THE TEXAS PROSECUTOR

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

The power of civil enforcement

How the Harris County Attorney's Office uses civil courts to fight crime, including gang activity, prostitution, illegal clubs, and drug dealing

Gambling, prostitution, and drug dealing are big businesses in Harris County. Thus, we have no shortage of illegal game rooms, massage parlors, after-hours clubs, problem motels, and apartment complexes in our county. Law enforcement and criminal prosecutors are effective in punishing the criminal offenders, but the businesses profiting from these illegal acts too often stay in business, leading to a cycle of more arrests and more criminal prosecutions. In many parts of Harris County, law enforcement is repeatedly called to specific properties that are magnets for criminal activity. The job of law enforcement at these crime-ridden properties seems to be never-ending. Moreover, frequent criminal activity has a negative impact on the quality of life and property values in our neighborhoods. These businesses and criminal actors are nuisances to law enforcement and everyone living near them.

By Julie Countiss (left) and Celena Vinson
Assistant County Attorneys in Harris County

Rather than relying solely on traditional law enforcement techniques to combat these nuisances, the Harris County Attorney's Office is using the power of civil enforcement to put a stop to certain types of habitual criminal activity. Chapter 125 of the Texas Civil Practice and Remedies Code allows an individual, attorney general, district attorney, county attorney, or city attorney to file a lawsuit against a person who owns, maintains, or is party to a place that maintains a common nuisance. Nuisance abatement is one of the most effective ways to bring to task property owners who have failed to take reasonable steps to stop crime on their property. Harris County Attorney Vince Ryan has obtained numerous judgments requiring business owners to take reasonable measures to reduce crime. Through these lawsuits our office has shut down countless nuisance businesses and even enjoined gang members from stepping foot onto these properties. Because of this success, we have seen an increase in the number of cases brought to our office. Information typically comes from law enforcement, citizens living near these nuisance locations, and social media. Recently, we filed a case based on evidence we retrieved from the Internet that resulted in an after-hours club closing.

The after-hours fight

During the Christmas holidays, our office received an email with a link to a YouTube video posted on Facebook. While we routinely use social media to make our case that a business is illegal or that an individual is

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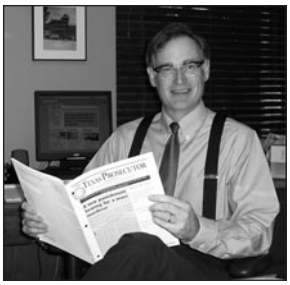
Brady training reminder for new prosecutors

If you are a relatively new prosecutor who has started the job in the last six months, remember that the law requires that you complete a course on *Brady* within 180 days of your start date. The course must be approved in advance by the Court of Criminal Appeals, and you can find just such a course for free on the TDCAA website at http://tdcaa.litmos.com/online-courses. When you take the course, TDCAA will record your compliance and provide one hour of MCLE ethics credit. And with over 1,000 people having completed the two free ethics courses currently available ("Mandatory *Brady* Training" and "A Prosecutor's Duty to the Truth: A Roundtable Discussion"), Texas prosecutors have saved over $90,000 in fees for comparable online training from other entities. A great Foundation service!



By Rob Kepple
TDCAA Executive Director in Austin

Management training

In the last few issues of this journal, you have read about the Foundation's efforts for additional resources to ramp up training in leadership and management. We are slowly building a menu of course options and different ways to bring that training to you through major seminars, smaller regional courses, and even in-house training.

We hope you take advantage of the management offerings at our Annual Criminal & Civil Law Update in September. First, **Jay Aldis**, a partner at Bracewell Giuliani LLP and a former assistant county attorney in Harris County, will talk on "Managing Your Friends." As any of you who have worked in even a small office know, one day two of you may be officemates and the next day one is a supervisor. That can be a tricky situation, but rest assured it is common and can be done well.

Second, we are offering a staple course in management: how to manage your time and get organized. It should surprise no one that there are some basic principles to organizing your day that can really keep you ahead of your caseload (or whatever pile is on your desk).

Third, another essential topic is an introduction to management styles. Yes, there are different ways a person can be an effective manager, and it revolves around the manager's personality and the personalities of his subordinates. Learning about those different styles and personalities can make managing folks on a daily basis much easier!

Finally, keep an eye out for an announcement about a two-day management seminar that TDCAA will offer in the spring of 2016, as well as upcoming regional trainings at a location near you. Once again, thanks to the efforts of the Foundation for moving this training forward.

Victim Services update

Jalayne Robinson, TDCAA's Victim Services Director, has been busy with personal office visits and curriculum planning. In April, Jalayne traveled to Mason County and the Panhandle area. Her first stop was Amarillo for a meeting with the victim services staff members in both the district attorney's office and that of the county attorney, followed by a visit to Dumas to meet with staff members from Sherman, Moore, Hartley, and Dallam Counties. She also worked with members of the Harris County District Attorney's Office to plan free protective order training on June 24 in Austin (in conjunction with TDCAA's Domestic Violence conference), August 7 in Houston, and August 21 in San Antonio (before TDCAA's Legislative Updates at the latter two locations). For more information on this training, which we provide free of charge to prosecutor office personnel courtesy of our Violence Against Women Act (VAWA) grant, check out our website at www.tdcaa.com/training. ❇

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Texas District & County Attorneys Association

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Hot topics at the Legislative Updates

As this edition of *The Texas Prosecutor* goes to print, the dust is still settling on the 84th Legislative Session. As usual, there are some fascinating developments in criminal law which you will want to learn about at this summer's TDCAA Legislative Updates. (Sign up at www.tdcaa.com/training/2015-legislative-updates-summer-tour-starts.) It seemed that last session was all about prosecutor accountability, and we have worked hard the last couple years to demonstrate to the public and our lawmakers that prosecutors are worthy of their trust. Judging by the number of new responsibilities district and county attorneys will have after the 84th Session, it appears that we have regained that trust—and then some! Two areas prosecutors need to learn about are public integrity prosecutions and the civil commitment of sexually violent predators. That's because two special prosecution programs (the Public Integrity Unit of the Travis County District Attorney's Office and the Special Prosecution Unit in Huntsville) have been dissolved, and their authority and responsibility to handle those cases will now be in local hands. Just what does that mean? Come to our Legislative Updates and find out!

By Rob Kepple
TDCAA Executive Director in Austin

Some changes to the Annual in Corpus

Many of you are preparing to come to the TDCAA Annual Criminal and Civil Law Update in Corpus Christi September 23–25. This has been a popular location for this event in the past, but we want you to be prepared for a new training venue. Instead of spreading out into the Omni Bayfront and other hotels, we are able to host the entire conference under one roof at the American Bank Convention Center, which is a great facility. It's just a short distance from the hotels at the north end of Shoreline Boulevard, and frequent shuttle service will run from the hotels to make it easy. And for the first time in a decade, we will again host our Thursday night reception on the U.S.S. Lexington aircraft carrier. There will be a lot to talk about as we digest the latest legislative changes, so see you there.

TDCAA Annual Business Meeting

You are used to getting a notice of our Annual Business Meeting and Board Elections in this summer edition of *The Texas Prosecutor*. In the past, that meeting has always been held in conjunction with the Annual Update in September, but this year, the meeting will be held alongside the Elected Prosecutor Conference in December.

The Board decided to move the meeting this year for two reasons. First, there is no impending by-law changes or other significant reason to call a meeting of the full TDCAA membership. Second, the Board was interested in invigorating interest in service on TDCAA boards and committees and wanted to use September's Annual to encourage members to take part in the association. So it made sense to push the elections to December and allow folks who are interested in serving to learn more about it at the Annual and begin the nomination and election process.

If you have an interest in TDCAA board or committee service, come to this year's Annual and learn more about it. This is truly a member-driven organization, so we need your energy and enthusiasm for the profession to keep moving forward!

Police use of force

One of the issues at the 84th Legislative Session was peace officer use of force and related prosecutions—or as some might say, the lack of prosecution. Although Texas has not seen the civil unrest of other jurisdictions, this topic was as hot at the Texas Capitol as in capitols all around the country. In the end, we saw legislative reforms in the grand jury and in police officer body cameras, but deeper reforms were tabled for at least a session.

But that isn't the end of the discussion. TDCAA's leadership is concerned about this national issue and how police use-of-force cases are handled in Texas. In an effort to see where we are as a state, TDCAA has applied for and received an additional grant from the Court of Criminal Appeals to host a prosecutor summit

on Texas use of force investigation and prosecution in November 2015. This will be a small group brought together over a couple days to closely examine how use-of-force cases are handled in Texas and what additional training and resources are needed. We have also extended invitations to experts in the field at the Department of Justice, so we can count on seeing where we stack up nationwide.

After we see where we do well and where we might improve, we will design training for our offices and perhaps even our local law enforcement agencies to make sure we are doing our best in these cases. Stay tuned!

Criminal justice and national politics?

For the first time in 20 years, it appears that criminal justice policy might play a part in the upcoming presidential election cycle. Take a look at the lead of a recent *New York Times* article titled "2016 Candidates Are United in Call to Alter Justice System":

> The last time a Clinton and a Bush ran for president, the country was awash in crime and the two parties were competing to show who could be tougher on murderers, rapists, and drug dealers. Sentences were lengthened and new prisons sprouted up across the country. But more than two decades later, declared and presumed candidates for president are competing over how to reverse what they see as the policy excesses of the 1990s and the mass incarceration that has followed. Democrats and Republicans alike are putting forth ideas to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.[1]

Be ready to fact-check if the televised debates focus on crime. By now, we have heard time and time again about "the Texas Miracle," touted as policies to increase treatment and rehabilitation in 2007 that led to savings of over a billion dollars in prison construction costs. Long story short, be very suspicious of someone who attributes the overall drop in crime and a lot of cost savings to a single legislative policy. Some would attribute the drop to tough-on-crime policies in the 1990s and others to treatment and rehabilitation options of the 2000s. I read one article arguing that it could very well be the aging of America and disappearance of lead paint in homes with small children. It seems plausible that a lot of factors played a role here, so one needs to be suspicious of a simplistic and convenient answer (and by convenient I mean the answer that just happens to save money). It is obviously great to have effective treatment and rehabilitation options when dealing with defendants in our courts, but the declining prison population doubtless has many other contributing factors. Has anyone noticed, for instance, that the Texas parole rate has gone from 22 to 38 percent in recent years?

Jaime Esparza wins national MADD award

Jaime Esparza, District Attorney in El Paso, Hudspeth, and Culberson Counties, was recently honored at Mothers Against Drunk Driving's 35th Anniversary National Conference in Washington, D.C. Jaime was the recipient of the National President's Award, a top honor from MADD. He was originally nominated by MADD's West Texas chapter for his work with victims and the El Paso Police Department's "Out For Blood" educational program, an eye-catching campaign that alerts folks that El Paso's police department runs a 24/7 blood-draw program. In his remarks accepting the award, Jaime was quick to praise all of the prosecutors around Texas and the nation who are dedicated to reducing drunk driving and helping the victims of this crime restore their lives. Congratulations, Jaime, for this deserved recognition.

Welcome, Ashley Martin

When you call TDCAA for some research assistance, you will no doubt get to talk with our new Research Attorney, **Ashley Martin**. Ashley is a graduate of Texas A&M University, where she double-majored in history and political science. She got her law degree at the University of Texas. Ashley, having interned at both the Travis County District Attorney's Office and the U.S. Attorney's Office for the Northern District of Texas, has hit the ground running, and we are lucky to have her on the team. Welcome!

Another talented Texas prosecutor

Every now and again you hear about a Texas prosecutor who has taken a non-law talent like writing, music, or acting to a new level. Recently, one assistant criminal district attorney not only got the attention of folks in the art world, but also dedicated her art to victims of crime.

This past April, **Johna Stallings**, a Victoria County prosecutor,

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Tales from the plains

Of all the lawyers, prosecutors have the best stories. Our business is human business—with all its attendant messiness. We see the whole gamut of drama, passion, rage, anger, and stupidity (a *lot* of stupidity) just by reviewing a handful of cases before lunch on a Monday. On an almost daily basis we see things that make us smack our palms against our foreheads and ask, "What were they *thinking?*" We see the best of people, but more often, we see the worst. Our jobs are just inherently interesting.

By Staley Heatly
District Attorney in Wilbarger, Hardeman, and Foard Counties

Trust me, I know. I used to work in corporate finance at a big law firm. There is no better way to put a dinner guest to sleep than by telling them about your exciting day at the printer working on an initial public offering. They would much rather hear about the latest juicy whodunit that came across your desk at the prosecutor's office. (On a side note, at the printers they usually have all-you-can-eat chocolate-covered strawberries. Not a bad perk for a boring job.)

We prosecutors see truly-gut wrenching situations—but at the same time, we see resilience and hope. We deal with people who habitually hurt other people, and oftentimes the victims of these criminals have been abused over and over throughout their lives. But we also meet victims of unspeakable crimes who go on not just to survive, but to thrive. Through all of the ups and downs of being a prosecutor, one thing is certain: If you don't have a sense of humor, you won't make it very long in this profession. With that idea in mind, I wanted to lighten the mood by sharing a few stories from the plains of Texas.

First jury trial

The first case I ever tried to a jury was a robbery. The defendant was 19 years old, and he beat up a guy and stole his wallet outside of a local convenience store. Despite strong evidence, the defendant refused to entertain a plea of any kind. After a two-day trial, he was convicted of the robbery and after a punishment trial, in which I proved up his pending burglary and theft of a firearm charges, the defendant was sentenced to 10 years in prison probated for 10 years. I was a little surprised by the probated sentence because the defendant, while young, had started his adult career on a pretty good spree. It must have been the defendant's compelling testimony at punishment that caused the jury to have compassion for him. During punishment, he got on the stand and bawled—tears running down his cheeks and snot coming out of his nose—about how sorry he was for everything. When I got him on cross, I asked if he was crying because he was sorry for what he had done or if he was afraid to go to prison. "I'm afraid to go to prison," he said. "I ain't done nothin' wrong." And he *still* got probation.

Two months later, the police were called out to the defendant's house. A "client" of the defendant's had called police to complain about being shorted. She reported to police that she had contacted the defendant to purchase some crack. He told her to knock on the side window of the house and then to slide the money under the window. She did as she was told, but no crack appeared after she slid the money through. She knocked on the window louder and the defendant told her to go away or else she would wake up his grandmother. After repeated knocking, the defendant stuck a pellet gun out the window and shot his customer a couple of times in the arm. She was so upset about not getting her crack and about getting shot that she pulled out her cellphone and immediately called police to complain. That was a very entertaining revocation hearing.

Next witness

One of my first big felony trials involved a shooting that happened after a group of people had been drinking beer all day. (Sound familiar?) The defendant had taken offense to someone else's comment and told people he would be back to shoot the place up (not his exact words), and he left in a cloud of dust. Within 30 minutes, the defendant reappeared halfway down the block with an SKS assault rifle. He fired more than 40 rounds from the gun, but by some miracle he managed to miss the group of people standing out in front of the house.

At the punishment phase of the

trial, we put on the defendant's previous cellmate from prison. The cellmate, who was serving a 55-year sentence for murder, told the jury how the defendant had sexually assaulted him in prison. Things were going poorly for our defendant at that point, but they were about to get worse.

The first defense witness was called to the stand and was asked about the defendant's good qualities. At the end of his questioning, the defense attorney asked the witness, "Are you asking this jury to have mercy on my client and to give him a lower sentence?" Without batting an eye, the witness answered, "No." The stunned defense attorney looked at his co-counsel who whispered loud enough for me to hear, "Are all of our witnesses going to say that?" They didn't all say that, but it was too late for their client.

Thanks, Mom

Just a few weeks ago we had a revocation hearing on a run-of-the-mill state jail felony criminal mischief. The defendant had been on probation for a couple of years and had simply been unable to comply with the terms of his probation. He had been arrested and convicted of a couple of misdemeanors while on probation, and we had amended his probation multiple times with short jail stays and drug treatment conditions. He had been given many opportunities to change his ways, but nothing ever seemed to stick and he would always be right back in trouble.

Because I didn't consider him to be a menace, I offered the minimum of six months in state jail. He and his

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Executive Director's Report (cont'd)

opened an art show in a Victoria gallery, with proceeds going to the local child advocacy center, the Hope of South Texas, Inc. You can read about the showing here: www.victoriaadvocate.com/news/2015/apr/15/art-show-to-benefit-hope-of-south-texas-inc.

It is always great to see that dedicated prosecutors also have diverse interests and talents. And I hope the public appreciates someone like Johna, who can't help but use her talent in art to find yet another way to help the children in her community. Well done!

David Escamilla honored

In April, the Austin Bar Foundation and Austin Bar Association held the 2105 Law Day Luncheon, at which it honored a number of Austin-area attorneys. Congratulations to **David Escamilla**, the County Attorney in Travis County, for being honored as this year's recipient of the Regina Rogoff Award. David was singled out as a career public servant who has contributed greatly in developing a strong Family Violence Division that prioritizes protective orders and the criminal enforcement of domestic violence cases. A well-deserved recognition! ❇

Endnote

1 Baker, Peter, *The New York Times*, April 27, 2015, available at www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html?_r=0 (payment or subscription required; last accessed June 8, 2015).

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defense attorney were pleased with the offer but unsure if the judge would approve it. (My judge reserves the right to sentence defendants on deferred adjudications, so a plea of true is essentially an open plea to the court.) During the revocation hearing, the defense attorney called the defendant's mother to the stand. He was hoping that a sympathetic mom would help the judge see his client in a positive light. Here is an excerpt from their exchange:

Defense counsel: Do you join in and ask the court to consider that minimum sentence for your son?
Mom: Y'all don't want my opinion on that.
DC: Ma'am?
Mom: You don't want my opinion on that because I'm in the background hollering, 'Give him the whole two years.' You asked me to tell the truth.
DC: Yes, ma'am. I pass the witness.
Court (to defense attorney): Do you have any more questions?
DC: I don't think I have any more questions, Judge. I think I might need to withdraw because of ineffective assistance of counsel.
Court (to Mom): Thank you, ma'am. You may step down. Anything else?
DC: No, Judge. I'm going to rest before I get my client sent to prison for life.

We were all laughing by the end of this exchange. The judge took mercy on the poor defense lawyer and his client and sentenced the defendant to the minimum of six months in state jail.

Serious work

We have serious jobs. We deal with grave matters, sometimes literally. (See what I did there?) But a good sense of humor is key to surviving in our line of work. So make sure that you take the time to share your stories and have a good laugh, and take advantage of the time you spend with colleagues across the state at TDCAA conferences. And most importantly, realize how lucky you are that you aren't relying on stories about the latest merger at the office

The author (far right) along with former Lamb County and District Attorney Mark Yarbrough (left) and former TDCAA President Mike Fouts (center) sharing a laugh at the 2012 annual conference.

Photos from our Civil Law Seminar at Las Colinas (near Dallas)

The 2015 Gerald Summerford Award for the Civil Practitioner of the Year was given to Kathy Braddock (at left), assistant district attorney in Harris County. And Sherine Thomas, assistant county attorney in Travis County (at right) was honored with a plaque commemorating her year as Chair of the Civil Committee. Congratulations to both ladies, and thank you for all you do for TDCAA and Texas prosecutors!

A case of first impression on DNA evidence and the Confrontation Clause—and it's good news!

The Confrontation Clause of the Sixth Amendment guarantees the accused the right to confront witnesses against him. More than a decade ago, the Supreme Court of the United States, in *Crawford v. Washington*, held that testimonial statements violate the Confrontation Clause unless the declarant takes the stand to be cross-examined; if he is unavailable, the defendant must have had a prior opportunity to cross-examine him.[1]

By Jessica Akins
Assistant District Attorney in Harris County

Since then, both the Supremes and the Texas Court of Criminal Appeals have grappled with what constitutes "testimonial" statements. Recent opinions have narrowed the gap on the issue, more often than not revealing which forensic analysis evidence is disallowed due to a *Crawford* violation.

A recent and well-structured opinion from the Court of Criminal Appeals shifts this tide and shows us what *is* allowed. The Court in *Paredes v. State* addressed this question: Does the admission of a supervising DNA analyst's opinion regarding a DNA match violate the Confrontation Clause when that opinion is based on computer-generated data obtained by non-testifying analysts during batch DNA testing?[2]

The answer is no, it does not.

The capital murder

The defendant in this case is a gang member. He and fellow gang members armed themselves and went to their drug dealer's apartment, seeking revenge for receiving a bad batch of cocaine. At least three gang members entered the apartment with firearms; the defendant was carrying an AK-47. They pretended to be interested in buying more cocaine but instead planned to rob the occupants of their drugs and money. The defendant and his accomplices demanded money and drugs from the people in the apartment, and when they did not comply, the defendant fired five shots at the first victim, killing him. He approached a second man and attempted to shoot him, but his gun jammed. One of his accomplices then shot and killed the second man, and they fled the apartment.

Afterward, the defendant admitted to the rest of the gang he had shot someone in the apartment. He joked and bragged that blood gushed out "like a river." The defendant, realizing that his white T-shirt had blood on it, asked a fellow gang member for a different shirt. He instructed her to wash his bloody shirt, but she never did.

DNA evidence

Not only did the fellow gang member fail to wash his shirt from the night of the offense, but she also left it in her closet, where the defendant had hidden the AK-47. When the defendant became a suspect in the capital murder two days later, she was arrested and the evidence implicating him was obtained from her house. (It's hard to find a good woman.)

Police obtained casings from the murder scene, and subsequent testing revealed they were fired from the AK-47 found in the closet. DNA testing of the bloodstain on the white T-shirt was a match for the DNA of the second victim.

The State introduced the DNA evidence through the testimony of a supervising analyst. She explained the DNA match was obtained through an assembly-line batch process, wherein three different analysts conducted steps in the DNA testing process.[3] Once complete, she conducted the final step of interpretation and comparison by viewing the DNA graph and determining whether this DNA profile matched the DNA profile of a known individual, in this case the second victim.

The defendant objected to her opinion regarding the DNA match because he did not have the opportunity to cross-examine the other three analysts who conducted the testing on which her expert testimony was based.

Recap on the law post-*Crawford*

In 2009, the Supreme Court issued *Melendez-Diaz v. Massachusetts*.[4] In that case, the defendant was charged with drug distribution, and the State offered certificates of analysis sworn

to by analysts at a state lab as evidence that the substance was cocaine of a certain quantity.[5] The analysts did not testify at trial, and the defendant did not have an opportunity to cross-examine them.[6] Justice Scalia, writing for the majority, held that the certificates were testimonial because they basically mimicked what a live witness would have testified to; thus, their admission violated the Confrontation Clause.

In 2011, the Supreme Court issued another case regarding the admissibility of forensic lab reports, *Bullcoming v. New Mexico*.[7] The defendant was charged with DWI, and the State introduced a blood-alcohol analysis report certifying that his blood-alcohol concentration was above the legal limit.[8] The State did not call the analyst who signed the certification as a witness but instead called another analyst who was familiar with the laboratory's testing procedures. Justice Ginsburg, writing for the majority, held that testimony from the second analyst did not meet the constitutional requirement of confrontation because the testifying scientist did not observe or participate in the testing.[9]

In 2013, the Court of Criminal Appeals issued *Burch v. State*.[10] The defendant in that case was charged with possession of cocaine with the intent to deliver. The State offered a lab report that certified the substance seized from the defendant was 2.2 grams of cocaine.[11] This report was signed by both the analyst and the reviewer, but only the reviewer testified at trial. In determining that the admission of this report and testimony violated the defendant's right to confrontation, the Court held that *Burch* was controlled by *Bullcoming*.[12] Judge Womack, writing for the majority, held that because the reviewer did not have personal knowledge of the testimonial facts that were submitted, she was not an appropriate surrogate witness for cross-examination.[13]

Adding *Paredes* to the mix

Judge Newell, writing for the Court in a unanimous opinion, held that *Paredes* is unlike *Bullcoming* and *Burch* because the testifying expert in this case was more than a surrogate for a non-testifying analyst's report.[14] This expert performed a crucial analysis in determining the DNA match and testified to her own conclusions. The Court rejected the defendant's argument that he was entitled to cross-examine all three analysts who contributed to the testing process, noting that although the testifying analyst relied upon the work of others, neither their lab reports nor their conclusions were offered into evidence.

Paredes holds that the admission of a supervising analyst's opinion regarding a DNA match does not violate the Confrontation Clause when the opinion is based upon computer-generated data obtained through batch testing.[15] Prosecutors should be mindful in our practice that this case does not overrule *Burch v. State*. The testimony of an expert witness that explains *another* analyst's report violates the Confrontation Clause, even when she is familiar with the testing process. And the admission of a lab report created solely by a non-testifying analyst, without calling that expert, violates the Confrontation Clause. The facts in *Paredes* are distinguishable in that the testifying expert shared her own interpretations and conclusions when rendering her opinion, and no report was admitted.

Although the issue presented in *Paredes* has not been directly addressed by the United States Supreme Court, the High Court has recently denied certiorari on cases from other jurisdictions that have issued opinions in line with *Paredes*.[16] From this, we can gauge some confidence that the practice of presenting an expert witness who testifies her in-court opinion is based upon non-testimonial information will not violate the Confrontation Clause. ❇

Endnotes

1 *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

2 *Paredes v. State*, No. PD-1043-14, 2015 WL 3486472 (Tex. Crim. App. June 3, 2015).

3 One analyst applied chemicals to the biological sample to isolate the DNA in the cells; another analyst determined the amount of DNA present. A third analyst copied the DNA sequence and loaded the data onto an instrument that yielded a DNA graph (i.e., the raw data) that could be used to compare the produced DNA profile to other evidence.

4 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

5 *Id.* at 305.

6 *Id.* at 309-311.

7 *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

8 *Id.* at 2709.

9 *Id.* at 2715.

10 *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013).

11 *Id* at 635.

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12 *Id* at 637.

13 *Id* at 604.

14 *Paredes*, 2015 WL 3486472 *6.

16 *Id*. at *7.

17 *Jenkins v. State*, 102 So.3d 1063 (Miss. 2012), cert. denied, 133 S.Ct. 2856 (2013); *Commonwealth v. Greineder*, 984 N.E.2d 804 (Mass. 2013); cert. denied, 134 S.Ct. 166 (2013); *Marshall v. People*, 309 P.3d 943 (Colo. 2013); cert. denied, 134 S.Ct. 2661 (2014).

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The power of civil enforcement (cont'd)

a member of a criminal street gang, we were not prepared for what we saw on the Internet that day. The video depicted more than 100 individuals involved in a fight in a parking lot. The fight grew more intense as the eight-minute video played, and although the most serious injury was a stabbing, gunshots could be heard in the background. What was striking about the video, other than the size of the crowd, was that the fight took place just as the sun was coming up. We began our research of this location by running the calls for service. We wanted to know how many times police were called to this particular club and for what purpose. After looking at the call slips, speaking to law enforcement, and receiving a call from another tenant of the strip center, we realized this was "the party after the party."

Located in a strip center was Club Eclipse. There was no sign on the business indicating it was a club, but the calls for service and incident reports were incontrovertible. These reports revealed that parking lot brawls, aggravated robberies, stabbings, and shootings occurred at Club Eclipse often, as did selling and serving alcohol without a permit during prohibited hours. The club was not in compliance with the fire code despite the fact that crowds in excess of 200 people were often packed inside. The lines were long to get into Club Eclipse and the party inside was large.

With the help of the Harris County Sheriff's Office, Precinct 4 Constable's Office, and agents from the Texas Alcoholic Beverage Commission, we were able to confirm that Club Eclipse did indeed sell alcohol without a license: The Texas Alcoholic Beverage Commission conducted an undercover investigation where undercover officers purchased and were served mixed drinks with liquor, even though the club had no permit. We also confirmed that the club operated from 2 to 7 a.m.; even with a permit, it is illegal to sell and serve alcohol after 2 a.m. This information gave us another cause of action against Club Eclipse. We could not only sue the club owner under Chapter 125 of the CPRC, but also under Chapter 101 of the Texas Alcoholic Beverage Code. This section allows the county attorney to sue a location as a nuisance that operates in violation of the CPRC or under circumstances contrary to the Code's purposes.

After-hours club is a common nuisance

Under Chapter 125, a suit can be brought on behalf of the State of Texas against any person who maintains, owns, uses, or is a party to a place for purposes constituting a nuisance and the action may be brought *in rem* against the place itself. A per-

son who maintains a place to which persons habitually go for a certain activity, who knowingly tolerates the activity, and who fails to make reasonable attempts to abate the activity, maintains a common nuisance. The statute lists the 22 crimes that are considered nuisances.

On January 20 of this year, we filed suit against the owners of Club Eclipse, the landlord, and the property *in rem*, outlining the many reasons Club Eclipse was in fact a common nuisance and requesting that the defendants be temporarily and permanently enjoined from operating it as such.

The hearing on our temporary injunction occurred on February 20, with the owner of Club Eclipse attending the hearing along with her attorney. The landowner did not appear at the hearing, despite being served with the lawsuit and receiving notice. Our burden at the temporary injunction hearing was to introduce evidence to convince the judge we would likely succeed at trial and that the public would suffer probable injury unless the defendants were ordered to take reasonable steps to abate ongoing criminal activities.

To prove habitual criminal activity occurred at Club Eclipse, we introduced into evidence offense reports that documented aggravated assaults and robberies. Offense reports and arrest records are also admissible to show knowledge on the part of the defendants, according to Chapter 125. Because Chapter 125 allows evidence of the general reputation of a place to show the existence of a nuisance, we also called law enforcement officers to testify about the reputation of the club, referring to the offense reports that Club Eclipse was known to be a nuisance.

In addition to showing that habitual criminal activity occurs at a location, we were required to prove that the defendants did not take reasonable steps to abate the crime. Not only were we prepared to offer evidence of the defendants' non-compliance with the Alcohol and Beverage Code and the fire code violations, we also had testimony that the security guards at Club Eclipse frequently called police when they could not control the large, unruly crowd of patrons. The video clip of the fight in the parking lot helped make our case that Club Eclipse had become a haven for violent crime and was a danger to the community and to Harris County law enforcement.

We emphasized to the judge that the repeated criminal activity irreparably harmed the public and would continue unless the judge ordered the club to take action. The judge granted our request against all defendants, including the missing landowner, and ordered the defendants to take the following steps to prevent crime on the premises:

1) prohibit selling, serving, or consumption of alcohol at the club;

2) close the club between the hours of 10:30 p.m. and 10:30 a.m.;

3) check all IDs and bags at a station outside the club's entrance;

4) refuse entrance to anyone found in violation of the law;

5) install cameras inside and outside the club, store the video for 30 days, and make it available to law enforcement within 24 hours of request;

6) hire two licensed, uniformed peace officers to be on premises while the club is open;

7) report any illegal activity to law enforcement, maintain a log of law enforcement activity, and report that to the county attorney's office on a weekly basis;

8) perform criminal background checks on all current and future employees and terminate or refuse employment for those convicted of a felony or drug offense in the past 10 years; and

9) comply with all fire safety codes.

These requirements are responsive to the type of criminal activity occurring at Club Eclipse. The addition of licensed peace officers and surveillance cameras on the property would certainly deter aggravated assaults and other weapons-related crimes, as would checking patrons' bags prior to entering the club. Requiring that Club Eclipse close at 10:30 p.m. would prevent the large crowds from gathering inside and outside Club Eclipse to drink and party after other clubs had closed.

Rather than comply with the judge's order, the owner decided to close the club and recently entered into an agreed permanent injunction with the State of Texas. The terms of the agreement require the club owner to permanently vacate the premises. If we had not moved for the temporary injunction, we would have had to wait for a final trial and then prove to the jury or judge that this club was a nuisance. The judge's ruling on the temporary injunction made survival impossible for this illegal after-hours club. Club Eclipse closed its doors permanently, thereby abating the nuisance.

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Gang members are a public nuisance

In some cases, law enforcement makes us aware of numerous repeated arrests and convictions against known criminals at a particular location. These gang members wreak havoc in particular neighborhoods, making things difficult for law enforcement and for the people living there. Apartment complexes and convenience stores in Harris County have been victims of certain gangs when their members repeatedly commit crimes on their properties. Law enforcement has requested our assistance to prevent these gang members from wasting more of their resources and to help fight crime in these neighborhoods.

Section 125.062 of the Civil Practice and Remedies Code states that a combination or criminal street gang that continuously or regularly associates in gang activities is a public nuisance. Section 71.01 of the Penal Code defines "combination" as three or more persons who collaborate in carrying on criminal activities. The habitual use of a place by a combination or a criminal street gang for engaging in gang activity is a public nuisance.

In an effort to take back certain problem properties in Harris County, our office has sued more than 80 individual gang members as public nuisances, as well as 40-plus condo owners and convenience stores as public nuisances for allowing gang activity on their properties.

We obtained crime statistics from analysts at the sheriff's office and the Houston Police Department for these problem areas to determine if we could meet the criteria necessary to enjoin these gang members from going onto these properties. We needed to show that a particular gang engaged in gang activities at least five times in a period of not more than 12 months at the designated location. After reading the reports outlining the crime in these areas, we determined that we could meet this element. Because law enforcement was documenting each actor's gang affiliation and criminal activity, we could prove the gangs were a public nuisance and sue the individual gang members.

In a case involving the Bloods and Crips gangs, we used the crime statistics and information from apartment and business owners, residents, and law enforcement to create a "safety zone," a geographic area from which gang members are barred. These gangs were nuisances to the people living in this zone and to law enforcement, who spent substantial resources responding to issues at these properties. Many of these individuals, including apartment managers, were desperate for our help. Gangs had victimized them and their properties for years.

We counted more than 50 gang members who had committed gang activity within the zone. These crimes ranged from aggravated assaults to criminal trespass. The zone was approximately one-third of a square mile in size and included four apartment complexes, a residential neighborhood, two schools, and a strip center containing several businesses.

Suing 50-plus gang members in one lawsuit is not an easy task. Each defendant must be located and personally served with the petition as well as a Show Cause Order ordering that person to appear at a temporary injunction hearing. Just as in the Club Eclipse case, we wanted quick action to prevent additional nuisances from occurring pending final trial. Rather than wait to have our case heard at trial (which can take over a year), we asked for a temporary injunction so that we could get in front of the judge more quickly and get temporary relief for nearby residents.

At the temporary injunction hearing, we presented evidence of each defendant's gang affiliation, as well as his participation in gang activity within the zone. Nineteen witnesses testified, including gang experts and apartment managers. At the conclusion of the hearing, we requested that the defendants be prohibited from entering the zone for any purpose. About 10 to 15 gang members showed up and most signed Agreed Permanent Injunctions, though a couple stayed through the hearing and one even cross-examined an officer.

After presenting our evidence, the judge granted our request and ultimately we received a permanent injunction against all 44 of the defendants that were located and served with the petition and Show Cause Order. (We non-suited the remaining gang members whom we were unable to serve.) The court order enjoins these Crips and Bloods from using the safety zone for the purpose of engaging in or facilitating gang activity and permanently bans them from the zone.

This injunction has given law enforcement an extra tool to combat

gangs and protect the people living in and around the safety zone. Under §71.021 of the Penal Code, law enforcement is able to arrest any of these defendants on sight if officers catch them inside the zone. They are subject to criminal and civil penalties for violation of a court order. The Harris County District Attorney's Office has supported our efforts to abate this criminal activity by requesting harsh punishments for offenders of the gang injunctions. The ability to combine criminal and civil enforcement against these offenders is a powerful and effective way to clean up these neighborhoods.

Prostitution

Prostitution, promotion of prostitution, and human trafficking are among the specific crimes listed under Chapter 125 as nuisances. Experts will tell you that Houston, as a major seaport and with its proximity to the Mexican border, is a hub for human trafficking. Our lawsuits and investigations have revealed that cantinas, spas, strip clubs, and motels are magnets for this illegal activity. Many times these businesses are a front for perpetuating the most serious offenses—the exploitation of vulnerable individuals. Not only are the people working at these locations victims of crime, but so are the people living nearby. These businesses act as havens for habitual criminal activity and adversely affect everything that surrounds them.

Our office files nuisance lawsuits to expose and eradicate these criminal enterprises. Too often, the landlords and owners of these locations turn a blind eye to what is happening on their property. Using civil remedies, we can uncover the truth.

We have obtained injunctions requiring "massage parlors" and "spas" to shut down, as well as settlements that force property owners to take steps to prevent prostitution and human trafficking. Currently, we have a settlement with a motel that is in an area known nationally as The Track because of the number of prostitutes working on street corners. Video surveillance shows lines of cars picking up girls in this area.

That video, plus arrests and convictions for prostitution at this location, were plenty of evidence for our office to file a Chapter 125 lawsuit against the motel's owners. The agreement prohibits the motel from renting rooms by the hour, selling condoms, and having pornographic material in the rooms or available on TV, and authorities there are required to post the human trafficking hotline in each room—these are just a few of the provisions they are required to follow. We also sued the Burger King across the street from this motel because of its compliance with prostitution and drug dealing. Burger King has agreed to take numerous steps to eliminate the crime, including hiring security, reporting criminal activity, and running background checks on employees, specifically looking for crimes involving prostitution, aggravated prostitution, sexual assault, aggravated sexual assault, and human trafficking.

On April 2 of this year, a Harris County judge issued a strong statement to a landlord who failed to respond to a Chapter 125 lawsuit regarding an illegal spa on his property. This location was the scene of an unlicensed massage parlor where multiple arrests for prostitution and violations of the Texas Occupations Code occurred over several years. We sued the landlord but didn't have owner information on the spa, which is not uncommon. A judge granted a default judgment against the landlord, ordering him to terminate the spa's lease. In addition, the landlord is prohibited from using the space where the spa was located for any reason for a term of one year. The order prohibits utility service providers from furnishing gas, water, and electricity to the premises during the one-year period.

Conclusion

These are just some of the ways our office is using civil remedies to crack down on crime in our county. After-hours clubs, illegal game rooms, massage parlors, and seedy motels adversely affect our community. The Harris County Attorney's Office started the Neighborhood Protection program in the 1980s under the leadership of then-County Attorney Mike Driscoll. Since that time, our office has used civil law to sue a variety of illegal businesses and business owners. The law states, and we believe, that a business owner has a duty to protect the neighborhoods of which they are a part. ❇

Editor's note: As this issue was going to press, the Office of the Attorney General (OAG) sent out a news release to Texas prosecutors alerting them that the marketing and packaging of "designer drugs" often violates §§17.46(a) and (b) of the Texas Deceptive Trade Practices Act (DTPA). The OAG offers to

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bring a civil action under the DTPA against people and retail businesses that sell synthetic marijuana to obtain an injunction against the seller prohibiting sales of such drugs and obtain a judgment for civil penalties. Of course, county attorneys are authorized to bring their own DTPA actions against these drug sellers (without partnering with the attorney general), but those who want to join forces with the OAG are encouraged to contact Tommy Prud'homme at Tommy.Prud'homme @texasattorneygeneral.gov for more information. ❇

A valuable checklist for writs of habeas corpus

A clip-and-save guide to Article 11.07 applications for writ of habeas corpus

Editor's note: TDCAA will publish Andréa's book, Writs, *in early 2016. Look for more information on our website, www.tdcaa.com, in January.*

By Andréa Jacobs
Assistant Criminal District Attorney in Tarrant County

Whether you respond to applications for writ of habeas corpus every day or once every six months, a checklist can be invaluable in planning and organizing your response. Here is a checklist specifically for Article 11.07 applications for writ of habeas corpus (final felony convictions; returnable to the Texas Court of Criminal Appeals).

First, here's a list of calendar deadlines[1]

15 days from receipt of application	State's response due
35 days from State's receipt of application	Trial court's jurisdiction expires unless Order Designating Issues (ODI) signed.
180 days from State's receipt of application	Trial court must resolve the issues regardless of ODI unless a motion for extension of time is filed with the Court of Criminal Appeals (CCA) *before* the 180-day period.
181 days from State's receipt of application	District clerk *shall forward* the writ record down to the CCA, regardless of resolution by the trial court, unless the district clerk has received an extension from the CCA.

Next, find out if the writ is dismissible on procedural grounds. Ask yourself:

- Is the application premature (that is, filed before final conviction)?
- Is the application non-compliant (not in or on the proper form)?
- Was the application properly verified?
- Is this a subsequent application (does it not overcome §4 subsequent writ bar)?
- Has the applicant's community supervision not been revoked?
- Is the applicant no longer confined? Has the applicant discharged his sentence and is not suffering any collateral consequences (such as sex offender registration, used to enhance another conviction, affecting ability to get a job, etc.)?
- If this is a time credit claim, has the applicant presented the claim to the time credit resolution system of the Texas Department of Criminal Justice's Institutional Division? (Has he complained to TDCJ first?)
- Is the only claim one of presentence time credit? (It must be raised in a motion for *nunc pro tunc*.)
- Has the applicant died?
- Are the applicant's claims moot?

A "yes" answer to any of these questions means the writ is dismissible on procedural grounds.

Third, begin the investigation.

- Are the claims cognizable?
- Order records (appellate and trial files).
- Do you need evidence to properly respond to claims? (Is it a purely legal claim?)
- Are the claims barred by laches because the evidence is no longer available? (Is the attorney dead? Are the files destroyed?)
- Do you have the evidence (e.g., appellate record; witness statements, etc.)?
- Do you need affidavits (e.g., ineffective assistance of counsel [IAC], parole board, and time credit claims)?
- Is an ODI needed (for time to collect evidence, affidavits, etc.)?
- Is a hearing needed (e.g., actual innocence, IAC, etc.)?

Now, it's time for the State to respond.

- Respond on the merits.
- Request an order for affidavits.
- Request a hearing.
- Request forensic testing.
- Request designation for general investigation.
- Request scheduling order for deadlines.

Note: If the State does not respond, matters "not admitted by the State are deemed denied."

Findings of Fact

These should be separate from Conclusions of Law (see below).

- Address every claim. If there are multiple grounds, consider organizing findings by ground for clarity.
- Every finding should have a citation to the record or a clear explanation as to its origin (e.g., the trial court's personal recollection).
- Each finding should contain only one fact.
- List them in logical order; it should read like a road map for the trial court.

Conclusions of Law

These should be separate from Findings of Fact (see above).

- Address every claim. If there are multiple grounds, consider organizing conclusions by ground for clarity.
- Provide legal basis before each legal conclusion.
- Every conclusion of law should contain only one conclusion.
- List them in logical order; it should read like a road map for the trial court.

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Order

Always prepare:

1) a proposed order for the trial court to sign adopting your proposed findings and conclusions or

2) a proposed order that includes the desired findings and conclusion unless local rules dictate otherwise.

- The trial court hears the evidence and resolves credibility issues.
- The trial court does not rule on the application but recommends disposition.

Objections[2]

- If the trial court adopts the applicant's proposed findings, the State should file objections to the proposed findings *in the trial court* as soon as reasonably possible.
- If trial court grants relief, file objections to the adopted findings *in the trial court* within 10 days from the date of receipt.

Bond[3]

- Generally, the applicant may be released on bond upon the trial court adopting or making findings of fact and conclusions law *only if the State agrees* to release.
- In DNA cases, after making a favorable finding under Article 64.04 of the Texas Code of Criminal Procedure, the trial court may release an applicant on bail pending writ of habeas corpus proceedings *without input from the State*.
- The trial court determines conditions of release.
- The applicant may continue on bond until denied relief, remanded to custody, or ordered released.

Remands[4]

- The Court of Criminal Appeals may remand the proceeding back to the trial court for additional evidence because the Court of Criminal Appeals does not hear evidence.
- The remand order will dictate whether a live hearing is required or if affidavits are sufficient.

Motion for Rehearing/Reconsideration[5]

- If the Court of Criminal Appeals dismisses the application, a motion for rehearing may be filed within 15 days of the judgment or order.
- If the Court of Criminal Appeals grants relief, a motion for rehearing may be filed within 15 days of the judgment or order.
- If the Court of Criminal Appeals denies relief, *no* motion for rehearing may be filed.
- If the Court of Criminal Appeals denies relief, a party may file a request for the Court of Criminal Appeals to reconsider the application on its own initiative. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 11.07 §3; Tex. R. App. P. 73.4(b)(5), 73.5.

2 Tex. R. App. P. 73.4(b)(2).

3 Tex. Code Crim. Proc. arts. 11.65, 17.48.

4 Tex. R. App. P. 73.6.

5 Tex. R. App. P. 79.

An arsonist's anti-social media

How a serial arsonist was burned by his Facebook threats

By John A. Peralta
Assistant District Attorney in Angelina County

On the evening of November 10, 2012, Stanford Dewayne Jones was at Lanzy's, a private club on the north side of Lufkin, enjoying a drink or two with an ex-girlfriend. He suddenly started acting erratically, making threats against other patrons for no apparent reason. He left the club but returned a short time later waving a handgun around. The Lufkin police responded to a "man with a gun" 911 call, but Jones had left the premises. A .22 caliber pistol was found outside the club and taken into evidence.

A few hours later, some of Jones' friends and family found him walking down the street in his underwear, still acting incoherently. They took him to the emergency room and he was admitted to the hospital. He claimed that someone at Lanzy's club had "spiked" his drink. He was treated and released shortly before noon on November 12, 2012.

Six suspicious fires

The first fire occurred at 4:45 the next morning. Samuel "Pops" Gilmore was making his morning coffee when he heard noises outside his small wooden house. He went outside and discovered that someone had placed sticks and other combustible materials against the side of his house in two different places and lit them on fire. Luckily he was able to extinguish the flames before any significant damage had occurred. Police and firefighters responded to the scene and discovered that the gas caps from two cars parked next to the house had been removed; a black cloth had been stuffed into one of the gas tank openings (see the photo, at right). The cloth was taken into evidence.

The second fire occurred 35 minutes later, three blocks from Mr. Gilmore's house. It had been ignited near a window on a vacant house and had advanced into the attic and roof before firefighters could extinguish it. A flaming can of lighter fluid was discovered immediately under the window.

About an hour later, a third fire was ignited in the bed of a pickup truck parked next to a house just two blocks away. This fire was extinguished, and no evidence was located at the scene.

The following day, just before 4:00 a.m., the fourth—and most devastating—fire was ignited. It began in a two-story house and quickly spread to two other nearby houses. All three structures were (fortunately) vacant, and all three burned to the ground.

Around 6:30 the next morning someone attempted to light Lanzy's club on fire at three different locations around the building. One of these attempts succeeded, and the wooden back door to the club was engulfed in flames. The fire awakened Laura Owens, who lived in an apartment above the club. Her screams brought her brother Lanzy to her assistance, and he was able to put out the flames. That fire was located at the bottom of an exterior

metal stairway that was the only exit from Laura's apartment.

Approximately 30 minutes later the sixth and final fire was started in an abandoned house five blocks from Lanzy's club. Some cardboard and other debris had been placed against two plywood boards in a laundry room and set afire. An alert police officer noticed the smoke and was able to drag the plywood onto the driveway and the fire was extinguished.

Later that morning, in a combination of good fortune and diligent police work, an important piece of evidence was discovered. A Lufkin police detective decided to walk along the railroad tracks that stretched between the two fires that

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had occurred that morning. A typical November morning frost covered everything in sight, but the detective noticed something unusual: some fresh sputum (spit and mucus). Realizing that the sputum could not have been present for any appreciable length of time and that it was located between the sites of the two fires earlier that morning, he obtained a swab of the sputum, which was placed into evidence.

Thirty minutes after the last of the six fires, Stanford Jones was arrested for a felony probation violation. As he was booked into the Angelina County Jail, it was discovered that he had three disposable lighters in his possession. Moreover, the fires ceased once Jones was taken into custody, and there was not another intentionally set fire in that neighborhood for over a year thereafter.

The investigation

The Angelina County Fire Marshal's Office spearheaded the investigation. Fire Marshal Steve McCool and Assistant Fire Marshal Ozzie Jarman spent many an hour in the neighborhood, questioning dozens of potential witnesses and running down the innumerable leads they were given. More than one person advised them to look at Stanford Jones—and to pay special attention to his Facebook page.

Logging onto an alias Facebook page, McCool accessed Jones' page and discovered that he had made several threats while hospitalized after the incident at Lanzy's club. One threat, made in a comment to a photograph showing the defendant wearing a hospital gown in his hospital room (shown at right), stated, "im ready to put a match to lufkin tx and watch thi s mutha***** burn down su wuu biz [sic]". McCool later determined that the phrase "su wuu biz" is commonly used by the Bloods street gang members as a call to one another announcing their presence.

Another post read: "Enjoy a peaceful night get plenty of sleep because after tonight some of you will see heaven the rest of you go burn ya go burn slow." A third posting said, "Im alive and all you mutha****** who want me dead you go die before me one by one lord forgive me for my sins." Fire Marshal McCool subpoenaed Facebook and obtained digital records of Jones' Facebook page.

Assistant Fire Marshal Jarman obtained and served a search warrant on Jones for a buccal swab. That swab, the black cloth retrieved from the gas tank, and the sputum swab from the railroad tracks were all submitted to the DPS laboratory for DNA analysis. The forensic chemist's report stated that the sputum sample came from the defendant, and the odds of it coming from some other person were one in 414.8 quadrillion. The results from the black cloth were not quite as definitive. The chemist concluded that more than one person had contributed DNA to the cloth but also stated that the odds of the Defendant's DNA not being present on the cloth were one in 452.5 million.

McCool was able to locate three key witnesses during his exhaustive investigation. Two witnesses placed Jones at the scene of the first fire shortly before it was ignited. A third witness stated that he had been driving through the neighborhood with Jones the day before the first fire and that Jones had pointed to various houses, threatening to burn them down. However, all three witnesses shared a common problem: They all had extensive criminal histories and were convicted felons.

Tienda v. State

It was immediately apparent that the admissibility of the Facebook evidence was going to either make or break the case, but the subpoenaed records had arrived without a business records affidavit. I thought about contacting Facebook to get an affidavit executed, but after considering the matter carefully I concluded the better course of action was to have Fire Marshal McCool proffer the Facebook pages he had printed directly from the Internet. This strategy addressed two issues I had with the records subpoenaed from Facebook.

To begin with, it avoided any Confrontation Clause issues under *Crawford v. Washington*.[1] As we all know, this area of law has been in flux over the past several years. And although the Supreme Court in *Crawford* opined that "most of the hearsay exceptions [cover] statements that by their nature [are] not

testimonial—for example, business records …,"[2] I wasn't willing to risk losing this valuable evidence either at trial or on appeal based on a judicial determination that my business records were "testimonial."

More pragmatically, after reviewing the subpoenaed records from Facebook headquarters, my first impression was that the printouts bore absolutely no resemblance to the Facebook pages with which we are all familiar. The records were in black and white, in a plain font, with no Facebook logos, no avatars, and no Timeline—none of the features normally associated with Facebook pages. I needed something to put on the digital overhead that would be instantly recognizable to the jury.

I was confident the Facebook threats would not pose any hearsay issues—the fight would be over their authenticity. So I devoted a sizeable portion of my trial preparation to the Court of Criminal Appeals' opinion in *Tienda v. State*.[3] In *Tienda*, the State offered printouts of the defendant's MySpace page through a witness who personally printed the evidence directly from the Internet.

The Court of Criminal Appeals began by delineating the role of the trial judge and jury in determining the authenticity of evidence:

> The ultimate question whether an item of evidence is what its proponent claims then becomes a question *for the fact-finder—the jury, in a jury trial*. In performing its Rule 104 gate-keeping function, the trial court itself need not be persuaded that the proffered evidence is authentic. The preliminary question for the trial court to decide is simply whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic.[4]

The Court then acknowledged that due to the wide variety of such digital evidence, no single rule could be articulated that would adequately address all situations.

> Like our own courts of appeals here in Texas, jurisdictions across the country have recognized that electronic evidence may be authenticated in a number of different ways consistent with Federal Rule 901 and its various state analogs. Printouts of emails, Internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity.[5]

Applying these principles to the facts of the case before it, the Court held that "the internal content of the MySpace postings—photographs, comments, and music—was sufficient circumstantial evidence to establish a *prima facie* case such that a reasonable juror could have found that they were created and maintained by the appellant.[6]

> This combination of facts—(1) the numerous photographs of the appellant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring; (2) the reference to David Valadez's death and the music from his funeral; (3) the references to the appellant's "Tango Blast" gang; and (4) the messages referring to (a) a shooting at "Rumors" with "Nu–Nu," (b) Hector as a "snitch," and (c) the user having been on a monitor for a year (coupled with the photograph of the appellant lounging in a chair displaying an ankle monitor) sent from the MySpace pages of "ron Mr. T" or "MR. SMILEY FACE" whose email address is "ronnietiendajr@"—is sufficient to support a finding by a rational jury that the MySpace pages that the State offered into evidence were created by the appellant. This is ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.[7]

The Court acknowledged the remote possibility that someone could have hacked into Tienda's MySpace page and manufactured the incriminating facts upon which the State relied, but the Court emphasized that this unlikely scenario was for the jury to consider, not for the trial court to rely upon for purposes of excluding the evidence.[8]

Unlike the *Tienda* case, the defendant's Facebook page was under his actual name, Stanford Jones. (The MySpace pages in the *Tienda* case were under aliases, making their authentication more problematic.) Using *Tienda* as a guide, I sifted through my evidence and marshaled all the facts linking my defendant to his Facebook page.

Like the MySpace page in *Tienda*, Jones' Facebook page contained numerous photographs and "selfies" of the defendant, including several in the hours immediately preceding the setting of the first fire. I printed out all of these photographs, marked them as separate exhibits, and made a note to have my witnesses identify them as images of Jones.

I also realized that I had evidence similar to the ankle monitor evidence in the *Tienda* case, i.e., evidence of a personal circumstance

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peculiar to the defendant. One of the photographs on the defendant's Facebook page showed Jones in a hospital room wearing a hospital gown. This image was posted approximately a day and a half before the first fire was set. McCool, the fire marshal, had already obtained Jones' hospital records, so I knew I could establish that he was in the hospital at the time that particular photo was posted.

McCool had also subpoenaed Yahoo for the email address listed on Jones' Facebook page. The records showed that the email address had been obtained by Stanford Jones of Lufkin, Texas, and, significantly, contained Jones' street moniker, jboyheartofthanorth. This street name also appeared in several of Jones' Facebook posts, and I planned to have my witnesses testify that Jones commonly used it.

I also planned to have my witnesses verify that many of the defendant's relatives, friends, and acquaintances were listed as "friends" on his Facebook page. Several of these persons had commented on his Facebook posts, including the three threats made shortly before the first fire. I would also have these witnesses verify various personal facts that Jones had listed on his Facebook page, such as his place of birth, where he went to high school, and where he was previously employed. Finally, during trial I planned to have Jones' Facebook friends identify the printouts as Jones' Facebook profile.

I drafted a detailed trial brief that discussed the *Tienda* case and outlined the authenticating evidence I planned to introduce at trial. I filed it far in advance of trial so that the presiding judge would be well-prepared to address these issues.

The trial

Prior to trial, Jones' community supervision on his second-degree felony drug delivery charge had been revoked and he was adjudicated and sentenced to seven years in prison. He rejected a plea offer of 15 years on the arson case.

The indictment alleged two counts of arson of a habitation, three counts of arson of a building, and one count of arson of a vehicle. The habitation counts were first-degree felonies and the remaining counts were second-degree felonies. Jones had no prior felony convictions that could be used for enhancement purposes.

Each of the arson counts averred that the defendant knowingly ignited the fires "within the limits of an incorporated city or town, namely, Lufkin." I contacted the Lufkin City Attorney's Office and obtained a certified copy of the Lufkin City Charter, which stated in its very first section that Lufkin was an incorporated city. My law enforcement witnesses would testify that the fires occurred inside the city limits.

With six separate offenses to prove, DNA evidence to admit, and the Facebook predicate to establish, I planned on calling more than 20 witnesses and introducing 100-plus exhibits. I organized the trial as follows: the first portion would involve proving up each of the six fires; I would then offer evidence concerning the incident at Lanzy's club and the defendant's subsequent admittance to the hospital; next I would call the forensic chemist and proffer the DNA evidence; and finally I would lay the Facebook predicate and offer the printouts into evidence. If all went according to plan, the Facebook threats would be the last thing the jury would see before the State rested.

In preparing for voir dire, I wanted to stress three points in particular. First, because two of my counts involved fires that did very little damage, I wanted the jurors to understand that the arson statute provides that the crime is considered complete "regardless of whether the fire continues after ignition."[9] Second, I wanted to emphasize the distinction between actual damage and destruction versus the *intent* to damage and destroy. And third, I wanted to stress that any element, indeed the entire case, could be proven by circumstantial evidence. With respect to the type of juror I preferred, I recognized that certain persons were especially vulnerable to fires, i.e., the very old and the very young, so the elderly and parents of young children were high on my list of prospective jurors.

The defense raised several issues in its motion in limine prior to commencement of trial, all of which were uncontested and granted by the trial judge. I was allowed to offer evidence of the incident at Lanzy's club, but would not be permitted to mention that a firearm was involved; I would be permitted to prove that Jones had been taken into custody shortly after the last fire, but could not mention the reason for his arrest; and I would be able to refer to the defendant's Facebook page, but could not mention the substance of any threats until the time the judge had ruled upon its admissibility.

Trial commenced on March 23, 2015, before the Honorable Robert Inselmann, Jr., of the 217th District Court—and, from my point of view, it could not have gotten off to a worse start. Of my three eyewitnesses, two did not appear, and the third now insisted that he had never identified Jones as the person he observed at the scene of the first fire. I was forced to impeach this last witness with his prior inconsistent statement to Fire Marshal McCool—which was accompanied by an instruction to the jury that the evidence could be used only for impeachment purposes and not as substantive evidence of guilt. Basically all the jurors initially learned was that six fires had been set, but they heard nothing about who may have started them.

The next phase of the trial went considerably better. The admission of the DNA evidence on the black cloth linked Jones directly to the scene of the first fire, and the DNA from the sputum placed him in the vicinity of two other fires close to the time of their ignition. I also played a portion of a police patrol unit video that showed the fourth fire in progress. This was by far the most damaging fire, and the dramatic footage of the 30-foot flames against the night sky undoubtedly created quite an impression with the jury.

The concluding part of the trial started with a surprise: One of my wayward eyewitnesses showed up. I had already prepared a motion for a writ of attachment for this witness, but had not yet filed it. Along with the DNA evidence, her testimony also placed Jones at the scene of the first fire. The defendant's mother and two of his ex-girlfriends were next on the stand. As hostile witnesses, I had them identify the photographs from his Facebook page, had them verify a number of other personal facts establishing its authenticity, and finally had them testify that the printouts were in fact from his Facebook page. My final witness was Fire Marshal McCool, who offered the hospital records and Yahoo email records into evidence. The last exhibit offered was the Facebook printouts, which were admitted into evidence and promptly published to the jury to great effect.

The primary thrust of the defense consisted of variations on the same theme, i.e., that there was insufficient evidence to directly link Jones to any of the fires and that we were possibly prosecuting the wrong person. Jones' able defense counsel emphasized that more than one person contributed DNA to the black cloth in the gas tank, pointed to a number of other forensic tests that could have been performed but were not, and argued that there were a number of leads and other potential suspects that were not thoroughly investigated.

The defendant chose not to testify, no doubt based on his recent felony conviction and prison sentence for delivery of a controlled substance. The defense rested without presenting any evidence, opting instead to argue that the evidence failed to establish beyond a reasonable doubt that Jones was the perpetrator of the fires. Not unexpectedly, the court granted the defense's motion for dismissal as to our weakest count, which involved the largest of the six fires and occurred on the second day of the defendant's three-day arson spree. This was the only count for which we had no eyewitness testimony or forensic evidence. The remaining five counts were submitted to the jury.

After approximately two hours of deliberation, the jury returned its verdict: guilty on two counts of arson of a habitation, guilty on one count of arson of a building, and not guilty on the other two counts. The court ordered a pre-sentence investigation report to be prepared and the case was reset for sentencing.

Summing up

On May 14, Stanford Dewayne Jones was sentenced to 20 years' imprisonment in the Texas Department of Criminal Justice. Of course, the jurors were unaware throughout Jones' trial that he had already commenced serving a seven-year sentence for delivery of a controlled substance. They were also evidently unaware that the defendant's Facebook threats had been published in our local newspaper and aired on local newscasts on several occasions before the trial had started.

I likened my trial strategy to a three-legged stool, consisting of the eyewitness testimony, DNA evidence, and Facebook threats. The stool would not stand if even one of the legs were missing. Looking back, I believe that the time I expended planning my predicate for the Facebook pages was absolutely invaluable. I also believe that taking the time to thoroughly brief the issues for the court prior to trial greatly facilitated the admissibility of the evidence. In the end, I was able to get almost all of my evidence before

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the jury, which practically compelled a finding of guilt.

Stanford Dewayne Jones demanded a fair and impartial jury trial, and that is exactly what he received. As I argued to the jury in summation, when he chose to take his anger out on his neighbors by setting those fires, he burned the bridge of freedom behind him. I like to think that the residents of the north side of Lufkin are sleeping a little bit easier now. ❇

Endnotes

1 541 U.S. 36 (2004).

2 *Id.* at 56.

3 358 S.W.3d 633 (Tex. Crim. App. 2012).

4 *Id.* at 638 (emphasis added)(footnotes omitted).

5 *Id.* at 639 (footnotes omitted).

6 *Id.* at 642.

7 *Id.* at 646 (footnotes omitted).

8 *Id.* at 645-46.

9 Tex. Penal Code §28.02(a).

29 years of delayed justice

Prosecutors in Hays County tried an aggravated kidnapping case from 1986 and secured justice for two young girls (now adults) and accountability for the lifelong criminal who terrorized them.

On December 20, 1986, Reynaldo Zamora abducted two young girls, Deana and Samantha, aged 8 and 9 years old respectively.[1] He enticed them into his white Corvette after claiming to be the uncle of a neighborhood child they knew and asking directions to that child's house. The girls shared the passenger seat, Samantha nearest Zamora. They gave him directions around the neighborhood, passing by their own homes on the way. This small 10-home community in Buda adjoined the eastern access road of Interstate Highway 35 just south of Austin. The streets were unpaved and lacked signs or lights. Their homes were surrounded by flats of dirt and brush, though today it's sprawling suburbia. (Even now, Samantha lives in this neighborhood, haunted by a past left unresolved for nearly three decades.)

By Brian Erskine
Assistant Criminal District Attorney in Hays County

Zamora promised to drop the girls back off, but not before he could get gas, offering to buy the girls treats for their trouble. He stopped first at a nearby convenience store, but he told the girls his credit card was declined. Zamora then travelled to the nearby city of Kyle, where he stopped at a Conoco, the only other gas station nearby. Samantha recalled this location in detail, commenting that she had frequented this place because of its vicinity to her aunt's home and the Dairy Queen.

At the gas station, Zamora bought Deana a hamburger and a Sprite. Samantha also recalled that Zamora had purchased her a wine cooler, which she refused. Both also recalled Zamora stopping across the street for matches before lighting up a marijuana cigarette. As they all headed back down IH-35 toward home, the girls became increasingly nervous as Zamora passed their exit. Both girls asked Zamora to take them home. They begged him to exit and turn around, but he kept on going. Zamora traveled nearly five miles before eventually turning around.

His white Corvette finally came to a stop in the girls' neighborhood

near Deana's home. Deana got out first. Samantha edged herself toward the passenger door, but as she leaned outside, Zamora grabbed her hair, pulled her back into the car, and sped off. Deana hysterically ran to Samantha's home to alert Samantha's mother, Doris, of her daughter's abduction. Doris then took Deana in her car to look for Samantha. Unable to find her daughter or the white Corvette, Doris returned home and called police. (Deana later told the jury that the way Doris was acting and driving scared her to death, though now as a mother of three, she understood Doris' fears. Deana admitted she likely would have been even more frantic if she had been Doris.)

Zamora drove Samantha around to the IH-35 frontage road and parked at an old rest stop with a short brick wall separating it from the roadway. A small clump of trees and brush slightly obscured Samantha's view of her own home in the distance. She pleaded with Zamora to let her go, but he threatened to break her arm if she touched the door handle. Zamora groped at Samantha over her clothes, grabbing her breast and cupping one hand over her vagina, moving his hands back and forth. Samantha could not recall how much time passed for what otherwise felt like an eternity. Zamora then drove up the street to the intersection of the frontage road and her neighborhood's mailboxes. He let Samantha out of his vehicle with a warning: "If you tell, I will find you and I will leave your body in a ditch with burn marks and bites, lying there naked for all your friends to see."

Samantha ran home and waited for her mother. Through the tears, she told her Mom and the police about the sports car, the gas station, the rest stop, and what Zamora looked like. Deana gave the police a similar version of events with the exception of the molestation. The police went to the gas stations the girls had described, but they initially came up empty-handed. It was Doris who went to the Conoco in Kyle and demanded to see the store receipts. In these receipts Doris recognized a name she knew: Rey Zamora.[2] He had done septic work for her and her husband, and she also knew he drove a Corvette that matched the description her daughter had given police. Doris shared this information with Hays County Sheriff's Deputy Paul Cossette.

To locate Zamora, Deputy Cossette called directory assistance,[3] which gave a phone number and address for "Rey Zamora." Deputy Cossette contacted Zamora pretending he needed septic work done. Zamora answered the landline number and told Deputy Cossette he could not do the work as he was already on his way to Colorado. While Deputy Cossette was speaking to Zamora on the phone, Deputy Mike Dees was outside Zamora's home, standing by the white Corvette parked outside. Zamora had active unrelated warrants, so deputies entered the home believing Zamora was an imminent flight risk. As Deputy Cossette arrived at the house, Zamora had still not been located inside. Eventually officers found a locked bathroom door, and inside they found Zamora hiding behind the shower curtain fully clothed. He was booked into the Hays County Jail, where he was fingerprinted and photographed.[4]

While Deputy Dees was compiling a photo lineup, Deputy Cossette drove the girls around the surrounding areas to see if they could identify the perpetrator's vehicle. At this point neither Deana nor Samantha was aware that Zamora was in custody or had been identified by Doris. The girls observed several sports cars, but as Deputy Cossette drove past Zamora's home, both girls immediately identified the car, noting that it still had mud on it from driving in their neighborhood.

Deputy Dees showed both girls (individually) a series of photographs, and both identified Zamora as the perpetrator. Doris and her husband both identified Zamora in the photo lineup as well. Police recorded audio statements from the girls and took hair and fingerprint samples from them, which were submitted to the DPS lab for comparison to evidence located in Zamora's car, but there was no match. DPS retained this report and it was available at trial, but almost everything else—the hair samples, fingerprints, Corvette, photo lineup, gasoline, beer, marijuana, Sprite can, the original Conoco ticket, and Zamora's photos and fingerprints—were lost over time.[5]

The defendant's disappearing acts

In May 1987, while out on bond, Zamora followed his neighbor home from a local bar in Austin and waited until 5 o'clock in the morning to break into her house through a window in the kitchen. Zamora made his way into one of the adjacent bed-

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rooms and attempted to sexually assault a young guest of the homeowner who awoke screaming for help. The homeowner called police, identified Zamora as the perpetrator, and made a report. Zamora fled and was not immediately arrested. He was indicted on August 22, 1987, for this new case and failed to appear for the case involving Samantha and Deana on August 31, 1987.

These cases were first placed on my desk in late November 2013 after Zamora had spent the better part of 27 years on the run. I received only the contents of district clerk's files.[6] In September and November of 2014, Zamora challenged at multiple pretrial hearings the State's ability to prosecute him. He filed a Motion for Dismissal for Lack of Speedy Trial (hereinafter referred to as MDLST[7]). With the length of delay triggering the *Barker v. Wingo* balancing test,[8] we knew the burden to explain the reason for delay, the failure of Zamora to assert his rights, and the lack of prejudice would be extraordinarily high.

Following Zamora's criminal history through the rabbit hole of aliases, dates of birth, changes in appearance, relocating to different states, committing new crimes and systematically bonding out and failing to appear showed us that Zamora was well-practiced in eluding apprehension. Prior to 1986, Zamora had two separate convictions for rape[9] and aggravated kidnapping with intent to commit sexual assault of a child.[10] After failing to appear for the trial involving Samantha and Deana in 1987, he remained on the run until he was picked up in Maverick County in 1992 for transporting marijuana across the border under an assumed name and date of birth.[11] Since then, he had many run-ins with law enforcement:

- an arrest in Louisville, Kentucky, in 2000 for criminal possession of a forged instrument and theft (he bonded out and failed to appear);
- an arrest in Austin in 2001 for masturbating in his car while parked at a playground (again, he bonded out and failed to appear);
- a conviction for marijuana possession in May 2002 in Maverick County and a 12-year sentence in TDCJ; it looks like he was released in 2005. It's hard to tell, but we think he was bench-warranted from TDCJ to Kentucky and back again (there are no judgments for the Kentucky offenses, so we can't know exactly);
- an arrest in October 2007 for evading arrest and failing to register as a sex offender, which led to another prison stint (he was paroled in 2008);
- an arrest in Kyle in October 2013 for being drunk on the side of the interstate. It was this final arrest that landed his file on my desk and ensured that he would be held accountable for kidnapping Samantha and Deana so many years ago.

I understand the sentiment of many regarding the State's negligence in failing to capture Zamora for more than 27 years, including time when he was in TDCJ. Really, the hardest thing was pleading and begging all the related agencies to look for documents related to this defendant. In many instances, the documents were so old that they had either been destroyed or placed in warehouses that no one wanted to visit. In one case we asked for two months before we could convince anyone to actually go to the warehouse to look for documents. We are assuming that in many cases, the documents were so old that the agencies presumed them lost or destroyed and never even bothered to look for them, leaving us hanging in the wind. What we ultimately did piece together was Zamora's cat-and-mouse game of committing crimes and then disappearing, presumably to pop back up somewhere under an alias until an agency was wise enough to trace him back to his other crimes. This game worked well for Zamora for over 30 years. Zamora never turned himself in to law enforcement, and he never requested a speedy trial. He just kept moving.

The MDLST hearing

Defense counsel filed the MDLST. For us, Zamora's identity was confirmed with his 1986 fingerprint card and his 2013 re-arrest. However, for Zamora, identity was always in question. The defense's tactic from the onset was that the perpetrator must have been Zamora's brother Enrique Mata-Jiminez, and Zamora insisted that the 1986 fingerprints could not possibly be his as he was out of the state at the time. (Only during the trial did the defense abandon the issue of identity and instead attack witness credibility and loss of evidence.)

For the entirety of the MDLST hearing Zamora was adamant that it was not he who was arrested in 1986; it must have been his brother using his name. He insisted that his brother owned the white Corvette

and that Zamora owned 36 acres of land in Colorado, which is where he would've been in 1986. Zamora furthered another of his alibis to include farming in Kentucky with Colonel Sanders.[12] He also brought up a 1987 car wreck that left him with partial memory loss.[13] But his fingerprints were his undoing: The facsimile former Hays County Criminal District Attorney (and a longtime assistant before that) Mike Wenk sent to Maverick County in 1992 tied the elusive defendant in the 2015 courtroom to the kidnapper from 1986. DPS fingerprint expert Meghan Blackburn testified that the contributing individual to the faxed fingerprints from the December 20, 1986, Hays County arrest for aggravated kidnapping belonged to the defendant in the courtroom.[14]

Zamora testified at this hearing, and I had the opportunity to cross-examine him for hours about his criminal history, convictions, aliases, photographs, fingerprints, signatures, and whereabouts. Zamora was presented with an assortment of 48 exhibits selected from thousands of pages of certified records with various aliases and dates of birth, photographs, written letters, and other documents spanning his tenure in custody in Guadalupe County, Hays County, Maverick County, Travis County, TDCJ, DPS, and Franklin County, Kentucky.

We acknowledged to the judge that the State's negligence in failing to bring Zamora to trial weighed heavily against us. However, Zamora never insisted on or requested a trial take place—not once. Further, he failed to substantiate prejudice, if any, that he endured as a result of this delay. In fact, what further discredited Zamora in his prejudice argument was that the evidence clearly showed Zamora was the same person arrested in 1986, even though he was insistent that we had the wrong guy and that his alibi witnesses, who would have stated Zamora was out of state at the time, were deceased.

Judge Bruce Boyer denied Zamora's motion in early November 2014, and the case was reset for trial in early 2015. (If the ruling had been adverse to the State, we may have appealed, so the judge set the agg kidnapping and sexual assault case separately from the MDLST hearing. Plus, the hearing went abnormally long.)

Preparing for the agg kidnapping trial

Knowing that the MDLST was the primary hurdle of this case, we also knew that securing documents from Zamora's past was of utmost importance. We obtained thousands of pages of documents from the various agencies that Zamora had come into contact with in the past 40 years. Forty-eight exhibits chronicled his aliases, dates of birth, signatures, photographs, arrests, incarcerations, letters, convictions and parole documents that shed light into the elusive history of Zamora.

In 2014, Samantha's mother, Doris, was deposed to preserve her testimony. Having had a stroke four years prior and struggling with spinal ataxia (a genetic disorder characterized by progressive degeneration of movement and speech), Doris had an extraordinarily difficult time communicating, and we had difficulty understanding her. Still, she recalled the details of Deana telling her that Samantha had been taken. Doris also testified that she retrieved a receipt affixed with the name Ray Zamora from the Conoco station on the day of the kidnapping. She identified Zamora in the photo lineup that Deputy Dees created and further stated that she knew Zamora from business dealings with her now-deceased husband and knew that he drove a Corvette.

Deputy Dees was also deposed to preserve his testimony because of his progressive multiple sclerosis. (Dees was confined to a wheelchair and rarely left his home.) The deputy testified that he executed the arrest warrant for Zamora, put together a photo lineup, and presented the lineup to Samantha, her parents, and Deana.

We had tried to find Deana but were unsuccessful until a week before the trial. (For more on our attempts to track down the witnesses and victims in this case, see the article on page 30.) It turns out that she was alive and well but had moved to Fort Worth as a child and only in recent months had returned to the Austin area. Deana, now 36 years old and mother to three children, shared her recollections of the events that were to this day still fresh in her mind.

The agg kidnapping trial

Mr. Wenk, former Hays County Criminal District Attorney, testified at trial regarding the criminal justice process from investigation to jury trial, including the steps he took to subpoena witnesses and business

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records and to prepare Deana and Samantha for trial. Based on his more than 30-year tenure in Hays County as both prosecutor and defense attorney, Mr. Wenk told the jury that there are some people who are able to stay on the run for a long time. He went on to explain that in a perfect world he would have prosecuted Zamora in 1987, but Zamora's failure to appear and his continued absence made that impossible. Mr. Wenk further testified that ideally, all outstanding warrants would be honored and communication among agencies would be flawless; however, this is not always the case, especially when offenders use aliases and flee custody. Mr. Wenk identified several of the documents from 1987 in the district clerk's file and helped the jury understand what processes were undertaken and why.

Deputy Dees' and Doris' redacted video depositions were played for the jury, outlining among other things the photo lineup procedures, the Zamora investigation, and Doris' struggle to find her daughter. Deputy Cossette also testified regarding his encounters with Deana and Samantha, the gas receipts puzzle pieces, officers finding Zamora hiding in the shower, and the girls' identification of the white Corvette. Because of his extensive interactions with Zamora, Cossette was also able to identify him in the courtroom, noting significant aging but very distinct features.

Now at 38 years of age, married, and a mother of one, Samantha provided the most compelling testimony. I remember meeting with her in my office in early 2014 with our Victim Assistance Coordinator, Monika Lacey. I don't normally talk about the abuse scenario with victims during our first meeting, but without prompting, Samantha relayed to us her intense memories of the abduction and molestation. She was sitting in front of us as that same scared 9-year-old, using language and descriptors of a child that age. At the time, I didn't even know most of the dastardly deeds Zamora had committed in his life, but I was altogether convinced of what he had done to Samantha.

Of particular note, Samantha described how scared she was because of Zamora's threat to hurt her family if she told anyone about the assault. It turns out that her fear was well-founded: In December 1987, just a few months after Zamora skipped town (and the trial), her family's trailer burned down, and a sibling died in the fire. The family wholly attributes it to Zamora, who was on the run and presumably wanting to make good on his threats.

The jury deliberated for about an hour before rendering the guilty verdict. In a brief punishment hearing, District Judge Bruce Boyer heard evidence that Zamora had been previously convicted of aggravated kidnapping to commit sexual assault of a child, rape, indecent exposure, and drug offenses. Meghan Blackburn of DPS testified that the fingerprints on each and every arrest and conviction documents previously mentioned matched the fingerprints of the defendant sitting in the very same courtroom.[15]

Judge Boyer then sentenced Zamora, now presumably 60 years old, to 60 years in prison. We had asked for life.[16]

Conclusion

The elephant in the room remains that we brought a nearly 30-year-old case back from the dead. We attempted to exhaust every avenue imaginable and give the trial court everything we could muster for its determination at the MDLST hearing. There were many who said, "The case is too old—just let it go," but we are glad to have seen it through to the end.

We realize the appellate hurdle is still ahead, but knowing we did everything in our power we are now comfortable placing the onus back on Zamora to show the appellate courts why he shouldn't be held responsible. We are thankful for the people who helped us complete this task, including TDCAA, the State Law Library, my trial partner and First Assistant Ralph Guerrero, and investigator Sergeant John Paul Garza, who convinced, without compromise, many agencies to dig into the back of the old record warehouses and brush the cobwebs off of some much-needed evidence. ❇

Endnotes

1 Pseudonyms are used to protect the victims' identities, and in this particular case, they memorialize Samantha Dean, deceased Kyle Police Department Crime Victim Liaison.

2 The Conoco records with a business record affidavit, along with Zamora's credit card records matching the store receipts, were filed with the district clerk in 1987 and were the only remaining physical evidence available at trial (other than a DPS lab report).

3 Google for old people.

4 The fingerprint card shows a DOB of March 25, 1954 (3/25/54). At his MDLST hearing, Zamora

denied being born on this date. He also failed to recognize the affixed signature or the alias of "Ray."

5 The parties submitted a stipulation into evidence that a diligent search by the Hays County Sheriff's Office resulted in the inability to locate this physical evidence.

6 The 1986 case consisted of the indictment, a court docket sheet, a cash bond, a waiver of arraignment, a continuance by the defense, a State's subpoena list, an announcement of ready by the State, a business records affidavit (consisting of Zamora's bank records from 1986 and a tally sheet from a Conoco gas station dated December 20–21, 1986), and a capias issued on August 31, 1987.

7 Abbreviated solely because of its ironic resemblance to "MOLEST."

8 *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

9 He was convicted of rape in Guadalupe County in 1972 and sentenced to five years' probation. DPS provided 10-point prints that delineate the following identifiers: Raynaldo "Ray" Y. Zamora, DOB 3/28/54, signed Ray Y. Zamora. Zamora claimed during the MDLST hearing that he did not recognize his name and insisted, "My name is R-E-Y." He further disavowed the signature.

10 He was convicted of the aggravated kidnapping charge in Guadalupe County in 1979, sentenced to seven years in TDCJ, and was awarded shock probation. Zamora was shown the judgment for Raymond Zamora and his TDCJ photograph, and he disavowed the name, but he admitted the photo "looks like me," further insisting, "My name is not Raymond." He was successfully discharged from this probation in February 1987. Guadalupe County was unaware of his newest arrest for the kidnapping and sexual assault of a child in Hays County.

11 When officers arrested Zamora, he gave the name Enrique Mata-Jiminez (his brother's name) with a DOB of December 21, 1958. He possessed several pounds of marijuana; a Texas driver's license with the name Reynaldo Ybarra Zamora (DOB 3/28/54) signed Ray Y. Zamora; an international driver's license with the name Reynaldo Ibarra Zamora (DOB 3/28/54) signed Ray I. Zamora; and a United States Birth Certificate card with the name Reynaldo Ybarra Zamora (DOB 3/28/54). Additional information contained in Zamora's TDCJ records show that he had a United States immigration detainer for illegal entry in connection with the use of his brother's name. Zamora testified that his brother was born in Mexico to a different mother and that it was his brother, Enrique, who owned the white Corvette.

12 We did our best to locate "Colonel Sanders" by issuing a subpoena for him near any farms in Kentucky. We had our own questions for the Colonel regarding the 11 secret herbs and spices.

13 Likely the same crash that caused him to forget about his court date.

14 The original 1986 fingerprint booking prints could not be located.

15 Footnotes infra 4, 9, 10, and 11 among many others admitted but not referenced.

16 The punishment range for aggravated kidnapping is five to 99 years or life in prison.

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They were just kids back then

Two girls, ages 8 and 9, had been kidnapped (and one sexually assaulted) in 1986. When they finally faced their perpetrator in court, they were in their 30s and had families of their own. Here's how Hays County found and helped these victims.

By Monika Lacey
Victim Assistance Coordinator in Hays County

I first learned of the Rey Zamora case by assignment. Every victim assistance coordinator (VAC) in our office is assigned to a specific prosecutor. Because this case was assigned to assistant CDA Brian Erskine, it was also assigned to me and our felony investigator, Sergeant John Paul Garza. Our investigators and VACs work closely on a daily basis searching for and contacting victims and witnesses.

Working with Sgt. Garza, who has access to investigative databases, we established leads to include phone numbers, addresses, and email addresses of the victims and possible relatives. The two victims in this case, Deana and Samantha,[1] were just 8 and 9 years old when Rey Zamora kidnapped them and sexually assaulted Deana. The original offense reports, dating back to 1986, were used to pull information to locate relatives and addresses, which eventually led us to the whereabouts of the now-adult victims.

After having poor luck, I came across a promising email address that Sgt. Garza had provided, and I sent a message to Samantha explaining who I was, where I was from, and if she was in fact the child victim in the offense report I was given dating back to 1986. Two days later, I received a response. It was indeed the same Samantha who had been kidnapped and then forced back into the car with Zamora. She remembered the events of that day and was willing to talk to me. I called her the next day and I explained that Zamora had been arrested and that he was in custody in Hays County. I went on to say that Samantha and I would be working together on the case and explained some of the things to expect from here on out. We discussed her state of mind and if she had ever told her husband and children what she had endured as a child. Samantha had spoken to her husband and children, who were very supportive of her decision to come forward and testify against Zamora. I told Samantha that I would like to meet with her in person and that I would arrange for the prosecutor to be present as well. She agreed and we met soon thereafter.

During our first meeting Samantha gave us her personal history. She described in great detail what had transpired the day she and her friend were taken by Zamora. We generally focus our first victim meeting on getting to know each other and familiarize our victim with the court process. However, Samantha jumped right into the kidnapping, recalling her abduction and molestation, becoming tearful but remaining coherent and expressive.

Samantha told us about her young friend Deana, who had lived nearby and attended the same elementary school. The two girls would often play together and take walks in their neighborhood. Zamora had worked for Samantha's father. Zamora claimed to be the uncle of another childhood friend, and he asked if the girls would show him where to find his niece. Using this excuse, he was able to lure the girls into his car. (See Brian Erskine's article on the crime and the trial on page 24.)

Finding Deana

Finding the second child victim, Deana, was harder, but she was important to the prosecution of this case and could lend further credibility to Samantha's testimony. At one point we believed Deana to be deceased because we could not obtain any information on her based on her name or any personal data. Finally Sgt. Garza and I traveled to the addresses on the original sheriff's report to speak to Deana's former neighbors. They were able to lead us to Deana—she was alive and well living in another city not far from

Buda. Sgt. Garza contacted her and mentioned Zamora's name—Deana knew instantly what the call was about. She is now married, has a family of her own, and is still able to recall Zamora and the kidnapping she endured at 8 years of age. We set up a meeting for Deana and Brian, the prosecutor.

Deana remembered watching Zamora dragging Samantha back into his car, after which Deana ran to Samantha's house to tell her mother that Samantha had been taken. Deana was very nervous as she told us about that day, but she held it together pretty well during her interview (and while testifying). We believe that this meeting between Deana and Brian may have been the first time she had spoken about the kidnapping since it happened.

The trial

When the trial was underway and it was Samantha's turn to testify, she was detailed, direct, and precise. As she recalled more graphic molestation details, she became highly emotional and the immense fear she must have endured as that small, scared child in Zamora's vehicle that day was obvious for everyone to see.

Before the trial began I explained the Victim Impact Statement (VIS) and encouraged both women to take the time to fill one out, as it serves as an aid to help us understand in depth just how this crime affected their childhoods and later adult lives. Samantha ultimately gave an allocution in which she expressed her long-standing fears of Zamora over these years, along with the joy she now felt in knowing he was no longer out there to get her. Deana was made aware that she could give an allocution, but her schedule did not permit her to stay any longer than simply to testify.

A lasting impression

Being in social services for over 20 years and in different jobs throughout my career, I have dealt with victims of all ages, from infants to the elderly. These two girls (now women) really made an impression. To endure such terrible events and still grow into loving parents and spouses is a joyous miracle. As I got to know the victims more, I suggested to both, as we often do, that counseling would be beneficial. We have found counseling to be a major help with apprehension and any fear crime victims may have about testifying and the aftermath of a criminal trial that so often accompanies victims—many of them still deal with relationship and familial anxieties. Both victims were given counseling contact numbers and a Crime Victim Compensation (CVC) application to help with the cost of a private therapist if they so choose.

This case taught me and my fellow VACs that it is never too late to establish a relationship with a victim, no matter how much time has gone by. ❇

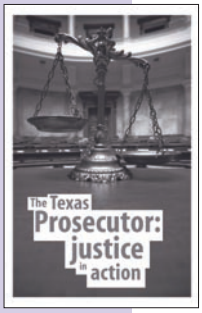
Endnote

1 Not their real names.

News Worthy

Prosecutor booklets available for members

We at the association recently updated our 12-page booklet 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 email the editor at sarah.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 compendium of bite-size legal tips

Shock probation is not a final conviction for enhancement purposes unless revoked

In the case of shock probation, the defendant is convicted of the charged crime, punishment is assessed, and his sentence begins to be executed; however, when the trial court places the defendant on shock probation, execution of the defendant's sentence is suspended. Accordingly, because further execution of the sentence is suspended, the conviction is not considered final for purposes of enhancement—just like with regular probation—unless and until the defendant's probation is revoked.[1]

No regular probation, no shock probation either

A defendant who is ineligible for regular community supervision under Article 42.12, §§3 or 4 is also ineligible for shock community supervision under Article 42.12, §6.[2]

By Melissa Hervey
Assistant District Attorney in Harris County

Consent to search

How consent may be demonstrated: A person's consent to search can be either express or implied, and it may be communicated to law enforcement in a variety of ways, including by words, actions, or by circumstantial evidence demonstrating that consent is implied—e.g., movements or gestures that convey implicit consent.[3]

Burden of proof: While federal law requires the government to establish that consent was voluntary by only a preponderance of the evidence, Texas law is well-settled that the State must prove the voluntariness of consent by clear and convincing evidence.[4] Whether consent was voluntary is a fact question that the trial court can resolve only after analyzing the totality of the facts and circumstances of the particular situation.[5]

Same-transaction, contextual extraneous-offense evidence

Evidence of the defendant's extraneous offenses is not admissible at the guilt phase of a trial to prove that a defendant committed the charged crime in conformity with a bad character.[6] However, extraneous offense evidence may be admissible when it has relevance apart from demonstrating bad-character conformity.[7] For example, extraneous-offense evidence may be admissible to show the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[8] Similarly, extraneous-offense evidence may be admissible to rebut a defensive theory at trial, such as self-defense or a claim that the State's witnesses are lying.[9]

Evidence of another crime, wrong, or act also may be admissible as same-transaction contextual evidence where "several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony ... of any one of them cannot be given without showing the others."[10] "The jury is entitled to know all relevant surrounding facts and circumstances of the charged offense," and same-transaction, contextual evidence can be essential to illuminate the nature, context, and circumstances of the charged crime.[11]

However, it is important to remember that, under Rule 404(b), same-transaction contextual evidence is admissible only when the charged offense would make little or no sense without also bringing in the evidence of the extraneous offenses, and it is admissible only to the extent that it is necessary to aid the jury's understanding of the charged offense.[12] ❇

Endnotes

1 *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992); see *Ex parte White*, 211 S.W.3d 316, 319 (Tex. Crim. App. 2007) ("As we have long held, '[i]t is well-settled that a probated sentence is not a final conviction for enhancement purposes unless it is revoked'") (quoting *Langley*, 833 S.W.2d at 143).

2 See Tex. Code Crim. Proc. Art. 42.12, §6(a) (a trial court may, within 180 days of the date that the execution of the sentence actually begins, place the defendant on shock community supervision if the judge determines that the defendant would not benefit from further incarceration, "the defendant is otherwise eligible for community supervision under this article," and the defendant has never been incarcerated in prison for a felony sentence); *State v. Dunbar,* 297 S.W.3d 777, 780 (Tex. Crim. App. 2009).

3 *Meekins v. State*, 340 S.W.3d 454, 470 (Tex. Crim. App. 2011); see *Valtierra v. State*, 310 S.W.3d 442, 451–52 (Tex. Crim. App. 2010) (consent to enter defendant's apartment and speak with a suspected runaway in bathroom was sufficient, when combined with other facts, to support voluntary implied consent to walk down the apartment hallway); *Johnson v. State*, 226 S.W.3d 439, 440–41 (Tex. Crim. App. 2007) (calling 911 and asking for police assistance constituted implied consent for police to enter defendant's home and investigate a homicide); *Gallups v. State*, 151 S.W.3d 196, 201 (Tex. Crim. App. 2004) (defendant's hand gesture made towards officer was sufficient to convey consent for the officer to enter defendant's home); *Thomas v. State*, 297 S.W.3d 458, 463-64 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (defendant voluntarily consented to the search of his pockets when he put his hands up, pushed his hip towards the officer, and "invit[ed] her to 'look.'"); *Kendrick v. State*, 93 S.W.3d 230, 234 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (defendant consented to a pat-down search when he stood up and raised his hands); *Simpson v. State*, 29 S.W.3d 324, 329 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (defendant consented to the search of his car when he nodded his head affirmatively, despite his subsequent testimony that he did not give consent).

4 *Meekins v. State*, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011); *State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997).

5 *Id.* at 459-60.

6 Tex. R. Evid. 404(b); *Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011); see *Nobles v. State*, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992).

7 *Devoe*, 354 S.W.3d at 469; *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003).

8 Tex. R. Evid. 404(b).

9 *Williams v. State*, 301 S.W.3d 675, 686-87 (Tex. Crim. App. 2009); *De La Paz v. State*, 279 S.W.3d 336, 345-47 (Tex. Crim. App. 2009).

10 *Devoe*, 354 S.W.3d at 469 (quoting *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000).

11 *Devoe*, 354 S.W.3d at 469; *Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993); *Quincy v. State*, 304 S.W.3d 489, 502 (Tex. App.—Amarillo 2009, no pet.).

12 *Devoe*, 354 S.W.3d at 469; *Pondexter v. State*, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996).

The rise of the synthetics

Synthetic marijuana and other "designer drugs" are easy to find and buy but hard to prosecute. Montgomery County prosecutors recently went after a fake-weed dealer.

When officers awoke Cameron Moseley from an apparent fake-weed hangover, he had been passed out in his vehicle with multiple trash bags full of fake weed and a shotgun. After Moseley was *Mirandized*, he told police that he was selling synthetic marijuana and that the shotgun belonged to him.

By Brian Foley
Assistant District Attorney in Montgomery County

When I read these facts in the offense report, I nearly stood up on my desk and shouted with excitement. Then I read that Moseley was a felon who was convicted of arson in North Carolina and even had a prior juvenile burglary of a habitation from my county. So he was a felon in possession of a firearm, and his minimum punishment would be 10 years for possession with intent to deliver a controlled substance Penalty Group 2-A over 400 grams. This case was looking great for the State.

The lab report identified the substance as XLR-11. "Great," I thought. "I'll check TDCAA's *Annotated Criminal Laws of Texas* book (the red one), flip to the Controlled Substances Act, and start looking for XLR-11. XLR-11 … XLR-11 … where is it?" I nearly threw the file across the room when I saw that XLR-11 wasn't listed among the known fake weeds in Penalty Group 2-A.

That could have been the end of our case against Cameron Moseley. But it wasn't, thanks to a careful reading of the Health & Safety Code and the Ninth Court of Appeals agreeing with me that Penalty Group 2-A is not an exclusive list. This article explains why the appeals court agreed and how we can prosecute these cases in any Texas jurisdiction right now.

The challenge of synthetic drugs

Synthetic drugs—including fake weed, molly, bath salts, and 25i-NBOMe (fake LSD)—are starting to ravage our state and our youth. They began appearing in our country with greater regularity in the mid- to late-2000s,[1] and the number of emergency room visits involving fake weed more than doubled from 2010 to 2011.[2] The packaging on these "designer drugs" is often bright and colorful, and they are marketed like legitimate products; they are even sold at gas stations and smoke shops. Until 2011 many of these substances were not regulated in Texas, and some remain unregulated today. Texas finally passed a ban on fake weed when the legislature created Penalty Group 2-A in the 82nd Regular Session, but it did not stop the surge in the use of fake weed.

People who manufacture and sell fake weed at gas stations do not label it "fake weed." The label says Kush, Fire & Ice, Scooby Snax, Spice, OMG, K2, Ultra Zombie Matter, or Psycho Potpourri (see the photos below for some examples). And the packages almost always say "not for human consumption." Why? Because drug dealers have figured out how to evade some federal drug laws. Synthetic drugs can be altered slightly so that their chemical structures fall outside the list of identified controlled substances prohibited by federal law. When this happens, federal prosecutors can use a controlled substance analogue provision that allows for prosecution if the substance in question is similar to an identified and prohibited substance. But before federal prosecutors can try someone for

selling a controlled substance analogue, they have to prove that the substance is "for human consumption."[3] That is why all the synthetic drug packaging in Texas communities has this language about not being for human consumption. Moreover, when the feds began identifying and prohibiting the main chemicals in fake weed, such as AM-2201, the packaging started to include the note, "Does not contain AM-2201." These criminals are smart.

When a prosecutor asks a chemist if an analogue is the same as its illegal counterpart, the chemist says absolutely not. But ask a junkie on the street if the drugs are the same, and the junkie cannot tell the difference. In most instances the slight changes to a designer drug's chemical makeup do not change the drug's effect on an individual at all.

Controlled substance analogues

In Texas, we do not toil under the same restrictions as our federal counterparts, even though we also have a controlled substance analogue provision. That provision allows prosecution of a non-listed substance if the substance 1) has a chemical structure substantially similar to the chemical structure of a controlled substance listed in the applicable penalty group *or* 2) is specifically designed to produce an effect substantially similar to or greater than a controlled substance listed in the applicable penalty group.[4] There is no requirement that state prosecutors prove that the product is "for human consumption." There is not even a requirement that the drug have a similar structure if the effect of the drug was designed to be "substantially similar to or greater than" an illegal drug.[5]

The problem is that the controlled substance analogue provision in Texas applies only to substances similar to those listed in Penalty Groups 1, 1-A, and 2.[6] Penalty Group 2-A did not make the cut. And once I came to that conclusion, Cameron Moseley's file nearly flew across the office for a second time. But I plodded onward determinedly.

I read that the Health & Safety Code broadly defines which drugs fall into Penalty Group 2-A: "Penalty Group 2-A consists of any quantity of a synthetic chemical compound that is a cannabinoid receptor agonist and mimics the pharmacological effect of naturally occurring cannabinoids, *including*: [a really long list of strangely named chemicals that, at the time of the bill's passage, were known to fall into the broadly defined category].[7] …"[8] That word "including" was key—when I read that, I knew that I just might have an argument encompassing Mr. Moseley. It was clear that he had possessed, as the statute says, well over 400 grams of a synthetic chemical compound that was a cannabinoid receptor agonist (meaning that it stimulates the same part of one's nervous system that THC does) and mimicked the pharmacological effect of naturally occurring cannabinoids (e.g., it gets you high).

In charging Moseley, I made sure that the indictment tracked the language of the Health & Safety Code's broad language for Penalty Group 2-A. I did not specify that the drug is XLR-11 because the name of the chemical doesn't matter—what mattered is whether we could prove it was fake weed using the general description in the beginning of the statute.

The defendant filed a motion to quash the indictment, and the trial judge granted the motion. I filed a State's appeal, and my brief to the Ninth Court of Appeals focused on the difference between the language of Penalty Group 2-A and the language of the other penalty groups with regard to legislative intent. The language "including"—followed by the list of drug names—means that Penalty Group 2-A is not an *exclusive* list of substances which fall into the category. In fact, "any quantity of a synthetic chemical compound that is a cannabinoid receptor agonist and mimics the pharmacological effect of naturally occurring cannabinoids" will fall into Penalty Group 2-A.

The intent of the legislature was clear through the bill analysis. "C.S.S.B. 331 criminalizes the manufacture, sale, and possession of the unregulated compounds by *broadly defining subclasses of synthetic cannabinoids* but explicitly listing compounds that have been identified in products currently on the market."[9] The legislature knew that fake weed was an increasing problem throughout the state and that the chemical compounds that make up fake weed would change rapidly. To allow for successful prosecution, lawmakers used this broad language and an *inclusive* list.

The language of Penalty Group 2-A is in stark contrast to all other penalty groups, which consist of only *exclusive* lists.

"Penalty Group 1 *consists of*: 1)

Continued on page 36

Continued from page 35

the following opiates … 2) *the following* opium derivatives … 3) *the following* substances … 4) *the following* opiates …"[10] This language clearly indicates the legislature's intention to make the list exclusive. Only "the following" substances are described by Penalty Group 1.

"Penalty Group 1-A *consists of*: lysergic acid diethylamide (LSD), including its salts, isomers, and salts of isomers."[11] That is the entirety of Penalty Group 1-A and it therefore doesn't need a list or a broadly defined category.

"Penalty Group 2 *consists of*: 1) any quantity of *the following* hallucinogenic substances …"[12] It does not have the word "including" before the list of substances and has the same use of "the following," making it an exclusive list.

"Penalty Group 3 *consists of*: 1) a material, compound, mixture, or preparation that contains any quantity *of the following* substances … 2) a material, compound, mixture, or preparation that contains any quantity *of the following* substances … 3) Nalorphine; 4) a material, compound, mixture, or preparation containing limited quantities *of the following* narcotic drugs. …"[13] Penalty Group 3 follows the same method of providing an exclusive list by limiting the substances to "the following."

"Penalty Group 4 *consists of*: 1) a compound, mixture, or preparation containing limited quantities of any *of the following* narcotic drugs. …"[14] Penalty Group 4 also follows the same method of providing an exclusive list by limiting substances to "the following."

Oral arguments on the State's appeal focused on the language and structure of Penalty Group 2-A.[15] And when the Ninth Court of Appeals in Beaumont released its opinion, the court said, "The Legislature's definition of the term 'including' is clear and unambiguous.[16] … In applying this definition to §481.1031, we conclude the specific list of substances identified in the statute is non-exclusive and Penalty Group 2-A should be interpreted as including any 'synthetic chemical compound that is a cannabinoid receptor agonist and mimics the pharmacological effect of naturally occurring cannabinoids.'[17] … There is nothing absurd about the Legislature drafting the statute to allow for the inclusion of those substances not yet identified by name when the statute was drafted but that share the characteristics identified in the statute as constituting Penalty Group 2-A."[18]

Defendant Cameron Moseley pled guilty after the appeal to the State's offer of 10 years in prison.

How do you actually prove the effects?

When the State seeks to prosecute under the broad category of Penalty Group 2-A, prosecutors must provide evidence of how the substance operates chemically. To prove this, I planned on using Gregory Enders, who works at Cayman Chemical in Ann Arbor, Michigan. He is an expert in this field and is familiar with the chemical structure of almost any fake weed out there. He has been gracious enough to allow me to refer him to other prosecutors facing these problems. And Mr. Enders knows more than merely the science—he is also a frequent presenter to legislatures around the country in their attempts to put synthetic drug-dealers behind bars. His assistance is something that other Texas prosecutors may want to secure for the highest-level drug offenses in their jurisdictions.

So how does one prosecute a misdemeanor-level fake weed case with a substance not yet listed in Penalty Group 2-A? Unfortunately, an analyst from the Department of Public Safety cannot testify to the effects of any Penalty Group 2-A substance, nor are there any studies on the matter because these drugs are too new. The best information we can get from a State chemist is verification that the substance is synthetic.

However, there may be a treasure trove of information on the packaging of the product itself. Along with references to the federal statute's requirement for "human consumption," the name of the chemical from which it was derived may be included on the packaging (to assure consumers that it "does not contain JWH-018"). But this has not been tried yet and there are no cases on the subject for sufficiency of the evidence. A final possibility may be to simply ask the defendant what the product does. Is it like marijuana? Does it affect users the same way?

Conclusion

It is not as easy to produce these products as it is to make methamphetamine—it is unlikely we will find a mobile home with a K2 lab inside. And the distribution of these

products is much broader in scope. We may want to focus our efforts on identifying the location from which the drugs are imported and who is distributing them. We may find, as the Drug Enforcement Administration did, that we can trace "the massive flow of drug-related proceeds back to countries in the Middle East and elsewhere."[19] The influx of synthetic drugs is particularly concerning when one realizes the criminal enterprises involved are crossing international boundaries.

I hope *State v. Moseley* helps prosecutors see that justice is done in every Texas jurisdiction. If you are struggling with how to charge a case like this or how to prove it, please contact me at brian.foley@mctx.org. I certainly don't have all the answers, but I may be able to point you to someone who does. ❇

Editor's note: As this issue of the journal was going to press, the Office of the Attorney General (OAG) sent out a news release to Texas prosecutors alerting them that the marketing and packaging of "designer drugs" often violates §§17.46(a) and (b) of the Texas Deceptive Trade Practices Act (DTPA). The OAG offers to bring a civil action under the DTPA against people and retail businesses that sell synthetic marijuana to obtain an injunction against the seller prohibiting sales of such drugs and obtain a judgment for civil penalties. Of course, county attorneys are authorized to bring their own DTPA actions against these drug sellers (without partnering with the attorney general), but those who want to join forces with the OAG are encouraged to contact Tommy Prud'homme at Tommy.Prud'homme@texasattorneygeneral.gov for more information. See also the cover story of this issue for more information on injunctions.

Endnotes

1 Synthetic Drugs Overview and Issues for Congress, Congressional Research Services R42066.

2 *Id.* at 2.

3 Title 21, U.S.C. Controlled Substances Act §813. "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."

4 Texas Health and Safety Code §481.106.

5 *Id.*

6 SB 173 adds XLR-11 to the list of Penalty Group 2-A substances and adds Penalty Group 2-A to the Controlled Substance Analogue provision in Texas Health and Safety Code §481.106. SB 461 adds Chapter 484 to the Texas Health and Safety Code providing civil and criminal penalties for the false and misleading packaging of abusable synthetic substances. Both are effective September 1, 2015.

7 These chemicals get their name from the initials of the person who discovered them. For example, JWH-018 was discovered by John W. Huffman. Mr. Huffman was an organic chemist from the University of Clemson who began research on synthetic marijuana in the 1980s.

8 Texas Health and Safety Code §481.1031

9 Shapiro et al., Criminal Justice Committee Report, March 23, 2011, Bill Analysis, Senate Research Center, 82R16861 JSC-D (emphasis added).

10 Tex. Health & Safety Code §481.102 (emphasis added).

11 Tex. Health & Safety Code §481.1021 (emphasis added).

12 Tex. Health & Safety Code §481.103 (emphasis added).

13 Tex. Health & Safety Code §481.104 (emphasis added).

14 Tex. Health & Safety Code §481.105 (emphasis added).

15 I used the analogy that the legislature could have banned all sodas, "including" a sub-group of Coke, Cherry Coke, and Vanilla Coke, and another sub-group of Dr Pepper, Cherry Dr Pepper, Cherry Vanilla Dr Pepper, etc., but that as long as I could prove the substance was soda, then it would fall under the new penalty group of banned sodas. The oral argument concluded with one of the justices asking for assurance that Dr Pepper was still legal—followed by laughter from all parties and the court.

16 *State v. Moseley*, 09-14-00279-CR (Tex. App.—Beaumont, 2015).

17 *Id.*

18 *Id.*

19 U.S. Drug Enforcement Administration, "Updated Results from DEA's Largest-Ever Global Synthetic Drug Takedown Yesterday," *Headquarters News*, June 26, 2013.

Answers to FAQs about our Annual Criminal & Civil Law Update

This time of year, we field lots of questions about our Annual Update, which is in Corpus Christi September 23–25. Here are a few answers to your burning questions.

Question: "The Omni Bayfront Hotel is sold out. Does TDCAA have any rooms or know when some will open up?"

Answer: No, but several prosecutor's offices scoop up dozens of rooms in advance, and this is the time of year they start to cancel the rooms they don't need. It's best to make a back-up reservation at another hotel and continue to check for availability at the Omni throughout the summer if you really want to stay there.

Q: "Our office has extra hotel rooms we reserved but that we're not planning on using. Do you want them?"

A: No, thank you. Please release them back to the hotel so other members can use them. TDCAA has our own block for staff and speakers.

Q: "I'm a speaker at the conference—do I need to make my own hotel reservation?"

A: No. TDCAA will send packets to all the speakers and will make hotel reservations for you once you fill out the travel request form and return it to us.

Q: "I'm on a TDCAA committee—do y'all make my hotel reservations for me, or do I need to?"

A: The only reservations TDCAA makes are for the parent board of directors and the foundation board. All other committees and boards should make their own.

Q: "I'd like to play in Wednesday's golf tournament."

A: Great! Please RSVP to Mike Waldman at michael.waldman@co.bell.tx.us.

Q: "Can I exhibit or be a vendor?"

A: Sure! Please email Patrick Kinghorn at patrick.kinghorn@tdcaa

No, it's not just your imagination; the Texas Rules of Evidence *do* look different

Effective April 1, 2015,[1] the Texas Rules of Evidence are new and improved, incorporating many non-substantive, stylistic changes, as well as a few substantive amendments to Rules 511, 613, and 902(10).

In its order, "Final Approval of Amendments to the Texas Rules of Evidence," dated March 12, 2015, the Texas Court of Criminal Appeals explained that the rules were amended and generally reformatted for two reasons. First, to "make the rules more easily understood and to make the style and terminology consistent throughout." Second, to be as consistent as possible with the Federal Rules of Evidence—which were similarly restyled and amended, effective December 1, 2011—while avoiding major substantive change in Texas evidence law.

By Melissa Hervey
Assistant District Attorney in Harris County

What substantive amendments were made to the rules?

Only a few of the Texas Rules of Evidence have been substantively amended. First, intended to align Texas evidentiary law regarding the waiver of a privilege by voluntary disclosure with Federal Rule of Evidence 502—concerning the attorney-client privilege, work-product privilege, and limitations on waivers of those privileges—Texas Rule of Evidence 511 was substantively amended as shown on the opposite page. (To make the changes easier to see, the previous versions of the rules are in white boxes while the current, amended versions are in purple. The fonts are also different.)

Previous version of Rule 511

Rule 511. Waiver of Privilege by Voluntary Disclosure

A person upon whom these rules confer a privilege against disclosure waives the privilege if:
(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character train insofar as such communications are relevant to such character or character trait.

Current, amended version of Rule 511

Rule 511. Waiver by Voluntary Disclosure

(a) General Rule
A person upon whom these rules confer a privilege against disclosure waives the privilege if:
(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character train insofar as such communications are relevant to such character or character trait.

(b) Lawyer-Client Privilege and Work Product; Limitations on Waiver.
Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) Disclosure Made in a Federal or State Proceeding or to a Federal or State Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or state proceeding of any state or to a federal office or agency or state office or agency of any state and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:
(A) the waiver is unintentional;
(B) the disclosed and undisclosed communications or information concern the same subject matter; and
(C) they ought in fairness to be considered together.

(2) Inadvertent Disclosure in State Civil Proceedings. When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3(d).

(3) Controlling Effect of a Court Order. A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(4) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

As indicated in the "Comment to 2015 Restyling" regarding these substantive amendments to Rule 511, it is clear that subsection (a) of restyled Rule 511 embodies the previous version of the rule, though now cast as the general rule of the provision, while new subsection (b) incorporates the tenets of Federal Rule of Evidence 502. Notably, though, as with Federal Rule of Evidence 502, subsection (b) of restyled Rule 511 pertains only to the disclosure of communications or information covered by the lawyer-client privilege or work-product protection—not to any other privileges enumerated in Article V of the Texas Rules of Evidence or to the waiver of those other privileges or protections.

The second Texas Rule of Evidence that was substantively amended by the rules-restyling project is Rule 613, as illustrated by the following comparison between the previous and the amended versions of the rule (see page 40):

Continued from page 39

Previous version of Rule 613

Rule 613. Prior Statements of Witnesses; Impeachment and Support

(a) Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

(b) Examining Witness Concerning Bias or Interest. In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when, and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

(c) Prior Consistent Statements of Witnesses. A prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in 801(e)(1)(B).

Current, amended version of Rule 613

Rule 613. Witness's Prior Statement and Bias or Interest

(a) Witness's Prior Inconsistent Statement

(1) Foundation Requirement. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:

(A) the contents of the statement;
(B) the time and place of the statement; and
(C) the person to whom the witness made the statement.

(2) Need Not Show Written Statement. If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) Extrinsic Evidence. Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

(5) Opposing Party's Statement. This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

(b) Witness's Bias or Interest

(1) Foundation Requirement. When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement—whether written or oral—to prove the witness's bias or interest, a party must tell the witness:

(A) the contents of the statement;
(B) the time and place of the statement; and
(C) the person to whom the statement was made.

(2) Need Not Show Written Statement. If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

(4) Extrinsic Evidence. Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

(c) Witness's Prior Consistent Statement

Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

As noted by the Comment to 2015 Restyling accompanying the amended version of Rule 613, the revised rule retains the requirement from the previous version that a witness be given an opportunity to explain or deny the witness's prior inconsistent statement or the circumstances or statement that tend to show the witness's bias or interest. However, unlike the previous variant of the rule, amended Rule 613 does not require the attorney seeking to impeach the witness to afford the witness that opportunity; rather, the impeaching attorney may simply cross-examine the witness regarding the witness's prior inconsistent statement or the circumstances or statement that tend to show the witness's bias or interest and then leave it to the witness's proponent to provide the witness with the opportunity, during redirect examination, to explain the statement or circumstances.

Importantly, though, amended Rule 613 still prohibits the impeaching attorney from introducing extrinsic evidence of the witness's prior inconsistent statement or of the witness's bias or interest unless the witness has first been examined about the statement and has failed to unequivocally admit making the statement or having the bias or interest. Apart from these substantive amendments, all other structural and textual changes to Rule 613 are intended to be purely stylistic.

Finally, Texas Rule of Evidence 902(10), regarding self-authenticating business records accompanied by affidavit, is also substantively changed from its earlier version. Rule 902(10) was actually amended before the restyling of the other evidentiary rules had been announced, and its new, altered version has been effective since September 1, 2014. However, the current, updated edition of Rule 902(10) has been wholly incorporated into the newly restyled rules and, when compared with its previous version, demonstrates the following substantive alterations:

Previous version of Rule 902(10)

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ...

(10) Business Records Accompanied by Affidavit:

(a) Records or photocopies; admissibility; affidavit; filing. Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavits were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties, or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to the commencement of trial in said cause.

(b) Form of affidavit. A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit [see page 42 for the sample form]:

Continued from page 41

No. _____

John Doe	§	IN THE _____
(Name of Plaintiff)	§	
v.	§	COUNTY IN AND FOR
John Roe	§	
(Name of Defendant)	§	_____ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows: My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated: I am the custodian of the records of _____. Attached hereto are ___ pages of records from _____. These said ___ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicate of the original.

_____ Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, _____.

_____

Notary Public, State of Texas

Notary's printed name:_____ My commission expires:_____

(c) **Medical expenses affidavit.** A party may make *prima facie* proof of medical expenses by affidavit that substantially complies with the following form:

Affidavit of Records Custodian of _____

STATE OF TEXAS § COUNTY OF _____

Before me, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows: My name is _____. I am of sound mind and capable of making this affidavit, and personally acquainted with the facts herein stated.

I am a custodian of records for _____. Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that _____ provided to _____ on _____.

The attached records are a part of this affidavit. The attached records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the service provided, to make the record or to transmit information to be included in the record. The records were made in the regular course of business at or near the time or reasonably soon after the time the service was provided. The records are the original or a duplicate of the original.

The services provided were necessary and the amount charged for the services was reasonable at the time and place that the services were provided. The total amount paid for the services was $_____ and the amount currently unpaid but which _____ has a right to be paid after any adjustments or credits is $_____.

_____ Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, _____.

_____ _____

Notary Public, State of Texas Notary's printed name

My commission expires:_____

Current, amended version of Rule 902(10)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: ...

(10) Business Records Accompanied by Affidavit.

The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).

(A) Service Requirement. The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.

(B) Form of Affidavit. An affidavit is sufficient if it includes the following language, but this form is not exclusive. The proponent may use an unsworn declaration made by penalty of perjury in place of an affidavit:

1. I am the custodian of records [or I am an employee or owner] of _____ and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.
2. Attached are ___ pages of records. These are the original records or exact duplicates of the original records.
3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [or It is the regular practice of _____ to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]
4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [or It is the regular practice of _____ for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them.]
5. The records were kept in the course of regularly conducted business activity. [or It is the regular practice of _____ to keep this type of record in the course of regularly conducted business activity.]
6. It is the regular practice of the business activity to make the records.

As the Comment to the 2014 amendment to Rule 902(10) explains, the most notable change to the rule is that the requirement in the previous version, that business records and their accompanying affidavit be filed with the clerk of the court before trial, was removed at the direction of the Texas Legislature.[2] In lieu of that obligation, amended Rule 902(10) now imposes a pretrial service requirement—meaning that it is no longer sufficient to simply file business records and their accompanying affidavit with the trial court clerk and then notify the attorney for the opposing party of that fact; rather, the proponent of the business records must now serve the records and their accompanying affidavit on the opposing party at least 14 days before trial via any method authorized by Texas Rule of Civil Procedure 21a.[3] Somewhat less noteworthy, amended Rule 902(10) also omits subsection (c) of the previous version of the rule, the medical expenses affidavit form, which was removed as unnecessary.[4]

Non-substantive amendments

Non-substantively, the rules were amended in two general ways. First, the rules were structurally reformatted to make them easier to read and understand. To do this, previously cumbersome rules were broken down into shorter, more concise sections, using progressively indented subsections and clear subsection headings. Further, many of the horizontal lists in the rules were eliminated and replaced with vertical lists, which are more discernible. For an example of this structural reformatting, compare the previous and amended versions of Rule 202 (on page 44):

Continued from page 43

Previous version of Rule 202

Rule 202. Determination of Law of Other States

A court upon its own motion may, or upon the motion of a party shall, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Current, amended version of Rule 202

Rule 202. Judicial Notice of Other State's Law

(a) Scope. This rule governs judicial notice of another state's, territory's, or federal jurisdiction's:

- Constitution;
- public statutes;
- rules;
- regulations;
- ordinances;
- court decisions; and
- common law.

(b) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) Notice and Opportunity to Be Heard.

(1) Notice. The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.

(2) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Determination and Review. The court—not the jury—must determine that law of another state, territory, or federal jurisdiction. The court's determination must be treated as a ruling on a question of law.

Second, apart from structural reformatting, the text of the rules was also amended in four different but non-substantive ways to make them more straightforward:

1) the restyled text reduces the use of inconsistent terms that convey the same meaning in different ways—e.g., the rules no longer arbitrarily switch between "accused" and "defendant"; between "party opponent" and "opposing party"; or between "action," "case," and "proceeding," and the various formulations of civil and criminal cases;

2) the restyled text minimizes the use of inherently ambiguous words—e.g., the rules replace "shall" with the clearer words of "must," "may," or "should," depending on which of those words is most correct in light of the context and established interpretation of the rule at issue;

3) the amended text lessens the use of redundant "intensifiers," expressions that were originally intended to add emphasis, but instead "state[d] the obvious" and tended to create negative implications for other evidentiary rules—e.g., the text of Rule 602, regarding the requirement that a witness have personal knowledge of the matter to which he is attesting, was amended from, "Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness" to "Evidence to prove personal knowledge may consist of the witness's own testimony," eliminating the repetitive intensifier "but need

not" and simplifying the rule; and

4) the restyled rules also omit words and concepts that are archaic or repetitive.

Despite these structural and textual changes, it is important to note that the rules' numbers were not changed during the amendments. That being said, the subsections of some of the rules were reorganized, and the titles and subheadings of some of the rules were changed for purposes of simplification and clarity. For instance, if you compare the previous and amended versions of Rule 901(b)(1)–(10), you will see that the subheadings for the examples of evidence that may satisfy the authentication or identification requirement of Rule 901 are modified but more descriptive in the restyled version of the rule.

What do the amendments to the rules mean?

Although there are few substantive amendments to the Texas Rules of Evidence, we should be aware of and must adhere to those changes going forward, given that the rules of evidence in effect at the time of trial will control. Cases tried before the April 1, 2015, revisions went into effect, however, will be reviewed on appeal with consideration of only the previous version of the rules that were in effect at the time of trial.[5]

Regarding the structural reformatting and text simplification changes to the evidentiary rules, recall that the Court of Criminal Appeals has emphasized that the non-substantive "restyling changes are intended to be stylistic only." Thus, it is apparent that the court did not intend the reformatting or diction amendments to alter the way in which practitioners and courts interpret or apply the rules. Instead, let's hope that the alterations will simply clarify the rules and make them easier for us to read and use.

So while we may not get 33 percent more free with the freshly restyled Texas Rules of Evidence, at least we've now got a new-and-improved version of the rules that we can construe and wield more easily. Oh, and we also have the satisfaction of knowing that we're not just seeing things—the rules look, and actually are, a little different. ❇

Endnotes

1 The amended version of Rule 902(10) has actually been in effect since September 1, 2014.

2 See Act of May 17, 2013, 83rd Leg. R.S., ch. 560 § 3, 2013 Tex. Gen. Laws 1509, 1510 (SB 679).

3 Rule of Civil Procedure 21a(a) states that documents filed electronically must be served on an opposing party through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. Alternatively, if the email address of the party or attorney to be served is not on file with the electronic filing manager, or if the document at issue is not filed electronically, the proponent of the document may serve the document in person, by mail, by commercial delivery service, by fax, by email, or by any other method the court in its discretion may direct. Rule 21a(b) provides the following regarding when service is complete: (1) if service is by mail or commercial delivery service, when the document is deposited, postpaid, and properly addressed, in the mail or with the commercial delivery service; (2) if service is by fax, when the document is received, except that if the document is received after 5:00 p.m. local time at the recipient's location, service is deemed to have occurred on the following day; or (3) if service is electronic, when the document is transmitted to the serving party's electronic filing service provider.

4 The medical expenses affidavit form that appeared in the prior version of Rule 902(10)(c) is still available in §18.002(b-1) of the Texas Civil Practices and Remedies Code.

5 See, e.g., *Rahim v. State*, No. 06-14-00147-CR, 2015 WL 2437509, at *1-2 n.1 (Tex. App.—Texarkana May 22, 2015, no pet. h.) (mem. op., not designated for publication); see also *Kesterson v. State*, 997 S.W.2d 290, 293 n.1 (Tex. App.—Dallas, no pet.) ("We analyze the case under the evidentiary rules in effect at the time of trial").

Concurrent causation for dummies

An introduction to the issue of concurrent causation for prosecutors who have yet to encounter it

Say an intoxicated driver causes a collision that seriously injures or kills another person—it's a tragedy all too common on our roads and all too familiar to those of us who prosecute intoxication assaults and intoxication manslaughters. This kind of case seems, at first glance, to be simple enough in terms of the intoxicated driver's culpability—but what if the victim had been drinking too?[1] What if the victim survives the crash, but his family decides to remove life support after doctors determine there is no realistic hope of recovery?[2] Are these kinds of intervening acts truly detrimental to the State's case? Are they what the law defines as "concurrent causes?" If so, what is a prosecutor to do about these issues?

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Concurrent causation is an issue that is bound to arise in the life of any prosecutor who deals with intoxication offenses such as intoxication manslaughter and intoxication assault. This article is designed to provide an introduction to the issue of concurrent causation for the prosecutor who has yet to deal with this issue. Specifically, it will address the statutory basis for concurrent causation, the practical application of that term in caselaw, and the jury charge implications of raising the issue of concurrent causation.

The statute

Concurrent causation is defined in Texas Penal Code §6.04(a), which reads in relevant part:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

What is a concurrent cause?

"A concurrent cause is 'another cause' in addition to the actor's conduct, 'an agency in addition to the actor.'"[3] The law does not require an actor's conduct to be broken down into its component parts so that each could be a concurrent cause. For example, the driver's exhaustion or difficulty seeing into the sun is not a concurrent cause in addition to his intoxication.[4] Even in scenarios where acts or omissions of other persons were raised, they still do not raise the issue of concurrent causation if there is no evidence that they were clearly sufficient by themselves to cause the result, and the actor's actions were clearly insufficient.[5]

A scenario where a defendant contends that the result was in no way caused by his action but was instead attributable entirely to some other cause also does not raise the issue of concurrent causation.[6] To prove the defendant's guilt of the charged offense, the State must prove a "but for" causal connection between the defendant's conduct and the resulting harm.[7] In the context of intoxication manslaughter and intoxication assault, this means the State must prove that the death of or injury to another person would not have occurred but for the defendant's intoxication.[8]

To be entitled to an instruction on concurrent causation under Penal Code §6.04 in the jury charge, the evidence must raise the issue of concurrent causation.[9] To raise the issue of concurrent causation, there must be some evidence that the concurrent cause was clearly sufficient by itself to produce the result and the actor's conduct was clearly insufficient to cause the result.[10] Questions propounded by counsel are not evidence sufficient to raise the issue of concurrent causation.[11]

A defendant successfully raising a concurrent causation issue and obtaining a jury instruction on it is not fatal to the State's case. This is because even if a concurrent cause or causes exist, "two possible combinations exist to satisfy the 'but for' requirement: (1) the defendant's conduct may be sufficient by itself to have caused the harm, regardless of the existence of a concurrent cause; or (2) the defendant's conduct and the other cause together may be suf-

ficient to have caused the harm."[12] This still allows the State to obtain a conviction even where a concurrent cause is shown and the defense obtains a jury charge on the issue. By contrast, if the concurrent cause "is clearly sufficient, by itself, to produce the result and the defendant's conduct, by itself, is clearly insufficient, then the defendant cannot be convicted."[13]

More resources

There are many resources available for prosecutors looking for more information on the issue of concurrent causation. Richard Alpert's book, *Intoxication Manslaughter*, which is available from TDCAA at www.tdcaa.com/publications, has a thoughtful section on how to approach the causation issue in voir dire. There are also numerous practice guides and journal articles that provide useful outlines on the workings of concurrent causation law and summaries of cases on the issue.[14] Model jury instructions can also be found, as can in-depth discussions on the applicability of concurrent causation to the jury charge.[15]

Other prosecutors are, of course, also great resources. Please feel free to contact me if I can be of any assistance. ❇

Endnotes

1 See *Hale v. State*, 194 S.W.3d 39, 42-43 (Tex. App.—Texarkana 2006, no pet.) (discussing whether State's evidence was legally sufficient in light of concurrent causation evidence that victims may have been drinking and their vehicles were either stopped or moving slowly in street when collision occurred).

2 See *Quintanilla v. State*, 292 S.W.3d 230, 234-35 (Tex. App.—Austin 2009, pet. ref'd) (discussing family's decision to remove life support after victim sustained severe brain trauma in crash with intoxicated driver and concluding that removal of life support was at most a concurrent cause and not an alternative cause of death).

3 *Robbins v. State*, 717 S.W.2d 348, 351 n.2 (Tex. Crim. App. 1986).

4 *Id.*; *McKinney v. State*, 177 S.W.3d 186, 201-02 (Tex. App.—Houston [1st Dist.] 2005, *aff'd on other grounds*, 207 S.W.3d 366 (Tex. Crim. App. 2006).

5 See, e.g., *Remsburg v. State*, 219 S.W.3d 541, 545 (Tex. App.—Texarkana 2007, pet. ref'd) (no evidence that officer's act of jumping into window of appellant's car enough to cause his injuries where appellant drove into ditch with officer hanging out of window); *Deboer v. State*, No. 01-96-00492-CR, 1999 WL 660153 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (not designated for publication) (no evidence that emergency personnel's slow pace in treating victim was sufficient to cause victim's death and defendant's actions clearly insufficient).

6 See *Barnette v. State*, 709 S.W.2d 650 (Tex. Crim. App. 1986).

7 *Robbins*, 717 S.W.2d at 351.

8 *Id.*; see Tex. Pen. Code §§49.07, 49.08.

9 *Giddens v. State*, 256 S.W.3d 426, 432 (Tex. App.—Waco 2008, pet. ref'd); *Bell v. State*, 169 S.W.3d 384, 394 (Tex. App.—Waco 2005, pet. ref'd); *Hernandez v. State*, No. 14-09-00753-CR, 2010 WL 5132567 (Tex. App.—Houston [14th Dist.] Dec. 14, 2010, pet. ref'd) (not designated for publication); see *Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994). See also 1 Comm. On Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges, Defenses PJC §B1.8 (2010) (alternative causation or evidence that simply negates the State's affirmative proof of the offense does not support a jury charge of any kind).

10 *Bell*, 169 S.W.3d at 395; *Ramirez*, 2010 WL 5132567 at *2; *Remsburg*, 219 S.W.3d 541.

11 *Ramirez*, 2010 WL 5132567 at *2, *citing Kercho v. State*, 948 S.W.2d 34, 37 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd).

12 *Robbins*, 717 S.W.2d at 351.

13 *Id.*

14 See, e.g., 8 Michael J. McCormick et. al., *Texas Practice: Texas Criminal Forms and Trial Manual* §§103.7, 103.8 (2015).

15 See *Id.* at §103.8; 1 Comm. On Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges, Defenses PJC §§B1.8-B1.8-8 (2010) (providing a lengthy discussion of concurrent causation law and jury charge practice including citations to cases on this issue).

A murder case with no body

Julie Ann Gonzalez disappeared in 2010 and was never seen again. The last person to see her alive was George DeLaCruz, her estranged husband, who was recently convicted of her murder.

By Gary Cobb and Monica Flores
Assistant District Attorneys in Travis County

George DeLaCruz and Julie Ann Gonzalez met while attending Crocket High School in South Austin. After graduation, the young couple moved into a place of their own. After about a year, they had a daughter, Layla, who was the center of Julie Ann's attention. The young family relocated a couple of times as they struggled to make ends meet and eventually moved in with George's mother, Victoria DeLaCruz, and his three younger sisters. After a few years of dating, George and Julie Ann got married in May 2009.

Though they married, Julie Ann was not happy with George, and she struggled to make the relationship work. She was ambitious and hardworking and wanted financial security. She had received a scholarship to attend St. Edward's University but dropped out after she became pregnant with Layla. Needing to financially support her family, Julie Ann began to work at a Walgreens in East Austin as a cashier. She enrolled in a pharmacy tech school, eventually earned her pharmacy tech degree, and was promoted to the Walgreens pharmacy.

Unlike Julie Ann, George was not motivated and seemed satisfied with living at home with his mother and sisters. George did not have steady employment, working on and off as a security guard and construction worker. He spent the majority of his time playing video games on his Xbox and spending money on his gaming addiction. Julie Ann was not happy about George playing Xbox for hours on end while she worked, and she voiced her concerns to him when his gaming interfered with his responsibilities as a father. It became commonplace for Julie Ann to come home from work and find George playing on his Xbox and their infant daughter wearing dirty clothes with a soiled diaper.

After a few months, Julie Ann realized that she had made a mistake in marrying George. She and Layla moved out of the house and into her grandfather's place in Dripping Springs. She filed for divorce in December 2009, only seven months after they married.

Three months later, Julie Ann disappeared and was never seen again.

Rekindling an old flame

When Julie Ann was in high school (before she met George), she worked at her grandfather's taco stand and convenience store. She was a responsible and hardworking employee—friendly, personable, and well-liked by the customers.

While working at her grandfather's store, 17-year-old Julie became friends with a coworker, Aaron Breaux, who was 23. The longer they worked together, the closer they became, and a mutual love interest began to develop. Julie Ann's mother, Sandra Soto, kept a close eye on them and noticed that her teenage daughter was getting too close with an older man. Sandra confronted Julie Ann and Aaron about the nature of their relationship and made it clear that they could not see each other romantically given the difference in their ages. When it was evident to Sandra that Julie Ann and Aaron continued to pursue a relationship, Sandra met with Aaron and fired him from her father's store. This ended their relationship, and Julie Ann was upset and heartbroken.

Several years later, when Julie Ann's marriage to George had begun to deteriorate, she ran into Aaron at the grocery store. Happy to see each other, Julie Ann and Aaron embraced, chatted for some time, and exchanged contact information. Soon after, they began to email back and forth and arranged to go on a date. It was evident that their feelings for each other had resurfaced and

their affection was strong despite the passage of time. Excited about their reconnection, Julie Ann and Aaron began to see each other romantically.

Julie Ann confided in Aaron that she was not happy in her marriage and was going to file for divorce. As their love grew for each other, Julie Ann and Aaron made plans for their future: moving in together, getting married, and having children. They were likeminded: Aaron, like Julie Ann, was ambitious, hardworking, and responsible, and he had goals for his life, his own apartment, and steady employment as an electrician.

Knowing that Julie Ann was not legally divorced and that George was not taking their breakup well, Julie Ann expended great effort to keep her relationship with Aaron a secret from her husband. She introduced Aaron to little Layla as her friend and even made it a point to not use Aaron's name around the little girl so that Layla would not inadvertently mention him to her father. She also marked her MySpace page private so that only her "friends" could view it—once she separated from George, she deleted him as a friend. Unfortunately, she remained "friends" with George's cousin, Ariel Jaimes, so Ariel (and eventually George too) had access to her posts. In March 2010, just days before her disappearance, Julie Ann posted a photo of her and Aaron at the Austin Zoo. After Julie Ann disappeared, a data extraction of George's cell phone, made pursuant to a search warrant, revealed that George had stored this photo of Julie Ann and Aaron at the zoo on his cell phone.

Increasingly erratic behavior

As George realized that he was losing Julie Ann, his mental well-being deteriorated. The two did not spend the Thanksgiving holiday together in 2009, and after that, George sought Julie Ann's attention by claiming to have amnesia from an accident at work. He acted like he did not recognize her or Layla, ignoring and keeping his distance from his daughter on one particular visit even though she was happy to see her dad and was trying to get his attention. George eventually admitted to Julie Ann that he had faked amnesia.

Another way George sought Julie Ann's attention was by attempting suicide. In January 2010, two months before Julie Ann disappeared, she picked up Layla from George's house. George told her that there was a note in Layla's diaper bag, and George asked her to read at a later time. Julie Ann left the house and stopped her car to read the note, which turned out to be a suicide letter. Concerned for his safety, Julie Ann rushed backed to George's house; he had taken some pills, and Julie Ann called 911. Medical personnel were able to save him.

On a number of occasions, George arrived unannounced at Walgreens, where Julie Ann worked; he'd just hang out in the lobby, making it difficult for Julie Ann to concentrate on her job. Her supervisor, Mylinda Burrow, noticed George's stalking and constant calling and became concerned for Julie Ann's safety. Mylinda asked George to leave the Walgreens store, and George complied. Julie Ann confided in Mylinda that she was worried and felt that George was "up to something." Once, Julie Ann called Mylinda when she was in her car and said that George was following her in his own car. Julie Ann said that if something ever happened to her, "it was him"—meaning George.

During child-exchange interactions, George gave Julie Ann a hard time and tried to keep her from leaving his house, sometimes restraining her by the arms or blocking the doorway. He went as far as jumping on Julie Ann's car as she tried to drive away. His increasingly odd behavior forced Julie Ann to ask family members to accompany her when she was going to drop off or pick up Layla. She also asked the family law court for supervised visits for Layla, as she was concerned for her daughter's safety. George agreed to have his child visitation schedule coincide with his mother's work schedule so that his mother would be home whenever Layla was with him.

Julie Ann filed for divorce in December 2009—three months before her disappearance. George repeatedly refused to sign the divorce papers and waiver of service, telling her that he did not want the divorce. Before Julie Ann was able to hire a process server to serve George with papers, she disappeared. George was the last person to see her alive on March 26, 2010. The next business day, Monday the 29th, George finally signed the divorce paperwork and filed it with the district clerk's office at the downtown courthouse.

Letting her guard down

On Thursday, March 25, Julie Ann was supposed to pick up Layla from

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George's house, but George asked if he could have one more day with his daughter. Julie Ann agreed to get Layla on Friday and seemingly let her guard down: She did not ask a family member to accompany her to get Layla that morning, and George's mother wouldn't be there either.

The night before, Julie Ann spent the night with Aaron at his apartment. They had had dinner and stayed in watching movies. Early the next morning, Aaron woke up Julie Ann when he was heading off to work to tell her that he loved her. She asked him to take the day off and spend it with her since she didn't have to work that day, but Aaron had to decline—he would not get paid if he skipped work. So he kissed Julie Ann goodbye and told her that he would see her later that evening.

After Aaron left, Julie Ann handwrote him a long love letter where she told him how much she wished that he was still cuddling with her in bed and that she loved him very much. Julie Ann expressed how happy she was to be in a relationship with him and that he made her feel special and beautiful. She looked forward to getting married and having a son together. Julie Ann left the letter for Aaron on his bed, then she left to pick up Layla at George's house. Aaron never heard from her again.

Gone missing

Julie Ann was very close to her family and friends. She was in frequent contact with her girlfriends, Amanda and Natasha; her new boyfriend, Aaron; her aunt Dora, and her cousins Michael and Alyssa. After she went to George's house to get Layla, posts on her MySpace page popped up, stating, "going away hate all this BS want to run away [sic]." This was uncharacteristic for Julie Ann, so family and friends began to call her cell phone to check on her, but she would not answer or return their calls. Instead, Aaron, Michael, and Alyssa received text messages from Julie Ann's cell phone saying that she was OK and just wanted to be left alone. Aaron was not convinced that it was Julie Ann who was sending those text messages. He challenged the person with Julie Ann's cell phone to text Aaron his middle name. The response was, "I don't have time to play games."

Throughout Aaron's workday, he continued to call Julie Ann, but she would not answer his phone calls. Later that day, he read her MySpace posts that she was going to Colorado with a web designer named James and that she hoped James would show her a good time. This new development upset Aaron so he began frantically calling her. Finally Aaron texted Julie Ann and gave her an ultimatum: If she did not call to explain what was going on, their relationship was over. Julie Ann never responded. When Aaron got home from work that evening, he discovered the handwritten love letter. He was confused and did not know what was going on or what to believe.

The following evening, Julie Ann's family and Aaron gathered at Aunt Dora's house and discussed their concerns for her whereabouts and safety. Knowing that Julie Ann was a protective and devoted mother to Layla and that she was not one to become disconnected from her family and friends, Aunt Dora called 911 to make a missing person's report. An Austin Police Department officer arrived, and the family explained that Julie Ann's unexpected disappearance caused them great concern. They believed that George might have hurt her: Julie Ann did not trust George with Layla and would never have left her behind with her father. Further, the family said that although Julie Ann's MySpace posts said that she was OK and that she was going away to Colorado, the family was sure that she had not been the one to post these messages.

The police officer documented their concerns in a report and then briefed his supervisor. Because there was no sign of imminent danger, the officer told the family that there would be no further action.

Finding Julie Ann's car

The following morning, Aunt Dora found out her niece hadn't shown up for work or called to say that she'd be gone. As Dora drove home to South Austin, she passed another Walgreens location and noticed that Julie Ann's 2006 Gold Impala was parked outside. Thinking Julie Ann might be inside shopping, Dora raced into the store looking for her but found nothing. She called police to report finding the car and also called Sandra and Aaron to meet her in the parking lot.

When a responding police officer arrived at the scene, Aaron showed him the love letter from Julie Ann and informed the officer that they had a great relationship and that the recent posts on Julie Ann's MySpace were incongruous with the love letter. Sandra additionally

informed the officer that it was uncharacteristic for Julie Ann to leave Layla alone with George, especially after his recent suicide attempt. After meeting with Aunt Dora, Sandra, and Aaron, the police officer drove to George's house, which was a few blocks from the Walgreens where Julie Ann's car was found.

George told the officer that Julie Ann had gone to his house to pick up Layla on Friday morning. He said that Julie Ann was acting strangely and appeared to be "out of it," possibly under the influence of drugs. She asked George if he could continue watching Layla for the weekend because she had some stuff to do, and George agreed. According to George, that was the last time he saw or heard from Julie Ann.

George gave the officer permission to check his house to ensure that Julie Ann was not there. Then they made their way to the backyard, which included a playhouse and storage shed. The shed had a large square cut into the plywood floor; there was fresh sawdust around it. The officer noticed that the cut portion was loose when he stepped on it, and it almost gave way on him. When he lifted the plywood, he saw a peculiar, empty trench measuring about 5 feet long, 2 feet wide, and 1.5 feet deep. George claimed that someone had dug the hole for plumbing purposes, but his own mother, Victoria, would later testify at trial that when she asked George about the hole, he acted surprised and told her that he did not know how the hole got there.

Though the ominous trench appeared to be out of place, police did not consider George a suspect in Julie Ann's disappearance—"Julie Ann's" texts to her family and friends saying that she was OK and just wanted to be left alone seemed to say that she had disappeared voluntarily. As far as police could tell, Julie Ann was alive, not in any imminent danger, and had voluntarily withdrawn from family and friends. As such, police did not open a criminal case to investigate, which was devastating to Julie Ann's mother.

Raising awareness

Sandra and her family began efforts to bring attention to Julie Ann's disappearance. The family made flyers with her photo and posted them throughout the city. They hired a private investigator to interview anyone who might have information as to what happened to Julie Ann. To make sure that the Austin Police Department did not forget about her, Sandra and various family members called several APD detectives over the next few months to update them on their private investigator's findings and to ask about any information that police may have received from the public. (After a thorough investigation by both the private investigator and police detectives, the prospective leads fell flat—Julie Ann was nowhere to be found.) The family held fundraisers and vigils and invited the local media to attend. Sandra and her sister, Margarita, even appeared on the nationally televised "Dr. Phil Show" in California to raise awareness of Julie Ann's disappearance. George, too, appeared on the show. He reiterated to Dr. Phil what he had previously told police: that when Julie Ann showed up at his house, she was acting strangely and asked him to continue watching their daughter because Julie Ann had some stuff to do. George further agreed to take a polygraph test on the show. After failing the polygraph, George became extremely emotional and continued to deny that he had any involvement in his wife's disappearance. Concerned for his well-being, Dr. Phil offered to connect George with a mental health professional upon returning home to Austin. George accepted Dr. Phil's offer, and immediately upon returning to Austin, he checked himself into the Austin Lakes Hospital for a mental health evaluation and remained at the hospital under observation for a few days.

Police get involved

The turning point in the investigation came after "The Dr. Phil Show" when George's mother, Victoria, became concerned that her son may have had something to do with Julie Ann's disappearance. While her son was at the mental health facility, Victoria learned from her daughter's boyfriend, Javier Carrasco, that there was a trench under the storage shed in her backyard, furthering her suspicions about her son's involvement. She then called police to examine the trench. With Victoria's consent (the property belonged to her), the police searched the home and yard, with the exception of George's bedroom. Days later, police secured a search warrant for the entire property, including George's bedroom.

Though police did not find any evidence of blood, they found various types of ammunition, latex gloves, a knife, remnants of burned

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clothing from a pit in the backyard, various cleaning products, digging tools near the ominous trench, and a big dirt pile behind the storage shed that was covered with a mattress and other unused household items. Inside the residence and George's room, police collected several items that were purchased with Julie Ann's debit card on the day she disappeared, including baby bath products and a child's DVD movie. Police also collected various electronic devices, computers, George's Xbox, recent Best Buy receipts, more ammunition, and a torn up photo of Julie Ann that had been taped back together.

Police detectives analyzed Julie Ann's bank records and discovered that the day that Julie Ann disappeared, her debit card was used to make purchases that were processed as credit, not debit, transactions. This was significant because her bank records showed that Julie Ann's habit was to make PIN-required debit transactions with her card, not credit transactions. Detectives went to Walmart and McDonald's, where the transactions were made, and reviewed surveillance video to see if Julie Ann had made these purchases. The video showed George pushing a grocery cart with a grocery bag and Layla inside—Julie Ann was nowhere to be seen. The video's time-stamps were minutes apart from transactions on Julie Ann's debit card. (By the time police had obtained the incriminating surveillance video, George was no longer cooperating with police and had retained an attorney.)

To track the movement of Julie Ann's cell phone, detectives enlisted the assistance of Jim Cook, a cell phone expert, to analyze Julie's Ann cell phone records. Because George's cell phone service was disconnected, Cook tracked only Julie Ann's phone movement via cell site towers. He found that on March 26, the day Julie Ann disappeared, and through March 27, her phone was in the vicinity of George's house for extended periods of time. There were over 100 texts and 20-plus data connections during this time period, which was uncharacteristic of the phone's past activity. Usually, Julie Ann's cell phone would depart from George's house within a few minutes of arrival.

Cook also found that on March 26, Julie Ann's phone was in the vicinity of a particular Walmart and McDonald's where her bank card was used and where George was captured on surveillance video. Later that evening, the phone was in the vicinity of a Best Buy where George was purchasing Xbox equipment using his store credit and account. All of the incoming calls for Julie Ann on the morning of March 26 were either not answered or diverted to voicemail. This was not typical of her call history before that date. There was no more cell phone activity on Julie Ann's phone after March 27. Plus, her phone never left the Austin area and had never traveled to Colorado (as her MySpace posts claimed). In fact, Julie Ann had never placed a call to nor received a call from the state of Colorado.

Cook also analyzed George's Xbox records from Microsoft. George played on his Xbox daily for extended periods of time—but he did not have any gaming activity until the nighttime on March 26, which was uncharacteristic. George's sister, Liliana DeLaCruz, and her ex-boyfriend, Javier Carrasco, testified that George would take his Xbox console and games to Javier's North Austin apartment to play while he hung out with Javier. Police detectives analyzed the IP addresses on George's Xbox records and compared them to the IP addresses in subpoenaed Internet account records from George's and Javier's neighbors. George was accessing Javier's neighbor's unsecured wireless Internet when playing on his Xbox. Detectives also discovered that George's and Julie Ann's MySpace accounts were accessed within seven minutes of each other from Javier's neighbor's IP address on the evening of March 27. Cook noted that Julie Ann's cell phone had been near Javier's apartment after her disappearance—which had never happened before. Javier further testified that Julie Ann had never been to his apartment.

After a thorough investigation, it was evident that George was responsible for Julie Ann's disappearance and murder and that he bought time to dispose of her body by using her cell phone and updating her MySpace page while purporting to be her. On September 13, 2013, George was charged with murder, manner and means unknown, and was arrested on the same day.

Two months later, as George was in the Travis County Jail awaiting trial, his cellmate came forward to inform detectives that George had described what had happened between George and Julie Ann. The cellmate, whom we'll call Justin, testified at trial that George had been

venting that he and his estranged wife got into an argument because of another man in whom his wife was interested romantically. George told Justin that the argument turned physical and that his wife fell, hit her head, and was rendered unconscious.

George minimized the physical altercation in telling his cellmate about it, but given the fact that he had dug a trench in his backyard before Julie Ann arrived to pick up Layla and that he had posed as his wife on her cell phone the day she disappeared, it was clear that there was a physical incident that took place at George's house that day—Justin corroborated it.

Connecting the dots

Deciding to go forward with prosecuting George for the murder of Julie Ann was not an easy decision, given that the State had yet to locate any remains. It was evident, however, after months of interviewing Julie Ann's family, friends, and coworkers that she never would have voluntarily walked away from Layla and others whom she loved. Even George's mother and sister testified that it was not like Julie Ann to be away from Layla for an extended period of time. Knowing that George was the last person to see Julie Ann alive, that he had Julie Ann's bank card and cell phone the day she disappeared, that he was purporting to be Julie Ann as he used her cell phone and MySpace page, and that there was no proof of life since Julie Ann's disappearance, the State was confident that it had enough evidence to secure a conviction. The State did not have Julie Ann's body, but delaying prosecution would delay justice.

Prior to trial, the State offered George DeLaCruz 50 years in the Texas Department of Criminal Justice in exchange for his guilty plea to murder, but he rejected the State's offer and did not make a counteroffer. George proclaimed his innocence and through his lawyer, he stated that he did not know what happened to Julie Ann.

Proving a murder without a body or murder weapon would be a difficult feat but certainly not an impossible one to overcome. It was critical to educate the venire that circumstantial evidence can be just as reliable as direct evidence to prove the elements of a murder charge, including the defendant's culpable mental state. The case against George required jurors to pay particular attention to the evidence, as there were many pieces that had to be connected to ascertain the truth. To assist the jurors in connecting the evidence, our cell phone expert, Jim Cook, used maps and charts to chronologically track the movement of Julie Ann's phone along with George's known whereabouts. In addition, he used color-coded charts and graphs to depict Julie Ann's phone usage and George's Xbox gaming activity. The visual presentation of the maps, charts, and graphs were undoubtedly effective in illustrating the digital footprint that George left behind.

To quash any doubt for jurors that Julie Ann may still be alive, the State produced evidence at trial that there was no "proof of life." In this digital world, it is common for people to leave a trace of their movement and activity wherever they go, so to confirm that Julie Ann was dead (that is, that there was no proof of life), detectives and crime analysts performed frequent and automated searches in local, state, and national law enforcement databases, beginning a few weeks after she disappeared in March 2010 and continuing until the day of George's murder trial in April 2015. Police confirmed that Julie Ann did not have any involvement with law enforcement since she was last seen alive in March 2010.

In addition, an APD intelligence officer contacted the State Department and confirmed that Julie Ann did not have a visa or passport, and there were no records of her traveling outside the United States from land, air, or sea ports. The intelligence officer also requested that the 50 states, Puerto Rico, and the U.S. Virgin Islands perform a facial recognition search based on the portrait on Julie Ann's Texas driver's license against other government-issued identification. The officer confirmed that there were no facial matches to Julie Ann's Texas driver's license picture—meaning that Julie Ann had not applied for a national or state government-issued identification in her own name or under an alias.

We presented the case chronologically (much as we wrote this article): how George and Julie Ann met, Julie Ann running into Aaron again, George losing his mind because his wife was moving on, and Julie Ann going to pick up Layla and never being seen again. We used maps, charts, graphs, and photos to help the jurors get a visual to connect the dots. The only expert who testified was our cell phone expert, Jim Cook.

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The defense did not present any witnesses, facts, or experts during the guilt-innocence part of the trial.

The jury deliberated for over six hours before finding George guilty of murder, a first-degree felony.

George did not have a significant criminal history, so during the punishment phase, the State called Julie Ann's mother and aunt, Sandra and Dora, to express the void that they felt without Julie Ann in their lives and the impact that her disappearance has had on the family, including Layla.

The defense called Victoria, George's mother, to testify that George had never been convicted of a felony and that he was a good son and brother. She told the jury that George was raised by both parents, had never been physically or sexually abused, had graduated from high school, and that when George was employed, he contributed to the household expenses. Victoria called her son "an angel."

The jury deliberated for an hour before assessing a punishment of life in prison. This punishment spoke to their certainty of George's guilt and to the value of Julie Ann's life and her worth as a kind and loving mother, daughter, sister, and friend. This punishment also spoke to the fact that Julie Ann's disappearance, murder, and cover-up was premediated and that George lied to the police from the onset of his involvement.

While George's conviction and life sentence were important to Julie Ann's family, it cannot bring back Julie Ann. Sandra still has many unanswered questions, the most important of which is, "Where is Julie Ann?" Sandra has not been able to get any closure as she still does not know what George did with her daughter and where her remains are resting. Until Sandra brings her daughter home, she will not have the peace that she desperately desires and deserves. ❇

Photos from our Domestic Violence Seminar in Austin

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