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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

Also in this issue…

How authorities handled protesters from Kansas who demonstrated at the funeral of a Texas man who died in Iraq ....page 21

A primer on motions to revoke probation ....page 24

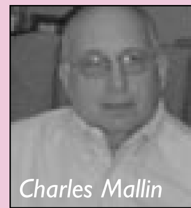
Montgomery County prosecutors used a civil injunction to permanently shut down a brothel.......page 29

A wooden stake for *Bauder*

The Court of Criminal Appeals overrules the difficult and confusing *Bauder* and its progeny.

By Charles Mallin
Assistant Criminal District Attorney in Tarrant County

Remember Bram Stoker's *Dracula*, where Count Dracula is finally done in by the Professor Abraham Van Helsing gang? There, Van Helsing and his band of vampire hunters finally pursued Dracula back to Transylvania. They chased down and cornered him. Armed with knives (not really wooden stakes), Jonathan Harker and Quincy Morris decapitated Dracula and impaled his heart. Dracula's body then crumbled to dust.


Charles Mallin

Well, similarly, the Court of Criminal Appeals cornered *Bauder* and impaled its heart; thus, an entire body of ill-conceived double jeopardy jurisprudence supposedly predicated on the Texas Constitution crumbled to dust.[1]

Under the harsh *Bauder* standard, a prosecutor's statement in the heat of battle could, by itself, obliterate the chance to ever try that defendant again. The reasoning was that courts were trying to prevent prosecutors from throwing a trial they were certain they were about to lose and so made an objectionable comment to provoke a mistrial and get a second crack at the defendant.

But a standard as strict as *Bauder* isn't necessary to protect against this (assuredly) rare occurrence. The federal standard (set out in *Oregon v. Kennedy*, which is explained in more detail later in this article) protects when prosecutors do this deliberately.

Football provides an easy-to-understand comparison between the two standards. In the National Football League, if a defender commits pass interference in the end zone, the penal-

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the
Executive Director's Report

By Rob Kepple
TDCAA Executive Director

Home, home on the Web

I have bragged about our TDCAA website before. We are also mighty proud of the weekly case summaries you get by e-mail. (If you don't get them now, go to www.tdcaa.com today and sign up!). And we have a great legal assistance team: research attorney **Sean Johnson** and law clerk **Emily Sitton**.

But to make sure you get all the help you need, you should know that there are now law firms out there spamming away with offers to do legal research for $50 an hour. For instance, last week I got an email with a list of cases that could help me prevail in a DWI case on a motion to bar prosecution for a constitutional speedy trial violation. Gee, thanks. (In the spirit of full disclosure, you can get that kind of help at www.researchlawfirm.com. It takes you to the firm of Cheatham and Flach. No kidding on the name.)

You should know that TDCAA is keeping up in the battle for legal Internet dominance. This year, with the support of the newly formed Texas District and County Attorneys Foundation, a group of TDCAA members led by **John Bradley** (DA in Georgetown) is taking the wildly successful TDCAA website to new levels of content and usefulness. Some people have also asked that we freshen up the colors a bit. (Hard to believe people are tiring of that drab gray!)

As far as DWI research goes, I think we can go toe-to-toe with Cheat'm. In addition to having Sean, Emily, and **Clay Abbott** (as our full-time DWI resource prosecutor), we are working to add a new resource for prosecutors: a website dedicated to the investigation and trial of DWI cases. We will keep you informed as that work progresses.

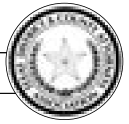
Buy a trophy case

That's my advice to **L.E. "Ted" Wilson**, a Harris County Assistant District Attorney. As you know, Ted is one of the state's gurus of search and seizure. He's also been a long-time faculty member at TDCAA seminars and is the proud winner of the prestigious C. Chris Marshall Distinguished Faculty Award. Add another honor to the mix: Ted is this years' winner of the Leon Goldstein Award from the Crime Stoppers of Houston, which is named for one of the founders of the Houston chapter of Crime Stoppers. It is a fitting award, as you probably can't count all the crime Ted has stopped in his career. Congratulations!

Seemed like a good idea at the time …

Prosecutors shuddered in 1996 when the Court of Criminal Appeals issued its opinion in *Bauder v. State*. That's the case in which the CCA held that the State was jeopardy-barred from retrial if the prosecutor had intentionally *or recklessly* made a mistrial necessary in the first trial. In other words, every time a prosecutor made an unintentional mistake, the defense would have the opportunity to go after a jeopardy bar, and we'd be spending a lot of time arguing about just how bad the mistake was and the prosecutor's exact mental state at the time.

The resulting thrashing about in the lower courts was not pretty. It took a lot of convincing, but the State Prosecuting Attorney's Office, and in particular **Jeff Van Horn**, finally got *Bauder* turned around in January in a case styled *Ex parte Swanda Marie Lewis*. The reasoning: Texas should stick to federal precedent, which calls for a double jeopardy bar only when the prosecutor intentionally goads the defense into a mistrial to avoid an acquittal. See **Chuck Mallin**'s



cover story in this issue for more information about *Bauder* and the court's recent decision in *Ex Parte Lewis*.

We are always going to have spirited debates with our loyal opposition about certain cases, and in most of these situations reasonable people can differ. But I view it as healthy when a court can announce a new principal, then back up when it just flat-out doesn't work. And *Bauder* was high on prosecutors' list of troublesome opinions.

This isn't an isolated example of a healthy judiciary; we've seen it before. If you were practicing in 1990, you would have cursed *Grady v. Corbin*, in which the Supreme Court held that a manslaughter prosecution was jeopardy-barred because the defendant had earlier pled out on the lesser included traffic offense of crossing the center line. It took the Supreme Court only three years to figure out that was the wrong direction to go in double jeopardy jurisprudence, and the court threw *Grady* in the jurisprudential trash heap in *U.S. v. Dixon.*

Another idea that sounded good at the time: requiring a definition of "beyond a reasonable doubt." That was *Geesa v. State* in 1991. Folks on both sides of the bar had reservations about that, and the court officially scrapped the idea in *Paulson v. State* in 2000.

So now what troublesome caselaw is on the radar for prosecutors? Anyone have a clue?

Another new face

It looks like your prosecutor teams are in place after the changes at the beginning of the new year, but we have a recent new arrival to the profession. **Mark Marshall** has been appointed as the new McCulloch county attorney to replace **Ginger Treadwell,** who retired. Welcome!

What a difference a year makes

It wasn't but a year ago that prosecutors were cringing at the news reports of a Panhandle prosecutor heading to the federal pen for drug abuse and other assorted unpleasantries. Fast forward, and we continue to get reports from the 31st Judicial District that the new DA, **Lynn Switzer**, is knockin' 'em in the dirt. Her string of successes includes the recent prosecution of a couple of escapees from an Oklahoma jail. These guys terrorized their way from Caddo County to Wheeler County. It took a carefully orchestrated collection of witnesses from the FBI, Oklahoma police, and Texas law enforcement to prosecute these two.

The peace and dignity of the State have been restored along the north fork of the Red River.

Not so funny after all

Last year I made fun of the yearly *Texas Lawyer Legal Almanac* list of big law firm perks. It was kind of hard not to, given that your list of perks as an assistant prosecutor or staffer usually includes a paycheck, whether you need it or not. Our profession competes for talent at a different level.

I must apologize, however, for making light of the fact that one firm felt they needed to mention that they had an automated defibrillator. In this last year, most folks have come to view it as a pretty wise addition to an office, and indeed your TDCAA staff is now fully trained on that device, and we bring one with us to all of our seminars.

OK, all those perks are pretty much great. But I just can't help but chuckle about one perk listed in 2006's almanac: the annual bosses' day miniature golf tournament. You've got to admit, it sounds like swingin' material for that popular TV show, "The Office." (That's what *she* said.)

the President's Report

By David Williams
County Attorney in San Saba County

The county attorney as the State's lawyer

Many of you have been watching the progress of Senate Bill 844 by Juan "Chuy" Hinojosa (D–McAllen) and House Bill 1356 by Dan Gattis (R–Georgetown). These companion bills seek to include all assistant county attorneys in the state longevity pay program now enjoyed by assistants in offices with felony jurisdiction. By all accounts this program, launched three sessions ago thanks to the efforts of former Harris County Assistant District Attorney and Representative Vilma Luna (D–Corpus Christi), has had a real impact on the ability of assistants in felony offices to stick with the job.

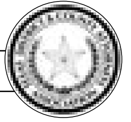
Our thanks should go to Scott Brumley (CA in Amarillo) and David Weeks (CDA in Huntsville) for working to expand this program to assistant county attorneys. Passing any legislation is always a challenge. The hardest part about passing *this* legislation may be that the title "assistant county attorney" and the job description don't match up in many people's minds.

Texas prosecutors are pretty comfortable with all of our names: county attorney, county and district attorney, county attorney with felony responsibility, district attorney, and criminal district attorney. But you can tell where others might be a little confused. To the uninitiated, you can also see where people may think that the "county attorney" is just that: the attorney for the county. But our county attorneys and assistant county attorneys have duties to the State that even *they* probably don't know about.

Under the Texas Constitution, the original attorney for the state was the county attorney, unless there was a district attorney or criminal district attorney in the jurisdiction. Notwithstanding the creation of many district attorney, criminal district attorney, and district and county attorney offices (there are now 155, with 1,950 assistants), we still have 177 constitutional county attorneys and 356 assistant county attorneys who have significant duties to represent the State in criminal and other matters.

As part of our education process, TDCAA's Shannon Edmonds spent about six months reviewing Texas law page by page and cataloging every enumerated duty of county attorneys to represent the State. Some are obvious: County attorneys carry a huge load when it comes to criminal misdemeanor prosecutions, which not too long ago was expanded to require representation of the State in all justice of the peace courts. County attorneys were also tapped to handle family violence protective orders. And some of a county attorney's most important work is in representing the Department of Family and Protective Services and children who are in danger. Over 90 percent of those cases are handled by county attorneys' offices, and it seems to be a growth industry. Additionally, in the last legislative session, county attorneys were ordered to represent Adult Protective Services.

What most citizens don't know is that county attorneys and their assistants are required to represent 41 different state agencies, boards, and districts in all sorts of situations. Agencies such as the Department of Agriculture, General Land Office, Parks and Wildlife Commission, and State Chest Hospital Administrator (in a civil collections capacity) may call upon the local county attorney. In addition, the legislature has given 26 state agencies and other legal entities the right to ask the county attorney for legal representation in certain



circumstances. That list includes the Office of the Governor, the Department of Licensing and Regulation, and the Center for Infectious Disease.

What's more, a case can be made that the assistant county attorney's work is even *more* important to the State. Of course, felony assistants have a duty to prosecute murderers and other violent criminals. But who protects the "Go Texan" program? Who is on the front lines of Mexican fruit fly control? Who protects the integrity of our bees, honey, and eggs? Who stops scabies in its tracks? Who is responsible for seizing all the illicit beverages in a county? Who puts the hurt on illegal international matchmaking? Who makes sure that your massage is performed by a professional? Who takes up the many causes of local zoo animals? And finally, who else but the county attorney maintains vigilance against sedition, sabotage, and Communism? No kidding: All of these duties are just a small slice of the county attorney's job description, courtesy of the Texas Legislature.

The final list that Shannon compiled is too extensive to enumerate in *The Texas Prosecutor.* And while my presentation in the previous paragraph may be a bit lighthearted, the work is serious, and there certainly is a lot of it. Assistant county attorneys are truly attorneys for the State, and I hope they can get that recognition during this legislative session.

Newsworthy

Reflections on Paul Gartner

By Tanya S. Dohoney
Assistant Criminal DA in Tarrant County

North Texas prosecutors, especially those in Tarrant County, mourned the untimely death of a cherished friend and colleague, Paul Gartner, who died unexpectedly during the last weekend of December. After graduating from his beloved Baylor, he cut his prosecutorial teeth in the mid-late 1970s in the Tarrant County CDA's office, then returned to Waco and entered private practice until serving as the McLennan County DA during the late 1980s. In 1991, Paul pursued federal prosecution and, in the Fort Worth office of the U.S. Attorney, supervised and tried a multitude of complex criminal cases during his 15-year tenure.

Paul Gartner

Newspaper accounts of Paul's sudden demise described him as a "tenacious prosecutor." While the tenacity label was certainly true, Paul's real gift was the ability to mentor others, especially in prosecution.

When Paul was my boss in the Waco DA's office more than 16 years ago, he was a constant and patient source of advice. I'll never forget the week we attended an Advanced Criminal Law Seminar together; he made sure that I met Chris Marshall, his friend and former Tarrant County colleague. Paul arranged for me to sit directly across from Chris during lunches so that we could "talk cases," cementing the connection that launched my future at the Tarrant County DA's office. After Paul lost the 1990 election, we both headed to Fort Worth. While discussions about lawyers, judges, and politics always permeated our lunches, Paul steadfastly reserved time to discuss "our girls," his two amazingly brilliant daughters, Amanda and Ashley, and my sweet child, Hillary. Amanda recently joined our office as an assistant prosecutor, and Ashley just began a highly competitive doctoral program at Baylor.

I'm not the only person Paul took under his encouraging wing. I suspect there are hundreds. When sending out office e-mails for memorial contributions after his death, my door was instantly graced by one of our newest hires, Kelly Meador, who informed me that she would not be in our office but for Paul. She met him through a law school professor, and Paul touted prosecution as a career and encouraged her to apply at our office.

Moments after Kelly related her story, *another* attorney arrived at my door singing Paul's praises. Jake Battenfield interned at the Department of Justice and met him there. Paul's advice promoted prosecution as a career path, and as with Kelly, he encouraged Jake to apply with our office.

Longtime prosecutors extol Paul's influence as well. As a police officer in the 1970s, Greg Miller met Paul working on high-profile prosecutions. They became friends; as Greg puts it, "I don't know why he liked me, but he did." Paul, along with others, encouraged Greg to enroll in law school and become a prosecutor. Now Greg is one of our most experienced attorneys and serves as a deputy chief.

Richard Roper, the U.S. Attorney for the Northern District of Texas, describes Paul as passionate about everything, especially people. Anyone needing assistance on a case would get the "full Paul Gartner treatment," which meant that he would not simply impart a quick answer but would instead sit down, digest the issue, bounce ideas back and forth, and check back

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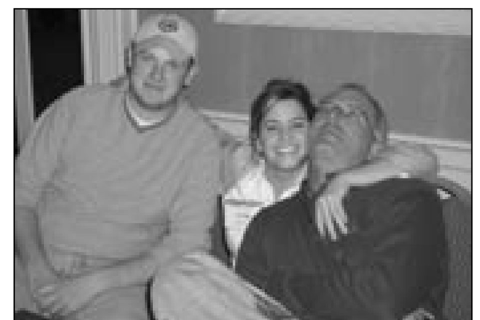
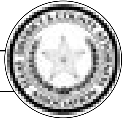
Photos from the Prosecutor Trial Skills Course





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A wooden stake for Bauder *(cont'd)*

ty is to give the offense the ball on the one-yard line, which is the equivalent of the federal standard. *Bauder*, on the other hand, would simply hand the offense a touchdown without allowing the defense another chance to prevent an offensive score.

More details

Bauder and its progeny interpreted the double jeopardy provision of the Texas Constitution to bar retrial following a defense-requested mistrial "when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request."[2] This construction of Tex. Const. art. I, §14[3] was much more expansive than the interpretation of the federal double-jeopardy provision by the United States Supreme Court. The federal interpretation of its double-jeopardy counterpart was articulated in *Oregon v. Kennedy*,[4] where the 5th Amendment's Double Jeopardy Clause was construed to bar retrial after a defendant successfully moved for mistrial *only* when it was demonstrated that the prosecutor engaged in conduct "intended to provoke the defendant into moving for a mistrial." Prior to the initial *Bauder* opinion, the Court of Criminal Appeals used the federal standard to resolve double-jeopardy issues following a defense-requested mistrial.[5]

Bauder proved difficult to apply, and Texas prosecutors uniformly criticized it. In fact, I wrote an article[6] in this publication advocating that the court reverse *Bauder* and return to the standard formulated under the 5th Amendment in *Oregon v. Kennedy*.[7] That article pointed out several defects in the path the Court of Criminal Appeals chose to follow in holding that the Texas Constitution provided more double jeopardy protection than the federal constitution. Chief among the complaints about the court's formulation under *Bauder* and its progeny was its almost impossible application and the re-clarification quagmire the court undertook. *Bauder* proved to be like a broken-down 1958 Edsel that was constantly in the shop for repairs. It was pointed out:

> The first time the court attempted to clarify the initial decision in *Bauder I*, it noted that the question of whether the trial court correctly granted a mistrial request was not the proper focus of a double jeopardy claim based on the state constitution.[8] Rather, the critical inquiry is whether the defendant made a free choice to request a mistrial, rather than being compelled to do so because of the prosecutor's "manifestly improper methods . . . deliberately or recklessly" committed.[9] Apparently, this meant that the prosecutor's conduct crossed the line between "legitimate adversarial gamesmanship and manifestly improper methods" that rendered the trial before the jury so unfair that no instruction to disregard the prosecutor's conduct could have cured the error.[10]

Notwithstanding the resulting confusion and misapplication by both trial courts and intermediate appellate courts, the Court of Criminal Appeals had steadfastly refused to abandon the *Bauder* standard.[11] Before *Lewis*, the latest review of *Bauder* came in *Ex parte Peterson*. After discussing the significant differences between the *Bauder* and *Kennedy* standards, the *Peterson* Court summarized a three-pronged analysis appropriate for both the trial and appellate courts in analyzing a double-jeopardy-mistrial claim: 1) Did manifestly improper prosecutorial misconduct provoke the mistrial? 2) Was the mistrial required because the prejudice produced from that conduct could not be cured by an instruction to disregard? and 3) Did the prosecutor engage in that conduct with the intent to goad the defendant into requesting a mistrial (*Kennedy* standard) or with the conscious disregard for a substantial risk that the trial court would be required to declare a mistrial?[12] While the standard articulated in *Peterson* seemed workable, it resulted in as much confusion as its predecessors.

Not only the did the *Lewis* Court recognize the practical difficulties in *Bauder*'s application, it systematically dismantled *Bauder*'s supposed underpinnings.[13] First, the court conducted an in-depth constitutional analysis of Texas' double-jeopardy provision and concluded that the provision does not apply only to situations where the defendant is acquitted. The historical framework of

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the provision protects a defendant against the premature termination of a trial except where there is a manifest necessity for a mistrial or where the defendant consents.[14] In its analysis, the court thoroughly dissected the Texas double-jeopardy provisions from Texas' first version to the present version.[15] The court fortified its conclusion with well over 100 years of precedent,[16] starting with Lord Coke's Rule extending double jeopardy protection to premature termination of a trial and including an early-19th-century state court decision that hewed a traditional early understanding implicating double jeopardy protections only after a previous conviction or acquittal.[17] Finally, the court exhaustively analyzed Texas caselaw interpreting the various Texas double jeopardy provisions promulgated from the initial Texas independent republic, the first state constitution, constitutional provision adopted when Texas became a member of the Confederate States, provision after the defeat of the Confederacy, Reconstruction provision, and present state constitutional provision.[18]

Probably the most important analysis came when the court tackled the second issue concerning the practical application of *Bauder* and its progeny. Judge Cochran, in her concurring opinion, immediately points out that *Ex parte Wheeler*,[19] which she authored, attempted to "split the difference" between *Kennedy, Bauder,* and *Ex parte Peterson* by opting for a middle course amid the "harsh" Supreme Court rule and the "kinder, gentler" but ambiguous Texas rule.[20] However, the rule crafted under the Texas Constitution was not "workable."[21] This thought was the thrust of the majority opinion with its systematic decimation of the *Bauder* guarantees extracted from Tex. Const. art. I, §14.

Simply put, the court, in overruling *Bauder*, found that there were no Texas constitutional underpinnings to support a conclusion that the framers of the Texas Constitution intended the *Bauder* standard. The court found fault with *Bauder* for a bevy of reasons:

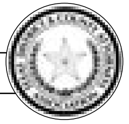
1 The majority and concurring opinions in *Bauder* just got it wrong. Those opinions did not cite legal materials (cases, treatises, statutes, etc.) preceding the 1876 constitution that influenced the provision's wording or reflected the framers' intent to support the "reckless" standard.[22]

2 *Bauder* did not accurately reflect the purposes of double-jeopardy protections. The law concerning the Texas double-jeopardy provision really depends on the vitality of *Powell v. State*[23] and *Moseley v. State*.[24] These cases advanced reasonable propositions, were correct as a historical matter, and should not have been overturned.[25]

3 The *Bauder* Court's justification for its articulated "reckless" standard was faulty. "[T]he remedy of a new trial" is "sufficient to vindicate both the citizen interest in a fair trial and the societal interest in bringing those properly found guilty to punishment." The question for double jeopardy is not whether the trial is fair, but whether the request for a mistrial is the defendant's decision. In reality, the only time this decision is not the defendant's is when the prosecutor intends to provoke the mistrial to seek the termination of the trial.[26]

4 The *Bauder* "reckless" standard is confusing because the language of the case suggested that the defendant's right to a fair trial was important but that the prosecutor's specific intent was "irrelevant." This was neither a less subjective nor a less complex analysis. Moreover, the opinion actually suggested that granting a defendant's requested mistrial would usually result in a double-jeopardy bar by emphasizing the distinction between legitimate adversarial gamesmanship and manifestly improper prosecutorial methods. Setting aside confusing language in the *Bauder* opinion, the "reckless" standard poses some practical problems in this context. "Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant" in front of the jury so that it will convict him. The prejudice should be fair rather than foul, but in the heat of battle prosecutors may overstep their bounds. While a prosecutor clearly knows he should not try to cause a mistrial, he may be a lot less certain what conduct an appellate court would decide carried a substantial risk of a mistrial that the prosecutor consciously disregarded. In his *Bauder* dissent, Presiding Judge McCormick doubted that prosecutors would "know with any certainty what conduct is prohibited by this rule."[27]

5 The *Bauder* standard was so confusing and its application so difficult that the court struggled unsuccessfully at least three times to clarify it. But even with these repair jobs, the *Bauder* standard conflicted with other legal precedents holding that a retrial is not barred by double jeopardy following the grant of a new trial on appeal. In this regard, the court was concerned with the internal inconsistency of the stricter standard. In Texas, the prosecutor who obtained a conviction, notwithstanding that he engaged in reckless conduct,



would not be barred from further prosecution following an appellate court reversal. Five other jurisdictions recognizing a broader rule than the one set out in *Kennedy* have addressed the issue by also applying the mistrial rule to convictions overturned on appeal.[28]

6 The standard set forth in *Oregon v. Kennedy* is workable, is appropriately narrow, and comports with the purpose of the double-jeopardy provision's application to the mistrial setting.[29] *Bauder* wrongly conflated generalized notions of due process and due course of law with double-jeopardy protection. Double jeopardy is not a form of due-process protection; due course of law can be ensured by granting a mistrial and conducting a retrial. The appropriate question for double-jeopardy purposes is not whether the defendant's trial was fair but whether requesting a mistrial was ultimately the defendant's decision. *Bauder* wrongly suggested that a defendant's decision in a "recklessness" situation would not be a free decision. To the contrary, as *Lewis* points out, when a prosecutor is merely reckless, one cannot say that the prosecutor has made the decision to seek a mistrial. Only when the prosecutor intends to provoke the defendant's mistrial motion can it be said that the prosecutor has exercised primary control over the decision to seek the trial's termination.[30]

The point of setting out the underpinnings and foundation of the holding of *Lewis* in overruling *Bauder* is that the court undertook to completely—on every constitutional level and rationale—dismantle and destroy the *Bauder* decision. Like the stake through Dracula's heart, the outcome is the same. *Bauder* has turned to dust, never to be resurrected.

Future prosecutions

The holding in *Lewis* will greatly diminish the ability of the courts of appeals to hold that prosecutorial conduct bars a future retrial under the Texas Constitution's double jeopardy provisions. As the Court of Criminal Appeals states, relief under the *Oregon v. Kennedy* standard (now the standard under the Texas Constitution) will (and should) be rarely granted, and the rare granting of relief does not make this standard inadequate to protect the defendant's double-jeopardy guarantees. The court points out that it is aware of no decisions granting relief without either a State concession or a favorable trial court finding. However, this is acceptable and to be expected in dealing with such an extreme remedy essentially amounting to an acquittal.[31] The court reaches this conclusion on the basis of its good-faith belief that prosecutors do not ordinarily attempt to throw cases or to instigate a mistrial when they encounter problems with their cases.[32] Under the sweeping and confusing *Bauder* standard, prosecutors were often left uncertain as to what conduct an appellate court would later conjure up to be deemed reckless. Courts of appeals were prone to overstepping the appropriate scope of review—regardless of trial court findings that the prosecutorial conduct causing the mistrial was not reckless—to bar retrial based on double jeopardy.[33] I hope that under *Lewis,* prosecutors will be able to determine with more certainty the scope of conduct that falls within the rule, and barring retrials will be a rare exception reserved for the most egregious prosecutorial conduct as envisioned by *Oregon v. Kennedy.*

The *Bauder* "reckless" standard is confusing because its language suggested that the defendant's right to a fair trial was important but the prosecutor's specific intent was "irrelevant."

Just a thought

It seems that the Court of Criminal Appeals has gotten into another quagmire in the area of reviewing factual sufficiency, which suffers the same infirmities as double jeopardy under *Bauder*. The modern-day notion of factual sufficiency was set out in *Clewis v. State*,[34] which predicated its holding on the "factual conclusivity clause of Tex. Const. art. V, §6."[35] Under *Clewis*, an appellate court reviews the factfinder's weighing of the evidence and is authorized to disagree with the factfinder's determination. Of course, the courts of appeals were to be appropriately deferential to avoid an appellate court's substituting its judgment for that of the jury. But that did not happen. What happened was that *Clewis* empowered the courts of appeals to act as the "13th juror" and to disagree with the factfinder's determination (while at the same time being deferential to the jury's judgment). As with

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Bauder, the standard articulated by the *Clewis* Court was ambiguous, contradictory, and from the beginning impossible to apply.

Clewis does not accurately reflect what a sufficiency review should be in a criminal case,[36] the justifications for a factual-sufficiency review in criminal cases are faulty, the holding is confusing, there have been practical difficulties in its application from the get-go, lower appellate courts have had difficulty correctly interpreting and applying it, and the Court of Criminal Appeals has obviously struggled to clarify it. Because the court has absolutely jumbled the distinction between a factual-sufficiency review and a legal-sufficiency review, it has been compelled on several occasions to clarify, redefine, refine, and re-clarify *Clewis*.[37] Each time the court has engaged in this futile effort, it has been unable to explain the real distinction between a legal sufficiency review and a factual sufficiency review, except that one leads to an acquittal and the other does not.

Clewis, like *Bauder*, is impossible to apply practically and consistently and results in a windfall for the appellant who receives a new trial notwithstanding that the evidence was legally sufficient. In fact, the Florida Supreme Court, which started the rush to review factual sufficiency in criminal cases, quickly realized that it was a bunch of bunk. Although the United States Supreme Court in *Tibbs v. Florida*[38] concluded that a reversal of a conviction because the verdict is against the great weight of the evidence does not trigger double jeopardy, the Florida Supreme Court ruled that Florida appellate courts may no longer reverse convictions on the ground that the evidence is factually insufficient to support the verdict. This was because such a review amounted to nothing more than the appellate court substituting its judgment for that of the jury.[39] Frankly, this is what the Court of Criminal Appeals needs to do.

Now that *Bauder* is gone, the focus should be the demise of *Clewis* because it is impractical, confusing, and cannot be substantively interpreted, clarified, or refined. *Lewis* provides us a template and a road map for the attack.

Endnotes

1 *Ex parte Lewis*, 2007 WL 57823 (Tex. Crim. App. January 10, 2007). In her concurring opinion, Judge Cochran accurately sets out the historical facts of this case: "Swanda Lewis was charged with murdering her husband. During the trial, the prosecutor asked her, on three separate occasions, whether she had told the 911 operator, the crime scene officer, or the detective to whom she had given a post-arrest statement, anything about her trial-time testimony that her husband had raped her immediately before she killed him. Each time the defense objected, stating that these questions improperly commented on her post-arrest silence. After the third such question, the trial court granted a defense-requested mistrial. Ms. Lewis then filed an application for a writ of habeas corpus, arguing that retrial was barred by the Texas constitutional double-jeopardy provision under this Court's decision in *Ex parte Bauder.* The trial court denied relief, but the court of appeals held that the trial court abused its discretion in failing to find that the prosecutor's questions were manifestly improper and were asked "with conscious disregard for a substantial risk that the trial court would be required to declare a mistrial." The court of appeals held that the State was prohibited from retrying Ms. Lewis. We granted review to decide, inter alia, whether to reconsider our decision in *Bauder*. I join the Court in overruling *Bauder*." *Ex parte Lewis*, 2007 WL 57823 at *27 (Cochran, J., concurring) (footnotes omitted).

2 *Bauder v. State*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996)(*Bauder I*).

3 Article I, §14 states: "No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."

4 456 U.S. 667, 679 (1982).

5 See *Crawford v. State*, 703 S.W.2d 655 (Tex. Crim. App. 1986).

6 Mallin, "The Future of *Bauder* and Its Progeny? It Shouldn't Have One!" *The Texas Prosecutor*, July-August 2005.

7 456 U.S. at 679.

8 *Ex parte Bauder*, 974 S.W.2d 729, 731-32 (Tex. Crim. App. 1998)(*Bauder II*).

9 *Bauder II* said: "Under this rule, the prosecutor is not accountable for mistrials when the judge need not have granted the defendant's motion. But he was accountable for mistrials properly granted by the trial judge when the events making a mistrial necessary were of his own deliberate or reckless doing." *Ex parte Bauder*, 974 S.W.2d at 731-32.

10 *Ex parte Bauder*, 974 S.W.2d at 731-32.

11 *Ex parte Peterson*, 117 S.W.3d 804 (Tex. Crim. App. 2003); *State v. Lee*, 15 S.W3d 921 (Tex. Crim. App. 2000).

12 *Ex parte Peterson*, 117 S.W.3d at 816-17.

13 The State Prosecuting Attorney made two claims: First, the Texas double jeopardy provision did not encompass mistrial situations because of the language in Tex. Const. art. I, §14. Second, the Texas double jeopardy provision did not impose a different standard than its 5th Amendment counterpart for determining when a defense-requested mistrial would, if granted by the trial court, result in barring further prosecution. *Ex parte Lewis*, 2007 WL 57823 at *3.

14 *Ex parte Lewis*, 2007 WL 57823 at *18. See also *Powell v. State*, 17 Tex. Ct. App. 345 (1884).

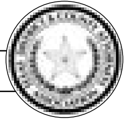
15 See Rep. Tex. Const. Decl. Rts. §9 (1836); Tex. Const. art. I, §12 (1845); Tex. Const. art. I, §12 (1861); Tex. Const. art. I, §12 (1866); Tex. Const. art. I, §12 (1869); Tex. Const.art. I, §14 (1876).

16 *Id.* at *3-14.

17 See *State v. Garrigues*, 2 N.C. 241, 241-42 (1795). Compare *Commonwealth v. Fells*, 36 Va. 613, 619 (1838); *People v. Shotwell*, 27 Cal. 394, 398-99 (1865).

18 *Ex parte Lewis*, 2007 WL 57823 at *7.

19 203 S.W.3d 317 (Tex. Crim. App. 2006).



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Reflections on Paul Gartner (cont'd)

later to learn the outcome. Nothing received superficial treatment. Richard said that while Paul focused on assisting less experienced federal prosecutors, he treated everyone's queries as important.

After Paul's untimely death, hundreds of people attended his memorial services in Fort Worth and Waco, and the wait at visitation to greet his family consistently took 45 minutes. During my wait, I overheard repeated murmurs of ways Paul had touched others' lives with his counsel and his role-modeling. It's the first time I've seen so many attorneys shed tears (even the dark-suited federal ones!).

Paul's mentoring abilities also included the fact that he led by example. Paul modeled unquestionable integrity and ebullient passion for his family (who *always* came first), his challenging cases, and his love of Baylor sports. (Paul was this year's Baylor Bear Foundation President and, in more than 30 years, he had only missed two home games!)

Thankfully, we have myriad tenacious prosecutors in this state, which is good. But I'm not that sure that we have quite as many prosecutors who are gifted mentors. Paul's compassionate and positive influence will be sorely missed, but his legacy lives on through so many other prosecutors because I suspect that those who were guided by Paul through the years will try to follow his lead, especially one new prosecutor in Tarrant County who knew him not only as a mentor, but as her father.

20 *Ex parte Lewis*, 2007 WL 57823 at *27 (Cochran, J., concurring).

21 *Id.*

22 *Ex parte Lewis*, 2007 WL 57823 at *19, 23.

23 17 Tex. Ct, App. 345 (1884).

24 33 Tex. 671 (1877).

25 *Ex parte Lewis*, 2007 WL 57823 at *18.

26 Id. at *23-24 (quoting *United States v. Dinitz*, 424 U.S. 600, 673 (1976)).

27 *Ex parte Lewis*, 2007 WL 57823 at *29.

28 *Id.* at *24-25.

29 *Id.* at *27.

30 *Id.* at *17.

31 *Id.* *19-20.

32 *Id.*

33 See *Ex parte Wheeler*, 146 S.W.3d 238 (Tex. App.—Fort Worth 2004), *rev'd*, 203 S.W.3d 317 (Tex. Crim. App. 2006).

34 922 S.W.2d 126, 133 (Tex. Crim. App. 1996).

35 Article V, §6 states: "Provided, that the decision of said courts [of appeals] shall be conclusive on all questions of fact brought before them on appeal or error."

36 See *Jackson v. Virgina*, 99 S. Ct. 2781 (1979).

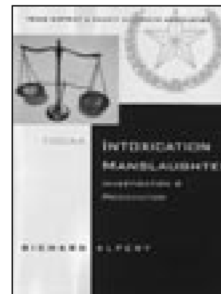
37 1) *Jones v. State*, 944 S.W.2d 642 (Tex. Crim. App. 1996); 2) *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997); 3) *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000); 4) *Goodman v. State*, 66 S.W.3d 283 (Tex. Crim. App. 2001); 5) *Swearingen v. State*, 101 S.W.3d 89 (Tex. Crim. App. 2003); 6) *Zuniga v. State*, 144 S.W.3d 477 (Tex. Crim. App. 2004); 7) *Watson v. State*, 204 S.W.3d 404 (Tex. Crim. App. 2006).

38 102 S.Ct. 2211, 2218 (1982).

39 *Tibbs*, 397 So. 1120 (Fla. 1981).

New books from TDCAA

TDCAA is proud to offer two new publications, *Traffic Stops* (an update by Diane Beckham) and *Intoxication Manslaughter* by Richard Alpert, available at tdcaa.com or 512/474-2436.



Traffic Stops

From initial sighting of a car on the road through arrest, *Traffic Stops* leads officers and prosecutors through the permissible ways to approach a traffic stop. This updated edition includes charts on the most common traffic offenses and important facts about each of them, easy-to-read tables on what officers can do at each step of a stop, and plain-English summaries of what the courts have said about arrests, detentions, and searches related to cars, drivers, and passengers. *Traffic Stops*, 85 pages, $25.

Intoxication Manslaughter

This book is indispensable for officers and prosecutors investigating or trying an intoxication manslaughter case. Officers will find invaluable charts and checklists for collecting information on the scene, while prosecutors will appreciate caselaw, practice pointers, charts (including traffic offenses, license suspensions, discovery, and probation conditions), sample pleadings, and voir dire questions. Chapters written by experts Tim Lovett (collision reconstruction) and Dr. Maurice Dennis (expert witnesses on intoxication and driving) make this book an indispensible tool for officers and prosecutors at all levels of experience. Intoxication Manslaughter, published January 2007, 220 pages, $40.

CRIMINAL LAW

By Christina L. Playton
Assistant Criminal District Attorney,
White Collar Crime Unit of the Bexar County
Criminal District Attorney's Office

Breach of trust

A far-reaching home repair scam leaves more than civil damages in its wake

In February 2005, Juan Castillo and his wife, Theresa, were expecting their first child. The Castillos lived in an older home and wanted to remodel their kitchen before their daughter arrived. After seeing a full-page advertisement in the Southwestern Bell Yellow Pages, they hired "Mike" (a false name, it turned out) from Centex Building and Remodeling to do the work. They explained to Mike they wanted the work done before the baby arrived. Mike assured Juan and Theresa that he could get it done in time, and Juan gave him $8,000 as a down payment. Mike and some of his workers came to the Castillos' home and gutted their kitchen. Once the kitchen was demolished, Mike disappeared.

Christina Playton

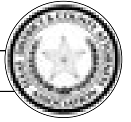
After trying unsuccessfully to get Mike to finish the work or to get his money back, Juan was not surprised when he got a call from the Bexar County District Attorney's Office about Centex Building and Remodeling. Juan was not alone in his remodeling debacle. More than 50 other people had been defrauded by Daniel Delafuente (a/k/a Mike), and new victims continued to come forward even after trial. A five-month investigation uncovered that Delafuente was at the helm of an elaborate home remodeling scheme that cost Bexar County homeowners over $500,000 and earned Delafuente 90 years in prison. Exposing Delafuente's scheme, however, was not easy.

The first complaint

When the first complaint against this contractor came into our office, it was unclear who was the actor. The complainant was a homeowner, Ruth McClendon, who could not get the home improvement company to return and finish a job for which she had paid $20,000. The company name was Centex Building and Remodeling, and she believed the owner was Bernard Beckingham. The case hit my desk with the question, "Is this a civil dispute?" At first glance I thought it might be. There was a contract, and someone had come out to the home and done *some* demolition work.

We ran the name Bernard Beckingham for a criminal history and found nothing. We got his photograph from driver's license records and put it in a lineup, but the victim could not identify him. It was only when we checked with the Attorney General's Office and the Better Business Bureau that we realized there was more to this story. More than 10 complaints against Centex Building and Remodeling had been filed in a short time, and the allegations behind the complaints were all the same: The contractor was paid a large sum of money up front, he did some demolition, and then he disappeared. After we contacted the Yellow Pages, we learned that the $30,000 phone book advertisement for Centex Building and Remodeling had not been paid and had resulted in a default judgment against Bernard Beckingham.

Records from the AG's office, Better Business Bureau, and Southwestern Bell Yellow Pages revealed numerous addresses and phone numbers. Linked to one of those addresses was the name Daniel Delafuente. A search on TCIC showed Delafuente had a criminal history; during that search, a deconfliction report came back indicating that two other law enforcement agencies were also investigating him. We further discovered Delafuente had several other remodeling



businesses. We put his picture in a line-up, and the homeowner Ruth McClendon immediately identified him as Robert Gonzales, the man who took her money on behalf of Centex Building and Remodeling. Once Delafuente was identified as the contractor, we could focus our investigation, and the evidence and victims started pouring in.

The scam

The investigation revealed Delafuente had been running a remodeling scam dating back to 2002. At the early stages of his criminal enterprise Delafuente used his real name. However, after some of his victims started showing up on the doorstep of his $300,000 home, he began using aliases such as Robert Gonzales, Bernard Beckingham, Mike Hernandez, or just Frank. He was even found with a Texas driver's license issued to Bernard Beckingham with his picture.

There was a real person named Bernard Beckingham. In fact, the real Bernard Beckingham had worked at one time for Delafuente. However, Beckingham was not the owner of any of the remodeling companies as Delafuente told several homeowners, and Beckingham did not know that Delafuente was using his name.

In addition to using aliases, he used different company names. Most of them were recognizable names like Centex Building and Remodeling and Pulte Builders. Although Delafuente was not affiliated with the large home-building companies of Centex Homes and Pulte Builders, he often capitalized on their reputations and name recognition.

Delafuente used the Yellow Pages to advertise his company's purported services to ensure a steady flow of customers. He would contract with the Southwestern Bell Yellow Pages for full-page advertisements that cost $20,000–$40,000, then refuse to pay once the directory was already in print. Delafuente changed company names every year so he could continue to "buy" ads in the phone book and enlisted various family members to take out the advertisements on his behalf.

The advertisements were impressive—and false. They claimed Delafuente's companies had been in business for over 20 years and were licensed, bonded, and insured. In 2002 it was Broadway Remodeling, in 2003 it was Ace Remodeling, and by 2004 it was Centex Building and Remodeling. By 2005 Delafuente had gotten so good at the scam, he had two shell companies listed in the phone book at the same time: Pulte Remodeling and Capital Remodeling. In fact, some victims had contacted both Pulte Remodeling and Capital Remodeling, not knowing they were both under Delafuente's control.

When homeowners responded to an advertisement, Delafuente was almost always the person who came to their home for an estimate. He was consistently described as friendly, knowledgeable, and accommodating, and he always had the lowest price. Once the homeowner accepted his bid on a job, he would demand a large payment upfront. The amount varied between a third to half of the total contract price. Occasionally, he would convince homeowners to pay the full contract price upfront in exchange for a large discount.

Once Delafuente had the money, he would send one of two workers to do demolition. Apolonio Hernandez was identified at almost every home and was often the only worker who would show up. On some occasions Delafuente sent his brother Rudy Delafuente, who was also identified in some of the cases as being a "worker." Regardless of who was sent, the work, if any was done, consisted primarily of demolition. As Delafuente grew bolder in his scheme, he began to take large payments upfront and do nothing at all.

If demolition was done, it was done for several reasons. The first was to demand a second payment from the homeowner. When the homeowner would inquire about why they had to pay more money, Delafuente would point to the demolition as evidence that the job was in progress. Almost uniformly he would tell the homeowner he could not complete the job without more money. The homeowner, seeing the house partially—and in some cases completely—demolished, would agree to pay the second or final payment on the contract.

Another reason for the demolition was to convince a third party that the nature of the dispute was in fact civil. On more than one occasion homeowners called police to complain about the loss of their money and the condition of their home. Delafuente would claim that the homeowner had made too many changes to the contract, which was why he could not complete the project. The police often believed the cases were civil

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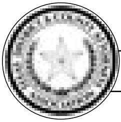

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contract disputes, and charges were not filed. Even the Attorney General's Office initially believed the nature of these complaints to be civil. It was not until the continuous pattern of activity was revealed that Delafuente's crime became evident. He was committing theft.

The charges

Delafuente and his crew were charged with engaging in organized crime to commit theft over $200,000[1] and theft over $200,000.[2] He was charged based upon his participation as the front man in the operation. Apolonio Hernandez and Rudy Delafuente were charged based upon their work posing as the construction workers in the scheme. Joshua Delafuente, Daniel's 22 year old son, was charged because all the profits of the criminal enterprise were hidden in his name, making Delafuente judgment-proof to all his victims.

Both charges are 1st-degree felonies. The decision to charge both was one of trial strategy. With the organized crime charge, we had the ability to put on evidence of the structure of the criminal enterprise as well as details of its members' participation to further the crime. Essentially, it broadened the range of admissible evidence at trial.

Even though the investigation uncovered more than 50 victims, the indictment alleged only half that number in an attempt to simplify what could easily become overwhelming. As alleged, the indictment was eight pages long and took almost 45 minutes to read. The jury charge on guilt/innocence took twice as long to read due to the application paragraph. Additionally, after hearing from 10 victims, it was clear the jurors had heard enough, and putting on all 50 victims in our case in chief could have resulted in losing the jury's interest.

Trial preparation

Preparation for the trial of this case began from day one. Once I realized the scope of the crime, I knew that it had to be put together in a trial-ready fashion during the early investigation stages. This was not the type of case that could be organized later for trial. There were too many victims, witnesses, documents, defendants, and bank accounts to go back later and organize. In fact, once the investigation was complete, the file consisted of more than 10 boxes plus one trial notebook.

As the investigation unfolded, I put the information into a working spreadsheet. The victims went in the spreadsheet as they were discovered, and additional details of the crime were added as we learned them. Once complete, this spreadsheet allowed me to have the names, contact information, dates, type of evidence, amount of theft, and details of the specific crime for each complainant in one document. The document proved invaluable and did not take long to make because I entered the information as I obtained it. In fact, I used a modified form of this spreadsheet as my witness list for trial.

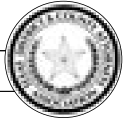
In one last attempt to con the citizens of Bexar County, Daniel Delafuente decided to represent himself at trial.

Trial

In one last attempt to con the citizens of Bexar County, Daniel Delafuente decided to represent himself at trial. Before trial he went through two hired attorneys. It was only after the jury was selected that Delafuente decided to fire his last lawyer and plead his own case.

Delafuente's self-representation allowed the jury to see firsthand how he conned the victims. Watching this trial was like reading a textbook on con men. Delafuente was fast-talking and would talk in circles trying to confuse the issue. He had an excellent memory dating back to 2002 and recalled details about each victim that I had a hard time remembering, despite my handy spreadsheet. He also had a chameleon-like demeanor that changed from minute to minute depending on the victim or witness he was cross-examining.

Delafuente acted differently with various victims. Generally with the older victims, he was polite and respectful; however, he would go over minute details with them that they could not remember. With the female victims he exploited their lack of knowledge in the area of carpentry and would discuss the demolition, asking them if they knew the value of the work he had done. Additionally, he became more confrontational with the women and tended to be more intimidating when they were on the stand. With the male victims, he



was more deferential but would try to relate to them as fathers or husbands. He also frequently talked about personal matters that he had learned from the victims during his encounters with them in some attempt to personalize himself.

Several interesting things happened during this trial. One that stands out involves Delafuente's use of fake names. About half of the victims knew Delafuente by an alias he had used. During the cross-examinations of these victims, they addressed Delafuente by his fake name. The exchanges would begin with Delafuente asking the victim, "Isn't it true you made too many changes to the contract?" and the victim would respond "No, Robert, I never made any changes," "No, Mike, I didn't do that," or "No, Frank, that is not true." It was interesting that Delafuente never corrected them, and it reminded the jury that these victims had been lied to from the start.

During the course of the trial, 350 exhibits were admitted and just over 40 witnesses were called. The direct examinations of the victims were structured the same way for each victim so that the jury knew each time what to expect. We asked the same series of questions of each victim and admitted the same type of evidence for each victim in the exact same format.

The outline of the direct examination was as follows:

1) What work did the victim want done and why?

2) How did s/he find the defendant's company?

3) Upon what name, description, and advertisement did the victim rely?

4) Who initially came out to the house, what name did he use, and what things did he say to entice the victim to sign a contract (to identify Delafuente in court)?

5) What were the terms of the contract, when was work to begin, and how much was to be paid?

6) How much money was paid upfront and why?

7) Who came out to the house and what names did they use (to identify the other participants)?

8) How much additional money was given to Delafuente and why?

9) What was the difference in ability to contact Delafuente after the money was given compared to when he was trying to get them to sign the contract?

10) What damage was done to the victim's home (plus photos of the damage) and how did it affect the victim's ability to live at home?

11) Where did the money come from that Delafuente took?

12) Had the victim been able to get the work done or his/her home repaired? If not, why not? If yes, how much did it cost?

During the course of the trial we admitted numerous photos showing the demolition Delafuente did to his victims' homes. Once admitted, these photos were tacked onto a posterboard that remained in the courtroom throughout the trial. As each victim testified, photos of that home were added to the posterboard. By the end of the trial we had two large poster boards filled with photos of Delafuente's destruction.

To keep the exhibits organized during trial, they were maintained in different stacks. For example, all the contracts Delafuente gave to the victims were kept in one stack, all the false advertisements in another stack, photo line-ups of co-defendants in another, and so on. This organization allowed us to quickly find exhibits later for use with other witnesses or during argument.

The jury returned a guilty verdict in four minutes. Delafuente, a con artist to the end, delayed the reading of the verdict by asking that his pastor be allowed to stand with him when it was read. Surprisingly, Delafuente was completely unfazed by the verdict; when I passed him in the hall later he said to me, "Good job."

During punishment I again decided to exercise restraint and put on only six additional victims of Delafuente's home-remodeling scam. Some of those victims included a pastor from a low-income neighborhood whose church lost $18,000 and an elderly man Delafuente tried to con while out on bond for the offense. The jury also learned during punishment that Delafuente had sexually assaulted his 15-year-old niece a year earlier.

It took the jury longer to return the verdict on punishment, approximately two hours. However, it was worth the wait. Delafuente got 90 years in prison and a $10,000 fine on both counts.

Lessons learned

This case was a reminder not to underestimate the human side of financial crimes. The majority of my career I have prosecuted violent crimes, and their

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Congratulations!

We at the association celebrated two weddings back to back this past fall. Two TDCAA staffers, Lara Brumen and Ashlee Holobaugh, have gotten married recently. Above is Lara with new husband Barry Skidmore at their October wedding. Lara will go by Lara Brumen Skidmore.

Ashlee and her new husband, Darren Myers, were also married in October. She will now go by Ashlee Holobaugh Myers. Congratulations to both couples!

Continued from page 17

affect on victims and their families is obvious. However, financial crimes can have a less obvious yet substantial impact on the victims that can last for years after the criminal act has ended.

In this case, most victims were never able to get their homes finished because they could not afford it after Delafuente stole their money. These people see the damage done to their homes everyday. Other victims are still paying off home improvement or home equity loans that they took out to pay Delafuente. They are reminded each month when they write the check of how they were conned. Other victims lost the feeling of confidence and safety in their own home after Delafuente came in, took their money, and damaged the place.

While at the hospital for his baby's birth, Juan Castillo continued to call "Mike" to finish his home project. However, three months after giving Mike their money, Juan had to bring his newborn baby home to an upstairs bedroom in his mother-in-law's house because his own home was unlivable. When he finally moved back into his own house, Juan and his wife sterilized and washed baby bottles in a small bathroom while his family helped him put his kitchen back together. Juan cannot forget the way Delafuente damaged his home and affected what should have been a joyful time in their lives.

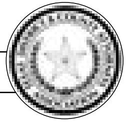
Juan Castillo was not the only person whose life was affected by Delafuente in a way that went beyond the loss of money. Delafuente destroyed Emma Chamberlain's back apartment where her sister had been living. As a result Emma's disabled sister has no permanent place to live, and Emma Chamberlain is still paying off a $44,000 loan. Billie Arredondo, a disabled woman, felt ashamed and contemplated suicide after Delafuente stole approximately $20,000 from her and her husband and left her modest home damaged. Judith Grimes spent Thanksgiving and Christmas of 2004 in a hotel because her home was left unlivable and in some places without a roof after she gave Delafuente $50,000 to improve her house. Marilyn Weininger paid Delafuente to do a room addition so that her elderly father could live out his final years in her home. She could not afford to get the work done after Delafuente took her money, and her father died a year later in a nursing home. These are just a few examples of the harm he caused these victims.

Since prosecuting Delafuente, I do not evaluate cases the same way. When asked, "Is this a civil dispute?" I hesitate to conclude it is without investigating. Even if it is as simple as an Internet search, a criminal history check, an inquiry with the Attorney General's Office, a Better Business Bureau search, or a county records assumed name search, I urge any prosecutor to look more closely at these types of cases. You never know if lurking behind what appears to be a contract dispute is another Daniel Delafuente.

Endnotes

1 Texas Penal Code §71.02.

2 Texas Penal Code §31.03.



CIVIL LAW UPDATE

By Becky Gregory
Judge of the 283rd Criminal District Court in Dallas in 2006

The right of succession

When elections shift judicial power, when does the old judge's term end and the new one's begin? Here's a helpful guide for everyone at the courthouse.

New judges began presiding over more than 40 courts in Dallas County on January 1, 2007, as a result of November's election, newly created courts, and others vacated for one reason or another.

Becky Gregory

Almost immediately after the election, questions arose over whether the incumbent appointees could continue to sit and, furthermore, when the successful candidates were entitled to assume their judgeships. This confusion and uncertainty stemmed from language in the Texas Constitution which provides that appointees serve "until the next succeeding general election."[1] In at least one instance, attorneys sought recusal or disqualification of an incumbent judge, arguing a lack of authority to preside over cases.

May incumbent judges continue to preside following an election ouster and, if so, when does their tenure end?

When may the newly elected successor judges wield the gavel and wear the robe?

Does it matter whether an incumbent gubernatorial appointee was appointed to a newly created bench or to an established bench?

The answers to these questions require reconciling provisions in the Texas Constitution, Election Code, Government Code, Attorney General Opinions, and caselaw. In Texas, the regular term for state and county office holders begins January 1.[2] Persons elected to such regular terms are required to qualify and assume their duties on, or as soon as possible after, January 1 of the year following their election.[3] Such terms of office cannot begin before that date, and newly elected officials cannot claim any part of the previous term. "Any other conclusion would make the beginning of a term of office depend on the will of the electee rather than the will of the electors."[4]

In the case of incumbents who were gubernatorial appointees, vacancies are filled by the governor "until the next general election."[5] If followed literally, this language would result in benches being vacant from the time of the election until January 1. To avoid an absurd and clearly unintended result and to preserve the "orderly process of government," the Texas Supreme Court has read this provision in conjunction with another constitutional provision, article XVI, §17, which requires officers to "continue to perform the duties of their offices until their successors shall be duly qualified."[6] When reconciled, these authorities make clear that ousted incumbents do not depart immediately following the election but rather continue to hold over until their successors are chosen and qualify. Successful candidates cannot qualify before January 1, 2007, because there is "no mandate by election or otherwise to do so."[7]

While all *regular* terms of office begin on the first day of January following the general election, the winner in a race to complete an *unexpired* term may assume office at once. In those instances, the successful candidate "is entitled to qualify for and assume the duties of the office immediately and shall take office as soon as possible after receipt of the certificate of the election."[8]

Despite the long-standing rule enunciated by the Texas Supreme Court in the *Sanders* case, issues concerning the

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TDCAA's seminar schedule

Here's a list of seminars on tap for the coming months.

Intoxication Manslaughter, March 25–30, 2007, at the Inn of the Hills in Kerrville. Room rates are $80 for a single, $90 for a double, $100 for a triple, and $110 for a quad; these rates are good until February 23 or until sold out. Call 830/895-5000 for reservations.

Civil Law Seminar, May 16–18, 2007, at the Omni San Antonio. Room rates are $85 for a single and $110 for a double and are good until April 25 or until sold out. Call 800/THE-OMNI or 210/691-8888 for reservations.

Forensic Evidence, June 12–15, 2007, at the Omni Marina in Corpus Christi. Call 800/THE-OMNI or 361/887-1600 for reservations.

Prosecutor Trial Skills Course, July 15–20, 2007, at the Doubletree North in Austin. Call 512/454-3737 or 800/222-8733 for reservations.

Advanced Advocacy Course, August 2007, at the Baylor School of Law in Waco.

Annual Criminal & Civil Law Update, Sept. 26–28, 2007, at the Omni Bayfront and Marina in Corpus Christi. Call 800/THE-OMNI or 361/887-1600 for reservations.

Key Personnel Seminar, Nov. 14–16, 2007, at the Omni Marina in Corpus Christi. Call 800/THE-OMNI or 361/887-1600 for reservations.

Elected Prosecutor Conference, Dec. 5–7, 2007, at the Hotel Galvez in Galveston. Call 409/765-7721 for reservations.

Seminar brochures are mailed two months before the seminar; online sign-up

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timely succession of successful candidates continue to perplex office holders and have resulted in numerous opinions by various attorneys general, all of which follow the analysis in *Sanders*.[9]

In short, successful judicial candidates who ran for a full four-year term have no "legal right nor color of legal right" to the judgeship prior to January 1 of the term of office they were seeking. "That is what [they] asked for and that is what [they] got...."[10] The electorate voted them in for a four-year term and no more.

Endnotes

1 Article IV, §12 of the Texas Constitution provides that "[a]ppointments to vacancies in offices elective by the people shall only continue until the next general election." Tex. Const. art. IV, §12 (g).

2 §601.003 of the Government Code provides that "[t]he regular term of an elective state, district, county, or precinct office begins on January 1 of the year following the general election for state and county officers." Tex. Gov't Code §601.003(a).

3 §601.003 of the Government Code provides that "[a] person elected to a regular term of office shall qualify and assume the duties of the office on, or as soon, as possible after, January 1 of the year following the person's election." Tex. Gov't Code §601.003(b).

4 *Ex parte Sanders*, 215 S.W. 2d 325, 326 (Tex. 1948).

5 Tex. Const. art. V, §28.

6 Tex. Const. art. XVI §17.

7 *Ex Parte Sanders* at 326.

8 Tex. Gov't Code §601.004.

9 See e.g., Op. Tex. Att'y Gen. No. GA-023 (2004) (elected sheriff does not assume office until January 1 of succeeding year); Op. Tex. Att'y Gen. GA-0263 (2004) (incumbent sheriff remains until January 1); Op. Tex. Att'y Gen. JM-579 (1986) (elected JP assumes duties on January 1 following election); Op. Tex. Att'y Gen. No. MW-521 (1982) (incumbent appointee to newly created district court bench continues until successor duly qualifies on January 1); Op. Tex. Att'y Gen. GA-0263 (2004) (appointee sheriff continues until successor qualifies on January 1 following election); Op. Tex. Atty. Gen. M-742 (1970) (appointed JP holds position until January 1 of following year).

10 *Ex parte Sanders* at 326 (Tex. 1948).

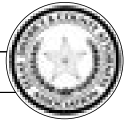
Nominations needed for Distinguished Service to Children and Families award

The State Bar Committee on Child Abuse and Neglect is accepting nominations for its ninth annual Award for Distinguished Service to Children and Families.

Anyone who'd like to nominate a person for the award should submit a one-page written nomination with specific reasons included. (You can download a copy of the nomination form from www.tdcaa.com; click on the Forms and Briefs button, and search for "child abuse service award.") Please provide the nominee's address and telephone number, and advise whether you will permit publication of your name as the nominator in print media honoring all nominees.

The deadline for nominations is April 15, 2007. Only practicing attorneys (private or government) are eligible. Candidates must have made a substantial contribution to the field of advocacy for abused and neglected children. Judges and members of the State Bar Committee on Child Abuse and Neglect are ineligible.

Mail or fax the nomination to: Mandi Scott, Committees Coordinator, State Bar of Texas, Ste. 400, P.O. Box 12487, Austin, TX 78711-2487; the fax number is 512/427-4109.



CRIMINAL LAW

By Lynn Switzer
District Attorney in Gray, Hemphill, Lipscomb, Roberts, and Wheeler Counties

My first encounter with funeral service protests

Are you familiar with §42.055 of the Texas Penal Code? Neither was I—until church members from Kansas showed up to protest at the funeral of a local man killed in Iraq.

It was on a somewhat quiet afternoon that I received a phone call from Hemphill County Sheriff Gary Henderson. He had received notice from the Westboro Baptist Church in Kansas that church members intended to protest at the funeral of Miles Henderson, a 24-year-old pilot with the 82nd Airborne Division in Iraq who died when his Apache AH-64D crashed. His body was brought home to Canadian November 14, 2006, and his funeral was scheduled for the following Sunday.

Lynn Switzer

(For those of you unfamiliar with Westboro Baptist Church, its members protest at the funerals of soldiers who have served in the Middle East and others, carrying signs designed to hurt and insult an already pained and grieving family and community.)

As soon as Sheriff Henderson called, I immediately contacted Rob Kepple at TDCAA and, as always, he came to my rescue. Rob located Penal Code §42.055,[1] which concerns funeral service disruptions, and also suggested I call Jeri Yenne, the CDA in Brazoria County, because she had previous contact with the Westboro Baptist Church.

It was late when I called Jeri and although she was not in, she immediately returned my call. We had a very good conversation about what we believed we could and could not do under this new section of the Penal Code and ultimately determined we really had no definite answers. One thing we were certain of was that as prosecutors, we would assist law enforcement in protecting the Henderson family during the funeral. Jeri also suggested videotaping the entire event, noting that the Westboro Baptist Church usually asks a member to take photos at and videotape the protest too. She also recommended I contact the Patriot Guard Riders, a group of motorcycle riders, most of whom are either veterans or military reservists (many are also current law enforcement) familiar with the Westboro Baptist Church. They ride their motorcycles to the funeral and assist law enforcement in protecting the family from the protesters. Once I learned all of this, some of my fears were dispelled; however, I must confess I still had some lingering reservations. (It is hard to let go of that "biker" stereotype.)

After talking with Jeri, I did a little of my own research on the Westboro Baptist Church. A visit to its website spoke volumes about these people. I even went online and watched an interview by Sean Hannity and Alan Colmes on FoxNews.com with a leader of this group, Shirley Phelps-Roper. (If you knew how computer illiterate I am, you would be properly impressed with this amount of Internet research!) If you ever anticipate this group coming into your community, you must listen to this interview. (Do an online search on the Fox News site for Phelps-Roper's name.) I do not understand what motivates these people to do and say the things they do, but even more so, why they choose to do it at a time when family and friends are mourning the loss of a loved one.

Armed with Jeri's suggestions, I called Sheriff Henderson back. At the

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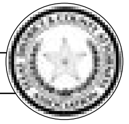
time he initially called me, I had no idea how much planning he had already done in anticipation of the protesters coming into his county. He had been working with the family, funeral home, city manager, and public works director to plan routes for the funeral procession and to determine what intersections to block. He had already anticipated the route the protesters would take coming into the county and knew where his officers would need to be to intercept and escort them to the protest area he had cordoned off. Sheriff Henderson had measured the 500-foot distance required under the statute from the church (where the memorial service was held), making sure it was in a public location, and marked it with crime scene tape. We were fortunate because the church is south of our courthouse in Canadian; Sheriff Henderson placed the protest area on the north side of the courthouse, thus effectively using the courthouse to block the protestors from the funeral.

He determined that the Patriot Guard Riders would stay in the street on the north side of the courthouse, allowing them to protect Miles' family and friends from the protestors' chants and signs but still not interfere with the church members' right to protest. He had already contacted the Patriot Guard Riders and notified them of the upcoming protest. He had also anticipated the need for videotaping and photographing the crowd and had already contacted area agencies to assist Hemphill County deputies on the day of the funeral. Although the statute requires law enforcement to order any protestor to "move, disperse, or otherwise remedy the violation prior to his arrest," I told him that my interpretation of the statute also allowed him to arrest anyone who "had intentionally harmed the interests of others which those sections seek to protect"; to me, this language was an exception to the provision requiring law enforcement to order the protestors to move. We also needed to identify a specific individual who had been harmed prior to any arrests. Sheriff Henderson's position was that we would try to avoid arrests if possible, allow the church members to protest, then leave the community. He believed (and I did too) that to do otherwise would provide this group the publicity they were so desperately seeking.

The Patriot Guard riders assembled behind the police tape to act as a buffer between the protesters and the family of the fallen soldier.

The funeral

The day of the funeral dawned bright and comfortably cool, which is unusual for a November day in the Texas Panhandle. There was just enough breeze to assist the flags in flying proudly. My investigator, Connie Lockridge, and I drove to Canadian and went directly to the courthouse for our strategy meeting. I was so impressed and humbled by the number of agencies in attendance. Sheriff Henderson had received volunteers from Sheriff Joel Finsterwald in Wheeler County and a couple of his deputies (his sergeant was riding with the Patriot Guard); Sheriff Dana Miller in Roberts County and one of his deputies; Sheriff Don Copeland in Gray County and his chief deputy, lieutenant, and two additional deputies; Sheriff Gary Evans in Hansford County and one of his deputies, Texas Highway Patrol Lieutenant Ben Urbanczyk; Sgt.



Randy Woodrum and three of their troopers; Texas Parks and Wildlife Game Warden Jerry Stucki; Chief Scott Brewster of the Canadian Volunteer Fire Department and his entire department; Hemphill County EMS and the entire Hemphill County Sheriff's Department.

During the meeting Sheriff Henderson told the group that there would be a private memorial service at the family's ranch and that he would escort the Patriot Guard out to the ranch. After the service he would lead the Patriot Guard, which would act as an escort for the family, back to town to the church where a public memorial service would be held. He had prepared maps for the attendees that had the routes and intersections marked. He informed the group that the protestors would be escorted to the specific location on the north side of the courthouse and that after the protest they would be escorted out of town. The Patriot Guard would be located on the street between the protestors and the courthouse and that the street to the south of the courthouse, which ran in front of the church, would be cordoned off for the general procession. Sheriff Henderson made it very clear that his intent was to maintain the peace, allow the protestors to exercise their right, and then get them out of his county and back to Kansas. With assignments handed out, we were ready.

The protestors arrived early and took time to enjoy the city's walking park, which I thought a bit odd. Once they were escorted to the protest area it became increasingly clear that this "protest" was not going to be of a scale and magnitude that would make CNN or Fox News. There were only about 10 protestors; however, the potential for trouble was still there. The Patriot Guard, with backs turned, lined up in front of the protestors and held U.S. flags.

The protestors removed their signs from bags, held them up, sang a few songs, and were done. They were escorted out of town without incident. Sheriff Henderson had accomplished his goal of maintaining the peace. Miles Henderson's family had neither seen nor heard any of the protest.

Advice

If you are ever confronted with a similar situation, I suggest employing Sheriff Henderson's strategy of careful, detailed planning, working extensively with the family and the funeral home, and contacting the Patriot Guard Riders for help (www.patriotguard.org). It was clear by the bikers' professionalism that they knew what they were doing: They were not there to argue with, confront, or even acknowledge the existence of the Westboro Baptist Church members but rather to protect the family and friends of Miles Henderson. I was truly impressed and deeply moved by the Patriot Guard Riders.

§42.055 was not put to the test in Canadian, Texas, on that November day, which is not necessarily a bad thing; therefore, I have no actual experiences to pass along regarding this statute's legal ramifications. What I can tell you is how truly proud I am of all of the agencies and people who participated in this event. I still get tears in my eyes when I think of what took place in our small Panhandle town: the three-mile long procession of bikers riding two abreast escorting the general procession; the Patriot Guard Riders, standing with flags flying, lining the walkway for the family to enter the private memorial service; and the Riders standing guard protecting the family from the protestors. I know that patriotism still lives and in some small way perhaps we were able to tell Miles' family that we truly appreciated his sacrifice.

Endnote

1 Because §42.055 was passed during a special session, its language does not appear in TDCAA's Penal Code. For readers' convenience, it is reprinted here.

§42.055. FUNERAL SERVICE DISRUPTIONS.

(a) In this section:

(1) "Facility" means a building at which any portion of a funeral service takes place, including a funeral parlor, mortuary, private home, or established place of worship.

(2) "Funeral service" means a ceremony, procession, or memorial service, including a wake or viewing, held in connection with the burial or creamation of the dead.

(3) "Picketing" means:

(A) standing, sitting, or repeated walking, riding, driving, or other similar action by a person displaying or carrying a banner, placard, or sign;

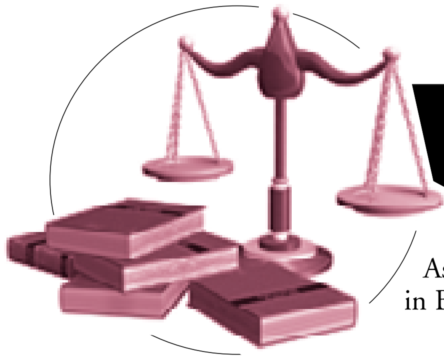
(B) engaging in loud singing, chanting, whistling, or yelling, with or without noise amplication through a device such as a bullhorn or microphone; or

(C) blocking access to a facility or cemetery being used for a funeral service.

(b) A person commits an offense if, during the period beginning one hour before the service begins and ending one hour after the service is completed, the person engages in picketing within 500 feet of a facility or cemetery being used for a funeral service.

(c) An offense under this section is a Class B. misdemeanor.

Added by Acts 2006, 79th Leg., 3rd C.S., ch. 2, Sec. 1, eff. May 19, 2006.



BACK TO BASICS

By Greg Gilleland
Assistant Criminal District Attorney
in Bastrop County

Motions to Revoke: Ain't no joke

Though filing motions to revoke probation differs by jurisdiction and even by court, here are the basics to keep in mind.

Over the past few years, with increasing frequency, you've read articles and editorials in the papers or heard media reports about prison overcrowding in Texas and the "broken" probation system. One major issue regards how many offenders are in prison as a result of motions to revoke their probation for "minor and technical" violations of probation.[1]

Greg Gilleland

During my career as a prosecutor, some of the greatest examples of justice for victims occurred as a result of motions to revoke probation. Likewise, I have seen the rehabilitation of some defendants who needed more guidance to complete their probation.

If the public comments of some legislators become reality in the form of legislation, then expect that in the very near future there will likely be significant changes in both probation and probation revocations. In this article, I seek to cover some basics about probation revocation practice, but I cannot cover every facet or nuance. Thus, as always, I urge you to research your specific issue to ensure your law is correct and up to date.[2]

The practical aspect

In 17 years of Texas criminal law practice, I have observed wide variance in the methods that counties and judges handle their revocation proceedings. My first 15 years were spent in Fort Bend County, one of the fastest growing counties in the nation, where the population grew from roughly 200,000 to more than 750,000 during my tenure. As the various criminal justice agencies expanded rapidly, so did our revocation proceedings. As a prosecutor, I was privileged to practice before many fine judges, yet there was little consistency even among these elected and visiting judges as to how each handled and treated revocation proceedings.

Through practice in each court, prosecutors should have a very good idea which violations will result in revocation and which violations will not.

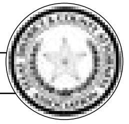
Probation vs. deferred adjudication

As you know, a defendant placed on formal probation has been convicted of the offense, but the defendant placed on deferred adjudication has not been convicted. Instead, the deferred adjudication probationer has had his finding of guilt deferred, pending successful completion of the probated sentence.

This difference becomes important in many cases because of the range of punishment. When a defendant is placed on probation, his sentence time is probated for a number of months or years. For example, a felony DWI offender might receive a 10-year sentence in TDCJ probated for five years, meaning that if his probation is revoked, he cannot receive more than a 10-year prison sentence.

But with deferred adjudication, the full range of punishment is available if that deferred adjudication is adjudicated. Thus, an offender who receives a 10-year term of deferred adjudication probation for the 1st-degree felony of aggravated robbery, if adjudicated, could be sentenced to anywhere in the entire five to 99 years or life range.

In the jurisdictions where I have practiced, the probation department presents the violations to the prosecutor, who decides whether to file a Motion to Revoke Probation or Motion to Adjudicate Guilt. The probation depart-



ment submits a written violation report to the prosecutor alleging the violation's particulars, and the prosecutor drafts a formal MRP, containing sufficient information[3] to appraise the defendant of the alleged violations to comport with due process.[4] The prosecutor can request that a capias issue for the defendant's arrest or that a summons issue to notify him of the setting of the case. My general rule, like many other prosecutors, is that offenders who have money- or community service-related technical violations are summoned, but those offenders who are constituting some danger to society by their violations have a capias requested, often with bond conditions.[5] When I feel that it is in the best interest of public safety to have a probation violator arrested on the MRP, I request a capias from the court, and I make a bond recommendation (with conditions of bond if necessary) at that same time.

Motions to show cause and administrative hearings

A motion to show cause can be a step between administrative hearings conducted by the probation department and filing a formal revocation motion. These are especially useful for technical violators. It summons the probationer to court to show cause why a MRP based upon the violations should not be filed against him. The court and the probationer then have the opportunity to discuss the violations, and the court can give the offender an opportunity to resolve those issues prior to filing a MRP. The case can be reset as needed so the offender can correct his violations. Both administrative hearings and motions to show cause are a good way to address initial non-compliance with minor probation violations.

The hearing itself

Revocation hearings are administrative in nature,[6] but because a finding of revocation implicates a defendant's liberty interest, probation cannot be revoked without due process of law.[7] The defendant has the right to representation by counsel at a revocation hearing.[8] The burden of proof is by preponderance of the evidence for the State,[9] and the rules of evidence are often relaxed.

Because a revocation hearing is administrative in nature, there is no right to a trial by jury.[10] The probationer doesn't plead guilty or not guilty; rather, he pleads true or not true to the allegations in the MRP. A plea of true is sufficient to uphold a revocation of probation.[11] Also, an extrajudicial confession or a judicial confession of a violation of the conditions of probation is sufficient to revoke probation.[12]

I always ask the defense attorney if his client will stipulate to his identity, and 99 percent of the time, the defense agrees. I always obtain a written stipulation of identity for the case.[13] Note that if the defendant doesn't raise the issue of identification in the hearing, it is waived for all time.[14]

A defendant has a right to appeal a probation revocation hearing resulting in a revocation.[15] However, a defendant may not appeal an order adjudicating guilt.[16]

The MRP *must* be filed *and* the capias or warrant issued prior to the expiration of the term of probation,[17] but the hearing can be held after the term of probation has ended.[18] Check your motion to ensure that your dates, facts, and violations are properly alleged and that they give adequate notice of the manner and means that the condition of probation was violated; amend it if necessary at least seven days prior to the hearing, and give adequate notice of the amendment to opposing counsel. Thereafter, the motion can be amended only for good cause but not after presentation of the evidence has begun.[19]

Prior to the hearing, review the probation department file, and have the officer make copies of all relevant documents, such as admissions of drug or alcohol use in the defendant's handwriting, positive urinalysis results, etc. Rather than introduce the entire file, I seek to introduce select documents and have the officers testify that they are true and correct copies made from their files for the proceeding. This practice keeps the officer from having to copy the entire file and prevents huge files containing many irrelevant documents from taking up space in the district clerk's office.

The probation department's file is a business record and is therefore admissible as such. I usually cover the business record predicate with the probation or court officer, then I ask the following:

- When was the defendant placed on probation?
- What is the cause number and offense?

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- What is the period of supervision?
- Has the probation been terminated and/or was the MRP filed prior to the end of the probation period?
- Did the violations occur while probation was in full force and effect?
- Did the defendant acknowledge in writing the receipt of a copy of the conditions of probation at the onset of his probation?
- What conditions did the defendant violate? How so?[20]

A special word of caution regarding defendants who are supervised outside of your county: Although notes of the supervising department can be a business record and thus in some cases a probation officer from your jurisdiction can testify to them, I always try to bring the officer supervising the defendant from the jurisdiction in question to testify personally. I have seen judges exclude probation records from outside the county because your local probation officer does not have the capacity to testify, based upon personal knowledge about how those records are kept. I have found that often the records do not reflect the probationer's attitude or demeanor the way that his supervising officer can, and oftentimes the records do not contain detailed information on just how much the supervising officer tried to help the probationer succeed.

Finally, ask your judge to make a finding on the record as to which conditions were violated. Such a finding is especially important if there are non-payment violations alleged because there are no indigency concerns for non-monetary condition violations.

Indigency issues

If the State shows that the probationer failed to meet certain financial obligations of probation, and if the defendant raises the defense of inability to pay those fines, fees, costs, restitution, or other probation expenses, the burden then shifts to the State to prove that the probationer *was* able to pay some or all of the amounts in question.[21] This area of revocation gets very complicated very fast in caselaw because there are constitutional implications as to whether the court must inquire as to the issue of inability to pay even if the defendant does not raise it.[22]

Cross examination

Perhaps the best crosses I have ever observed in a MRP proceeding were those done in the late 1990s by former Fort Bend County narcotics prosecutor Glenn Cook.[23] Glenn began by asking defendants if they did or did not violate the conditions alleged in the motion. Invariably, on direct the defendant would "promise" not to violate his conditions of probation (again). Glenn then got them to admit that, in this very case, they had made that same promise and broken it. If the probationer had prior probated sentences that had also been revoked, Glenn went over these and established that in each of those cases, he had promised the judge that he would obey the probation conditions. Glenn summarized that the probationer had previously had two or three (or more) chances to succeed but had decided consciously to violate those promises. He would do this very briefly, not beating a dead horse, but often this type of questioning resulted in revocation, not reinstatement.

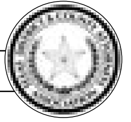
Motion practice

Be sure to review the probationer's performance with the probation officer well in advance of the hearing to determine if any further probation violations have occurred. Likewise, have your probation officer or investigator run the probationer's criminal history to ascertain if he has been arrested or charged with a new crime during the pendency of the MRP. Often you will find that numerous further violations or other crimes were committed after a MRP was filed.

Regarding absconders, be sure to amend your motion before the term of probation expires. Many prosecutors neglect to amend the MRP once a probationer has absconded, but it's the perfect opportunity to allege yet another offense and increase the probability that the MRP will be granted.

Allege each and every violation of the conditions of probation in your MRP. Do not be tempted to allege only one major violation or to leave out what your judge may consider to be "minor" violations. If a probationer has a new law violation and many technical violations, allege them all. Your proof at the hearing may fall short on the new law violation, but a probationer could still be revoked on a failure to perform community service hours.[24]

Another reason to allege every violation in the MRP probation is to comply with due process requirements of notice. The probationer has the right to notice



as to which conditions you allege were violated. By alleging all violations of probation, you can paint a complete picture for the court as to how seriously the probationer took his probated sentence. If you do not allege certain violations, a competent defense attorney will object that you are introducing evidence outside the MRP and therefore not relevant to the decision of revocation.[25] How many times have you heard a probationer tell the court,"I was late paying my fine, but I am doing everything else that my probation officer has told me to do"? He's not mentioning, of course, that he failed to report, failed to abstain from injurious habits, failed to do community service, etc.

Also, because the court may revoke (except in rare exceptions) for the commission of one violation of probation, the more violations you allege ensures you have a better chance of seeing that justice is done. For example, many conditions of probation prohibit the use of illegal substances and alcohol as "injurious habits." Caselaw has said that one positive urinalysis does not a habit make. In other words, you must have more than one example of drug or alcohol use as evidence to comprise a "habit."

MRP proceedings do not invoke double jeopardy.[26] If a motion has been filed but no plea was made and no revocation hearing held (i.e., the probation is modified and/or the MRP is withdrawn), then previous allegations may be refiled in a new MRP.[27] However, if a defendant was continued on probation after a revocation hearing, the court may not grant a continuance of the revocation hearing and then revoke the probation without a new motion and a new hearing, and the grounds for revocation must have occurred after the defendant was continued on probation.[28]

Zero tolerance caseload

In my opinion, certain offenders must be targeted for intense monitoring to ensure public safety and, in financial cases, to ensure that victims are compensated for their losses. I always work closely with probation officers in cases involving large amounts of restitution (often embezzlement or white-collar theft), DWI, and sex offenders.

For restitution cases, I recommend establishing a guideline where the probation officer notifies you if the defendant falls behind in his restitution payments. I have found that quickly addressing this type of violation through a Motion to Show Cause, an MRP, or an administrative hearing at the probation department often results in the probationer quickly catching up on his restitution payments, thus negating a call to my boss from the victim about how we are not doing our job. Restitution-paying probationers are pretty motivated about not being sent to a restitution center.[29] (For those who don't know, a restitution center is a Texas Residential Program, a form of Community Corrections Facilities administered by the Texas Department of Criminal Justice. Restitution centers target offenders who have problems maintaining employment and meeting court-ordered monetary obligations; these facilities provide employment, housing, education, community service restitution, and life skills/cognitive training programs.)[30] I usually won't initially move to revoke an offender who has restitution due unless there is a total and absolute failure to pay. I will modify to a restitution center, several times if necessary. The victim deserves to be made whole unless the probationer is committing other crimes while on probation.

Likewise, for DWI probationers, I request that I be notified upon any positive urinalysis or interlock alert. I bring those violations to the court's attention immediately because quick intervention is the key to avoiding injury or death resulting from a DWI probationer causing a collision while intoxicated. I have often found it useful to suggest to the probation officer voluntary modifications for the initial violations of DWI offenders, including daily AA meetings or other intensive counseling. If those do not work, SAFPF is the next step, either by modification or hearing.

And so it goes with sex offender probationers. These offenders are often on a specialized caseload with a very attentive officer, but I want to know of *any* problems (other than payment issues for non-restitution conditions) as soon as they occur. As far as I am concerned, the court needs to be appraised immediately of a sex offender not attending or participating in treatment, not reporting, absconding, failing a polygraph or plethysmograph examination,[31] accessing the Internet, or other related violations.

Continued on page 28

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Judicial economy

An MRP can also be used to further judicial economy. For example, if a person is serving a probated sentence for a 1st- degree felony and while on probation commits a misdemeanor or a lower-level felony, it may make sense to proceed on the new case as the basis of a revocation motion rather than filing a new criminal case. The newer and lesser offense will oftentimes be dismissed upon the revocation of probation. Conversely, if a state jail probationer commits a murder, then the murder case should be pursued because its sentence would likely greatly exceed the maximum state jail sentence.

But what if your chief witness in the murder case dies before trial or the overwhelming guilt of the probationer is based upon weakly corroborated co-defendant testimony? Then at least you have the alternative of trying the law violation in an MRP, where the burden is by a preponderance of the evidence instead of beyond a reasonable doubt, giving the murder victims some justice in the matter.

If there is a new law violation in your or another jurisdiction, good communication between yourself and the prosecutor handling the new charge is key to insuring success in both prosecutions. Be sure to consult with appellate attorneys if you have a question of collateral estoppel regarding proceeding on the revocation first or on the new charge first. Obviously, if a defendant is on deferred probation for murder and picks up a new charge (say, a 3rd-degree felony), then you will probably want to proceed on the MRP because of the larger punishment range. The lower burden of proof in revocation proceedings (preponderance of the evidence) is at times advantageous when there are issues that might complicate a trial on the new charge, where the burden is beyond a reasonable doubt. Another consideration is that a judge might not be as readily confused as a jury might in a complex factual or legal case based on a new offense. As always, good communication makes for effective law enforcement.

Endnotes

1 I will refer in this article to motions to revoke probation/community supervision and motions to adjudicate guilt collectively as MRPs, except as where otherwise specifically indicated concerning deferred adjudication. Community supervision will be referred to as probation. I'm from the old school, and it's easier for me this way.

2 And as always, attend the 2007 TDCAA Legislative Update Seminar to learn what changes this current session holds.

3 *Garner v. State*, 545 S.W.2d 178 (Tex. Crim. App. 1977).

4 It is also common for prosecutors in different jurisdictions (and states) to contact each other when a probationer is arrested in another county. I often fax copies of indictments and informations to other DA's offices at their request, which can be beneficial in more than the obvious way. Perhaps your charge has witnesses who do not wish to cooperate or other issues, which would more easily be tried in an MRP hearing. Communication between offices is the key.

5 Examples of cases where I feel a capias is necessary are DWI defendants (who continue to drink, fail to have an interlock device, or have violations with said device), persons who commit crimes against a person or property crimes (I usually do not arrest for non-chronic DWLS-type offenses), and others.

6 *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Cobb v. State*, 851 S.W. 2d 871 (Tex. Crim. App. 1993).

7 *Gagnon*, at 781-782.

8 *Ex Parte Shivers*, 501 S.W. 2d 898 (Tex. Crim. App. 1973); Tex. Code Crim. Pro. Art. 41.12 §21(d)

9 *Kulhanek v. State*, 587 S.W. 2d 424 (Tex. Crim. App. 1979)

10 *Valdez v. State*, 508 S.W.2d 842 (Tex. Crim. App. 1973); *Barrow v. State*, 505 S.W.2d 808 (Tex. Crim. App. 1974).

11 *Cole v. State*, 578 S.W. 2d 127, 128 (Tex. Crim. App. 1979).

12 *Bush v. State*, 506 S.W.2d 603, (Tex. Crim. App. 1974); *Valdez v. State*, 508 S.W.2d 842 (Tex. Crim. App. 1973).

13 I use a simple fill-in-the-blank form that contains the style, cause number, and court, entitled "Agreed Stipulation of Identity" and reads as follows: "The defendant ____ and The State of Texas hereby stipulate that the defendant present in the courtroom today, namely ___, is the same person that pleaded ___ to the offense of ______ on ______ in the above-styled and numbered cause of action, and that the defendant was placed on community supervision on or about that date." It also contains signature and date lines for the State, the defendant, and his attorney. I introduce form as an exhibit and read it into the record.

14 *Batiste v. State*, 530 S.W.2d 835 (Tex. Crim. App. 1975).

15 Tex. Code Crim. Proc. Art. 42.12 §23(b).

16 Tex. Code Crim. Proc. Art. 42.12 §5(b); *Wright v. State*, 592 S.W. 2d 604 (Tex. Crim. App. 1992).

17 *Strickland v. State*, 523 S.W.2d 250 (Tex. Crim. App. 1975).

18 Tex. Code Crim. Pro. Art. 42.12(2)(e); *Strickland* at 251.

19 Tex. Code Crim. Pro. Art. 42.12 §21(b).

20 I usually do not seek to admit the entire file of the probation department. If I do, I ask the court to allow the probation department to submit a copy of the file for the record.

21 *Stanfield v. State*, 718 S.W.2d 734 (Tex. Crim. App.

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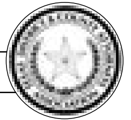


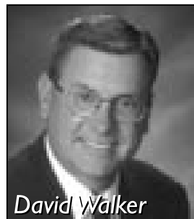
CIVIL LAW UPDATE

By David Walker
Montgomery County Attorney

Civil injunctions

A useful tool for Montgomery County prosecutors in shutting down a prostitution ring

The Montgomery County Attorney's Office, working with the county sheriff's office and the fire marshal, successfully closed down a massage parlor fronting for prostitution. The investigation and eventual closing of the parlor demonstrated how a coordinated and cooperative law enforcement effort can produce results that might elude a more typical application of law enforcement assets.


David Walker

The investigation of KM Massage Center began as many criminal investigations do, with a complaint from a local citizen. This person contacted a deputy sheriff and complained that an employee of KM Massage Center had offered to perform a sexual act in return for money. The deputy sheriff referred the information to the sheriff's special investigations unit (SIU), which is composed of municipal and county peace officers under the sheriff's supervision and investigates a wide variety of criminal matters that often require undercover investigative techniques. An investigation of alleged organized prostitution activities seemed to be right up the SIU's alley.

KM Massage Center was located on Sawdust Road in a strip center in one of the busiest parts of Montgomery County, near the southern entrance to The Woodlands and just west of Interstate 45. Fast food restaurants, grocery stores, and a wide variety of other businesses are crowded together along Sawdust Road. Traffic is almost always congested. It was a bit unusual to find an organized prostitution activity in such a location. Montgomery County is adjacent to Houston and Harris County, and though it is a rapidly growing suburban area, sexually oriented businesses (either legal or illegal) have, to date, not found their way into the county. For the past 45 years, sheriffs have exhibited a conservative brand of leadership in law enforcement that, at least in part, has discouraged sexually oriented business here. Current sheriff Tommy Gage continues that tradition.

The investigation

An investigator with the SIU began his investigation in August 2004. Coincidentally, this was within 30 days of the establishment's licensure by the Texas Department of State Health Services as a purportedly legitimate massage therapy business. The SIU collected evidence at KM Massage Center in September 2004 by sending an undercover officer into the premises. The undercover operation resulted in the arrest of a female attendant, Lihua Zhao, on September 22, 2004, who was charged with prostitution (§43.02, Texas Penal Code) and with violating Chapter 455 of the Texas Occupations Code, the regulatory statute for massage therapy establishments. Ms. Zhao had offered to perform oral sex on the undercover officer for $80. The attendant's arrest was referred to the Montgomery County District Attorney's Office, and for the balance of 2004 and the first half of 2005, members of the sheriff's department continued to monitor KM Massage Center and await the results of the attendant's prosecution. Lihua Zhao subsequently pled guilty to prostitution (Class B), was placed on deferred adjudication for nine months, and was assessed a $500 fine.

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Motions to Revoke (cont'd)

1986).

22 *Ortega v. State*, 860 S.W.2d 561 (Tex. App.—Austin 1993); *Hicks v. Feiock*, 485 U.S. 624 (1988).

23 Also formerly of the Harris County District Attorney's Office and now an assistant United States attorney in the Southern District of Texas.

24 Note that many conditions of probation direct a probationer to perform the total number of community service hours "as directed." Usually language directs that community service be performed at no less than four hours per week.

25 Although evidence of probation violations outside the allegations contained in the MRP are certainly admissible for the punishment portion of a revocation proceeding.

26 *Bass v. State*, 501 S.W.2d 643 (Tex. Crim. App. 1973).

27 *Winkle v. State*, 718 S.W.2d 306 (Tex. App.—Dallas 1986, no pet.).

28 *Rogers v. State*, 610 S.W.2d 248 (Tex. Crim. App. 1982).

29 Similar to the fear of attending SAFPF as exhibited by drug offenders. They would often rather go to prison or state jail than SAFPF.

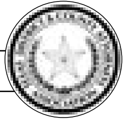
30 Report from the Texas Department of Criminal Justice Community Supervision and Corrections Departments Judicial Advisory Commission to the Texas House of Representatives Corrections Interim Committee-2002.

31 Wikipedia says: "Another common but more controversial type of plethysmograph is the penile plethysmograph (PPG), a device used to measure changes in blood flow in the penis. Although controversial, there are many learned and respected experts who believe it is an effective tool. Allen Cowling of Cowling Investigations states on his website concerning false allegation cases that: 'The penile plethysmograph is a machine that measures changes in the circumference of the penis. A stretchable band with mercury in it is fitted around the subject's penis. The band is connected to a machine with a video screen and data recorder. Any changes in penis size, even those not felt by the subject, are recorded while the subject views sexually suggestive or pornographic pictures, slides, or movies, or listens to audio tapes with descriptions of such things as children being molested. Computer software is used to develop graphs showing the degree of arousal to each stimulus.' The plethysmograph directly measures the outside evidence of sexual arousal. When a man becomes sexually aroused, there is engorgement of the penis. When the penis becomes engorged, you are measuring sexual arousal, so for all practical purposes, the test is a blood pressure measurement. … The tests have been used to weed out false gays, in the treatment of sex-offenders, in sentencing decisions for sex offenders, as a condition of parole for certain sex offenders, and in some child custody cases to determine if a father is or is not likely to abuse his child. Some psychologists use the PPG to measure the success of the therapy." I have seen it admitted in Texas courts in revocation hearings in conjunction with polygraph evidence and other evidence regarding sex offenders from their treatment providers who utilize the instrument.

Continued from page 29

The Montgomery County Sheriff's Office continued to receive complaints about KM Massage Center during the summer of 2005. The SIU increased its surveillance of the premises and gathered additional intelligence. Additional SIU officers were detailed to document the amount of customer traffic in and out of the parlor, and license plates were run to determine ownership of patrons' vehicles. Additionally, the Montgomery County Fire Marshal, Jimmy Williams, was asked to aid in the investigation by inspecting the premises pursuant to his authority under §455.104(b) of the Texas Occupations Code. Fire inspections occurred that November, and a variety of violations were discovered, resulting in the arrest of two attendants, Lihua Zhao and Ling Hui Ho, and the owner of the business, Kit Ming Chen. One attendant, Lihua Zhao, of course, was the same woman who had been arrested for prostitution the previous year. These arrests were also referred to the district attorney for prosecution. Ling Hui Ho was subsequently found guilty of failing to post a massage license, a Class B misdemeanor, and was assessed a fine of $350. Kit Ming Chen was found guilty of failing to post a massage license and was assessed a $750 fine. Ms. Ho and Mr. Chen were each convicted under §§455.352 and 455.204 of the Occupations Code. (The Occupations Code offense against Lihua Zhao was dismissed when she pled to the prostitution charge.)

By January 2006, KM Massage Center had been the subject of a continuing investigation for approximately 18



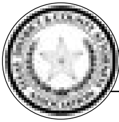
months. The arrests of two employees and the owner had not closed down the parlor. KM Massage Center continued its operations amid continued suspicions that its real enterprise was prostitution. Sheriff's officers and the fire marshal began to consider an alternative means to force KM Massage to shut its doors permanently. They contacted my office to discuss filing an application for an injunction under §455.351 of the Texas Occupations Code. Our senior investigator, Jimmy Wiggins, joined the investigation with the SIU and fire marshal, and the three agencies began collecting information of repetitive violations of the Occupations Code and Title 25 of the Texas Administrative Code (General Ethical Requirements for Massage Therapists). The agencies' plan at this point was to develop enough information to demonstrate to a district judge that KM Massage Center was flagrantly violating the licensing provisions for a massage establishment and that imposition of a permanent injunction closing the business was warranted.

A series of inspections of the parlor began in the late summer and fall of 2006. We gathered evidence that showed KM Massage Center was in daily violation of a host of licensing provisions of Chapter 455, Texas Occupations Code, and that the attendants were in frequent violation of the ethical requirements for massage therapists in the Texas Administrative Code. Some violations of Chapter 455 of the Occupations Code and of 25 Texas Administrative Code §141.5 were that KM Massage Center failed to keep accurate records of the dates and types of massage therapy provided. There were no records of initial consultations with therapy clients or billing records for therapy sessions. Massage therapist licenses were not displayed, and there was no evidence that therapy clients had been advised how to contact the Department of State Health Services if they had a complaint. It became apparent to attorneys in our office that a substantial body of information was available to plead in an application for an injunction, and we started work on an original petition. We anticipated a well-funded defense to the application for injunction, so we carefully planned for arguments and defenses that might be raised on the parlor's behalf. Though we did not know how the defendant might respond to our petition, we did not want the court to let the parlor stay open while they "corrected" their violations.

Injunction petition

The original petition was brought against KM Massage Center, Inc., and was filed in the 221st District Court in November 2006; it sought injunctive relief and the application of statutory civil penalties. Specifically, the petition requested that after a hearing, the massage parlor be closed until the defendant, Kit Ming Chen, after notice to the county and a hearing, demonstrated his ability to operate his business in full compliance with applicable regulatory statutes. Because the defendant had *never* demonstrated an ability to operate his business legally, our plan was to present enough evidence to convince the court to close the business presently and not allow it to reopen until the defendant could specifically show the court that he could operate legally in the future. Given the evidence we had accumulated, we did not think the massage parlor had much chance to stay open.

Kit Ming Chen was successfully served, and a hearing was set for December 21, 2006. State witnesses included representatives from the sheriff's office, fire marshal, county attorney's office, and an investigator from the Department of State Health Services, all of whom told of their observations and evidence they collected during surveillance of the parlor. The petition for injunction was listed near the end of a lengthy ancillary docket, and the long wait apparently provided the defendant and his attorney an opportunity to consider the details of the State's allegations and to attempt to reach an agreement in lieu of proceeding with a contested hearing. Because the petition listed daily violations spanning almost two years, the defendant's request to negotiate a settlement was not surprising. The defendant suggested that he be allowed to remain open for two months during which he'd try to sell the business, a totally unacceptable suggestion. We demanded the premises close immediately because our evidence showed that Chen had completely failed to follow the licensing statute. An agreement was reached, and Judge Suzanne Stovall in fact entered a temporary injunction that day. The order provided for the immediate closing of the massage parlor and scheduled a compliance hearing for March 22, 2007. Subsequent to issuing the temporary injunction, the sheriff's department



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continued to monitor the premises to insure compliance, and there has been no further activity.

Our use of injunctive relief to shut down an apparent organized prostitution operation went over well with the local media. The *Houston Chronicle* newspaper covered the story, and *The Courier of Montgomery County* ran a couple of stories and a full-length editorial. It seems to me that our success merely reflected an effective application of available legal tools to address criminal activity in our community. Local law enforcement officials have expressed for years that certain features of "life in the big city" will not be tolerated in Montgomery County, and those "adult" activities that may be constitutionally protected and therefore demand our tolerance will be carefully and vigorously regulated. That conservative approach played a part in how we developed evidence of prostitution behind closed doors; the sheriff's office was understandably concerned with how far the undercover officers might have to go to secure evidence of an offer of prostitution. Professional law enforcement officials obviously have a duty to use the most effective investigative techniques available; however, any technique, though legal, must yet be employed within a framework of acceptable community social standards and due regard for the appearance of propriety. Our use of injunctive relief for repetitive violations of the Occupations Code solved our dilemma in an agreeable fashion.

Conclusion

Our success in closing down KM Massage Center, Inc., was the result of a coordinated, careful, and patient application of law enforcement resources, using available statutory provisions, which, thankfully, had enough teeth to enable us to protect our community. Our success prepares us to repeat our efforts, if need be, in the future. Montgomery County, though far from perfect, is a great place to live. I would like for it to stay that way.

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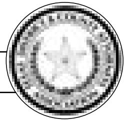


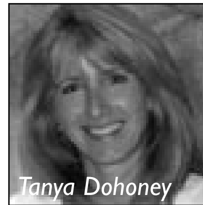
AS THE JUDGES SAW IT

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

Questions

1 Richard Vela, Jr., unleashed his temper one night on his live-in girlfriend and anally raped her, among other things. When she escaped his clutches and ultimately obtained a sexual assault exam three days later, medics discovered an oozing anal tear. In Vela's sexual assault trial, he sought to proffer expert testimony from a certified legal nurse consultant. Cheryl Hartzendorf expected to testify that, where no DNA nor physical evidence links a defendant to the crime, no sexual assault occurred. Premising her opinion on her general nursing experience, she could recite no published authority supporting her belief. At the State's behest in a *Daubert* hearing, the Nueces County trial judge excluded her testimony. The 13th Court of Appeals reversed, holding that Hartzendorf's experience qualified her as an expert. Who was right: the trial judge or the appellate court?

____ trial judge
____ appellate court



Tanya Dohoney

2 During the wee hours of a Houston morning, while several Whataburger employees worked inside the closed fast-food restaurant, Gerald Edward Marshall shimmied in through the unlocked drive-thru window. While other employees hid, Marshall chased one worker out the back door, caught him, and brought him back inside. After Marshall repeatedly, albeit unsuccessfully, demanded access to the safe, he shot the employee in the face. After uncovering Marshall's identity, officers visited him, but he extolled his innocence. Later, through his girlfriend, Marshall sought to reinitiate police contact to "tell his side" to the authorities. Curiously, when the officer met Marshall and asked him if he wanted to voluntarily waive his rights, Marshall replied, "No, sir." Instead of instantly stopping his inquiry, the officer restated that he had been contacted by the girlfriend regarding Marshall's desire to talk to law enforcement. The officer elaborated that he was asking one more time to "clear up" whether Marshall wanted to voluntarily *agree* to waive his rights and talk to the police. The officer explained that, to do so, Marshall needed to say "yes." At this point, Marshall agreed to waive his rights, gave a statement, and later contested its admissibility, contending that the officer violated his constitutional right to remain silent by continuing the discussion after Marshall initially refused to waive his rights. Was admission of this statement error?

____ yes ____ no

3 Galveston resident Charlie Melvin Page's preoccupation involved posing as a policeman. During these stints, his penchant for persuading prostitutes to orally probe his privates prevailed when he promised not to arrest them in exchange for the previously mentioned personal prurient favors. His promiscuities persisted until the police placed him in the pokey.

During the guilt phase of his trial for sexual assault and impersonating a public servant, the trial judge allowed the admission of two very similar extraneous offenses perpetrated against other prostitutes. Page voiced a TRE 404(b) objection and complained that identity had not be raised, even though the victim's cross-examination had called into question the description of Page's weight. Assuming that the evidence raised the identity issue, were the extraneous acts admissible in this trial?

____ yes ____ no

4 An Odessa teacher named Daniel Igo seduced his 15-year-old student, drove her to a Lubbock motel for sex, maintained this illicit relationship post-indictment, and even tried to bribe the

Continued on page 34

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poor girl to drop the charges. After the jury heard the evidence against Igo, the trial court submitted an erroneous parole-law charge to which Igo failed to object. After being convicted and receiving a maxed-out sentence, Igo unsuccessfully complained that the judge had misdirected the jury on the law in a motion for new trial filed under Rule 21.3 of the Rules of Evidence. On appeal, Igo contended that the abuse-of-discretion standard used to review the denial of motions for new trial trumped utilization of *Almanza*'s egregious harm standard applicable to charging error. Which standard applies?

____ abuse of discretion
____ *Almanza*

5 Two days after being arrested for possessing cocaine (residue) in a long plastic tube, Adam Troy Griffin was described as selling crack cocaine at a specific location (known for high drug trafficking) by a reputable confidential informant. About five minutes later, officers who had received this information saw Griffin at the described spot. Although they observed no overt criminal activity, they knew about his prior arrest and that he carried narcotics in tubes. When Griffin saw the officers, his nervousness was apparent, and he reached for his pocket. Believing they had insufficient information for probable cause, the officers chose only to stop and detain Griffin to further investigate the CI's information. For safety, one officer frisked Griffin. Testimony indicated that this was common practice when investigating drug suspects because of the possibility that they carry weapons. During the frisk, the officer felt two long cylindrical tubes and, based upon his knowledge of illegal narcotics practices, believed they contained drugs. Upon feeling the tubes, the officer secured Griffin's arrest. At that point, the tubes were extricated from Griffin's pocket and each contained numerous rocks of crack cocaine. Will the officer's actions (detention, frisk, and seizure) be upheld?

____ yes ____ no

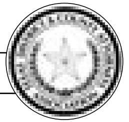
6 On a September evening in San Antonio, Anthony Gigliobianco erratically sped his motorcycle on the San Antonio loop. SAPD Officer Heim stopped him, recognized signs of intoxication, and conducted a typical roadside DWI investigation. Gigliobianco failed some of the field sobriety tests at the scene and admitted drinking some beer, but he appeared quite lucid on the station-house videotape. The DWI information charging Gigliobianco alleged both intoxication definitions, and evidence of the .09 Gigiliobianco blew was admitted at his trial over a TRE 403 objection. He was found guilty of DWI. On appeal, this offender argued that the trial court erroneously admitted the breath test because its relevance was "significantly low" as it only proved that Gigliobianco had been drinking, which he had already admitted to Officer Heim and, accordingly, the test's results posed a "high potential for an irrational impression" on the jurors. Neither the trial court nor the San Antonio appellate court bought this claim. Should the trial judge have ruled that TRE 403 prohibited admission of the breath test in this case?

____ yes ____ no

7 Swanda Marie Lewis killed her husband, then called 911. At the scene and at the police station, Lewis made statements to the officers after she received *Miranda* warnings. During trial, the prosecutor posed questions pertaining to statements Lewis made when the officers had first contacted her and when she spoke to the 911 operator; another general question was "did you ever" tell officers about being raped. Lewis objected that these three interrogatories commented on her post-arrest silence; each objection was sustained and essentially followed by the litany of regular preservation questions. After sustaining the third objection, the trial judge granted Lewis' requested mistrial. When the State sought to retry Lewis, pretrial habeas proceedings ensued, with the trial court denying relief. However, the 2nd Court of Appeals reversed, relying on *Bauder* and finding that the prosecutor's reckless behavior risked that the trial court would find mistrial necessary. *Bauder v. State*, 921 S.W.2d 696, 699 (Tex.Crim.App. 1996). Does *Bauder* still bar retrial where a court finds that the prosecutor recklessly risked mistrial?

____ yes ____ no

8 A Tarrant County jury convicted James Timothy White, a child-sex offender, on two counts, then heard



punishment evidence regarding his similar escapades in Delaware. The resultant finding of "true" to the enhancement allegation invoked an automatic life sentence under Penal Code §12.42(c)(2)(B)(v) on each conviction. The Fort Worth court of appeals made short shrift of White's direct appeal complaints regarding the enhancement with his out-of-state prior sex offense. After denial of discretionary review, the defendant filed a habeas application contending that his sentences were improperly enhanced due to the priors not being final. Habeas evidence revealed that White's 1994 Delaware probation had never been revoked, that the northern state's offense was substantially similar to Texas' indecency statute, and that Delaware considered post-1972 convictions final, regardless of whether a probated sentence had been revoked. Did the prosecution properly rely on the automatic-life-sentence provision to enhance this sex offender's convictions with his out-of-state prior?

_____ yes _____ no

9 Step-mommy dearest, Martina Vansice Stuhler, threw newspapers in the morning, then headed home to sleep. When her husband's 3-year-old son was placed in their custody, Stuhler apparently sought to prevent the child from interrupting her slumber by duct-taping him to the toilet and locking him in the bathroom. The trauma of this boy's confinement and restraint caused him to suffer moderate to severe constipation. When he was removed from the home and medically treated, he suffered an obstructed urinary tract. Psychologically, he manifested PTSD symptoms. On the issue of serious bodily injury, a pediatrician testified that the boy suffered abdominal trauma that created a substantial risk of death, but her testimony included statements that the boy was not at risk of dying when she examined him.

The Denton County trial judge charged the jury with injury to a child but instructed jurors to find guilt disjunctively on two statutory alternative theories for injury to a child—causing serious bodily injury and also causing serious mental deficiency, impairment, or injury—under Penal Code §§22.04(a)(1) and (2), respectively.

Can proof of serious bodily injury survive a legal sufficiency analysis when the treating physician testified that the injury (here, constipation) did not constitute serious bodily injury "as it was inflicted?" And did the trial court's instructions disjunctively charge two separate offenses, depriving Stuhler of her right to a unanimous jury verdict?

_____ yes _____ no

10 While driving his small white car in the early morning, David Edwin Wiede crashed into the back of an 18-wheeler on a farm-to-market road in Hays County. An eyewitness to the crash, Mr. Tambunga, stopped to help Wiede, who remained seated in his disabled car. Troopers on their way elsewhere also stopped and rendered Wiede assistance. The truck driver departed, apparently initially unaware that a vehicle had smacked into him from behind. While waiting for EMS to arrive and treat Wiede for facial wounds, Mr. Tambunga observed Wiede reach with his left hand across his body and appear to hide something contained in a plastic baggie near the car's center console. After Tambunga alerted the nearby troopers to this furtive gesture, the officers discussed the information, and one went to the car and searched it. After the officer found a little baggie, Mr. Tambunga corrected the officer saying, no, that he had seen a larger one. Sure enough, a second sweep uncovered a larger baggie containing methamphetamine.

After charges were filed, Wiede moved to suppress the evidence. The trial judge overruled the motion and explained that the bystander's observation of the furtive gesture which included a description of a plastic bag constituted probable cause to search for drugs because "officers see dope in plastic bags all the time." However, on appeal to the Austin Court of Appeals, some of Wiede's arguments were better received. The appellate court noted that the State could not identify the officer who conducted the search; thus, the record failed to reveal that any officer had knowledge that plastic bags are ordinarily used to contain drugs. Additionally, because the appellate court found no suspicious circumstances existed to give rise to a belief that Wiede possessed drugs, the appellate court overturned the trial judge's decision. Will this reversal stand?

_____ yes _____ no

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Answers

1 The trial court was right; it did not abuse its discretion by excluding this witness' testimony. Judge Keasler's unanimous decision is the court's first opinion that thoroughly delves into the qualification aspect of expert-witness testimony. Cautioning that many judges fail to discern the distinction between the qualification issue versus determinations of reliability and relevance, Judge Keasler explained that trial courts must independently evaluate expert witness qualifications.

A qualification analysis must consider three questions: 1) How complex is the field of expertise, 2) how conclusive is the expert's opinion, and 3) how central is the area of expertise to the lawsuit's resolution. In this respect, not only must a witness have sufficient background in a particular field, but also her experience must go to the matter on which the witness is to give an opinion. Possession of knowledge, skills, or credentials does not automatically qualify someone as an expert. The expert's knowledge, skill, experience, training, or education regarding *the specific issue before the court* qualifies that witness to give an opinion on that particular subject. The qualification inquiry requires a "fit" between the subject matter at issue and the expert's specific familiarity with it, just as this "fit" also applies to the reliance and relevancy conditions. See *Jordan v. State*, 928 S.W.2d 550, 556 (Tex.Crim.App. 1996).

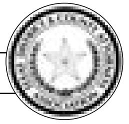
In this case, the interim appellate court failed to adequately inquire into Hartzendorf's qualifications to testify about physical evidence of sexual assault. Simple consideration of her general background—her education and experience as a nurse—constituted no meaningful inquiry into her qualifications in the specific area of expertise.

Also reviewing the lower court's reliability-of-the-testimony inquiry, Judge Keasler found that the Corpus court completely failed to analyze the issue in spite of its being thoroughly explained in prior opinions. Under TRE 705(c), testimony is inadmissible if the underlying facts/data provide an insufficient basis for the opinion. Contrary to examining the proffered expert evidence for being grounded upon sound scientific methodology, the Corpus court imbued medically-based testimony about sexual assault matters as inherently reliable. The appellate court's presumption undermined the trial judge's authority to weed out junk science by demanding a technical showing from a sponsored expert. Judge Keasler reminded trial courts not to admit opinion evidence where it rests solely on the authority of the so-called expert. Judge Cochran's concurrence elaborates that a scientifically unusual theory requires greater-than-usual scientific documentation supporting its reliability. Also, a trial court's exclusion of an outside-the-norm opinion will survive appellate review unless the theory's proponent comes forward with significant supporting documentation. Her opinion assiduously rips this witness' sexual assault "expertise" to shreds.

Because the Corpus court improperly evaluated the witness' credibility, failed to review reliability, and also neglected to apply the proper deferential standard, the cause was remanded to the court of appeals for reconsideration. *Vela v. State*, No. PD-1388-04, 209 S.W.3d 128 (Tex.Crim.App. December 13, 2006) (9:0).

2 No. Analogizing to the invocation-of-counsel discussion in *Davis v. United States*, 512 U.S. 450, 458 (1994), the unanimous court upheld the trial court's admissibility ruling. While *Davis* mandates that questioning must be curtailed when a suspect unambiguously invokes his right to counsel, officers may clarify an ambiguous invocation. In the right-to-remain-silent context presented here, the officer's testimony illustrated that he found the circumstances ambiguous. The re-initiation aspect of the circumstances rendered Marshall's "no, sir" ambiguous, reasonably entitling the officer to clarify whether Marshall understood the question and really wanted to remain silent or not. *Marshall v. State*, No. AP-75,048, ___ S.W.3d ___ (Tex.Crim.App. December 20, 2000) (9:0).

3 Yes. On the State's PDR, the Court of Criminal Appeals again reversed the Corpus Christi Court of Appeals (this case has been in perpetual appellate orbit). While placing identity in issue does not automatically authorize admission of extraneous offenses, such extraneous conduct need not be exactly like the charged offense to become admissible for identity purposes under TRE 404(b). The evidence must simply show a pattern of conduct sufficiently distinctive to constitute a signature. Here, myr-



iad similarities between the three criminal acts existed: Each prostitute/victim worked along the Galveston sea wall; Page approached each victim posing as a police officer and driving a maroon car with a police radio squawking in the back; in each instance, this imposter threatened to arrest the victim unless she gratuitously performed oral sexual favors; and Page was identified in each case. On these facts, Judge Johnson's unanimous decision upholds the trial court's ruling because it was not outside the zone of reasonable disagreement, and the court of appeals was again reversed because no abuse of discretion occurred. Perpetrator Page now pounds plates in the penitentiary! *Page v. State*, Nos. PD-1744-05 & 1745-05, ___ S.W.3d ___, 2006 WL 3733256 (Tex.Crim.App. December 20, 2006) (subsequent history omitted) (9:0).

4 *Almanza* controls the review of charge error, and its preeminence was not usurped by Igo's attempt to litigate his unpreserved charge error via a motion for new trial under TRAP Rule 21.3. *Almanza* construed article 36.19 of the Code of Criminal Procedure. *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App. 1985) (opinion on rehearing). A statute cannot be superceded by a rule. More specifically, when the legislature enacts a statutory provision directing appellate treatment of an issue, a litigant may not employ appellate procedure to circumvent the statutory requirement. Although Igo unsuccessfully sought to characterize the charge error as the erroneous denial of a motion for new trial, appellate courts are statutorily mandated to review charging error in accordance with article 36.19 and, thus, *Almanza*. If Igo's theory were correct, unpreserved jury charge error could be resurrected preservation-wise in a motion for new trial, contrary to the policy set out in article 36.19 and longstanding caselaw. *Igo v. State*, No. PD-0137-05, ___ S.W.3d ___, 2006 WL 3733215 (Tex.Crim.App. December 20, 2006) (7:2) (Meyers would have applied rule 21.3 and Holcombe dissented without opinion).

5 **Yes to all three.** As for the reasonable suspicion analysis, the officers acted on information gained from a reliable informant which revealed that Griffin was selling crack cocaine in a specifically described drug-trafficking area of town, and they found Griffin minutes later in that precise place. Additional specific and articulable facts, including the officers' knowledge of Griffin's past illegal drug activity and Griffin's nervousness when law enforcement officers approached, corroborated the tip. Thus, the *Terry* detention was proper.

On the frisk issue, officers may reasonably believe that persons in the drug business are armed and dangerous. Relying on an objective standard, Judge Hervey determined that the facts permitted these officers to reasonably believe that the frisk was appropriate. Although the evidence revealed a dearth of subjective fear harbored by the officers and no basis to believe that Griffin had a propensity to carry weapons, neither undermined the frisk's propriety, especially in light of Griffin's furtive reach for his pocket when the officers approached. See *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex.Crim.App. 2000) (officer not required to testify that he feared the defendant; the objective standard does not necessitate any testimony pertaining to the existence or absence of fear).

Finally, the court upheld this plain-feel seizure. When the officer frisked Griffin, the lawman immediately recognized the pocketed tubes as contraband based on his knowledge and experience with illegal drugs. Thus, the seizure was valid under the "plain-feel" exception to the 4th Amendment's warrant requirement. See *Minnesota v. Dickerson*, 508 U.S. 366, 374 75 (1993) (where the contour of an object felt during a frisk made the object's identity immediately apparent, the warrantless seizure was justified relying on the same considerations utilized in the plain-view context). *Griffin v. State*, No. PD-1036-05, ___ S.W.3d ___, 2006 WL 3733248 (Tex.Crim.App. December 20, 2006) (7:2).

6 **No.** Rule 403 did not thwart admission of the breath test in Gigliobianco's trial. Judge Holcombe's unanimous decision notes that relevant evidence may be excluded if the cost/benefit analysis of its admission illustrates that its probative value is not worth the problems of its admission. Judge Holcomb also delves into the meaning of individual phrases in Rule 403. Describing Rule 403's enumerated concerns in detail, the opinion explains that a balance between these concerns

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and the inherent probative force of the complained-of testimony must be struck. Acknowledging the considerable probative value of the test result, the decision also noted that the State's need for the evidence was significant because the videotape appeared somewhat positive for Gigliobianco.

Consideration of the other Rule 403 factors ensued. For example, no inflammatory nature of the breath test was discerned. Because the breath test results focused on the main issue at trial—intoxication—no confusion of the issues arose from its admission, even though the evidence required a fair amount of time to adduce. Because the technical supervisor's testimony pointed out that the test results could not be used to determine Gigliobianco's driving-time BAC, the jury was equipped to evaluate the probative force of the breath test results without being misled. Finally, presentation of this evidence did not consume an inordinate amount of time or repeat evidence already admitted.

After balancing the Rule 403 factors, the court concluded that the probative value of Gigliobianco's breath test result was not substantially outweighed by any countervailing Rule 403 factors. Be aware that the court gratuitously stated that breath test results may not always be admissible in the face of a Rule 403 challenge, listing an example involving a test's administration "several hours" after a stop where the results are at or below the legal limit. *Gigliobianco v. State*, ___ S.W.3d ___, 2006 WL 3733192 (Tex.Crim.App. December 20, 2006) (9:0).

7 **No.** Presiding Judge Keller's opinion delves into a wealth of historical caselaw underpinning double jeopardy protections. Following this comprehensive history lesson and after consideration of various prosecution arguments cogently put forward by the State Prosecuting Attorney, the court overruled *Bauder* and held that Texas law now mandates that jeopardy protections bar retrial after mistrial only when a prosecutor intentionally provoked the defendant's mistrial request. Texas law now parallels federal caselaw under *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982).

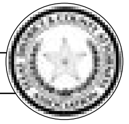
Interesting aspects of this fascinating opinion include the court's decision not to overturn prior caselaw holding that Texas' double jeopardy provision protects against premature termination of trial. The court opined that, although not explicitly addressed by the Texas Constitution, caselaw has long held that retrial is barred after jeopardy's attachment if a jury is discharged without a manifest necessity unless the defendant consents.

On another note, Judge Keller acknowledged the illogical dichotomy presented by allowing retrial after appellate reversal where a reckless prosecutor committed trial error but successfully obtained a conviction, versus the situation presented by *Bauder* where retrial is prohibited after a reckless prosecutor's attempt to convict has been stymied by a mistrial. Judge Keller's research discovered the erroneous nature of a previously voiced concern that proof of intent to cause a mistrial was impossibly high. In his concurring opinion in *Bauder*, Judge Baird wrote that he found no cases where the intentional mistrial standard in *Kennedy* had been met, yet Presiding Judge Keller stopped researching after she had uncovered numerous cases, with several decided prior to the *Bauder* decision. See *Bauder v. State*, 921 S.W.2d at 701 (Baird, J. concurring). Following a discussion of the problems presented in myriad cases when applying *Bauder*'s "messy jurisprudence" and an acknowledgment that *Bauder* was a flawed decision which this court has been unable to clarify, *Bauder* was expressly overruled. *Ex parte Lewis*, No. PD-0577-05, ___ S.W.3d ___, 2007 WL 57823 (Tex.Crim.App. January 10, 2007) (6:3).

Judge Cochran concurred to elaborate on other reasons for overruling *Bauder*, including its lack of historical analysis and its inability to be practically and consistently applied, rendering it a proper case to be jettisoned, *stare decisis* notwithstanding.

Judge Price dissented, joined by Meyers and Holcomb. Judge Meyers originally authored *Bauder*.

8 **Yes.** After first finding that §12.42 (c)(2)(B)(v) covered the sexual misconduct proscribed by the Delaware statute (because the Delaware crime's elements are substantially similar to the Texas indecency prohibition), Judge Johnson's unanimous opinion examined the finality requirement. The Delaware case involved a probated sentence that was not revoked. In general, a probated sentence is not considered final and cannot be used for enhancement purposes. However, §12.42(g)(1) carves out a spe-



cific exception to this rule when certain sexual offenders are subject to the automatic-life enhancement provisions; §12.42(g)(2) applies this exception to out-of-state prior sex offenses used for enhancement purposes. Thus, a prior foreign conviction for an offense substantially similar to the crimes enumerated under subsection 12.42(c)(2)(B) may give rise to an automatic life sentence as set out in 12.42(c)(2), because Texas' own legislature has expressly permitted the use of certain convictions for enhancement, regardless of finality. Note that under these circumstances, it is unnecessary to consider the effect of finality in the foreign jurisdiction on enhancements in Texas. *Ex parte White*, Nos. AP 75308 & AP 75309, ___ S.W.3d ___, 2007 WL 57785 (Tex.Crim.App. January 10, 2007) (9:0).

9 **Yes to both.** *Stuhler v. State*, ___ S.W.3d ___, 2007 WL 162164 (Tex.Crim.App. January 24, 2007) (5:4). Judge Price's opinion upholds the 2nd Court's reversal for legal sufficiency, finding that a sufficiency analysis focuses on the degree of risk of death that the injury caused *as it was inflicted*. The court found that the doctor plainly testified that the boy was not at risk of death. Further, when analyzing evidence to assess whether an injury caused a substantial risk of death, courts should look at the degree of injury that the assaultive behavior in fact caused, not the degree of injury that might have resulted had the behavior persisted.

On the disjunctive charge issue, Article V, §13 of the Texas Constitution requires jury unanimity in all felony cases. The gravamen of the offense of injury to a child is not the conduct but the resulting injury. The legislature defined the offense of injury to a child according to the kind and degree of resultant injury; thus, the legislature intended that separate results spelled out in the various subsections are elemental, requiring jury unanimity. Accordingly, the trial court erroneously submitted the two alternative types of injury in the same application paragraph. The opinion acknowledges that sufficient evidence established serious mental injury. Nevertheless, reviewing this error on an egregious harm standard, harm occurred, given the State's emphasis on the "serious bodily injury" part of the case, a fact which increased the risk of a non-unanimous verdict here.

Presiding Judge Keller's four-vote dissent takes issue with both holdings. Along with Womack, Keasler, and Hervey, Judge Keller focused on different aspects of the pediatrician's testimony, including the doctor's assessment that, left untreated, the child could have died in two days. As for jury unanimity, Judge Keller would have found a lack of harm based upon the overwhelming nature of the mental injury evidence.

10 **No.** Judge Keasler criticizes the lower court's "divide and conquer" or piecemeal approach to its probable cause review as contrary to the applicable totality-of-the-circumstances standard. In addition to misapplying the proper standard, the lower court did not deferentially review the trial judge's implicit fact-findings. For instance, the appellate court failed to consider which facts were known and not known to the officers at the time of the search. After the truck driver was located, additional information placed the blame for the crash on him, not on Wiede's possibly impaired driving, but that after-the-probable-cause-finding information was used by the court of appeals to undermine the propriety of the officer's probable cause finding. Additionally, the Austin court had determined that the record lacked evidence relating to the connection between baggies and drugs, in part because the officer who seized the baggie did not testify. Judge Keasler looked to another officer's testimony about his training and his identification of the bag's contents as contraband in light of several officers' collaborative efforts at the scene, which gave rise to an inference that the unidentified officer who conducted the search possessed knowledge regarding how drugs are commonly packaged. Considering the totality of the objective facts and circumstances of this case and granting the trial court its due deference, the Court of Criminal Appeals reversed the interim appellate court and reinstated the trial court's judgment. *Wiede v. State*, No. PD-0748-05, ___ S.W.3d ___, 2007 WL 257624 (Tex.Crim.App. January 31, 2007) (7:2:0).

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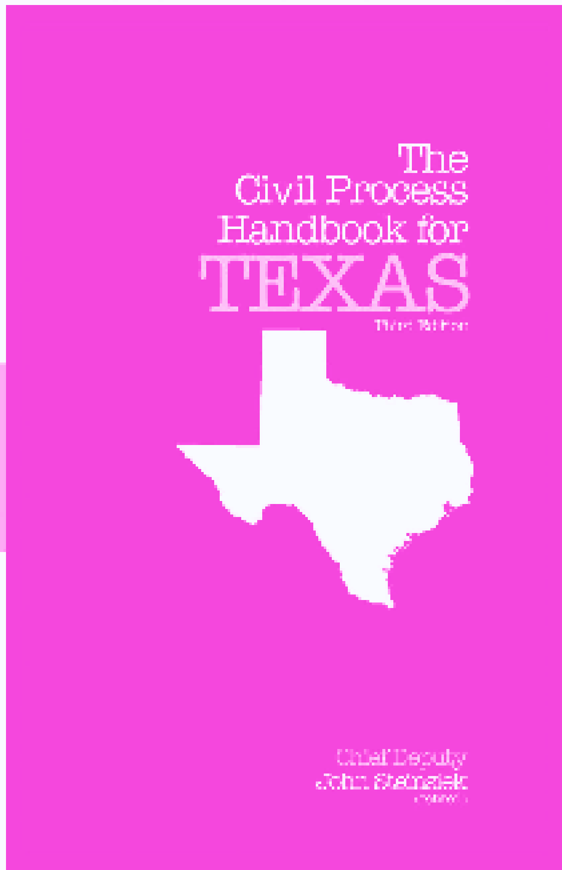

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