and over the years I have witnessed how Tim Curry worked to improve relations between the DA's office and local, state, and federal law enforcement. One such example was his election (by the county's police chiefs) to chair the narcotics task force. They felt he would be an impartial leader and could fairly represent their opinions relating to local narcotics enforcement. I served for eight years as the assistant commander of the task force and witnessed numerous times that Mr. Curry stepped up to the plate for them. Over the years I have personally heard him defer to law enforcement leaders and officers as the experts and offer his support to them instead of letting his ego dictate to them from his powerful position.

He liked to be called Tim, and his door was always open. I found his counsel always wise and backed by common sense and experience rather than by a wish to make himself seem more important than the citizens he served. Self-promotion and self-importance were not part of Tim Curry's personality.

I called Tim Curry "Boss" when I addressed him. In 40 years of service to the State of Texas as a peace officer, I have worked for many individuals I have liked and respected but only one I called Boss.

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Tanya S. Dohoney
Assistant Criminal District Attorney, Tarrant County

Gratefully, I worked for Tim Curry for over 18 years. But I learned of his office's excellent reputation long before I came to Tarrant County. When I worked at the Court of Criminal Appeals during the 1980s, the reputations of the various DA offices and the attorneys within them was a constant topic of conversation among law clerks, court clerks, staff attorneys, and judges. Tarrant County's office was universally held in high esteem by those working at the "supreme court" for criminal cases. Over and over, those of us who were recently out of law school heard the advice: "The best place to go to be a prosecutor was with the Tarrant County DA's office." We were told that you would receive good training, enjoy decent pay, have a manageable caseload that would allow professional growth, and learn how to prosecute in an office with high standards of integrity.

Life did not take me to Fort Worth right away, yet Mr. Curry's office still impacted my career. From Austin, I moved to central Texas and commuted to McLennan County, prosecuting there for three and a half years as the sole appellate attorney while carrying a small misdemeanor, then felony, caseload. I instantly adopted Tarrant County's appellate forms and protocol for my brief writing. My first CLE credits came from attending a Tarrant-County-prosecutor-led seminar in Fort Worth on trying DWIs. Our Waco office took many cues from Tarrant County over those years. For instance, when a former bank-exec-turned-capital-murderer claimed indigency, we followed Tarrant County's lead from one of their highly publicized trials and contested the murderer's indigency, saving the taxpayers a significant chunk of change.

Mr. Curry, second from right, in a 1970s photo (we think!) from the TDCAA archives

Tarrant County's influence in the McLennan County Criminal District Attorney's Office increased with the arrival of a new McLennan County DA, Paul Gartner. Paul had cut his prosecution teeth working for Mr. Curry. Once Paul led the office, everything we did in McLennan County was patterned after Tarrant County—policy, prose, and procedures. Members of the McLennan County office routinely headed up I-35W to Fort Worth for training on DWI prosecution, evidentiary issues on child cases, organizing a hot check department, and more. I received especially helpful instruction from Tarrant County regarding capital habeas litigation.

While working for Paul, I met Tarrant County prosecutors, and that's how I ultimately landed in Tarrant County years ago in 1991. The solid reputation I had heard about during the '80s remained intact, thanks to Mr. Curry's strong leadership and the many experienced prosecutors he had cultivated as office leaders through the years. Mr. Curry's motto remained, "Hire good people and then let them do their work."

Over eight years ago, my duties shifted; at the suggestion of two senior staff and with misdemeanor chief Richard Alpert's blessing, I moved my office down to the misdemeanor section, allowing me to advise our misdemeanor staff on legal issues as they arose—another outside-the-box idea implemented by the Tarrant County DA's office. I am thankful that, in this capacity, I had repeated occasion to seek out Mr. Curry to obtain his signature for state-appeal notices. He always showed interest in the details of the legal issues we wanted to challenge and reiterated his characteristic desire for us to pursue what was right, knowing that we were entitled to reply on the letter of the law.

People who worked for Mr.

Curry will continue to follow his good example. And while we have new leadership (who worked for Mr. Curry for years), we will still have Mr. Curry's name on our business cards because the county just aptly renamed our building the Tim Curry Criminal Justice Building.

Richard Alpert
Misdemeanor Chief, Tarrant County Criminal District Attorney's Office

For just over 22 years, I had the honor of working for Tim Curry, and I can't imagine anyone having a better boss. Tim always put his employees first and took pleasure in our accomplishments while never taking the credit. Walking into a courtroom to prosecute a tough case is never easy, but knowing, win or lose, we had the support of our boss removed much of the pressure and taught us that being a good prosecutor meant more than the tally of our wins and losses. My family has collected an assortment of Tim Curry election T-shirts over the years, and one of the most exciting days for two of my children is captured in the photo above where they got to meet Tim at a campaign party. Every professional success I have achieved was made possible through the support of this great man, and I will do what I can for the rest of my career to keep his legacy alive.

Dale Hanna
District Attorney in Johnson County and Former Assistant Criminal District Attorney in Tarrant County

I've always been humbled and proud to have been a part of the Tarrant County Criminal District Attorney's Office. Working for Tim Curry from 1975 to 1979, I was first assigned to intake, then juvenile, then grand jury, then misdemeanor, and finally felony courts. That was Tim's program. It called for young assistant DAs to become skilled at the duties of each section before moving on to positions of greater responsibility, and for that I am grateful. He called those times "character builders." It was what I needed, and it worked well for me even though I didn't understand it at the time.

Under Tim's leadership, as a young prosecutor I worked with the highest quality of assistants in each section who not only taught me the skills and judgment needed to be a trial lawyer, but who also motivated me to be an elected prosecutor (first county attorney and now district attorney) in my home district, Johnson County, where I was born and raised and which is adjacent to Tarrant County.

Tim had the respect of his assistants, office staff, and defense attorneys because of the steady hand with which he headed what I considered to the leader among DA's office in the state. Tim was a mentor by example not only to me but to the hundreds of other assistant district attorneys who passed through his office during his 36-year tenure. Under Tim's leadership his office set the standard by which all offices in the state are judged.

As an elected prosecutor for the past 20 years, when I consider what a legacy Tim Curry has left, I am envious. We should all leave such a legacy. Tim had quite a good run and will be greatly missed. We can only strive to leave such a lasting mark on our criminal justice system.

I have no doubt that newly appointed District Attorney Joe Shannon will continue to lead this office in providing excellent prosecution with the highest degree of integrity and professionalism.

Upcoming Legislative Updates schedule

It's about that time of the biennium again! We will travel to 18 Texas cities to tell folks what changed during the 81st Legislative Session. Each session is from 1:30 to 5 p.m., is worth three hours of TCLEOSE/CLE credit, and costs $75 for paid TDCAA members and $100 for non-members. All attendees will receive a copy of the 2009 *Legislative Update* book on new criminal laws with a Penal Code table of offenses. Registration is online only; go to www.tdcaa.com/training and choose the city near you.

City	Date	Location
Austin*	Friday, July 17	Doubletree North Hotel, 6505 IH-35
Del Rio	Thursday, July 23	Val Verde County Judicial Center, 100 E. Broadway
San Antonio	Friday, July 24	Grand Jury Room, Bexar County Courthouse, 300 Dolorosa
Beaumont	Thursday, July 30	Jury Room, 1st floor, Jefferson County Courthouse, 1001 Pearl
Houston	Friday, July 31	Garrett-Townes Hall, South Texas College of Law, 1303 San Jacinto St.
Fort Worth	Friday, July 31	Convention Center, 1201 Houston St.
Midland	Thursday, August 6	Business Training Lecture Hall (Advanced Technology Bldg.), Midland College, 3200 W. Cuthbert
El Paso	Friday, August 7	Commissioners Courtroom, 500 E. San Antonio
Llano	Friday, August 7	Ben E. Keith Bldg., 1604 Bessemer Ave. (State Hwy. 16 North)
Dallas	Friday, August 14	Ste. B-4 (Central Jury Room, 2nd floor), Frank Crowley Criminal Courts Bldg, 133 N. Industrial Blvd.
Edinburg	Friday, August 14	UT Pan Am Int'l Trade & Tech Bldg., 1201 W. University Dr.
Waco	Friday, August 14	2nd fl. auditorium, Baylor School of Law, 1114 S. University Parks Dr.
Lubbock	Thursday, August 20	Lubbock County Central Jury Pool, 1308 Crickets Ave.
Amarillo	Friday, August 21	Central Jury Room, Potter County Courthouse, 501 S. Fillmore
San Angelo Beauregard	Friday, August 21	Courtroom A, Tom Green County Courthouse, 112 W.
Bryan	Wednesday, Aug. 26	Assembly Rm. 102, Brazos Center, 3232 Briarcrest
Austin*	Friday, August 28	DPS Auditorium, Bldg. C, 5805 N. Lamar Blvd.
Jacksonville	Friday, August 28	Norman Activity Center, 526 E. Commerce St.
Corpus Christi**	Tuesday, Sept. 22	Omni Bayfront Hotel, 900 N. Shoreline Blvd.

*** Note that there are two legislative updates in Austin. Please be sure to register for the right session.**

**** The legislative training in Corpus Christi is the same week as our Annual Criminal & Civil Law Update;**

"Did you want a lawyer before your confession?"

With *Montejo v. Louisiana*, a unified *Miranda* warning now applies to custodial interrogation.

God asked Eve, "What is this you have done?" Eve, on behalf of everyone, replied, "The serpent tricked me, and I ate."[1] And so, without the intervention of *Miranda* warnings, lawyers, or an appellate court, God concluded the first recorded interrogation and dispensed justice upon Satan and man-kind.

By John Bradley
District Attorney in Williamson County

Not having the same powers of omniscience and infinite perfection, humans have taken a more rule-based approach to interrogation. The Supreme Court's recent decision in *Montejo v. Louisiana*[2] provides a striking moment in the development of those bright-line interrogation rules. Tests under the Fifth and Sixth Amendments used to be separate and distinct, but the *Montejo* decision creates a new, far simpler test for the admissibility of a defendant's confessions.

Case background

In 2002, Jesse Montejo was arrested as a suspect in a robbery and murder in Louisiana. Unlike Eve, Montejo heard *Miranda* warnings read to him before any interrogation.[3] Like Eve, though, Montejo made an incriminating statement that minimized his participation, blaming a co-defendant for the worst of the crime. During a subsequent court appearance, similar to the procedure required in Texas by article 15.17 of the Code of Criminal Procedure (commonly called magistration), a judge notified Montejo of the charges pending against him, denied bail, and appointed an attorney. Montejo was then returned to jail, presumably to await indictment and the arrival of his lawyer.

Later that same day, as part of an ongoing investigation, police contacted Montejo at the jail, again read to him *Miranda* rights, and asked him to show them where he disposed of the murder weapon. During that excursion, Montejo wrote a letter of apology to the victim's widow. At trial, he challenged the admissibility of the letter, claiming that his Sixth Amendment right to counsel was violated when police contacted him despite the appointment of a lawyer.

"Hold on!" you exclaim. "This Montejo guy is right. His appointed attorney was not present when he confessed while writing a letter at the encouragement of police. That has to be an automatic violation." After all, since 1986, the Supreme Court has protected the Sixth Amendment right to counsel by consistently applying the prophylactic, court-created rule adopted in *Michigan v. Jackson*[4] prohibiting police from initiating contact with a suspect once that right to counsel has attached. (That likely explains why Montejo's lawyer was "quite upset" about the post-appointment interrogation.)

And only last year, we learned from Walter Rothgery, a Texan arrested in Gillespie County, that a defendant's initial appearance before a magistrate—even though it only follows arrest on a police officer's complaint with no formal involvement of a prosecutor—is a triggering moment for the Sixth Amendment right to counsel.[5] Applying the *Rothgery* decision, the Court of Criminal Appeals has since held that police may not initiate a conversation with a suspect after a magistrate conducts an article 15.17 procedure.[6] How, then, could the Louisiana police lawfully initiate contact with Montejo after he had already made a Sixth Amendment-triggering appearance before a judge?

The simple answer is the Supreme Court changed the rule adopted in *Jackson*. Justice Scalia, writing for a five-judge majority, approached the issue as a pragmatist in search of a broad solution that would work in all 50 states. He also recognized that law enforcement, when rightfully pursuing custodial interrogation, is sometimes faced with the complex problem of applying two sets of rules in protecting a right to counsel that arises from both the Fifth and Sixth Amendments.[7] With the *Montejo* decision, police in all 50 states now have a single consistent, clear constitutional rule.

To protect the privilege against self-incrimination under the Fifth Amendment, before initiating custodial interrogation, an officer must

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inform a defendant of his right to remain silent and his right to have an appointed or retained lawyer present.[8] These are the classic *Miranda* rights. If a confession follows a defendant's waiver of those *Miranda* rights, the courts must consider the confession presumptively voluntary. On the other hand, in *Edwards v. Arizona*,[9] the Supreme Court held that if a defendant invokes the right to have a lawyer present, police may not proceed with interrogation until a lawyer is actually present.[10] The *Edwards* bright-line rule prevents police from badgering a suspect into giving up the Fifth Amendment right to counsel after it has been invoked, but the defendant still must make an unambiguous request for this right to counsel. And an absent third party (such as a lawyer, priest, or the defendant's mother who hires a lawyer on the defendant's behalf) cannot invoke the right for the defendant.[11] These decisions all emphasize that the Fifth Amendment right to counsel is a personal right that may be waived or invoked only by the defendant.

In protecting the Sixth Amendment right to counsel, the Supreme Court in *Jackson* adopted a more rigid rule than the one applied in the *Miranda* decision. In *Jackson*, the court held that regardless of whether a defendant had actually communicated any desire to have a lawyer present for interrogation, police could not initiate contact with a suspect following any event that triggered the attachment of that right to counsel. As states have moved toward early proceedings to appoint counsel following arrest, the *Jackson* rule has presented practical problems for police approaching a suspect for custodial interrogation. At the early stages of a case, how can a police officer know with certainty whether some procedure has already triggered the Sixth Amendment right to counsel? And, given the different laws and timing of appointment of counsel in the 50 states, the *Jackson* rule has resulted in radically different outcomes regarding a confession's admissibility, each one depending on the venue of a suspect's crime and the timing of interrogation.

Scalia found a solution to these questions by abandoning the *Jackson* rule and adopting a unified *Miranda* rule for protecting both the Fifth and Sixth Amendment rights to counsel. Now, the defendant, after hearing *Miranda* rights, must waive or invoke the right to remain silent and the right to an attorney. If the defendant waives those *Miranda* rights, then interrogation may continue, even if a lawyer has been appointed in a previous setting. In short, the defendant personally controls whether to have a lawyer present for interrogation by invoking or waiving that right.

Heading off defense arguments

Defense attorneys no doubt will argue that the *Montejo* decision is not so clear when applied to Texas law. Montejo, they will argue, was interrogated in Louisiana, where appointment of counsel is automatic. Texas law, on the other hand, requires an indigent defendant to request appointed counsel.[12] Shouldn't that express request for appointment of counsel serve as an actual invocation of the Sixth Amendment right to counsel and prevent police from contacting the defendant, even if only for the limited purpose of interrogation?

Anticipating that challenge, Scalia wrote, "What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation—not what happened at any preliminary proceeding." In other words, regardless of how a particular state's law triggers the right to counsel under the Sixth Amendment, a defendant still must protect that right to counsel as it applies to custodial interrogation by expressly invoking it for the purpose of preventing or delaying interrogation. And, once invoked, the police must cease contact with the defendant unless and until counsel is actually present.[13] On the other hand, if a defendant, even after appointment of counsel, independently decides to waive the right to counsel after presentation of *Miranda* rights for the purpose of custodial interrogation, then a constitutionally acceptable interrogation may take place.

Justice Scalia came to believe that adopting the more flexible *Miranda* rights standard for protecting the Sixth Amendment right to counsel was appropriate because he placed great weight on society's proper expectation that law enforcement should be able to pursue evidence, especially a confession, so long as a defendant's personal rights were protected. The rigid *Jackson* rule too often prevented police from pursuing a confession, even under

circumstances that did not threaten the defendant's right to counsel. Prosecutors should recognize that *Montejo* is a remarkable—perhaps radical—alteration of the constitutional scenery as applied to custodial interrogation.

No doubt there will be much litigation over this new rule. Indeed, Montejo himself has been given a second chance, through remand, to litigate whether he actually waived his Sixth Amendment right to counsel before writing a letter of apology. On remand, he may well complain that he was confused about his right to counsel. Courts may be inclined to apply strict scrutiny to such a waiver, especially if the defendant requested and was appointed an attorney before interrogation took place. Prosecutors should advise police to act carefully before contacting a suspect who may have already appeared before a magistrate, making sure to document and record a clear, unambiguous waiver of *Miranda* rights.

Ethics alert

Before advising police about contacting a potentially represented defendant for interrogation, prosecutors should consider Texas ethics Rule 4.02(a) for lawyers.[14] That no-contact rule is designed to prevent interference with the attorney-client relationship once it has been formed.[15] Note that the no-contact rule applies only to lawyers, not police officers but does discourage lawyers from encouraging police officers to make contact with a represented defendant. However, the no-contact rule does not apply if the lawyer is "authorized by law" to advise another person to make such contact.

Under the authorized-by-law exception, Rule 4.02(a) would not be violated if the *Montejo* decision is new case "law" that authorizes contacting a represented defendant for the limited purpose of interrogation.[16] This would seem comparable to past caselaw authorizing law enforcement to respond to contact initiated by a represented defendant.[17] Perhaps even stronger authorization is contained in the Texas confession statute, expressly accepting the use of a confession as evidence so long as the defendant received *Miranda* warnings from a magistrate or an officer and waived those rights before interrogation took place.[18]

Likewise, the no-contact rule would not apply if the prosecutor advised an officer to contact a represented defendant for information about a subject other than the subject that triggered the representation.[19] And, of course, if the defendant does not yet actually have a lawyer, by appointment or otherwise, he would not be represented, and there would be no violation of the no-contact rule.

Balanced against the no-contact rule is the duty of all prosecutors to educate the police. Indeed, the American Bar Association Standards for Criminal Justice strongly encourage prosecutors to work with police and advise them on investigative decisions. One of those standards, while reminding prosecutors not to circumvent ethical rules that apply to lawyers, expressly provides: "The prosecutor may provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use."[20] That standard certainly suggests some tension between the no-contact rule and the duties of a prosecutor.

Even if defense counsel could ultimately allege a prosecutor's violation of the no-contact rule, suppression of an otherwise admissible confession is not a remedy; state disciplinary rules are not part of the "laws" subject to the exclusionary rule.[21] Nonetheless, prosecutors should act carefully in this area. Perhaps the most cautious approach for now would be for prosecutors to educate police in general as to the constitutionally acceptable choices in seeking to interrogate potentially represented defendants without providing any express advice in a particular case.

The *Montejo* decision is a dramatic simplification of the custodial interrogation landscape in what has otherwise been a legal minefield. Confessions, which for decades have been viewed as violating the Sixth Amendment right to counsel, may now be constitutionally acceptable.[22] Nonetheless, numerous new questions will be raised as lawyers and police begin to apply the *Montejo* decision. In the meantime, prosecutors should continue to educate law enforcement on the powerful influence of a lawful confession, press for careful documentation of the interrogation process, and encourage the use of modern recording equipment whenever possible.

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NEWS WORTHY

Hotel information for our Annual Criminal & Civil Law Update

The host hotels, the Omni Bayfront and Omni Marina in Corpus Christi, are both sold out, but you can check in periodically for room availability by calling 361/887-1600. Room rates are $80 for a single, $110 for a double, $140 for a triple, and $160 for a quad.

TDCAA has secured overflow rooms at Holiday Inn Emerald Beach at 1102 South Shoreline Blvd. Call 361/883-5731 for reservations. Room rates are $85 for a single and $109 for a double, triple, or quad. These rates are good until September 6 or until sold out. You must mention TDCAA to receive these rates.

A couple of other notes about room reservations for this seminar: Please make reservations in an attendee's name, not a county or office administrator's name. Also, if reserving more than one room, do not make all reservations in the same name.

And lastly, please do not overbook hotel rooms. TDCAA is allotted a certain number of rooms at the state rate, which we surrender if you don't use them.

Thank you, and we hope to see you in Corpus!

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Endnotes

1 Genesis, 3:13.

2 556 U.S. __ (2009).

3 Arguably, Eve was not in custody and, therefore, not entitled to *Miranda* warnings. Even so, the warnings likely would not have been helpful, given the absence of any lawyers and God's ability to know Eve's thoughts before she expressed them.

4 475 U.S. 625 (1986).

5 *Rothgery v. Gillespie County*, 554 U.S. __ (2008).

6 *Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008).

7 The Fifth Amendment right to counsel is implied in the *Miranda* rights that protect the Privilege Against Self-Incrimination. U.S. Const. amend. V. The Sixth Amendment right to counsel is an express clause. U.S. Const. amend. VI.

8 *Miranda v. Arizona*, 384 U.S. 436 (1966).

9 *Edwards v. Arizona*, 451 U.S. 477 (1981).

10 If the defendant invokes his right to remain silent, a different standard applies. *Michigan v. Mosely*, 423 U.S. 96 (1975) (requiring that right to remain silent be "scrupulously honored"). For an application of the factors relevant to that standard, see *Maestas v. State*, 987 S.W.2d 59 (Tex. Crim. App. 1999).

11 *Moran v. Burbine*, 475 U.S. 412 (1986).

12 Tex. Code Crim. Proc. art. 1.051.

13 Note that a defendant may independently initiate contact with the police following invocation of a *Miranda* right. *Michigan v. Harvey,* 494 U.S. 344, 352 ("But nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.").

14 See Texas Disciplinary Rule of Conduct, 4.02(a) ("In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization, or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so").

15 See also Texas Disciplinary Rule of Conduct, 3.09(b) ("The prosecutor shall . . . refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining counsel and has been given reasonable opportunity, to obtain counsel.").

16 See also *Heinrich v. State*, 694 S.W.2d 341, 343 n.2 (Tex. Crim. App. 1985)(State Prosecuting Attorney argued that various laws authorized prosecutor to investigate criminal cases by recording phone call to defendant).

17 See, e.g., *State v. Maldonado*, 259 S.W.3d 184 (Tex. Crim. App. 2008) (officer lawfully received incriminating letter from defendant following appointment of counsel because conduct initiated by defendant); *Heinrich v. State*, 694 S.W.2d 341, 343 n.2 (Tex. Crim. App. 1985)(State Prosecuting Attorney argued that defendant initiated conversation).

18 Tex. Code Crim. Pro. art. 38.22.

19 See *Texas v. Cobb*, 532 U.S. 162 (2001) (*Miranda* rule is offense-specific; invocation of *Miranda* right to counsel or right to silence for one offense does not automatically prevent interrogation on separate offense).

20 ABA Criminal Justice Section Standards, Prosecutorial Investigations, Standard 1.3(g) (approved 2/08) (www.abanet.org/crimjust/ standards/pinvestigate.html). Cf. National District Attorneys Association Prosecutor Standards 2-7.6 (3rd Edition)("A prosecutor performing his or her duty to investigate criminal activity should neither be intimidated by nor discouraged from communicating with a defendant or suspect in the absence of his or her counsel when the communication is authorized by law or court rule or order.").

21 *Pannell v. State*, 666 S.W.2d 96 (Tex. Crim. App. 1984).

22 See, e.g., *Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008).

A primer on wiretaps, pen registers, and trap and trace devices

Texas investigators and prosecutors rarely use these tools, but they can be incredibly handy in certain situations. Here's how to obtain and employ them in partnership with law enforcement.

By Jeff Strange
Assistant District Attorney in Fort Bend County

The purpose of this article is to generally discuss the utility of wiretapping, the use of pen registers and trap and trace devices, and how to obtain them.

Wiretapping has become a hot-button issue with the political pundits on cable news shows but has a legitimate law enforcement function. The cellular telephone now plays an important role in just about everyone's life; thus, police are now more frequently popping up in our offices seeking assistance with pen registers. A prosecutor who wishes to stay ahead of the curve definitely has to adapt his tool belt to the changing times.

Wiretaps are infrequently used in Texas; only four were authorized in 2007, all in Harris County. By comparison, Los Angeles County alone was granted 291 of California's 660 wiretap orders, while state prosecutors in Arizona were granted 35 wiretaps in 2007, and Tennessee courts signed 19 wiretap orders.[1]

Obviously, different regions of the country have different law enforcement needs and practicalities that dictate the directions of their criminal investigations. It is probably also fair to suggest that different regional law enforcement cultures exist. For example, authorities on the East Coast have long use wiretaps and "bugs" fighting organized crime; thus, they are more comfortable with the process and have somewhat streamlined it.

One area where wiretaps are consistently useful is in narcotics investigations. Of the 2,208 wiretaps authorized nationwide, 1,792 were used in drug cases; such investigations lend themselves to wiretaps as the information gleaned can be used to identify and go up a chain of command. They are also very helpful in locating drug and cash caches. As narcotics investigations are proactive and not strictly reactionary, they allow more detailed pre-planning. Undercover officers, informants, and controlled buys traditionally provide the basis of the probable cause necessary to obtain a wiretap. Pen register and trap and trace information focus investigators on the relevant telephones and potential co-conspirators.

Each of Texas' nine judicial regions has a designated district court judge authorized to sign interception orders. Statutorily, our ability to seek a wiretap is limited to the offenses of capital murder, murder, child pornography, and felony drug offenses other than possession of marijuana.[2] All four of the wiretaps authorized by Texas judges in 2007 were for narcotics offenses. However, wiretapping has utility beyond the traditional narcotics investigation.

One example is the recent tracking of Brandon Wayne Robertson, who killed decorated DPS Trooper James Burns. Robertson sought refuge in the dense East Texas woods of Cass County. Texas Rangers had learned from an informant that Robertson had holed up in an abandoned methamphetamine lab. Authorities had a warrant for his arrest and were contemplating how best to serve it. Robertson, a former police officer and trained survivalist, was a dangerous adversary in this rugged environment.

A trap and trace and pen register order was signed by a local judge providing Rangers with the phone numbers of all incoming and outgoing calls involving Robertson's cell phone. With the assistance of local prosecutors, an emergency wiretap order was signed for the criminal's cell phone. DPS investigators listened in as Robertson detailed his plans to resist capture, with deadly force if necessary. Robertson vowed in one intercepted call not to be taken alive.

Police overheard Robertson stating that he was going to abandon his hideout in an attempt to leave the

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area, at which time he was tracked and surrounded just outside of Linden. A man of his word, Robertson turned his weapon on himself and ended his life. Because police knew of his intentions ahead of time, they could take precautions to minimize danger to themselves and any bystanders.

Procuring a wiretap

The Texas Department of Public Safety (DPS) is the only agency authorized to possess, install, and operate wiretapping equipment pursuant to State law.[3] The DPS Technical Unit, located at the main headquarters in Austin, has four rooms for monitoring and recording wiretaps. Each room can monitor two telephones apiece. Under Texas law, the application for a wiretap must be made by the elected district attorney, criminal district attorney, or county attorney with felony jurisdiction[4] at the request of the head of a law enforcement agency. Before an application may be sought, the director of the Department of Public Safety must approve the project in writing.[5]

Anyone considering seeking a wiretap should get folks in DPS's technical unit involved as soon as possible. They will provide valuable assistance in all aspects of the effort, starting with the preparation of the wiretap application, which should track art. 18.20 §8 of the Texas Code of Criminal Procedure. Be sure to review this statute with the officer serving as affiant; the section itself is a good organizational tool when preparing both the application and affidavit. The reviewing judge should be able to read both with his codebook open and stay on track.

The affidavit must demonstrate that probable cause for one of the enumerated offenses exists and that the proposed wiretap will likely intercept relevant communications. When possible, it is necessary to identify the target of the wiretap and the location of the relevant telephone. Finally, the reviewing judge must be satisfied that traditional investigative methods have been tried and failed or would be too dangerous or impractical. Intercepting communications is supposed to be a tightly controlled, meticulously documented last resort.

A court may not sign a wiretap order granting a fishing expedition or a Hail Mary pass when all else has failed. Go into the process ready to detail a practical plan. DPS will not commit resources unless officials there can see a method to your madness. A wiretap can cost in the hundreds of thousands of dollars for the logistics and police overtime: A tap must be monitored by two members of the investigative agency at all times. Additionally, a pen register must be obtained before a wiretap can start monitoring conversations. There must also always be a member of DPS present when communications are actually being intercepted.

While the wiretap must be monitored at DPS headquarters in Austin, the technical capability exists to provide a remote, secondary monitoring location at the investigating police agency. A prosecutor assisting in the effort should be available to prepare grand jury subpoenas for telephone records and applications for pen registers as the investigation expands. The wiretap will provide raw data of the phone numbers involved in the phone calls. The subscriber information is obtained via good old-fashioned shoe leather.

The benefits

The utility of a wiretap when investigating an ongoing criminal enterprise is obvious. Police get to listen to what the crooks are saying while they are committing the crime. This is why wiretaps are used predominately in drug investigations. A wiretap is more difficult to obtain for a completed crime, and their use in cold cases will require imagination, planning, and sometimes pure dumb luck. The major obstacle is demonstrating to the reviewing judge that the relevant parties will likely continue to communicate relevant information about the offense via the telephone. Criminals tend to split up and keep their mouths shut after committing a crime, but that's not always true.

In 2005, for example, Sugar Land police were investigating a 2003 murder-for-hire in which two members of Thomas Bartlett Whitaker's family were shot to death as they entered their home. (Read more about this investigation and trial in the September-October 2007 issue of this journal, available at www.tdcaa.com/node/1448.) Police suspected that Whitaker had induced his two roommates to commit the murder so the three of them could split the eventual inheritance. Detectives had meticulously documented the times they had initiated and terminated several interviews with Chris Brashear and Steven Champagne, the suspected shooter and getaway driver, respectively. A

review of the three suspects' cell phone records revealed that they called each other almost immediately after police investigators left their company. On a couple of occasions, after the flurry of phone calls, the suspected shooter, Chris Brashear, contacted police to change or explain the details of his story.

The Sugar Land wiretap application proposed to combine the wiretap with the issuance of grand jury subpoenas for Brashear, Champagne, their parents, and their girlfriends.[6] Detectives asserted that the suspects would return to their pattern of contacting each other to discuss the crime when it was clear the investigation was renewed.[7]

When such an effort is contemplated, it is important for police and prosecutors to work together to develop a strategy well before the wiretap application is sought. As reluctant as police can be to involve prosecutors in their investigations early on, investigative strategy can be tailored to develop the probable cause for a wiretap. In the Sugar Land case, police sought to obtain incriminatory statements from Champagne to use as leverage to induce his cooperation in prosecuting Brashear and Whitaker, both of whom played a more active role in the murders. The theory articulated in the wiretap application was developed by comparing investigators' notes with the suspects' cell phone records. Always remember that before the Department of Public Safety will commit valuable resources, the wiretap must have a clearly defined goal. Be prepared to articulate how the proposed wiretap will advance the ball toward solving the crime.

Other rules

As with the Robertson case (the murderer hiding out in the woods), a wiretap may be granted on an emergency basis by seeking the verbal approval of the appropriate "wiretap judge."[8] An appropriate application and affidavit must be filed with the court within 48 hours after the wiretap is initiated.[9] Emergency wiretaps are appropriate in response only to an immediate life-threatening situation and may be initiated only by Department of Public Safety officials or officers specially trained to deal with life-threatening situations.

Any wiretap order is good for 30 days; however, an application for extensions in 30-day increments may be filed. Each and every call, pertinent to the investigation or not, must be carefully documented and a report must be filed with the authorizing court every 10 days during the wiretap's pendency. The prosecutor must assist with this report and develop a working relationship with the reviewing judge. The report must detail the number of calls intercepted, the number of pertinent and non-pertinent calls, and the duration of the recording. If the judge cannot see that the investigation is making satisfactory progress, the wiretap may be terminated before the expiration of 30 days.

A wiretap order does not give police carte blanche to listen to the entirety of each and every intercepted phone conversation. Police may listen at the beginning of each conversation to determine if it is pertinent to the subject of the investigation (called "minimization"). If it is, police may continue to monitor and record the conversation. If after listening for a few minutes the call is deemed non-pertinent, police are required to minimize or stop monitoring the conversation. Failure to minimize could result in suppression. The prosecutor must be involved in determining minimization protocols, training officers, and making sure this process is followed.

Crooks quickly became familiar with the law of minimization and would frequently spend the first five minutes of each conversation discussing the weather or some other innocent subject, only to discuss business after police had minimized. Police are now allowed to spot-monitor calls after minimizing. After the call is minimized, they may briefly check in to determine if the call has become pertinent. They may repeat this process on a regular basis during the call's duration, and police are allowed more latitude at the beginning of a wiretap. After conversation patterns are established, police are expected to be more efficient in their minimization practices.

Each monitored phone call or portion thereof must, under the statute, be recorded.[10] Additionally, the recordings must be preserved, and a copy will ultimately be filed with the court at the termination of the wiretap. Keep in mind that the recordings will not just produce evidence that the State may use in court. The recordings will also show the monitoring officer's minimization practices, providing fodder for possible suppression of the wiretap.

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Pen registers and trap and trace devices

A pen register or trap and trace device, unlike a wiretap, does not require a finding of probable cause.[11] The application must simply state under oath that the installation and use of the device will likely produce information material to an ongoing investigation. The application must further identify the telephone subscriber and the relevant phone number and carrier. The application may be reviewed by a district court judge in the jurisdiction of the requesting agency, the location of the device, telephone subscriber, or communications carrier.[12]

Should a pen register or trap and trace appear to be useful in an ongoing investigation, it is a good idea to seek the assistance of a local Texas Ranger or DPS investigator. Any peace officer may apply for a pen register, but the application must be filed by the appropriate elected prosecutor unless the requesting peace officer is employed by the Texas Department of Public Safety or is "commissioned by the department."[13]

Not only does a pen register show outgoing and incoming phone numbers, but if tracking a cellular phone, it also identifies the cellular antenna and sector that the cell phone is using at the beginning and end of the call. Thus, a pen register has some utility tracking people, usually people with warrants for their arrest. A pen register is also a good source of investigative intelligence. If a known suspect and his phone are identified, a pen register can provide the identities of potential co-conspirators. After a completed crime, if a known suspect is on the run, a pen register helps identify potential destinations, allowing police to prepare a warm welcome for the wayward crook.

Like wiretaps, pen registers and trap and trace devices can be installed on an emergency basis, again, allowing officers to obtain verbal authorization and file the appropriate application within 48 hours.[14] Like a wiretap, only specially trained officers may install a pen register during emergencies. A pen register is also not cheap. A police agency wishing to use this technology will invest between $20,000 and $30,000 in equipment and specialized training. Additionally, telephone companies typically charge an average of $600 per target to conduct pens.

A pen register or trap and trace order is good for 60 days but may be extended for another 60 days upon a showing of good cause.[15] The pen register, like a wiretap, must be routed through DPS headquarters but may be monitored by the requesting police agency remotely at the location of the investigation. The pen register is less onerous to monitor than a wiretap as conversations are not monitored and recorded. Unless pen register is granted for an emergency, there is no further necessity of documenting the results with the court.

Conclusion

The decision to intercept telephone conversations is not one to be made on a whim or without knowing what it entails. We as prosecutors need to change with the times and the technology to track and trace criminals. They use cell phones, and cell phones contain and transmit information useful in the investigations of the crimes they commit. How we assist police in the effort is really limited only by our imagination.

Editor's note: The author wishes to thank Sgt. Breck McDaniel of the Houston Police Department, Texas Ranger Brandon Davis, and Captain Doug Kunkle of the Texas Department of Public Safety for their expertise, input, and assistance with this article.

Endnotes

1 All statistics are provided by the 2007 Wiretap Reports, Administrative Office for United States Courts.

2 Tex. Code Crim. Proc. art. 18.20 §4. This statute has been expanded over the years to be more inclusive. Originally, wiretapping was an option only for narcotics-related offenses.

3 Tex. Code Crim. Proc. art. 18.20 §5(a). This statute of course does not apply to federal agencies, several of which have the ability to conduct wiretaps.

4 Tex. Code Crim. Proc. art. 18.20 §1 (8).

5 Tex. Code Crim. Proc. art. 18.20 §6.

6 Bart Whitaker had fled and was later arrested in Mexico.

7 All three suspects were arrested and convicted. Thomas Bartlett Whitaker is currently on Texas' Death Row.

8 Read and be familiar with Tex. Code Crim. Proc. art. 18.20 §8A.

9 Tex. Code Crim. Proc. art. 18.20 §8A(d)(2).

10 Tex. Code Crim. Proc. art. 18.20 §10.

11 *Uresti v. State*, 98 S.W.3d 321 (Tx. App.—Houston [1st District] 2003); *Smith v. Maryland*, 442 U.S. 735 (1979) ; see also *Richardson v. State*, 865 S.W.2d (Tex. Crim. App., 1993).

12 Tex. Code Crim. Proc. art. 18.21 §2(a).

13 These are officers with the Dallas, Houston, Fort Worth, Austin, San Antonio, and El Paso Police Departments and the Harris County Sheriff's Department.

14 Tex. Code Crim. Proc. art. 18.21 §3.

15 Tex. Code Crim. Proc. art. 18.21 §2(f).

NEWSWORTHY

New online resource for DWI information

Our website, www.tdcaa.com, has a new feature for investigating and prosecuting intoxication offenses. Click on the DWI Resource button in the gold bar at the top, and you'll be directed to a wealth of information on standardized field sobriety tests (SFSTs), vehicle stops, voir dire, and dozens of other subjects. The section is still in its early stages, but soon we plan to upload articles that have to do with DWI and related offenses, plus video clips. Keep checking back to see the new items we post.

To catch an oil thief

Oil theft in Wilbarger and Hardeman Counties caught the attention of authorities; here's how investigators and prosecutors took down a theft ring that stole over a million dollars' worth of crude.

By Staley Heatly
46th Judicial District Attorney

PB Oil Company, a small, unremarkable oil company in Vernon, was owned and operated by two oil field pumpers, Terry Smith and Willie Greening. The company had two assets, the Lowke lease and the J.N. Johnston lease, both located in Wilbarger County. The two leases had one thing in common: prior to being purchased by PB Oil Company, they had been shut-in wells that had produced no oil for the previous two years.

Remarkably (and suspiciously), after being acquired by PB Oil Company, these two tired old wells produced about $1.2 million dollars worth of oil between 2003 and 2007. Not bad for a couple of wells purchased for salvage.

Investigation

In September 2007, I received a visit from Texas Ranger Dick Johnson and Railroad Commission employee Nick Nichols. Nichols and Johnson were initiating an investigation into oil field theft in Hardeman and Wilbarger Counties and were looking for guidance on how to proceed.

The Railroad Commission had received information from an oil field worker that Oscar Gray, an oil transport truck driver, was stealing oil for PB Oil Company. As a transport truck driver, Gray's job was to pick up loads of oil at different leases and deliver the oil to the gathering company to be placed in the pipeline. When Gray delivered the oil to the gathering company, he turned in a manifest called a run-ticket that showed which well and which company had produced the oil. According to the informant, Gray was picking up oil from the Crews Lease, owned by Williford Energy Company, and delivering it to the gathering company with a fraudulent manifest showing PB Oil Company as the producer and the J.N. Johnston lease as the producing lease. Thus, PB Oil Company was paid for oil produced by another company.

At the initial meeting, we decided that we needed to gather more information before interviewing any potential witnesses or suspects. The goal was to catch Oscar Gray delivering a stolen load of oil to the gathering company. At the time we initiated the investigation, a 180-barrel load of oil was going for about $15,000.

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Over the next couple of months, Nichols and Railroad Commission field personnel closely monitored the Lowke and Johnston leases to check for suspicious activity. In early October, Nichols performed a seven-day flow test on the Johnston lease to determine its production capabilities. The test revealed that the Johnston was capable of making only about 1 to 1.5 barrels of oil per day. Nichols attempted to conduct a flow test of the Lowke lease but the electricity to the pumpjack was turned off at the power pole. Nichols determined from his inspections that the Lowke lease was not capable of flowing oil into the storage tank and that its production capability was essentially zero.

Nichols gauged the Lowke and Johnston wells on a regular basis in October and November. In late October, he noted a strange phenomenon was occurring at both wells. Nichols would check the wells on one day and they would have very little oil in the storage tank; however, he would come back two days later and the storage tank would have over 180 barrels of oil in it. Amazing, considering that the wells weren't capable of producing much oil at all. Nichols also noted bobtail truck tracks at both well locations, consistent with someone trucking oil into the leases rather than taking it out. During the period that Nichols was monitoring the leases, PB Oil Company sold over 900 barrels of crude oil valued at over $70,000 from the Lowke and Johnston leases. From January 1 to October 1, 2007, PB Oil Company sold over 5,500 barrels of crude oil valued at around $400,000 from the Lowke and Johnston leases.

Caught red-handed

On December 14, 2007, Nichols received information from an oil field informant that Gray had been dispatched to pick up a load of oil from the J.N. Johnston lease. Nichols had been monitoring that lease and knew that there wasn't sufficient oil in the storage tank to comprise an entire load of oil. Nichols set up on the Johnston lease early in the morning while a private investigator for Williford Energy Company monitored the Crews lease.

Gray never showed up at the Johnston lease. He did, however, upload a full 180 barrels worth of oil from the Crews lease. When Gray arrived at the gathering company to deliver the oil, he was met by Ranger Johnson and DA Investigator Jeff Case. In his hand, Gray held a run-ticket that showed that the oil had been picked up at the J.N. Johnston lease and that PB Oil Company was the producer. We had our first break in the case.

Gray agreed to cooperate with law enforcement and provided us with a confession. He admitted that he had been stealing oil for Terry Smith for about a year and that Smith would pay him $500 to steal a load of oil from the Crews lease and deliver it to the gathering company as though it came from the J.N. Johnston lease.

On December 17, we subpoenaed the bank records of PB Oil Company from a local bank. We asked for the most recent transactions first, and within a day or two we were provided with documentation showing that Smith and Greening had moved over $60,000 from the company account immediately after Gray was stopped with the stolen load of oil. Based on the information we had from Gray and Nichols' inspections of the leases, we obtained a warrant and seized about $60,000 from the PB Oil Company account and Smith's and Greening's personal accounts.

Over the next couple of weeks, Ranger Johnson, Nichols, and Case interviewed scores of oil field truck drivers. Mark McLean and Steve Moorhouse, both oil transport truck drivers, had similar stories regarding their dealings with Terry Smith. McLean stated that Smith approached him in 2005 to "move oil" from one lease to another and offered him $500 per load. McLean said he told his supervisor Frank Ackerman about Smith's offer and that Ackerman laughed it off and said, "I wondered if they would ask you." Moorhouse stated that Terry Smith approached him in March 2006. Smith offered him $500 per load to haul oil from the Crews lease and to put on the run-ticket that the oil had come from the J.N. Johnston lease. Moorhouse declined Smith's offer.

Investigators also talked to Frank Ackerman, Mark McLean's supervisor and the lead driver for a gathering company in Hardeman County. Ackerman, after 30 minutes of denials, finally admitted that he had been approached by Terry Smith and offered $500 to move oil to the Lowke lease. Ackerman's behavior and denials during the interview moved him up on our list of suspected drivers.

On January 15, 2008, Ranger Johnson interviewed a driver named Randy Hinsley. Hinsley worked for

D.A. Loveless Trucking Company, a saltwater hauler located in Hardeman County. Saltwater is a natural byproduct of oil production, and saltwater haulers pick up and dispose of saltwater from lease sites. Hinsley admitted immediately that not only had Terry Smith and Willie Greening approached him, but also that he had been stealing oil for them for $500 per load for almost two years. Hinsley informed Johnson that he had been paid in cash and by check to steal oil from various leases in Hardeman and Wilbarger Counties and to deliver the stolen oil into the storage tanks of the Johnston and Lowke leases. Hinsley's saltwater truck had a 140-barrel capacity, and he estimated that he had stolen dozens and dozens of loads.

Two days later, Ranger Johnson arrested Terry Smith and Willie Greening for theft over $200,000 and engaging in organized criminal activity. The investigation was coming along nicely and we felt that we had more than enough information to convict Smith and Greening, but we were anxious to obtain the banking and oil company records that would corroborate our witnesses' stories.

Records

The bank records came in slowly, but each one revealed an abundance of information. When the man from the bank dropped records by the office it was always a race to see who would get to review them first. One thing that we noticed immediately was the number of checks written for $500 and made out to cash. There were also numerous checks made out to cash for $1,000 or $1,500. We knew that the checks made out to cash for multiples of $500 had to be for stolen oil, but we needed to link them directly to a load of stolen oil.

The scheme became clear when we compared the check dates with the oil company records that indicated the dates that loads of oil were delivered from the Lowke and Johnston leases. It was a slow process but we eventually noticed a trend. Whenever Smith or Greening would write a check for $500 to cash, there would be a load of oil delivered within a day or two of the check's date. For example, on January 17, 2007, Oscar Gray delivered a load of oil claiming it was from the J.N. Johnston lease. On January 18, 2007, Terry Smith cashed a $500 check. The proximity of the dates seemed convincing to us, but the records only got better from there.

In 2006, Greening and Smith had written checks in multiples of $500 directly to Randy Hinsley and placed "loan" in the memo line. Several other checks were made out to cash with "R.H." in the memo line. The 2005 bank records revealed numerous checks in multiples of $500 made out to cash with "F.A." in the memo. Oil company records revealed that Frank Ackerman had delivered loads of oil for PB Oil Company on the same date or within a day or two of the checks with "F.A." written in the memo line. Ackerman was now a target.

On February 21, 2008, Terry Smith and Willie Greening were indicted for theft over $200,000, engaging in organized criminal activity, money laundering, and violations of the Natural Resources Code for filing false reports with the Railroad Commission. Oscar Gray and Randy Hinsley were indicted for Theft over $100,000 and under $200,000 and engaging in organized criminal activity. Frank Ackerman was later indicted in Hardeman County for theft over $100,000 and under $200,000 and engaging in organized criminal activity.

Oil fingerprinting

In March 2008, Nick Nichols informed me that oil can be tested to determine its various components and that generally speaking no two oils are the same. Both the Johnston and Lowke leases had been shut down since December 14, 2007, and their tanks each held a significant amount of oil.

The typical oil lease contains a pumpjack that pumps the oil up from the ground and a tank where it is stored until it is picked up by a transport truck. Once the pumpjack pulls the oil up from the ground, it passes through the wellhead, then it goes through the flow line into the storage tank. In theory, the oil in the wellhead should be exactly the same as the oil in the storage tank.

DA Investigator Jeff Case contacted a professor at the petroleum engineering department at Texas A&M University. When Jeff explained to him what kind of testing we needed, he referred us to Dr. Roger Sassen, a Texas A&M geochemist and an expert in the field of oil comparison. Dr. Sassen has tested and examined oils from all over the world for several major oil companies. He was intrigued by our case and offered to work with my office

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at a reduced rate. (Unfortunately, DPS does not provide lab analysis for oil samples.)

On March 26, 2008, Ranger Johnson, along with several Railroad Commission employees, executed search warrants on the Lowke and Johnston leases. The warrants authorized Johnson to collect samples from the flow line and tubing string of both leases to be compared with samples collected from the oil storage tanks. We also received permission to take samples from several different wells that had been identified as victim wells by Randy Hinsley. Those samples would also be compared against the oil in the storage tanks of the Lowke and Johnston leases.

A few weeks later, Dr. Sassen sent us his preliminary findings. The oil in the tubing string at the Lowke lease did not match the oil in the Lowke oil storage tank, and the oil in the Johnston wellhead did not match the oil in the Johnston storage tank. Additionally, Dr. Sassen indicated that the oil in the Johnston storage tank appeared to be a mix of different oils that looked like a combination of the oil samples we had provided from the victim leases. Dr. Sassen's findings confirmed that the oil in the storage tanks of both the Johnston and Lowke leases had been trucked in from somewhere else. We immediately filed seizure warrants and became the proud owners of 240 barrels of crude oil which, converted into cash, came to around $20,000.

A deal is made

A few days after we received the results from Dr. Sassen, I got a call from Jeff Kearney, Willie Greening's attorney. Greening wanted to cooperate. After a few days of wrangling, we eventually reached a plea agreement whereby he would cooperate with our investigation and plead guilty to theft over $200,000 with a 10-year cap on his prison sentence. Greening gave us the kind of detailed information about how the thefts occurred that we never could have obtained without an insider's view of the conspiracy. We also struck a deal with Oscar Gray, the transport truck driver who was caught with a stolen load and provided a full confession. Gray pleaded guilty and was placed on probation for eight years.

Trial

By the time trial rolled around, the oil theft team had spent hundreds of hours investigating and preparing the case. We had so much evidence and so much information to present that I was worried that jurors would be overwhelmed. Also, I had become thoroughly immersed in the oil field industry and its terminology. I could talk about heating a tank, fracing a well, and pulling a bottom with the best of them. I had to remind myself that my jury pool would likely have the same minimal knowledge that I had when I first started working on this case.

I used a detailed PowerPoint presentation in my opening statement to provide the jury with a basic understanding of the oil field and its terminology. Willie Greening was the first witness; he provided an overview of the entire theft operation. He also explained how the oil field industry operates including how leases work and the use of oil transport trucks and saltwater haulers. According to Greening, the Lowke and Johnston leases were both poor producers that were incapable of producing much oil. Greening said that 80 to 90 percent of the checks made to cash in multiples of $500 were to pay drivers for stealing oil.

Mark McLain and Steve Moorhouse testified about how Smith had approached them and asked them to steal oil for $500 per load. Randy Hinsley and Oscar Gray testified that they had stolen oil for Terry Smith and Willie Greening and that they were paid $500 per load. Gray had stolen just over $100,000 worth of oil and Hinsley over $150,000.

Through investigator Jeff Case, we introduced numerous charts. We had a chart for each driver that showed the checks used to pay the driver, date of the stolen load, and total profit made by PB Oil Company from each load. Frank Ackerman's chart, for example, showed eight checks with "F.A." in the memo along with 11 associated loads totaling $108,000 worth of stolen oil. We also had charts for Randy Hinsley, Oscar Gray, and Wiley Thompson, a now-deceased driver whom Greening told us had assisted in the thefts. The checks on the charts totaled almost $500,000, though there were numerous checks for $500 cash that we did not include in the charts. (If a check was not dated within a few days of a

load, we did not include it as a stolen load on our charts. While Greening told us that the checks were probably for stolen oil, we wanted the jury to see the strong correlation between the date of the check and the load of oil. If the dates were not close together, we did not include them.)

The charts were the most important pieces of evidence that we presented to the jury. They demonstrated the thefts in black and white. No matter how Smith's attorney tried to spin it, his client's signature was on 42 of the checks made to cash for oil theft, and Willie Greening's was on 22.

The testimony of Dr. Roger Sassen was the icing on the cake. Dr. Sassen is a professor at heart. He stood at a dry-erase board for an hour educating the jury on how oil is produced and why oil from different locations has a different fingerprint. By the time he was through testifying, the jury knew without a doubt that the oil in the tanks at the Lowke and Johnston leases had been trucked in from another location.

The verdict

The jury came back with the guilty verdict for theft over $200,000 on Friday afternoon after three hours of deliberations. The court convened the proceedings until Monday morning.

The punishment phase was short. Smith had no prior convictions so we simply re-offered the evidence from guilt-innocence in punishment. His attorney, Dan Hurley, called up several character witnesses to tearfully testify that Smith was a good provider for his family. At 5:00 p.m. Monday, the jury returned a verdict of 10 years' probation along with a $10,000 fine.

Needless to say, we were disappointed with the jury verdict. In the days after the trial we started talking to some of the jurors about their decision. In our discussions, the name of one particular juror, Carae Reinisch, kept being repeated. She was very pro-defendant and was talking on her cell phone a lot during the deliberations. We also found out that she disclosed during the course of the deliberations that one of Terry Smith's relatives, and a witness on his behalf, was her babysitter.

We obtained a subpoena for the juror's phone records and noted numerous calls while the jury was deliberating. When we tracked down the phone numbers that Reinisch was calling, we noted a very interesting connection. The juror was calling Terry Smith's cousin Jessica Lacy, a woman who had been present for almost the entire trial. Those calls were not made during deliberations, but they did take place during the week of trial and on the weekend between the guilty verdict and the start of the punishment phase. I wanted to find out what they had been talking about.

I had my investigators coordinate with each other so that they were face to face with the two women at exactly the same time. That way Reinisch and Lacy wouldn't be able to call each other and get their stories straight. The juror stonewalled us. She said she hadn't talked to anyone about the trial during the trial and that her phone calls from the jury room were just to coordinate the pickup and delivery of her children from daycare. Lacy told us a different story. She said that she called Reinisch during the week of the trial and told her that Terry Smith had a big heart and was a good man. Also, after the guilty verdict was rendered on Friday, Lacy talked with Reinisch in person. Lacy told Reinisch that she was heartbroken that the jury was going to send her relative to prison on Monday. Reinisch assured Lacy that wasn't the case, that all of the jurors had to consider probation to get on the jury, and that the case was not yet decided. At that time, Reinisch and Lacy had an extensive discussion about the case and about probation.

Lacy said she talked to Reinisch about the case because Terry Smith had called her and asked her what she thought the jury was going to do. Lacy said it was unusual for Smith to call her and that, while he didn't ask her to contact Reinisch, she felt like that is what he wanted her to do. The discussions between Reinisch and Lacy violated Article 36.22 of the Code of Criminal Procedure, which states that "no person shall be permitted to converse with a juror about the case on trial." Judge Dan Mike Bird admonished the jury each and every time they left the courtroom not to discuss the case with anyone. Article 36.23 provides that a violation of Article 36.22 is punishable by up to three days in jail. On December 10, 2008, we filed a motion for contempt of court against juror Carae Reinisch. We did not file on Lacy because she was truthful and remorseful regarding the conversations, and we needed her testimony against Reinisch.

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On January 12, 2009, after a hearing in which Lacy and Reinisch both testified, Judge Bird sentenced Reinisch to three days in the Wilbarger County Jail for contempt of court. Unfortunately, there is no provision in Texas law for a new trial for the prosecution. We were stuck with the verdict of probation, but we still had two first-degree felony charges and four Natural Resource Code violations (two to five years) pending against Smith.

The aftermath

In February 2009, Randy Hinsley pleaded guilty to his involvement in the thefts and was given a 10-year sentence with a provision for shock probation. Frank Ackerman was convicted by a Hardeman County jury and sentenced to 7½ years in prison March after a three-day trial. Following his conviction, Ackerman agreed to cooperate and testify against Terry Smith.

At the end of April, Terry Smith pleaded guilty to money laundering in exchange for a 9½-year prison sentence. We also agreed that his probation in the theft case would be revoked and that he would serve a 9½-year sentence to run concurrently with the money laundering case.

Willie Greening is testifying in a related case and has yet to be sentenced.

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Turning a sword into a shield

A guide to the new "media shield" law and what it means for Texas prosecutors

On May 13, 2009, Governor Rick Perry signed House Bill 670, making Texas the 37th state to enact a media shield law, and with his signature the bill became effective immediately. It has already been used in several counties in an attempt to quash subpoenas and no doubt it will crop up more and more in the future. It is my hope that this article will inform prosecutors about the law and help them navigate these new waters.

By Katrina Daniels
Assistant Criminal District Attorney in Bexar County

How we got here

Beginning in 2005, media representatives proposed a journalist shield law that most prosecutors viewed as overbroad and unnecessary. Depending on how one counted the various factors imposed under those bills, there were as many as 13 hurdles for the State to overcome before certain evidence could be used at trial. If that version of the bill had become law, prosecutors would not have been able to subpoena *published* newspaper articles or broadcast videotape, much less a reporter's unpublished notes or never-broadcast raw video footage essential to our cases. What the media touted as a shield, we saw as a sword that could be used to slay proper subpoena requests. This possibility worried many prosecutors, but after a previous version of the so-called Free Flow of Information Act came within a whisker of passing the Legislature in 2007, several prosecutors committed to finding a suitable compromise in 2009.

During the most recent legislative session, the media did an excellent job framing the debate as protecting confidential sources and whistleblowers from overzealous prosecutors, placing prosecutors in the defensive posture of explaining their legitimate concerns to legislators. Despite claims to the contrary, most prosecutors never argued with the *concept* of protecting confidential sources; they were more concerned with other provisions of the proposed law. For the prosecutors who volunteered to work on this issue at the Legislature, compromising on the confidential source protection—which was rarely (if ever) sought by the State to begin with—became a negotiating chip in the battle over access to published and unpublished non-confidential material. Ultimately, after many hours of negotiation—both public and private—between prosecutors, media representatives, and legislators, the final version of HB 670 reflects the fruits of that hard labor. The law creates separate tests for civil and criminal cases and goes no farther than necessary to shield confidential sources from unnecessary intrusion, yet it still permits prosecutors access to the evidence they need in court. A review of the law's most important changes follows.

Criminal vs. civil privilege

One of the most important parts of the bill as it ultimately passed was the creation of separate standards for criminal and civil cases. The definitions for the criminal and civil statutes are essentially the same, with one exception: the definition of "public servant" in the criminal statute includes "grand juror," so there is no question that the new law allows a journalist to assert this privilege against disclosure in response to a summons from the grand jury.

The most significant definition is that of "journalist," which requires that a substantial portion of the person's livelihood or a substantial financial gain is derived from gathering, compiling, preparing, collecting, photographing, recording, writing, editing, reporting, investigating, processing, or publishing news or information disseminated by a news medium or communication service provider. Accordingly, most independent bloggers or students do not qualify for protection under this bill, though it does cover both television and newspaper employees.

The civil privilege is codified in Civil Practices and Remedies Code Chapter 22, Subchapter C. Under its framework, the civil shield law first requires notice and an opportunity for the journalist to be heard. The new law does not specify what is required for the notice or what is meant by an opportunity to be

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heard; therefore, this area could be ripe for litigation. The party requesting the information must then make a clear and specific showing that:

1) all reasonable efforts to obtain the information have been exhausted;
2) the subpoena is not overbroad, unreasonable, or oppressive;
3) when appropriate, it will be limited to the verification and accuracy of the published information;
4) notice to the journalist is reasonable and timely;
5) the interest of the party subpoenaing the information outweighs the public interest in gathering and disseminating the news (including the concerns of the journalist);
6) the subpoena is not being used to obtain peripheral, nonessential, or speculative information;
7) the information, document, or item is relevant and material; and
8) the information, document, or item is essential to the maintenance of a claim or defense.

This test is required whether the information sought is the name of a confidential source or a copy of a news broadcast. The new civil statute also states that publication or dissemination of the information does not waive the privilege.

The criminal privilege is codified in Code of Criminal Procedure Article 38.11. In contrast to the new civil privilege, it has separate requirements depending on the information sought. It is divided into three main sections: §4 deals with confidential sources, §5 concerns unpublished information and non-confidential sources, and §8 is about published information. Although the statute applies to information requested by both the prosecution and defense, we will discuss each in greater detail in the context of requests by the State.

Confidential sources

Section 4 of new Article 38.11 gives journalists an almost absolute privilege against revealing the identity of a confidential source in the prosecution of misdemeanors and some felonies. However, the privilege can be pierced with any of four exceptions, all of which require a *clear and specific*[1] showing by the prosecution that the prosecutor has exhausted reasonable efforts to obtain the confidential source from alternative sources.

The main exception is if the prosecutor makes a clear and specific showing that disclosure of the confidential source is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.[2]

Another exception allows a court to compel a journalist to testify or disclose a confidential source if the prosecution shows one of these three things: 1) the journalist observed the confidential source committing a felony, 2) the confidential source confessed or admitted to the journalist the commission of a felony, or 3) probable cause exists that the source participated in a felony.[3]

A third exception covers situations where the secrecy of the grand jury has been violated. A journalist can be compelled to testify or disclose a confidential source if the information, document, or item obtained by the journalist was disclosed or received in violation of a grand jury oath. If there is a motion to quash the testimony, production, or disclosure of the information, document, or item concerning grand jury violations, then the statute gives the court discretion to conduct an *in camera* hearing.[4]

The last exception applies when the alleged criminal conduct is the act of communicating, receiving, or possessing the information, document, or item.[5] Under this scenario there is a lesser test, the same one for obtaining "unpublished" information, which is discussed later in this article.

To pierce the privilege for confidential sources, §4 also requires the elected prosecutor to sign the subpoena, although in the elected prosecutor's absence from the jurisdiction, the highest ranking assistant can sign.[6] Be aware that the media's principal lobbyist believes that this requirement applies to all subpoenas, but we respectfully disagree for several reasons. First, §8 states that nothing in Article 38.11 applies to published information; therefore, this signature requirement will not apply to a subpoena requesting published or broadcasted information. Moreover, if the legislative intent was to require that all media subpoenas be signed by the elected district or county attorney, lawmakers could have changed those actual articles to so indicate. Or, for the signature requirement to apply to both confidential and non-confidential sources and published and unpublished information, the requirement could been have placed in its own section applicable to the entire article. Because this signature requirement is located only in the section dealing with confidential sources, it should apply only when obtaining information regarding the identity of a confidential source.

Unpublished information or non-confidential sources

Section 5 provides journalists a *qualified* privilege for unpublished information or non-confidential sources. After service of a subpoena and an opportunity to be heard, a court can compel a journalist to testify and/or provide notes, raw footage, and other unpublished information in two circumstances: 1) the information is relevant, material, and essential to the maintenance of a claim or defense, or 2) the information is central to the investigation or prosecution of a criminal case and based on something other than the prosecutor's assertion that there are reasonable grounds to believe a crime has occurred.[7] As with previously detailed exceptions, the prosecution must also make a clear and specific showing that one of these circumstances applies and that all reasonable efforts have been exhausted to obtain the information from another source.

The court, when considering whether to compel the journalist to testify or provide the information, should consider whether:

1) the subpoena is overbroad, unreasonable, or oppressive;
2) reasonable and timely notice was given;
3) the State's interest outweighs the public interest in gathering and disseminating the news; and
4) this process is being used to obtain peripheral, nonessential, or speculative information.[8]

Section 5 also allows the prosecutor to present other factors when making a decision, so be sure to read it thoroughly.[9] In addition, no single factor is determinative in the court's decision whether to compel the journalist to testify or provide information.[10]

For an example of how this section might work in the real world, let's say two TV reporters videotape an interview with a defendant in jail, and he confesses to committing a felony. The local prosecutor seeking the raw footage from the interviews should first request a copy of the *published* broadcasts from all network stations and decide which station provides the better information. Doing so should demonstrate to the court that the request is reasonable and seeking only relevant material not available from another source. If the TV stations file a motion to quash the subpoena for raw footage, use the published videotape as evidence in the hearing to lay the groundwork for proving a need for the unpublished footage (by showing that the published information is just a small portion of what the overall tape contains and that the jury must see it to get the whole story).

The media might argue in the hearing on the motion to quash that the information is available from another source (and immune from disclosure) because an officer in the interview room heard the confession. Remember that a picture—or in this case a video—is worth a thousand words. The requirement that "reasonable efforts have been exhausted to obtain information from alternative sources" should be for "like evidence." A police officer talking about what the defendant said to the reporters is not the same as the jury actually *seeing* the defendant talk to the media—those are two different types of evidence. If, however, law enforcement also taped the interview, then the TV stations will have a good argument for quashing the subpoena.

Another argument for the requestor is that each video is unique and cannot be obtained from an alternative source; therefore, the media outlet that published the story will be the sole source of the unpublished information. Again, the published information will be essential in proving the need for the raw footage.

Note that prosecutors need to move quickly to request broadcasts and subpoena raw footage because television stations often recycle their tapes and delete unused footage within a few weeks. Note too that §9 requires that the requesting party pays the journalist a reasonable fee for the time and costs incurred in providing the information. The fee is limited to the structure provided in the Open Records Act.[11] Several district and county attorney's offices have indicated that they do not charge the media for open records requests, so one would hope that the media will return the courtesy.

Published information

Although one of the shortest provisions in the new law, §8 is undoubtedly the most important for prosecutors. Section 8 provides that once a journalist publishes or broadcasts information, documents, or items, Article 38.11 does not apply in the vast majority of cases. Prosecutors can simply subpoena the media outlet as they have always done because §8 expressly states that this new law does not apply to published material. In that event, courts are to use

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your office's current procedures in determining whether to grant a journalist's motion to quash. (For assistance, see "Newsperson's Privilege" from the March–April 2003 issue of this journal, available online at www.tdcaa.com. Search for "journalist shield.") To further indicate that the criminal media shield law does not apply to published information, a statement of legislative intent was read on the House floor.[12] However, note that §7 states that publication or broadcast does not waive the journalist's privilege with regard to confidential sources or unpublished information.

Additionally, one of the benefits of the new shield law is that broadcasted recordings are now self-authenticating, so in most cases, prosecutors no longer have to subpoena a journalist to authenticate what everybody knows to be a true and accurate copy of a broadcast story. As long as the footage was obtained from a Federal Communications Commission (FCC)-licensed radio or television station,[13] the only predicate is to mark the videotape for identification purposes, show opposing counsel, and offer it as evidence.[14] However, a videotape classified as self-authenticating can still be objected to on the basis of genuineness, hearsay, best evidence, relevance, or privilege.

With this law now in effect, a Texas TV station has already challenged a subpoena for testimony from a reporter sought for the purposes of entering a broadcast tape into evidence. Because the tape is now self-authenticating, the judge granted the media's motion to quash the subpoena for the reporter's testimony. (The tape was still admitted as it had been already broadcast.) In light of this, a best practice when subpoenaing a journalist for the purpose of entering a tape into evidence may be to place him on standby to respond to any potential objections to the tape's admissibility, with the understanding that he will not take the stand unless the court grants an objection that prevents self-authentication.

Conclusion

Representative Debbie Riddle (R–Houston) stood on the House floor and gave voice to what many prosecutors thought about the concept of a media shield law: "What makes journalists so special that they are in another category? If the pope came to America, the pope would not have the same privileges as these journalists."[15] Nevertheless, we now have a media shield law to deal with in addition to the other roadblocks in our way as we seek the truth and fight for justice in the courtroom.

Endnotes

1 Criminal law now has a new burden of proof: "clear and specific." During the house committee hearing, prosecutors opposed the use of a non-standard burden, but the media stated it is an accepted burden of proof in Texas media privilege cases, citing *Channel Two Television Co. v. Dickerson*, 725 S.W.2d 470 (Tex. App.—Houston, 1987). Prosecutors should anticipate that the media will be arguing that this new standard is somewhere between "preponderance of the evidence" and "clear and convincing."

2 Tex. Code Crim. Proc. Art. 38.11(§4)(a)(4).

3 Tex. Code Crim. Proc. Art. 38.11(§4)(a)(1-3).

4 Tex. Code Crim. Proc. Art. 38.11(§4)(c).

5 Tex. Code Crim. Proc. Art. 38.11(§4)(b).

6 Tex. Code Crim. Proc. Art. 38.11(§4)(d).

7 Tex. Code Crim. Proc. Art. 38.11(§5)(a)(1-2).

8 Tex. Code Crim. Proc. Art. 38.11(§5)(b).

9 Tex. Code Crim. Proc. Art. 38.11(5)(b).

10 Tex. Code Crim. Proc. Art. 38.11(§5)(c).

11 Gov't Code Chapter 552, Subchapter F.

12 A statement of legislative intent was placed in the journal of the House of Representatives on April 2, 2009, when HB 670 was read on third reading and a final record vote was taken. At that time, Chairman Todd Hunter had the following exchange with the author of the bill, Rep. Trey Martinez Fischer:

Chairman Hunter, "…We just want to clarify that published principles are under current law and unpublished principles will be under the new law."

Rep. Martinez Fischer, "That is my intent."

To watch a recording of this exchange, go to www.house.state.tx.us/media/chamber/81.htm. The statement is 1:47:24 into the archived House floor proceedings for that day. In addition, the House Resource Organization (HRO) Bill analysis associated with HB 670 will provide valuable insight into the various arguments regarding this bill. The HRO Bill Analysis can be found at www .capital.state.tx.us. Search for HB 670 and the HRO Bill Analysis will be located on the Text tab.

13 The new law authorizes the court to take judicial notice of the recording license. Information concerning a station's FCC license can be found at the following website: www.fcc.gov/licensing.html. Once there, select Universal Licensing System (ULS). Under the Search tab, select Licenses. If you do not know the station's call sign, FRN, or name, then use the specialized search to look geographically, which allows a search by county.

14 Schlueter, David, et al., Texas Evidentiary Foundations §4-4(A) (2d ed. 1998).

15 Emily Ramshaw, "Texas House OKs law to help journalists protect sources," *The Dallas Morning News*, April 2, 2009. Rep. Riddle, who killed the media shield bill in 2007 by raising a successful point of order against it on the House floor, was one of only two Texas legislators to vote against passage of HB 670.

News worthy

Investigator Section bylaw change

The Investigator Section will hold a special meeting of its members on Thursday, September 24, at 9:30 a.m. during the 2009 Texas District & County Attorneys Association Annual Civil and Criminal Law Update in Corpus Christi at the Omni Marina Hotel.

At this meeting, we will vote on proposed bylaw changes for the Investigator Section as a result of the 2006 Long Range Planning committee recommendations that all TDCAA boards be elected uniformly. Currently, all boards other than the Investigator Board are elected by regional caucus. Since the committee recommendations, the Investigator Section Board has been working with the Parent Board to draft the necessary revisions. These revisions would enable the Investigator Section to comply with the Long-Range Plan by conforming to regional elections as opposed to the at-large elections we have conducted in the past.

The proposed changes can be found at www.tdcaa.com. If you have any questions, please contact chairperson Maria Hinojosa at 940/349-2714, vice-chair Charlie Vela at 956/318-2310 ext. 760, or secretary Melissa Hightower at 512/943-1103.

Criminal Law

I love you to death

A "modern-day Casanova" infected 10 women with HIV, and prosecutors tried him for aggravated assault with a deadly weapon. Here's how they won a guilty verdict and tough sentence.

By Curtis Howard and Lisa Milasky King
Assistant Criminal District Attorneys in Collin County

The defendant's attorney referred to Philippe Padieu as a "lover" and "a modern-day Casanova." But we argued Padieu was a narcissistic predator who used his personality to attract and date several women simultaneously, ultimately infecting them with HIV. Not only did he fail to disclose his deadly secret, but he also lied to the women about his infection. In the end, 10 women from different walks of life and who had not known each other previously were forever connected by two things: They all dated Padieu and they all were infected with HIV. The courage of these women in coming forward to reveal the most intimate and sometimes embarrassing parts of their lives enabled us to bring Philippe Padieu to justice.

The investigation

In March 2007, our office received a phone call from the Collin County Health Authority (CCHA); a doctor there inquired if we would prosecute an HIV-positive person who had violated a joint Collin County and Dallas County Health Authority Cease & Desist Order. Philippe Padieu had been served with the order in February 2007, when he was ordered to refrain from having unprotected sex and to inform his partners of his HIV status. The CCHA learned that after the order was served, Padieu had violated both requirements.

The CCHA advised us that the woman with whom Padieu engaged in unprotected sex would not participate in any sort of prosecution. We explained that without cooperation from the witness, we would be unable to meet our burden of proof. But the Frisco Police Department had already started a criminal investigation on the belief that Padieu may have infected several women. Detective Tom Presley, who accompanied the doctor to Padieu's residence when he was served the health authority order, was investigating the possible criminal transmission of HIV and had contacted our Intake/Grand Jury Division about the proper criminal charge. After conferring with the chief of that division, Doris Berry, we called Detective Presley, and our office's involvement in this investigation truly began.

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That February, Detective Presley was contacted by two of our victims, Barbara and Susan, who reported that Padieu knowingly infected them with HIV. Each said that she had been involved in a long-term (but apparently overlapping) relationship with Padieu, and neither knew about the other. Both women further advised Detective Presley that he assured them that he was "clean."

All of the women's connections to each other came after July 2006 when Barbara, who had believed she was in a monogamous relationship with the defendant since 2002, tested positive for the human papillomavirus (HPV) during her annual well-woman check-up. Barbara and Padieu had just ended their relationship a week earlier. During their relationship, Barbara had paid for his cell phone, and when they broke up, she demanded he return it. Upon learning that she had HPV, Barbara began calling the numbers in his phone and the numbers listed on the phone bill to advise the women who answered that Padieu had infected her with HPV and to get tested.

Barbara and some of the women she contacted met for lunch to compare notes and learned that Padieu had been seeing many of them simultaneously. The ladies took a picture of them together and sent it to Padieu. Unfortunately, at the time, these women believed the issue with their health was HPV. No one had any idea of the devastation that was about to come.

One of the many women Barbara called was Susan. Susan had begun her relationship with Padieu in October 2005, one month after he learned about his HIV+ status. By early December 2006, Susan started having doubts about their relationship, partly because of the conversation about HPV she had with Barbara in September 2006. Susan decided that after Christmas she was going to get tested for all STDs. On January 2, 2007, Susan was told she was HIV-positive. Soon thereafter, she was contacted by the Dallas County Health Department (because HIV is a reportable infection). Susan suggested the health department contact Barbara too because of her long-term relationship with Padieu and because Barbara had the names and numbers of additional women. That evening, Susan and Barbara talked, and Susan revealed her HIV diagnosis.

The next day Barbara was tested and learned that she too was HIV-positive. A few days later, Barbara was given additional devasting news—she had AIDS.[1] Barbara and Susan made it their mission to contact as many women as possible from Padieu's cell phone records and urge them to get tested for HIV. Those calls resulted in three more women finding out they, too, carried the AIDS virus.

The women

On May 27, 2007, our investigator, Samme Glasby, prosecutor Lisa Milasky King, and Detective Presley agreed to meet some of the women at Barbara's home to discuss the status of the investigation, what additional work or information would be necessary, and whether we felt we could gather enough evidence to successfully prosecute this case. At this point we knew of five women who had dated Padieu and were HIV-positive. Barbara met him through an online dating website, Diana was his student in a martial arts class, Jan was a former coworker, Megan was his neighbor, and Susan met him at a restaurant frequented by a mostly middle-aged crowd. (The other women who ended up being part of our case surfaced later, mostly as the result of the news coverage of Padieu's arrest in July 2007.) Although the women came from diverse backgrounds, they shared common characteristics: They were middle-aged, divorced, had children (some had grandchildren as well), and they all dated Philippe Padieu. These women came together in support of one another in managing a disease they all knew would probably kill them.

Shortly after the group meeting at Barbara's house, we scheduled individual meetings with each of the women to discuss their personal experience with Padieu. In our meetings, we stressed that we needed to know the good, bad, and ugly details of their lives and relationships to control how this evidence was presented at trial. We stressed Padieu likely knew this information and would be sharing it with his attorney. The only such information we obtained was one woman admitting that she and Padieu visited swingers clubs on three occasions and the Red Light district on a trip to Amsterdam. There was not anything else shocking or surprising that we felt we would affect our case during trial. We also told them that we would need contact information of any other person they had a sexual rela-

tionship with prior to and during their time they dated Padieu to establish that these women were not infected by that other man. Only two of the six women had to provide this type of information and, fortunately for us, the men we contacted were more than happy to cooperate. The women knew that testifying was not going to be easy and that unflattering information would be revealed, but nonetheless they remained strong and committed to see this prosecution through to the very end.

Obtaining records

We also knew that it was absolutely necessary to prove when Padieu was aware of his HIV status. We knew from Barbara that Padieu had visited the office of Dr. Pedro Checo during their relationship. We obtained a grand jury subpoena for Dr. Checo's records and found the proof we needed. On September 12, 2005, Padieu met with Dr. Checo and was told he was HIV-positive.

Although we had a concrete date, we believed Padieu knew he was HIV-positive long before September 2005. Our fantastic and dedicated investigator, Samme Glasby, then began a mission of securing additional grand jury subpoenas for Padieu's work records to find out if he had insurance coverage. From there, she subpoenaed his insurance records, which provided information about the health care providers he had visited; those records were subpoenaed too. Although we did not find evidence of prior HIV testing, we learned Padieu had visited other doctors in the area primarily for STD testing. The records revealed that the doctors not only counseled him on safe sex practices but repeatedly suggested HIV testing. He always refused with the excuse that he was "recently" tested and was negative. (In spite of his long-time claim of a negative HIV test, not one single medical record showing he had been HIV-tested in the past was produced by the defense.)

The charging instrument

We decided to charge Padieu with aggravated assault with a deadly weapon and used a prior federal conviction to enhance him to a first-degree felony. We appreciated the assistance Padieu gave us by his prior criminal actions because we felt the second-degree maximum of 20 years was much too low for what he did to these women.

We tapped into a vast pool of talented, seasoned, and experienced prosecutors in our office to draft the indictment. We first met with our Intake/Grand Jury prosecutors. At our meeting, everyone came armed with caselaw about HIV transmissions in sexual assault cases, bodily fluid as a deadly weapon, and any other case they felt would assist us. Once we were satisfied, we presented them to our appellate folks (we like to refer to them as the warranty and repairs division) for review. We then obtained six indictments for the offense of aggravated assault with a deadly weapon.

Trial prep

As we prepared for trial, we knew we had to overcome the problems posed by the amount of information from the six victims. We wanted to highlight the dates the victims were in a relationship with the defendant, the dates they were informed they had contracted the various STDs including HIV, and the date Padieu had definitive knowledge of his own infection. We also knew we had three other HIV-positive victims who would testify at punishment, and we needed to convey the same information for them.

We created a timeline that included a photo of each victim, the case number, the victim's pseudonym and initials, the dates of the relationship, the date Padieu was informed of his HIV status, the date the women testified positive for HIV, and the sample number used for the phylogenetic analysis. We also created a timeline for Padieu showing his STD history. Each timeline was blown up and mounted onto a 3x5-foot posterboard that would allow the jury to compare the relationship dates to the date Padieu was informed of his HIV status. We felt this method of presentation would allow us to concisely highlight the important information and could easily be used by witnesses during testimony and the jury during deliberation to determine the date Padieu definitively knew he was HIV positive and compare it to each relationship.

Although we felt this was going to be the most effective methods of presenting the evidence, it also highlighted one of the weaknesses we had in the case. Of the six victims, four had started their relationship after Padieu knew he was HIV-positive. However, two victims began their relationship prior to this date. This

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was a problem we would have to solve though the medical evidence.

Medical evidence

Our trial plan was to start by highlighting September 12, 2005, the date Dr. Checo had a 35-minute consultation with Padieu and informed him he was HIV-positive. We could then weave all of our victims' testimony around this date in our effort to prove Padieu's knowing transmission of HIV.

We also wanted to establish a pattern of behavior that included treatment for various STDs, doctors' requests for the defendant to get tested for HIV, and Padieu's continued high-risk behavior in spite of warnings from medical personnel. Based on information from Padieu's insurance records, we found he had history of visiting doctors for various sexually related infections. We planned on presenting the medical records and medical testimony detailing his doctor visits and phone calls he made along with the advice he was given (and ignored) about safe-sex practices.

We talked with many of the infectious disease doctors who had been treating the victims and decided that we would use Dr. Allen Reuben as a witness to explain HIV. This was an important aspect to the case because we had alleged HIV-infected bodily fluid as a deadly weapon that caused serious bodily injury to the victims. We wanted Dr. Reuben to discuss the method of transmission which mainly follows a pattern of a man infecting a woman. Dr. Reuben could testify that a woman infecting a man was a less likely scenario—important to contradict Padieu's claim he was infected by one of the victims. Dr. Reuben was also going to help us overcome our problem in the two cases where the women had been dating Padieu prior to September 12, 2005, which had left us unable to prove whether they were infected before or after he knew he had HIV. Dr. Reuben testified about re-infection, which can occur when HIV with a different DNA sequence is transmitted to a person who is already HIV positive. This virus can re-infect the recipient and possibly cause different health issues depending upon its genetic characteristics.

Phylogenetic analysis

Although six women were positive for HIV and Padieu was the common denominator, we were interested in backing up our case with science. We contacted Dr. Michael Metzker, Ph.D., an Associate Professor at the Baylor College of Medicine in Houston. Dr. Metzker uses phylogenetic analysis to determine the relationship, if any, between HIV samples. We discovered his work after reading one of many articles the victims had sent us about prosecutions based on HIV transmission. After a conference call with Dr. Metzker in August 2007, we felt we could use his expertise to prove or disprove that a significant relationship existed between the seven samples,[2] and whether Padieu was the source of infection in the six victims.

Dr. Metzker provided a written protocol as to the collection, transportation, and analysis of each of the seven samples, which was approved by our office. Because Dr. Metzker's laboratory was not accredited as a crime laboratory as required by §411.0205 of the Government Code, we applied for and received a waiver allowing him to perform this analysis. Upon completion of the accreditation process and pursuant to the protocol, a single victim's blood sample was taken and driven from McKinney to Houston by our DA investigators Samme Glasby and Bobby Chacon—a process they repeated seven times. The protocol required a blind analysis so each sample was identified only by number to prevent the potential bias by the research team or investigators. Dr. Metzker performed the necessary DNA sequencing procedures on a single sample and decontaminated the laboratory and equipment to eliminate any question of contamination of further samples. It took seven trips and nine months before all the samples and sequencing procedures were completed.

The protocol required the sequencing analysis to be done on two different gene areas of the HIV. This data would be compared to the data of 20 closely related sequences from GenBank, a public DNA database, to determine the genetic relationship between our seven samples and public samples. Failure to show a significant relationship between either the sequence areas on the seven samples or a finding of a significant relationship with the public samples would nullify the hypothesis that Padieu infected the six victims. The news was good when we received the analysis from Dr. Metzker. Not only did he determine that all specimens were significantly related, he could also say that one specimen was the source of the HIV

infection with respect to all other samples.

Dr. Metzker had testified before as to the significant relationship that existed between samples in an HIV transmission case,[3] but testimony concerning which sample was the source had not been allowed in any U.S. court that we knew about. We knew that if we could qualify Dr. Metzker and phylogenetic analysis in a 702 hearing, the strength of our case would be exponentially greater. As part of the protocol, Dr. Metzker was not informed whether his theory on the source of the infection was correct.

The trial

We had known that ABC's "20/20" news program had been following this case. About a month before trial, we were informed that journalists from the show would be allowed to film parts of the trial but that any identifying information about the victims would not be broadcast. The final court order allowed filming of Dr. Metzker, closing arguments, and the verdict.

This case started on May 19, 2009, and lasted two weeks. During voir dire, community supervision was not an option so the biggest issues we faced were the presumption of innocence (because we were trying six separate cases) and the morality perception surrounding our victims' conduct. We were able to dispatch the presumption of innocence issue with ease, but we did encounter a few jurors who felt that a person engaging in sexual activity must suffer the consequences of her actions. These people did not make the jury.

Due to scheduling issues with the defense and Dr. Metzker, we were unable to have the 702 hearing until the afternoon following voir dire. Although this was a very complex subject, the use of a PowerPoint presentation and Dr. Metzker's professional and easygoing personality provided the information the court needed to rule that he would be able to testify to both the significant relationship between all seven samples and that one sample was the source of HIV in the other six.

We started our case with Dr. Checo, who detailed his five visits with Padieu for treatment of chlamydia and urethritis, both sexually transmitted diseases. He encouraged Padieu to get an HIV test due to his lifestyle and to practice safe sex. Padieu always claimed he had been recently tested and refused any HIV testing. Dr. Checo also talked about Padieu's phone call to the office a short time after being diagnosed with chlamydia where he stated he had been having unprotected sex with his girlfriend and inquired if she needed treatment. In September 2005, Padieu finally acquiesced and submitted to an HIV test at Dr. Checo's request. The most important testimony in this trial was about his 35-minute conversation with Padieu September 12, 2005, regarding his positive HIV test. Interestingly, Padieu never went back to Dr. Checo again.

All six victims discussed their relationships with Padieu. Cross-examination mainly focused on the women's decisions of quickly entering into a sexual relationship with Padieu and all of the graphic details. Of the six victims who testified, Barbara had the longest relationship with the defendant. She testified that she had paid Dr. Checo for Padieu's STD testing in September 2005. She used to be a nurse and became extremely anxious when Dr. Checo's office set up an appointment to tell him about the results. Padieu did not allow her to come into the doctor's office with him during the consultation so she waited in the car. When he emerged following the revelation that he was HIV positive, she asked him the results: Padieu looked her in the eyes and told her, "I'm HIV-negative."

Following the testimony of Dr. Reuben, who proved HIV caused serious bodily injury and HIV-infected bodily fluid was a deadly weapon, we were ready to end our case-in-chief with Dr. Metzker. Because we had already been through a dry-run during the 702 hearing, Dr. Metzker did an outstanding job of testifying about the science he used to sequence the genes and the analysis to create the phylogenetic tree showing the "significant relationship" amongst the seven samples. He went into detail about the one sample that stood out as the source of HIV infection. That specimen, of course, belonged to Philippe Padieu.

The defensive theory was Padieu thought the 2005 test results were a false-positive due to the number of women with whom he had had sex who were HIV-negative. During the initial investigation, the Health Authority came up with 26 sexual partners for Padieu.[4] He called some of these women to testify as to their HIV status in an effort to support his theory. The defense claim was

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that he was infected by Barbara after the "false-positive" test and that was why he spread it to the other women.

The jury was out four and a half hours before they returned with guilty verdicts in all six cases.

Punishment

It is great to start out a punishment case with the introduction of a federal pen packet! Padieu had been sentenced to 20 years in a robbery case where he used a gun.

Unfortunately, there were also more victims to present at punishment. Two of them were from Dallas County, so they were not included in our indictments. One woman testified she had a short relationship with Padieu; at the last sexual encounter she had with him, he was so rough with her that he tore her labia. She ended the relationship.

Approximately a year before trial, our office was contacted by a woman from Michigan. She had dated Padieu in the late 1990s when he was living in the Detroit area. She found out she was HIV-positive and had always believed he infected her. One day she was cleaning out some drawers and came across his business card. She searched his name on the Internet and saw all the news articles that had been written about this case. Although she was not allowed to testify about her HIV status due to the remoteness, she did talk about the last time she dated Padieu: He surprised her by taking her to a swingers party. She had been unaware of this aspect of his lifestyle and ended the relationship.

We met our last victim the Friday night following the first week of trial. Her fiancée called the day before we started testimony because he believed that Padieu was the person who infected this woman with HIV. She met Padieu and dated him a couple of times around September 2005. At the end of September or beginning of October, she engaged in one sex act with him, right after he found out his HIV status. By the time she had figured out why she had so many health problems, the HIV had developed into AIDS. She had kept this hidden from all but her family, but she decided to testify against Padieu.

Although Padieu did not testify during the guilt-innocence stage of the trial, he decided to take the stand at punishment against the advice of his attorneys. The women described him as a gentleman with a personality that most of them had fallen in love with, but this was not the man who testified. There was very little control from his attorney as Padieu rambled about conspiracies and the over-reaching prosecutors who were only out to make a name for themselves and get promoted. He alleged he was infected by one of the women and that they had formed a "hate group" against him. He felt they should be prosecuted for a hate crime. At one point during cross-exam, prosecutor Lisa King told Padieu to look over at the jury and tell them he was the victim—which he did.

The jury took only two hours to sentence Padieu to 45 years in five cases and 25 years in one case (that being his long-term girlfriend, Barbara). Because he will not be eligible for parole until he is around 75, we are very pleased with the verdict. Based on his age and the noticeable deterioration of his health, we are confident that he will never infect another woman again.

Endnotes

1 AIDS is generally defined as having a CD4-cell (T-Cell) count below 200.

2 The seven samples consisted of blood from Padieu and the six victims.

3 *State v. Schmidt*, 699 So.2d 448 (La. 1997); see also *State v. Schmidt*, 771 So.2d 131 (La. 2000).

4 Some women were HIV-negative, some women would not cooperate, and we believe that there were many women unaccounted for because of the possibility of anonymous sex that occurred at various swingers' clubs or houses that he frequented.

Court of Criminal Appeals update

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

Questions

1 After her grandmother discovered a green, slimy discharge on 4-year-old L.N.'s underwear, the child revealed that Brunshae Steadman, her mother's boyfriend, had lay on her, touched her "tutu," and rubbed his penis "down in her stride." When doctors examined the child at the emergency room, they suspected that the preschooler had a sexually transmitted disease (STD), gonorrhea.

Steadman tested positive for the infection, and when an investigating officer sprung the diagnosis news on him, he confessed he had touched the little girl during bouts of heavy drinking and masturbating. After hearing of her boyfriend's actions and his STD, the child's mother uttered disbelief and explained to investigators that she herself had suffered from gonorrhea during her pregnancy. However, at trial, the jury learned that when children contract gonorrhea from their birth mother, the STD presents only in their eyes. Other expert testimony revealed that gonorrhea is typically transferred via sexual contact but could also occur when a finger touches the exterior of the vagina. The sexual-assault nurse examiner (SANE) explained that penetration of the female sexual organ (FSO) occurs when any object passes the labia majora and that this definition does not require actual vaginal penetration. The jury convicted Steadman on counts of digital and penile penetration of the child's FSO.

The Waco Court of Appeals reversed for factual insufficiency on the penile penetration count. In light of evidence that suggested that gonorrhea can also be transmitted by the male sexual organ merely touching the outside of the FSO without having passed through the labia majora, the Waco judges reversed, finding that penile intrusion into the victim's sexual organ beyond the vaginal lips was not established. Chief Justice Tom Gray dropped a footnote dissent to this result. Was the Waco court correct?

yes ______ no ______

2 Antonio Sierra rounded a corner of a busy Houston roadway and, when the vehicle in front of him turned slowly into an apartment complex, he pulled his SUV into a left lane to continue forward unimpeded. At the same time, when a couple pulled their vehicle out of that complex, Sierra T-boned them, pinning the driver in the vehicle. She suffered serious bodily injury and remained in the hospital for a month.

During the investigation, Sierra's self-described 13-beer intake registered a 0.12 BAC. Even though the evidence revealed that an average, undistracted person traveling at the posted speed would have avoided the collision and there was no evidence Sierra attempted to brake, uncertainty about the wreck's causation arose because of some possible vision-impairment issues. Felony DWI charges ensued and, on appeal, the Fourteenth Court of Appeals deleted the deadly weapon finding after finding no evidence that Sierra drove in a reckless, threatening, careless, or dangerous manner, or that he violated any traffic laws or was at fault for the collision. Was this holding correct?

yes ______ no ______

3 While separated from his wife, Daniel Rey arrived from out of town at 12:30 in the morning to visit his 1-year-old daughter. He heard the child crying from outside and could see his 3-year-old stepson inside asleep through a window. After rapping on the window to wake the little boy and gaining entrance after breaking a window, Rey found only the children at home. Rey took his daughter back to his Muleshoe house and claimed to have left the little boy with neighbors. The neighbors disputed Rey's assertion, saying they had found the child standing alone, outside, screaming for his father. Convicted of child abandonment, Rey argued that insufficient evidence supported this crime because he did not have care, custody, or control over the little boy. The Amarillo court agreed and held that stepfather Rey did not stand *in loco parentis* with the little boy. Was this the proper standard?

yes ______ no ______

4 Prosecutors charged Roberto Trejo with aggravated sexual

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assault. In his trial, the court's jury instructions submitted this primary offense as well as three lesser offenses: sexual assault, aggravated assault, and assault. Trejo did not object to the lesser charges, and the jury found him guilty of aggravated assault. For the first time on appeal, Trejo claimed that the trial court had no jurisdiction to convict him on the lesser charge because aggravated assault was not a proper lesser-included offense of aggravated sexual assault. The Fourteenth Court of Appeals agreed and entered an order of acquittal after finding the conviction void. Was the appellate court correct?

yes _____ no _____

5 After CPS removed 15-year-old P.H. from her drug-addicted mother's home, the already-troubled teen moved in with her grandmother and father, Murray Hammer. P.H. woke up four separate times to find her father molesting her during the night. She told a friend about these instances, who in turn reported them to a school counselor, and authorities were notified.

During the trial and P.H.'s cross-examination, evidence showed serious conflict between the teen and her father. When P.H. moved in, she was required to follow rules, work at her grades, and be responsible—the opposite of her lifestyle under her mother's loose supervision. This conflict meshed with Hammer's defensive theory that P.H. had falsified these indecency allegations to end her father's strict control.

Also in support of this theory, Hammer unsuccessfully sought to introduce additional evidence that included P.H.'s previous sexual conduct and false allegations of abuse. For instance, after living with her father for a month, P.H. ran away with her boyfriend overnight. Her father took her to be examined by a sexual-assault nurse, and P.H. told the nurse she had instead been sexually assaulted by a youth named Ignacio and previously molested by an uncle (describing the same conduct that was alleged against her father). Yet P.H. told another witness that the Ignacio sexual assault tale was contrived to keep her dad from learning about the boyfriend. During the defense bill of exception, P.H. ultimately admitted the comments to the nurse (after being shown the medical records) but denied the statements about making up the prior assault. The trial court excluded all of this evidence. Other instances of the victim's prior sexual history were also excluded, including her false report of being held and raped by five men at knifepoint when she had again run away and her removal from school after being caught with a boy in a compromising position. Was evidence of P.H.'s prior, purportedly false, accusations admissible?

yes _____ no _____

6 A homeless woman living under Houston's Pearce Elevated stabbed a homeless man who lived in the same vicinity; their dispute arose over a debt. Trial witnesses who also lived in this homeless community described how Dereskey Hayden stabbed John Kimball in the back. During the guilt phase, the eyewitnesses described the victim as a pretty nice, quiet guy who did not give others any problems. The victim's daughter testified about his prior family and employment life but that his battle with alcohol progressed over the years, rendering him homeless. During the guilt phase, the defense sought to admit evidence of Mr. Kimball's status as a registered sex offender to rebut the State's evidence, but the trial court denied the request. In punishment, Hayden reoffered this evidence to rebut the false impression that Mr. Kimball was a nice guy. Did the trial judge correctly exclude the victim's sex-offender registration status when the defense offered it during punishment?

yes _____ no _____

7 Emily Hardy and Hiram Myers participated in an anti-war protest outside of then-President Bush's ranch in Crawford. The protest took place where three roadways intersected, leaving a triangular patch of median. As the demonstration gained momentum, its leaders cooperated with McLennan County authorities by using shuttles to the site and moving out of the roadway onto the right-of-way as ordered. They specifically complied with Sheriff Captain Vanek's request to move away from the triangle and into the bar ditches to avoid blocking the roads. The official told the protesters that the bar ditches were "public property on which they could express their views."

Subsequently, the McLennan County commissioners issued an order prohibiting tents and portable toilets from being placed on the right-of-way of any county road. The order's poor drafting left it

without enforcement because it included no penalty except for removal of the offending tent.

Protesters Hardy and Myers sought to challenge the ordinance's constitutionality, so they erected a tent in the right-of-way. Knowing their intent, Captain Vanek formally notified them of the need to stay off the road and in the bar ditches. The warning also referred to a safety hazard posed by tents erected in the right-of-way; Vanek expressed concern that cars might stray into that area for various reasons. Finally, the warning stated that failure to promptly remove tents would result in arrest under Penal Code §42.03 for obstructing a highway. Hardy and Myers went into their tent and remained until they were arrested. A video of the arrest scene showed demonstrators seated in folding chairs set up about 5 feet from the edge of the roadway, a vehicle parked completely off the pavement, and the tents situated even farther off of the road than the seated protesters and the vehicle.

At trial, Captain Vanek testified that the protesters were not obstructing the paved part of the street but were obstructing the right-of-way. Section 42.03 defines "obstruct" as rendering impassable, unreasonably inconvenient, or hazardous, and the statute prohibits obstruction of, among other things, a "highway," which is not defined in this section of the Penal Code. The court of appeals held that the remote possibility of an obstruction is not a violation of §42.03. Was the intermediate court correct?

yes _____ no _____

8 Elena Karenev sought to divorce Nikolai Karenev and, during the throes of their divorce litigation, Nikolai sent purportedly threatening emails to his soon-to-be ex-wife. A harassment prosecution ensued, and a jury found Nikolai guilty. For the first time on appeal, Nikolai raised a facial constitutional challenge to the harassment statute based on vagueness. The Fort Worth Court of Appeals reversed on that basis. On petition for discretionary review, the State argued that Nikolai forfeited his facial challenge to the provision's constitutionality. Was this a successful argument?

yes _____ no _____

9 Officer Gill's experience included 24 years as a patrol officer dealing with street-level drugs and working undercover. After receiving unspecified information from a confidential informant and while surveilling a narcotics-infested area of Houston, Officer Gill came into contact with Garland Vennus, a felon whom he had arrested at least twice on drug charges. Lo and behold, Officer Gill watched Vennus stop for a few minutes at a service station known for selling crack. While driving away, Vennus committed a couple of traffic violations, so Gill instructed a uniformed officer to stop him. Vennus denied the officers' request for consent to search his car, so the officers promptly placed him in the back of a squad car to prevent evidence destruction. The group waited 30 minutes for the drug dog's arrival, and the dog alerted on the car. A subsequent search revealed contraband.

Seeking suppression, Vennus contested only the length of the detention while waiting for the drug dog. At the hearing, Vennus voiced a speculation objection before Officer Gill answered the State's inquiry about the basis of the officer's reasonable belief that Vennus possessed contraband in his car. The trial court inexplicably sustained this objection. The trial judge also sustained a defense objection to Gill's prior observation of Vennus appearing to conduct narcotic transactions. Can Vennus argue on appeal that the State failed to carry its burden to prove the reasonableness of the continued detention and subsequent search under these facts?

yes _____ no _____

10 Billy George Reedy pled guilty to capital murder. As part of the plea agreement, the prosecution waived the death penalty in exchange for waiving his habeas rights as set out in CCP Articles 11.07 and 11.071. After this plea agreement, no appeal ensued. In spite of the agreed habeas waiver, Billy raised six grounds in a *pro se* application for writ of habeas corpus. His petitioned for relief regarding 1) an involuntary plea; 2) his attorneys' coercing him to plea; 3) the propriety of his police interrogation; 4) ineffective assistance of counsel; 5) denial of his appellate rights; 6) and indictment error. The trial court reviewed the habeas claims and recommended relief be denied based upon the plea-bargained waiver of future habeas litigation.

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Is a blanket waiver of all future habeas litigation enforceable?

yes _____ no _____

Answers

1 No. *Steadman v. State*, 280 S.W.3d 242 (Tex. Crim. App. April 1, 2009) (Keller) (6:1:2). The Waco court skewed its factual sufficiency review by failing to defer to the jury's verdict and granting greater weight to the defense's competing causation theory. Also, the lower appellate court too narrowly interpreted the child's testimony, the expert evidence of gonorrheal transmission, and the definition of penetration, especially when it emphasized that the young victim had not indicated that her perpetrator penetrated her female sexual organ. Presiding Judge Keller explained that no one should expect a 4-year-old child to use adult-level descriptions of sexual-assault conduct. Applying a correct view of penetration, the child's testimony could reasonably be viewed as establishing penetration of the FSO. In other words, vaginal penetration was established by proving the tactile contact beneath the fold of the victim's external genitalia and the resulting transmission of a loathsome STD to a 4-year-old girl.

2 No. *Sierra v. State*, 280 S.W.3d 250 (Tex. Crim. App. April 1, 2009) (Keasler) (7:2). Without addressing the argument that driving while intoxicated is inherently dangerous and reckless, the Court of Criminal Appeals found that the interim appellate court applied the wrong standard of review by failing to look at the evidence in a light most favorable to the jury's finding. Here, a rational factfinder could conclude that Sierra drove recklessly or dangerously while intoxicated because there was no evidence that he attempted to brake, some evidence that he was speeding, and significant evidence that he could have avoided the crash. Also, the driver's injuries showed that Sierra's conduct caused serious bodily injury. Hence, his reckless driving and failure to avoid the collision supported the deadly weapon finding with legally sufficient evidence.

3 No. *Rey v. State*, 280 S.W.3d 265 (Tex. Crim. App. April 1, 2009) (Johnson) (8:1:0). The gravamen of the child-abandonment statute is abandonment by one who has *care, custody, or control* of the child, and proof of a familial relationship with the victim is only one evidentiary fact to consider. Penal Code §22.041 does not define care, custody, and control, nor has this issue been addressed on appeal. However, because §22.041 focuses on the protection of vulnerable individuals, as does §22.04's prohibition of injury to a child, the definition of care, custody, and control in §22.04 applies to child abandonment with equal vigor. An actor has assumed care, custody, or control when he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for a child's protection, food, shelter, and medical care. By utilizing the *in loco parentis* requirement, the lower court applied the wrong standard. *In loco parentis* is more restrictive than care, custody, or control because a person, such as a baby-sitter, may have temporary care, custody, or control but not be in loco parentis. The court remands the case to the lower appellate court to apply the correct legal standard.

4 No. *Trejo v. State*, 280 S.W.3d 258 (Tex. Crim. App. April 1, 2009) (Womack) (6:3:0). First, the Court of Criminal Appeals explained that Trejo did not need to object to the charge error to raise the issue on appeal under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984). While a defendant may be estopped from complaining about a charge he requested, estoppel will not prevent a defendant from raising a claim where the record fails to show who was responsible for including an erroneous lesser crime, as in this case.

Second, the court considered whether the trial court harbored jurisdiction to find Trejo guilty on the erroneous lesser charge. The return of an indictment invoked the jurisdiction of the trial court, so the Court of Criminal Appeals remanded back to the interim appellate court to consider harm on the erroneously submitted lesser-included crime.

5 Yes. *Hammer v. State*, ___ S.W.3d ___, 2009 WL 928561 (Tex. Crim. App. April 8, 2009) (Cochran) (9:0). Evidence of prior false accusations of sexual activity may be admissible for a purpose other than a propensity attack upon a witness's general character for truthfulness even though prior false allegations of rape do not tend to prove or disprove any of the elements of the charged sexual offense

and "once a liar, always a liar" evidence is prohibited under the propensity theory. Hammer's defensive theory before the jury focused on claims that P.H. fabricated the sexual molestation because her father required her to follow rules for the first time in her teenaged life. But the jury did not hear about how upset P.H. became when her father took her for a sexual-assault exam after she had the overnight encounter with her boyfriend; distress over this event led P.H. to be hospitalized after threatening suicide. The indecency accusations against her father arose only a month later. The evidence also illustrated that P.H. was not above changing her story from a consensual encounter with her boyfriend to a non-consensual encounter with another boy to attempt to prevent her father from punishing her.

Rule 412 contains an explicit motive or bias exception, and the unanimous decision alludes to a possible Confrontation Clause issue as well. Hence, the trial court abused its discretion in preventing Hammer from cross-examining P.H. about the hospital incident, her allegations of prior molestations, claims of having been raped at knifepoint, and admissions about lying to the hospital nurse about her overnight affair with her boyfriend. These instances demonstrated bias against Hammer and P.H.'s possible motive to testify falsely against him.

Trials involving "he said, she said" credibility battles often require a jury to reach a unanimous verdict after hearing diametrically different versions of events. In these cases, the Rules of Evidence, specifically Rule 403, should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the victim or the defendant. Federal and state laws give trial judges wide latitude when admitting evidence of specific bias, motive, or interest to testify in a particular fashion. Under Rule 403(a)(3), a defendant may always offer evidence of a pertinent character trait, such as truthfulness, of any witness, but Rule 608 limits evidence of truthfulness to reputation or opinion testimony. However, specific instances of conduct are used under Rule 613 to establish specific bias, self-interest, or motive for testifying. Rule 404(b) also allows evidence of others' misconduct to establish a person's motive for performing some act, such as making a false allegation against the defendant.

6 Yes. *Hayden v. State*, ___ S.W.3d ___, 2009 WL 928569 (Tex. Crim. App. April 8, 2009) (Keasler) (8:1:0). While it is true that we now essentially have wide-open punishment hearings under Code of Criminal Procedure Article 37.07 and victim character and victim impact evidence—both good and bad—are admissible during punishment. The victim's collateral sex-offender status was not relevant to the jury's assessment of punishment in this case. Evidence that draws comparisons between the victim and other members of society based on a victim's worth or morality is not relevant to punishment and should usually be excluded under Rule 403.

However, the court notes that a party may open the door to this evidence on rebuttal by creating a false impression. Where that false impression relates directly to the offense charged, it may become admissible. Still, the admissibility of this evidence rested within the sound discretion of the trial court and, here, the trial court's exclusion fell within the zone of reasonable disagreement. When discussing this victim character evidence, the court cautions against using the imprecise term negative victim *impact* evidence.

7 Yes. *Hardy v. State*, 281 S.W.3d 414 (Tex. Crim. App. April 22, 2009) (Johnson) (5:4). Legally insufficient evidence supports this obstruction conviction, requiring reversal, because there was no proof of an actual roadway obstruction. Although the county ordinance barred structures such as tents in the right-of-way, Hardy and Myers were charged with obstruction of part of the road easement for the passage of vehicular travel. The statute's purpose involves the free flow of traffic and the safety of travelers, not those on the side of the road. Because the protesters in the tent did not actually obstruct or impede highway passage, the State failed to prove a violation of §42.03. The court also noted the unreasonableness of prosecuting persons who had been ordered to remain in the bar ditches and off of the road, who complied, and who were later prosecuted for that same conduct.

8 Yes, but don't ignore the concurrence. *Karenev v. State*, 281 S.W.3d 428 (Tex. Crim. App. April 22, 2009) (Keller) (5:4). The five-vote majority holds that a defendant

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may not first launch an attack on the facial constitutionality of a statute on appeal. The court recognized that federal and state jurisprudence has narrowed the circumstances for finding jurisdiction lacking, thereby voiding judgments. *See, e.g., Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990) (applying procedural limits to raising fundamental indictment error) and *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993) placing rights/rules into three categories for preservation purposes). This trend generally undercuts the notion that a facial constitutional challenge is somehow akin to a jurisdictional matter, validly raised at any time. The court vitiates two late-'80s cases (*Rabb* and *Rose*) and describes their holdings as made-up rules in search of a rationale to justify their existence.

Judge Cochran's concurrence contains several salient observations. First, she describes the majority's decision as painted too broadly and, thus, opening itself to misinterpretation as sanctioning un-American incarceration for an unconstitutional crime where procedural default occurred. Second, the concurrence reasons that federal caselaw always allows defendants to question the constitutionality of the penal provision that creates or defines the crime prosecuted, but defendants have no ability to delay raising constitutional arguments aimed at procedural or evidentiary provisions. Third, the rationale of the contemporaneous objection rule fails with respect to facial constitutional challenges; for example, nothing the judge or any party does will cure such an error. Fourth, Judge Cochran points out that Nikolai's allegation isn't a facial constitutional challenge of the harassment statute, nor was the fact-based claim even an as-applied challenge to the statute's constitutional viability, but the first-time appellate complaint actually raised a legal sufficiency challenge, wrapped in the garb of a First Amendment facial constitutional claim.

9 No. *Vennus v. State*, 282 S.W.3d 70 (Tex. Crim. App. April 22, 2009) (Hervey) (6:2:1). The invited-error doctrine prohibits the defendant's Fourth Amendment challenge. When a litigant induces the commission of an error by his conduct, estoppel prevents him from asserting that ground on appeal. Here, when Vennus caused the judge to improperly exclude evidence based on hearsay, he locked himself into that strategy and its consequences.

Judge Price's concurrence would have upheld the trial court's ruling based on a reason not discussed at trial: He suggested relying on the officer's ability to arrest Vennus for the illegal left-hand turn, bypassing the continued detention question, and heading unknowingly into an *Arizona v. Gant* (129 S.Ct. 1710 (April 21, 2009) search-incident-to-arrest issue. Unbeknownst to Judge Price, the Supreme Court had decided *Gant* the day before the CCA decided this case. Presumably, he would not rely upon this justification now that *Gant* has sharply limited a police officer's ability to search a car incident to an arrest.

Judge Meyer's dissent blisters the prosecution for ignorance of the advantageous fact that, in a suppression hearing, the Rules of Evidence do not apply under *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2007).

10 No. *Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. April 29, 2009) (Price) (8:1). While a defendant may voluntarily, knowingly, and intelligently waive the right to file future writs of habeas corpus, such a forfeiture is probably not enforceable regarding unforeseeable claims because they could not have been knowingly waived at the time of the agreement. Because an express waiver of the right to post-conviction habeas corpus relief must be knowingly and intelligently executed, it must occur under circumstances indicating that the defendant had knowledge of the nature of the claims he could have brought but for the waiver. However, habeas claims cannot be waived ahead of time if they are predicated on facts that did not exist or did not fall within the defendant's knowledge, comprehension, or anticipation.

In Reedy's case, facts surrounding his allegations of an involuntary plea, coerced confession, the negotiated waiver of his appellate rights, and his bald assertion of indictment error, were either known or knowable, rendering his waiver of each valid. However, Judge Price's decision found Reedy's habeas waiver unenforceable on the ineffective assistance claim because trial counsel's purported incompetence could have rendered his plea involuntary. Price says that the magnitude of the claim—trial counsel's lack of preparedness forcing Reedy to accept the plea agreement—vitiated any

habeas waiver and warranted remand to the trial court for further habeas proceedings. The opinion posits that claims premised on newly available evidence such as actual innocence, suppression of exculpatory evidence, and ineffective assistance would most likely render a habeas waiver unenforceable.

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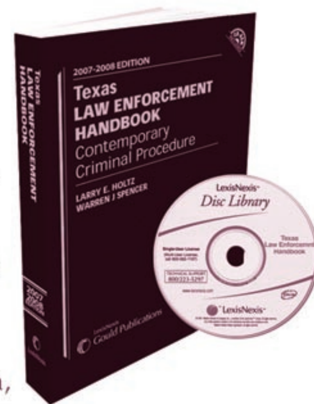

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