THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 42, Number 4 • July–August 2012

"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

Brady and beyond

TDCAA is proud to offer a free hour of ethics training on our website at www.tdcaa.com/node/10250. Use this article to follow along while viewing the webinar—and enjoy!

By Erik A. Nielsen
TDCAA Training Director
in Austin

May you be blessed to live in interesting times. (Or is it cursed?) Whichever way the old proverb cuts, we are living in a very interesting time for prosecutors. Whether it's due to the prevalence of the 24-hour news cycle which requires any "new" news as fast as possible, or the immediate dissemination of information (and misinformation) through the Internet, blogs, and other social media, or other factors, one thing is certain: Any bad acts (whether intentional or not) taken by a prosecutor are increasingly ascribed instantly to all of his brethren. In short, when one of us fails to act ethically, legally, or morally, it casts a shadow on us all. So what can we do?

Although the entire answer is wide-reaching and complex—and rest assured, TDCAA has been and is currently working with our members on this complicated issue—one facet of the answer is quite simple: Every prosecutor must understand and uphold her legal, statutory, and ethical duties to ensure a just result. With every defendant, witness, and victim. In every case.

But where can prosecutors look for guidance? Virtually every Texas prosecutor knows one sentence from the Texas Code of Criminal Procedure art. 2.01 by heart: "It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done." In fact, it's been quoted on the masthead of the publication you're holding for decades. But that is only the starting point for a Texas prosecutor's ethical and legal duties. Perhaps less well-known is the final line of art. 2.01 that directly follows the aforementioned quote: "They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." This duty directly echoes the other major guide that prosecutors should use to set their ethical compass, the seminal case of *Brady v. Maryland*.[1] Using these guidelines as a foundation for their conduct, Texas prosecutors can ensure justice in each and every case.

To help achieve that goal, TDCAA created a one-hour ethics

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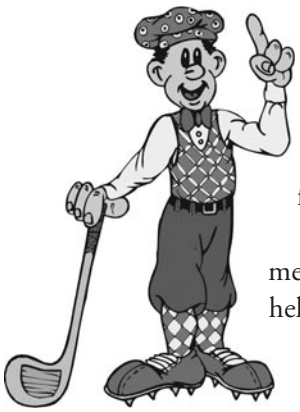
What we're planning for the Annual Update

We are gearing up and getting excited for the 4th Annual Foundation Golf Tournament and silent auction set to take place at this year's Annual Criminal and Civil Law Update on South Padre Island. (The exact location of the tournament will be announced later.) This year we will have an award for the golfer with the craziest outfit, so please pack your plaid golf shirts and green blazers for this year's event.

By Jennifer Vitera
TDCAF Development Director in Austin



We are asking members to please help the foundation identify corporations and individuals who might be interested in sponsoring the tourney or donating an auction item. Sponsorship levels are: Platinum, $10,000; Gold, $5,000; Sterling, $2,500; and Bronze, $1,000. Please contact Jennifer Vitera at vitera@tdcaa.com for more information.

DWI Summit

We are excited to present the third DWI Summit, called Guarding Texas Roadways, which is scheduled for November. The Texas District and County Attorneys Association (TDCAA), in cooperation with the Texas Department of Transportation (TxDOT), Anheuser-Busch Companies, Inc., and Texas District and County Attorneys Foundation (TDCAF), is proud to offer the third DWI Summit. We are asking members to please help the foundation identify corporations and individuals who might be interested in supporting this popular training event. Please contact Jennifer Vitera at vitera@tdcaa.com if there is someone in your area we can send more information to.

Annual Campaign reminder

By now you have received the 2012 Annual Campaign brochure, which is 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.

This year will be our third annual campaign membership fundraising challenge between the investigators, key personnel, and victim assistance coordinators (VACs). Last year the investigators took home the win, earning a free happy hour at Investigator School in February, but 2012 is a new year! As of May, our investigators are in the lead in their fundraising efforts, but there's lots of time left so it's not too late for the key personnel or VACs to overtake them!

2011 Annual Report online

We are honored to show you our 2011 Texas District and County Attorneys Foundation Annual Report. It summarizes what we accomplished last year, lists all donors, and explains plans for the next year and beyond. Please take a few minutes to review it at www.tdcaf.org. ❇

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

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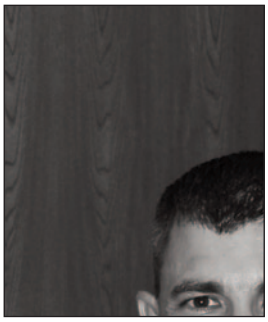
In remembrance of a dear friend

I'm writing this President's Column on May 24, 2012. It just occurred to me that 10 years ago, I was right in the middle of what will probably be the defining case of my career as a prosecutor.

From April 1 to July 3, 2002, I helped prosecute the third capital murder trial of Johnny Paul Penry—probably the most notable case to ever come out of Polk County. My co-counsel on that case was Joe Price. At the time, Joe was serving as the District Attorney of the 258th Judicial District. At the time of the 1979 murder, Polk County was included in that district. By 2002, the district included only Trinity County, which borders Polk to the northwest.



By William Lee Hon
Criminal District Attorney in Polk County

Joe Price was my friend. He was tragically killed in a car wreck on February 21, 2003—less than a year after the jury returned its verdict in *Penry III*. To this day, Joe remains one of the most profound influences on my career as a prosecutor. The memories I have of working with him on that case remain just as vivid as if we were in court yesterday. As it's been 10 years since the trial, I thought this might be a good time to write a tribute to Joe Price.

For those of you who didn't know Joe, he was kind of a wiry little guy. He was probably around 5-foot-5 and might have weighed 150 pounds. In earlier lives, he had been a rodeo cowboy and the owner of the legendary Rising Sun dancehall just outside of Trinity. I still chuckle remembering the story Joe told about the time he recovered a rather sizeable appearance fee he paid to country music star George Jones after George got drunk and lost to Joe in a poker game.

I suspect several members of our association would agree with me when I say that Joe had the personality of a pit bull on steroids. He certainly had that demeanor in court. He lived large. He had been twice married—and divorced. And I think he had pretty much settled into the lifestyle of a confirmed bachelor during the latter years of his life. And for someone who hailed from such a small, rural, East Texas county, Joe enjoyed the finer things in life. He dated beautiful younger women. He enjoyed nice restaurants and expensive liquor. He had a sports car and a tanning bed. He had one of the coolest Schnauzers I've ever met—named Bubba. And I'm pretty sure his favorite entertainer was Cher, of all people.

His office in Groveton was a one-man show. He had one loyal investigator, Ronnie Dunnahoe, and the lifeblood of his office, secretary Deana Bell. Joe wasn't under the Professional Prosecutor's Act so he got to have a private practice on the side. He did extremely well for himself financially in his civil practice.

We tried *Penry III* on a change of venue to Montgomery County. We lived in a Conroe hotel for about four months during the trial proceedings. We had about 20 banker's boxes with our file materials that my investigator and I had to lug back and forth from the hotel to court on a daily basis. We spent many a late night brainstorming, interviewing witnesses, going over records, and getting ready for the next day. Joe's motto was, "The more you sweat in preparation, the less you'll bleed in battle." Getting Joe ready for court in the morning was another matter. The time it took for him to get his hair fixed just right and become immaculately dressed became a running joke. We finally stopped waiting on him and made him take his own car to the Montgomery County Courthouse.

To give you a sense of how tenacious Joe was in the courtroom, I recall one instance which happened in the middle of Penry's two-week competency trial. We had to get competency out of the way before we started the trial on the merits. The defense had called a psychologist during its case-in-chief, and Joe had already worked her over pretty good on cross-examination. We were continually doing opposition research on the defense experts throughout the trial proceedings. After this particular expert testified and while we were presenting our own case-in-chief, one of our own experts brought to our attention some pretty damning impeachment evidence concerning the aforementioned defense expert. When it came time for the defense to present its rebuttal witnesses, the judge invited the attorneys into her chambers to get a sense of how many more witnesses might be called.

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When the defense attorney mentioned that they were considering recalling the expert in question, Joe put our cards on the table and told them, "Here's what we've got. It's your decision as to whether you want to put her back on the stand but if you do, I'm going to cut her throat on cross-examination and you'll get to watch her bleed out all over the courtroom."

They didn't call her.

Joe was a master at the art of cross-examination. I think his country background and demeanor really disarmed a lot of very sophisticated expert witnesses. By 2002, he had been involved in the Penry prosecution for 23 years. He knew the record and exhibits like the back of his hand. I think he had a photographic memory when it came to all of the documentation of Penry's mental health history. He was well-versed in psychological terminology and could find his way around the *Diagnostic and Statistical Manual of Mental Health Disorders* with ease. If the testifying defense expert had not thoroughly prepared by reviewing every single piece of paper ever written about Johnny Paul Penry, he or she was in big trouble. Joe knew the case far better than any defense expert ever could, and it showed. Joe had actually come to the crime scene on the day of the murder. He told investigators which photos he wanted taken and from which angle. His knowledge of every significant (and insignificant) detail of that case was unbelievable.

I usually enjoy trying cases by myself. Maybe it's a control thing or just how my personality works. Joe was the same way. In *Penry III*, however, there were just way too many witnesses and too much information for one prosecutor to manage by himself. If memory serves, there were more than 20 experts who testified throughout the entirety of the proceedings. Joe and I worked very well together, but I still laugh about how many sticky notes we must have gone through during that trial. When one of us was handling the witness on the stand, it was impossible for the other to sit still without passing notes saying, "You need to ask this" or "Ask the witness about that." I suppose in some cases it might be difficult for two Type-A personalities to sit at the same counsel table for three months, but it really did work well for us in that trial.

I noted earlier how culturally refined Joe was for a country prosecutor. I remember one Friday night during the trial when we didn't get to go home because we had expert witnesses to meet with over the weekend. That night Joe took me and my investigator out to eat at a really nice seafood restaurant down in The Woodlands. After a fine meal and dessert, Joe mentioned on the way back to the hotel that he had a bottle of Middleton Very Rare Irish Whiskey that he wanted to share with us—on one condition: that we were not going drink fine whiskey out of plastic hotel cups. To The Mall of the Woodlands we went in search of old-fashioned crystal drinking glasses. After finding a set, we lounged in Joe's hotel suite and enjoyed some of the finest and smoothest whiskey I've ever consumed. It was going for about $118 a bottle at that time.

Joe Price was about six months shy of his 60th birthday at the time of his death. He was serving on the TDCAA Board of Directors. While in law school at Baylor, he received the Phi Delta Phi outstanding freshman award in 1968. During his career as a prosecutor, he obtained death sentences against three different defendants. If you count the three competency trials Penry had, Joe actually tried Penry six times, and he won each time. He was recognized twice by the Association of Government Attorneys in Capital Litigation (AGACL) for his work on the *Penry* case. He testified multiple times in legislative committee hearings on matters related to the death penalty. He was an avid supporter of Kalin's House Child Advocacy Center and multiple other benevolent causes in Trinity County. He served as District Attorney for the 258th Judicial District from 1977 until his death. He never had an opponent for re-election.

For a little guy, he certainly left some mighty big footprints. I know a lot of people still miss him very much. I certainly do. ❇

Our first-ever online *Brady* training

We are very pleased that our first foray into the world of online training is on a very timely topic: the prosecutor's duty to disclose exculpatory evidence. TDCAA's leadership, through our Long-Range Plans, has taken a cautious approach to online training. Our leaders wanted to be sure that the technology was sound, the topic was timely, and the quality was worthy of TDCAA.

By Rob Kepple
TDCAA Executive Director in Austin

First, I'd like to thank **Buck Files**, the incoming State Bar President, and **Pat Nestor**, the State Bar's online training director, for helping us produce our first online training. They really went the extra mile to launch the first program, the materials for which appear in this edition of *The Texas Prosecutor* (see the cover story). The Bar has an excellent facility and the experience to produce some very good training.

Second, the topic is most certainly timely. An hour devoted to *Brady* is an hour of ethics, which everyone is keen to have. TDCAA has offered a steady stream of *Brady* training in the last three years, and our goal is to be sure that everyone has access at a seminar or now online.

Finally, the quality is what you've come to expect from TDCAA. You will be the judge of that, and after taking the hour-long course, we really want your feedback. Be sure to email your comments to our training director, Erik Nielsen, at erik.nielsen @tdcaa.com, or to me at robert.kepple@tdcaa.com. We want to be able to offer timely training in this manner in the future, but we need to be sure it meets your expectations. I hope to hear from you!

NDAA elections report

Somewhere squeezed in between running a great prosecutors' office and just plain running, **Henry Garza**, the DA in Bell County, has the time to work at the national level for the benefit of our profession. Congratulations to Henry on his nomination for the position of President-Elect of the National District Attorneys Association (NDAA). The election will take place at the NDAA July meeting, and with no opposition, Henry will take the helm of NDAA in July 2013.

Henry will be the first Texan at the helm of the NDAA since his predecessor, the late **Arthur C. "Cappy" Eads** in 1986. There is little doubt that prosecutors needs an effective national association to advance our profession on that level, and Henry is the Texan for the job. Good luck!

A major Texas export: "justice reinvestment"

We all know that Texas criminal justice takes its share of lumps from the national media. As a southern state with a functional death penalty, that is to be expected. But truth be told, the Texas criminal justice system has been exporting methodology, ideas, and programs for years.

It probably started in 1991, when a small state agency called the Texas Criminal Justice Policy Council was funded to do a national first: a comprehensive study of the criminal justice system. Our crippled Texas system was laboring under extremely inadequate capacity, outrageous parole rates (anyone else remember the "parole *in absentia*" cases where inmates were paroled before they actually arrived from the county jail to the prison?), and huge lawsuits by the counties that were housing state prisoners.

The council, led by Dr. Tony Fabelo, did a comprehensive study of the system to find out who was in prison, for what crimes, and for how long. Most importantly, the council designed a way to collect, analyze, and report data in a way that was simple and clear for our policymakers. It took a huge amount of work from prosecutors to "drill down" into the files and find the needed information, but the resulting comprehensive report gave our legislative policymakers the ability—for the first time—to make knowledgeable, rational decisions about resources, their allocation, and the effects of every change they were considering—no more legislating by anecdote.

That study led to an increase in capacity, a new and refocused Penal Code ranked best in the country for simplicity and clarity, and a new system of state jails to implement the concept of local rehabilitation, drug treatment, and judicial oversight of

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offenders. It was some real groundbreaking stuff when it came to handling non-violent, property, and drug offenders.

A couple things happened in the next 15 years of lowering crime rates, stable prison populations, and inadequate budgets. People kinda lost interest in the rehabilitative promise of the state jail system, and the programmatic aspects of intensive supervision and "short leash" jail therapy were scrapped. And with Texas in relative criminal justice bliss, our leaders lost interest in the focused work of the Criminal Justice Policy Council, zero-funded the operation, and transferred its duties to the Legislative Budget Board.

Dr. Fabelo and his crew found a home in the world of consulting non-profits at a think-tank called the Justice Center of the Council of State Governments (see its website at www.justicereinvestment.org). The council is a bi-partisan association of state elected officials, and the Justice Center is the criminal justice analysis and development arm of the council. And now, with most states involved in major budget problems and with crime ranking very low on the public's list of concerns, there is a renewed interest in anything in the world of criminal justice that will save money and at least tread water when it comes to public safety.

Re-enter Dr. Fabelo. His crew and others have been working in Texas on efficiencies within various components of state criminal justice entities to develop programs that give more than just lip service to public safety while making the system more efficient, all with the goal of taking savings and reinvesting in criminal justice initiatives. They have taken the methodology developed in the 1990s to make the system more transparent and data-driven and applied it to all sorts of criminal justice-related activities.

It has now gone national. Lots of groups are working on these programs, but the concepts are the same that were originally developed in the early 1990s in the Texas state jail concept. And as legislatures around the country end their sessions for the summer, you will see a little bit of Texas everywhere. Missouri just passed its version of justice reinvestment: Probationers can take a "quick dip" in jail for probation violations, probation terms are shortened, and the system is "front-loaded" with intensive supervision options designed to avoid a revocation to prison. And Pennsylvania recently passed reforms similar to the Texas effort in the '90s, reworking its penal code structure, designing diversions for non-violent offenders, and ramping up treatment alternatives. Hawaii, Oklahoma, Ohio, and North Carolina have adapted their criminal justice policies in different ways, but all in response to a data-driven examination of the key factors impacting the effectiveness of the various systems.

I don't think anyone in the criminal justice field is naive about the nation's renewed interest in criminal justice reform—it is all about state budgets. The public has the right to remain skeptical about the promises that public safety won't be compromised by initiatives whose primary interest is to save money, but maybe, just maybe, some of the things that have been developed here in Texas in the last 20 years (and the lessons we've learned) will be useful around the nation and be properly implemented and funded. The key, of course, will be the follow-through after the budget crisis subsides. Do the reforms and initiatives have the substance and merit to survive into the future, and will the ultimate promise of uncompromised public safety come to pass? I think it is safe to say we are going to find out.

"Right-sizing" Texas corrections

Now here is some interesting stuff if you believe that the Texas prison system offers the proper amount of correctional bite to our judicial system bark. The Texas Department of Criminal Justice (TDCJ) will undergo sunset review. Every state agency undergoes this top-to-bottom review every few years, and it gives lawmakers an opportunity to make some pretty big changes in the core functions of an agency. TDCJ's last sunset review was in 2007.

There has been a lot of talk in public forums about the need to save more money in the state's criminal justice budgets, and doubtless those pressures will be big in 2013. In recent meetings, the Sunset Advisory Commission has been discussing a wide range of cost-saving measures: better re-entry programs, more flexible medical release rules, and better coordination between TDCJ and the Board of Pardons and Parole. But more than one expert has observed that we have pretty much hit "operational efficiencies" in the system—that is, there may not be much more to be saved by trying to make the prison system leaner. So how are you going to save significant chunks of money in the prison system? You've got to close units. Hence, in the near future you will likely hear lots of discussion about "right-sizing" Texas corrections. If you want to read the Sunset Advisory Commission's report on TDCJ, go to www.sunset.state.tx.us/83rd/CJ/CJ_HM.pdf.

R2R2R HG 2012

What does this jumble of letters and numbers mean? It is code for "Henry Garza is half-crazy." Henry, mentioned above and pictured below, took his love of exercise and the outdoors to a new level in May when he completed the R2R2R—which stands for Rim to Rim to Rim—at the Grand Canyon. Yes, it is just as it sounds: You start on one rim, go down and climb up to the other, then go back. Henry finished this trek of 45 miles of trail and nine miles of elevation in an inspiring 22 hours. His motivation for this challenge? "To completely understand the answer, you really have to experience the adventure," Henry says.

"And explaining the adventure is a joy that takes a while. Why? We wanted to do something extreme, challenging, and tough—something that very few will ever accomplish or even think of doing. We did, and it was incredible!"

From what I can tell from the Internet posts, it is a life-changing type of thing. Just Google "r2r2r" and you will get pages and pages of blogs, photos, videos, and testimonials on the event. Congratulations, Henry! ❇

Righteous accountability versus forbidden retaliation

By John Stride
TDCAA Senior Appellate Attorney

You may have heard of such a case. After preparing for weeks, a prosecutor took a defendant to trial and, in the course of full-blown proceedings with a reticent victim, dueling experts, and an agile adversary, obtained what seemed to be an appropriate conviction and sentence: say, 40 years for aggravated sexual assault. Satisfied, the prosecutor moved on to other cases. Weeks or months later, however, a court finds reversible error—maybe even as a result of no act or omission on the prosecutor's part—and awards the defendant a new trial. Frustrated with the lack of finality and even more determined to hold the defendant accountable, the prosecutor starts all over again. The prosecutor works even harder, adds another charge, and eventually obtains a more severe sentence on retrial—now 60 years. The prosecutor feels some sense of gratification because the defendant finally got what he deserved.

Or did he?

An increase in exposure or an assessment of a harsher sentence is one that can provoke a defendant to question the integrity of the process. At retrial, the inclusion of additional or greater charges may lead a defendant to complain vigorously that his greater exposure is nothing more than prosecutorial payback for his successful appeal. Likewise, after retrial, the defendant might allege on appeal or in a writ of habeas corpus that the additional or greater charges or increased sentence resulted from prosecutorial or judicial retaliation. When additional or greater charges or a harsher sentence are an option on retrial, then, we must position ourselves to defend the enlarged exposure.[1]

Due process[2]

As a matter of due process, both prosecutors and trial judges are forbidden from retaliating against a defendant simply because he has exercised his legal rights.[3] The Supreme Court of the United States acknowledged the claims of judicial vindictiveness in 1969 and prosecutorial vindictiveness five years later. Federal and Texas courts continue to address them. Judicial vindictiveness and prosecutorial vindictiveness are now firmly established sister-claims.[4]

Seeking a harsher result or assessing a more severe penalty against a defendant because he has obtained a retrial after a successful legal challenge is vindictive. Not only does it punish the defendant for doing what he is legally entitled to, it also has a chilling effect on a defendant's exercise of his trial and appellate rights. If a defendant knows that he is likely to face a more severe punishment after a successful direct appeal or collateral attack, he is less likely to assert his rights to a fair

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trial.[5] Moreover, the Supreme Court has identified an "institutional bias inherent in the judicial system against the retrial of issues that have already been decided."[6] Thus, to some degree, there is an inherent risk that the integrity of trial and appellate proceedings can be substantially undermined.

Prosecutorial vindictiveness

The Court of Criminal Appeals has addressed prosecutorial vindictiveness in six published opinions over the last 30 years, and the Supreme Court has decided fewer still. But our state criminal high court's last opinion on the topic was six years ago and, currently, there is national discourse on prosecutorial misconduct; thus, it seems timely to remind ourselves of the nature of the claim.

Ordinarily, so long as a prosecutor has probable cause that the accused committed a statutory offense, the prosecutor has substantial discretion in determining whether to prosecute and, if so, the nature of the charges to bring.[7] This prosecutorial independence is vital to our adversarial criminal justice system. Accordingly, the courts presume that criminal prosecutions are brought in good faith and without discrimination.[8] But a prosecutor's discretion is tempered by the merciful constraint that he is not permitted to retaliate against a defendant who simply exercised his legal rights. As the Justice Stewart writing for the majority of Supreme Court of the United States opined in 1977:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'[9]

Accordingly, in very particular circumstances, the good faith presumption yields to a claim of retaliation or vindictiveness. A constitutional claim of prosecutorial vindictiveness may be established in two ways: 1) a presumption of prosecutorial vindictiveness or 2) actual vindictiveness. A trial court decides both issues on a case-by-case basis depending on the evidence presented and the credibility of the witnesses.[10]

A "presumption of prosecutorial vindictiveness" is proven when there is proof of circumstances that pose a "realistic likelihood" of such misconduct. The State must overcome this presumption by rebutting it or suffer dismissal of the charges.[11] But, as we will see below, a presumption does not always attach.

"Actual vindictiveness" is proven when there is "direct evidence that the prosecutor's charging decision is an unjustifiable penalty resulting solely from the defendant's exercise of a protected legal right."[12] The defendant has the burden of both production and persuasion unaided by any presumption, and the burden is a tough one.

In the event that a defendant brings a claim of vindictiveness but is unable to prove either actual vindictiveness or a realistic likelihood of vindictiveness, the trial judge need not reach the issue of government justification, and the State can remain mute.[13] Nevertheless, a careful trial judge or prosecutor may choose to develop the record so as to dispose of the claim once and for all time. This is especially true if the hearing is conducted near the time of the trial when memories are fresh, witnesses are available, and detail can be provided.

Failed claims of vindictiveness

The Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, only by those that pose a realistic likelihood of vindictiveness.[14] If a defendant obtains a new trial from the trial judge rather than an appellate court, no motivation for vindictiveness arises; after all, the trial judge awarded the new proceedings.[15] If the case is simply the same one tried to a different jury or a different trial judge, without additional or more severe charges brought by the prosecution, a concern of retaliation should not arise. The fresh jury or judge on retrial can increase the sentence from that previously assessed usually without danger of a successful claim of retaliation. Neither a fresh judge nor a fresh jury should care about any prior proceedings or results (to the extent they are re-deciding them) and, at least, should not be ill-motivated simply because the defendant prevailed on appealing after the first trial.[16] Simply, they have no personal stake in the prior proceedings.

With pretrial prosecutorial decisions to amend the charge, the Supreme Court has advised, "A mere opportunity for vindictiveness is insufficient to justify the imposition

of a prophylactic rule."[17] So no presumption automatically attaches to pretrial charging decisions.

Usually, after reversal of a guilty plea, if the defendant is assessed a longer sentence at the retrial there is no presumption of vindictiveness.[18] With "the 'give-and-take' of plea bargaining, *there is no such element of punishment or retaliation* so long as the accused is free to accept or reject the prosecution's offer."[19] So, also, when the State drops a habitual offender allegation and obtains a guilty plea at the first trial resulting in an 11-year sentence, but the defendant successfully appeals and, on retrial, the defendant goes to the jury with the habitual offender allegation and is assessed a life sentence, the Court of Criminal Appeals held that the result was a consequence of the defendant's choice of trial strategy, not any vindictiveness.[20]

"The mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified."[21] Also, a claim of prosecutorial retaliation does not attract a presumption of vindictiveness if after a defendant has elected a jury trial but before he has been convicted, the State brings other charges.[22]

Finally, the advent of new caselaw authorizing certain action can provide the basis for non-vindictive addition, such as a deadly weapon finding, on retrial.[23]

If a presumption of vindictiveness adheres on retrial, a prosecutor can rebut it by an honest testimony that another charge or an enhancement was inadvertently excluded at the first trial. In Texas, unlike some other states, an explanation of a mistake or oversight is an "objective explanation" that may be sufficient to rebut a presumption of prosecutorial vindictiveness especially when a prosecutor does not merely deny his state of mind was motivated by vindictiveness.[24] Also, know that an explanation of "we forgot," while it could be considered "lame," is not vindictive.[25]

On appeal, a claim of prosecutorial vindictiveness can be forfeited for many of the usual reasons, including failing to raise the issue in the trial court or obtaining a ruling on a claim.[26]

Judicial vindictiveness

In a similar vein to prosecutorial vindictiveness, the hazard of judicial vindictiveness arises when the same judge imposes a more severe sentence on retrial. The Supreme Court has advised that, in that instance, the sentence is "more likely than not" attributable to the vindictiveness of the judge. Thus, absent the reasons for the increased penalty appearing affirmatively on the record, a presumption of vindictiveness lies and objective information justifying the heavier sentence is required to rebut the presumption.[27] But the court has also cautioned that "it no more follows that such a sentence is a vindictive penalty … than that the inferior court imposed a lenient penalty."[28]

In any case, events at the retrial can readily provide all that is required to rebut a claim of vindictiveness. First, during trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged. Second, the defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Third, after trial, the factors that may have indicated leniency as consideration for the guilty plea may no longer be present.[29] Thus, just ask the trial judge to put her detailed reasons on the record.

Additionally, when a trial judge places a defendant on deferred adjudication community supervision but then adjudicates and assesses a term of years greater than the original term of probation, the Court of Criminal Appeals has held the doctrine of vindictiveness inapplicable. The court reasoned that, at the first trial, the defendant had neither been found guilty nor assessed a sentence so when he was adjudicated he had not been effectively retried.[30]

Besides developing a record on why increased charges or a harsher sentence is warranted on a retrial, the tour de force is securing favorable findings of fact. In *Texas v. McCullough*, a jury convicted and assessed a 20-year sentence but, after reversal on appeal, the trial judge assessed a 50-year sentence.[31] The Supreme Court found no basis for applying a presumption of vindictiveness because the defendant had elected to go to the judge for sentencing.

Just as significantly, however, the trial judge had given detailed reasons for the enlarged sentence: She thought the prior sentence too lenient in light of significant new evidence heard at the second trial. Describing this explanation as "findings," the Supreme Court held that, even if the presumption of vindictiveness was to apply, the findings were sufficient to overcome the pre-

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sumption. Thus, obtaining a trial judge's explanation to prevent a claim of judicial vindictiveness or findings of fact to head off a claim of prosecutorial vindictiveness can resolve any claim and may even serve to avert one altogether.

Conclusion

If events at a retrial could give rise to a claim of vindictiveness—either prosecutorial or judicial—protect a conviction with an adequate record. Ensure that there are detailed reasons for the different charges or more severe penalty and, if prosecutorial vindictiveness is at issue, request findings of fact. These steps are not difficult to accomplish, but they serve well to safeguard cases in which a defendant's accountability and any victims' peace of mind has already been postponed for too long. ❇

Endnotes

1 The Supreme Court of the United States has even reproduced an inmate's letter reflecting concern about the likelihood of a harsher sentence on retrial. See *North Carolina v. Pearce*, 395 U.S. 711, 725 n.20 (1969).

2 For reasons of space, this article is confined to the leading decisions of the Supreme Court of the United States and the Texas Court of Criminal Appeals.

3 *Pearce*, 395 U.S. at 725.

4 See *Blackledge v. Perry*, 417 U.S. 21 (1974) (prosecutorial vindictiveness); *Pearce*, 395 U.S. 711 (judicial vindictiveness).

5 *Pearce*, 395 U.S. at 725-26.

6 *United States v. Goodwin*, 457 U.S. 368, 376 (1982).

7 *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (after defendant declined a plea bargain agreement, the State also charged him as a recidivist).

8 *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004).

9 *Hayes*, 434 U.S. at 363 (citations omitted), quoted in *Castleberry v. State*, 704 S.W.2d 21, 24 (Tex. Crim. App. 1984).

10 *Neal*, 150 S.W.3d at 174.

11 *Id.* at 173.

12 *Id.* at 174-75.

13 *Id.* at 175.

14 *Perry*, 417 U.S. at 27.

15 *Castleberry*, 704 S.W.2d at 24.

16 See *Texas v. McCullough*, 475 U.S. 134, 140 n.3 (1986) (noting that, despite other courts implying a presumption of vindictiveness even where different judges were involved, the Supreme Court did not specifically address the issue in its seminal case and, further, a subsequent judge has no personal stake in the prior reversed conviction); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (different juries).

17 *Goodwin*, 457 U.S. at 384 (after a defendant elected for a jury trial on misdemeanor charges, the government obtained an additional felony charge).

18 *Alabama v. Smith*, 490 U.S. 794, 801 (1989), overruling *Simpson v. Rice*, the companion case to *Pearce*, 395 U.S. 711.

19 *Hayes*, 343 U.S. at 363 (emphasis in original).

20 *Alvarez v. State*, 536 S.W.2d 357, 360 (Tex. Crim. App. 1976) (op. on reh'g).

21 *Goodwin*, 457 U.S. at 382 (1982) (explaining *Hayes*, 434 U.S 357).

22 See *Goodwin*, 457 U.S. 368.

23 See *Lopez v. State*, 928 S.W.2d 528, 533 (Tex. Crim. App. 1996).

24 *Hood v. State*, 185 S.W.3d 445, 450 (Tex. Crim. App. 2006).

25 *Id.* at 450 n.16.

26 See *Neal*, 150 S.W.3d at 175-80 (claim untimely, not specific, and not ruled upon); see also *Hood*, 185 S.W.3d at 449 (claim procedurally defaulted because it was not first presented to the trial court).

27 See *Smith*, 490 U.S. at 798-99.

28 *Colten v. Kentucky*, 407 U.S. 104, 117 (1972) (rejecting claim of judicial vindictiveness under two-tier misdemeanor system—similar to Texas' municipal and county court system—of prosecution).

29 *Smith*, 490 U.S. at 803.

30 *Walker v. State*, 557 S.W.2d 785, 786 (Tex. Crim. App. 1977).

31 *McCullough*, 475 U.S. 134 (after a jury assessed sentence, the trial judge granted a new trial on grounds of prosecutorial misconduct, presided at the retrial, and personally assessed sentence).

News Worthy

E-books are here!

TDCAA announces the launch of two new e-books, now available for purchase from Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both ~~strikethrough~~ underline text to show the 2011 changes *and* annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; $10) and Code of Criminal Procedure (2011–13; $25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

How a few counties celebrated Crime Victims Rights Week

Mandie James
Crime Victim Liaison in the Brazos County District Attorney's Office

Victim advocates in the Brazos Valley come together each year to put together the Every Victim Every Time Crime Victim Conference in College Station. This year's conference hosted over 450 attendees over the two-day conference as well as the inaugural Legacy Dinner. Guest Speaker was Marc Klaas with the Klaas Kids Foundation (pictured at left) and was a great success. The committee that puts the conference together as well as the Legacy dinner is the Crime Victim Conference Alliance or the CVCA.

Kendra Couch and her husband Billy (far left) with Marc Klaas after Brazos County's Legacy Dinner. Kendra is the Administration Chair for the Crime Victim Conference Alliance.

Dalia M. Arteaga
Crime Victims' Coordinator in Medina, Uvalde, and Real Counties

The very first annual "Go Blue Day" was a rousing success in Hondo, thanks to the collaborative efforts of the Bluebonnet Children's Advocacy Center, Child Protective Services, and the 38th Judicial District Attorney's Office. The event drew an enormous crowd and was held at the historic train depot in Hondo on April 19. It raised awareness of the crime victims in our community and also educated the community as to where to seek help if they are the victims of crime. As you can see from the pictures, the festivities were enjoyed by all.

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Dawn Hickey Myers
Crime Victims' Coordinator in the Harrison County District Attorney's Office

Here are a couple of photos, below and to the right, from our county's celebration of Crime Victims' Rights Week.

Above, Keisha Willams, left, and LaKendra Dillard, right. Their brother, Kenneth Dillard, was honored as a victim at this year's ceremony in Harrison County, and his murder was solved shortly after the ceremony.

Above, a wreath with all eight roses inserted by a member of each victim's family in their remembrance. The wreath remained in the lobby in the Harrison County District Attorney's Office for the remainder of the week to honor the victims.

Below, a table displays pictures of each victim honored at this year's ceremony in Harrison County. People could view these mementos as they walked in the entrance at the ceremony.

Cheryl Williams
Anderson County Criminal District Attorney's Office

For the past four years, we have celebrated Crime Victims Rights Week by hosting a victim/survivor dinner and having all victims of violent crime in our county come as our guests. We have a wonderful catered meal, entertainment including an inspirational song, and a keynote speaker.

This year we hosted our Fifth Annual Victim/Survivor Dinner and we had approximately 145 people in attendance. Our speaker was Kevin Galey. He is in charge of counseling at the Wedgewood Baptist Church in Fort Worth. He is also a survivor of a tragic crime. He was one of the many victims of a man who walked into their church in 1999 and shot numerous people, killing seven. Mr. Galey was shot and had life-threatening injuries; he also witnessed others being shot, many of whom were young. Mr. Galey spoke not only as a counselor, but also as a victim. He talked about how a person survives and recovers from a traumatic and senseless crime, telling of his own struggles, not necessarily "how to get over or past it." It was something that a lot of our audience could truly relate to.

We advertised our event in the local newspaper the week prior to the dinner. There were some victims that saw this article about Mr. Galey being a victim himself and they came for that reason alone. They felt that he could relate to them and their feelings. ❇

Photos from our Civil Law Seminar

Gerald Summerford Award winner

Lisa Hulsey, an assistant county attorney in Harris County, was honored with the Gerald Summerford Award at May's Civil Law Seminar in Austin. Ray Rike, Civil Section Board Chair and an assistant criminal district attorney in Tarrant County, is pictured with her. Congratulations, Lisa!

Trial judges must meet "exacting" standard before excluding spectators, or retrial is warranted

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

Secret trials, the Spanish Inquisition, and the "worst excesses of the Star Chamber." These long-since discarded practices prompted our founders to spell out a right to a public trial in the Sixth Amendment. Through a public trial, citizens may see that the accused is fairly dealt with, interested spectators may keep all of the participants "keenly alive" to their responsibilities, previously unknown witnesses may come forward, perjurers may be less inclined to perjure themselves, and the public may gain confidence in the judicial system.[1]

But even when no one is attempting to subvert these goals, a trial judge's actions may still deny a defendant his right to a public trial. This spring, two new cases from the Court of Criminal Appeals give prosecutors reason to tread carefully when a defendant complains he is being denied a public trial. In both cases, the court held that the record was inadequate to justify the trial judge's actions, and in both cases, the result was serious: The defendant won a new trial—without having to show any harm.

The first case was *Steadman v. State*.[2] In *Steadman*, four of the defendant's family members came to support him in his trial for multiple sex offenses against a child. As is the case in many courtrooms, the jury panel was expected to take up all the available seats in the gallery. The trial judge told Steadman's relatives that they would have to wait outside during jury selection but were welcome to return once the jury was seated. Steadman objected and suggested pulling up chairs along the walls or seating the relatives in the jury box. The judge made numerous findings on the record to explain his decision to exclude the family members. He found that seating the family so close to the venire would make panel members "reticent to fully express" any prejudice and that seating them in front of the bench would interfere with court officers' access to the defendant. The trial judge noted "heightened" security concerns in the case and found that even if the family initially sat in the jury box, once the selected jury was seated, there was nowhere else to seat them. The judge also considered moving court to the central jury room but determined that it was less convenient, would cause delay, and was less secure than the courtroom. The trial judge overruled Steadman's objection, and Steadman was ultimately convicted.

The public-trial right extends to jury selection

After Steadman's trial, the Supreme Court of the United States decided *Presley v. Georgia*.[3] In that case, the Supreme Court made it clear that the Sixth Amendment's requirement that "the accused shall enjoy the right to a … public trial" applies to voir dire.[4] The Supreme Court had already held that the right to a public or "open" trial was not absolute but could give way in certain cases to other rights or interests.[5] But the court warned that such cases would be rare and that judges had to apply a four-part test before excluding the public from any stage of a criminal trial:

1) the proponent must articulate an overriding interest that is likely to be prejudiced;

2) the closure must be narrowly tailored to protect that interest;

3) the trial court must consider reasonable alternatives to closure; and

4) the trial court must make findings adequate to support the closure.[6] (If this test sounds like First Amendment strict scrutiny, that is because the test originates from the more common public trial cases: those decided under the implied, public trial right in the First Amendment.[7])

In *Presley*, the trial judge excluded Presley's uncle from voir dire based on similar space constraints as

in *Steadman* and concerns about family members intermingling with jurors.[8] Presley had not suggested any alternatives to the trial judge, but the Supreme Court held this did not matter. The trial court was obligated to consider all the reasonable alternatives on its own.[9] The judge's findings also fell short of what was required to *show* that the public could not be accommodated. The Supreme Court acknowledged that it did not know the precise circumstances that the trial judge was dealing with—but that was exactly the problem. To justify closing the courtroom, the judge needed to articulate findings specific enough that an appeals court could see for itself whether closure was warranted. The judge's findings in *Presley* were too broad and too generic for that. The court wanted to know the circumstances that were particular to Presley's trial that would not exist for every criminal trial set in that particular courtroom.[10]

Armed with the decision in *Presley*, the Court of Criminal Appeals considered Steadman's challenge to the exclusion of his four relatives from voir dire. The court reversed Steadman's conviction and ordered a new trial. The court explained that *Presley* required an "exacting standard" to be met before a courtroom could be closed to spectators.[11] And like *Presley*, the judge in *Steadman* both failed to consider all reasonable alternatives and failed to articulate specific reasons to justify making an exception in Steadman's case. The appellate court could easily imagine several less drastic alternatives:

1) split the panel in half and separately voir dire each half,

2) instruct the jurors not to interact with spectators,

3) move some venire members to the jury box and seat the defendant's relatives in their vacated seats until it was time to seat the jury, or

4) seat the family in the jury box and then have them switch seats with the seated jurors.

It is likely the judges in *Steadman* and *Presley* rejected these alternatives out of concern about seating family members so near potential jurors. This is a common concern in the reported cases. Given the high cost of a mistrial arising from an inadvertent or even intentional communication with jurors, it is understandable that trial judges would want to insulate jury panels as much as possible from potential interaction. But after *Steadman* and *Presley*, a judge will have to articulate a particular reason that the spectators in the case at hand will be unable to follow instructions not to communicate with the potential jurors. Otherwise, the judge, fearing a remote chance at mistrial, could end up guaranteeing a retrial by excluding spectators over the defendant's objection.

Steadman is a clear reminder that trial judges need to articulate the incidents or threats that have occurred in the particular case so that it is apparent to an appellate court why the right to a public trial had to give way. Prosecutors would do well to remind judges of this "exacting standard" and the need to document the uniqueness of the situation, ask jail transport staff and bailiffs about any incidents at prior court appearances, and volunteer alternatives of our own. Our effort at this stage could prevent a retrial. Even without having to show that his family members' presence would have made any difference at all, *Steadman* won the remedy of a new trial.[12] While there is some Second Circuit precedent that exclusion of the public during voir dire constitutes a "trivial" exclusion that need not require a new trial (because it does not frustrate the purposes of the public trial right), a Texas intermediate appellate court recently rejected that argument, too.[13]

The court considers another public trial case: *Lilly v. State*

Just a few weeks after *Steadman*, the Court of Criminal Appeals found another violation of the right to a public trial in *Lilly v. State*, where an inmate's guilty-plea hearing was conducted in a prison chapel.[14] Conrad Lilly was already an inmate in the French Robertson Unit of TDCJ when he assaulted a guard. His prison prosecution took place at the prison based on two statutes: one that allows lesser populated counties, such as the one where the prison is located, to designate a branch courthouse outside the county seat, and another statute that allows judges to hear cases inside a correctional facility if they are nonjury matters involving inmates.[15] Lilly argued that having the proceedings at the jail deprived him of his right to a public trial, and he presented testimony about the security measures that a member of the public or press would have to overcome to attend court in the prison chapel. As you might expect, Lilly also challenged having court in a chapel, but that issue was not reached in the case before the

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Court of Criminal Appeals. The trial judge denied Lilly's motion to transfer the proceedings to the courthouse, and afterward, Lilly and the State struck a plea-bargain agreement, and Lilly pleaded guilty in the chapel.

On appeal, the State pointed to part of the boilerplate language in the written plea agreement that declared that the plea was being entered "in open court," and argued that by entering the plea agreement, Lilly was acknowledging that the proceedings were indeed open.[16] But the Court of Criminal Appeals rejected the argument, finding enough other evidence that Lilly wanted to continue litigating his public-trial claim.

Was Lilly's trial closed?

The trial judge in *Lilly* made no findings at all that would support closure of the proceedings. There was no mention of an overriding state interest, a narrowly tailored remedy, or consideration of any, much less all, reasonable alternatives. The judge likely did not consider the proceedings to be closed. No one was refused entry, and the warden testified that he was not aware of any member of the public ever wanting to attend court at the prison.[17]

But the Court of Criminal Appeals found Lilly had been deprived of his right to a public trial. While the court did not rule that holding court in a prison was always a Sixth Amendment violation, the court held that the "cumulative effect" of the security measures in place in Lilly's case established that the proceedings were indeed closed to the public. These measures included the fact that a visitor had to be on an inmate's approved-visitor list, be a state employee, or have the on-duty warden's approval. In addition to having their identification checked at a highway gate, front gate, and various metal doors, visitors were also subject to a physical pat-down search and metal detectors, and the prison would keep a record of the name and ID number of anyone who visited. The sum of these security precautions, the court concluded, meant that the trial court had not "take[n] every reasonable measure to accommodate public attendance," which the Supreme Court required in *Presley*.[18] The court suggested that by holding proceedings in the prison, the trial judge had relinquished to prison officials the authority to control the public's access to the courtroom.

The right to a public trial extends to a plea hearing

The court in *Lilly* also held that the Sixth Amendment's right to a public trial applies in a guilty plea proceeding. There are few, if any, other courts that have extended the right to a public *trial* to a proceeding where the defendant is waiving a plethora of other rights we ordinarily associate with trials. In fact, even the American Bar Association Standards for Criminal Justice in Guilty Pleas look on the right to a speedy and public trial as one of the core rights that a defendant should be advised that he is giving up by pleading guilty.[19] But this is Texas, and the *Lilly* court looked to one of its own cases, *Murray v. State*, which had observed that a plea-bargain proceeding is still a trial.[20]

Because a plea constituted a trial in that case, the court reasoned that plea proceedings must also constitute trials within the meaning of the Sixth Amendment. The court failed to mention that *Murray* involved whether a guilty plea was a "trial" for purposes of Code of Criminal Procedure Article 4.06, which gives district courts authority over lesser-included misdemeanors "[u]pon the trial of a felony case." Whether Lilly had a public-trial right at his plea proceeding, however, may have been beside the point. Lilly asked to transfer proceedings to the courthouse before he entered a plea, so presumably the trial court was also denying Lilly the right to a contested bench trial in the courthouse. And to that kind of trial, the Sixth Amendment must certainly apply.

Nevertheless, the court still decided that a plea-bargaining defendant initially has the right to a public trial. That said, it is clearly one of the rights that a plea-bargaining defendant can waive. The Supreme Court has held that a defendant can forfeit the right to a public trial by not asserting it at trial,[21] so there is no question that a defendant could also knowingly waive such a right. So while Lilly has won for his fellow inmates the right to a bench trial with better access by the public, those inmates who decide to plead guilty will most likely have another condition added to the State's plea-bargain offer: that they waive their right to a public trial.

Left for another day is whether an inmate's public trial right is preserved by transmitting audio and video of the prison court proceed-

ings into a public space in the county courthouse. But such a procedure may be just enough to keep the door to courtroom open for all to see. ❇

Endnotes

1 *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *In re Oliver*, 333 U.S. 257, 269-70 (1948).

2 *Steadman v. State*, 360 S.W.3d 499 (Tex. Crim. App. 2012).

3 *Presley v. Georgia*, 130 S. Ct. 721 (2010).

4 *Id.* at 724.

5 *Waller*, 467 U.S. at 45.

6 *Presley*, 130 S. Ct. at 724 (citing *Waller*, 467 U.S. at 48).

7 See, e.g., *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

8 130 S. Ct. at 722.

9 *Id.* at 724-25.

10 130 S. Ct. at 725.

11 *Steadman*, 360 S.W.3d at 505.

12 *Steadman*, 360 S.W.3d at 510.

13 See *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009); *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011); *Harrison v. State*, No. 02-10-00432-CR, 2012 WL 1034918 (Tex. App.—Fort Worth Mar. 29, 2012).

14 *Lilly v. State*, No. PD-0658-11, 2012 WL 1314088 (Tex. Crim. App. Apr. 18, 2012).

15 Tex. Local Gov't Code §292.0231 & Tex. Gov't Code §24.012(e).

16 See State's Brief on the Merits, No. PD-0658-11, 2011 WL 5295121 (Tex. Crim. App. Sept. 2, 2011).

17 See State's Brief on the Merits, No. PD-0658-11, 2011 WL 5295121, at *5 (Tex. Crim. App. Sept. 2, 2011).

18 130 S. Ct. at 725.

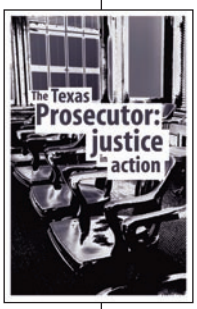
19 Standards for Criminal Justice 14-1.4, American Bar Association, available at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#1.4.

20 See *Murray v. State*, 302 S.W.3d 874, 880 (Tex. Crim. App. 2009).

21 See, e.g, *Freytag v. C.I.R.*, 501 U.S. 868, 896 (1991); *Levine v. United States*, 362 U.S. 610, 619 (1960).

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field.



Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

A note about death notices

The Texas Prosecutor journal will begin accepting information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at wolf@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

Nine steps on a seven-step boat

Using standardized tests in a non-standard world poses many problems. While the Standardized Field Sobriety Tests (SFSTs) in DWI cases provide officers an essential tool in detecting impaired drivers, sometimes the most oft-used tool is not the right tool. This may come as a surprise to the National Highway Traffic Safety Administration (NHTSA), policymakers, and engineers, but the world is not standardized. This column is not meant to be a critique of the SFSTs (look at my past articles for that) but rather the introduction of a tool that puts the best parts and essential nature of the SFSTs into something workable for investigating Boating While Intoxicated (BWI) offenses. Maybe even more importantly, this new standardized sitting battery may have great future application for situations where the SFSTs simply don't work. Any officer or DWI prosecutor has seen cases where environment, weather, or other circumstances have simply made the SFST battery impossible.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Texas Parks and Wildlife (TP&W) authorities held an initial instructors' training at Lake Texoma March 19–21. They were kind enough to invite me to come see what they were up to out on the lake. In short, I was impressed with the sitting battery of tests they use on boats to detect impairment. More importantly, prosecutors in jurisdictions where TP&W make BWI and DWI arrests will soon become familiar with these tests. TP&W has begun training its officers in the new National Association of State Boating Law Administrators' "Boating Under the Influence Seated Battery Transition Training Course" (that name is a mouthful, so I will hereinafter abbreviate it to "seated battery of SFSTs").[1] This training builds on the game warden's existing SFST training and updates.

So what is this seated battery? Appropriately it looks a bunch like the SFSTs, including the same pre-test questions as SFSTs and a four-task battery, all done while the subject sits. This sitting aspect means it can be done on a floating, seven-step boat or in other circumstances where the SFST battery would be impossible, impractical, or unfair.

It starts with HGN, the only difference being that the subject sits instead of stands. That's it—other than that, it is the standard HGN test. Then the Walk-and-Turn and One-Leg-Stand tasks are replaced by three divided-attention tests, each with a very recognizable "instruction stage" followed by an equally recognizable "performance stage." Each task has standardized clues and standardized evaluation criteria, or decision points.

Task two, after HGN, is the Finger-to-Nose. Each of this task's four parts are explained and demonstrated, and understanding is confirmed by asking the subject, "Do you understand?" The subject is told to make both hands into fists, extend his index fingers, turn his palms forward, and hold that position during instructions (see photo 1, below), which is very much like the beginning of the Walk-and-Turn. Then

photo 1

the subject is told to tilt his head back, close his eyes, touch the tip of his nose with the tip of the index finger (using the right or left hand as the officer instructs), and return his hand to his side (see photo 2, below). All of these instructions are set out in very clear language, simplified here

photo 2

for space. After this "instruction phase," the subject is told to begin the "performance stage." There are 13 standardized clues (nine or more of which are necessary to reach the evaluation criteria), some of which are very familiar to those experienced in SFSTs. They include not following directions, starting too soon, using the wrong hand when the officer calls out right or left, three specific varieties of failing to touch the instructed part of the finger to the instructed part of the nose, and failing to return the hand down to one's side. This task is incredibly easy. Just follow simple directions and touch your nose. None of the unimpaired subjects had any problem with it. For the drinking subjects, not so much.

Task three is the Palm Pat. Yes, this test also includes divided-attention elements. Like in the Finger-to-Nose, the subject is told to assume a starting position of one hand on top of the other held horizontally in front of his chest (see photo 3, below). This is followed by instruction broken into three parts, followed every time by the officer's demonstration and confirmation of the subject's understanding. Then the subject is instructed to begin and the performance stage follows. The suspect is told to turn the top hand over and "pat" the lower while counting "one," then to rotate back to palm down, "pat" the lower, and count "two." The subject is told to repeat this sequence, keeping his hands parallel until told to stop and to increase his speed through the test. Two clues of the 10 standardized clues are necessary. Like the One-Leg-Stand task in the roadside SFSTs, general types of failures are listed as standardized clues: "used arms for balance," "hopping," and "putting foot down" from the One-Leg-Stand are mirrored in the Palm Pat test by clues such as "rolled hands," "double pat," and "chopped pat." Starting or stopping too soon, miscounting, failing to speed up, and rotating hands are also standardized clues. Again, receiving a full set of instructions and demonstrations allowed non-drinking subjects to sail through the test, while impaired subjects failed miserably, often with no idea how poorly they had done.


photo 3

The final task, Hand Coordination, was the most complicated by far—but no more so than the nine-step Walk-and-Turn. In fact, it was uncanny how similar the two tests are, yet unlike with the Walk-and-Turn, sea legs, bad ankles, shoes, surface, wind, vertigo, and all the other dumb excuses heard on the roadside and in the courtroom seem to vanish with the Hand Coordination task. It is far more oriented to divided attention than coordination.

Like the other tests, there is an instruction stage, with demonstrations and confirmations, and then a four-task performance stage. Once more the subject assumes a starting position during instructions with both hands in a fist, the left fist in the center of the chest with the right fist against and in front of the left (see photo 4, below). First the subject is instructed to count out loud from one to four while moving his fists in step-like fashion and touching fists with each "step." Then the subject is told to remember his hand position (which fist is where), clap his hands three times, and return his hands to the last position. Third, the subject must count from five to eight while taking four "steps" with his fists back to his chest. Finally, the subject is told to open his hands and place them palm down in his lap. Like the demonstrated turn in the nine-step Walk-and-Turn SFST, every impaired subject I saw forgot to return his hands to his lap. Even though the test is complicated, unimpaired subjects made it through. There are 15 standardized clues, of which three are necessary to


photo 4

Continued on page 22

How to host a "tree of angels" in your community

The Tree of Angels is a meaningful Christmas program specifically held in memory and support of victims of violent crime. The Tree of Angels allows your community to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

This special event honors and supports surviving victims and victims' families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree. The first program was implemented in December 1991 by Verna Lee Carr with People Against Violent Crime (PAVC) in Austin. Over the years the Tree of Angels has become a memorable tradition observed in many Texas communities, providing comfort, hope, support, and healing.

The Tree of Angels is a registered trademark of PAVC, and we are extremely sensitive to ensuring that the original meaning and purpose of the Tree of Angels continues and is not distorted in any way. For this reason, we ask that if your city or county is interested in receiving a copy of the How-To Guide, please complete a basic informational form on the Tree of Angels website, http://treeofangels.org/index.html. After the form is completed electronically and submitted to PAVC, you will receive instructions on how to download the guide. Please do not share it to avoid unauthorized use or distribution of the material.

If you have any questions regarding the How-To Guide, contact Verna Lee at PAVC 512/837-PAVC (7282) or e-mail her at vernalee@peopleagainstviolentcrime.org. ❇

Continued from page 21

reach the standardized evaluation criteria.

If this all sounds like the SFSTs, that's because it is. It should be no surprise that the battery has been through an initial three-year laboratory and subsequent field validation studies. These studies showed results that equaled or surpassed the validation results found in the NHTSA SFST validation studies over the years.[2] Best yet, the validation studies are continuing. Now, as a cautionary note, they are not approved by NHTSA—but who cares? I have long advocated "Mom's sobriety tests" (read about these on our website at www.tdcaa.com/node/2489) and NHTSA has not approved of mothers, common sense, or thousands of other valid field and scientific investigative tools. And it doesn't have to: The "highway folks" are a bit out of their element while afloat.

Having done the unthinkable and suggested doing or supporting something new, let me make two recommendations. First, go to the National Association of State Boating Law Administrators's website dealing with this new tool (www.operationdrywater.org/index.php/odw/le_judgout), and check it out. Second, talk with your local Texas Parks & Wildlife folks and see if there is a training on this new seated battery near you, and then go watch. We've reprinted the performance report on the opposite page for you to look through it and familiarize yourself with it.

As I have noted in the past, there are some serious limitations to the roadside SFST tool. Weight, age, weather, wind, traffic, officer safety, and claims of physical ailment have all been used effectively against the SFSTs in court. This new seated battery of tests eliminates or minimizes many of those issues, and it also makes much more sense in a marine setting. Just remember that many of the issues used effectively against SFSTs will exist with it too, including officer performance, updated training, the officer's communicating a subject's divided attention and mental impairment, impeachment with the manual, and relating these tests to operation of a boat or vehicle. Despite these potential hurdles, these tests are a step in the right direction. If your jurisdiction includes both water and beer, get ready because they are headed your way. ❇

Endnotes

1 From a letter from the National Association of State Boating Law Administrators found at www.operationdrywater.org/index.php/odw/le_judgout: "Recognizing the benefits of developing a seated battery of field sobriety tests, which have no dependency upon balance or equilibrium, the U.S. Coast Guard and National Association of State Boating Law Administrators partnered to have research performed with a goal of scientifically validating a seated battery of field sobriety tests. This three-year project involved the research team from the Southern California Research Institute, which is the same organization that has researched sobriety testing in the United States for the National Highway Traffic Safety Administration and International Association of Chiefs of Police. This research involved both laboratory and field research, which ultimately proved validity of this battery of tests during actual on-water boating under the influence investigations. In 2009, the research was completed and the final report was both peer-reviewed and published in at least one scientific journal."

2 D.D. Fiorentino, *Accident Analysis and Prevention* 43 (2011) 870–877; this and other resources can be found at www.operationdrywater.org/index.php/odw/le_judgout.

Field Sobriety Test Performance Report

Subject Name_____Start time_____

PRE-TEST QUESTIONS Notes:

Do you have any physical defects or disabilities? Y N
Do you have any defects with your eyes? Y N
Are you sick or injured? Y N
Are you under the care of a doctor or dentist? Y N
Are you taking any medication or drugs? Y N

GENERAL INSTRUCTIONS:

Please sit straight at the front edge of your seat. Put your arms down at your sides. Place your feet shoulder-width apart so you are comfortable and stable. Are you stable? *(Response)* **Do not move your feet until the tests are over. Stay in this position and do not do anything else until I tell you to do so. Do you understand?** *(Response)*

HORIZONTAL GAZE NYSTAGMUS

Have the subject remove their eyeglasses, if worn.

Are you wearing contact lenses? ___ *Yes* ___ *No*

I am going to check your eyes. Hold your head still and follow the stimulus with your eyes only. Do you understand? *(Response)*

Elevate the stimulus about 12-15" from the subject's nose. Check for equal pupil size, resting nystagmus and equal tracking.

Clues	Left	Right
Lack of smooth pursuit		
Distinct & sustained nystagmus at max. deviation		
Onset of nystagmus prior to 45-degrees		
Total Clues		

Vertical nystagmus: **Yes**___ **No**___ **Evaluation Criteria: 4 or more clues**

FINGER TO NOSE

- **Make a fist with both hands, extend your index fingers and turn your palms forward. Remain in this position while I explain the test.** *(Demonstrate)* **Do you understand?** *(Response)*
- **When I say begin, tilt your head back to about a 45-degree angle and close your eyes.** *(Demonstrate)*
- **When I tell you to, touch the tip of your nose with the tip of your index finger and immediately return it to your side.** (*Demonstrate and explain the fingertip, pad and side of fingers and demonstrate touching tip of the nose)*
- **When I say right, you must touch your right index finger to your nose; when I say left, you must touch your left index finger to your nose. Do you understand?** *(Response)*
- **Begin.** *(After head tilt...)* **Left...Right...Left...Right...Right...Left** *(After performance...)* **Open your eyes and straighten your head.**

Instruction Stage		Performance Stage			Left	Right	Left	Right	Right	Left	
Unable to follow instructions		Did not close eyes		Wrong hand							Wrong hand
		Did not tilt head		Wrong finger							Wrong finger
Started at wrong time		Opened eyes during test		Hesitated							Hesitated
				Searched							Searched
		Moved head during test (1"+)		Not fingertip							Not fingertip
				Missed nose							Missed nose
				Did not bring down							Did not bring down
				Total Clues							

Evaluation Criteria: 9 or more clues

PALM PAT

- **Place your hands palm to palm with one hand up and one hand down, like this.** *(Demonstrate)* **Remain in this position while I explain the test. Do you understand?** *(Response)*
- **When I tell you to begin, turn the top hand over and count out loud "one," then turn the hand back over and count out loud "two," counting only when the hands make contact, like this.** *(Demonstrate at least two sets)*
- **Repeat this, speed up as you go, and do not stop until told. Make sure to keep your hands and fingers parallel during each pat, like this.** *(Demonstrate)*
- **Do you understand?** *(Response)* **Begin.** *(If necessary, tell to speed up)*

Instruction Stage	
Unable to follow instructions	
Started at wrong time	
Performance Stage	
Did not count as instructed	
Rolled hands	
Double pat	
Chopped pat	
Other improper pat (document)	
Did not increase speed	
Rotated hands	
Stopped before told	
Total Clues	

Evaluation Criteria: 2 or more clues

HAND COORDINATION

- **Make fists with both hands, place your left fist at the center of your chest and your right fist against your left fist, like this.** (*Demonstrate)*
- **Remain in this position while I explain the test. Do you understand?** *(Response)*
- **When I say begin, you must perform four tasks.**
- **The first task is to count out loud from one to four while you move your fists in a step-like fashion, making contact between your fists at each step.** *(Demonstrate while counting out loud 1, 2, 3, 4)*
- **The second task is to memorize the position of your fists after you have counted to four, clap your hands three times and return your fists to the memorized position.** (*Demonstrate)*
- **The third task is to move your fists in a step-like fashion in reverse order; counting out loud from five to eight and returning your left fist to your chest.** *(Demonstrate while counting out loud 5, 6, 7, 8)*
- **The fourth task is to open your hands with palms down and place them in your lap.** *(Demonstrate)*
- **Do you understand?** (*Response)* **Begin.**

Instruction Stage	
Unable to follow instructions	
Started at wrong time	
Performance Stage	
Task 1 – Forward Steps	
Improper count	
Improper touch	
Did not perform	
Task 2 – Hand Clapping	
Improper count	
Improper touch	
Improper return	
Did not perform	
Task 3 – Return Steps	
Improper count	
Improper touch	
Did not return left fist to chest	
Did not perform	
Task 4 – End Position	
Improper position	
Did not perform	
Total Clues	

Evaluation Criteria: 3 or more clues

Revised 12/2011

Remembering Suzanne McDaniel, a pioneer in victim advocacy

TDCAA's Victim Services Director passed away in May after a years-long battle with pancreatic cancer. Here, two former bosses fondly remember Suzanne.

Carol Vance
Former District Attorney in Harris County

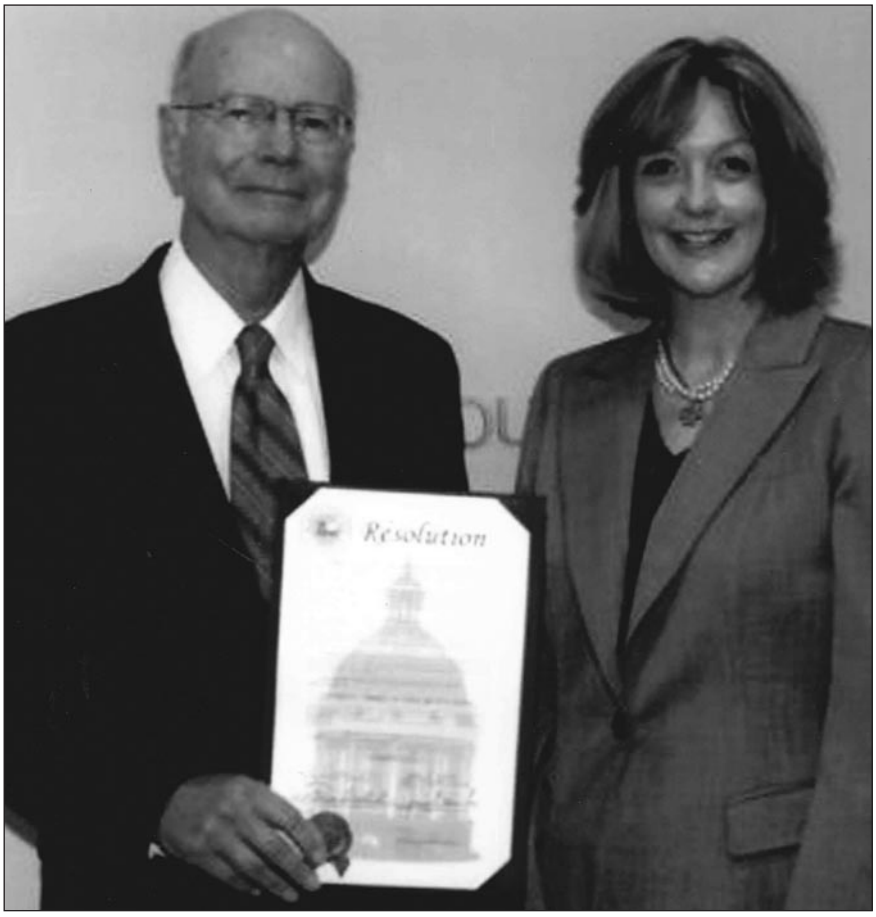
Suzanne McDaniel was a special person and a good friend. Her mother and my mother were closest of friends, so I knew her all her life. She always had that captivating smile. Suzanne would walk into a room, and the room would light up. She always had a compassionate heart for those who were hurting.

In 1975 when I was District Attorney in Harris County, I took advantage of federal grant money to start new and unusual initiatives against organized crime, consumer and commercial fraud, and so on. One such new addition to the office was the Victim Witness Assistance Section, the first in Texas and second in the country. When Suzanne heard about our office undertaking this project, she immediately called me and told me that this job was made to order for her.

"Suzanne, we are plowing new ground. I don't even know where this is going," I told her.

"I know where it is going," she replied, "and I can run that office." So I hired her—and the rest is history.

Suzanne assumed command and hired three people, each of whom would serve the victim-witness needs for six criminal district courts. We had 18 courts at the time, and they handled about 18,000 felonies per year. That's a lot of victims and witnesses. The prosecutors were snowed under and barely keeping their heads above water, so victims and witnesses received little attention in cases that did not go to trial. All that most of them wanted was basic information like when to show up for court and what to expect when they got there. A new experience at the courthouse can be scary.



Carol Vance, former district attorney in Harris County, pictured with Suzanne McDaniel.

Our victim-witness operation got going and was such a success that most large jurisdictions in Texas put in for similar grants. Suzanne's operation became a role model for offices throughout the country as well as Texas. She gave generously of her time to help set up other new such offices. Suzanne excelled at this work and stayed in it the rest of her life. Along the way she received many awards. President Bill Clinton gave her the Crime Victim Service Award,

and Congressman Ted Poe, a former chief prosecutor and judge, named the Congressional Victim Rights Award the "Suzanne McDaniel Award." The National District Attorneys Association (NDAA) gave her special recognition for her assistance to many offices around the country.

President Bill Clinton with Suzanne in the White House.

Suzanne later moved to Austin and went on to work for the Texas Crime Victims Clearinghouse, a part of the Governor's Office. She later became the Crime Victim's Information Officer for the Attorney General's Office. Her last job—and a dream job it was—came along when Rob Kepple hired her to serve as TDCAA's liaison and representative for all victim assistance issues. Rob knew a superstar when he saw one.

She loved this work and loved her close friends on staff at TDCAA. What a way to close out such a productive and unselfish life helping others. We will all miss her. I can only imagine that Someone up there might be saying to Suzanne, "Well done, my good and faithful servant."

Rob Kepple
TDCAA Executive Director

More than one person will tell you that Suzanne was driven by her empathy for victims of crime and a vision to help them restore their lives. She served as the first victim-witness coordinator in Houston under legendary DA Carol Vance, doing back then what so many victim witness coordinators and other prosecutor staff do today: guide the victims of crime through the criminal justice maze, offering a comforting smile and a hand to hold.

In the early 1980s, the victims' rights movement began to pick up momentum, and as folks redoubled their commitment to victims of crime, Suzanne took her energy and enthusiasm for serving victims to a statewide level. I first met Suzanne when she was the director of the Crime Victims Clearinghouse in 1991, and she played a major role in the policy discussions about where the victims' rights movement would go and how it would evolve. True to her roots, she always viewed prosecutors and the prosecutor's office as the key to a successful victim outreach.

In 2010, the TDCAA Board of Directors voted to create a Victim Services Section and to seek funding for a staff position to support the new section. The bottom line was that the state had never come through with the support needed for robust victim services at the local level, so it was up to prosecutors to get the job done. And y'all were there, with your support of the Texas District and County Attorneys Foundation. With funding from the Foundation, we were able to make the new section—and the staff support, by hiring Suzanne—a reality.

Suzanne had the career we all hope to have, one full of meaning, purpose, and growth, where we might leave things better than we found them. But what struck me in all my occasions working with Suzanne was her loyalty. Loyalty to the mission of prosecutors, loyalty to prosecutors themselves, and loyalty to the office and staff. She always stood up for the work you do and made sure folks appreciated just how hard you work to protect and support the victims of crime. She didn't tolerate people denigrating prosecutors' duties or demeaning your efforts. At times that was a lonely job, but she always spoke up for you.

I like to think that when Suzanne came to work for you at TDCAA, she had come home. Her enthusiasm for the new Victim Services Section and the work it is doing lit up every room she walked into. Suzanne, you've passed that enthusiasm on to us, and we pledge to continue building what you have started. ❇

Continued from the front cover

Brady and beyond (cont'd)

presentation that can be accessed by any prosecutor at any time by visiting our website at www.tdcaa.com/node/10250. And even better, it's a *free* hour of ethics credit with the Texas State Bar; simply input the MCLE number, which is shown in the opening minutes of the video, on the State Bar's website (www.texasbar.com) upon completing the entire lesson to earn credit.

The presentation begins with an overview of "zealous representation" and why that standard doesn't translate well for prosecutors. We lay out the basic statutes and caselaw that serve as the foundation for an ethical prosecution, including the aforementioned CCP art. 2.01, Texas Disciplinary Rule of Professional Conduct 3.09,[2] and American Bar Association Model Rule 3.8(g) and (h).[3] Finally, the introductory segment ends with a recap of why prosecutors have a responsibility to and luxury of the truth, quoting *Berger v. United States*.[4]

Remember that to the justice system and to the public, nothing is a "fouler blow" than concealing facts, evidence, or witnesses that exculpate a defendant. That's why we're doing this entire exercise, and at this point, we delve into *Brady* and the following seven scenarios, which were taken from real cases (listed in this article after the scenarios). So get yourself a cup of coffee or a Coke, sit down at your computer, and get ready for an interactive and informative hour of *Brady* … and beyond!

Background on *Brady*

After the introduction, there is an expansive explanation of *Brady v. Maryland*, which involved separate trials in a Maryland court where both defendants in a first-degree murder case were sentenced to death. In his trial, Brady admitted participating in the crime but claimed that his co-defendant did the actual killing. Prior to trial, defense counsel requested the prosecution allow him to examine the companion's extrajudicial statements, and the prosecutor complied—to a point. Several of the statements were shown to the defense, but one in which the co-defendant admitted to doing the actual killing was withheld by the prosecution and did not come to counsel's notice until after the defendant had been tried, convicted, and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. The Supreme Court of the United States held that "suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material to either guilt or punishment" and that a new trial is required whether or not the prosecution acted with malicious intent in failing to disclose the exculpatory or mitigating evidence.[5]

So what basic principles can be taken from this watershed case? Well, it established that Due Process is violated when:

1) the prosecutor fails to disclose evidence,

2) which is favorable to the accused and

3) which is material.

But what is favorable evidence? The court told us it is any evidence that, if disclosed and used effectively, *may* make the difference between conviction and acquittal, including exculpatory and impeachment evidence (emphasis added).

That word "may" certainly adds a huge level of subjectivity and "gray area"—especially in Texas where there is no reciprocal discovery, which puts the prosecutor in the unenviable position of trying to read the defense attorney's mind as to what defenses he will use and what information *may* be important to that defense. Add this to the materiality standard (it's held to be material if the failure to disclose it creates a *probability* sufficient to undermine the confidence in the outcome of the proceeding), and there is a large potential for unintentional error. A prosecutor may determine initially that evidence is either not favorable or not material, but after the trial, such evidence will be viewed in a much different light, and any defense attorney worth his salt can make an argument that will overcome the materiality and favorability standards.

That's why we suggest that you ignore the materiality test. If the evidence causes you to pause and exclaim, "Oh no" in regards to your case, then *turn it over!* Think of it this way: Would you rather contest this evidence at trial where you can call witnesses and both sides have input into the information presented, or on a writ, years later when wit-

nesses have died, memories are fuzzy, and the main area of battle is not always the courtroom but also the media? Plus, we are supposed to be wearing the white hats—we don't play "gotcha" in the courtroom; we are purveyors of justice.

The widespread acceptance of "open-file" policies by the vast majority of Texas prosecutors' offices has certainly aided this effort, but such policies are not enough. We must keep meticulous records including who was shown what, when, and where, and detail every single piece of paper and evidence that was seen. The time spent keeping such records today is worth it compared to potential headaches down the road.

With this basis, we're onto the case scenarios:

1 You are handling a murder case. Dad shot his daughter's boyfriend in the driveway of his daughter's house. In a pretrial hearing, the defense laid out its theory of the case: that the boyfriend had become increasingly violent because of his use of anabolic steroids, and Daddy shot him in self-defense and defense of his daughter. A little lame, given that Daddy shot the boyfriend five times with a .38 revolver. In the back.

You review a number of statements. One is from a person who cleaned out the victim's house after his death. He reported opening up an old Coke machine to find a bunch of syringes with orange caps and some little bottles. The witness threw the stuff away because he didn't want the victim's ex-wife to know about it, but a friend who is a nurse told him that it must have been steroids.

Are you required by law to give this information to the defense?

a. Yes.

b. No.

c. Yes, but you will be throwing in a motion *in limine* to keep it company.

2 You are handling a nasty murder case. A family is murdered and burned in a house, and the no-good husband/father and a co-defendant are charged in the case. The co-defendant decides to testify for the State with no deals and meets with you, your investigator, and his attorney.

First thing out of his mouth: "I did this all by myself!" You respond that that is unlikely because the murders were committed with a knife, gun, and baseball bat. The co-defendant quickly retreats from his statement and implicates his no-good husband/father friend and one additional suspect you hadn't figured was part of the mix. You feel pretty good about his testimony, even with no deal in place.

Is there anything about this discussion that requires disclosure to the defense?

a. Yes.

b. Yes, and you cover it on direct.

c. Yes, and you tell the defense and cover it on direct.

d. No.

3 You are trying a dope delivery case. You have a guy from the neighborhood lined up to testify about the drug-dealing activity in the area and what he has seen the defendant do. Your investigator gets the witness to the hallway and during a break lets you know the witness is there. She also tells you that she's not sure, but she heard that the witness just might have an outstanding warrant or two. So now what?

a. Who the heck knows—and what difference would it make?

b. You ask your investigator to run a criminal history check to verify the rumor.

4 You get a conviction in a murder trial where only one of six eyewitnesses identifies the defendant, who was found 15 minutes after the crime not far from the scene with some gun residue and a weak alibi. There is no evidence of motive. The victim's friends say there are no other suspects. You provide your whole file to the defense pre-trial. Nice and neat, the defendant goes to prison.

A couple years later the writ comes in to your office. There are two undisclosed police reports. One is an anonymous phone tip identifying another suspect who confesses to the crime and gives little-known details and a motive. The second is an earlier report involving your victim threatening an unrelated party at gunpoint about a week before his death. Neither was in your file, but both were created before trial. Should the judge grant the writ?

a. Yes; you violated *Brady*.

b. No, neither police report is admissible and not *Brady*.

c. Nope. There was a *Brady* violation, but not enough to undermine the verdict.

5 At a break on the third day of a murder trial you are digging through your cardboard box of evidence and paperwork when you

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come across an envelope. You open it, and out pop two witness statements. They are earlier statements of some of your witnesses, and they conflict with their other statements and testimony. These new statements even allude to other possible suspects in the killing. You know you should have turned the statements over long ago, but you must have just missed them when the detectives dumped that box of stuff on your desk. You turn the statements over to the defense right away. You offer an investigator to the defense so that they can find anyone they want, and you don't oppose a continuance. Does the defense get a mistrial?

a. No.

b. Yes.

c. Not right away, but it's not looking good for your case or your bar card.

6 You are out with your investigator on a murder case. You are talking to a whole bunch of folks in the neighborhood, and you are hearing all kinds of wild stories. One person tells you that a few weeks after the killing, he heard a guy whom he doesn't know say that another guy whom he also doesn't know was the shooter, not your defendant. Must you tell the defense attorney?

a. Yes; this is classic exculpatory evidence.

b. No way; it is the usual hearsay noise on the streets, so it's not gonna play a part in this trial.

7 Well, you haven't thought of that old murder case for three years. Time to think again, though, because here comes some new information. Seems that another guy in the pen for life has now confessed to the murder and is claiming to be a serial killer. Sounds like a play for media attention to you. So what do you do? Call someone?

1. Yes.
2. No.

Conclusion

The courts' answers to all these questions is laid out in the web video, and you can read the decisions (listed below) for more details.

Let's work together for prosecutors to become the leaders of "actual innocence" and ease the expediency of exonerations where the facts call for it. Remember, as President Teddy Roosevelt said over a century ago, "Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against wrong." Make sure that wherever and whenever you find exculpatory or mitigating information—whether pre-trial, post-trial, or even years later on a writ—that you have the courage to uphold not just the conviction, but the right and just result. ❇

Editor's note: TDCAA would like to gratefully acknowledge the State Bar of Texas for all of its generosity in producing this webinar. Thank you so much!

Caselaw resources for scenarios

After listening to the explanations given in the presentation regarding the cases, please read and underscore the principles enunciated, which are found in the following cases:

Question 1: *Ex Parte James S. Masonheimer*, 220 S.W.3rd 494 (Tex. Crim. App. 2007).

Question 2: *Graves v. Dretke*, 442 F.2nd 334 (5th Cir. 2006) and *U.S. v. Sipe*, 338 F.3d 471 (5th Cir. 2004).

Question 3: *Johnson v. State*, 917 S.W.2d 135 (Tex. App.—Fort Worth 1996).

Question 4: *Ex Parte Richard Ray Miles, Jr.*, ___ S.W.3d___ (Tex. Crim. App. 2012).

Question 5: *Etheridge v. State*, 903 S.W.2d 1 (Tex. Crim. App. 1994) and *Castaneda v. State*, 28 S.W.3d 216 (Tex. App.—El Paso 2000).

Question 6: *Ex Parte Mares*, 201 Tex. Crim. App. Lexis 309 (unpublished) (No. AP-76,219, May 19, 2010) and *O'Rarden v. State*, 777 S.W.2d 455 (Tex. App.—Dallas 1989).

Question 7: *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Banks v. Dretke*, 540 U.S. 668 (2004).

Endnotes

1 *Brady v. Maryland*, 373 U.S. 83 (1963).

2 Texas Disciplinary Rules of Professional Conduct, Rule 3.09 ("A prosecutor must disclose *all evidence or information* known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentence, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor …").

3 American Bar Association Model Rule 3.8(g) ("When a prosecutor knows of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense, the prosecutor shall: [1] promptly disclose that evidence to an appropriate court or authority and to the defendant, and [2] undertake such further inquiry or investigation as may be necessary to determine whether the defendant was convicted of an offense that the defendant did not commit."); and Rule 3.8(h) ("When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.").

4 295 U.S. 78 (1935).

5 See *Brady*, id.

Prosecuting protesters at "Occupy Fort Worth"

A "peaceful" protest still violated the law. Here's how Tarrant County prosecutors held protesters accountable.

By Charles Boulware (left) pictured with Bryan Hoeller
Assistant Criminal District Attorneys in Tarrant County

By October 2011, less than a month after its notable beginning as "Occupy Wall Street" in New York City's Zuccotti Park, the "Occupy" movement arrived in Fort Worth. However, the movement didn't have my full attention until Deputy Criminal Division Chief Betty Arvin personally delivered two DVDs to me. Unaware as to the reason for Betty's visit, I quickly glanced at the discs and immediately spotted the words "Occupy Fort Worth" prominently written among various other markings. "There's more on YouTube," she commented before leaving.

Deputy chiefs don't routinely hand-deliver evidence to misdemeanor attorneys in our office, so with little hesitation, I grabbed the discs and met with my court partner, Bryan Hoeller. The anticipation of what I might see conjured images of angry protesters set against a backdrop of tear gas and burning vehicles. However, what we actually observed was lengthy footage of a peaceful yet energetic protest rally. Captured from a small camera clipped to an officer's uniform, the videos showed a modest gathering of approximately 50 people tirelessly chanting while enjoying live music. Seeing no apparent misconduct, we pulled the offense reports to learn why five protesters were arrested for interference with public duties.

Our initial impression of what we observed on video ultimately shaped our approach. There was no violent or unruly behavior. There was no cursing and very little banter toward the officers. From reading the offense report, we learned that the five protesters were arrested for merely refusing to leave a tent that was set up on the sidewalk, and this action was eventually shown toward the end of the videos. We quickly realized that aggressive trial tactics filled with theatrics and a demand for justice would be inappropriate. Because the protesters' actions were purely limited to civil disobedience as a means of furthering their message, the common aggravating facts that motivate a jury to convict were not present. As a result, Bryan and I immediately began discussing a reserved approach that would provide the jury with sound reasoning as to why these individuals should be held accountable.

The rally

The Occupy Fort Worth rally occurred on October 15, 2011, in downtown Fort Worth's Burnett Park. The movement had already established a presence in the park; however, city officials were informed that this gathering would include live music and a march, so they anticipated that it would be the largest to date. Sergeant Darren Young of the Fort Worth Police Department's downtown bike patrol unit was made aware of the rally, and he was assigned the task of regulating traffic during the march as well as overseeing the subsequent gathering. Sgt. Young was told the protesters did not have a permit for any of their scheduled activities, but they were allowed to hold the rally anyway.

However, supervisors gave him one specific instruction: *Do not allow any tents on the sidewalk*. Fort Worth has a city ordinance that prohibits the private use of streets and sidewalks. It specifically provides that "it shall be unlawful for any person to enclose, build upon, or make any other private use of any part of the street, sidewalk, or other right-of-way."

The protest was scheduled to

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begin at 7 p.m., so Sgt. Young and five of his bike officers headed to Burnett Park around 6 to introduce themselves and prepare for the march. When they arrived, they immediately noticed that tents were already set up on the sidewalk. Among the crowd of early arrivals to the protest was Paula Smith, a woman who had identified herself as the protest coordinator to Sgt. Young two days earlier. Concerned about the tents, Sgt. Young approached Ms. Smith and attempted to reach a compromise. He told Ms. Smith that the placement of the tents on the sidewalk was a city ordinance violation, but that the tents could remain there until the conclusion of the march. He assured Ms. Smith that his only concern was the tents, and that he had no intentions of interfering with their plans to protest, march, chant, or play music. At the end of their brief conversation, Ms. Smith dismissively acknowledged his request and rejoined the other protesters.

The march occurred as planned without any problems. Afterwards, Sgt. Young reminded Ms. Smith that the tents needed to be moved as previously discussed. However, Ms. Smith told Sgt. Young that the protesters had to vote on whether to move the tents. Sgt. Young was not present for the vote, nor was he invited to participate (apparently the vote was not open to the public). However, the protesters' subsequent inaction indicated to him that the "nays" held the majority. At this time, Sgt. Young took no further action and decided to leave the park with his officers to tend to other matters.

When Sgt. Young and his officers returned to Burnett Park at around 9 p.m., they hoped to discover that the tents had been moved. However, the tents were still on the sidewalk. Convinced that the protesters had no intention of moving the tents voluntarily, Sgt. Young took a more proactive approach. He planned to meet with each tent owner individually and issue a final warning. If the tent owner refused to remove the tent, a Class C citation for violating the city ordinance would be issued. If after receiving the Class C citation the tent owner still refused to remove the tent, the officers would take down and confiscate the tent. If the tent owner or anyone else prevented the officers from taking down the tent, that person would be arrested for interference with public duties.

Sgt. Young met with each tent owner individually as the officers made their way down the row of tents. At the outset, the plan went smoothly. The first tent owner refused to remove her tent but changed her mind after receiving a Class C citation. The next tent owner refused to remove his tent even after receiving a Class C citation. After allowing him to collect his personal belongings from inside the tent, the officers took down the tent and there was no arrest.

Sgt. Young, however, was soon met with resistance. Shortly after the officers began confronting the tent owners, one protester announced to the crowd, "If anybody wants to occupy their tents, occupy them now." Joann Jones, the first of the five defendants arrested, immediately occupied the next tent in the row.

As this was the next tent in his sequence, Sgt. Young informed Ms. Jones that the tent needed to be taken down, but her only response was that the tent belonged to a friend. At this point, Sgt. Young explained to Ms. Jones in great detail why the tent needed to be taken down, as well as the consequences of refusing to leave. Sgt. Young told Ms. Jones that it was his public duty to keep the sidewalk clear, and if she prevented the officers from taking down the tent by refusing to leave, she would be arrested for interference with public duties. Hoping to persuade Ms. Jones, he further explained that interference with public duties was a Class B misdemeanor, and he even cited the specific section in the Penal Code by number (§38.15). Ms. Jones ultimately refused to exit the tent and was arrested. While being arrested, Ms. Jones passionately announced to the crowd, "I am exercising my right to peacefully assemble."

After taking down the tent, Sgt. Young moved on to a large tent decorated with protest signs and found four individuals sitting comfortably inside. Among the group was Anthony Momentoff, the only defendant to take his case to trial. Momentoff acted as a spokesman for the group and told Sgt. Young that the tent belonged to him. However, when Sgt. Young informed Momentoff that the tent needed to be dismantled, he responded only by saying, "Is there something wrong with the size of my sign?" Sgt. Young provided the same explanation given to Joann Jones regarding the consequences of refusing to leave the tent and asked Momentoff repeatedly if

he would comply. However, Momentoff passively explained that being arrested was the only way he would leave the tent. The other three occupants, Bryan Frederick, Matthew Yeager, and Brooklynn Smith, refused as well, so all four protesters were arrested.

The defendants were charged with interference with public duties, but by the time we received the case file, a second count for obstruction of a passageway (also a Class B misdemeanor) had been added as well. Neither of us had tried an interference with public duties or obstruction of a passageway case, so we knew we would have to spend time learning the law. However, we knew even less about the Occupy movement.

Educating ourselves

We tried to gain a general understanding of the protesters' outrage over corporate greed and income inequality, but our primary focus was on learning about the local movement. We read local news articles, browsed Facebook pages, and watched YouTube videos—lots of YouTube videos. Several defendants were regularly featured and praised on YouTube for standing up for their First Amendment rights. We anticipated an emotional First Amendment defense from the beginning, and our research and eventual first meeting with their defense attorney assured us that this would be our biggest obstacle.

All five defendants received *pro bono* representation from an attorney closely associated with the local movement, and his passion for these cases was obvious from our initial meeting. With a confident swagger he walked into docket and immediately informed us that all five cases would be trials. Though our conversation was brief, he told us, "These are First Amendment cases. My clients have principles and are not willing to plead. However, I might be able to convince them to do 12 hours of community service for a dismissal." I responded with a firm offer of one year of deferred adjudication, a $500 fine, and 24 hours of community service for each of the five defendants.

The defendants' first trial dates were set in January 2012, and in the preceding months, plea negotiations remained unchanged. However, on the day of the first trial setting, the defense told us that two defendants, Matthew Yeager and Bryan Frederick, had a "change of heart" about accepting the plea agreement. Given his previous assurances of a trial, along with the protesters standing side by side in solidarity outside the courthouse, we were surprised. However, the defense attorney immediately qualified his remarks by informing us that although Yeager and Frederick were willing to accept deferred adjudication and community service, they would not accept a fine under any circumstances. Apparently, accepting a fine was in direct conflict with the principles of an Occupy Fort Worth member.

Emphasizing their unwillingness to pay a fine, he went on to say, "They will do all the community service *in the world*; they just won't pay a fine." The defense attorney was clearly exaggerating his clients' feeling towards community service. However, we chose to take him literally and offered both Yeager and Frederick one year of deferred adjudication, no fine, and 100 hours of community service—the maximum amount permitted for a Class B misdemeanor probation sentence. After discussing it with their attorney for about a half hour, they accepted the deal. We ultimately pled four of the five cases that week. Joann Jones accepted 10 days in jail with no fine, and Brooklynn Smith, a possible victim of peer pressure whom we believed had the lowest level of involvement, accepted one-year deferred adjudication, no fine, and 24 hours of community service.

Heading to (one) trial

With four of the five Occupy Fort Worth defendants having pled, Anthony Momentoff remained as the only one on our contest docket. Momentoff failed to show up for his first contest setting, so his trial was eventually reset to April 19, 2012. Having already prepared for all five cases, this delay gave Bryan and me plenty of time to refine our trial presentation.

Before the first trial setting, Bryan and I divided up trial responsibilities. As first chair, I began by researching caselaw and organized a meeting with Sgt. Young and the other five officers. Bryan offered to order priors and file all the appropriate pre-trial motions, typically the job of a first chair. Momentoff had a prior conviction for possession of marijuana under two ounces out of Hill County. When the prior arrived, Bryan immediately filed a *Brooks* notice, thereby enhancing Momen-toff's punishment range to a minimum of 30 days in jail.

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As I began my research I quickly realized that legally, our interference with public duties case against Momentoff was very strong. Because the culpable mental state for the charge requires only criminal negligence, we simply had to prove that by refusing to leave the tent, Momentoff "ought to have been aware" that he was interrupting, disrupting, impeding, or otherwise interfering with Sgt. Young's attempt to carry out a lawful duty. And because the videos showed Sgt. Young leaning down and having a conversation with the defendants in Momentoff's tent, we believed we had sufficient evidence to meet our burden.

However, we didn't obtain our best piece of evidence until I met with Sgt. Young and his five officers. Because the video footage we originally received was captured from a bike officer standing nearby, it was difficult to hear the conversation between Sgt. Young and Momentoff. In addition, it was hard to see exactly who was talking back to Sgt. Young. However, Sgt. Young surprised us with footage from his own personal body camera. We could now clearly see and hear the conversation between Momentoff and Sgt. Young. During the meeting, Sgt. Young informed me that they were issued the small body cameras just a week before the protest rally. The department's timing couldn't have been more perfect.

Sgt. Young's footage also helped us negate the defendant's statutory First Amendment defense for obstruction of a passageway. The Penal Code (§42.04) provides that if a person commits the offense of obstruction of a passageway while participating in a political protest and that person has not yet intentionally harmed the interests of others the law seeks to protect, the person "must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest." We had no evidence that indicated Momentoff intentionally harmed the interest of someone not among the protest group. However, Sgt. Young's footage clearly showed that Momentoff was asked numerous times to leave the tent prior to his arrest. As a result, an instruction on this defense was never requested at trial.

We felt we could easily defeat a potential First Amendment defense, but we did identify a potential issue with the obstruction of a passageway charge. From watching the video, we could tell that Momentoff's tent was very large and entirely on the sidewalk. However, after visiting Burnett Park, I realized that that the sidewalk is much larger than it appeared on video. At most, Momentoff's tent covered half of the width of the "passageway." Because the statute provides that "obstruct" means "to render impassable or to render passage unreasonably inconvenient or hazardous," we were initially unsure how to proceed on this charge.

It wasn't until we watched the videos again that we were able to formulate a sound argument. We realized that we were not able to accurately estimate the size of the sidewalk in our initial review because all the protesters were standing on the uncovered portion. This realization was particularly relevant because the statute provides that a person commits the offense of obstruction of a passageway "regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone *or from his acts and the acts of others*." Using this part of the statute, we planned to argue that Momentoff's act of placing the tent on the sidewalk obstructed a passageway because the combined effect of his act, the other tent owners' acts, and the gathered protesters' acts resulted in "unreasonably inconvenient" passage down the sidewalk. Because this language in the statute appears to a certain extent as surplusage, it was omitted from the information. After discussing this omission with a supervising attorney, we re-filed the information to include this language (something our misdemeanor appeals attorney also advised me to do).

The trial

By April 19, the "Occupy" phenomenon was no longer making headlines. Still appreciating the effect it could have on the trial, we worked on a theme that would keep the jury focused on the fact that the defendant went out of his way to intentionally break the law. In opening statement, Bryan conveyed our theme to the jury: *Anthony Momentoff wanted to get arrested, and to achieve his goal, he knew he had to break the law*. We felt this theme was appropriate because at the end of the trial, all we planned to ask for was accountability when the law is intentionally broken.

Although there were numerous potential witnesses, we called only one: Sergeant Darren Young. During his testimony, Sgt. Young described the extraordinary measures he took

to avoid making the inevitable arrest of Anthony Momentoff. We limited our evidence as well by offering only two videos, two maps of Burnett Park, and a printout of the city ordinance Sgt. Young sought to enforce. Keeping our presentation of the case straightforward highlighted the patience and professionalism Sgt. Young exhibited.

During cross-examination, the defense seemed concerned only with making Sgt. Young agree that Anthony Momentoff was exercising his First Amendment rights. Sgt. Young never disagreed. As a result, the defense asked very few questions on cross-examination. By mid-afternoon, both sides rested.

Prior to closing arguments, Momentoff's attorney requested that the defense of free speech be added to the interference with public duties charge. Momentoff's attorney argued that the protest signs on the tent along with Sgt. Young's acknowledgement that Momentoff was exercising his First Amendment rights required the instruction. However, the relevant section in the statute provides, "It is a defense to prosecution that the … interference alleged consists of *speech only*." After reviewing the statute, the judge reasoned that it was Momentoff's *act* of refusing to leave the tent, as opposed to any spoken words, that resulted in the commission of the offense. Therefore, he denied the defense's request.

During closing argument, the defense attempted to persuade the jury that Momentoff should not be punished for peacefully exercising his First Amendment rights. We were prepared for a jury nullification argument, and if it arose, intended to address it during closing. After arguing the merits of both cases, I pointed out to the jurors that in the charge, a First Amendment defense is never mentioned. Therefore, they could not render a not-guilty verdict on those grounds. I followed this up by candidly expressing to them that our biggest concern was they would base a not-guilty verdict on some other reasons, such as sympathy or the nonviolent nature of the offense. Instead, I asked them to please show support for Sgt. Young and the professionalism he exhibited at the protest rally.

After deliberating for about 15 minutes, the jury returned a guilty verdict on both counts. Momentoff elected to have the judge assess punishment and was sentenced to 30 days in jail (he had the option to serve on the sheriff's labor detail program, day for day, instead of jail) and a $500 fine. We were very pleased with the speed of the verdict and believe it was indicative of the jury's appreciation for the officers' approach to a difficult situation.

Conclusion

As misdemeanor prosecutors, we mostly try DWI cases. Though the answer is not always clear, evaluating a DWI case primarily comes down to one major consideration: *Why will the jury believe this person was intoxicated?* However, this case was different. What we learned from the Occupy Fort Worth trial was that, in some instances, preparing for a case begins with gaining an understanding of the defendant's motivation for his actions, then assessing how a jury will feel about those underlying motivations. We will always be reminded of this experience and know that it will serve us well in our career as prosecutors. ❇

Law & Order Award winner

State Representative John Otto (R-Dayton), center, was honored with TDCAA's Law & Order Award at a recent appearance in Huntsville in May. He is pictured with TDCAA Executive Director Rob Kepple (left) and Walker County Criminal District Attorney David Weeks (right), who co-presented the award to Rep. Otto in recognition of his work on appropriations and child abuse issues.

10 myths about drugged driving

There are a lot of misconceptions about driving while impaired by drugs. Here are the facts to assist prosecutors in trying these increasingly common cases.

Impaired driving prosecution usually involves cases where alcohol is the substance causing impairment. The efforts of victim's advocacy groups, police, traffic safety agencies, and prosecutors have made a difference in—rightly—bringing attention to alcohol and driving.

By Warren Diepraam
Chief of Vehicular Crimes Division in Montgomery County

Recently however, drug-impaired driving is—also rightly—receiving more attention from law enforcement agencies. Although this increased focus will ultimately have traffic safety benefits, there are many difficulties in handling these types of cases: Peace officers are generally not familiar with what may be subtle signs of drug impairment; if alcohol is combined with a drug, the focus is often on alcohol; and while blood alcohol quantitations can be related to impairment, drug quantitations (that is, the number of milligrams of drug per milliliter of blood) generally cannot. Because the incidence of drug-impaired driving is increasing, we as prosecutors must combat the most common myths associated with this crime.

1 The first myth is that **hospitals will automatically take a blood sample from a driver if medical personnel or police suspect impairment**. In truth, hospitals rarely take blood samples, even though one would think that doctors would want to know what drugs are affecting a person prior to administering treatment. But certain archaic financial reasons (health insurance often won't pay claims if the patient is intoxicated) may prevent the hospital from taking these steps necessary for investigation and, later, prosecution. The remedy for this issue is to use a search warrant or other legal process to obtain the hospital blood samples and submit them to a forensic lab for testing, keeping in mind that time is of the essence as hospitals destroy their samples in as little as 24 hours.

2 The second myth is that **if a hospital does obtain a sample, it will be checked for drugs.** In fact, most hospitals will not test for drugs and if they do, they will search only for a limited class of drugs, such as cocaine, marijuana, phencyclidine, amphetamine, and LSD. This practice creates two problems for law enforcement: The first is that such testing will not detect a significant number of legal and illegal drugs. Secondly, the hospital's tests are merely screening tests and not confirmatory tests. A screening test involves the use of chemicals that react with certain classes of drugs; the process is similar to the tests officers use to identify drugs on the street. Such screening tests have a fairly high false-positive rate, which is the reason for confirmatory testing with a gas chromatograph. Screening methods are generally reliable and therefore relevant, but the defense lawyer will still have a significant issue to advance in trial. Again, the remedy for this issue is to obtain the blood samples from the hospital, submit them to a forensic lab, and request a full toxicological screening.

3 Next is the common belief that **the presence of drugs in hospital records means the subject is impaired.** This notion is faulty for several reasons. Unlike with alcohol, there is little scientific support that equates certain drug dosing levels with impairment. As of now, alcohol is the only drug where such dosing levels can be scientifically supported and admitted in court. The presence of drugs in hospital records does not necessarily mean that the subject is impaired. Further compounding this problem is that hospitals rarely quantify blood-test results and are merely reporting the *presence* of the drugs. Because Texas law currently has no *per se* levels for drugged driving, prosecutors must prove impairment when drugs are involved. The driving facts, impressions of medical personnel and paramedics, and medical records may be helpful to prove impairment, but there is no substitute for a police officer trained in

drug detection and impairment evaluating the suspect at the hospital.

4 Although there is little scientific support for quantitation relating to impairment, prosecutors should avoid the myth that **dosing levels are not important.** When combined with visual indicators of impairment through a trained police officer or other person, quantitation does have significant value because certain levels of a drug or its metabolite, combined with another person's observations, makes it more likely that the drug is causing the impairment.

Lastly, quantitation can be used to determine the general time of ingestion (as opposed to the general symptom of impairment), which is helpful to describe what symptoms a person would experience at that point in the metabolic process. Most forensic labs will perform this quantitative analysis, and the few labs that do not conduct it still have the instrumentation to do so.

5 If a quantitation is obtained, prosecutors then have to deal with the next myth, that **an ingested drug in a therapeutic dose does not create impairment.** In fact, many drugs taken in therapeutic doses are highly impairing. For example, anybody having surgery will rely on a therapeutic dose of anesthesia so the surgeons can operate. In such a case, the patient will be impaired and unconscious on a therapeutic dose. Although not an exhaustive list, some drugs that are highly impairing at therapeutic doses include LSD, Ambien, and Soma. Any prosecutor handling a drug-impaired driving case must dismantle this myth for the jury and emphasize the physical or mental signs of impairment.

6 The next myth is that **drugged drivers are easy to identify.** Highly impaired drugged drivers are obvious to most people, but those who are mildly impaired frequently escape arrest and prosecution. The alcohol equivalent is prosecuting a driver with a low alcohol blood result or a person who fails but does well on field sobriety testing. These individuals may not be "drunk," but they are obviously a danger on the roads.

The same principles apply to drug-impaired drivers. It is imperative that officers are trained on recognizing the signs of drug impairment by taking classes such the Drug Recognition Expert (DRE) or Advanced Roadside Impaired Driving Enforcement (ARIDE) courses. Additionally, the TDCAA forensic science project has several tools available to prosecutors and law enforcement to assist in impaired driving detection and apprehension. By being proactive and recognizing drug-impaired drivers, peace officers will arrest more offenders. The fear of apprehension and prosecution will increase as will deterrence.

Even more myths arise post-arrest. Many suspects will offer a breath sample as an alcohol rule-out. After that, the question becomes what sample to collect: urine or blood?

7 **An old myth is that a urine sample is best.** While urine was once the preferred sample, blood is now the sample of choice. Urine is the body's reservoir for expelled toxins and waste products; as a result, urine tests are less likely to be correlated to an opinion on impairment. Conversely, the amount of a drug in a person's blood is more reflective of the substance's effects on the nervous system because the substances are still being processed or metabolized. While blood samples are the general trend in drug cases, urine can still be useful and should not necessarily be discarded.

8 Once blood is obtained and the sample tested, drugs or their metabolites are sometimes not detected, leading to our next myth: that **a negative blood result means the suspect ingested no drugs and the officer was wrong in his assessment of impairment.** While that's definitely a possibility, it is not always the case. There may be many other reasonable explanations for a negative result. For example, labs set cutoff levels on detecting drugs versus reporting drugs, and these levels vary from lab to lab. (A higher cutoff level can save a laboratory significant costs by precluding the need for further confirmations and testing.) If the lab obtains a result but the result is below its reporting level, the lab will send out a negative report. A prosecutor should check with the lab and inquire if there were drugs present that were not reported.

Even if the test came up negative, many substances are extremely volatile and are metabolized before the blood is taken. Some substances can be quickly destroyed in the blood sample due to volatility, even with the preservative contained in the grey-top tube. In addition, there are literally thousands of intoxicating

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substances on the market and new ones being developed weekly. Labs are not able to develop protocols for detecting all of these substances. The explosion in designer drugs and synthetics such as salvia, bath salts, and K2 are but a few examples of new arrivals that need new testing protocols.

9 Another significant myth is that **the increasing use of blood samples courtesy of a county's no-refusal program and recent changes in the laws will minimize the need for the DRE or ARIDE programs.** This could not be further from the truth. In states, including Texas, where there is no *per se* level for drug-impaired drivers, we need officers to testify about the subject's level of impairment and whether it is consistent with any drugs. Evidence of physical and mental impairment is still necessary and must be proven beyond a reasonable doubt.

10 A related myth is that **if an officer describes a class of drugs different from what the lab results show, the officer's assessment of impairment is wrong.** Again, this is not necessarily true. For example, many drugs can affect people differently and symptoms for one class of drugs may mimic symptoms from another, especially with poly-substance abusers. Additionally, some substances may not have been detected due to cutoff levels or lack of testing, even when they were present at the time of the DRE evaluation. Lastly, some drugs have a certain class of physical manifestations in one phase and another class in a different phase. For example, a person under the influence of a stimulant may show symptoms of a depressant when in the downside, or crash phase, of stimulant use. All these factors and more should be considered when the officer and the lab results conflict.

In conclusion, the new focus on drug-impaired driving will require prosecutors to become more knowledgeable about the process of obtaining blood evidence, interpretation of lab analysis, and effects that different types of drugs can have on the human body. We have an ethical obligation to become familiar with these issues. Through increased awareness and focus on drugged driving and the myths associated with this crime, we can do a better job of making our roadways safer by ensuring that those in need of prosecution face the consequences of their actions and those that don't are released from the system. ❇