THE TEXAS PROSECUTOR

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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

A battle at punishment

How Tarrant County prosecutors secured a stiff prison sentence in an intox assault and intox manslaughter case whose defendant had no criminal history whatsoever

Matt Lundy, age 21, and Josh Carter, 20, were heading home from Josh's job at Chili's. He had called Matt, whom he had known for years, for a ride when his shift ended because he had let his girlfriend take his own car. The two climbed into Matt's white Dodge Avenger around 11 p.m.

By Nikki Nickols and Michele Hartmann
Assistant Criminal District Attorneys in Tarrant County

At about 11:15 p.m., the red light camera at Cooper and S.W. Green Oaks Boulevard in Arlington recorded a collision between Erica Kolanowski's SUV and Matt Lundy's sedan. The camera's video footage showed Matt's Dodge pull up to a red light and stop, crossing just over the white stop bar on the road. Traffic passed through the intersection normally, and the light cycled to green. After a brief pause, the Avenger slowly moved into the intersection, when suddenly, a red Chevy Blazer—going at least 77 miles an hour, it was later determined—hurtled into the intersection and broadsided Matt's car. Sparks, pieces of metal, and car parts flew, and the Blazer lifted up and swung around from the tremendous force of impact out of camera range; the Dodge Avenger appeared to have disintegrated upon impact.

Though both he and Matt were seat-belted, Josh Carter died almost instantly from a basilar skull fracture, which sheared arteries and led to lethal blood loss after his head struck the car's interior. (The medical examiner later said this injury is common in vehicle collisions involving significant speed and impact.) Matt Lundy suffered a severe brain injury and was Care-Flighted to John Peter Smith Hospital; first responders at the scene didn't think he would survive the trip to the hospital, but survive he did, so that he was even able to testify later at trial. Kolanowski, also wearing her seatbelt, suffered a severe fracture of the femur. Two hours later when her blood was drawn at the hospital, she was found to have a BAC of 0.17.

Preparing for a punishment trial

From the beginning, Matt and Josh's families made quite clear that they hoped Erica Kolanowski would serve a long stint in prison. In their minds her behavior was on par with

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2010 Annual Campaign has kicked off!

We would like to congratulate and thank the Ector County District Attorney's Office for 100-percent participation in support of the 2010 Annual Campaign. "Two weeks ago, I challenged every member of the office to contribute to TDCAF," said District Attorney Bobby Bland, "and every single employee responded with a contribution, pledge, or online donation."

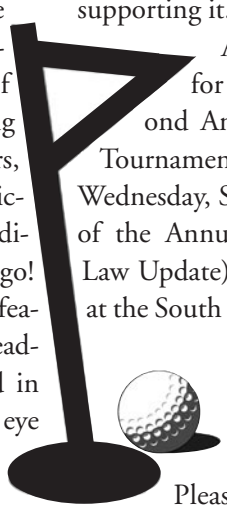
By Jennifer Vitera
TDCAF Development Director in Austin

By now, I hope all of you have received the 2010 Annual Campaign letter, brochure, and your invitation to be a part of the Texas District and County Attorneys Foundation. The foundation is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel.

As we previously mentioned, this year we have two fundraising goals for our membership groups, one for elected prosecutors and one for investigators, key personnel, and victim assistants. The elected prosecutor campaign challenge is to raise $500 in unrestricted funds for the annual campaign. If all 332 prosecutors donate at this level, the foundation will receive $166,000 in unrestricted funds. For investigators, key personnel, and VACs, the challenge is a competition between these three membership groups. So far, the investigators are leading the way in the 2010 Annual Campaign, based on dollars raised compared to the percentage of membership in each of our competing groups (investigators, key personnel and victim assistance coordinators)—way to go! We will track future results and feature a regular update on who's leading the way on our website and in *The Texas Prosecutor*. So keep an eye out!

In other news

Two major events are coming up in the next few months. One is our 2010 DWI Summit, Guarding Texas Roadways, on November 12. It is our second such day-long training on intoxication offenses. In 2008, TDCAA and TDCAF partnered with the Texas Department of Transportation (TxDOT), the Anheuser-Busch Companies, and the Busch Satellite Network to present this seminar. We trained more than 1,400 prosecutors and police officers across Texas by broadcasting live from the BSN studios in St. Louis to 32 Anheuser-Busch distributorships around the state. Anheuser-Busch is joining us again to broadcast another seminar, and we are asking for your help in identifying corporations and people who might be interested in supporting it.



Also, keep an eye out for information on the second Annual Foundation Golf Tournament, which will take place Wednesday, September 22 (the week of the Annual Criminal and Civil Law Update) on South Padre Island at the South Padre Island Golf Club. Funds raised through the tournament will support the 2010 Annual Campaign.

Please e-mail me at vitera@tdcaa.com if there is someone in your area to whom we can send more information on either the DWI summit or the golf tournament. Sponsorship levels are: Platinum: $10,000; Gold: $5,000; Sterling: $2,500; and Bronze: $1,000. Money raised from sponsorships and attendees will benefit TDCAF, a 501(c)(3) non-profit. ❇

See page 11 for a list of recent gifts.

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505 W. 12th St., Ste. 100, Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaa.com

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Wrapping up the TDCAA 2006 Long Range Plan—and starting a new one

By Rob Kepple
TDCAA Executive Director in Austin

The history of TDCAA has been one of slow and careful growth. Your association leadership has wisely chosen to plot our path through a series of five-year plans to make sure that we are meeting our members' needs and to regularly re-evaluate how we do our business.

At the Annual Criminal and Civil Law Update in September, the association will officially conclude activities under the 2006 Long Range Plan when the first Victim Assistance Coordinator Section board is chosen and seated. Four years ago our leadership committed the association to better help prosecutors serve crime victims, and a keystone to that effort was to create a section to work in tandem with that of the Key Personnel.

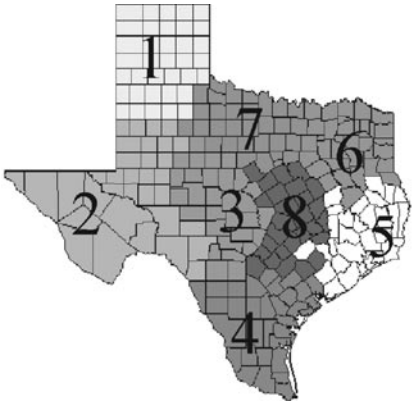
The new section board will be instrumental in guiding the efforts of **Suzanne McDaniel**, TDCAA's Victim Services Director, whose position is funded through the Texas District and County Attorneys Foundation—yet another example of how our leadership plans and executes the development of services that will improve our profession in the decades to come.

Other achievements from the 2006 Long-Range Planning (LRP) Committee include creating the senior appellate attorney position, which allowed us to bring on **John Stride** to assist all prosecutors in the consistent development of Texas criminal jurisprudence. In addition, we have revamped the TDCAA website, developed timely case summaries emailed to more than 1,900 subscribers every week, improved our speaker databases and speaker support, and increased ethics training opportunities.

This fall we will be launching a new five-year long range plan. The focus, as always, will be on service to our members. I'd sure like to hear from you as we organize this new LRP effort over the summer. What do you need to do your job better? How can your association help? Do we need to change how we are doing something? Is there something you need that you think we can provide? Would you like to be involved in the long range plan? Just give me a call or e-mail me at kepple@tdcaa.com.

TDCAA Annual Business Meeting

The TDCAA Annual Business Meeting will be held in conjunction with our Annual Criminal and Civil Law Update at 5 p.m. on Wednesday, September 22, at the South Padre Island Convention Centre. The meeting will include the election of officers for 2011 as well as other business. This year, caucuses will elect regional board representatives to two-year terms for the following regions: Region 1 (currently held by **Lynn Switzer**, the DA in Pampa); Region 2 (currently held by **Bobby Bland**, the DA in Odessa); Region 4 (currently held by **Martha Warner**, the DA in Beeville); and Region 7 (currently held by **Staley Heatly**, the DA in Vernon). (See the map, below, for a regional breakdown.) If you have an interest, call one of those folks or me to get the scoop on TDCAA board service.



Foundation Annual Campaign's first-round winner!

I'd like to take a moment to thank everyone—and I mean everyone—in the **Ector County District Attorney's Office** for rising to the occasion by recently sending in a donation to the Texas District and County Attorneys Foundation's 2010 Annual Campaign! Ector County joins other counties, such as Walker County and Ellis County, in sending in a donation that represents 100-percent participation from the folks in the office. We are so grateful!

As I noted above, the association

can't do all of the things you need us to do without being creative when it comes to funding, and the foundation has proved to be a great additional source for that support. Your donations of any amount form the basis of that effort, and every little bit helps. Thanks a ton to all of you—it is because of this support that we will have a safer Texas!

Hiring in the fall?

Even in this tight economy, prosecutor jobs are opening around the state. If you are looking to hire a new prosecutor this fall after bar results are in, check in with me first. The TDCAA Recruitment, Diversity, and Retention Committee has participated in on-campus interviews at various law schools around Texas, and we have a list of top candidates who have already been interviewed and ranked. There are some very good law students out there who really want to be prosecutors, and we know who they are and can connect you with them.

Student loan repayment progress report

Congress has authorized the first disbursements under the John R. Justice Student Loan Repayment Program. That is great news, even if the amount dedicated to the program, $10 million nationwide, is modest. Right now various Texas state officials are working out the details of managing the program and developing a framework for the loan repayments, so all we can ask you to do is keep an eye on the TDCAA website. We will publish any information you need as soon as it becomes available. And keep in mind that even if the amount of reimbursement is limited right now, we would like to see a solid program developed so that can accommodate growth of the program into the future. If you have any questions, just call me or email me at kepple@tdcaa.com, and we will fill you in as best we can.

Is it a crime to be ugly?

As prosecutors, we are accustomed to challenges that those of us who work in the criminal justice system and even the system itself are biased in different ways. Many studies have sought to explore racial and gender bias in various situations, and these studies have produced mixed results over time.

But a new study reveals the prospect of a very troubling bias in the system—a bias against ugly.

Heaven knows why, but Cornell University just released a study concluding that unattractive defendants are 22 percent more likely to be convicted and on average serve 22 percent more time in jail.

The study, called "When Emotionality Trumps Reason" and published by Cornell graduates Justin Gunnell and Stephen Ceci, contends that jurors make decisions both rationally and emotionally and that a defendant's attractiveness plays a role in that. The study contends that in slam-dunk cases and those involving serious felonies, a defendant's appearance doesn't make any apparent difference in how often he's convicted or for how long he's sentenced, but with minor crimes and in close cases, it looks like pretty people have the edge.

It reminds me of that Jerry Harrison song, "Man With A Gun" whose lyrics go: "Pretty girl, young man, old man, man with a gun / the rules do not apply." Not to fear though: I have asked **W. Clay Abbott**, our DWI Resource Prosecutor and expert in-house ethics trainer, to develop some new training using *US* and *People* magazines and the *National Enquirer* as training materials to sensitize us to this new potential bias in our criminal justice system. ❇

Greasing the skids: A proposed form to prepare for plea negotiations

All of us who work in the criminal justice system are busy. Time is short and the press of business is great. And so it is that ideas to make the process more efficient and less burdensome should be considered carefully. Like many of you, I have given this notion some thought, although I can't claim that the thought was particularly deep or useful. Nonetheless, the general idea of efficiency is a sound one, and in that vein, I recently recalled a tool I encountered early in my prosecutorial career.

By C. Scott Brumley
County Attorney
in Potter County

When I started in the government lawyer business years ago, several of my colleagues had posted on their doors a checklist for prefatory issues from defense counsel. I have no idea who the original author was, but I do know that he or she was a comedic genius. The form addressed an array of matters used to "prime the pump" for case disposition negotiations. Lest there be any misunderstanding or unintended hard feelings, the form was decidedly tongue-in-cheek.

In the years since, I have not seen an update of the form, so I thought I would undertake a revision to bring it into modern practice. Likewise, among the factors I considered was the concept that if you don't occasionally laugh in this business, it will eat you. As a result, I offer the following form to assist in the frequent and, with any luck, jovial interplay between prosecution and defense.

Preliminary Plea Negotiations Worksheet

My name is: _____ My client's name is:_____

My client may be identified by:

- ❒ his/her date of birth:_____.
- ❒ his/her Social Security number: _____.
- ❒ prominent tattoos.

My client is charged with:_____.

(You may attach additional sheets as necessary.)

To facilitate orderly, expeditious negotiations for disposition of my client's case(s), please be advised of the following:

I have _____ years of criminal experience, and this case:

- ❒ is one of the weakest I've seen.
- ❒ is deeply troubling because it seems to represent overreaching.
- ❒ is deeply troubling because you've gone to great lengths to portray my client as "guilty."
- ❒ is one that should be easy to work out by way of your capitulation.

(Note: In completing the blank for years of experience, a minimum of 20 is recommended for effect. However, anything over 75 may tarnish your believability.)

You may be appropriately intimidated by some of my past successes, which may be found:

- ❒ in the caselaw reporters covering Texas.
- ❒ on any electronic legal research database.
- ❒ in a list of cases I will gladly provide to you upon your remittance of $150, plus shipping and handling.
- ❒ on my website, _____ (if you see any unflattering remarks about you on the site, they undoubtedly are the work of nefarious hackers).

I'm glad to be talking to you:

- ❒ because what some call "weak trial statistics" I call a sense of compassionate justice.
- ❒ because … did I mention that you look strikingly stylish today?
- ❒ instead of some of the other Nazis around here.
- ❒ because that "pen time" thing we talked about on the phone was a joke, right?
- ❒ because I thought I had been trespassed from the office.

You have big problems because:
- ❒ my client is sympathetic, and your victim and witnesses are not.
- ❒ your victim has signed an affidavit of non-prosecution (please disregard that my office prepared the form).
- ❒ you can't prove one or more of your essential elements.
- ❒ I'm counting on you overlooking one or more of your essential elements.
- ❒ I'm smooth like chocolate pudding.
- ❒ I'm smooth like tapioca pudding.

The war stories I'm going to tell to soften you up will take:
- ❒ 15 minutes.
- ❒ more than an hour.
- ❒ less than an hour.
- ❒ the time required for your retirement to vest.

I need a continuance because:
- ❒ I have had an inadequate opportunity to prepare for trial.
- ❒ I have a conflicting setting.
- ❒ I have a conflicting tee time.
- ❒ I have been unable to locate an essential defense witness.
- ❒ I have been unable to locate an essential witness named "Mr. Green."

My client has:
- ❒ no criminal history.
- ❒ a few priors, which were the result of a series of amusing misunderstandings.
- ❒ several priors, which are irrelevant.
- ❒ a criminal history that reads like the Code of Federal Regulations.

As to any prior convictions/deferred adjudication orders, my client:
- ❒ will stipulate to any and all such orders after an opportunity to review them.
- ❒ has no fingerprints as the result of an unfortunate "chemical experiment" gone awry and cannot be tied to any "pen packet" you may offer.
- ❒ invokes the "liar, liar, pants on fire" doctrine.

My client is an ideal candidate for:
- ❒ pretrial diversion.
- ❒ deferred adjudication.
- ❒ a substantially reduced term of incarceration.
- ❒ a plea to a less onerous offense.
- ❒ an outright dismissal and letter of apology from the chief of police/sheriff/your office.

… because (please check all that apply):
- ❒ he/she has a good mama.
- ❒ he/she has other good family members, who may be contacted (please check one):
  - ❍ at their residences.
  - ❍ at the county jail.
  - ❍ by way of my version of what they will say.
- ❒ he/she has a mental impairment.
- ❒ you have a mental impairment.
- ❒ he/she didn't do it, and the State's witnesses who say otherwise are scallywags (even though this isn't a maritime case).
- ❒ he/she will be perfectly law-abiding if allowed to retain his/her Mercedes (needed to travel to and from work), automatic handgun (needed for self-protection) and all of the cash seized from him/her (legitimately earned through construction work or casino winnings).
- ❒ every other county in Texas does it this way.
- ❒ as a taxpayer of the county, I pay your salary.

You should consider leniency for my client, because he/she can provide *(please check all that apply)*:
- ❒ solid evidence against the more responsible parties to the offense.
- ❒ solid evidence against anyone you want.
- ❒ credible witnesses who will vouch for his/her generally good character.
- ❒ photographic evidence of his/her blamelessness (note: the county will be billed for any necessary Photoshop work).

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You're dead in the water because of our defensive issues, which include *(please check all that apply)*:

- ❒ no probable cause.
- ❒ that you can't prove the case beyond a reasonable doubt.
- ❒ that you can't prove the case beyond a metaphysical doubt.
- ❒ that the stop/search was bad.
- ❒ that the stop/search was unpleasant, hence it was unduly prejudicial.
- ❒ that my client expressly invoked his/her *Miranda* rights.
- ❒ that my client telepathically, but emphatically, invoked his/her *Miranda* rights.
- ❒ actual innocence.
- ❒ claimed innocence.
- ❒ insanity.
- ❒ mistake of law.
- ❒ mistake of judgment.
- ❒ a *Brady* claim.
- ❒ a *Brady Bunch* claim (see discussion of good family above).
- ❒ that the State's witnesses have all the credibility of a Wall Street CEO.
- ❒ that the State's witnesses *are* all Wall Street CEOs.
- ❒ an airtight alibi.
- ❒ a somewhat believable alibi.
- ❒ jury nullification.

If I were you, I wouldn't want to take this case to trial because *(please check all that apply)*:

- ❒ I've tried hundreds of these cases.
- ❒ I've tried hundreds of these cases and actually won one.
- ❒ I'm going to get a favorable instruction (justified).
- ❒ I'm going to get an instructed verdict (justified).
- ❒ I'm going to get a favorable instruction (because the judge doesn't like you).
- ❒ I'm going to get an instructed verdict (because the judge *really* doesn't like you).
- ❒ I'm going to jump up and object to every question you ask like an espresso-fueled Chihuahua.
- ❒ I look better in a suit than you do.

Your forensic evidence is flawed because *(please check all that apply)*:

- ❒ the tests did not follow scientifically accepted and proven methodologies.
- ❒ my experts can beat up your experts.
- ❒ it is based on junk science.
- ❒ it is based on punk science.
- ❒ you failed to provide me with exculpatory evidence for testing.
- ❒ you failed to misplace/destroy the inculpatory evidence for testing.
- ❒ I will dazzle the jury with my ability to correctly pronounce words like "nuclear," "chromatograph," "extrapolation" and "inadequate analytical rigor" (regardless of their applicability).

(If you have issued any press release or participated in any news conferences concerning this case, please complete the following two questions.)

In my press release/news conference, I referred to you as *(please check all that apply)*:

- ❒ a fascist.
- ❒ a jack-booted thug.
- ❒ unethical/unprincipled.
- ❒ a redneck.
- ❒ an idiot/moron.
- ❒ incompetent.

… and:

- ❒ I'm sorry.
- ❒ I regret the tone, but I believe the substance of the allegation to be correct.
- ❒ I have evidence to back it up.
- ❒ my version hit the airwaves first, so deal with it.

Based on the foregoing, I would like to discuss with you:

- ❒ a reasonable negotiated plea offer (with "reasonable" meaning no prison/jail time and an "affordable" fine).
- ❒ an immunity agreement or favorable sentencing recommendation in exchange for my client's testimony against other responsible parties.
- ❒ stipulations to simplify the issues for trial.
- ❒ your unconditional surrender.

Thank you for your efforts to streamline the criminal justice process. You will be contacted by the prosecutor handling your case as soon as possible. ✻

Photos from our Civil Law Seminar

Congratulations!

Thank you to Michael Hull, an assistant county attorney in Harris County (second from left, next to Erik Nielsen [far left], TDCAA Training Director) for his service as president of the Civil Section Committee. And congratulations to Bob Schell, an assistant criminal district attorney in Dallas County (second from right), winner of the Gerald Summerford Award, which was presented by Grant Brenna (far right), also an assistant in Dallas.

More about the Victim Services Board elections at the September Annual

Things are heating up in Austin, both in temperature and in victim services. We have been sending out notices to elected prosecutors and victim assistance coordinators about the coming Victim Services Board election. Board members will channel much-needed information from their region to plan training, establish operational procedures and standards, and serve as mentors. I can't emphasize enough the importance of the mentoring role. Those who do this work every day have invaluable experience and expertise and know best how to help others get started or solve problems in existing programs.

By Suzanne McDaniel
TDCAA Victim Services Director

Running for a regional position on the board is a simple process. All you need to do is obtain authorization from your elected official, be a TDCAA member who has paid TDCAA membership dues, and attend the TDCAA Annual Civil & Criminal Law Update on South Padre Island this September. Board members will be elected by region by other coordinators in that region. It isn't necessary to make a speech, kiss a baby, or buy a lot of expensive advertising time on television. However, if you would like to say a few words, go for it. TDCAA will reimburse you for travel to biennial meetings.

Getting involved

Many of you have also asked how you can become more involved in other ways. A great first step is to sign up for our e-mail notices by contacting me at mcdaniel@tdcaa.com or 512/474-2436. I've gotten lots of interesting calls since coming on board and would love to share them with you and get your comments. For example, a probationer was recently transferred to another county's supervision, triggering the issue of whose job it was to notify the victim. Did you realize that §76.016 of the Texas Government Code details the duties of victim notification for probation departments along with the prosecutor's duty to provide victim contact information to the department?

We would also appreciate your ideas for journal articles. Let us know what you would like to read about or share your creative solution or inspiring story with us. Early in my career I met a young woman who had been sexually assaulted, strangled, and left for dead. She had survived the unthinkable, but because her larynx had been severely damaged, she literally didn't have a voice. We became close as she went through continuance after continuance and finally through trial. The defendant was convicted and given a lengthy sentence, but she told me she persevered not for herself, but so that no one else would be harmed. I remembered her years later when we drafted and passed the victim impact statement (VIS) statute. I remember her each time I explain the importance of the VIS as the voice for victims that don't have one. I'm sure many of you have similar experiences, and it would be great if we shared these stories with the rest of our association's members. ❇

Recent gifts to the foundation

Malcolm Bailey *In Honor of Carol S.Vance*
Chris and Reese Baker *In Honor of Carol S. Vance*
Juanita Barner *In Honor of Carol S.Vance*
Robert and Cheryl Bennett *In Honor of Carol S.Vance*
Adelaide Biggs *In Honor of Carol S.Vance*
R. N."Bobby" Bland
Misty Renea Boon *In Memory of Elton A. Faught*
Michael R. Bostick
Dan Boulware
Kathy Braddock *In Honor of Carol S.Vance*
Denise Bradley *In Honor of Carol S.Vance*
John M. Bradley *In Honor of Carol S.Vance*
Bracewell & Giuliani *In Honor of Carol S. Vance*
James E. Brill *In Honor of Carol S.Vance*
Joseph D. Brown *In Honor of Carol S.Vance*
Leonard J. Bruce *In Memory of Elton A. Faught*
Kay Burkhalter *In Honor of Carol S.Vance*
Richard F. Callaway *In Honor of Carol S. Vance*
Michael Henry Carlson
Janet Reynolds Cassels
Bobbie Cate
Tree Chamberlain
Gloria Jean Clarke
Joe D. Commander *In Memory of Elton A. Faught and In Memory of Lee Wayne Holloman*
Nancy Cook *In Honor of Carol S.Vance*
Alice P. Craig *In Honor of Carol S.Vance*
Roland Dahlin *In Honor of Carol S.Vance*
Larissa Davis
Clifton Davison *In Memory of Dallas County Fallen Officers*
Cenia DeAnda
Gianna M. DeBottis *In Honor of Carol S. Vance*
Yolanda de Leon *In Honor of Carol S.Vance*
Linda Deaderick
Vic Driscoll *In Honor of Carol S.Vance*
Robert Duran
James M. Eidson
Laurie English *In Honor of Carol S.Vance*
The Honorable Erwin Ernest *In Honor of Carol S.Vance*
James A. Farren**
Robert Fertitta *In Honor of Carol S.Vance*
Nene Foxhall *In Honor of Carol S.Vance*
Karl T. Geoca *In Honor of Carol S.Vance*
Richard E. Glaser
William Gleason**
Gerald A. Goodwin *In Honor of Carol S. Vance*
Karen Gross
Michael J. Guarino, Jr. *In Honor of Carol S. Vance*
Eric Hagstette
Frank Harmon, III *In Honor of Carol S.Vance*
Judge Margaret S. Harris
Cary L. Hart *In Honor of Carol S.Vance*
The Honorable Ira Royal Hart

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A battle at punishment (cont'd)

murder. She chose to drink, and she chose to drive; therefore her actions were equivalent to intentionally taking a life and injuring another. Needless to say, the punishment they wanted was not within the statutory range for either of the charged offenses.

Not surprisingly, the defendant wanted probation, and she was eligible because her criminal history was clean. With no one budging from either end, there was little plea bargain discussion, and we knew from talking with defense counsel that the case would likely be a guilty plea to the charged offenses of intoxication manslaughter and intoxication assault with punishment submitted to a jury.

We then focused on preparing the family for the special nuances particular to drinking and driving cases that make them so different from any other criminal case. It was essential for these families to understand the qualities of and issues an intoxication manslaughter and intoxication assault case pose for prosecution and for purposes of punishment; getting any type of penitentiary sentence, especially when the defendant had no usable criminal history, would be tough.

We discussed with the family that intoxication cases have no *mens rea* element. That the defendant was not charged with intentionally committing these offenses would distinguish these cases from others where there was death or serious injury. We emphasized that although the lack of intent did not make the results of her actions less heinous, it would be an important factor that the defense would hammer home to the jury. Juries can and often do give significant weight to a defendant's lack of intent. Although not happy with the significant legal distinction between Kolanowski's behavior and an intentional murder, the families did come to understand how powerful a tool the defense would have for punishment argument.

A second issue that we broached with the families was that jurors might sympathize with this defendant. Though in a typical felony courtroom, the general public cannot (or does not want to) relate to the average murderer, sex offender, or aggravated robber sitting at the defense table, the majority of jurors will be able to reflect upon an instance (or more than one) at some point in their lives where they drank and drove, knowing then or afterwards that they shouldn't have. The feeling that "there but for the grace of God go I" must be all too common for jurors in DWI cases.

Third, we discussed what impact the defendant's lack of usable criminal history would have on the State's punishment case. We would need to rely upon the horrific lasting impact of defendant's actions, one family's loss of a child, and another family's child suffering a traumatic brain injury to drive home the long-lasting effects of Kolanowski's actions that night.

We also outlined the potential impact of the defendant's cooperation with police by consenting to a blood draw at the hospital, her expression of remorse when the officer told her that she had killed someone, and a subsequent suicide attempt a couple of months after the offenses. Although these factors carried little weight with Josh and Matt's families, jurors themselves would be entitled to use these facts in assessing a punishment sentence.

Lastly, we intensively prepared the families for the distinct possibility of the defendant receiving probation by virtue of the above issues. Based upon previous intoxication manslaughter cases and their respective verdicts, including several involving police officers, we knew that probation or even pen time on the low end of the range was a strong possibility. We wanted the families to be prepared for whatever the jury would decide.

Jury selection

Jury selection is a key component to trying any criminal case to a successful conclusion. We focused on preserving those panelists with backgrounds that would support a law-and-order sentence of penitentiary time even for a first offender, such as those with younger children or teenagers, those who had an established residency in Tarrant County, and those who believed that punishment ranked higher than rehabilitation or deterrence as the law's primary goal. We also tried to identify potential jurors that might be prone to sympathizing with the defendant's situation for purposes of challenges

for-cause if that sympathy might rise to legal disqualification.

Presentating the evidence

Even though the defendant entered guilty pleas before the jury, she entered a plea of "not true" to the deadly weapon enhancement charged on both indictments. (We can only theorize that defense counsel hoped that the jury would find the deadly weapon notices "not true" and save her client from sentences with a 3g component.) We planned that our presentation would encompass all they would hear at a regular contested guilt-innocence phase but with punishment witnesses added in.

We wanted to start with a punch and end with a punch, so right out of the gate our first witness sponsored the very powerful red light camera video that showed the defendant's devastating and horrific collision with Matt and Josh. Our criminal investigator, Ernie VanDerLeest, is one of 45 certified forensic video technicians from the Law Enforcement and Emergency Services Video Association (LEVA), and he had created a trial exhibit from the original video that showed the collision at normal speed, then slowed to half-speed and quarter-speed. The intent to offer the video was handled pretrial with, not surprisingly, defense objections that its probative value was substantially outweighted by its prejudicial effect. Our argument was that depriving the jury of the opportunity to see the actual collision, indeed the offense itself, would be tantamount to keeping from them some of the most substantive and probative evidence integral to determining punishment. The slow-motion portions of the video, while not enhancing the images in any artificial way, allowed the jury to actually see the path of Matt and Josh's car upon being struck. At real-time speed, their car almost disappears. Most, if not all, of the jurors and the courtroom gallery reacted with audible gasps when we played the video in court.

We continued with testimony from citizens who were at the intersection in their own cars; first responders from Arlington Fire Department; the emergency flight paramedic who worked on Matt Lundy on the ground and in the air and handed him over at John Peter Smith Hospital; the Arlington Police Department crash investigator who had done the reconstruction and speed calculations; the DWI enforcement officer who met with Kolanowski at the hospital, interviewed her, and requested her blood be drawn; and a well-known crash investigation expert who testified about examining Kolanowski's vehicle and determining there were no mechanical defects that would have prevented the vehicle from operating safely (this examination is often referred to as the "vehicle autopsy"). One of our deputy medical examiners testified to Josh's autopsy, and of course we presented testimony about Kolanowski's blood alcohol test results. Two of Matt Lundy's therapists, instrumental in helping with the start of his recovery soon after the collision, told jurors about the devastating injuries Matt had suffered and what type of therapy he had gone through. Jurors heard from Matt and Josh's mothers, saw pictures of both young men, and heard about the lives of each before the collision. Watching the anguish and grief during each mother's testimony had a powerful effect on the jurors. However, our final 1-2 punch was finishing the case with Matt Lundy himself.

A courageous survivor

Matt Lundy was a typical 21-year-old man. He loved to hang out with his friends and to be outside. He was very active and played disc golf. He enjoyed spending time at the lake with his friends, which he had done the weekend prior to this crash.

His injuries included a skull fracture, two traumatic brain injuries (one a diffuse axonal injury and one a contusion on his brain stem plus a small brain bleed); a fractured right sinus bone in his face and fractures in his neck, collarbone, shoulder, elbow, rib, and the small bones in his back; a bruised heart and lungs; a damaged kidney, liver, and spleen; internal bleeding, and a crushed pelvis. He was in a coma for an extremely long time with a ventilator and a feeding tube. He spent almost three months in the hospital, having multiple surgeries and fighting off infections. His stomach had been cut open in the wreck, and it would not close up and heal until doctors covered it with cadaver tissue. He had to undergo a complete blood transfusion to replace all of his plasma. He also developed Guillain Barre Syndrome, an autoimmune disorder that affects the nervous system, which made him a quadriplegic.

Since the wreck and upon waking from his coma, Matt had undergone intensive physical therapy to re-

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learn how to do almost everything, from speaking to swallowing to using his arms. Although he was still in a wheelchair at trial, he had regained some use of his legs and was learning how to walk with a walker. He was able to tell the jury that his main goals in life now were to someday "talk normally, walk normally, and be able to jump and run." From the night of the wreck, Matt was able to remember only going to Chili's to pick up Josh; his next memory was of waking up in the hospital weeks later to tell his mother, "I want to go home." His lack of memory was not a hindrance to the jury, we believe, as the jurors had the mechanically unbiased video evidence of the collision to rely upon for how it occurred.

The defense asked no questions of Matt.

With Matt's powerful testimony, the State of Texas rested its case.

The defendant's case

The defense called several witnesses, including Kolanowski's mother and uncle, both of whom testified they themselves were recovering alcoholics (perhaps to show a family predisposition to the disease and, theoretically at least, less culpability) and that Kolanowski was a "gentle" person. They tried to convey how Kolanowski's life had changed after the collision, that she had been doing community service work and had grief and remorse for her actions. Kolanowski's life partner also testified that Kolanowski was extremely remorseful.

The defendant herself testified that she recalled drinking three rum and Cokes and a fourth alcoholic drink but did not remember the collision itself or what else, if anything, she had had to drink. (Defense counsel had alluded in her opening statement that the defendant might have been slipped something in her drink at the second bar she visited that night, but no evidence was ever presented to that effect aside from Kolanowski's "memory loss.") She testified she had tried to kill herself with pills several months after the collision and ended up in the psychiatric ward of John Peter Smith Hospital. She told the jurors she was attending Alcoholics Anonymous meetings and had been sober since the day after her suicide attempt. Kolanowski made a powerful witness on her own behalf, as throughout her testimony she sobbed and appeared genuinely distressed. At one point she looked to the back of the courtroom where Matt Lundy sat in his wheelchair and apologized to him. She testified she would trade places if she could with either of the victims.

We spent minimal time in crossing the defendant's family members as they came across as genuine and ancillary victims of Kolanowski's offenses. Even with Kolanowski herself, we had to take care because she presented as distraught, at one time suicidal, and extremely remorseful. She had also, to some extent, insulated herself from certain questions because she claimed to have no memory of a portion of the evening and no memory of the collision itself. We had no prior bad conduct to mention, either.

Two issues did, however, present themselves for possible ground to gain with the defendant. First, we asked Kolanowski how she could enter a plea of not true to the deadly weapon finding—as the jury was shown two trial exhibits: a photo of Matt Lundy's car with Josh Carter laying dead outside of it, his body covered, and a photo of her own smashed Chevy Blazer. Kolanowski tried to evade directly answering by testifying she didn't intend for the offense to happen. Second, on redirect, we asked about her direct testimony in which she offered to trade places with the victims—if only she were able. She told the jurors if there was something she could do to make things right, she would do it. Her answer gave us an opportunity for a question and answer helped us argue for penitentiary time. We asked Kolanowski that if a lengthy prison sentence would give the Carter and Lundy families peace, would she be willing to go? She paused and said that if that's what God wanted for her, she would do it. I then came back at her and asked if she herself would commit to do it of her own free will. After another pause, she replied "yes." I passed the witness and the defense rested.

Argument

On closing argument, defense counsel strenuously argued Kolanowski's lack of intent for the offense to happen and her extreme remorse and change of life since the wreck, all as a justification for a probated sentence.

The State argued that the extreme circumstances of the offense (the high speed, running the red light, and her BAC more than twice the legal limit) differentiated this case from one with less egregious driving facts and a lower BAC. We

also encouraged the jury to look at the death of Josh Carter and the disabilities Matt Lundy would suffer the rest of his life. Strangely enough, having a live victim with severe injuries and incontrovertible disabilities in the courtroom may have been the strongest factor for the jury, even surpassing that of our deceased victim.

Verdict

The jury deliberated for the remainder of the afternoon and then asked to go home. Upon returning the following morning, jurors resumed their deliberations and finally signaled they had a verdict. They found the deadly weapon notices "true" for both indictments and in Matt Lundy's case assessed the maximum of 10 years with a $6,000 fine. For Josh Carter's case they assessed a 16-year sentence and a $6,000 fine.

To say that we were very pleased with the jury's decisions would be an understatement. The families were in shock as they had been prepared for Kolanowski to receive probation, a testament to our prep work with them and witnessing firsthand the defendant's grief and sobbing in front of the jury. Matt felt the sentence was appropriate in light of Josh's death and his own circumstances; he would have been devastated with Kolanowski receiving probated sentences. In light of previous verdicts in similar cases, some involving police officers, we were fortunate to have obtained a jury with whom the State's evidence resonated so strongly.

A note of thanks

We want to extend our heartfelt appreciation to the following people with our office who assisted in the case with preparation and presentation: Richard Alpert, the office's resident DWI expert; Ernie VanDerLeest, our investigator; Pat Sursely of our Victim's Assistance Unit; and Rhona Wedderien for help with trial exhibits. Also many thanks to the Carter and Lundy families and Matt Lundy himself, who repeatedly assured us they had faith in our ability to help obtain justice for them. It was an honor to work on behalf of a young man who is a model for courage and overcoming adversity. I would also like to thank my father, Calvin Hartmann, who is an inspiration to me by way of his own significant prosecution career and as my role model for each and every time I step into a courtroom to present a case on behalf of the State of Texas. ❇

Editor's note: Please see "Maneuvering crime victims safely through a mine field" on page 16 for more on how the prosecution worked as a team to seek justice in this case.

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Maneuvering crime victims safely through a minefield

How a prosecution team can guide victims and their families through the often bewildering criminal justice system

For someone who's never worked in a prosecutor's office, the justice system can be an intimidating place. The jargon alone is unfamiliar, as are the many twists and turns that any given case can take. Add to it that most innocent victims of crime are there unwillingly, without warning, and because a criminal has hurt them or someone they love, and it's no surprise that they end up confused and frustrated.

But a strong prosecution team can guide crime victims and their kin through the minefield of a criminal trial, even one with seemingly insurmountable difficulties and disappointments looming on the horizon. One such team in the Tarrant County Criminal District Attorney's Office steered two families through a very difficult punishment trial, and they did it by communicating clearly with their charges. (Read about the whole case starting on the front cover.)

As they prepared for the punishment trial of Erica Kolanowski, the Tarrant County team—a tightknit group of two prosecutors, an investigator, and a victim assistance coordinator—knew what they were up against. The defendant had no criminal history, showed great remorse for her crime, had quit drinking and was attending Alcoholics Anonymous meetings, pled guilty to both counts, and from the stand begged the jury for probation (for which she was indeed eligible). The Carter and Lundy families (who had buried one son while another was wheelchair-bound) were adamant, however, that Kolanowski serve pen time.

The prosecution team, therefore, had to walk a delicate balance between what the victims' families wanted and the sentence a jury could realistically hand down. As Pat Sursely, the victim assistance coordinator, says of her duties to victims: "I don't want them to be surprised by anything."

To that end, Sursely and the team met with the Carter and Lundy families early on as a group, educating them on every aspect of the justice system. "I try to explain the process in each courtroom because each court is different," Pat says. "I ask them to stand when the jury comes in, not to talk during the trial, and not to show any emotion. I don't want them to be embarrassed for doing something wrong or for the defendant to have grounds for a mistrial."

Families find some parts of the process especially difficult, Pat notes, so she prepares them in advance and reminds them of what's coming up. Plea bargains, for instance, can be a prickly topic for victims; many of them are reluctant to let their cases plead because they think it means the offender is getting off too easy. Pat explains that most cases end in a plea and that pleas resolve more quickly than going to trial. Plus, even with a plea bargain, victims can still confront the defendant in court, which is what many crime victims want most.

Once a case ends up in the courtroom, victims and their loved ones face other challenges. The medical examiner's testimony, for example, is extremely hard for victims' families to hear, so Pat alerts them when the ME is going to testify so family members can discreetly exit the courtroom if they wish. (The same is true for crime scene photos and their sponsoring witness.) Families also find defense counsel's cross-examination and closing argument to be offensive, especially when the attorney may blame the victim for some portion of the crime. "But we always tell them it's a good thing that the defense attorney is vigorously defending their client so there aren't grounds for mistrial or appeal," Pat says.

In the Kolanowski case, Pat and the prosecution team warned the families over and over that the defendant could very well receive probation for her offense. (The Tarrant County Criminal District Attorney's Office had had a handful of such sentences for intoxication manslaughter cases, including one or two

where the victim was an on-duty peace officer.) "Families don't want probation because they think it's easy, but probation in Tarrant County is *not* easy," Pat says. "We always explain that the judge can put conditions on the probation and that breaking those conditions can mean that the probation is amended or revoked." Pat also notes that if a defendant gets probation, the victims' families can follow up with the probation department's victim liaison to keep tabs on the offender. Plus, families may be notified if there's ever a hearing to revoke.

"It always helps victims to be kept informed throughout the process, either by the assistant district attorney or victim assistance coordinator, as we are just a phone call away," Pat says. "We are here to help them better understand the court process and in doing so will keep their stress to a minimum."

In the Kolanowski punishment trial, the State won a 16-year sentence on the intoxication manslaughter count and 10 years on the intoxication assault charge (to be served concurrently). Not only was the prosecution team pleased, but so were the Carter and Lundy families, who'd been warned that probation was a distinct possibility. Information is power to victims, who already feel a loss of control because of the crime, then enter the justice system where they have little input in any decision making. The Tarrant County team approach gives victims empowering information. Working together, prosecutors and coordinators make sure victims know that while there are no guarantees, we hope there won't be any surprises. ❇

—Sarah Wolf

Consenting adults

How prosecutors tried a man who shot his wife—with her permission

By John Gillespie
Assistant Criminal District Attorney in Wichita County

The day before Thanksgiving is supposed to be a quiet day at the courthouse—I had been looking forward to getting caught up on paperwork. Instead, I got an urgent phone call from Sergeant Bill Henning with the Wichita Falls Police Department's Crimes Against Persons Unit.

Sergeant Henning and Detective John Laughlin had been investigating a shooting that happened on August 20, 2009. The victim, Amanda Rivera, had initially claimed the shooting was an accident, but when confronted by detectives, Amanda admitted that her husband, Jose Rolando Rivera, had shot her. She also told officers that she was afraid that Jose would go on a shooting spree at Sheppard Air Force Base (AFB), where he was stationed. She told them he might turn Sheppard into Fort Hood—words that jolted me from my holiday mindset because the Fort Hood shooting spree that killed 13 and wounded 30 had happened just three weeks before.

While Sergeant Henning and I were heading to Sheppard AFB to coordinate with base security, we learned that Amanda was on her way to the JP to sign an affidavit of nonprosecution and ask for a PR bond for her husband, who had just been arrested.

I called Kyle Lessor, one of our felony prosecutors, and had him intercept Amanda at the JP's Office, letting the JP know of the risk that Jose Rivera posed and that the DA's office opposed any bond reduction.

The golden retriever, in the living room, with a .22

The day Rivera shot his wife, he brought her to the emergency room. Amanda had a gunshot wound in the back of her right calf. X-rays revealed that the bullet had fractured her tibia bone.

While at the hospital, Amanda told both her doctor and detectives that she had been cleaning their .22 long rifle and left it on the coffee table while she walked to the kitchen. Amanda then claimed that her 5-month-old golden retriever jumped up on the coffee table, causing the gun to accidentally discharge. Amanda claimed that her husband came home, found her shot, and took her to the hospital. She stuck to this story even when interviewed privately by detectives. Rivera told detectives the same thing, that he arrived home to find his wife with a gunshot wound.

In my nine years as a prosecutor, I've encountered claims of self-defense, defense of a third person, and even the SODDI ("some-other-dude-did-it") defense. But this was the first time I'd heard of a trigger-happy golden retriever!

Because neither Amanda nor

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Jose would admit how the shooting actually happened, the detectives set out to investigate her story.

Detective Laughlin took the rifle to a local gunsmith to determine its trigger pull-pressure and to rule out Amanda's claims that the dog did it. The gunsmith's experiments showed that the trigger-pull required 4.7 pounds-per-square-inch of pressure. Because the weight of the rifle was approximately equal to the trigger-pull pressure, the gunsmith concluded that any pressure on the trigger-pull while the gun rested on a smooth surface, such as a coffee table, would not cause the weapon to fire but would merely slide the weapon on the table. Thus, the gunsmith exonerated the good name of the golden retriever.

Second verse, a whole lot worse

The next step was for detectives to confront Amanda with the evidence that disproved her preposterous story. So Detective Laughlin asked Amanda to come to the station under the guise of returning the gun and closing his investigation. When faced with the gunsmith's evidence, Amanda admitted that the golden retriever was innocent and that her husband had shot her.

However, her second story was as bizarre as the first. Amanda claimed that she had "always wanted to know what it felt like to be shot." She said that she wanted a Derringer for her birthday, but Rivera told her their 9mm was sufficient. She said they were arguing over how much damage a .22 could do. While her husband offered to take her to the gun range and "string up some meat" to show her a .22 wouldn't do much damage, Amanda instead told him she wanted him to shoot her. Amanda also told detectives that Rivera had been suffering from post-traumatic stress disorder (PTSD) since returning from Iraq and that she was afraid he was "going to turn Sheppard into Fort Hood." So she told him to shoot her to "relieve some stress."

Amanda then claimed they went to their bedroom, where he put some pillows over her leg because "he didn't want me to get a muzzle burn." She said he then counted to three and shot her. When detectives confronted Jose, he told them the same story, at which time detectives arrested him for aggravated assault with a deadly weapon.

An alarming backdrop

On April 20, a month before the trial, Wichita Falls was rocked when Ross Muehlberger, a 22-year-old loner, walked into the coffee shop at Hastings and shot four people with a shotgun. Muehlberger then went to a local bar and killed the bouncer before ultimately killing himself. Muehlberger was out on bond on aggravated assault charges at the time of his shooting spree. There was a public outcry over the fact that he had received a substantial bond reduction by the court, even though the DA's office had opposed it.

This shooting spree served as the backdrop for the Rivera trial and heightened the reality that Rivera was, in our opinion, a dangerous defendant capable of similar violence. In fact, his mental health records revealed persistent, severe homicidal ideations focused on both his commanding sergeant and random men and women in uniform on the base.

Just shoot me

Kyle Lessor was the lead prosecutor on the case, and I sat second chair. Both Kyle and I believed consent would be the biggest hurdle at the trial's guilt/innocence phase. While we both thought that a person couldn't consent to being shot, we discovered the consent statute is quite vague on this point.

At trial, Amanda testified repeatedly that she consented to being shot and that Rivera would not have shot her without her permission. In his police interview, Rivera also told detectives that he shot Amanda only because she asked him to. So if Amanda *could* consent to being shot, a jury would likely find that she *did* consent.

Section 22.06 of the Penal Code provides that consent is a defense to assault, aggravated assault, or deadly conduct, so by its express wording, §22.06 applies to aggravated assault. But the same statute provides that consent is not a defense if the conduct threatens or inflicts serious bodily injury. While Amanda suffered a broken tibia and was on crutches for eight weeks, she had fully recovered by the trial. Also, we had charged the aggravated assault as causing bodily injury with a deadly weapon. Thus, we doubted we could win under the "inflict serious bodily injury" prong.

Our argument at the charging conference was that by using a deadly weapon in committing the assault, Rivera's conduct threatened serious bodily injury. While there were few

appellate cases on the consent statute (and none that applied to whether a person can consent to being shot with a firearm), we did find a Court of Criminal Appeals case stating that the "danger of serious bodily injury is necessarily established when a deadly weapon is used in the commission of an offense."[1] Based on that language, the trial judge declined to charge the jury on consent as a defense. Then, after 40 minutes of deliberations, the jury found Rivera guilty of second-degree aggravated assault.

"Guys like me have three options."

At punishment, we admitted Rivera's mental health records, which showed persistent, severe homicidal thoughts directed at people on base for over a year and a half. Rivera had fixated on his commanding sergeant, leading Amanda to fear her husband would take his 9mm to work and kill him. The records also revealed that Rivera contemplated "running down airmen" with his car and that he viewed "everybody in uniform as the enemy."

Amanda also testified that she didn't call for mental help because Rivera had threatened "to kill his way out of the mental hospital if he was ever sent again," and she believed his threats. Despite her fears, after Rivera's November arrest, the court placed him in a local mental hospital from January through April. Those records revealed that he was diagnosed with a lack of empathy and had been attending "empathy classes." (I still don't know how you can teach a 33-year-old man empathy for others, but I digress.)

The defendant also stated in March 2010 that, while he knows everybody thinks he did something wrong in shooting his wife, he still doesn't see it that way. On April 7, he told his counselor, "Guys like me have three options: drugs and alcohol, suicide, or homicide then suicide." Rivera also noted he never had thoughts about harming himself: "It's always other people. It's like, why would I hurt myself? That's silly."

The defense called Rivera's psychiatrist, who testified he had been diagnosed with PTSD and bipolar disorder with schizophrenia. The psychiatrist also testified that she didn't believe Rivera was a threat to the community and that his prognosis was good if he stayed on his medication.

Interestingly, Kyle's cross of the psychiatrist revealed that she didn't know about the defendant's mental health records showing his severe homicidal thoughts. She was also unfamiliar with notations she had made in his records. We were shocked that a mental health professional would testify that someone was not a danger to the community without thoroughly reviewing his mental health history.

The defense also called Rivera's elderly mother who testified about what a good boy he was and how he had helped her after his father's death. They also called various family members who testified something "just wasn't right" with Rivera after he returned from Iraq.

Protecting the community vs. punishing mental illness

During closing, the defense asked the jury not to punish Rivera because he has a mental illness that developed while defending our country. Kyle countered that the defendant's mental health records showed him to be a real and serious threat to our community, especially to Sheppard AFB and all the men and women stationed there. Kyle also argued that Rivera had already demonstrated his dangerousness by shooting his wife. He told the jurors it was their duty to protect our community.

After two hours of deliberations, the jury gave Jose a 10-year probated sentence with a $10,000 suspended fine. In talking to jurors afterward, we discovered that the initial vote on guilt/innocence was 10-2, with two jurors not wanting to "convict an Iraq war vet," even though he had admitted shooting Amanda and there was no legal defense for the crime. During punishment deliberations, those two jurors stated that they would never send an Iraq war vet to prison. The jurors also placed a lot of responsibility for the shooting on Amanda because of their crazy-attracts-crazy relationship.

While we hope that Rivera will take his meds, continue his treatment, and be successful on probation, we cannot help but worry for the safety of the community. As a result of the verdict, a man who shot his wife and has expressed repeated, persistent homicidal thoughts against members of our armed forces is now required to live in our community for the next 10 years, where he cannot go to Wal-Mart, a restau-

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rant, or the mall without running into men and women in uniform.

Ultimately, though, the jury is the voice of the community. And the jury said it was willing to accept that risk after being presented with all the evidence. ❇

Endnote

1 *Bell v. State*, 693 S.W.2d 434, 437 (Tex. Crim. App. 1985).

Upgrade on confessions law

You can't have missed them. The Internet, TV, newspapers, case summaries, seminars, our colleagues, and appellate courts have all reported the changes to collecting and introducing confessions. If the law were sold like software, I suppose we would call the changes "upgrades."

By John Stride
TDCAA Senior Appellate Attorney

Between them, the Supreme Court of the United States and the Court of Criminal Appeals have addressed the language of the Fifth Amendment *Miranda* warnings, the severance of the Fifth Amendment right to counsel, the invocation/waiver of the right to silence, the *Siebert* "safety valve," the attachment of the Sixth Amendment right to counsel, the waiver of *Miranda* warning sufficing for a waiver of the Sixth Amendment right to counsel, the content of jury instructions, and when deception and trickery during interrogation overreaches. In so doing, they have made the law more pragmatic and crafted more precise rules where only broad, ill-defined concepts once existed. Law enforcement officers and practitioners alike will benefit not only from the ready ability to apply the law but also from a decline in the availability and number of appellate challenges. This largely newfound clarity in the law will assist prosecutors in working with confessions. So let's gather up what we have been hearing and seeing, connect the dots, and look at the big picture.

Miranda warnings

Since the Supreme Court handed down *Miranda* in 1966, numerous decisions have looked at the language of the prophylactic warnings. To what extent must law enforcement officers follow a precise script when giving the *Miranda* warnings? The Supreme Court recently revisited this issue and reminded us that the words used are not as critical as the message conveyed. This is not novel law, but it is a timely restatement of important law.

In *Powell*, the Supreme Court reviewed whether the warnings that a suspect has "the right to talk to a lawyer before answering any of [law enforcement officer's] questions" and that he can invoke this right "at any time … during the interview" satisfied *Miranda*'s requirement that a suspect be advised of his right to counsel before and during the questioning.[1] In a 7-2 decision the court held that although not manifestly clear, the two sentences sufficed. While the four warnings of *Miranda* are "invariable" and the FBI warn-

ings "exemplary" and "admirably informative," the court has never specified the particular words that must be used. The inquiry is simply whether the warnings reasonably convey to a suspect his rights under *Miranda*.

But it takes more than an officer simply reading the warnings to demonstrate that a suspect has effectively waived his rights. In *Joseph*, which lacked an express waiver, the Court of Criminal Appeals reviewed the totality of the circumstances to decide that a suspect had knowingly, intelligently, and voluntarily waived his rights.[2] More significant, though, is Judge Cochran's concurring opinion in which she reminded that the better practice is for law enforcement officers to ask a suspect both whether he understands his rights and whether he waives those rights. She observed that there had been an unfortunate increase in officers failing to ask the second question. The failure to ask the waiver question specifically made *Joseph* a very close case and generally clutters the courts with litigation and risks exclusion of statements.

Together these cases inform that in Texas, law enforcement officers should adopt the warnings of art. 38.22 of the Code of Criminal Procedure and always inquire whether a suspect (1) understands his rights and (2) waives them. If statements must be obtained during custodial interrogation rather than in the free world, these requirements are not arduous or otherwise so detrimental that they would constitute an impediment to the process, but they surely will prevent the exclusion of many statements.

Re-approaching a suspect

We know that the Fifth Amendment right to counsel attaches when sufficiently invoked, but when does it expire? Previously, under *Edwards*, once a suspect invoked the right to counsel, police could not re-initiate contact without counsel present and the presumption was that, if they did so, any waiver of rights was involuntary.[3] Absent a break in custody, this presumption was temporally indefinite—even eternal—and much litigation developed around what constituted an adequate break in custody. But 30-plus years later, this radical presumption has been significantly tempered.

Michael Shatzer was already incarcerated for other crimes when a detective approached him about allegations that he had also sexually assaulted his son. Shatzer invoked his right to counsel, said nothing else, was released from the interview, and the investigation was closed. Three years later, another detective reopened the investigation and Shatzer waived his rights before inculpating himself. He then sought to exclude his statement on grounds that when the police reinitiated contact with him, they had violated his right to counsel under *Edwards*. The Supreme Court disagreed.[4] Although under *Edwards* there is a presumption that after a suspect has invoked his rights, any subsequent waiver in response to police questioning is involuntary, the passage of a 14-day break in custody is sufficient to allow the person to "reacclimatize" to their "accustomed surroundings and daily routine" and "regain the degree of control they had over their lives before interrogation," even if the person was incarcerated the entire time.

As a result of *Shatzer*, there are now four levels of questioning: two custodial and two non-custodial. (Please see the chart below for an easy reference for these levels of interrogation.) Naturally, greatest protection is afforded those in custody. Where a suspect has been arrested for a particular crime, has invoked his right to counsel, and is held in uninterrupted pretrial custody while the crime is actively investigated, the *Edwards* presumption survives. Any police re-initiation without the presence of counsel renders any statement involuntary.[5] If, however, a suspect has been arrested, has invoked his right to counsel, and has been released from pre-trial custody so that he can return to his normal life—whether in the free world or as an inmate—police can

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Re-initiating custodial interrogation under the Fifth Amendment

Arrested?	Invoked counsel?	In custody?	Released?	OK to re-initiate?	Authority
Yes	Yes	Yes	No	No	*Edwards*
Yes	Yes	Yes	Yes	Yes, >14 days	*Shatzer*
Yes	Yes	Yes	Yes	Yes	*Storm*
No	No	No	N/A	Yes (5th Am. n/a)	*Miranda*

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re-attempt custodial interrogation after 14 days.[6] In either situation, the suspect can choose to reinitiate questioning.[7]

When a person is released from custody after invoking his right to counsel, police can question him thereafter so long as the questioning is conducted in a non-custodial setting and the person has had a reasonable time to contact an attorney.[8] Finally, by avoiding any custody during the entire questioning process, the Fifth Amendment right to counsel is not implicated at all.[9]

The bright-line rule of *Shatzer* is unusual for the Supreme Court, but the court felt compelled, "in a country that harbors a large number of repeat offenders," to provide law enforcement officers guidance "with certainty and beforehand, when renewed interrogation is lawful." This decision is a boon to officers and prosecutors seeking statements in custody.

Invoking and waiving the right to silence

In the past, the standard for invoking the right to silence has been amorphous in comparison to that for invoking the right to counsel; a suspect must unambiguously assert the latter. But nearly at the end of this term, a closely divided Supreme Court finally equated the measure required to invoke the two rights.

In *Thompkins*, the suspect had been advised of his *Miranda* warnings but declined to sign a written waiver of his rights.[10] Over the next three hours while in a straight-backed chair, the police questioned him.[11] Although Thompkins remained silent for the greatest part of the interrogation, he briefly and infrequently responded to a few questions before making an admission almost at the end. On direct appeal, his conviction was affirmed but on a federal writ, the Sixth Circuit held that the state court was wrong to have found an implied waiver of the right to silence.

In a 5-4 decision, the Supreme Court reversed the lower court. The majority held that the right to silence needs to be unambiguously asserted—just like the right to counsel. And Thompkins had never done that. In fact, by speaking he had evinced an implied waiver of his right to counsel. If he had wished to obtain the protection of the right to silence, he should have remained mute or affirmatively invoked it during questioning. Law enforcement officers are not required to end an interrogation if a suspect unambiguously or equivocally invokes his right to silence. Also, they need not seek clarification of whether the suspect wants to invoke his rights, but the record should reflect that the suspect understood his right to silence.[12] Thus, if the prosecution can show that the right to silence was administered and the suspect understood it, the suspect's uncoerced statement establishes an implied waiver of the right to remain silent.

This case is not only important for the significant change in the law, but also for understanding how extremely close the relationship is between invoking the right to silence and waiving it. As the majority and dissenting opinions amply demonstrate, the ball—as in Woody Allen's movie *Match Point*—could have landed on either side of the net in this one.

The *Siebert* "safety valve"

In *Siebert*, the Supreme Court put an end to the "question first, warn later" practice adopted by some officers to obtain confessions.[13] This practice was designed by officers as an end-run around the perceived strictures of *Miranda*. But in crafting *Siebert*, the court carefully allowed for inadvertent situations where the police mistakenly questioned someone before warning them, i.e., where the officer did not deliberately plan to give warnings after asking questions.

The Court of Criminal Appeals reached the *Siebert* exception in *Carter*.[14] There, the officer arrested a driver and was transporting him when he simply asked the suspect if he knew he was under arrest and whether the product seized was cocaine or crack cocaine. The suspect acknowledged knowing he was under arrest, told the officer the substance was cocaine, and affirmed that it was cocaine. The colloquy lasted about 10 seconds before the officer stopped to give the warnings and secure a waiver. Relying on the trial court's favorable findings, the court did not identify the deliberate gamesmanship so evident in *Siebert* and upheld the lower tribunal's finding that the officer's initial failure to warn was an "oversight" and went on to hold that the post-warning statements were voluntary.

Carter is a necessary and useful exception to *Siebert* worth remembering, just like the forfeiture by wrongdoing exception to *Crawford*.[15] Both narrow exceptions may permit introduction of statements otherwise excluded by the better known general rule.

Sixth Amendment right to counsel

The issue of just when the Sixth Amendment right to counsel attaches under Texas criminal procedure has been an issue eluding definition for decades. If the right is triggered before an indictment or information is issued, when does that occur? Specifically addressing Texas procedure, the Supreme Court identified a pre-indictment/pre-information trigger and, the same year, the Court of Criminal Appeals also acknowledged it.

The Supreme Court had long instructed that the Sixth Amendment right to counsel attached at the initiation of "adversary judicial proceedings—whether by formal charge, preliminary hearing, indictment, information, or arraignment."[16] Of course, the court was attempting to answer the question of the triggering event for the various procedures in all jurisdictions. In Texas, while we all understood what was meant by formally charging a person by indictment or information, it was less clear what a intended by the terms "preliminary hearing" and "arraignment" and to what extent the right to counsel could be triggered before an indictment or information issued. Another 30-odd years, thousands of criminal cases, and not a few changes in the court's membership later, we have an answer.

In *Rothgery*, the Supreme Court instructed that in our state, the right to counsel attaches when magistration occurs under art. 15.17 of the Code of Criminal Procedure, i.e., when a person is taken before a magistrate, learns of the charge against him, and his liberty is restricted.[17] This represents the point in time when a person transforms from a Fifth Amendment "suspect" to a Sixth Amendment "accused"[18] and he "is faced with the prosecutorial forces of an organized society and immersed in the intricacies of substantive and procedural criminal law that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal."[19] Moreover, because bringing a person before a magistrate signals a sufficient commitment to prosecute, a prosecutor's involvement in the proceedings is immaterial.[20]

While, under *Rothgery*, counsel must be appointed within a reasonable time, courts in future cases will have to divine what time that is. Of course, upon the request of an indigent defendant, state law requires counsel be appointed either within 48 hours if a county has a population under 250,000 or 24 hours.[21] Given the statutory mandate, it seems possible that failure to comply with these rules might be considered unreasonable in Texas—not least because the states are free to provide greater protection than the constitution requires, and our legislature has already addressed the issue.

The Court of Criminal Appeals followed *Rothgery* in *Pecina*.[22] Even if we don't necessarily like or agree with this expansion of the law, it does afford a greater degree of certainty than before. One more unanswered question has been eliminated and a significant amount of litigation pre-empted.

Questioning after the Sixth Amendment right to counsel is triggered

For more than two decades, the law has been that once an accused is protected by the Sixth Amendment right to counsel, police could not question an accused who has counsel or has requested counsel.[23] In *Jackson*, the Supreme Court adopted a presumption that any subsequent waiver of the right to counsel was involuntary, but this often insurmountable barrier has been toppled.

In *Montejo*, the Supreme Court realized *Jackson*'s harsh rule prevented police from obtaining reliable confessions where the accused had never personally elected to exercise the right to counsel.[24] As a result, the court decided that if an accused waives his rights under *Miranda*, the waiver permits law enforcement to question him under the Sixth Amendment. This retreat from overprotective prophylaxis is a considerable relaxation of the law and should allow the admission of more voluntary confessions. The Court of Criminal Appeals followed *Montejo* in *Hughen*.[25]

Deception versus fabrication

Law enforcement officers frequently employ deception and trickery during interrogation. The law recognizes that not all suspects are enthusiastic to share their misdeeds and need a little encouragement to have their catharsis, albeit momentary, and has been tolerant of various ploys. But when does deception go too far? As a matter of state law, the Court of Criminal Appeals has

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drawn a line between acceptable and unacceptable interrogation techniques.

In *Wilson*, an officer altered an existing forensic laboratory report so that it purported to state that the suspect's fingerprints were found on a weapon's magazine, which they were not.[26] Because of this information, the suspect confessed. At the suppression hearing, the officer was candid about the fabrication and the trial court—informed by federal constitutional law—denied the defense motion. But both appellate courts ruled the use of false documents violated art. 38.23 of the Code of Criminal Procedure. Essentially, the Court of Criminal Appeals recognized the broader application of the state exclusionary rule over its federal counterpart and held that, under Texas Penal Code §37.09, "[n]either police nor private citizens have a license to fabricate documents or other evidence and then use them to affect a criminal investigation or other official proceeding." The specter motivating the result was that fabricated evidence has an "enduring life of its own," could be mistaken for the genuine article, then find its way into the courtroom. Thus, although a confession may be "voluntary" under federal constitutional standards, admission is barred under art. 38.23. In so ruling, the court supported its position with Fred Inbau's leading manual on criminal interrogations. As interrogator-friendly as Inbau is, he has warned against employing "false, incriminating documents" to obtain confessions.[24]

Wilson will require Texas law enforcement officers to reconsider the tactics they use to obtain a confession. Verbal trickery—even outright lies—concerning the existence of evidence is sanctioned by both federal law and Inbau. But traditionally, Texas has been suspicious of a confession used as evidence in a criminal trial. *Wilson* confirms this, so fabricated documents are out. Given the different mediums of writing and speech—the one memorializing, the other vaporizing—it seems something of a reach, but even verbal deception that engages the same concerns as false documentation could also render a confession inadmissible under Texas law.[25] Officers should remember that the state law on confessions is not as tolerant as the federal law. Federal law is the floor (not the ceiling) of protection afforded those suspected or accused of crimes. (Read more on the *Wilson* case in "As the Judges Saw It" on page 29.)

Jury instructions

Over the last decade, jury instructions have increasingly attracted the discretionary attention of the Court of Criminal Appeals, which has twice in as many years addressed jury instructions on confessions. When must they be given and how? The court has provided some instruction in *Oursbourn* and *Vasquez*.[26] But fair warning: As many of you have probably discovered already, it is not always a simple task to grasp and apply the law, at least not without a summary or chart handy. Thus, it is best to anticipate instructions before trial begins rather than rushing to find the right language in the heat of things. Distilled, these two cases establish a three-step program for submitting instructions.

1 **Identify the theory of involuntariness.** First, in deciding what instruction might be required, we must identify which theory of law has been triggered: (1) general voluntariness under art. 38.22, §6; (2) the warnings and waiver language, i.e., *Miranda* as expanded by art. 38.22, §§2 and 3 or possibly art. 15.17; or (3) the due process clause. While an art. 38.22, §6, claim can be based on any circumstances including the defendant's state of mind, due process and *Miranda* claims require police misconduct and involve an objective assessment of police behavior. Also, although custody is required for a §7 warnings instruction, it is not required for §6 and art. 38.23 instructions.

2 **Ask if evidence raises the issue or if there's a factual dispute.** If voluntariness is raised, a §6 instruction must be submitted; no request or objection is needed because the instruction is law applicable to the case. For an instruction under §7 (addressing warnings and waiver), there must be custodial interrogation and a factual dispute. For an instruction under art. 38.23, the evidence must raise an issue of fact, the evidence must be affirmatively contested, and the contested evidence must be material to the lawfulness of the police conduct in obtaining the statement. If these criteria for art. 38.23 are met, again, an instruction is applicable to the case.

3 **Submit the appropriate instruction.** The three types are: (1) a general voluntariness instruction under §6, e.g., "Do you believe beyond a reasonable doubt that the

defendant's statement was voluntarily made?"; (2) a general instruction under §7 setting out the requirements of §§2 and 3 and inquiring whether the requirements have been met; and (3) a specific exclusionary instruction under 38.23(a) asking a fact-based question, e.g., "Do you believe that Officer Obie held a gun to the defendant's head to extract his statement? If so, do not consider the confession." Statutory claims require only a general instruction, but due process and *Miranda* claims may warrant both general and specific instructions.

To date, *Oursbourn* is the most useful direction the Court of Criminal Appeals has given on jury instructions in confession issues. If this summary doesn't do it for you, *Oursbourn* is a must-read to thoroughly familiarize yourself with the law before trial on a confession case. Jury instructions on confessions are a trap for the unwary and ill-prepared.

Thus, we have the courts' recent contributions to confession law. These changes signal a relaxation of federal confession law but a tightening of state confession law. These upgrades and more are incorporated in the third edition of TDCAA's *Confessions* manual to be published in July. Purchase a copy of this new edition by going online at www.tdcaa.com or e-mailing books@tdcaa.com. ❇

Endnotes

1 *Florida v. Powell*, 175 L.Ed.2d 1009 (2010). In the interest of avoiding a list of endnotes longer than the article itself, citations are kept to the raw minimum.

2 *Joseph v. State,* No. PD-1111-08, 2010 Tex. Crim. App. LEXIS 15 (Tex. Crim. App. del. Feb. 24, 2010).

3 *Edwards v. Arizona*, 451 U.S. 477 (1988).

4 *Maryland v. Shatzer,* 175 L.Ed.2d 1045 (2010).

5 See *Shatzer; Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards*.

6 See *Shatzer*.

7 See *Cross v. State*, 144 S.W.3d 521 (Tex. Crim. App. 2004).

8 See *People v. Storm*, 52 P.3d 52 (Cal. 2002). Be aware, however, that no Texas appellate court has yet followed *Storm* but, also, no state law appears to bar its adoption.

9 See *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Miranda v. Arizona*, 384 U.S. 436 (1966).

10 *Berghuis v. Thompkins*, No. 08-1470, ___ U.S. ___ (del. June 1, 2010).

11 The chair design was given importance by Justice Kennedy.

12 Confusingly, Justice Kennedy repeatedly uses the term "accused" for a person who has not yet been charged. See endnote 18 below.

13 *Missouri v. Siebert*, 542 U.S. 600 (2004).

14 *Carter v. State*, No. PD-0606-09, 2010 Tex. Crim. App. LEXIS 101 (Tex. Crim. App. del. March 24, 2010).

15 *Giles v. California*, 128 S.Ct. 2678 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004); *Gonzalez v. State*, 195 S.W.2d 114 (Tex. Crim. App. 2006).

16 See *Kirby v. Illinois*, 406 U.S. 682 (1972).

17 *Rothgery v. Gillespie County,* 128 S.Ct. 2578 (2008).

18 Former Presiding Judge McCormick adopted this useful distinction for purposes of Fifth and Sixth Amendment analyses. See *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989). Another distinction you may find helpful to employ is using the term "interrogation" only when a suspect or accused is questioned in custody. Outside of custody, a person is simply questioned.

19 See *Rothgery*.

20 *Id.*

21 See Tex. Code Crim. Proc. art. 1.051(c).

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

23 *Michigan v. Jackson*, 475 U.S. 625 (1986).

24 *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009).

25 *Hughen v. State*, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009).

26 *Wilson v. State*, No. PD-0307-09, 2010 Tex. Crim. App. LEXIS 20 (Tex. Crim. App. del. March 3, 2010) (a 5-4 decision).

27 Fred E. Inbau et al., *Criminal Interrogation and Confessions* 217 (4th ed. 2001).

28 For instance, conduct that constitutes perjury, aggravated perjury, or a false report under Texas Penal Code §§37.02, 37.03, or even 37.08. See Tex. Code Crim. Proc. art. 38.22, §4.

29 *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008); *Vasquez v. State*, 225 S.W.3d 541 (Tex. Crim. App. 2007).

Keeping sexually violent predators locked up

Here's how all Texas prosecutors can help the Civil Division of the Special Prosecution Unit (SPU) keep these dangerous predators under intense supervision.

Meet three convicted sex offenders: David, William, and Jorge.

David

In 1997, 20-year-old David was a counselor at a popular Christian camp and was assigned to a cabin full of 7- and 8-year-old boys. During his first summer there, David befriended a young camper named Patrick, who introduced David to his parents. David developed a friendship with the family. After camp, David began visiting Patrick in his home, where he slept in the boy's room. On his first visit, after everyone had gone to bed, David masturbated in front of Patrick and then performed oral sex on him. David continued to visit Patrick's home over the next few months, and the sexual assaults escalated until they culminated in David anally raping Patrick while his parents slept.

By Lee Rech
Section Chief
and Catherine Palmore
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During the summer of 1999, David sexually assaulted at least two other campers by climbing into their bunks with them, pulling down their pants and underwear, straddling them, and masturbating until he ejaculated on them. That fall, David began a sexual relationship with a 14-year-old boy that lasted several years. When his victims made outcries a few years later, David was arrested and prosecuted. After entering into a plea bargain, David received seven years for one count of aggravated sexual assault of a child and one count of indecency with a child by exposure, plus deferred adjudication for another count of aggravated sexual assault of a child.

Under the law, David is not a sexually violent predator so he was released from prison and returned to the community.

William

William is a convicted sex offender who, at the age of 15, brutally assaulted a 3-year-old girl for two hours. William beat her on the stomach and vaginal area with his fists and a horsewhip, picked her up like a bowling ball by placing his fingers in her vagina and threw her up in the air more than 50 times, shot her with hot and cold water from a water gun, and sexually assaulted her with the horsewhip. William admitted that if his mother had not come home and interrupted the assault, he would have killed the little girl. He also admitted that he had molested her daily over a six-month period. Although his offenses qualified him to be tried as an adult, he was instead adjudicated as a juvenile and sentenced to 10 years in TYC. He was later transferred to TDCJ after he turned 18.

Under the law, William is not a sexually violent predator so he was released from prison and returned to the community.

Jorge

Jorge is a pedophile and convicted sex offender whose record includes five felony convictions and five parole and supervision violations. When he was 20, Jorge raped a 9-month-old baby girl. He was charged with sexual assault of a child but, through a plea bargain, the charge was reduced to indecency with a child and Jorge was sentenced to only 10 years in prison. Then, while in his early 30s, he sexually assaulted a 14-year-old girl at gunpoint and was charged with aggravated sexual assault. These charges were dropped and Jorge was not convicted for that offense. Finally, at the age of 46,

Jorge was caught sexually assaulting his 6-year-old niece both anally and vaginally with a stick. The charges were reduced to indecency with a child, and he was sentenced to only two years in prison.

Jorge was released from prison and, as expected, he returned to his mother's home, where he once again had free access to children. Within weeks of his release, CPS received a report that he had a 6-year-old and an 8-year-old sleeping in his bed with him.

Under the law, Jorge is a sexually violent predator and has been civilly committed. He currently resides in a supervised halfway house where he will receive sex offender treatment until he no longer poses a threat to society. To date, he has violated no one else.

What's the difference?

At first glance, all three of these sex offenders conjure the very image of a sexually violent predator. However, two of them don't "qualify" for civil commitment under the Sexually Violent Predator (SVP) Act. So what makes Jorge different? The answer lies in the way their sex offenses were originally prosecuted. This article highlights nuances of the SVP Act to make prosecutors aware of the potential for inadvertently placing an offender beyond the reach of the law.

Prior to this act, the State was powerless to protect potential victims from sexually violent predators. But in 1999, the Texas legislature found that "a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence." In response to its finding, the Legislature created Chapter 841 of the Health & Safety Code, which provides for the civil commitment of certain sexually violent predators. Within Chapter 841, the legislature created the Civil Division of the Special Prosecution Unit and entrusted it with the responsibility of initiating and pursuing civil commitment proceedings against SVPs who meet the requirements in Chapter 841. An SVP civilly committed under this act is placed in a highly supervised outpatient sex offender treatment program upon his release from prison, and a violation of the terms of that supervised release can result in a third-degree felony charge.

Shortly before a sex offender's release from prison, the SPU can file a civil lawsuit on behalf of the State claiming that the offender is a sexually violent predator and should be civilly committed. To prove SVP status of an offender, the State must establish two elements: 1) that the offender is a "repeat sexually violent offender" and 2) that he suffers from a "behavioral abnormality" that makes him likely to engage in a predatory act of sexual violence. The latter is established through expert testimony from forensic psychologists and psychiatrists who opine regarding the existence of a behavioral abnormality and the offender's risk of re-offense. But the former, not surprisingly, is simply proven by the number of *qualifying* convictions for sexually violent offenses.

So an offender's underlying sexual offense convictions serve as fundamental building blocks of the subsequent civil commitment case. The more solidly those building blocks are constructed, the more airtight the case for civil commitment becomes. Simply put, if the underlying convictions do not qualify, the SPU cannot proceed. David and William, even in light of the heinous nature of their sexual offenses, did not qualify as repeat sexually violent offenders because of the way they were prosecuted. Consequently, the State could not civilly commit them as sexually violent predators.

Qualifying convictions

In evaluating a case for civil commitment, the SPU first determines if the offender qualifies as a "repeat sexually violent offender" by ascertaining the type and number of convictions. According to the act, a "repeat sexually violent offender" is someone who:

- has more than one conviction;
- for a sexually violent offense; and
- has been incarcerated for at least one of those convictions.

What is a "sexually violent offense?" The following qualify:

- indecency with a child under 17 (contact but not exposure),
- sexual assault,
- aggravated sexual assault,
- aggravated kidnapping, if to violate or abuse sexually,
- burglary of a habitation with intent to commit one of the above offenses, and
- attempt, conspiracy, or solicitation to commit one of the above offenses.

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Hindrances

If the offender has more than one of these enumerated offenses on his record and has served time for at least one, the SPU can pursue civil commitment. This seems fairly straightforward, right? Not exactly. There are several hindrances to our ability to cilly commit these offenders.

Plea bargains

Understandably, plea bargains are an effective tool in a prosecutor's belt; they dispose of cases and help put offenders behind bars. But with respect to sex offenders in particular, some plea bargains can have an unintended negative impact on a subsequent civil commitment suit by inadvertently placing an offender beyond the reach of the SVP Act. In particular, pleas to lesser offenses, deferred adjudications, and juvenile adjudications can lead to non-qualifying convictions for purposes of civil commitment.

Pleading to a lesser offense

In Jorge's case, his offenses were dismissed or pled down to almost nothing. The good news, however, is that his lesser offenses still qualified as sexually violent offenses under the statute, so the State was able to civilly commit him. Had he been allowed to plead down to, for example, indecency with a child by exposure, he would have been beyond the reach of the SVP statute because that offense is not considered a sexually violent offense and does not result in a qualifying conviction.

The SPU bases its case on an offender's final convictions, regardless of the heinousness of the offenses' underlying facts. Pleading a defendant down to a lesser charge that does not qualify as a sexually violent offense can mean that the State is powerless to protect potential victims in the future. In fact, even something as simple as a mistake in the name of the offense as listed in the judgment can have a detrimental effect on the civil commitment suit.

Deferred adjudications

The SVP Act does not count a deferred adjudication as one of the two required convictions *unless* it is followed by another conviction for an offense that occurred *after* the date of the deferred adjudication. Without two otherwise qualifying convictions, a deferred adjudication means that the offender will have to commit and be convicted of a completely different sex offense *after* receiving the deferred before the State can civilly commit him.

Although two experts agreed that David has a behavioral abnormality, he is not a repeat sexually violent offender because he has only one qualifying conviction. (Remember, indecency with a child by exposure is not a qualifying offense so this conviction does not count.) His aggravated sexual assault conviction counts as one qualifying conviction, but he was given a deferred adjudication for the second count so that offense does not qualify. Had David been given two sexually violent offense convictions outright, he would qualify.

The bottom line is that the order of convictions is paramount when dealing with deferred adjudications: When an offender is given deferred adjudication, a "wait and see" period is triggered so that the offender must commit a new offense after the date of the deferred adjudication—and be convicted of it—before the State can prove that he is a sexually violent predator and civilly commit him.

Juvenile adjudications

In certain situations juveniles can be certified and tried as adults. Consequently, to the extent that an offender is eligible to be tried as an adult, the law treats juvenile adjudications the same way it treats deferred adjudications: A juvenile adjudication is not considered a qualifying offense unless it is followed by a conviction for an additional qualifying sexually violent offense that occurred after the date on which the offender was adjudicated as a juvenile.

Remember William? Experts agreed that he has a behavioral abnormality, is still attracted to female children, that he will reoffend sexually, and that he will most likely kill his next victim. In spite of this knowledge, the SPU could not pursue civil commitment because both of his sexual offenses resulted in juvenile adjudications. Under the statute, a person can have an unlimited number of juvenile adjudications for heinous sexual offenses and not be considered a repeat sexually violent offender because he does not have a *subsequent* adult conviction. The statute requires that he commit a new offense and be convicted as an adult before any juvenile adjudication can be counted toward his two qualifying convictions.

Therefore, when possible, trying a juvenile as an adult gives the State the best opportunity for ensuring

that the offender is not a threat to the health and safety of others in the future.

We're in it together.

The Sexually Violent Predator Act is a powerful tool that enables the Special Prosecution Unit to meet the Texas Legislature's goal of providing treatment for and keeping the public safe from SVPs. Although charged with very different responsibilities, prosecutors around the state form an important partnership with the SPU. By becoming aware of the strict letter of the SVP statute, trial attorneys can now prosecute underlying sex offenses with an understanding how the resulting convictions may or may not qualify for civil commitment purposes. When trying sex offenders, not only are prosecutors upholding the criminal laws of our state but also ensuring the SPU's ability to qualify that same defendant as a repeat sexually violent offender in a later civil commitment case. Together, we will get these sex offenders into treatment and protect our communities from further victimization.

For more information about civil commitment of sexually violent predators, please contact Lee Rech at 936/291-0431, ext. 238 or lrech@sputexas.com. ❇

Editor's note: You can read an article (as a PDF) on civilly committing sexually violent predators from the Septmeber-October 2003 issue of this journal by going to our website and looking in this issue's list of articles.

As the Judges Saw It

Wilson v. State: Deception to secure a confession is generally OK, but not when the deception also violates the Penal Code

By Emily Johnson-Liu
Assistant Criminal District Attorney in Collin County

Until now, the law has been fairly permissive about officers deceiving a suspect to obtain a confession. Trickery, deception, or an outright lie about the amount of evidence against the suspect usually will not, by itself, make a statement involuntary.[1] But in *Wilson v. State*,[2] a case decided by the Court of Criminal Appeals this past March, the court drew a distinction between run-of-the-mill deception and deception that violated the Penal Code. Ultimately, the court threw out Ronald Wilson's confession because the interrogating officer showed the defendant a faked lab report identifying Wilson's fingerprints on crime scene evidence. Instead of simply telling Wilson that they had identified his prints—which likely would not have resulted in suppression—the detective created a false lab report. This action violated Texas statute (tampering with evidence) and resulted in suppression of Wilson's confession.

Case background

Wilson was implicated in a murder investigation in San Antonio. He had been the one who called 9-1-1, reporting that he had found the body of the victim, killed by a single gunshot. A magazine clip was discovered at the crime scene, but no legible prints were recovered. When the lead detective interviewed Wilson, he insisted that he had not touched anything at the scene. The detective then showed him the fake crime lab report that the detective had created on his computer; it identified two latent fingerprints on the magazine as Wilson's. The detective told Wilson of the other evidence against him but added, "I can't get over the prints." The detective reminded Wilson, "I've got that report. Those guys are experts. … What they say is the truth, and we got you." Wilson rested his head on his hands, said "OK, OK," and admitted he shot the victim.

At the suppression hearing, the trial judge sided with the State, and Wilson later pleaded guilty to murder. But the San Antonio Court of Appeals believed the confession should have been suppressed and reversed the conviction, finding that in creating the false report, the detective committed a criminal offense: tampering with evidence. The State appealed to the Court of Criminal Appeals.

Although this was a case of first impression in Texas, several other courts had already considered the

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legality of using fabricated evidence as an interrogation technique. The Supreme Court of the United States precedent had long before upheld the constitutionality of some deceptive techniques, such as falsely telling a suspect that his co-defendant had confessed.[3] But there was no consensus among the lower courts whether the deception permitted under a totality-of-the-circumstances approach also extended to fabrication of evidence. Two courts determined that fabricating a report was something quite different from an oral misrepresentation and constituted a per se violation of due process, rendering any statement involuntary.[4] But the majority of courts fell in line with the Supreme Court's totality-of-the-circumstances ap-proach to deception and rejected a bright-line rule that would treat fabricated documents differently from oral deception.[5] Indeed, it may be difficult to determine whether the suspect decided to talk to the police because of the content of the fabricated report or because the content took on tangible form.

Texas courts may well have joined the ranks of the other courts considering fabrication just a factor in determining voluntariness, and that would have been the end of the analysis—if it were not for Texas's broader exclusionary rule. Under Code of Criminal Procedure art. 38.23, evidence may be excluded if it is obtained not only through constitutional violations but also through violations of the "laws of the State of Texas." This gave Wilson a more favorable avenue for excluding his confession—that the detective's fabrication of the fingerprint report violated the tampering with evidence statute, Penal Code §37.09. That statute makes it a crime for someone to:

- make, present, or use any record, document, or thing
- knowing it is false, and
- with intent to affect the course or outcome of the investigation or proceeding.

In the majority opinion by Judge Cochran, the Court of Criminal Appeals determined that the detective's conduct violated §37.09. He admitted creating the false report, intending for Wilson to believe it was genuine, and, in the court's view, he hoped Wilson would rely on it and make an incriminating statement. The State's motion for rehearing, contesting whether the court gave sufficient deference to the trial court's implicit fact findings and raising preservation of error issues, was denied in mid-June.[6]

The court also considered whether the exclusionary rule provides a remedy for a violation of §37.09. If it was not clear before, *Wilson* makes it clear now that not just *any* violation of Texas law will trigger the exclusionary rule. The test is whether the statutory violation is "related" to the purpose of the exclusionary rule: to protect a suspect's privacy, property, and liberty rights against overzealous law enforcement. For instance, a commercial statute requiring entrepreneurs to register the names they do business under has nothing to do with the purpose of the exclusionary rule. So an officer's failure to register a business used in an undercover sting operation would not warrant the exclusion of evidence.[7]

In considering the tampering with evidence statute, however, the court came to a different conclusion and found that a violation of such a statute was "at the core of conduct" that the Texas exclusionary rule prohibited. The court cited police use of planted weapons and fake drugs as examples of crimes encompassed by §37.09 and considered the statute's intent to maintain public trust in the integrity and reliability of the justice system. As a result, the court found this statute directly related to gathering and using evidence in police investigations, and consequently, a violation of that statute related to the purpose of the exclusionary rule.

The court never considered whether the particular violation at issue in *Wilson*—a detective presenting a fabricated fingerprint report during an interrogation—related to the purpose of the exclusionary rule. The court might have adopted such an approach, deciding whether Texas's exclusionary rule meant to curtail the particular conduct at issue, but it looked to the statute as a whole instead. Any conduct that met the elements of an obstruction-of-justice statute would warrant exclusion of evidence because these statutes regulate behavior that falls within the purpose of the exclusionary rule.

As a result, some interrogation techniques that would otherwise never trigger exclusion by themselves are potentially off-limits. For example, interrogation room props—such as a videotape labeled "co-defendant's confession" or a file folder marked "DNA"—might be seen to violate §37.09 because such props are "thing[s]" made with knowledge of their falsity and, just as in *Wilson*, with intent to affect the course of a pending investigation. Even though the interrogation manual the *Wilson* court cites authorizes these tech-

niques,[8] they may not be legally viable after *Wilson*. And it appears not to matter if creating such props was the kind of behavior that the exclusionary rule was meant to curtail.

Even oral misrepresentations could potentially trigger the exclusion of evidence under art. 38.23. Consider an officer who falsely announces to his partner in the suspect's presence that the suspect's co-defendant has confessed, all the while intending to deceive the suspect. A trial court could find such conduct violates §37.08, False Report to a Peace Officer, and as one of the obstruction-of-justice statutes, its violation may require exclusion of any confession.

Penal statutes are often written broadly enough to cover an array of criminal conduct, but when the defense accuses officers of violating these statutes so that the defense can exclude evidence, officers will not have the benefit of prosecutorial discretion in deciding whether such charges are appropriate. If the trial judge finds that the officer's conduct meets the elements of the penal statute and the statute regulates the type of behavior that the exclusionary rule aims to curtail, then the violation will likely trigger the exclusion of evidence under *Wilson*.

Judge Cochran points out that no one, not even a police officer, has the license to fabricate evidence and use it to affect a criminal investigation. But impunity is not really the issue. In restricting the application of the exclusionary rule only to those statutes "related" to the purpose of the exclusionary rule, the court already recognizes that the exclusionary rule is not the appropriate remedy for every violation of law. So it is really a question of whether the exclusionary rule is the appropriate sanction under the circumstances. And, at least in *Wilson*, the court looked to the violated statute and not the particular violation to answer that question.

At the end of the day, the lesson of *Wilson* is not to use fabricated evidence in an interrogation and, more broadly, to consult the penal code when contemplating the use of deceptive measures in an investigation. ❇

Author's note: My thanks to Bexar County Assistant Criminal District Attorney Barrett Shipp for his thoughts and comments on the case.

Endnotes

1 *Oursbourn v. State*, 259 S.W.3d 159, 182(Tex. Crim. App. 2008).

2 No. PD-0307-09, 2010 WL 715253 (Tex. Crim. App. Mar. 3, 2010).

3 *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

4 *State v. Cayward*, 552 So.2d 971, 974 (Fla. Dist. Ct. App. 1989); *State v. Patton*, 826 A.2d 783, 802 (N.J. Super. A.D. 2003).

5 See, e.g., *People v. Mays*, 174 Cal.App.4th 156, 167 (Cal. App. 2009) (fabricated polygraph results); *Lincoln v. State*, 882 A.2d 944, 956 (Md. Ct. Spec. App. 2005) (finding it a simplistic generality that deception in written form will always have a greater impact on a suspect's decision to cooperate than an oral one); *Arthur v. Commonwealth*, 480 S.E.2d 749, 752 (Va. Ct. App. 1997) (fabricated fingerprint and DNA report); *Sheriff, Washoe Co. v. Bessey*, 914 P.2d 618, 621-22 (Nev. 1996) (fabricated lab analysis).

6 *Wilson v. State*, 2010 WL 715253 (Tex. Crim. App. Mar 03, 2010) (NO. PD-0307-09).

7 *Roy v. State*, 608 S.W.2d 645, 651(Tex. Crim. App. 1980).

8 *Wilson*, 2010 WL 715253, n.38 (citing Fred E. Inbau et al., *Criminal Interrogation and Confessions* 217 (4th ed. 2001)).

TDCAF News

Recent gifts to the foundation (cont'd)

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* from March 6 to June 9, 2010
** denotes restricted gift

The all-important judgment

Why it's important for prosecutors to spend some extra time on judgments to get them right

Sure, we all know that judgments reflect the sentence of the court. But can you name some other uses? Have you thought about all of the things your judgment does after you present it to the judge? Have you thought about the possible consequences of it being wrong? This article will reflect on all of those things. Please take a few minutes and consider all of the things your judgment does and then reconsider the amount of time you spend on it.

By Melinda Fletcher
Appellate Attorney for the Special Prosecution Unit in Amarillo

"A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant."[1] A judgment tells the clerk's office, probation office, local jail, prison, or even the parole board what should be done by this defendant. It also tells the defendant and the rest of the world.

The bad news is that judgments too often fail to correctly perform all of their intended functions. The good news is that we can easily fix that.

Main uses for judgments

Here are a few uses, though there certainly may be more.

Sentencing

If a defendant was sentenced to do time, the jail or prison will look to the judgment to calculate the time he was ordered to do and the credit he was given for time already served. If the defendant went to prison, prison officials will use the information in the judgment to determine when the defendant will be released or considered for parole.

Enhancing punishment

If a defendant gets into trouble again, a copy of the judgment may be introduced in evidence to enhance the defendant's punishment on the new case.

Licensing

When the State or other government agency considers licensing a person for just about any reason, it usually looks at the criminal history. A judgment could be the difference in whether someone receives a government-issued license.

Screening potential jurors

When potential jurors are qualified, they are told about prior convictions that may disqualify them. They are often confused about whether their particular conviction really falls into one of the disqualifying categories. A judgment may answer that question.

Civil commitment of sexually violent predators (SVPs)

If a defendant was convicted of a sexual crime, prior to his release from prison he may be considered for a civil commitment. This is similar to parole but used for some repeat sexually violent offenders who have completed their prison sentences and would otherwise be released into society without appropriate restrictions. (See the related story on page 26.)

With all of these people looking at your judgments, it is pretty important to get it right.

What could go wrong?

Is it necessary to prepare a judgment yourself? Or to even read it yourself? Surely those nice people in the office that have been preparing judgments for years get them right, don't they? Besides, if a judgment is wrong, judges won't sign it—will they?

The first thing that can go wrong with a judgment is for it to reflect an illegal sentence. Maybe the judgment was filled out incorrectly, maybe everyone made a mistake and thought it was a legal sentence, or maybe everyone knew it was illegal but they still agreed to it for whatever reason. A judgment that reflects an illegal sentence can be attacked on direct appeal or by a writ of habeas corpus.[2] The result of an attack will most likely be that the case is returned to the court, and the State has to start over,[3] which is not something we usually like to have to handle. Consider that this may happen many, many years after the original judgment. We all know that cases rarely get better for the prosecution

with the passage of time, so we hate seeing a very old case get dumped onto our desk for re-prosecution.

Other things that can, and frequently do, go wrong is for the judgment to be incomplete or erroneous. It may not reflect an affirmative finding, findings on enhancement paragraphs, credit for time served, or any number of other things. An incomplete judgment is just that: It is incomplete and therefore not final.[4] An erroneous judgment brings up the argument of whether there was merely a clerical error or if a judicial error is the root of the problem.

If the judgment does not accurately reflect the sentence announced in open court, it is considered a clerical error and may be easily corrected by the entry of a judgment *nunc pro tunc*.[5] If the judgment reflects something that is not in the record, the issue becomes much more complex. Consider the case of *Guerrero v. State*.[6] The judgment in that case showed the defendant convicted of aggravated assault with a deadly weapon but did not reflect an affirmative finding of a deadly weapon. The defendant argued on appeal that the judgment and sentence were void; the State argued that it was a clerical error and an affirmative finding should be entered. The court of appeals decided neither side was right, rather that the judge had made a judicial decision not to enter an affirmative finding and the sentence was still legal. How much time and effort could have been saved by a good record and a judgment that accurately reflected that record?

The third area that often causes problems is when an indictment contained multiple counts and only one judgment was prepared. Trying to decipher or litigate which count(s) the defendant was convicted of and which sentence(s) were imposed can be very frustrating and sometimes even impossible. It may still be impossible even when re-reading the record of the sentencing. The easiest method is to prepare a judgment for each count.[7] On many older judgments only one judgment was used. It is unusual to find one of these that was properly prepared.

What's the big deal?

We can save time.

Consider the *Guerrero* case where an appeal could have been avoided simply by a complete record that discussed the issue of an affirmative finding. Or find out who in your office handles writs of habeas corpus that contend the judgment does not accurately reflect the defendant's time credit and ask that person how many hours they spend on this one issue—it's probably a lot. What's worse, you may end up having to start over at ground zero trying to negotiate a plea bargain or retry your case.

We can see that justice is done.[8]

A judgment should reflect what was agreed in a plea bargain case and what happened in a non-plea bargain case. Both sides fought for what they wanted, and the judgment should accurately reflect what was achieved by both sides.

We can reap the benefits of hard work.

This goes hand-in-hand with seeing that justice is done. Make sure the defendant serves the time he is supposed to serve and make sure that he suffers the future consequences of that conviction. Nothing less, but nothing more.

Does this really matter? Yes!

Consider the case where a defendant was tried by a jury and double enhanced. They found him guilty and the enhancements true. On appeal, the defendant raised the issue that one of his prior judgments contained an illegal sentence because it was below the minimum set by law.[9] The judgment was silent as to whether the sentence was to run consecutively or concurrently and silent as to whether the sentence was a result of a plea bargain agreement. To complicate matters, by the time the issue was presented to the appellate courts, the judgment at issue was the only remaining record: There was no reporter's record and no written plea agreement still available. The defendant argued on appeal that the judgment was void and therefore the conviction could not be used to enhance him. The Court of Criminal Appeals finally decided that the defendant could not collaterally attack that conviction through the new conviction or that he was estopped from doing so. Although the opinion ultimately favored the State, it came only after an appellate fight that lasted five years—five years during which that sentence was not a final conviction.

Or consider the man who was indicted for two counts in one indictment.[10] He was placed on probation in a single order that listed

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News Worthy

Free regional training in 5 cities this summer

We will travel to several Texas cities this summer to deliver high-quality CLE and TCLEOSE training to prosecutors and their office personnel completely free of charge. Here are five with firm dates and agendas:

Amarillo, July 15, at the Potter County Courthouse, 501 S. Fillmore, in the Central Jury Room. The topic is search and seizure, and the session starts at 1:30 p.m. and ends between 4:30 and 5. Three hours CLE/TCLEOSE.

Corpus Christi, July 23, at the Nueces County Courthouse, 901 Leopard Street, in the Central Jury Room. The topic is ethics, and the session starts at 8:45 a.m. and ends between noon and 12:15 p.m. Three hours CLE/TCLEOSE.

Fort Worth, July 23, at the Tarrant County Family Law Justice Center. The topic is search and seizure, and the session starts at 1:30 p.m. and ends between 4:30 and 5. Three hours CLE/TCLEOSE.

Dallas, July 29, at the Frank Crowley Criminal Courts Building, 133 N. Riverfront, in the 2nd floor Central Jury Room. The topic is the National Academy of Sciences (NAS) Report on forensic evidence featuring nationally recognized prosecutor and speaker Richard Wintory, and the session starts at 1:30 p.m. and ends between 3:30 and 4. Two hours CLE/TCLEOSE.

Houston, July 30, at the Anderson Clayton Building, 1310 Prairie Ave., on the 16th floor. The topic is the National Academy of Sciences (NAS) Report on forensic evidence featuring nationally recognized prosecutor and speaker Richard Wintory, and the session starts at 1:30 p.m. and ends between 3:30 and 4. Two hours CLE/TCLEOSE.

All training sessions are walk-in registration only; you do not need to register online ahead of time. We hope you can join us! ❇

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both counts. A motion to revoke his probation was filed, naming only one count. An allegation in the revocation was proven true, and the judge pronounced sentence and ended the hearing. The single judgment recited that the defendant was charged with both counts, but was silent as to which count(s) he was sentenced on. He went to prison, and prison records reflect that he is doing time on both counts. Is this right? May the State go back now and attempt to revoke his probation on the other count? Does he have one conviction or two? Can a judgment *nunc pro tunc* be filed to correct all of these errors? Why didn't someone take care of this all those years ago?

Where to find help

The same statute that defines a judgment for us also tells us that the "sentence served shall be based on the information in the judgment."[11] It goes on to list nearly 30 things that are statutorily required to be in the judgment. Luckily for us, it also provides that the Office of Court Administration shall create standardized forms for our use and mandates that all courts issuing felony judgments use these forms. They are available at www.courts.state.tx.us/oca/felonyforms/index.asp.

Keep up the good work

As a group, we prosecutors are getting much better at making sure our judgments are correct. Please do your part: Take a few extra minutes to check that all of the details are put on the record at the time of the plea or verdict and sentencing. Then take a few more minutes and ensure the written judgment properly reflects what was ordered in court. If you don't know how to do something, ask. This little bit of extra effort will not only help the State now, but it will also save courts and prosecutors time and effort down the road. And most importantly, it will ensure that defendants get exactly what is coming to them, no more and no less. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 42.01, §1.

2 *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

3 A defendant may be estopped from attacking the judgment if he agreed to it and has benefitted from it. *Rhodes v. State*, 240 S.W.3d 882, 891 (Tex. Crim. App. 2007). However, if he does try to attack it through a writ many years after the fact, can you come up with the proof that this is what happened all those years ago?

4 See *Bailey v. State*, 160 S.W.3d 11 (Tex. Crim. App. 2004), wherein the Texas Court of Criminal Appeals found a notice of appeal filed nearly two months after the initial plea hearing to be timely because the judgment was incomplete at the time of the initial hearing. All parties agreed the court would later set the amount of restitution to be paid and the notice of appeal was given within 30 days of the court setting the restitution amount.

5 *Alvarez v. State*, 605 S.W.2d 615, 617 (Tex. Crim. App. 1980).

6 299 S.W.3d 487 (Tex. App.—Amarillo 2009).

7 This is the method used by the Office of Court Administration. Please read further for a discussion of their mandate and their judgment forms.

8 Tex. Code Crim. Proc. art. 2.01 states that it shall be the primary duty of all prosecuting attorneys to see that justice is done.

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

10 This case is still being researched and litigated. Specifics are withheld in an attempt to allow the parties to freely pursue their respective arguments.

11 Tex. Code Crim. Proc. art. 42.01, §1.

One whale of a fish story

The tale of Rockwall prosecutors who charged a well-known professional fisherman with attempted theft for cheating in a bass tournament

As a misdemeanor prosecutor, I have a pretty good idea of what each day will entail. DWI, marijuana possession, and assault are par for the course. But when a game warden came to tell me about a one-pound weight, a 10-pound bass, and a tournament full of angry anglers, it wasn't a part of a normal day.

By Alex Imgrund
Assistant Criminal District Attorney in Rockwall County

On a sunny Saturday afternoon last October on Lake Ray Hubbard, Robby Rose confidently strode up to the weigh-in table at the 2009 Bud Light Trails Big Bass Tournament. In his possession was a 10.49-pound bass he was submitting to win the grand prize, a $55,000 Legend Bass boat.

Rose was well-known to the crowd competing that day. He had acquired a reputation as a successful professional bass fisherman, but that reputation had recently been called into question. In late 2007, Rose was informed by the Bass Champs Tournament circuit that because of allegations of impropriety, he would be required to fish all future tournaments with an independent observer in his boat. Even though he had been incredibly successful in the Bass Champs circuit, amassing over $100,000 in prize winnings, he never fished another one of its tournaments.

Standing on the dock on that beautiful Saturday, Rose had a fish certain to be in contention for the grand prize. However, when his fish was placed into a holding tank, it sank to the bottom! When tournament official Tyler Fisher noticed the sunken bass, he retrieved it from the tank and felt a hard but moveable object in its belly.

Tournament officials confronted Rose and told him they would have to cut the fish open to retrieve the obstruction. Rose took the fish, massaged its belly, and removed a one-pound lead weight, stunning tournament officials. Rose quietly muttered, "I'm sorry," walked to his boat, and left. He was immediately disqualified.

Texas Parks and Wildlife (TPW) game wardens were present for the tournament, and Game Warden Tom Carbone was the first on the scene. From the beginning, Carbone and TPW treated the matter like a criminal investigation and took statements from tournament officials and other witnesses.

Because the weigh-in took place at Chandler's Landing, which is on Rockwall County's portion of Lake Ray Hubbard, Carbone contacted our office. An extensive onsite investigation revealed a series of interesting facts. An official approached Robby Rose the day before the tournament to ask if he were planning to enter. When Rose said yes, the official told him that he would be required to have an observer in his boat to protect both his and the tournament's integrity. The next day at the tournament—contrary to this directive—Rose launched his boat from an unknown area and fished without an observer. He had plenty of time to catch a fish and force the weight inside without anyone around.

Charging Rose

I must admit that when Game Warden Carbone called our office to request a meeting about irregularities in a fishing tournament, I didn't think it would amount to much. But when he laid out the evidence that he'd gathered, I became convinced that serious criminal activity had occurred and that the matter should be thoroughly investigated.

Warden Carbone and I agreed that a crime had taken place, but we needed to determine the appropriate charge. While Texas Parks and Wildlife Code §66.119 specifically addresses cheating in freshwater fishing tournaments, it didn't account for Rose's particular deception. This statute makes it a third-degree felony to bring in a fish from another lake or to buy or sell a fish from another lake to submit in a tournament with a grand prize greater than $10,000. However, that law does not cover stuffing a weight in or otherwise

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altering a fish with the intent of winning the tournament.

We also examined Texas Penal Code §32.44, which is Rigging a Publicly Held Exhibition or Contest, a Class A misdemeanor. A person commits this offense if, with the intent to affect the outcome of a publicly held contest, he tampers with a person, animal, or thing in a manner contrary to the rules of the contest. This seemed to apply to Rose's conduct, but after discussion with Criminal District Attorney Kenda Culpepper and First Assistant Craig Stoddart, we agreed that a misdemeanor was insufficient for a person who tried to cheat his way to a $55,000 grand prize. As Kenda later said, "As far as we were concerned, the case was about a $55,000 bass boat, not a 10-pound fish."

We also examined *in pari materia* issues between the theft statute and the rigging a public contest statute. Our research did not reveal any cases comparing the two; however, applying the test for *in pari materia* in *Hanson v. State*,[1] we determined that the two statutes: 1) exist in different chapters of the penal code, 2) require different elements of proof, 3) have different penalties, and 4) serve a different purpose. The theft statute was designed, in part, to prevent unlawful appropriation (or attempted appropriation). The rigging statute means to prevent a person from affecting a contest's outcome, regardless of appropriation or benefit on the actor's part. Given our examination of the two statutes, we did not believe that there existed any *in pari materia* issues.

There was little precedent for this sort of situation. In a somewhat similar Kentucky case, fishermen had caught large fish before the tournament and stashed ("staked" in fishing parlance) them in a location where they could be retrieved during the tournament and submitted as though they'd been caught that day. The fishermen in that scam were charged with felony theft by deception under Kentucky law. As word of the Rose case spread, we heard other stories of cheating scandals in years past, but after extensive research, we weren't able to recover records as to how other Texas prosecutors handled those incidents.

Ultimately, we let the facts dictate the appropriate charge, which was attempted theft. Rose used deception in an effort to obtain a grand prize valued at $55,000, so we charged the defendant with the state jail felony offense of attempted theft over $20,000 but less than $100,000. To us it was clear that the legislature intended for cheating in freshwater fishing tournaments to be a felony and that a felony was most appropriate in this case. Because of my involvement from the beginning of the investigation, I remained lead prosecutor, even though we were proceeding with a felony charge.

Possible defenses

Given the unusual nature of the case, we began to consider Rose's potential defenses to the charge, such as, "I didn't know there was a weight in the fish" or "That weight must've been there when I caught it." The evidence, however, would turn back even the most outlandish defensive claims.

According to experienced fishermen, a one-pound saltwater weight would never have been used in this type of tournament and rarely, if ever, on Lake Ray Hubbard, a freshwater lake. Biologists told us that in all of their years of research and practice, they had never seen a bass consume something that large on its own, let alone swallow it and then swim well enough to be in a position to be caught. It was crystal clear that there was only one way that weight got into Rose's fish: He put it there to win the grand prize.

Plea negotiations

Now that we had criminal activity and a statute to charge, we had to decide what to do with the case. After the tournament on October 24, our office had received numerous calls from members of the bass fishing community expressing their outrage at Rose's behavior. I quickly learned that when it comes to bass fishing in North Texas, tournaments are serious business. Anglers come from across the state and region to compete in fishing tournaments with substantial prizes. These competitors have invested significant resources on boats and equipment, as well as travel expenses and time. Given all that competitors expend, they demand that competitions be held on a level playing field. Their passion and commitment, coupled with high investment and potential rewards, communicated to us that these tournaments are much more than a group of men and women looking for some sunshine on a Saturday. Tournament fishing, like other sporting events, hinges on the honesty and integrity of the competition and competitors.

Once we charged Rose, we

entered into plea negotiations with his defense counsel, Randall B. Isenberg. We weighed the seriousness of the criminal activity against the defendant's lack of a serious criminal record in determining what to offer. We argued that jail time, even a short stint, was necessary to send a message to the community about how seriously we took this case. It was also essential that the defendant plead to the felony as charged, accept a ban on fishing in tournaments, and surrender his fishing license. A lengthy probation with community service and a fine were also important to ensure that his competitive fishing days were over (because his fishing license revocation could be maintained only for the length of his probation).

We also wanted to ensure the three the major goals of punishment: retribution (punishment for punishment's sake), rehabilitation, and deterrence to both the defendant and the community. When Rose pled guilty to the offense, we felt all three were accomplished. He was sentenced to five years' deferred adjudication, a $3,000 fine, and 250 hours of community service. As a condition of community supervision, Rose received 15 days in jail and had to surrender his fishing license for the duration of his supervision.

The public reaction to the plea and sentence was positive. The fishing community was pleased that our office and the TPW took this case very seriously. The subsequent media attention also showed the high level of interest in this attempted theft. From Alabama to Ontario, people wanted to know how we were treating the case. We fielded interview requests from ESPN, sportsmen's blogs, and other regional media outlets from around the country that followed the story.

Consequences

Ultimately, this was a fascinating exercise in weighing statutory intent against the level of criminal behavior that occurred. Any time large amounts of cash or prizes are at stake, people will attempt to cheat the system. A professional baseball player once said, "If you're not cheating, you're not trying." Had our office not taken the case seriously and pursued and punished the defendant—thanks in part to the hard work and diligence of the Texas Parks and Wildlife game wardens who provided us with the evidence needed to convict—Rose's behavior would have been encouraged and would have continued unchecked.

Our office has already contacted our state legislators about filling the loopholes in the Texas Parks and Wildlife Code; we feel that the issue of altering a fish with the intent to affect the outcome of a contest should be addressed. Our state senator has already suggested the name of the legislation be "Get the Lead Out."

Working on this case was truly a unique experience. Never before had I been so challenged, puzzled, and entertained by the facts of a case. Not always is there a perfect statute or a perfect set of facts, but at the end of the day, with a little imagination and the penal code, we can reach a fair and just result. We can also earn nicknames like Bass Buster and Fishhook. Ahem.

But those are fish stories for another day. ❇

Endnote

1 55 S.W.3d 681 (Tex. Crim. App. 2001).

Substance Abuse Felony Punishment (SAFP) beds now vacant

After years of underfunding and long lines for treatment, SAFP is once again a viable option for offenders with substance abuse issues. Here is an overview of the SAFP program for prosecutors.

By Wanda Redding
Program Supervisor, Rehabilitation Programs Division of the Texas Department of Criminal Justice

Many of the offenders under the jurisdiction of the criminal justice system have committed offenses related to substance abuse or have a history of addiction. During the early 1990s, Substance Abuse Felony Punishment (SAFP) facilities were created as an alternative to prison for parolees and probationers with substance abuse problems. No significant expansion of the program occurred until 2007, when the 80th Texas Legislature appropriated funding for an additional 1,500 beds in SAFP facilities (SAFPFs). With these additional beds, lengthy waiting lists for admission have been eliminated or—as in the case of some special-needs offenders—are rapidly disappearing. Now that these beds are widely available, we want to inform prosecutors about available treatment options for those defendants who receive probation and whose offenses or addictions might warrant it.

An overview of the SAFP program

SAFP is an intensive substance abuse treatment program for offenders on probation or parole. The program is operated in a therapeutic community setting and lasts six months for regular-need offenders and nine months for those with a special need, such as physical or mental health issues or pregnancy. A judge sentences an offender to an SAFPF as a condition or modification of probation. The Board of Pardons and Parole may also place an offender in the program as a modification of parole supervision.

The in-prison phases of the program consists of Phase I (Orientation), Phase II (Treatment), and Phase III (Reentry and Relapse Prevention). In addition to the treatment curriculum provided by qualified, credentialed staff, the offenders may also avail themselves of volunteer-led support groups such as Alcoholics Anonymous (AA), Narcotics Anonymous (NA), Cocaine Anonymous (CA), Winner's Circle, or Secular Organization for Sobriety (SOS).

Once the in-prison phase has been completed, it is followed by a three-month stay at a transitional treatment center (TTC), which provides a diverse range of therapeutic, residential, and resource programs that allow the offender to focus on recovery while preparing for transition to the community. It is within this three-month period that the offender and treatment staff prepare a service implementation plan to address employment, education, vocational training, housing, medical, and other social needs; address coping skills in a supportive environment; meet peer support groups; engage in relapse prevention counseling and education; and identify coordinated services from community resources.

Once the offender has successfully secured employment, housing, outpatient treatment services, reporting instructions and requirements, and a "home" support group, he may then begin nine months of outpatient treatment while living in the community. The entirety of the SAFP Program may last up to 30 months, which includes the initial six-month, in-prison phase; up to three months in a transitional treatment center; and up to nine months in outpatient treatment, which may be followed by up to 12 months of supportive outpatient (support groups and peer support networks).

Nearly a decade after the program's implementation, several elements remain constant: that cognitive-behavior-based intervention is essential to the offender's success;

that addiction be recognized and treated through the disease model; and that treatment be client-driven. Through the years, the Rehabilitation Programs Division (RPD) of the Texas Department of Criminal Justice (TDCJ) has proactively adapted treatment to include new advances in evidence-based practices, or "what works."

One such adaptation has been the introduction and training of staff in Moral Reconation Therapy (MRT). MRT is a cognitive-behavioral treatment approach combined with elements of psychological traditions that address the ego, social and moral reasoning, and positive behavioral growth through group and individual counseling, structured group exercises, and prescribed homework assignments.

Another, more recent adaptation involves motivational interviewing techniques, which fits nicely with the idea of client-driven treatment. With the client serving as the impetus for change, he can come to the belief that change is possible and that he already owns or possesses within himself the mechanism for that change.

Research confirms that aftercare is crucial in the treatment of substance-addicted people, and for offending populations, it is significantly related to their successful transition back to the community. In late 2008, an alternative to the continuum of care was piloted in Dallas and Fort Bend Counties; it was designed for offenders who successfully completed the in-prison program and had a strong community support system. Instead of the traditional transitional treatment center, these offenders are required to participate in three months of non-residential supportive outpatient treatment, which includes weekly outpatient counseling, attending peer support groups, random urinalysis, meeting with the supervising officer as required, maintaining employment, working with a sponsor, and achieving other service/transitional plan goals. This is followed by nine months of outpatient treatment in which the offender continues to report to the supervising officer as instructed, attends support groups activities each week, maintains employment, continues education or vocational goals as needed or required, becomes a peer support volunteer, and submits to random urinalysis. Each phase the offender attains is less restrictive but still supportive. An offender who does not have an approved home plan within 45 days of projected release is not eligible for the 1B/4Cs release. Additionally, any violation may subject an offender to completing the original 90 days in the residential facility, regardless of the number of days "invested" in the 1B/4Cs program.

One additional adaptation for special-needs offenders has been a new procedure in which the Health Services Division reviews special-needs discharge recommendations on a case-by-case basis to ensure that inappropriate offender behavior is not related to mental health issues or the side effect of psychotropic medication. A counselor is also assigned to the special-needs units to assist with mental health issues and serve on the treatment team.

Offenders who complete the program and the critical aftercare component experience a significant reduction in recidivism. The TDCJ rehabilitation programs' aftercare component is an important part of substance abuse treatment as evidenced by the reduced recidivism rates (three years after release) for offenders who complete at least three months of outpatient aftercare. The recidivism rate for offenders who complete the program is 22.26 percent, compared with a 35.68-percent recidivism rate for those who participate in no such program.[1]

In summary, the SAFP program staff work diligently with drug addiction and drug-related issues to provide a holistic approach to treatment. Few offenders are ready to engage in treatment at the time of conviction, but these dedicated staff members tirelessly work with each individual towards one goal: reaching and maintaining sobriety. Should you find in front of you a defendant with substance abuse issues, please consider the SAFP program as an option. If you have any questions or a desire to visit one of the SAFP facilities, please contact Pam Carey, RPD Operations Manager, at Pam.Carey@tdcj.state.tx.us. ❇

Endnote

1 TDCJ Evaluation of Offenders Released in Fiscal Year 2005 That Completed Rehabilitation Tier Programs, February 2009.

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