THE TEXAS PROSECUTOR

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

Second chances bring both tragedy and justice

After an intoxicated driver kills one person and seriously injuries two others, New Hampshire families return to Texas to find justice and closure.

By Brent Robbins
Investigator in the Denton County Criminal District Attorney's Office

March 25, 2006, was going to be a day of celebration for several New Hampshire families. Marilyn Gates and her husband, Don, along with their good friends Gene Cordes, his wife Beverly Brooks, and their 17-year-old son, Griffin Cordes, had traveled from New Hampshire to the DFW area for a wedding. Marilyn and Don were just weeks shy of their own 30th wedding anniversary.


Brent Robbins

Marilyn, a flight attendant for American Airlines, could possibly have been working Flight 11 on September 11, 2001; terrorists flew this plane into the North Tower of the World Trade Center. Marilyn had taken September off to care for her ailing father. Despite cheating death (or perhaps *because* of it), Marilyn still, four and a half years later, often spoke of the close friends she lost that day. Don was enjoying his retirement after spending 32 years as a police officer and state trooper in New Hampshire. Many of Don and Marilyn's family (including one adult son, a daughter, and several sons-in-law) had followed in Don's footsteps, becoming cops as well. After attending the wedding and reception (where no alcohol was served) here in Texas, they left just after 10:15 p.m., and were heading back to their hotel outside of Carrollton.

The same day was a celebration for 52-year-old Stephen Mole as well. Mole, his elderly parents, sister, and brother-in-law were at a Dallas-area restaurant commemorating his folks' 55th wedding anniversary. Mole consumed a few glasses of wine at the restaurant bar before dinner, more glasses of wine with dinner, and several after-dinner Drambuies. After leaving the restaurant, he dropped his parents off at their house around 10:15 that night, then began the drive to his own home.

Seventeen minutes later, lives were changed forever. Driving down the road at an estimated 60 miles per hour (in a 45-mile-per-hour zone), Stephen Mole's white Ford Expedition approached a traffic light. The New Hampshire group, in a silver Mercury Grand Marquis rental car, were heading southbound, preparing to turn left. In the front seat next to Gene Cordes was Don Gates, while 17-year-old Griffin Cordes, his mother Beverly, and Marilyn sat in the back seat. (All of the men were wearing seat belts, as required by law, while neither Marilyn nor Beverly were. Seat belts are not legally required for adults in the back seat.) As the rental car approached the traffic light, Gene saw the light change from red to a green left arrow. Gene proceeded into the intersection to turn left as Stephen Mole approached. Mole never touched his brakes. Never. His SUV, still traveling at 60 miles per hour, blew through the red light and slammed into the left rear door of the Grand Marquis. The force was so great that the rental car spun nearly 360 degrees. During the spin Marilyn Gates and Beverly Brooks were ejected through the rear window of the sedan; both ended up in the middle of the intersection. Griffin Cordes'

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TDCAF News

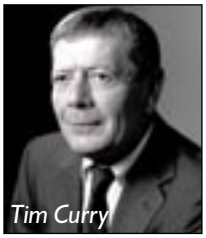
By Emily Kleine
TDCAF Development Director

Champions for Justice event to honor Tim Curry

TDCAF's first-ever Champions for Justice event will be held on Thursday, April 17, 2008, at the home of TDCAF Advisory Board member Sherri Wallace Patton in Fort Worth. This inaugural affair will honor longtime Tarrant County Criminal District Attorney Tim Curry, bring the foundation's message to community leaders, and articulate the importance of excellence in prosecutor training.

We are planning a series of four Champions for Justice events statewide throughout 2008. Sponsorship levels include Platinum, $10,000; Gold, $5,000; and Silver, $2,500. Individual tickets will be available for $150 per person. All proceeds benefit the Texas District and County Attorneys Foundation and our efforts to bring the highest quality education, training, publications, and technical assistance to TDCAA members.

I continue to be on the road more, meeting with TDCAA members and new donors. Next stop is West Texas. Thanks so much to Teresa Clingman, Midland County District Attorney; Laurie English, 112th Judicial District Attorney; Jody Upham, Crockett County Attorney; and Bobby Bland, Ector County District Attorney, for their willingness to generate support for the foundation in their communities. All of these folks will accompany me on appointments with potential donors and share their experiences on how TDCAA has benefitted their offices and boosted their prosecuting skills.


Tim Curry

As always, thank you for your continued support and ideas. I am appreciative of the many friends within the association who are committed to seeing this foundation flourish. If you would like to visit with me, please stop by our office or call me at 512/474-2436. ✤

CHAMPIONS *for* JUSTICE

Recent gifts

W. Clay Abbott, TDCAA DWI Resource Prosecutor, *in memory of the Honorable Susan Scolaro*
Eduardo Arredondo, County Attorney, Burnet County
Diane Beckham, TDCAA Senior Staff Counsel, *in memory of Matthew Paul*
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Billy John Edwards, 259th Judicial District Attorney
Kathryn J. Gilliam, County and District Attorney, Falls County
William Gleason, County and District Attorney, Marion County
Gail Ferguson, TDCAA Administrative Assistant, *in memory of Alejandro Arcadio Armendariz*
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William Lee Hon, Criminal District Attorney, Polk County, *in memory of Joe Price*
Barry and Jane Macha, Criminal District Attorney, Wichita County
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Ty M. Sparks, County Attorney, Hemphill County, in memory of Danny Hill
John E. Terrill, District Attorney, Erath County
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David Wallace, County Attorney, Sutton County

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the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

"You can't do that, Dan Moody!"

Sometimes your daily docket will keep you too busy to look up and see what impact prosecutors have on your state and even the nation.

One former prosecutor and now district judge, **Ken Anderson**, has taken the time to tell the story of **Dan Moody**, the former district attorney for Williamson and Travis Counties, who in the 1920s went head-to-head with the Ku Klux Klan. Moody went on to become the state's attorney general and governor, but he arguably did his best work inside the rail of what is now an historic courtroom in Georgetown.

Ken's work started with a young-adult book titled *You Can't Do That, Dan Moody!*, which is still widely available at most online bookstores. It followed with a play in two acts by Ken and **Tom Swift**, starring **Dan Gattis**, a former assistant district attorney and state representative from Georgetown. The play, produced for the fifth time in 2007, is performed in the restored courtroom in which Dan Moody first took the Klan members to trial.

The case itself doesn't sound like an episode of "Law and Order." It was the usual assault case against some guys for beating up a black traveling salesman accused of adultery. What made the case ground-breaking was that in 1923, no one took active members of the local Ku Klax Klan to trial on that type of allegation. After all, in that day and age the Klan was active in 48 states and had 3 million members—170,000 in Texas alone.

In January, Judge Anderson released the ultimate biography of Moody, *Dan Moody: Crusader for Justice*. This book finishes the story of the Klan-fighting DA that began in the Williamson County courtroom. As the state's attorney general and governor, Moody is credited with rallying the public against the Klan and eventually breaking its stranglehold on elected offices around the state. *The New York Times* declared Moody's victories the "death knell of Klan domination."

We know that most of our trials are about doing justice for the victim and our communities. But every now and again you have the privilege of prosecuting a case that may have reverberations for generations to come.

Thanks, Judge, for telling the story of Dan Moody. I guess the next step is film rights.

Federal funding for 2009

It's never too early to get bad budget news from Washington. Federal funding comes and goes for different programs. You may have a prosecutor whose salary is paid by Byrne funds, and your local domestic violence shelter may exist and offer services with VAWA and VOCA grants. As you know, pass-through funding from the federal government is dependent on the administration's priorities and the national economy's health. So here is a run-down of the funding issues at the national level that may trickle down to your neighborhood this year.

The biggest funding issue for the National District Attorneys Association is to keep the doors open at the National Advocacy Center in Columbia, South Carolina. It has been a tough sell this year in Congress to keep that great training facility open. At press time, funding for the NAC is still a possibility, so keep an eye on the TDCAA website for updates. I hope that by the time you read this column, Congress will have agreed to keep the NAC running.

And next year may be bleaker. President George W. Bush's fiscal year 2009 budget request would cut state and local criminal justice funding by 65 percent and change how the state and local law enforcement programs are funded. You may recall that Congress followed the President's lead in FY 2008 and cut Byrne Justice Assistance Grants by 68 percent. That meant the loss of some prosecutor and law enforcement positions in Texas and elsewhere. VOCA and VAWA funding, which supports myriad programs aimed at stopping domestic violence and supporting crime victims, did not take a big hit last year. But they are on the block again this year.

Under the president's plan, the formula and categorical grant programs

would be eliminated and reconstituted into four new competitive discretionary grant programs. These programs, which have been broken into a number of different categories for administration and grant application purposes would be thrown into one big bucket. Every program competes for funding out of that one bucket, and the worthy programs get what funding is available.

A number of discretionary grant programs would be abolished, replaced by a new $200 million Byrne Public Safety and Protection Program. It would encompass the Byrne formula and discretionary accounts, drug courts, and about 15 other grant programs under OJP and the COPS office. Last year, the administration proposed funding this new program at $350 million.

The COPS programs, which directly funds police officers on the streets, would be eliminated. Instead, the president proposed a new $200 million Violent Crime Reduction Partnership Initiative to establish multi-jurisdictional task forces in communities with high rates of violent crime. Current juvenile justice and exploited children programs would be consolidated under a single $185 million flexible grant program called the Child Safety and Juvenile Justice Program. It would focus on reducing incidents of child exploitation and abuse (including over the Internet), improving juvenile justice outcomes, and addressing school safety needs.

Finally, a new Violence Against Women Grants program would consolidate the existing VAWA programs into one $280 million competitive grant program. The budget would cap the Crime Victims Fund at $590 million and "withdraw" $2.02 billion from the fund, which would be deposited in the general fund. (Like Texas, the national crime victim's fund has done so well that it is hard for lawmakers to keep their hands off of it!)

So what does that mean for you? Last year the Bryne funding programs suffered major reductions, which translated into the loss of prosecutors and police officers at the local levels. We could be in for more reductions in the next fiscal year, with some additional impact on the domestic violence and victim services in your community. We will keep you informed as the budget season progresses.

DPS crime labs hit their marks

DPS announced that its 13 regional crime labs have received international accreditation. Only three other state police laboratories (those in Oregon, Utah, and Idaho) have reached this level.

As DPS explains it, this accreditation means that the American Society of Crime Laboratory Directors/Laboratory Accreditation Board recognizes the DPS labs meet international testing and calibration standards, as well as supplemental requirements for forensic-testing laboratories.

Are you getting your longevity pay?

As an assistant county or district attorney, you are entitled to state longevity pay beginning in your fifth year of work. Check out chapter 41, subchapter D, of the Government Code for the details.

But it recently came to our attention that some of y'all may *not* be getting your payments. If you think you are entitled to but aren't receiving the supplement, you need to do some checking around the courthouse. There are deadlines in the statute that some local officials need to meet. For instance, your auditor is required to send a list of qualifying prosecutors and their service credit to the state comptroller within 15 days of the beginning of each state fiscal quarter (i.e., the 15th day of September, December, March, and June). This presupposes that someone—assistants who qualify for supplements—gets that information to the auditor, who may not have it on hand. So, if you aren't getting your supplement, make a quick call to your county auditor. We have found that the folks at the comptroller's office do all they can to make sure you get your supplement—they just might not have all of the info they need.

Warren Diepraam goes national

Warren Diepraam, an assistant district attorney in Houston, has been named a National Association of Prosecutor Coordinators Prosecutor Fellow. The NAPC is a national organization of prosecutor training entities (to which TDCAA belongs) that devotes substantial energy to DWI training and assistance. As a Prosecutor Fellow, Warren will act as a resource for prosecutors in other states, NAPC training folks, and the National Traffic Law Center.

This is not the first time Warren has been in the national spotlight. In 2005 he was named NAPC's Traffic Safety Prosecutor of the Year. Thanks, Warren, for sharing your knowledge and expertise with the national prosecutor community!

Our first paperless seminar

As advertised, TDCAA seminars went paperless beginning with the Prosecutor Trial Skills Course in January. When attendees register, they receive a confir-

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mation email that includes a website address and password to download papers; those papers will be available one week before, during, and one week after the seminar. (That's why we now require an email address from everyone who registers for our seminars.) As a back-up to this new system, we also provided a CD-Rom containing the course materials.

We had a few folks who preferred that we print out 150 complete binders and hand them out, but the vast majority of attendees understood our need to reduce cost and eliminate wasted paper and appreciated not having to lug that heavy binder around.

Thanks to the TDCAA training team of **Erik Nielsen**, **Ashlee Myers**, and **Manda Helmick** for putting this new program together.

The revised National Criminal Justice Standards and claims of innocence

The National District Attorneys Association's National Prosecution Standards have been in existence since 1977 and are in their second edition. The NDAA is finishing its work on the third edition, thanks to the efforts of **Dean Robert Fertitta**, the former chief of the National College of District Attorneys.

The full body of work is a much-needed cleanup of the existing rules. But two in particular are of interest to all prosecutors as we come to terms with issues involving actual innocence.

The American Bar Association's Criminal Justice Section has some rules on the table regarding claims of innocence that you may not like. The way I read it, the current draft of the ABA rules would allow a prosecutor to be disciplined for a continued good faith belief in a convict's guilt in the face of new evidence to the contrary. The idea that ethics rules could be used as a weapon against a prosecutor who is acting in good faith is a bit unnerving. You can view these proposed rules, which may be adopted by the ABA later this year, using a link you will find at www.ndaa.org.

The NDAA's proposed rules focus on claims of actual innocence and would require a prosecutor to respond to such claims in a timely fashion. Here are the draft rules:

8-1.7 Duty to Cooperate in Post-Conviction Discovery Proceedings

A prosecutor should provide discovery to the defense attorney during post-conviction proceedings where 1) required to do so by law, court order, or rule, 2) the evidence is constitutionally exculpatory, or 3) he or she is convinced that the convicted person's claim of actual innocence is supported by specific factual allegations which, if true, would entitle the convicted person to relief under the legal standard applicable in the jurisdiction and the evidence relates to that claim. A prosecutor may require a specific offer of proof to establish a claim of actual innocence before the prosecutor agrees to take any affirmative action in response to a post-conviction request for discovery.

8-1.8 Duty of Prosecutor in Cases of Actual Innocence

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court, and (unless the court authorizes a delay) the defense attorney or the defendant (if the defendant is not represented by counsel), and seek the release of the defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose such evidence to the appropriate court, and (unless the court authorizes a delay), to the defense attorney or defendant (if the defendant is not represented by counsel).

As you can see, the NDAA rules would require a prosecutor to timely respond to evidence which may establish actual innocence by making full disclosure to the court and to the defense. Importantly, the rules do not expose a prosecutor to discipline for continuing to hold a good-faith belief in the continued guilt of a convict.

"You can't do that, mayor!"

I finish with another important case which, judging by the media coverage, has gripped the nation. Forget breaking the spine of the Klan—let's talk about the saga of **Puddles**. It seems that Puddles, a friendly little Shih Tzu, was entrusted to the care of the Alice mayor by some neighbors while they went on vacation. Tragically, Puddles died while his family was gone.

Or did he? Weeks later, a dog was spotted at the local dog groomer, and he looked a lot like Puddles. The mayor insisted that this dog was not Puddles at all, but **Panchito**. Puddles' family was not convinced, and the ensuing uproar made national news. The mayor has even resigned over the scandal.

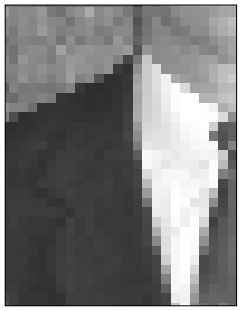
Felony indictments against the mayor for concealing and tampering with evidence were returned in January, and a trial is in the making. No one may be taking down the Klan in this one, but heck, you could strike a blow for dog rights around the globe. Never mind that reports of your triumph are more likely to appear in the *National Enquirer* than the *New York Times*. This story has just as good a shot at making it to the big screen as the story of some legendary Klan-fighter! ✤

the President's Column

By Bill Turner
District Attorney in Brazos County

"Glad to help"

A couple of years ago, a capital murder investigation took me to Atlanta. I stopped by the Fulton County District Attorney's Office to let the office know I would be working in their community. Paul Howard Jr. is the District Attorney of Fulton County, and as you might expect he has plenty to keep him busy. Nonetheless, he made time to see me. After I explained why I was there, he not only found me a place to work but also assigned a prosecutor to help me find witnesses and serve subpoenas. One of his assistants, Shep Orlow, was likewise eager to help.



On the way home, I began to reflect on Mr. Howard's gesture of kindness. It reminded me of the late Chris Marshall, an assistant criminal DA in Tarrant County, and the amount of time he spent fielding questions from prosecutors from all over the state. The late Matthew Paul also came to mind as I remembered the personal interest he took in helping other prosecutors. And Ted Wilson, a Harris County assistant DA, has helped me so often, I feel like I should deputize him.

Before the flight was over, I decided to think of a time when I asked for help from another prosecutor and did not get it. I couldn't. Such generosity is an amazing quality. When you ask a prosecutor for assistance, the response is almost universally the same: "Glad to help."

Why is that? Why do prosecutors so easily put their own work on the back burner and give immediate attention to another prosecutor? I think it has something to do with the kind of people who are drawn to prosecution. I tried my theory out by talking to a few prosecutors from around the State, and I share their responses with you.

Becky McPherson, 110th Judicial District Attorney

Why did you become a prosecutor?
I didn't start out as a prosecutor; I started out in private practice. When I moved back home, I was looking for work and I saw an opening in the DA's Office, so I applied.

Why have you made prosecution a career?
After a couple of weeks as a prosecutor, I started comparing my work to private practice. In private practice, I wasn't always sure that what we were doing was right. I wasn't always comfortable with what we were using the justice system for. As a prosecutor, I had a boss who told me to do what we believed was right—I was never forced to do otherwise. When you know in your heart someone has done something wrong, it is a good feeling to hold them accountable. I always liked the way Tom Krampitz [former TDCAA executive director] said it: "Don't do anything that would embarrass your mom."


Becky McPherson

If it weren't for prosecution, I'm not sure I would still be practicing law. I can't imagine doing anything else. It is what I am supposed to do.

Why are prosecutors always so ready to help each other?
It is for the same reason we prosecute: because it's the right thing to do. Other prosecutors are trying to do what is right and important in their communities. Shouldn't we help them do that? I think it's fun to help other prosecutors. They have challenging and interesting problems. This is a small town, and I may one day need their help.

Ted Wilson, Assistant

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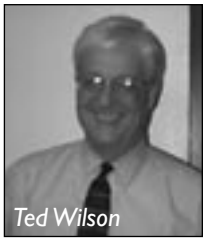
District Attorney, Harris County

Why did you become a prosecutor?

I started out thinking I would end up in a law office, drafting legal documents. In law school I clerked for a justice of the peace, and while I was doing that job I worked around some prosecutors. They all seemed excited about what they were doing, and it looked like they were having fun. They were also working a lot with police officers. I have always liked police officers and wanted the chance to get to know more about what they did and to play a role in what they were doing.


Ted Wilson

How did prosecution become a career?

I still enjoy coming to work today as much as I did in 1974. What we do is important to society. I look at the defense bar, and I know that what they are doing in representing their clients is honorable and important. They try to do the best they can for their client, the defendant. We try to do what is right for the State and not just the victim. Sure, we want to see the victim get some satisfaction out of the process. But when the victim's expectations or demands exceed what we believe is the appropriate disposition of a case, we should always decide in favor of a result that is just and appropriate for the facts of the case, the impact on the victim, and the background of the defendant.

We have a lot of power, authority, and responsibility. We can initiate a criminal charge, we can upgrade or reduce a criminal charge, and we can dismiss a criminal charge. We should never take our responsibility lightly. Our decisions affect more than just a defendant. The way that we conduct ourselves as prosecutors will have either a positive or a negative effect on our community. It is an honor to have a job that gives me that opportunity.

Why are prosecutors so quick to help each other?

It is our mindset to help people. You can't be a good prosecutor without having a great deal of empathy for people harmed by crime. You can spot the ones who don't, and they usually don't last long. Most of us are not getting paid what we could make somewhere else. But the lack of financial reward is offset by the enjoyment of doing what we do. You just can't care deeply about a victim of a crime in your community and turn your back on a prosecutor trying to help a victim in *their* community. A victim is a victim anywhere. If you believe in what you are doing, you feel it is incumbent on you to do the right thing wherever the right thing is. When somebody calls me and asks for help, I am honored they called.

Cheryll Mabray, Llano County Attorney

Why did you become a prosecutor?

I always knew I wanted to work with people as opposed to corporate work. I took a clinic in law school and saw that prosecutors were lawyers who were down to earth. They acted like regular people. I did not want to appear to be a stuffed shirt, so being a prosecutor was the only job I applied for. We are the good guys. We wear the white hats!

Why did you make it a career?

In a small town you get to know everybody. You get to know who needs help and who the bad guys are. It takes a while to know how to really help your community, but after a few years you start thinking that you can really make a difference. There are a lot of negatives in the world, but this is a positive profession. We combat crime and take children out of abusive surroundings. I'm not in it for the money. I enjoy people. The work is fun, and it is something new every day. I like it. I also like the flexibility to take care of my family when I need to do that.

When a prosecutor calls, why are you quick to respond?


Cheryll Mabray

TDCAA has always encouraged comradery and fellowship. I enjoy being part of a group of fellow prosecutors who are caring people, who are all working for the common good. When I get a call from a prosecutor, I feel like it's a call from a long lost brother or sister, like a fraternity or sorority. I know that if I ever needed anything, they would be there for me.

John Bradley, 26th Judicial District Attorney

Why did you become a prosecutor?
After graduating from college with a degree in English, I got married and began managing an ice cream parlor. And even though I felt like I was rising to the top and making good use of my knowledge of English grammar, my wife thought I needed to find another career.


John Bradley

While in law school, I signed up for an internship program with the Harris County District Attorney's Office, thinking it was a quick way to get four or five hours of credit. I worked in Judge Jo Kegans' court and was surprised to learn she was a magnificent storyteller, constant smoker, and cagey card player, telling me all about the drama of a criminal courthouse. I quickly became convinced there could be no more fascinating job than in criminal law.

After law school, I clerked for Judge Charles Campbell at the Court of Criminal Appeals. He was an excellent storyteller as well, giving me access to records of trials and showing me how lawyers should behave. I learned that, among lawyers, only prosecutors had the freedom to do the right thing. They had the discretion to file charges, decide on the proper punishment, or dismiss a case if they needed to. I decided I would be a prosecutor, or go I'd back to the ice cream business.

Why have you made prosecution a career?
From the first day as a prosecutor, I had no doubt about what I wanted to do for the rest of my career. The work is always fascinating. If you go to a social event or talk to a group of strangers, you can pick out the criminal lawyer as the one drawing the most attention in conversation. Prosecutors love their work, show great passion for the job, and tell the best stories. That's because crime and the decisions associated with prosecution are endlessly interesting.

Why are prosecutors so willing to help each other?
There is a brotherhood and sisterhood of prosecutors. TDCAA contributes to that feeling by initiating new prosecutors into that perspective at the baby prosecutor school. It's a boot camp on networking. New lawyers immediately get into small groups and start sharing stories with their faculty advisors. Technology also plays a part in maintaining that relationship. Whether by e-mail or the website's user forum, prosecutors across the state who have never met in person are able to discuss issues and share experiences with each other.

Despite fielding lots of questions, I never get annoyed when someone asks a question. The issues are always fascinating, and I still feel challenged to see if I can provide the right answer. Such questions are even more challenging when they involve a legislative issue because I want to make sure we are all approaching the issue in a way that can benefit prosecutors.

Conclusion

My first real dose of prosecutorial hospitality came at the hands of an assistant district attorney from Milwaukee—it was so long ago I can't even recall his name. A man accused of capital murder in Brazos County had an extensive criminal background in Wisconsin. The Milwaukee prosecutor assisted us in a number of legal battles in Wisconsin. After working tirelessly on the case and after completing his work, he felt obligated to ask me to spare the defendant's life if I could. Even though he was morally opposed to the death penalty, he did not hesitate to help a Texas prosecutor do his job. His attitude left a lasting impression.

I haven't seen it written down as part of the job description, but helping out, pitching in, and lending a hand seems to be second-nature to most people in this business. They can't see doing it any other way. TDCAA thrives because the association cultivates this fundamental trait of our profession. It is a trait worth preserving. ✤

Newsworthy

From the CCA: how to file an emergency email

In October, the Court of Criminal Appeals initiated a procedure for emergency filing time-sensitive pleadings. The procedure is intended to be rarely used and limited to uncommon circumstances. The court's experience with users of the procedure thus far indicates that a more detailed explanation is needed.

First, the system is strictly limited to time-critical matters, such as an imminent execution, writ of prohibition requesting protetction from an imminent act that would cause irreparable injury, or writ of mandamus requesting protection from imminent irreparable injury arising from a failure to act. For example, at 4:30 p.m., a trial court orders counsel, for either the State or the defendant, to turn over to opposing counsel by 9:00 the following morning, documents that constitute work product. Counsel may then properly use the emergency email filing system to file for leave to file a writ of prohibition and the application for a writ.

Second, if using the system is appropriate, do not dawdle. You must telephone the court clerk's office during normal business hours (8:00 a.m. until 5:00 p.m.) to notify it that you wish to file an emergency pleading. If the clerk's office is expecting a filing, someone will remain in the office to receive it. If you do not notify the clerk's office of your intent, you risk not having anyone on the other end to receive the pleading.

Third, file the pleading as an attachment via the email link embedded in the email-filing site. Please note that the system does not handle files larger than 5 MB. Confirm by telephone that the clerk's office has received the filing.

Fourth, if you use the emergency filing system, you must still serve all those who must be served if the pleading were filed by submitting paper documents to the court.

Fifth, you must still file paper pleadings that conform to the appellate rules by 9:30 a.m. CST on the next business day.

We state again that the system is designed to be used rarely. Amended pleadings on pending motions, petitions, or applications do not qualify. Motions for rehearing do not qualify. Administrative matters such as extensions of time to file, requests for oral argument, motions to withdraw, or requests to file a petition that exceeds the page limit do not qualify. The vast majority of complaints commonly pled on writ applications do not quality. The dispositive question is this: Will something legally disastrous occur in the immediate future if I don't file this pleading *right now*? If the answer is yes, call the clerk. If the answer is no, pack up an original and 11 copies, and head to the post office. ✤

TDCAA baby boom

Two babies have been born to TDCAA staffers in the past few months. First, Mary Kate Edmonds was born on Christmas Day to Shannon and Meaghan Edmonds, and on January 24, Lucas Michael Skidmore was born to Lara Brumen and Barry Skidmore. Congratulations to both families on such wonderful additions!

Baby Lucas

Baby Mary Kate

TDCAA's upcoming seminar schedule

Guarding Texas Roadways DWI Summit, March 7, in 32 Texas cities.

Investigation and Prosecution of Crimes Against Children, April 8–11, at the Omni Southpark, 4140 Governor's Row, in Austin. Room rates are $85 for a single, $120 for a double, $140 for a triple, and $160 for a quad. These rates are good until March 17, 2008, or until sold out. Call 512/448-2222 or 888/444-6664 for reservations.

Civil Law Seminar, May 28–30, at the Sheraton in downtown Austin. Call 512/478-1111 for reservations.

Crime Scene to Courtroom, June 18–20, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Prosecutor Trial Skills Course, July 13–18, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Advanced Trial Skills: Homicide, August, at the Baylor School of Law in Waco.

Annual Criminal & Civil Law Update, Sept. 17–19, at the San Luis Resort in Galveston. Both the San Luis and the Hotel Galvez are booked; call for overflow rooms at the Hilton at 409/744-5000, or keep checking the other two in case of cancellations.

Key Personnel Seminar, Nov. 5–7, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Elected Prosecutor Conference, Dec. 3–5, at the Omni Southpark in Austin. Call 512/448-2222 for reservations. ✤

Photos from January's Prosecutor Trial Skills Course

Continued from the front cover

Second chances bring both tragedy and justice (cont'd)

body took the brunt of the Expedition's force as its grill plowed into the smaller car right where Griffin was seated.


Mole's mug shot

Within three minutes, Carrollton police officers and multiple ambulances and fire trucks arrived on the scene. The men seated in the front of the rental car were not seriously hurt. However, Griffin Cordes arrived at a nearby hospital with multiple pelvic fractures, multiple left leg fractures, and window glass embedded in his face. (Nearly two years later, Griffin still has multiple pieces of glass buried under the skin of his face.) Beverly also suffered a broken pelvis, cardiac contusions, and leg fractures. (Mother and son went on to survive their injuries but endured months of pain, inability to walk without assistance, and multiple surgeries.) Though she was able to speak with her husband on the ambulance ride to the hospital, Marilyn Gates was not as fortunate as Bev and her son. Every one of her ribs had multiple fractures, which caused lacerations to her spleen, liver, aorta, kidneys, and heart. She was pronounced dead just after midnight on March 26, 2006.

Even with the front end of his Expedition destroyed, Stephen Mole exited his vehicle unhurt. He spent the next 45 minutes standing by his SUV, exhibiting no apparent emotion.

A trooper with the Texas Department of Public Safety arrived at the crash scene at 11:15 p.m. After he spoke with the first officers on scene, he conducted SFSTs and had Mole blow into a portable breath-testing device. Mole told the trooper and a Carrollton police officer that he had only consumed "two or three glasses of wine." (I interviewed Mole's parents and brother-in-law later and unearthed the credit card receipt from the restaurant where they'd eaten that night; everything indicated that Mole had consumed several more glasses of wine and two after-dinner liquers.) The trooper then arrested Mole and read him the DIC-24 warning. Mole agreed to provide a blood specimen at a nearby hospital. The results indicated that Mole's blood alcohol level was 0.12—nearly two and a half hours after the crash, likely more than twice the legal limit at the time of the crash.

My involvement

Unfortunately, I knew nothing about this case, Stephen Mole, or Marilyn Gates for nearly a year. In February 2007, the case files landed on my desk. It had been delayed for all of the usual reasons: waiting on blood test results and continuances from both the defense and the State. By this time, both vehicles had been released and destroyed, witness' contact information had changed many times, and memories had faded. An indictment for one count of intoxication manslaughter and two counts of intoxication assault were the first documents I read. Over the next 11 months, I subpoenaed, obtained by court order, begged for, gathered, and reviewed thousands of pages of documents and hundreds of photographs. This case, and specifically the family of Marilyn Gates, became mine.

One of the difficulties we encountered was that our two intoxication assault victims, as well as the other occupants of the rental car, were all back home in New Hampshire, 1,800 miles away. All interviews had to be conducted via telephone. Relatives of Marilyn Gates soon learned of my involvement with the case and began contacting me regarding possible trial dates, travel, hotel arrangements, etc.

As is the case in many other counties, Denton County has a website where one can search for information regarding pending criminal cases. I am convinced that half the state of New Hampshire was checking our website daily. I created a "distribution group" in my e-mail program and kept everyone updated on every motion, hearing, and potential issue with the trial. This line of communication proved vital, not only for later presentation of our case, but also for ensuring that everyone involved knew exactly what to expect when they returned to Texas. It seems so cliché to say that "communication is the key," yet I found that to be precisely the case. Whether it was the constant communication with my "second family" in New Hampshire or communication between me and the frequently changing set of


The scene of the wreck

prosecutors assigned to this case, excellent communication at all levels was truly an asset for us all.


Marilyn Gates

In the months that led up to the July trial, I began nearly daily communication with Melissa Gates Larochelle, Marilyn's daughter. Melissa sent me several CDs of photographs of Marilyn and her family so that I could put a face with the name on an indictment. From Melissa, I learned just how tragic this case really was: Melissa had been a police officer for a New Hampshire town. After learning she was pregnant (her husband was also a police officer), she left the streets and became a dispatcher for the local sheriff's office. Melissa considered Marilyn her best friend; I could hear in her voice how much she loved and missed her mother. I learned that Melissa was six months pregnant when her mother was killed. Melissa's son, Samuel, was born on June 24, 2006—which would have been Marilyn Gates' 53rd birthday. Melissa's sister-in-law was also pregnant when Marilyn died, leaving two grandchildren Marilyn never got to meet. Since the tragic loss of her mother, Melissa became involved with her local chapter of Mothers Against Drunk Driving and also started the Marilyn Gates Memorial Fund (www.marilyngatesmemorialfund.com) as one way to help her cope with her mother's senseless death. Melissa became my primary New Hampshire contact. She was well-liked and trusted by all of Marilyn's family (as well as Griffin Cordes and his parents). Having a single person as the main contact in a complicated case with multiple out-of-state witnesses, friends, and family members made my job much easier while still ensuring that everyone in New Hampshire was kept updated regarding the status of the case against the man who killed Marilyn Gates and severely injured Beverly and her son Griffin.

The first trial

Melissa, the occupants of the rental car, and more of Marilyn's friends and family than I could count, arrived in Texas on July 22, 2007, for the trial. It ended after just one day of testimony; the court granted a mistrial at the defense's request because of jury misconduct. A juror was overheard saying that the defense attorney did not want her on the jury because she was already convinced of the defendant's guilt.

Once the mistrial was declared, it was decision time. Should we offer Mole probation? A minimal prison sentence? Go back to trial in six months? Assistant Criminal DAs Ryan Calvert and Chris Abel and I agreed that the family and victims needed to have a say in how we proceeded. In a very emotional meeting in the office conference room, everyone agreed that they would return to Texas as many times as needed to ensure that Stephen Mole was made to answer for the lives he destroyed.

The re-trial

The re-trial was scheduled for January 7, 2008. From the end of July through the New Year, countless hours were spent continuing the investigation into this case. Again, contacts with the families occurred via telephone. My constant e-mail updates, with Melissa as my main contact, continued too. The final prosecution team was named: Ryan Calvert would lead the case, as he did in July. Chris Abel had since left our office, so Forrest Beadle, our newly promoted assistant chief of the misdemeanor division and DWI prosecutor, would sit second chair. In the background and ready to take over for Ryan during the second week of the trial (as Ryan had committed to be a faculty advisor at TDCAA's January Prosecutor Trial Skills Course) was Cary Piel.

While Ryan and I brought an intimate knowledge of the case—and I

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could rattle off every witness and family member's name, relationship, and phone number in my sleep—Forrest and Cary came in with new perspectives, knowing very little about the case originally. Cary's previous years as a criminal defense attorney brought yet another facet to the team. Although we didn't think it was possible, we were more ready for January's re-trial than we had ever been before.

The weekend prior to voir dire brought trips back to DFW Airport to pick up New Hampshire folks, meetings in the hotel conference room, and many long hours re-interviewing every one of our 20-plus witness. By 5:30 p.m. Monday night, 13 jurors had been seated and sworn in; it was the first time an alternate juror had been used in our county's history.

Opening statements and testimony began Tuesday morning. Between three entire rows of family members on "our side" of the room (nearly twice as many people came down from New Hampshire for the second trial), representatives from MADD and DPS, Sue Wooldrige (our office's Director of Victim Services), and other prosecutors who had heard about the case, it was standing-room-only the entire week.

We began our case-in-chief with testimony about the crux of our intoxication and causation evidence: Mole's driving. Seven civilian witnesses testified regarding the defendant's terrible driving prior to the crash. He was speeding and weaving in and out of traffic, and he nearly struck several other vehicles. Five of the seven witnesses saw that Mole's light was red for several seconds before he drove into the intersection. I also subpoenaed the traffic signal operations manager for the City of Carrollton, whose testimony was devastating to the defense. He testified that Mole's light was yellow for four seconds, then red for an additional two seconds before the cross traffic had green arrows. He also testified that it was impossible for both westbound and southbound lights to be green at the same time and that the traffic light was operating properly at the time of the crash.

Perhaps our most powerful witness was Julia Smith, a 16-year-old witness to the crash. Although she didn't know any of the people involved in the wreck, Julia climbed into the blood-covered rear seat of the rental car and held Griffin's hand, calming him down until ambulances arrived—all while Stephen Mole stood silently by the side of his SUV, uninjured and showing no interest or concern for his victims. Calling Julia to the stand first followed our strategy to "start strong."

Wednesday morning, the third day of trial, brought troublesome news: One of our jurors had suffered a miscarriage. While we all felt terrible for her loss, we also realized that we were down to 12 jurors. Just one more jury issue could result in a second mistrial. The court had disagreed with the State's request for at least two alternates, thinking we would never need the 13th juror, let alone a 14th.

We introduced Mole's book-in photo. He had a smirk on his face in the photo, which had been taken the night of the crash—*after* he learned that Marilyn Gates had died.

The blood evidence and results were then introduced, as well as testimony regarding toxicology and the effect of alcohol on the human body, then testimony from the medical examiner. Because we also wanted to "finish strong," we saved Beverly, Griffin, and Don's testimony for last. Although Beverly and Griffin remembered nothing about the collision, they testified about their injuries and recovery, leaving no doubt in the jury's mind that they both had suffered "serious bodily injury."

Don was one of our final witnesses. It was heartbreaking to listen to Marilyn's husband re-live that night. Hearing this hardened ex-cop's voice break as he told the jury how a doctor had notified him that his wife had died was more than most of us could bear. His testimony did not leave a dry eye in the room—with the exception of Stephen Mole.

All of these witnesses did an amazing job (especially under cross-examination from a very aggressive defense counsel) and were able to keep their wits about them, never uttering the phrase "first trial," which may have resulted in yet another mistrial.

One difficulty

Perhaps the most difficult State's witness was also the briefest. The trooper who investigated the case was forced to resign from DPS in February 2007. His resignation resulted from disciplinary actions that, while unrelated to this case, nevertheless called his credibility into question. The prosecutors made a successful

motion in limine to keep the trooper's specific conduct away from the jury. However, to avoid "opening the door" to what was sure to be multiple days of brutal cross-examination by defense counsel, the prosecutors severely limited what was asked on direct examination. We also knew that this witness was at the heart of the defense's strategy of attacking the crash investigation. Thus, we wanted to minimize his importance. As a result, the only areas we covered with him were that he formed probable cause to arrest Mole and that he placed the blood vial into evidence after the blood was drawn. The direct examination was less than five minutes long, but the cross was much longer.

Defense counsel immediately attacked the former trooper, forcing him to admit that he was not a credible person. The lawyer then aggressively questioned the witness about the many facets of accident reconstruction that were *not* performed in this case. Finally, after several hours of discussing drag sleds, coefficients of friction, and crush factors, the defense passed the witness. No re-direct. We dealt with crash reconstruction later.

After we rested, the defense began its case by calling the defendant's sister (whose husband had died of complications from an organ transplant just two days prior). She ate dinner with Mole prior to the crash and testified that he appeared fine when he left the restaurant. On cross, however, she admitted to ACDA Ryan Calvert that her brother's weaving, speeding, jerking from lane to lane, and running a red light were "not normal" for him. She also testified that she could not recall how much alcohol her brother had had at dinner but that he was already drinking wine when she arrived at the restaurant.

The defense then called two experienced DPS troopers to testify that the ex-trooper who investigated the crash was not credible. After giving their opinions on their former colleague's credibility, they were passed to Ryan for cross-examination. Ryan had both men explain that all of the crash reconstruction techniques, which the defense emphasized during its cross of the ex-trooper, were irrelevant to determining what occurred in this particular wreck. The two troopers testified that eyewitnesses and the traffic light engineer are the keys to a case like this. In addition, the more experienced of the two troopers testified on cross that the damage on the vehicles will generally indicate who ran the red light. When shown pictures of both vehicles in this case, the trooper said it was clear to him that the defendant's Expedition had been at fault in the crash. Ryan had effectively turned these two troopers, as well as Mole's sister, into State's witnesses.

After closing arguments late on Friday afternoon, the jury was out just two hours before returning their verdicts: guilty on all three counts (one of intoxication manslaughter and two of intoxication assault). Stephen Mole was immediately placed into custody and spent the weekend in the Denton County jail. Later that night, I joined Marilyn Gates' friends and family for an emotional dinner, where the birthdays of Don Gates and Marilyn's niece Jessica were celebrated together as they had been in years past. Although Marilyn's absence was conspicuous, it was satisfying to see everyone's relief that after nearly two years and one mistrial, the guilt/innocence portion of the trial was finally behind us.

Punishment

Opening statements in the punishment phase were scheduled for Monday morning. However, we had virtually nothing new to tell the jury, nothing but the facts of the case. Despite information I received from interviews regarding Stephen Mole's reported multiple DWI crashes and multiple out-of-state DWI convictions, I was unable to obtain any solid information we could have used in the punishment phase. Other than a previous arrest for assault (family violence), which was dropped by another DA's office after the victim signed a waiver of prosecution, we didn't have much to present. Mole had ignition interlocks installed on both of his vehicles just after the crash, yet after one year and nine months, he didn't have a single interlock violation. Bank records I obtained showed no obvious alcohol purchases. We were now looking at a 54-year-old man with two children and no criminal history to speak of, convicted of "there but for the grace of God go I" offenses. The chance that this jury could give Mole probation, however unthinkable it was to the victims and Marilyn Gates' family, was quite possible.

Enter ACDA Cary Piel. Cary quickly made Forrest and I realize that we needed to stop thinking about what we *didn't* have and concentrate on what we *did* have. OK, so what did we have?

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Marilyn Gates was dead. Beverly Brooks and her son, Griffin, were seriously injured; their lives would never be the same. We had a courtroom full of friends and family members whose lives would also never be the same. We had Marilyn's daughter, Melissa, who never had the chance to learn how to be a mom from her own mother and whose son will never get to meet his grandmother. Then we had Stephen Mole himself, a robotic, stoic man who showed no emotion or concern for any of the victims, neither at the crash scene nor during an entire week of trial. A man who lied to investigating officers about how much had been drinking that night. A man who was virtually *smiling* in his book-in photo.

Before we started punishment Monday morning, we had another jury issue. Judge Richard Podgorski read a note from one of our remaining 12 jurors: Her father was dying in a distant state, and she wanted to be excused from jury duty. Knowing that we were nearing the end, the court declined to release her, despite objections from defense counsel. We had dodged yet another jury bullet.

Cary and Forrest then did an outstanding job direct-examining Don Gates, his daughter Melissa, Gene and Griffin Cordes, and Beverly Brooks regarding their injuries and the hole left by Marilyn Gates' death. Don and Melissa's testimony especially, was gut wrenching. Once again, there was not a dry eye to be found in the entire courtroom, with one glaring exception—Stephen Mole. The defense then called Mole's girlfriend, sister, daughter, mother (in her wheelchair), and several friends, coworkers, and church members. Under Cary's expert cross-examination, several of these witnesses confirmed in front of the jury what I had previously discovered, that Mole consumed vast amounts of alcohol, much more than he admitted to investigating officers, on the night of the crash. Cary's closing argument concentrated greatly on the personal injuries suffered by Griffin Cordes and the tragic fact that Marilyn Gates was dead—all because of Stephen Mole. Cary addressed the probation option by suggesting that IF there were a probation case on an intoxication assault, it could only be for the injuries to Beverly Brooks.

With a punishment range of two years' probation to 10 years in TDCJ (for the two intoxication assaults) and two years' probation to 20 years in TDCJ (for the intoxication manslaughter charge), we all knew that anything was possible at this point. I had previously prepared the victims, friends, and family for the possibility of a "not guilty" verdict, and now I prepared them for probation, pen time, jury hanging on punishment (an option none of us wanted to contemplate), and all possibilities in between.

After more than five hours of deliberation, the jury returned with their punishment verdicts: 20 years in TDCJ for the intoxication manslaughter, 10 years in TDCJ for the intoxication assault of Griffin Cordes, and 10 years probated for the intoxication assault of Beverly Brooks. The jury also found Mole had used a deadly weapon (his Expedition) to commit the crimes. It was exactly what we had asked for, and then some. The jury had effectively sentenced Stephen Mole to the maximum prison term. A 54-year-old man with no criminal history was going to prison for 20 years.

Or was he? Prior to the July 2007 trial, a motion to stack had been filed with the court. After the guilty verdicts, Judge Podgorski advised everyone that he would address the motion the following morning. After his ruling and final sentencing, family members could give their victim impact statements. The next morning saw Stephen Mole enter the courtroom wearing a bright orange jail jumpsuit, leg irons, and handcuffs. Shortly thereafter, Cary Piel argued that the law was obviously written to allow for stacking these types of sentences for a reason: cases exactly like this one where intoxicated persons cause crashes that kill or injure multiple people. After a brief "I'm so sorry, please have mercy on me" statement from Mole, the judge pronounced sentence: 20 years *stacked* with the 10 years, with the 10 years' probation to run concurrently. With the deadly weapon finding, that meant Stephen Mole will not be eligible for parole for 15 years—when he is 69 years old. Tearful victim impact statements from Don Gates, Melissa, Marilyn's two sisters Joannie and Margie, Marilyn's oldest niece Meredith, and Gene and Griffin Cordes, concluded an extremely emotional week and a half.

Lessons learned

The importance of communication! Talk with everyone. Prosecutors and

investigators must work together and share their skills, knowledge, and experiences. Do this through all phases of the case: witness interviews, voir dire, case in chief, punishment, etc. This is exactly what we did, and I know it helped our case and our victims.

Talk to your witnesses more than once. Interview them again and again—you'll be amazed what new information you'll uncover. Bring in new people to evaluate your case strategy: Sometimes the input of someone who knows nothing about a case is exactly what you need. Keep your victims and their families updated. The kind words that all of us heard from the New Hampshire families regarding how we dealt with them and this case are words that we will always remember. Treat your victims and their families as you would want to be treated if you were in their shoes.

I will never forget the people I came to know so well because of this senseless tragedy. I have been asked to go to New Hampshire this June to celebrate Marilyn's birthday and participate in the second annual Marilyn Gates "A Night to Remember" to benefit the foundation Melissa started. I will be there, and I can't wait to see my New Hampshire friends again. I am certain that I will return each June for many, many years, and I will never forget Marilyn Gates (despite never having had the pleasure of meeting her) or her loved ones.

Marilyn Gates may have cheated death on September 11, 2001, and got a second chance. But she couldn't cheat death again on March 25, 2006. Stephen Mole cheated the law once during the July 2007 mistrial, and he got a second chance. He couldn't cheat it again this past January; this time it cost him 30 years of his life. ✤

INVESTIGATOR SECTION

By John H. Kleindienst
Investigator in the Harris County DA's Office

Mortgage fraud through the eyes of a DA's investigator

How the Harris County DA's Office investigates cases of mortgage fraud

By now most of us have heard about mortgage fraud as it sweeps across the great state of Texas and our nation. Most investigators dread the thought of dealing with the mountains of paper evidence that a mortgage fraud case involves, but as Texas peace officers, we must do our best to investigate mortgage fraud so those involved will be held accountable for their crimes. Methodically examining the paper transactions for false information and distilling the results into a case that can be presented and properly handled by a jury is the key.


John Kleindienst

What is "credit for sale" mortgage fraud? Generally, it is the use of any false or misleading information or documentation to obtain a loan to purchase real estate. For the most part, people commit mortgage fraud to obtain a large sum of money in a very short time. However, a small number of people get caught up in pursuing "the American dream" of making money, and they get sucked into what they thought was the opportunity of a lifetime—but is really fraud.

Our office receives telephone calls alerting us to possible cases of mortgage fraud weekly; these calls come mostly from the Texas Department of Saving and Mortgage Lending and from "straw buyers"—people who have been talked into helping with a fraud scheme but are left holding the bag (more on them later). Our goal is to investigate the cases that involve a large number of properties that are flipped by a so-called investor. We must stop the large volume of flips to bring it under control in the shortest time possible. Our office investigates 35 to 45 large cases a year, and lately that number has increased.

Participants in mortgage frauds are typically the investor, buyer, real estate agent, mortgage broker, appraiser, and title company. Here is a general outline of how a mortgage fraud takes place.

Anatomy of mortgage fraud

1) An "investor" locates a target property and purchases it at or near market value, say, $250,000.

2) This "investor" obtains a false, vastly inflated appraisal of the property for, say, $500,000, from a crooked appraiser in cahoots with the "investor."

3) A "straw buyer" is recruited with promises of no financial responsibility for the deal or the property and payment of an upfront lump sum payment, say, $10,000. This person is usually a bystander who is unaware of the fraudulent scheme but probably should know better because of the promise of quick money.

4) Closing occurs with the "straw buyer" purchasing the home at the (falsely) inflated price. The closing documents generally contain a variety of false statements: The "straw buyer" may lie about his income and expenses, his marital status, and his intent to occupy the house as his primary residence.

5) The lender funds the purchase to the "investor" and issues the loan to the "straw buyer."

6) The "investor," as the seller, receives the proceeds of the transaction ($500,000) with a net profit of $250,000.

7) The "investor" may or may not pay the promised amount to the "straw buyer."

8) The "investor" drops out of sight after a few months of making the mortgage payments or trying to lease the house to a renter.

9) The lender seeks payment from the "straw buyer" when the monthly mortgage payments become delinquent, but the buyer can't afford the payments or

sell the house because its value was vastly inflated.
10) Foreclosure sale of the property at rock-bottom price.

Who is affected by mortgage fraud?

Everyone! Foreclosures lead to instability in America's financial markets as mortgage-backed securities fail to perform. The inflated sales prices increase the property taxes we pay for our own homes. Your county appraisal district typically uses the sales price of real estate in your neighborhood to determine your home's appraisal value. If you live in a neighborhood where mortgage fraud is occurring or has happened in the past and the property value is inflated, your property value in turn will rise and you will pay higher property taxes based on the falsely inflated value. As the mortgage fraud scheme unravels, lenders are left holding a large number of inflated home loans, and suddenly no one is making the payments. The lenders will try to get rid of those houses and are willing to sell them at a price below the going market rate. One direct result of lenders taking large losses in their investments are fluctuations of returns for entities, such as our retirement accounts, which are invested in the mortgage industries. And finally, a legitimate homeowner in a neighborhood where houses were purchased through fraudulent transactions and then sold at severely reduced prices will have to sell at a price lowered to compete with those foreclosures and fire sales—possibly at less than the honest buyer originally paid. These are just a few of the ways mortgage fraud affects us all.

Obviously, an "investor" who buys a $250,000 home from a legitimate seller and sells the same home in a matter of days for $500,000 is interested in making a large sum of money in a short time. The "straw buyer" is typically a hard-working person who believes that he is being presented with his big break. The sales pitch from the "investor" to the straw buyer goes something like the following:

> "My investment company has been buying a lot of houses that are for sale below the market value. Right now we are asset-rich but money-poor from buying all of these houses. Do you have good credit? If you do, I am willing to help you buy one of these below-market homes at the true market value, which we will have appraised. I know all the people at the real estate office, the appraiser, the mortgage broker, the title company, and the insurance company. I will make sure everything is handled, including the down payment and closing costs. I will be with you throughout the whole process. After you buy a house, I will give you your equity money upfront. I will make the monthly payments, pay all the taxes, take care of the property maintenance, and rent the property out. We'll hold onto the property until the market value increases, and then we'll sell. I'll pay you the original price you paid, minus the equity you received upfront and any other fees I had to pay."

The straw buyer, swayed by the possibility of making a lot of money for nothing, ignores the warning that "if it looks too good, it is probably not real" and agrees to the deal. I have seen educated and experienced people, including a law enforcement officer, fall into the trap: The home is purchased at a price that is vastly inflated (a crooked appraiser helps here), the straw buyer's upfront costs are handled by the "investor," the mortgage company funds the new loan to the buyer, and all appears to be well. However, the "investor" eventually doesn't make the monthly payments, skips out on property taxes and maintenance, and the property is never rented out. The mortgage company looks to the straw buyer left holding the bag, and the home ends up in foreclosure due to non-payment. Guess whose credit is trashed?

Mortgage fraud of this type requires two separate real estate transactions: 1) the legitimate or good sale, and 2) the mortgage fraud or "flip" sale. Contact all of the following people to obtain their records for the property you are investigating. These records are full of valuable information.

Here are the common property transaction documents and mortgage industry acronyms
1) Settlement Statement: HUD 1
2) Uniform Residential Loan Application: 10-03
3) Verification of Employment: VOE
4) Verification of Rent: VOR
5) Verification of Deposit: VOD
6) Occupancy Affidavit
7) Marital Status Affidavit
8) Title Policy
9) Residential Sales Contract
10) Assignment of Rights and Notification, and
11) Special Warranty Deed

Examples of all of these documents are on www.tdcaa.com; just search for "mortgage fraud." As you examine the documents listed above, look for the following indicators that point to potential mortgage fraud:
1) Fax cover sheets. Are the company

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Entities to contact

The legitimate sale

Original seller: what was property worth and what was the list price. A common response is "$500,000! I couldn't get $260,000 and took the offer of $250,000." Did the seller meet the buyer? Where and how? Were real estate agents involved? What title company?

The title company: a copy of its General File, aka "GF Number," including copies of all checks and/or wire transfers involving the property in question.

The real estate agents/brokers: both the seller's and buyer's agents. Get copies of the listing, all contracts, and earnest money checks.

The mortgage fraud/flip sale

The lender: usually this file will contain most of the records listed below. Compare these documents with others you obtain from other sources.

The title company: a copy of the General File, aka "GF Number," including copies of all checks and/or wire transfers involving the property in question.

The real estate agents/brokers: both the seller's and buyer's agents. Get copies of the listing, all contracts, and earnest money checks. In some cases you'll find the real estate agent creates a new listing to increase the sales price to accommodate the inflated false appraisal.

The mortgage broker: get all of her records. This is where you will find the largest number of fraudulent documents.

The title insurance company: a copy of the title insurance to the property.

The appraisal: from the appraiser or the lender's file. It will show the inflated property value. Look at the comparable appraisals from the same neighborhood, construction, and home size.

The county appraisal district: these records document property values through the years and prior ownership. Compare these values to the value on the fraudulent appraisal. You can also compare the values of surrounding properties.

The county clerk: pull each deed, lien, assignment, or any other document filed in this office for the property.

All bank accounts: belonging to the person(s) involved in the mortgage fraud. Follow the money trail and you'll find any others who are involved.

names different but show the same address and telephone numbers? It is highly suspicious to have entities such as a property management company, an employer, an investment company, a home remodeling company, and a mortgage company all using the same style of fax cover sheet, telephone number, and fax number.

2) Fax headings on documents. Look for fax headings from the same company where the dates and times do not fit the purchase time period—these are caused by cutting and pasting efforts to create documents.

3) Signatures. Do they appear to be signed by the same individual? I have found signatures for the seller and buyer that were clearly generated by the same person on almost every document for one transaction.

4) Correction fluid (Liquid Paper or Wite-Out). Look for documents in the mortgage broker and title company files that have been changed by using correction fluid, photocopied, then marked "original."

5) Cut-and-pasted items. I have found title polices, bank statements, and financial statements that were cut and pasted or scanned and then altered by computer.

6) HUD 1. Examine this document for all dates and fees paid POC (Paid Outside of Closing—beware because fraudulent transactions will often list a lot of POC costs that are not legitimate), and what fees the seller and buyer paid. Is the earnest money recorded on this document? Did the buyer have to pay any money at closing? Did the "investor" attend the closing? Did the seller sign before or after the buyer? Who selected the title company? Item No. 210, for example, in mortgage fraud cases, typically shows a zero amount which is incongruent with the earnest money listed in the sales contract. This payment with the sales contract will often be done with a bogus check. Also, watch for a HUD 1 with no costs due for the seller; this will happen where the seller is taking credits for items such as taxes that should be paid at closing but are not.

7) Compare all documents. Is the information the same on all the documents (i.e., the 10-03 from the broker or title company compared to the 10-03 from

the lender?) This is where to look for any changes made to the documents by comparing them to documents from other sources.

8) VOE. Is the information and income correct? Call the phone number on the VOE to verify information such as employment dates, salary, and whether the person who signed on behalf of the employer really exists.

9) VOR. Is the information and monthly rental fees correct? Call the phone number on the VOR to verify the information provided such as rental dates, rental amount, and whether the person who signed on behalf of the company exists.

10) VOD. Compare the bank records. Does the deposit and/or bank account balance match? Call the phone number on the VOD to verify the information provided such as account number, account holder, and whether the person who signed on behalf of the bank exists.

11) Occupancy Affidavit. Which box is marked: primary, secondary, or investment property? Typically the straw buyer marks the "primary residence" box but never intends to move into the property.

12) Marital Affidavit. Is the buyer married but shows himself to be single so his wife will not have to sign the closing documents? In my experience straw buyers frequently indicate they are single and never inform their spouse about their purchase.

13) Title Policy /"Schedule A". See how the property is conveyed from the seller to the buyer ("investor" as Trustee/Assignee for Mr. Seller, which is typically done when the "investor" actually has not taken title of the property yet). In many mortgage fraud cases, the title policy has been altered on "Schedule A" after it was issued, either by correction fluid or cut-and-paste.

14) Sales Contract. Does it show earnest money being deposited with the listing agent? If so, check for a receipt and a copy of the check. Did any of the agents discount their commission? Frequently the sales contract will show earnest money paid by the buyer, but it was never actually paid or was done with a counterfeit check. The buyer's agent gave a 2-percent rebate to the buyer after closing and the agent was then paid by the seller.

15) Assignment of Rights and Notification. Has this document been filed with the County Clerk's Office, and if so, when? In fraud cases an Assignment of Right and Notification is typically used but is never filed at the County Clerk's Office.

16) Special Warranty Deed. If a home is sold by the lender due to foreclosure, the lender typically issues a Special Warranty Deed. Why was this document used rather than a General Warranty Deed? Was the deed recorded with the county clerk? Whose name is on the deed? In a small number of mortgage fraud cases the seller never conveys the property to the buyer. On a legitimate transaction, a General Warranty Deed is issued to the buyer.

A sampling of fraudulent documents such as those described above are available on the TDCAA website at www.tdcaa.com. Search for "mortgage fraud."

It is important to remember that the people involved in mortgage fraud have access to computers. My investigations have uncovered bogus bank statements, W-2 and 1099 forms, tax returns, rental contracts, VOEs, VORs, and VODs that were produced via the computer. Those involved in mortgage fraud will do whatever it takes to get the loan funded.

You've unearthed fraud—now what?

What happens after you have gathered all the above documents, examined them, and discover that mortgage fraud has occurred? That mound of paperwork is not the end of the job. The next step is to prepare flow charts and spreadsheets to condense the volume of documents and demonstrate how and where the fraud occurred. If you are lucky enough to have a financial analyst in your office, this part is his job.

Finally, it is time to present your investigation to your assistant district attorney who will decide what offense and which participants should be charged. Consider the following violations of the Texas Penal Code:

(1) §32.32, False Statement to Obtain Property or Credit.

(2) §34.02, Money Laundering.

(3) §71.02, Engaging in Organized Criminal Activity.

Do not forget the Code of Criminal Procedure, Chapter 59, Forfeiture of Contraband, which is an effective way to stop the criminal enterprise. When you locate the bank accounts of those involved in mortgage fraud or any other criminal activity, you should file a court order to seize them, as they hold the profits from the criminal enterprise and could ultimately be awarded to your office for use in future investigations.

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CRIMINAL LAW

By Dana Nelson
Assistant District Attorney in Travis County

Denying bail for family violence offenders

Texas prosecutors have a tremendous new tool to protect victims of family violence. Wading through the steps will be well worth it.

Effective January 1, 2008, a family violence offender may be denied bail after violating a protective order or bond condition in a family violence case.[1] Other changes to PC §25.07 (Violation of Protective Order) and CCP art. 17.292 dramatically broaden the option for no-bail requests and is a major change for trying family violence cases.[2]


Dana Nelson

Many prosecutors have been scratching their heads about how to use this new tool; every path to a no-bail ruling requires a hearing, but when and what rules apply is confusing. Practical application of the new no-bail statutes will require some ingenuity and good judgment on our part.

No-bail requests will not be appropriate for every family violence defendant; we must exercise this option carefully and consider which defendants have the highest potential to inflict lethal harm. Also remember that not every defendant requires a setting of no-bail to remain in custody.

Changes to CCP art. 17.292: emergency protective orders

Defendants accused of committing sexual assault or aggravated sexual assault may now be subject to an Emergency Protective Order (EPO). As with stalking defendants, there is no relationship requirement between the defendant and victim for an EPO. Now the protective order process for victims of sexual assault parallels the process for victims of family violence. After an offense occurs, an EPO that is criminally enforceable can be entered while a victim decides whether to pursue a civil protective order.[3]

EPOs are also available for victims of sexual assault of a child. One concern for these victims is including their names and personal information in the public record and providing a defendant with more information than he already has about the child. If CPS is involved and pursuing other legal remedies, then avoid working at cross-purposes by considering other alternatives, such as a bond condition, that afford similar protection without the formality of an order.

Changes to PC §25.07: violations of a protective order (VPO)

Bond conditions in a family violence case (if they relate to the safety of the victim or community) and Temporary Ex Parte Civil Protective Orders (TExPOs) have been added to the list of protective orders (POs) whose violations can be criminally enforceable under Penal Code §25.07. The TExPO must have been served on the defendant to be enforceable.[4]

New CCP art. 17.152: denial of bail[5]

Every defendant who violates a PO is eligible to be denied bail. The statute requires a magistrate to consider everyone from the first-time criminal defendant who drives by his victim's workplace, to the offender with multiple FV convictions who commits aggravated assault, for a denial of bail. The beauty of this broad expanse of defendants is that the first defendant may be the most appropriate for no-bail based on the circumstances.

A defendant must have committed an act prohibited by PC §25.07 to trig-

ger CCP art. 17.152 to make no-bail an option. A denial of bail can occur only after a hearing. There are three categories of conduct that must be proven to deny bail. Each category of conduct—how the defendant committed the violation—requires a different showing at the hearing. The burden for all hearings under CCP art. 17.152 is a preponderance.

The categories are:

1) if the defendant committed a VPO offense under PC §25.07 by violating a bond condition in a family violence case, then the State must show that the bond has been revoked or forfeited for this violation, that the defendant violated the bond condition, and that the bond condition was related to the safety of the victim (of the family violence case) or the safety of the community.

2) if the defendant committed VPO other than by violating a bond condition, then the State must prove that new VPO offense.

3) if the defendant committed VPO, including violating a bond condition, by going to or near a protected place (home, work, or school), then the State must prove the conduct and prove that the defendant went to the place with the intent to threaten or commit family violence or stalking.

An example of the first category is a defendant on bond for a Class A misdemeanor family violence assault with a condition to stay away from and have no contact with the victim. If the defendant calls the victim, he violates the "no contact" bond condition. The State would have to prove A) that the bond was revoked for this violation (note: The State would have to file that motion and get the order before making this motion for no-bail); B) that the defendant vio-

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Mortgage fraud through the eyes of a DA's investigator (cont'd)

The following departments and/or agencies have assisted with expert opinions and witnesses:

- Texas Department of Savings and Mortgage Lending, www.sml.state.tx.us
- Texas Real Estate Commission (TREC), www.trec.state.tx.us
- Texas Appraiser Licensing and Certification Board (TALCB), www.talcb.state.tx.us, and
- the lender.

Use the following to obtain information and/or certified documents as evidence:

- Comptroller of Public Accounts—Corporation Search and Certification of Franchise Tax Account Status, www.window.state.tx.us
- Secretary of State—Corporations and Filing Searches, www.sos.state.tx.us
- The District Clerk's Office—Civil Lawsuits, naming your targets.
- The County Clerk's Office—Real Property Records for all suspect properties and assumed names for all of your targets.

It is easy to look at mortgage fraud cases and think that they are just too overwhelming to handle. Begin at the beginning and be methodical in your examination. Try to prove that it is a legitimate transaction and you will begin to see the discrepancies. Do your best—we owe it to our profession, our district attorney, and the prosecutors who present our cases in court, but most of all, to the citizens of the great state of Texas.

Editor's note: In the 80th Regular Session, the Texas legislature passed HB 716 to combat mortgage fraud. Among its many changes, the bill increased the statute of limitations on money laundering and false statement to obtain credit from three to seven years. See CCP art. 12.01 for more information.

Mike Elliott named Prosecutor of the Year


Mike Elliott

Mike Elliott, an assistant DA in Fort Bend County, was named the Prosecutor of the Year by the Texas & Southwestern Cattle Raisers Association for his "dedicated efforts to thwart cattle and livestock-related thefts."

Elliott was recognized especially for his prosecution of Heath Novak, who stole hundreds of head of cattle over an eight-county area. Novak pleaded guilty and was sentenced to five years in prison and ordered to pay $10,000 in restitution.

The award was presented in Corpus Christi on March 15 at the TSCRA's annual convention. Congratulations, Mike, on a much-deserved award! ✤

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lated the bond condition; *and* C) that the bond condition was related to the safety of the victim *or* community. This category will be most helpful when there are no other protective orders in place.

An example of the second category is a defendant who is subject to a PO and violates that order by possessing a firearm. The State would have to prove the elements of that VPO: A) the defendant was subject to a PO, B) the defendant possessed a firearm, C) possessing a firearm violated the order, and D) the defendant knew possessing a firearm violated the order.

An example of the third category is a defendant who is subject to a PO and appears at the residence of the protected person. The State would have to prove the VPO as in example No. 2 (above) *and* prove that the defendant went there with the intent to commit family violence or stalking. "Commit family violence" is a new phrase in our statutes, so we return to Family Code §71.004 to figure what it means. Simply put, the defendant went to the protected person's home to assault or threaten to assault her. The State could alternatively show that the defendant went there with the intent to commit stalking; however, proving stalking adds a lot of elements to this example. (Remember that when a PO is in place, an accumulation of misdemeanor VPOs usually meets the elements of VPO by stalking.)

Now let's consider a more realistic example. The defendant is on bond for misdemeanor assault (FV) with a condition to stay away from and have no contact with the victim. The victim has applied for a PO, and the defendant has been served with the TExPO. The defendant goes to the victim's home, assaults her, and threatens to kill her children.

1) For going to the residence, the defendant may be charged with either VPO of the bond condition or VPO of the TExPO, both Class A misdemeanors. While PC §25.07(c) permits the same conduct to be charged as two offenses, it is more practical and conservative to allege these facts as one offense or the other to avoid double jeopardy implications.[6]

2) For the assault, the defendant may be charged with violation of the TExPO by assault, a third-degree felony.

3) For the threat to the victim's children, the defendant may be charged with either (but not both, for the same reason in No. 1, above) VPO of bond condition (to have no contact) or VPO of TExPO (no threatening or harassing communication), also both Class A misdemeanors.[7]

The category with the fewest facts to prove at a no-bail hearing is a plain VPO, not the bond condition or the "go to or near" violation. In this scenario we have the VPO by assault and the VPO for threatening or harassing communication. These should be the simplest to prove and have no additional facts for the judge to find before issuing a no-bail ruling.

The no-bail hearing: when and how

Hearings requesting no-bail are not new. These hearings will be like those we already do to deny bail for bail jumping, committing a particular type of offense, or commission of a subsequent felony. The rules of evidence, including the 6th Amendment (and all of the difficulties it may present in a FV case) will apply. Art. 17.152(e) lists what the magistrate may consider: the order or condition of bond, circumstances of the offense, relationship of the defendant and victim, and the defendant's criminal history. The list includes a catch-all for "any other facts or circumstances" relevant to the defendant being an imminent threat.

I recognize that having a victim testify in this circumstance can be daunting for many reasons. The victim may not be cooperative or may already have recanted. She may also be truly afraid of the defendant. If the State seeks to enter otherwise admissible hearsay, the declarant must be available for cross-examination unless the hearsay is non-testimonial or the defendant has forfeited his right by wrongdoing.[8] If the declarant must testify at this hearing, it may satisfy the defendant's right to confrontation at trial if the defendant has an opportunity to cross-examine the declarant. Many prosecutors are already using this tactic in bond-reduction hearings to great advantage.

The most difficult section of this statute to put into practice is the timing of the hearing. Subsection (f) instructs the magistrate that any person arrested for an offense under PC §25.07 "shall without unnecessary delay … conduct the hearing and make the determination required." The statute requires the hearing to be conducted not later than 48 hours after arrest, and the court is required to notify the State and defense counsel before the hearing. Yikes!

The statute seems to contemplate

that the magistrate will do this automatically without a motion from the State. Will law enforcement request it? The bright side may be that there seems to be no prohibition on making a motion later even if a magistrate already set bail. Also, the defendant whom the prosecution wants to be held without bail might be in your sights before he is arrested for the eligible offense because you are probably already working with law enforcement and may be looking for the defendant on other warrants.

Procedure

We should start with a written motion alleging the facts making the defendant eligible for a denial of bail and attaching any public records, such as the probable cause affidavit for the new offense, to the motion. Be sure to provide notice to opposing counsel; then you should receive a setting for the hearing. At the hearing, the State will have the burden of proof, so have witnesses ready and any certified public records you may need, such as the protective order or the bond that set the condition that was violated.[9] After the State has established the protective order or bond condition that was violated, prove the conduct committed by the defendant that violated the PO or bond condition. Witnesses may include the victim, law enforcement officers, or civilian witnesses. For "go to" or "go near" violations, an aerial photograph to scale will help show the defendant was within the 200-yard radius of the protected area. (Remember that if you are using Google Earth, you should request permission to use the copyrighted material and may have to pay a fee. Most large urban counties already pay for access to satellite photos you can use.)

Other factors the judge may consider include the relationship of the defendant and victim and the defendant's criminal history. To prove the relationship of the defendant to the victim, you are not limited to the victim's testimony. You may choose to call a family member or friend to show the relationship. For criminal history, have the judgments from the defendant's prior convictions just as you would in the punishment phase of a trial. You will need a fingerprint expert for comparison of the prints if the defendant will not stipulate to those prior convictions. For a defendant with many charges but no convictions, bring the booking prints, arrest sheets, and charging instruments from the priors. Be on the lookout for other information that can help you, including the defendant's jail calls, visitors, and mail. You will be amazed what you can find from these sources.

All in all, this new tool will be just the right remedy for just the right defendant and victim, so keep an eye out for these motions as a possibility. ✤

Endnotes

1 Credit for these changes goes to Rep. Joe Straus (R-San Antonio) and Sen. Jeff Wentworth (R-San Antonio), who filed and passed HB 3692 and HJR 6 at the request of Bexar County Criminal District Attorney Susan Reed.

2 "Family violence" has the meaning in the Family Code §71.004: "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault but does not include defensive measures. It does include dating relationships."

3 Remember that CCP ch. 7A permits a victim of sexual assault to pursue a civil protective order under Ch. 85 of the Family Code in the criminal case, regardless of the relationship between the defendant and victim. CCP art. 7A.07 permits these orders to have a lifetime duration if the court finds there was a threat that reasonably places the victim in fear of further harm from the defendant.

4 I hope you are served by a great constable like we have in Travis County; he has real-time postings on his website and email notification of when TExPOs and POs are served.

5 This statute is enabled by amendments to the Texas Constitution Art. I, §11b for violating bond conditions, and §11c for violating a protective order.

6 *Bigon v. State*, 2008 Tex.Crim.App. LEXIS 1 (No. PD-1769-06, January 16, 2008) (because multiple convictions for the same conduct violate double-jeopardy, only one conviction will be upheld)

7 An interesting idea, particularly if no other felony VPO is available, would be to consider this incident stalking because the defendant placed the victim in fear of serious bodily injury to or death of another person. Add this incident with another (to satisfy the requirement that this conduct occurs "on two or more occasions"), and the defendant could be charged with VPO by stalking, a third-degree felony.

8 *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington* and *Hammon v. Indiana*, 547 US __, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

9 As with trials for a Violation of Protective Order, the State must prove the defendant had been served with the PO and knew that this conduct violated the order. See *Harvey v. State*, 78 S.W.3d 368 (Tex. Crim. App. 2002). Particularly for violation of a TExPO, the State must prove the defendant was served. If there is no public record on file yet, then call the officer who completed service as a witness.

IN THE SPOTLIGHT

By Sarah Wolf
TDCAA Communications Director

Yes! You *can* pay off law school loans on a county salary

You don't have to leave your office after a few years just so you can pay off your debt and start saving. Here's how to manage your money, pay off loans, and live well on a prosecutor's salary.

The numbers are astounding, even for non-mathy lawyers.

Loaded with student loans and perhaps credit card debt, the average new lawyer graduates from law school with an astounding $90,000 in loans. Settled into a 10-year repayment plan, such debt amounts to over $1,000 a month in payments, according to the Law School Admission Council (online at www.lsac.org)—more than a mortgage in many cities.

But wait, there's more.

Those lawyers who take entry-level jobs in prosecutors' offices might earn a salary of $36,000 to $50,000, judging by a few recent job postings on TDCAA's website. Take-home pay on a $43,000 salary—the average of those starting salaries—nets just over $2,400 each month (calculated at the 25-percent tax bracket and including federal withholdings). After shelling out $1,000 for student loans, that doesn't leave a whole lot for rent, car payments, utilities, and food, let alone any luxuries. It's enough to make people who *want* to be prosecutors leave public service after a very short time because they feel like they must choose between a job they love and the lifestyle they want.

But smart money management and advice from some expert financial types can help those saddled with heavy loans pay them off and start saving money for emergencies and retirement—without defecting to a deep-rug firm. It won't be easy, but it is more than doable if you make smart choices early in your prosecutorial career. "Those first few years are critical with how prudent you are with your money," says Andrew Keller, a certified financial planner in Houston. "The more you can do while you're still single and young is critical in not getting behind in everything." Here is advice from money wizards and career prosecutors who've been there, paid off that, and kept wearing the white hats.

Loan repayment options

Federal student loans, such as Stafford and PLUS loans, can be repaid according to one of four plans: standard, extended, graduated, and income contingent. (A fifth option, income-based, will be available in July 2009.) Simply choose the plan once you graduate. The interest rate on each is the same (currently 6.8 percent on new Stafford loans), but the length and amount of the repayment varies widely.

Using our example of a lawyer earning $43,000 a year and owing $90,000 in loans at 6.8 percent interest, here's how the different repayment plans compare:

Repayment Plan	Term (in mos.)	Monthly Payments (first 24 mos.)	Total Payments
Standard	120	$1,035.72	$124,286.40
Extended	360	$586.73	$211,222.80
Graduated	360	$517.86	$224,798.16
Income contingent	201	$546.50	$159,850.13

(Go to www.ed.gov/offices/OSFAP/DirectLoan/calc.html for a repayment calculator.)

Note that by spreading payments over a longer term, the total amount you

repay overall grows astronomically—but doing so leaves more money in your checking account every month. Mr. Keller advises extending your loans over the longest period you can. "That just gives more flexibility rather than being strapped every month," he says.

Also remember that your salary will increase over the years through cost-of-living raises, promotions, and prosecutor longevity pay (which kicks in after four years of employment and now applies to all assistant county and district attorneys), so paying more each month down the road, as the repayment structure for the last three options dictates, is feasible. And you can always pay more than the prescribed monthly payment—in fact, financial advisers recommend doing just that once your budget allows it.

Visit www.ed.gov/offices/OSFAP/DirectLoan/callus.html for a list of contacts at the Department of Education, which can help you with repayment options.

Foregoing luxuries

People's definition of "luxury" swings wildly from "a morning Starbucks fix" and "eating out for dinner" to "annual family vacations" and "a shiny new car every three years." But when you get right down to basics, all we humans truly need are food, shelter, clothing, and companionship. "Food" can mean home-cooked dinners and brown-bag lunches *or* restaurant meals every night of the week—but guess which option makes more sense for someone with a modest income?

"We always like to say we don't want people to have to sacrifice," says Marilyn Macha, a certified financial planner in Houston, "but there will certainly be sacrifices in those first three years with that kind of debt on that income. There's no way around it. It's tough if a third of what you earn is going toward student loans. You've still gotta make rent, and you've still gotta eat."

One prosecutor in a mid-size jurisdiction notes that he and his wife ate out no more than twice a week while he repaid his loans. They also lived in an apartment rather than buying a house. (Mr. Keller also recommends holding off on buying a home until you get a handle on your student-loan payments. "The student loan payment *is* your mortgage," he notes.) Another assistant DA recounts how much money he saves by buying used cars. "The single best thing I did when I started working as a prosecutor was to sell my new pick-up," he says. "It was just like getting a raise." He replaces old vehicles with late-model used ones, many of which still have warranties and "new car smell." What they lack, though, is the huge mark-up of new cars.

Financial advisers say to draw up a budget, listing your after-tax income, your fixed expenses (rent, insurance, utilities, etc.), and those expenses with wiggle room (groceries, entertainment, clothing, etc.). "Be honest with the debt you have," Ms. Macha says. "Don't inflate it or deflate it. That'll take the power of the debt away and put the power back with you." Then draw up a plan (with advice below) for paying down your debt.

Good debt vs. bad debt

Ms. Macha differentiates between "good debt" and "bad debt," and so should you. Good debt is an investment in your future; examples are a mortgage and student loans. Taking on such debt may require a hard swallow in the short term, but over the long haul, it reaps big rewards, such as a place to live, a career with growth potential, and financial security. In addition, such debt is somewhat offset because the interest is tax-deductible, so be sure to take advantage of these IRS benefits by itemizing your tax returns.

Bad debt, on the other hand, doesn't leave anything to show for itself—think high-interest credit cards and new-car loans. Retiring bad debt first is key to digging out from under its load.

How to pay it all off

Ms. Macha tells her clients to play "the zero game": List your debts according to how much you owe on each, and pay off the smallest debt first. (Some financial planners call this practice "snowballing.")

Say you've racked up $2,000 on a credit card, you have a $7,000 car loan, and your student loan is $50,000. Make minimum payments on the car loan and student loan, then put all of your extra money into that credit card until the balance is down to zero. (Hence the name of the game.) Then turn your attention to the car loan; add its minimum payment to what you'd been paying on the credit card until it's also down to zero. Once the car loan is cleared, do

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the same with the student loan. Macha likes this game because "it puts psychological power back with the borrower," she says, and it efficiently pays off what you owe. It's also very satisfying to cross off debts one by one.

An emergency fund

Once you've retired bad debt but you still have student loans, it's wise to kick a little money into a savings account, even if doing so means you pay off your student loan a little later. "Things happen," Mr. Keller notes. "Cars break down. Family members get sick. You need to have a fund for emergencies." Be creative in eking out such money from your budget. Rather than snowballing an extra $300 toward your student loan, for example, toss $150 toward the loan and send the other half into savings. "I used to say you can have it all," Ms. Macha says, "but I think having it all is completely overwhelming. You can't—not right away, anyway." Contribute to your emergency fund until you've built up a couple months' salary, which both Keller and Macha say might take a couple of years. But it's worth it "to allow yourself some cushion," Keller says.

One assistant prosecutor agrees wholeheartedly. "Salt away some cash so that unexpected (but common) expenses like water heaters and insurance deductibles do not get put on plastic," he says. That will prevent racking up more bad debt, which you worked so hard to eliminate.

Retirement contributions

"Retirement would be the third bucket" for contributions (after bad debt and an emergency savings account), Keller says. Most prosecutors don't have a choice about putting money into retirement—the most common pension plan for county offices, the Texas County and District Retirement System (TCDRS), actually *requires* every non-contract employee to sock away a certain percentage of each paycheck; in Harris County and several others, for instance, 7 percent of employees' paychecks go straight into the TCDRS. That money is pre-tax, so it effectively lowers your (admittedly already low) income and reduces what you owe in taxes every year. Employers match your contributions heartily—some more than double what you put into your pension fund. Because each county has its own contract with TCDRS, you'll need to check with someone in your office to find out what your county's plan includes, or you can visit www.tdcrs.org for more information.

So if you're automatically setting aside a certain percentage for retirement, isn't that enough? Financial advisers say no; they usually recommend socking away 15 percent of your pre-tax income to a retirement account, which is of course daunting to new prosecutors who have student loans hanging over them. But once you have eliminated bad debt, carved out money for emergencies, and adopted good habits about spending and saving, you should consider ramping up your retirement fund with an additional account. The one advantage young prosecutors have, when it comes to retirement, is *time*. Even small investments, when compounded over decades, can grow exponentially, but you must start early to take full advantage.

Ask around your office to find out if a 403(b) or 457 plan is available. These are essentially 401(k) accounts for government employees that let you invest a percentage of your pre-tax income; your employer may match part of what you kick in—a bonus you can't pass up. "Retirement contributions would not be a priority unless there were some sort of match," Mr. Keller says. "Then it might be advantageous to put in the minimum to get the match because that's free money. It's the one break you're getting."

Even without an employer's matching contributions, throwing a little extra money into a retirement account early in your career will reap rewards later on. To reach the full 15-percent contribution, use some sneaky methods, and start early while you're still in save mode. Send cost-of-living raises—those annual or biennial boosts of 2 or 3 percent—directly into a retirement fund. You'll never even miss the money because you'll live on your old salary just as you always did. If you get a raise, sweep all or part of it into retirement accounts.

"Paying yourself first"—setting aside savings and retirement money before paying any other bills—is a smart practice to start when you're young. If you begin early, these good habits will become second nature. You'll adapt to your income and after a while not miss the luxuries you're giving up. And after several years, you'll hit the 15-percent mark, and then you can send future rais-

es and windfalls toward vacations or other luxuries.

Student loan forgiveness

Regular readers of this journal have likely been eagerly following the progress of bills in the U.S. Congress that would forgive the federal student loan balances of those who have spent a certain number of years in public service. The main bill on the National District Attorneys Association's agenda, the John R. Justice Prosecutors and Defenders Incentive Act, is still winding its way through Congress (we will pass along information as it becomes available), but a different bill passed last year.

The College Cost Reduction and Access Act took effect October 1, 2007. Among other things, this federal legislation cancels the balance of interest and principal due on any federal direct loan (including Direct Stafford, PLUS, and consolidated loans—Perkins loans are *not* included, but see below for information on those) that is not in default for borrowers who 1) have made 120 monthly payments on a direct loan after October 1, 2007, as part of a standard, extended, graduated, income contingent, or income-based (available in July 2009) repayment plan, 2) are employed in a "public service job," which includes prosecution and law enforcement, and 3) have been employed in a public service job during the 120-payment period.

There are currently no details on signing up for the program because it is so new and because no one can even apply for loan forgiveness until 2017. Borrowers should visit the U.S. Department of Education's website for more information at www.studentaid.ed.gov/PORTALSWebApp/students/english/index.jsp. A PDF of frequently asked questions is also available at www.tdcaa.com; search for "loan forgiveness."

Note that the terms of this loan forgiveness apply only to those at the beginning of their repayment schedule; it won't help people who have almost paid off their debt. (Public service loan forgiveness is prospective, meaning that all 120 payments must be made on or after October 1, 2007.) Rather than counting on such forgiveness to wipe out your debt, view it as a windfall on the horizon, and work hard in the here and now to make payments on your loans (defaulting automatically disqualifies your forgiveness application) and keep your finances in order.

Perkins loans, unlike these other federal loans, may be eligible for deferment or cancellation if you qualify—and one means of qualification is working in law enforcement. Go to www.ed.gov/offices/OSFAP/DCS/perkins.deferment.cancellation.html#Def-Service to read more about your options with these loans.

Conclusion

Paying down a huge law-school loan is a difficult task made tougher by a modest starting salary. But many prosecutors have managed to pay off their debt and stay in jobs they love by eschewing luxuries and focusing on their long-term goals rather than what's happening right now. "It can be daunting," Mr. Keller says, "especially because you went to school to be attorneys, not to budget and manage money. But get professional advice, and understand your cash flow and budget."

"If you can see the bigger picture by taking a step back and knowing that this career is what you want to do, handle that decision with integrity," Ms. Macha suggests. "If prosecution is worth it, then go for it. Don't look back." ✤

Editor's note: Marilyn Macha and Andrew Keller are certified financial planners at Macha & Associates in Houston; they can be reached at 713/355-9910.

CRIMINAL LAW

By Cameron Calligan and Spence Graham
Assistant District Attorneys in Harris County

Baytown serial rapist brought to justice

How the Harris County DA's Office prepared for and prosecuted the case of a rapist who targeted men

On April 4, 2006, 18-year-old E.J. (not his real name) returned home after closing down shop at a local sandwich restaurant where he worked. After pulling into his driveway, E.J., as was his routine every night, walked back down the driveway to secure the gate that blocked access to the driveway from the street. He was approached by a masked man brandishing a handgun who quickly forced E.J. onto the ground and used zip ties to restrain his hands. E.J. was then forced into the passenger seat of his own truck, and his attacker drove them both off into the night.


Cameron Calligan & Spence Graham

The assailant soon made a brief stop to wrap duct tape around E.J.'s head to restrict his eyesight. During the abduction, the kidnapper acquired E.J.'s wallet, forced E.J. at gunpoint to disclose his PIN, proceeded to multiple ATMs, and withdrew hundreds of dollars from E.J.'s bank account. Soon thereafter, the attacker demanded that E.J. perform oral sex on him, and E.J. complied out of fear for his life. This scared young man soon found himself in a field; his attacker led him around aimlessly, then forced him to the ground. The attacked attempted to sodomize E.J. but could not, so he digitally penetrated E.J. Eventually, the frightened and exhausted victim was abandoned in a wooded area not far from his house.

This assault on E.J. was the first of five reported cases perpetrated by Keith Hill, the media-proclaimed Baytown Rapist. And although the eight-month investigation into these heinous acts, all committed against young white men, involved the Baytown Police Department, the Harris County Sheriff's Office, and even the Federal Bureau of Investigation, it would be a truly amazing coincidence that led authorities to Keith Hill.

Officials had first speculated that the same man might be responsible for multiple sexual assaults in the Baytown area immediately after the second attack in May 2006. The first two attacks both involved young white men as the victims, as well as the same means of restraint (zip ties), the same method of blindfolding the victims (duct tape), the same demands for oral intercourse, and the same description of a light-skinned black man as the abductor. Over the next several months, as the next three white male victims came forward and gave similar descriptions of their attacks and of the suspect himself, it became obvious to investigators that they were after one man. Media outlets were utilized, fliers of the attacker's likeness distributed, and the FBI brought in to assist in the psychological profiling of the man responsible—the first time ever for a male-on-male rapist. The crimes were even featured on "America's Most Wanted" in hopes that someone could provide a solid lead, but none was established until one fortuitous day in December 2006.

Nabbing the suspect

As if fate were doing its part in ending Keith Hill's crime spree, the most recent victim of the "Baytown Rapist"—we'll

call him Jason—just happened to pull up next to Keith Hill at a traffic light in Baytown. The driver's similarity to the man who had attacked him, along with the driver's suspicious behavior, alerted Jason to the possibility that he once again was in the presence of his abductor. After a short pursuit, Jason lost sight of Hill's vehicle, only to see it again the same day, in the very police station parking lot where he was describing his previous encounter to detectives! Hill had gone to municipal court after receiving a traffic citation.

Investigators contacted Hill inside the courtroom, and he agreed to speak to them. Not more than a month later, DNA analysis of Hill's buccal swab (obtained in December after he signed a voluntary consent form in his parents' presence) linked Hill to semen collected from an article of clothing taken from one of his victims. Once Hill was arrested, a search of his residence proved fruitful for authorities. The most important discovery was two rings in Hill's bedroom that had been taken from E.J. during his abduction.

The day after he was arrested, Hill confessed to five attacks on young men in the Baytown area over seven months in 2006. Had he not received that traffic ticket; had he not responded to it in person; and had Jason not looked to his left while sitting at that traffic light, how many more young men might have fallen prey to Keith Hill? Furthermore, were there any more victims who were too ashamed to come forward? These unknowns would become a central theme in our preparation and prosecution of the Baytown Rapist.

We knew very little about these crimes before the cases came across our desks. We were aware of the abductions and sexual assaults only to the extent that each was covered by the local news media. So, as one can imagine, it was a mad scramble for us to catch up on everything that the investigators had done over the previous eight months. We charged Hill with five counts, including charges of aggravated kidnapping, aggravated robbery, and aggravated sexual assault, and named only three of the five victims as complainants, as we focused on the cases with the strongest evidence. We hoped that we'd get the opportunity to present everything Hill had done to a jury during the punishment phase of a trial.

Victim issues

Clearly, the rarity of these cases' circumstances presented us with a significant challenge. Our initial concern was the difficulties we might encounter when we met with the victims. How would they react to two strange men asking the questions we had to ask? Would they be forthcoming in their answers? Would it be more beneficial if a woman prosecutor attempted to gain their trust? After all, we are talking about 17- and 18-year-old men who had to endure unimaginable attacks. In fact, even the two victims who ultimately admitted to being sexually assaulted did not immediately do so to their parents or to the authorities after each returned home from his abduction.

What we found were varying degrees of acceptance, comfort, and candor with each of the victims we met. We don't mean that any of these young men were uncooperative, just that the emotional and conversational ebb and flow of these meetings was drastically different from one victim to the next. Where one victim was able to matter-of-factly recount the most awful of details from his abduction without much prodding from either of us, another victim avoided discussing the graphic truths of his encounter with Hill at every turn—that is, until he was directly confronted with our need to know every indignity that was forced upon him so we could build our case against Hill.

In other cases when we met with victims of sexual assaults, we always expressed somehow that what happened to them was not their fault. But these cases were different. These men *knew* that they weren't at all to blame for these assaults—they had had a gun pressed to their heads, after all. So we were not concerned that the victims might have any traditional feelings of partial responsibility for the attacks. But we did have unusual concerns to handle. For instance, although these victims looked us straight in the eye and said they had no choice in what they were forced to do, we couldn't help but wonder whether some of them were totally convinced of that conclusion.

Additionally, none of these young men were homosexuals; their sexuality had never been challenged before, either by others or themselves. From the standpoint of an outsider looking in, nothing about how these guys viewed their sexual identity should have changed after these assaults, but that's easy for the rest of us

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to say. As male prosecutors, we felt it was crucial to make the victims, whether they had admitted to being sexually assaulted or not, understand from the beginning that we had no idea what they had been through, that neither of us could imagine having gone through something like that, and to reassure them in every way that they had no choice in doing what they did. We also reassured the victims that they weren't less manly for giving in to Keith Hill's demands and that what truly defined them was willingness to sit down and tell their stories. We found that the victims responded very well to this approach, not only in our witness meetings, but also while testifying at trial.

Unfortunately, one victim who had been named as a complainant in one of the indictments but who was going to serve solely as a punishment witness, refused to meet us in preparation for trial, putting us in a difficult position. We prosecutors sometimes find ourselves with a missing or uncooperative witness, and oftentimes we take the hard-line approach of warning him of the consequences of not cooperating or appearing in court. However, given the unusual nature of these cases and the willingness of Hill's other victims to confront their attacker, we felt like we would achieve a successful verdict without this particular victim's assistance.

As with most cases that capture the public's interest, media attention in the Baytown Rapist cases tapered off as the case went from arraignment to trial, only to flare back up on the morning of jury selection. As one might expect, a primary concern shared by all of the victims was the possibility that their names would appear in the paper under the headline "Victim of Male Rapist Testifies" or that their faces would be splashed all over a television report with a similar title. It was a great comfort for these young men when we secured both a promise from the media not to use any of the victims' names in their coverage, as well an order by Judge Don Stricklin that the victims were not to be filmed during any testimony in the courtroom. We considered using pseudonyms as the Code of Criminal Procedure provides, but after getting assurances from the media that the victims' real names would not be disseminated, we were comfortable using their real names in the indictments.

The trial

After much discussion, we decided to proceed to trial on only one victim, an aggravated sexual assault involving Hill's second victim. It was the semen collected during the investigation of this incident that was linked to Hill's buccal swab. The driving force behind this decision was the defendant's lack of criminal history; Hill had no prior criminal convictions of any kind and therefore was eligible for probation from a jury assessing punishment. Proceeding on more than one case would make it much more difficult to commit a jury, during voir dire, to considering the full range of punishment. Once we secured a conviction, we reasoned, the jury would hear the facts in all of the other cases anyway, so we shouldn't make it more difficult on us at the outset of trial. Plus, each of the charges against Hill was a first-degree felony, so the punishment range did not play a role in choosing one case over another in proceeding to trial.

At trial, we focused our efforts on the DNA that linked Hill to the semen obtained from five separate areas of the victim's shirt, as well as Hill's confession to the crime. We were intent on presenting our evidence in a very streamlined manner, a task made easier by defense counsel's dilemma during the trial. Any challenge of the assailant's identity or any assertion that the sexual contact was consensual would almost certainly have opened the door for us to present evidence of Hill's extraneous crimes for which Hill was not currently on trial. As such, we were pleased not only with how well our witnesses testified, but also with how efficiently we presented the State's case to the jury. After a day and a half of testimony, the jury deliberated for about an hour before finding Hill guilty of aggravated sexual assault.

As relieved as we were with the verdict, we knew that our work was far from over. Three more victims were going to testify during the punishment phase, along with a slew of supporting testimony from police officers, FBI agents, neighbors of the victims, computer technicians, etc. We were hoping that the jury was already overwhelmed by the brutality of the abduction and assault they heard about in guilt-innocence, and that, upon hearing testimony from three additional victims, would feel compelled to assess the maximum punishment. The punishment phase lasted two days, during which those three vic-

tims told their stories with more courage than should have been asked of these young men. And for that, the jury rewarded them: After deliberating for almost five hours, jurors sentenced Keith Hill to imprisonment for the maximum term of 99 years and assessed the maximum fine of $10,000.

Needless to say, we were extremely satisfied with the outcome of the case, as were the victims and their families. After further discussion with them, we all decided it was in the best interests of everyone involved, especially the victims, that we not pursue the other cases against Keith Hill, not only to avoid asking these victims to testify again, but also because we were confident that these victims had finally received the closure they had been awaiting for so long. Furthermore, the jury's verdict was a clear and appropriate response to what all of the victims endured at the hands of Keith Hill. ✤

Criminal Law

By Terri Tipton Holder
Special Prosecution Unit in Walker County, and
Floyd L. Jennings, J.D., Ph.D.

"The witness is not competent to testify."

How prosecutors from Angelton's SPU overcame this clever defense during the agg assault trial of two prison guards who beat a mentally ill inmate.

A bright yellow "wet floor" sign will never look the same again. This piece of janitorial equipment became two guards' weapon of choice to assault a mentally ill inmate in the Jester IV Unit of the Texas Department of Criminal Justice near Sugar Land. The inmate, whom we'll call Charlie for the purposes of this article, often retrieved the signs at the behest of two correctional officers, who then used the plastic signs to beat him on the back and buttocks. At times, Charlie was struck with such force that the signs broke.


Terri Holder


Floyd Jennings

A nurse observed the activity and reported it. The inmate, however, gave a statement about the assaults only after being assured of his safety. The correctional officers, both veterans of the TDCJ system, denied any wrongdoing. As the investigation proceeded however, one other correctional officer admitted that she had also witnessed the officers engaging in the sport of beating Charlie with signs.

A Fort Bend County grand jury returned an indictment for injury to a disabled person (because of the victim's mental illness). Separate trial dates were set for defendants Kevin Brown and Anthony Monroe.

In preparing for the first trial, the State dealt with the usual litany of pretrial form motions from the defense, but prosecutors also immersed themselves in

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the world of the mentally ill inmate incarcerated in TDCJ. Medical records, inmate transfers, and interviews with other mentally ill inmates who were potential witnesses made for interesting trial preparation. But the day before jury selection, an issue was raised that the prosecution had not previously encountered outside of dealing with child witnesses.

While reurging a motion to dismiss the indictment, the defense raised the issue of whether the mentally disabled victim was even competent to testify. The issue was not pertinent to the motion before the court, but it did catch the court's attention as one that could potentially delay the proceedings. The State had witnesses regarding the victim's mental status at the time of the incident, but no one who had done any recent testing of his mental state. After reviewing Rule 601 of the Texas Rules of Evidence, the judge said he would have a hearing on the issue the following day after jury selection. He further indicated that he wanted to hear from a doctor who had recently examined the victim. To avoid delay and to ensure a clear appellate record, the State managed to find an expert who could examine the victim and testify the following day: Floyd L. Jennings, a psychologist and attorney.

Charlie had a long psychiatric history, including much self-mutilation that had left severe scarring on his arms. He had been admitted many times to psychiatric units and was more than a bit wary of talking with anyone about the matter. He nonetheless was quite cooperative with Dr. Jennings.

The examination consisted of a one-hour clinical interview, plus a review of the offense report and Charlie's medical record. (Medical staff of UTMB Correctional Managed Care readily made the complainant's medical record available on presentation of the court's order.) In addition, a portion of the complainant's disciplinary history within TDCJ was made available.

Psycho-legal issues

The court ordered the complaining witness to be examined "to determine his sanity and competency to testify" in the trial of guard Kevin Brown. No definition of sanity was provided in the court order, but regarding competency to testify, the court indicated that "a person is incompetent to testify if he does not have sufficient present ability to understand the difference between telling the truth and telling a lie and the consequences of telling a lie under oath."

The issue to be determined was inherently confusing for several reasons, one of which was that the term "competency" was most commonly utilized in Code of Criminal Procedure Chapter 46B regarding a defendant's competency to stand trial. In few other locations was there reference to witness competency. Moreover, the defense's use of "sanity" in this context was confusing because sanity as a legal term appears only in Rule 601 (discussing "insane persons") and in Penal Code §8.01 with regard to an affirmative defense. In this case, the subject of the examination (Charlie) was not charged with a crime so the meaning of "sane" had to be addressed with regard to whether he could testify.

As to "competency," our difficulty was to differentiate the various ways in which the term was used and what it meant regarding witness testimony.

Examination of the complainant

Charlie is a 36-year-old Hispanic man who was then confined in the Texas Department of Criminal Justice, Darrington Unit. He had served some 16 years flat time on a 20-year sentence (15 years for burglary of a habitation and five years for an inmate assault). He was of average build and had short, unkempt hair and a goatee.

His father and grandmother were reported to have had a serious mental illness, possibly schizophrenia. Though he lived mostly on the streets of El Paso, he attended school until the sixth grade but had many behavioral problems; he also began use of many street drugs: marijuana, methamphetamine, cocaine, opiates, peyote, and inhalants. By 13 he was hospitalized psychiatrically and had begun cutting himself, for which he has been hospitalized 30 to 40 times in subsequent years.

As a youth, he was placed in six different TYC units or programs. According to his report and his records, behaviors included truancy, suspension, fighting, cruelty to animals, and self-mutilation. He has had four formal psychiatric hospitalizations. While in TDCJ he picked up well over 100 separate disciplinary cases, most involving self-mutilation but also assaults (generally throwing feces or urine).

The witness had been diagnosed as exhibiting a schizoaffective disorder, as well as an impulse control disorder and/or borderline personality disorder. Though he had received many psychiatric preparations, he was receiving haloperidol decanoate (an injectable antipsychotic) every two weeks as well as carbamazepine (Tegretol) at the time of the interview. The Tegretol was used as an antispasmodic (Charlie had a history of seizures) and mood stabilizer and to control rage outbursts.

Although his reading level is at the third-grade level, his estimated I.Q. was tested at 114, which, if correct, would place him ahead of most TDCJ offenders. He had the ability to learn but due to his behavioral and emotional problems, he did not learn well and consequently, did not read for pleasure.

The mental status examination was essentially benign and without evidence of gross disorganization or disturbed thinking. However, Charlie reported that in the past he had experienced hallucinations of the command type, i.e., telling him to cut on himself. He could experience these feelings abruptly and with no obvious precipitating events, though in retrospect one can discern at least one potential cause for his anxiety. At various times he had been suicidal and paranoid, but more residual elements were present in this examination.

Incidentally, when Charlie was tried for the crimes that landed him in prison, his competency was not questioned. His self-destructiveness did not reach the level, at that time, as it had after his years in TDCJ.

Witness competency

The rule concerning witness testimony is Tex.R.Evid. 601, which states in part that every person is competent to be a witness; exceptions (that is, those who are incompetent to be a witness) include "insane persons," who are defined as "in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify."

While most of the caselaw applying this rule deals with the competency of a child witness, it sets the parameters within which the rule has been applied. The courts have ruled that Rule 601 creates a presumption that a person is competent to testify.[1] Courts have further held that the party objecting to a witness's competency has the burden of proving incompetency.[2]

However, the meaning of the term "insane person" is not self-evident. It is an arcane term, not used in the Probate Code or the Mental Health Code. Nor is the term commonly used in psychiatry or psychology, as it is not part of common diagnostic vernacular. Its meaning is more discernible in caselaw: *Freeman v. Am. Motorists Ins. Co.*[3] states, "Generally, persons of unsound mind and insane persons are synonymous. [4]The term "unsound mind" refers to a legal disability, although it is not limited to persons who are adjudicated incompetent."[5]

It is reasonable to argue, then, given the presumption of competency, that all witnesses are of sound mind, i.e. not "insane" unless found so by a court, and even then, the incapacity is narrowly related to the issue before the court. Dr. Jennings took this position with Charlie in the case against guard Kevin Brown.

The standard for witness competency is discussed more specifically in *Watson v. State*,[6] where the court stated that witness competency has three components, plus an additional one that is presumed: perception, recollection, communication/narration, and truthfulness.

Perception refers to whether the witness had the ability to intelligently observe the events in question at the time of their occurrence. Recollection refers to whether the witness has sufficient present capacity to recall those events accurately. Communication/narration refers to whether the witness has the capacity to communicate, either through narration or other means, his recollections, and truthfulness means whether the witness understands the meaning of the oath and truth-telling. Note, however, that the "truthfulness" component goes to credibility if it goes beyond the mere awareness of a moral obligation to give truthful testimony.

The standard for review of competency decisions is abuse of discretion.[7] Consequently, the court has great latitude as well as a significant burden in deciding whether a witness may testify.

Mental illness

The presumption of witness competence is not defeated by mental illness.[8] Even the Mental Health Code presumes that persons subject to court-ordered mental health services (civil commitment) are

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not incapacitated, that such civilly committed patients may contract, marry, or vote, even if they have been found to require court-ordered mental health services because of 1) mental illness, 2) posing a likely danger to himself or others as a result of that illness, or 3) inability to provide for basic needs.[9] Persons subject to mental health proceedings have the right to give testimony in their own defense.

Similarly, a determination of incapacity (i.e., guardianship established by a probate court) does not by itself defeat a witness's competency to testify.[10] Rather, the fact that a guardianship has been established shifts the burden on the person proposing that the witness testify to establish his/her competency.[11]

Pretrial hearing

At the pretrial hearing, Dr. Jennings testified as to his legal research regarding the determination of sanity as it reflected the witness' competency to testify. The State further asked the doctor to apply the factors of witness competency (perception, recollection, communication/narration, and truthfulness) to Charlie.

Perception. Charlie told of several occasions when he had been subject to physical abuse by the defendant, Kevin Brown. He stated that he was fearful of registering any complaint because the assailants were correctional officers. The State contended that it was not relevant whether his mental illness made him reluctant to object to the attacks. It is clear that he knew that officers should not treat him as they reportedly did, i.e., that the act(s) were wrongful.

Recollection. The victim provided an account of events that corresponds well to the offense report. He named each officer and described the circumstances of their acts as well as his location (at Jester IV).

Communication/narration. Charlie spoke directly and cogently to Dr. Jennings during the examination, well representing his history.

Truthfulness. Here, the defense attempted to elicit testimony regarding Charlie's credibility rather than his awareness of the necessity to tell the truth. The questioning was cut off after a State's objection and once Dr. Jennings drew a distinction between the two for the court.

General factors such as understanding the nature of a trial and the necessity to monitor his own behavior were also addressed. Charlie specifically stated that he knew he could speak "only when I am spoken to." And when asked what he would do if he thought other witnesses were lying, he said, "I would whisper to Ms. Holder, the prosecutor."

Further illustrative of his cogency was his awareness of the necessity to remain on prescribed medication and his realization that staff were some three days late in providing the prescribed injection described earlier. (Medication was obtained for him.)

Result

At the conclusion of the testimony, the court ruled that Charlie was competent to testify. The jury heard from him, the nurse who reported the assaults, and the other correctional officer who had also observed the abuse. After the defense brought several correctional officers to say they had never seen any such behavior, the State called a second inmate in rebuttal. This inmate was housed in the same unit as Charlie and had also been diagnosed with a mental illness. When the defense raised the issue of HIS competency to testify, the State pointed out that the witness was presumed competent and that the party raising the issue had the burden to prove it. With the issue clearly briefed and researched, the court quickly agreed. When the defense was asked what evidence they had to show the witness incompetent, counsel was forced to admit that he had none. The second inmate was allowed to testify to the actions of the defendants against the victim.

After some 15-plus hours of deliberation, the jury convicted the defendant of injury to a disabled individual, and the State and defense agreed to a probated sentence. The crime may have been only a third-degree felony, but the case set the tone for how society expects mentally ill inmates to be treated. Russian novelist Fyodor Dostoevsky once said, "The degree of civilization in a society can be judged by entering its prisons." By convicting the defendant, the jury dictated that our mentally ill inmates be treated with a higher degree of civility than exhibited by the defendants. They have assured that the law will be enforced no matter who the victim is.

The technical issue, however, has wide implications for both victims/complainants and witnesses. As in this case, the presumption of witness competency is not defeated by mental illness; the

mere presence of mental illness is not probative of being an "insane person" as defined in T.R.E. §601 without more—such as a defect in perception, recollection, recall, or ability to understand the necessity for truthfulness.

As two last notes, Charlie is still confined at TDCJ, and the second guard pled guilty to the crime, receiving four years' probation and a $750 fine. His 10 years with TDCJ and spotless record contributed to his receiving probation. ✤

Endnotes

1 *Reyna v. State*, 797 S.W.2d 189 191 (Tex. App—Corpus Christi 1990, no writ).

2 *Foster v. State*, 155 S.W.2d 938, 940 (Tex. Crim. App. 1941), compare Tex.. Code Crim. Proc. Ch. 46B.

3 53 S.W.3d 710, 713 (Tex. App.—Houston [1st Dist.] 2001, no writ).

4 *Hargraves v. Armco Foods, Inc.*, 894 S.W.2d 546, 548 (Tex. App.—Austin 1995, no writ). The *Hargraves* case (cited in *Freeman*) was an appeal from a summary judgment wherein the single issue had to do with allegations that the plaintiff was of "unsound mind", and the court devoted some effort to articulating how this term is used in the law.

5 *Casu v. CBI Na-Con, Inc.*, 881 S.W.2d 32, 34 (Tex. App.—Houston [14th Dist.] 1994, no writ).

6 596 S.W.2d 867, 870-871, (Tex. Crim. App. 1980).

7 *Garcia v. State*, 573 S.W.2d 12 (Tex. Crim. App. 1978).

8 *Watson* at 871.

9 Tex. Health & Safety Code §§574.034, 574.035.

10 *Mobil Oil Cor. v. The Honorable Donald R. Floyd*, 810 S.W.2d 321(Tex. App—Beaumont 1992, no writ).

11 *Mobil* at 324 ("the fact of the guardianship does not automatically render Mr. Brindza incompetent to testify or incapable of giving his deposition. It does create a presumption that he is incompetent").

Criminal Law

By Jeff Swain
Assistant District Attorney in Parker County

Blood search warrant program successful with juries too

Parker County prosecutors get a guilty verdict on what might have been another case of a multiple-DWI offender who refused to provide a breath sample.

We've all been there: A jury deliberates and returns with an unexpected verdict.

That was the position that Assistant District Attorney Robert DuBoise and I were in after the "not guilty" verdict in the jury trial of Michael Watkins, convicted three times previously of DWI, in September 2005. The police-car videotape introduced during his trial showed him falling over backwards during field sobriety testing, but the defense contended that Watkins suffered from knee and leg problems, causing his legs to buckle. Jurors told us after the trial that they thought they saw something on the pavement that may have tripped the defendant.


Jeff Swain

And, of course, Watkins refused to provide a breath sample for testing.

After Watkins' acquittal, we decided that we needed to do something to prevent another intoxicated driver from going free. Feedback from the jury was that they just weren't completely sure that Watkins was guilty and that what they really wanted was a BAC score to be certain of his intoxication.

With the rate of breath-test refusals on felony DWIs higher than ever and the number of total-refusal cases on the rise, this situation seemed ripe for repetition. We had heard of other counties that had set up a blood search warrant program and decided that was exactly what we needed in our county.

Starting the program

After the 2002 Court of Criminal Appeals opinion in *Beeman v. State*,[1]

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which approved the use of a search warrant to draw a blood sample in a DWI case even over a defendant's refusal, we knew that a program of this kind was legally permissible. The bigger question was how to coordinate it between our office and all of the other necessary county agencies.

We first approached our district and county court-at-law judges, one at a time, to see if they would be willing to participate. We felt that we needed to get all of them on board so that the workload and corresponding loss of sleep—inevitable when calling judges to sign a search warrant in the middle of the night—could be spread out. We purchased a fax machine for each judge's house to receive the search warrant affidavits and proposed warrants. In an effort to keep the number of requested warrants at a manageable level, we decided to focus on the worst offenders, those looking at felony DWI charges. Each of our four judges was willing to participate, and a rotating schedule was set up with a primary and back-up judge for each month.

The next hurdle was to get the cooperation of the staff at our county hospital who would draw the blood for us. I was concerned that a billing question would be raised, and I had prepared our elected DA, Donald Schnebly, to be ready to pay on a fee-for-service basis, with accompanying requests for restitution from the defendant at the conclusion of each case. After a meeting with the head of laboratory personnel, however, the hospital told us that its staff would be glad to assist us as a free service to the community.

I made clear in our discussions with the hospital that, if any arrestee required restraint or resisted the blood sample, police officers would be responsible for securing him so that the nurse or phlebotomist could safely draw the blood. This eased several concerns that hospital authorities had.

The last step was obtaining the participation of law enforcement. It was the easiest step because when we met with the department head at every county agency, officers were enthusiastic about the program. We went over the necessary procedures and provided them with the check box affidavit form that we had created to speed up the warrant process. Finally, the forms were put in the Intoxilyzer room at the jail, along with the judges' fax numbers and our contact information in case there were any questions.

The program was launched in time for the 2005 holiday season.

The cases

After the program was launched, we were interested to find that most of the felony drunk drivers were significantly more intoxicated than they appeared. In fact, nearly all of the blood tests revealed BAC results exceeding 0.16, twice the legal limit, with many coming in at 0.20 or higher. While these readings were consistent with what we had been telling jurors for years about the masking effect of a long-term drinking problem, it was still rewarding to see our belief scientifically confirmed.

When the first cases under the search warrant program came to court, they were met with suppression hearings. After the judges upheld the blood draws in a couple of cases, the defense bar seemed to concede the issue, and we have not been confronted with one since.

Quite a while went by without any defendant going to trial on a felony DWI case with a blood test result ready for admission. Most of them simply pled guilty and accepted prison sentences through plea agreements. But that recently changed with defendant Terry Wayne Patterson.

Patterson's DWI case

Around 7:30 p.m. on February 16, 2007, 36-year-old Terry Patterson was driving his mother's van down a country road in Parker County on the way to his girlfriend's house when his tire blew out. It was his bad luck that, when the tire went, he was passing an oncoming car and a piece of the tire hit the other car, damaging the passenger side. The other driver turned around and followed Patterson to a nearby convenience store to exchange information. When she noticed that Patterson was acting strangely, smelled of alcohol, and was slurring his speech, she called 911.

Trooper Colby Langford responded to the call and found Patterson walking around near the store. Langford noticed that his speech was slurred, his eyes were bloodshot and glassy, and his balance was poor. Patterson exhibited all six clues on the HGN test, but he refused to perform the walk-and-turn and one-leg stand, claiming various injuries from

bull riding. When Trooper Langford tried to administer a preliminary breath test, Patterson faked blowing twice, then spit out the mouthpiece before finally giving a sample that showed a 0.26 BAC, more than three times the legal limit. Patterson was then arrested.

The videotape on Langford's patrol car beautifully captured the PBT performance and a variety of Patterson's other antics on the way to jail. At varying points, Patterson tried out some defenses:

"**Not my car.**" "That ain't my vehicle. It ain't in my name. I stole it," and "My momma will come say she left the van at the gas station. "

"**Not worth your time.**"

Patterson: "I'm telling you, I've gotta pee."

Trooper: "Are you peeing?"

Patterson: "I'm trying to."

"**Bigger fish to fry.**" In response to Trooper Langford's disinterest in Patterson's efforts to tell him all that he knew about Parker County's criminals and, presumably, could be an informant, Patterson said, "You're a scaredy scaredy."

At the jail, Patterson yelled at Trooper Langford throughout the reading of the DIC-24, claiming he couldn't prove that Patterson was driving. Then he refused to provide a breath sample.

The program at work

After Patterson refused to submit to breath testing, Langford completed the search warrant affidavit, faxed it from the jail to 415th District Judge Graham Quisenberry at his home, and received back a signed search warrant. He then woke Patterson, who had since passed out in a holding cell, and took him to the hospital, which is about five minutes from the jail.

On the way, Patterson could be seen on the in-car camera spitting at the camera and telling Langford that he was crazy if he thought he was going to allow him to take a blood sample. After a four-officer show of force, however, Patterson changed his mind and the phlebotomist withdrew the sample without any difficulty. Testing later showed his BAC to be 0.22, well over the legal limit.

Trial

At trial, with the issue of intoxication put to rest with the blood test and the driving issue handled via civilian witness testimony, the defense had to try a different approach.

Patterson testified that, in two gulps, he had consumed a pint of Kentucky Deluxe whiskey after he pulled into the convenience store but before he approached the other car's occupants. He said that he had not consumed anything at all before he pulled into the store's parking lot. Therefore, he was not intoxicated when he was driving, he claimed.

On cross-examination, Patterson was confronted with the fact that the defense he was asserting at trial was completely different than the defenses he repeated ad nauseum on the video (that we could not prove that he was driving and that he was not drunk). He also had no good explanation for his admission on video to drinking beer and Coke but not a word about the whiskey.

We really didn't have the right facts to extrapolate the BAC to the time of driving, so Assistant District Attorney Abby Placke and I asked the jury to consider that, for Patterson's story to be true, he would have had to consume the whiskey and become instantly drunk. That's because from the time of the wreck until the police arrived, only about five minutes had elapsed, and he was clearly drunk on the video. Also, during that time, he interacted with two civilian witnesses, both of whom testified that they thought he was intoxicated. In the end, as so many prosecutors have throughout the years, we asked the jury to use their common sense.

The jury deliberated about two hours before finding Patterson guilty.

In the punishment phase, we introduced judgments showing that Patterson had two misdemeanor DWI convictions, a penitentiary trip for a felony DWI and an attempted injury to a child, and five assault convictions. District Judge Don Chrestman assessed his punishment at 12 years in prison.

Two years of success

Our DWI search warrant blood-draw program has been up and running for two years now. The judges are still willing participants, with the fax machines still in their homes. Despite nearly monthly subpoenas for trials that end up pleading out, the nurses and phlebotomists at the hospital have remained on-board.

One of our greatest concerns—the defendant who fights to avoid the blood draw—has not materialized on a significant level. While a good number of

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arrestees say they will not let the blood draw occur, a show of force by a few officers standing nearby has stopped all but two from actually resisting the process. In those two exceptional situations, the officers teamed up, some holding the defendant to a chair and others holding his arm to the arm of the chair with towels. Blood was withdrawn from the arrestees' arms at that point without further incident.

The only issue that we have had is with training newly hired police officers about the program and explaining to which cases it applies. As new officers start with departments in our county, they have so much to learn that sometimes our program is overlooked. Nowadays, when we see a case come in without a blood or breath test, we follow up with the officer to make sure that the next time, we will have the evidence that our jurors love to see.

In conclusion, we have seen the quality of our felony DWI cases increase significantly with this program, resulting in more guilty pleas and stiffer sentences. I would strongly encourage all of my fellow prosecutors to consider creating a similar program in their counties. ✤

Endnote

1 86 S.W.3d 613 (Tex. Crim. App. 2002).

CRIMINAL LAW

By Jennifer Varela, LCSW
Clinical Social Worker and Director of Family Violence Services at the Harris County District Attorney's Office

A primer on mental health for prosecutors

Prosecutors are one group in the criminal justice system that deals with mentally ill defendants. But most prosecutors know little about mental health. Here is a primer which discusses terminology and diagnosis.

Due to ignorance, fear, shame, or lack of insurance, funding, or programs, the criminal justice system has become one of the largest providers of mental health intervention and treatment in the country. Police officers are often first responders to a mental health crisis, and prisons and jails have become de facto mental health treatment facilities—even judges, probation officers, and parole officers have had to address mental health needs.


Jennifer Varela

Prosecutors are an integral part of this new frontline mental health treatment team and must be aware of mental health issues to properly evaluate and dispose of cases. In this article, you'll learn the basics of mental health terminology and diagnosis and how to read mental health reports. A second article (to be published in a later issue) will cover treatment and medication. This article is only a primer, and I hope you want to learn more. If so, just head down to your local Barnes & Noble and poke around the psychology or science section, or surf the internet. A reference list is provided at the end of this article.

Brain basics

There are myriad theories about the causes of mental illness. Suffice it to say that we're born with certain characteristics and shaped by our environments—

think of it as nature *and* nurture rather than nature *versus* nurture. Chemicals (i.e., neurotransmitters, hormones, etc.) in our bodies impact our moods, thoughts, and actions. For instance, dopamine regulation is a problem for people with ADHD. So, one of the most effective treatments for ADHD is a medication that targets dopamine. Perhaps we were born with the inability to learn past a certain point (mental retardation) or maybe we have an Einsteinian brain. Some of us may be so in-tune with non-verbal communication that we seem psychic. Others have difficulty interpreting and responding to emotions and social cues (a symptom of autistic disorder).

Our brains are use-dependent, which means we form new connections depending on how we use our brains (brain plasticity). For instance, birth to age 3 is a critical time for forming brain connections. That's why kids exposed to repeat trauma during this time, such as witnessing domestic violence, are at an increased risk for psychological problems.

Age and development are important in evaluation and treatment. Brains of children and juveniles are not developed like adults in areas of reasoning and impulse control. Many of us cringe at the impulsive things that we did as teenagers. Without excusing our behavior, science can now tell us that said behavior might have been due to our immature teenaged brains. The older adult brain is subject to changes related to aging, such as dementia.

Substance abuse is a complicating factor in diagnosis and treatment. Sometimes people self-medicate when they have a mental illness, are under stress, or are exposed to trauma. It doesn't usually work. For instance, alcohol is a depressant, and it can increase depression symptoms. Methamphetamine abuse can look like the symptoms of a mental health disorder (paranoia, sleeplessness, and agitation). If a history prior to the substance abuse can be obtained, a provisional diagnosis may be made. The best diagnosis is made once a client is detoxed.

Common symptoms and terms

Following are some symptoms and terms that will help prosecutors understand diagnosis and mental health reports:

Anxiety: the overwhelming concern about something bad happening. Unrelenting anxiety can turn into depression.

Appearance: verbal and non-verbal communication, physical appearance, body movement, and demeanor.

Compulsion: the intrusive and disruptive need to "do something." "I must turn off the light switch three times before I leave the room."

Cognition: the ability to think and be aware.

Delusion: a strongly held false belief, not accounted for by culture. "When I see a yellow car, that means the FBI is following me." A bizarre delusion is implausible. The people in the yellow cars are actually from a distant star. A grandiose delusion is one in which a person has an inflated sense of self-worth, position, or power. "I am the best prosecutor in the entire world." There are delusions in which a person thinks others can hear her thoughts or insert thoughts into her brain.

Dementia: This isn't usual forgetfulness but rather a progressive symptom often associated with Alzheimer's disease or old age. A person can lose her memories and control of thoughts, behaviors, or moods. Dementia can be caused by disease, head trauma, or substance ingestion (i.e., inhalant abuse). Delirium is also a change in cognition but occurs briefly and suddenly.

Depressive episode: a period of at least two weeks during which there is either a depressed mood or a loss of interest or pleasure in nearly all activities, plus at least four of these symptoms: changes in appetite or weight, sleep, and psychomotor activity; decreased energy; feelings of worthlessness or guilt; difficulty thinking, concentrating, or making decisions; or recurrent thoughts of death or suicidal ideation.

Executive functioning: higher (frontal lobe) brain functions including reasoning, ordering, analyzing, decision-making, and impulse control.

Environment: We must be culturally competent, which means we consider the norms and values of a person's culture. We also consider gender, socioeconomic status, family, trauma exposure, religion, age, education, occupation, ethnicity, and life experiences.

Factitious disorders: A person fakes an illness in himself or another because he likes the attention of being sick. An example is Munchausen's by Proxy, which could be an attention-seeking

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mother who induces her child to be sick.

Hallucination: a perception of any of the senses that is false. A person with an auditory hallucination may hear a voice that taunts and criticizes her. A visual hallucination is seeing something that isn't there. These hallucinations are real to the sufferer because his brain tells him it is real.

Intelligence: a measure of mental capacity. There are different types of intelligence (i.e., emotional, social, artistic, spatial, etc.) but generally we consider IQ score, which is usually a measure of verbal, math, general knowledge, and reasoning ability. High intelligence and the presence of a mental illness are not mutually exclusive. For instance, Dr. Kay Redfield Jamison, Ph.D., is a brilliant psychologist who has bi-polar disorder. Her personal experiences make her writings particularly authentic.

Malingering: a person faking an illness for an external gain, such as a person who pretends to be mentally ill to avoid criminal charges. Collateral information and careful observation are important in discovering malingering. Even mental illness follows patterns, so when people fake it, they tend to overact.

Manic episode: at least one week during which a person displays an abnormally and persistently elevated, expansive or irritable mood, plus at least three of the following: inflated self-esteem or grandiosity, decreased need for sleep, pressure of speech (chatterbox), flight of ideas (can't stay on one subject), distractibility, increased involvement in goal-directed activities or psycho-motor agitation, and excessive involvement in pleasurable activities with a high potential for painful consequences. For example, this person may make rash, impulsive decisions, such as charge up thousands of dollars in credit card debt or quit her job when she gets mad at a coworker.

Mental Status Exam: an exam that ascertains a person's emotional, cognitive, and mental condition.

Mood: how a person feels over a long period of time (i.e., sad, happy, indifferent, angry, etc). Affect is the external expression of how a person feels, such as facial expression.

Neurotransmitter/hormones: chemicals that impact our mood, behavior, and cognition.

Obsession: an intrusive, persistent thought or impulse.

Personality Disorder: a shorthand way for mental health workers to describe a set of maladaptive, long-term, and ingrained personality characteristics. There are 11 personality disorders. A person with an **Anti-Social Personality Disorder** routinely hurts people and doesn't feel remorse. You may know this person as a sociopath or psychopath. It's more complicated than that, but you get the idea. The others are: **Paranoid** (suspicious), **Schizoid** (detached), **Schizotypal** (eccentric and odd, not in a good way), **Borderline** (impulsive, high-maintenance, likes drama), **Histrionic** (drama queen); **Narcissistic** ("I am the center of the world and smarter than you"), **Avoidant** ("Stop looking at me"), **Dependent** (clingy), **Obsessive-Compulsive** ("Stop moving my things; I must have them that way"), and **Personality Disorder, Not Otherwise Specified** (something is wrong but doesn't meet the criteria for a specific personality disorder).

Psychotic episode: This is a "know when you see it" kind of thing, when a person really loses it. He has active hallucinations or delusions, may babble incoherently, and has generally lost touch with reality. Psychosis can be caused by trauma; an organic brain problem, such as schizophrenia; or substance abuse. We think of psychosis as most associated with schizophrenia, but it occurs with depression and other disorders.

Phobia: an intrusive, persistent fear.

Self-Awareness: how much a person understands how they appear to others. For instance, someone with Narcissistic Personality Disorder might believe he is the smartest man ever. The rest of us just think he's a jerk. The clinician's challenge is to help the client understand there is a problem.

Shame: According to social worker Dr. Brene Brown, shame is the debilitating feeling of being "flawed" and "unworthy." Shame prevents people from getting help and is different from guilt, which is remorse for doing something wrong. Dr. Brown says we can't shame people into change. Regrettably, I've tried it, and it doesn't work. People do need straight talk, but coupled with compassion, respect, and empathy.

Substance abuse and substance dependence: Substance abuse is the use of a brain-altering substance over a 12-month period that negatively impacts a person's life but doesn't dominate it. For example, a person has a good job and an

intact family, but after receiving a DWI argues repeatedly with his spouse and friends about his drinking. Substance dependence is more serious. A person needs an increased amount of the substance (she has built up tolerance), and a great deal of time and energy is spent getting it. She can't stop drinking even though she is facing a felony DWI charge, her husband left her, and she lost her job. This woman knows exactly how many beers are in the refrigerator at any given time.

Suicide: a byproduct of untreated or improperly treated mental illness. Psychologist Dr. Kay Redfield Jamison, who has written extensively about bipolar disorder and suicide, says that people see suicide as a solution to ending suffering.

Thought content: what dominates a person's thoughts. For instance, does he have paranoid, persecutory, sad, anxious, desperate, or suspicious thoughts? Does she have any obsessions or phobias? Is he self-absorbed?

The DSM-IV

In the early 1950s, mental health professionals agreed to common language and guidelines for defining mental illness and created the DSM, *Diagnostic and Statistical Manual of Mental Disorders*. We're on the fourth edition, including revisions, so it's often called DSM-IV. The DSM is designed for use by trained clinicians; it isn't a "Cosmo Quiz" to be used by non-clinicians to self-diagnose. Prosecutors can use it as a reference tool in trial for questioning experts.

Diagnosis is primarily done based on evaluating the type, duration, and severity of symptoms. We consider a client's appearance, affect, mood, cognitive abilities, thought content, and environment. Information is often gained by self-report, which can be unreliable. Clients may be given tests, such as the MMPI (Minnesota Multiphase Personality Inventory, which is designed to identify personality problems) or the Beck Depression Inventory (which measures depression). Collateral information, such as criminal records, medical history, or information from family, friends, or teachers, can be gathered. It is important to identify medical issues that can impact mental health, such as diabetes and thyroid problems.

Major mental health diagnosis includes the following categories:

Mood disorders

Major Depressive Disorder: one or more major depressive episodes that are disruptive in major life areas. Dysthymic Disorder is a low-level depression that lasts for over two years. Bereavement is a normal period (less than two months) of sadness after a major loss, such as the death of a spouse.

Bi-Polar Disorder: alternating or mixed episodes of depression and mania, formerly called "manic-depression." A person in the manic phase might feel like she is the best in her profession, that no one in the history of her profession has ever been as good. She talks nonstop to everyone, sleeps four hours a night, makes plans and promises she cannot keep, and generally overwhelms everyone around her. During the depressive stage, she feels like the worst of her profession. She feels stupid, worthless, and powerless. She sleeps 16 hours a day and sometimes thinks she should just end her pain by killing herself.

Substance Induced Mood Disorder: a mood disorder caused by a substance, such as alcohol or cocaine. For example, the police respond to a call in which a man is reported to be aggressive, paranoid, and angry. He could be experiencing the impact of cocaine abuse, or he could have a mood disorder. The key is looking at whether the symptoms started before or after the substance abuse.

Psychotic disorders

Schizophrenia: a psychotic disorder that includes positive symptoms (hallucinations, delusions, and disorganized speech) and negative symptoms (severely limited emotional expression, lack of energy, and poverty of speech) that last for more than six months. Schizophreniform Disorder lasts from one to six months. Sometimes people erroneously equate schizophrenia with "multiple personality disorder" (a controversial diagnosis that is now called Disassociative Identity Disorder). The homeless man with the matted hair who talks to an unseen person is an example of a person who may have schizophrenia. Another example is the main character in the movie, *A Beautiful Mind*.

Schizoaffective Disorder: a combination of schizophrenia and a mood disorder, such as Major Depressive Disorder.

Anxiety disorders

Because we work with crime victims, the

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most common anxiety disorder we probably see is post traumatic stress disorder (PTSD), which is a reaction to extreme stress or trauma. Symptoms include intrusive thoughts about the traumatic event, loss of concentration, agitation, and depression. A person with PTSD may cope by becoming divorced from her emotions. You can probably think of a crime victim who recounted a horrific incident with no emotion. Other common anxiety disorders include panic disorder, panic attacks, generalized anxiety disorder, phobias, and obsessive-compulsive disorder.

Disorders of childhood

Oppositional Defiant Disorder (ODD) and **Conduct Disorder** (CD): ODD is an abnormal pattern of defiant, negative, or hostile behavior lasting six months or more. CD is a more severe form of ODD, which includes hurting themselves or others and property destruction.

Mental retardation: an IQ score of 70 or below, impairments in functioning, *and* onset before age 18.

ADHD: Attention Deficit Hyper-Activity Disorder, formerly known as ADD. People with ADHD have executive functioning problems, such as impulse control, stimulus processing, and ordering ("Should I do this first or that?"). It isn't that they can't concentrate on one thing, it is the inability to not pay attention to everything. For instance, a kid with ADHD can't focus on her test because she can't ignore the boy next to her who drops his pencil, the person who walks by the door, the ticking of the clock, or the teacher shifting in her chair.

Pervasive Developmental Disorders: disorders that include impairments in verbal and non-verbal communication, social interaction, thinking, and behavior. Examples include autistic disorder and the less restrictive Asperger's disorder.

Other disorders

Other disorders we might see are substance abuse disorders, personality disorders, malingering, and factitious disorders (all described above), impulse control disorders (i.e., kleptomania, gambling, hair-pulling), and eating and body dysmorphic disorders (anorexia and bulimia).

Reading a mental health report

Armed with this background, you're ready to read mental health reports. They are written in a standard format with uniform language, codes, qualifiers, and shorthand language.[1] The reports are often in a format called a multiaxial assessment report, which contains five areas of evaluation. Sometimes narratives are included with the multiaxial assessment, or the report may be narrative only.

Following are the five axes in the multiaxial assessment:

Axis I: clinical disorders, *except* mental retardation and personality disorders. This includes mood, psychotic, development, and learning disorders. Common Axis I disorders include depression, bi-polar, schizophrenia, ADHD, and anxiety disorders.

Axis II: mental retardation and personality disorders. Persistent maladaptive personality features can also be noted here. Examples include borderline personality disorder or severe mental retardation.

Axis III: other medical conditions that impact mental health, such as cancer or heart disease.

Axis IV: Psychosocial/environmental issues that impact mental health. i.e. problems with family, support systems, unemployment, domestic violence, housing problems, etc.

Axis V: GAF, Global Assessment of Functioning, a numerical score that gives an indication of the severity of problems and the presence or absence of systems and/or degree of overall functioning. The scale is 1 to 100, with 1 as the worst and 100 the best. The midpoint is 51 because moderate problems start here. Serious problems are captured at 50 and below.

Conclusion

The next article will discuss types of treatment, including types of medication, and treatment providers. I hope this information helps in your work and that you learn more about this topic. In today's world, all of us need to be more of a "hybrid" professional. Being a clinical social worker in a district attorney's office, I have had to learn about legal and law enforcement issues to be effective. Similarly, having a greater understanding of mental illness will help you be able to handle today's issues as prosecutors.

Endnote

1 Qualifiers and shorthand language include: mild, moderate, and severe; in partial or full remission, prior history, recurrent; NOS (Not Otherwise Specified) meets the general criteria, but need more information; Rule-Out: some criteria met, but need more information; Deferred: can't make a diagnosis on this Axis; V-Codes: areas of clinical focus that do not meet the criteria for another disorder, i.e., relational problems, abuse or neglect, life adjustment problems; With Psychotic Features Disorder includes psychotic features.

Referrals and references

Child Trauma Academy at www.childtraumaacademy.org. Best website for information about how trauma impacts a child's developing brain and what can be done about it.

NAMI, National Alliance for the Mentally Ill at www.nami.org. A great consumer organization for mental health issues. You can sign up to receive e-mail updates when they have new information.

NIMH, National Institute of Mental Health at www.nimh.gov. Find the latest research on mental health issues.

Public Broadcasting Service at www.pbs.org. Search for "mental illness" or "brain" or related topics. There are many good online free videos.

American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR.* Washington, D.C.: APA; 2000.

Andreasen, N. *Brave New Brain: Conquering Mental Illness in the Era of the Genome*. New York, NY: Oxford University Press; 2001.

Brown B. *Women and Shame: Reaching Out, Speaking Truths & Building Connection*. Austin, Tex: 3C Press; 2004.

Carter, R. *Mapping the Mind.* Los Angeles, CA: University of California Press; 1999.

Earley, P. *Crazy: A Father's Search Through America's Mental Health Madness.* New York, NY: G.P. Putnam's Sons; 2006.

Jamison, K.R. *An Unquiet Mind: A Memoir of Moods and Madness.* New York, NY: Alfred A. Knopf; 1995.

Jamison, K.R. *Night Falls Fast: Understanding Suicide*. New York, NY: Random House; 1999.

Johnson, S. *Mind Wide Open: Your Brain and the Neuroscience of Everyday Life*. New York, NY: Schribner; 2005.

Shorter, E. *A History of Psychiatry: From the Era of the Asylum to the Age of Prozac*. New York, NY: John Wiley & Sons; 1997.

Siegel, DJ. *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are*. New York, NY: Guilford Press; 1999.

Warwick, L and Bolton, L. *The Everything Psychology Book: Explore the Human Psyche and Understand Why We Do the Things We Do*. Avon, MA: F+W Publications; 2004.

Zimmerman, M. *Interview Guide for Evaluating DSM-IV Psychiatric Disorders and the Mental Status Examination.* East Greenwich, RI: 1994.

IN THE SPOTLIGHT

By Nelson Barnes
Assistant District Attorney in Bell County

My adventure in the Wild East

What I did on my summer vacation: I worked to build the Rule of Law in Afghanistan.

"Are you crazy?" That was the response of Henry Garza, Bell County DA and my boss, when I told him I had put my name in the hat for a mentor position in Afghanistan in the summer of 2006. The question of my sanity was far and away the most common response to my decision to "help out overseas."


Nelson Barnes

I had been with Bell County more than 15 years and with the DA's office more than 12 when I decided to apply. I always thought I would stay in the DA's office for 30 years, then move on to something else; I never really imagined doing anything but saying, "The State is ready." Then some friends told me that a project to establish the Rule of Law in Afghanistan was looking for American lawyers with law enforcement backgrounds. I have always been proud of my relationship with local police agencies, and the opportunity to work with police and prosecutors in a developing country just called out to me. Also, after 15 years in an office job, I figured a change of scenery might be a good thing.

The added benefit of embarking on something of this large scale also included financial rewards. The salary was quite generous with a 35-percent bonus for the dangerous location and another 35 percent for being out of country—not to mention a big chunk was tax-free. This year abroad would allow me to do things for my family and our future that I never imagined on the county pay scale. With college getting closer, educational expenses (and the bonus of some nice family vacations) would become more than just wishful thinking.

So I filled out the paperwork and waited. About six weeks later (the Friday I returned from TDCAA's annual conference in South Padre, in fact), I received an offer and a plane ticket for two weeks out. Getting ready to leave your family and gather the necessities for a year abroad in two weeks was a whirlwind. I had to take business clothes (even for a war zone), and I was allowed one checked bag. I laid everything out and then began to edit. It was a squeeze but it all fit, and a portrait of my 7-year-old and me, drawn by her for the occasion, topped things off. Thanks to the APO post office, other necessities including drink mix and cookies later followed.

I flew to Washington D.C. at the end of September 2006. I left behind my wife, Kathy, with four kids (ages 15, 13, 7, and 3), three dogs, a cat, and all the trappings of our life. I was excited and sad at the same time as I knew it would be months till I saw their faces, and the tears of my 7-year-old stayed with me all the way to D.C. I had a whole new appreciation for the folks at Fort Hood who have said goodbye to their families many times in the last few years, but my sadness was tempered with the excitement of a great adventure and the hope to make a difference somewhere.

Weapons and first aid

I was given rather cryptic instructions to rendezvous with some people I didn't know at a rental car agency near Dulles Airport. It seemed almost "cloak and dagger" as we were given each other's flight arrangements and told where to meet. We were then to drive to a hotel in Fredericksburg, Virginia, and await further instructions. At the hotel we were told to proceed the next morning to a training facility in Fredericksburg. The evening before, I had dinner with one of the guys who would become a really

good friend, Jim Bothwell from San Antonio (a retired Air Force officer), and began my career as a contractor for the Department of State. We lived near each other for the rest of my tour and have even spent some leave time together over Mexican food since I got home. Jim is still working at the Ministry of the Interior (MOI), but we keep in touch.

The next morning we drove down winding dirt roads to an almost clandestine training facility in the Virginia woods. We were introduced to a number of Navy Seals and Special Forces guys who, in their words, were "going to do our best to make sure you can stay alive if the %@#$ hits the fan." For three days, we were taught how to handle, clean, and use M-4 rifles, 9-mm pistols, and AK-47s. I was instructed how to call a helicopter for a pickup, navigate with a compass, read terrain maps, and how to apply a tourniquet or other first aid. These lessons were particularly geared to combat trauma, such as bullet wounds, bomb blasts, and knife wounds. A lot of the training was new to me as I have never served in the military. All the guys with me were retired officers.

If this training weren't enough to get our attention, we were then given briefings on Afghan culture, the political situation, and some basic tactical survival skills. The training gave me pause about what I was getting into, but it was also exhilarating. For one thing, I was surprised by the ethnic diversity in Afghanistan; I did not know that so much foreign influence had created such a tribal structure. The different tribes became a constant issue in the year ahead. Making sure we provided representation of these different groups was an important issue to the Afghan government and thus to us. The instructors were great and at least made me feel like it might take a couple of minutes before the bad guys finished me off. We then had the pleasure of going to a clinic for whatever necessary inoculations we needed. There I learned the greatest lesson of my time: If you love your children, make sure that you keep their shot records up to date and readily available. I had no records so I got every shot: six in one arm and seven in the other. I cursed myself for not keeping better records. Needless to say, I then ran a fever for most of the next couple of days. Instead of enjoying the completion of training and celebrating the beginning of the adventure, I spent my last night in the U.S. laid up with some cold medicine and chicken from the KFC next to the hotel. It also made my first plane trip across the pond seem to last for two weeks.

The next afternoon I got on a plane in Washington, spent a seven-hour layover in Frankfurt, and arrived in Dubai at 9:30 the next evening. It was about 40 traveling hours from hotel to hotel, and I slept like the proverbial stone. The next day we had off in Dubai. I toured the city a little and recuperated from the proceeding week making sure I did not have to carry much. Little did I know that the real adventure was about to begin.

Kam Air (chickens welcome)

The next morning began with a five o'clock shuttle to the airport for what was supposed to be a 7 a.m. plane flight to Kabul. The plane ended up leaving at 9, something I learned was close to the real schedule. Kam Air does not seem to worry about keeping a schedule for its customers, but we had to deal with it as that airline is the only approved one for flying in and out of Kabul. It was notoriously late leaving Dubai and not much better on the return. If you were within two hours of the schedule, that counted as "on time."

I had read that the boarding procedure was akin to the running of the bulls, and that is an understatement. Getting on the plane was an epic itself. Seat assignments were advisory at best, and it seemed that a hundred different languages were flying around as I just tried to find a place to sit down. The plane seemed really old, with a lot of exposed wires, and a guy down the way was carrying a live chicken. This was when I first had the thought, "What have you signed up for?" However, the flight went relatively smoothly, I adjusted to the different hygiene of some of my fellow passengers, and we safely made it to Kabul "Insha'allah" (God's will).

Welcome to Kabul

We were met on the tarmac by some DynCorp employees who were carrying weapons and looked like soldiers of fortune. Most of the folks there on the police mission were from the South so at least they didn't talk funny. Some of our mission worked at the airport so our trip through the customs line was very quick. I would learn this wasn't always true on future flights (unless you had a little Baksheesh [gift] for the officials). We then went out, and I was introduced to Kabul for the first time. Particularly the dust and

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the smell. Many places—San Francisco, the French Quarter, and definitely Kabul—have a distinct smell to me. The country is covered in dust—a reminder of years of war where citizens burned trees and vegetation to keep warm. The air has an acrid smell as the Afghans will burn whatever they can to cook and fight off the cold. The smell of open sewers and piles of garbage also added to the odor. Yet somewhat offsetting this stench was the air coming down from the mountains; it was cool, pure, and clean. It was, as the country would unfold to me, a real contrast. I still say you could blindfold me, fly me around, unload me, and I could tell if I were in Kabul.

Everywhere were the signs of war: blown-up buildings, rutted roads, and wrecked military equipment. The armored truck we rode in bounced and swayed all over the road as they took us for weapons and lunch. Weapons and individual body armor (IBA) were first on the list and would become the No. 1 priority while in country; food was next. We then moved on to our new home for the next six months.

The author heading out to Mazar-E-Sharif

It was always rush hour on the roads. This cab is loaded with vegetables.

Third-World living

This is the part of the whole Third World experience that does not get any sympathy from my family and coworkers. We were housed in the heart of Kabul at a four-star hotel, The Serena (which was recently attacked in January 2008). I had my own room, and it became home for the following six months. After that, we then moved into a compound, and my cosmopolitan digs were replaced with one half of a military shipping container and a 7x20-foot (including bathroom) unit in one of our compounds. This change was a little less upscale, but it was much more social.

My time in Afghanistan began with a more intensive repeat of the training in Virginia. It was scheduled to take about a week but instead took two weeks as we were constantly interrupted by improvised explosive devices (IEDs) and other threats that limited or shut down our travel in the city. It became almost second nature to get the daily threat reports of what routes had intelligence of problems or what vehicles we were watching out for. We were constantly told to watch out for white Corollas, which is like saying, "Watch the pickup trucks" in Texas—white Corollas are common! I can't say I ever got used to the explo-


Afghan children waiting at the MOI


Friendly locals hauling water in old oil containers

sions, but they did just become part of our life. Loud noises did tend to make me look for escape routes and what was around me. I guess the guys in Virginia did their job in training me!

Keeping busy

After the training, I was assigned as a mentor to the Chief of Legal Affairs for the Afghan MOI. His name was General Masood Ragheb. He, though not a lawyer, was in charge of all legal affairs at the ministry. The MOI in Afghanistan is the national police department for the country and has around 82,000 officers. (Afghanistan is approximately the geographic size of Texas, with 32 million citizens, compared to Texas' 23.5 million.) The MOI is also responsible for all the district chiefs, mayors, provincial governors, and other governmental officials. These positions are all appointed among Afghanistan's 34 provinces. Just imagine mayors, county judges, and county commissioners all under one appointed roof.

I worked with Ragheb in developing an improved disciplinary system for the police. They still jailed officers who required professional discipline, which had no long-term effect; officers just spent a few days in jail and then went back to work. (I hope none of our elecTeds get any ideas from this practice!) We also flew out to different sites within the country to visit with prosecutors and police on problems they were having and what could be done to fix them. Flying in an old Russian military aircraft was an adventure in and of itself. (Catch me at a conference and I'll really tell you about it.) The coordination between the police and prosecution in the country was all but nonexistent, and we tried to build these relationships into a more cohesive partnership. Communication was always a challenge as I had to work through an interpreter, and some concepts I tried to relate were not compatible with how things are done there. The idea of suspension without pay, for instance, was met with, "How can we take money from his family?" Or the idea of enhanced punishment came back with, "Each act is to itself." These things took some "cussin' and discussin'." It made every day a new challenge but also kept things interesting.

My usual day involved getting to the

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MOI (not always an easy task), meeting with Ragheb or other officials in the morning, then going to meetings at Camp Eggers, a military base, in the afternoon. With so many bureaucracies as there are in Afghanistan, you can imagine the number of meetings! Every meeting with an Afghan also invlvoled chai tea. You did nothing unless you had chai first. I found it so interesting that these big, burly, rugged guys (many of whom had fought in the mountains) would drink tea from china with saucers. It was a custom, one I learned to really like. I have some chai tea in my office now and the spicy smell makes me think back to good times in Kabul.

One of the more interesting international issues I was involved with had to do with some discoveries of a potential mass grave on an Afghan Army installation. This discovery involved meeting with Afghan officials, the U.S. military, the U.S. Embassy, and U.N. officials. We didn't reach a resolution, but the situation is a good example of how we tried to coordinate efforts of the many agencies and agendas working in Kabul.

Me in intelligence?

In March I transferred to the Intelligence Directorate. My work there was more like what I do here in the DA's office in coordination with our local police. The Intelligence Directorate is more like our FBI in that it not only oversees intelligence-gathering but also investigates and takes care of bank robberies, kidnappings, and other major (federal) crimes. I was more of an advisor in the directorate, coordinating with the military, advising on personnel issues and operations, and providing course training.

Setting up anti-corruption stings was a highlight of the experience. We built some really good cases including one against a provincial governor that was referred for prosecution. I had to learn some Afghan law and procedure, and it was fun—more of a working job than a book one. I still talked to Ragheb weekly and helped with those issues I could. He actually called me for more help after I was reassigned than when I was working with him. Afghan society is largely about relationships, and once you have made a bond, it can be very strong. I have gotten e-mails in broken English from him since I returned, and I wish I spoke Dari so I could better keep in touch. I later transferred to Internal Affairs and helped with some anti-corruption and internal audit measures in those units before I returned home.

I will always remember watching a court proceeding with everyone in overcoats or sitting with the director of intelligence in a scarf and gloves while he was at his desk.

Working in the dark

I really have gained an appreciation for things we take for granted here, which came from working not only with the Afghan police but also with prosecutors. Throughout most of January, it never got warmer than 18 degrees, yet these guys went to work everyday with no heat! I will always remember watching a court proceeding with everyone in overcoats or sitting with the director of intelligence in a scarf and gloves while he was at his desk.

The other fun thing was the lack of electricity. Power would go on and off at will—and off was more prevalent. It became second nature to sit in the semi-dark of the offices and discuss whatever issue the day had brought forth. The intermittant electricity also made me rethink our training methods. One time I was asked to do training on crime scene investigation for some new investigators. I sat down with a number of officers who were in Afghanistan with me, and we put together a course. I made PowerPoint slides and had my interpreter produce them in Dari. I luckily had some slideshow presentations on my laptop from past jury trials with pictures I could use as examples. After a few days of preparation, we remembered that we would not have electricity for the projector! Adapt, improvise, and overcome become the motto. We printed the slides on paper and made posters with tape and staplers. It reminded me of my early days in prosecution when we thought it was a big deal to have a poster printer. This kind of challenge was a daily thing and always kept things interesting.

Meeting the world

I worked with a wide assortment of international lawyers and military representatives from Macedonia, Italy, Nigeria, the

Philippines, New Zealand, England, Australia, and others, which made for a very international experience—not to mention some very different views on how a criminal justice system should operate. I also worked closely, though not in a legal capacity, with a lawyer from Nepal. Our personal security was provided by Gurkhas from Nepal, one of whom was a lawyer. He could make more money doing security work in Afghanistan than back home practicing law! He was saving to work on his L.L.M. (advanced law degree) when he returned home. We had some great discussions, and he was fascinated with our system. One of the most treasured items I have from my time in Kabul is a Gurkha knife he brought me back from his leave.

What makes your truck shake

One of the most exciting mornings came in June. I was driving myself, a ghurka, and a couple of other mentors to the MOI. We were inching along in the usual morning traffic (think downtown Houston mixed with I-35 in Austin at 7:55 a.m.) when we felt the truck wheels lift off the ground. After a quick gathering of our senses, we saw smoke rising about 200 meters in front of us. Just past our turn to the MOI, a suicide bomber had gotten onto a bus filled with instructors for the police academy and detonated himself. He killed 35 of our colleagues. We were able to move out of traffic and get to the safety of the MOI compound. After the adrenalin wore off, I was happy that nobody on our team had panicked but rather had followed most of the procedures we had been taught about looking for exit routes or what store we would move into if we had to get out of the truck. My wife did not find that comforting.

Coming home

I was gone for a little less than a year, and when asked to renegotiate my contract for a new position, I decided instead to return home. It was timely as the office had an opening, and Henry (in an obvious moment of madness) hired me back. I flew in on a Tuesday and came back to work the next morning. I am thrilled to be back announcing "ready" for the State and seeking justice for the good citizens of Bell County and Texas. I had missed being in the courtroom. A couple of months before I came back, we were discussing staying around Afghanistan, and I remember saying, "This coaching is fun, but I think I have a few starts left in me." Getting back in trial has been glorious.

I learned a lot about myself and the world during my time in Kabul. For one, I can fly around in "retired" Russian helicopters and survive. And I really appreciate those folks in uniform who leave their families time and again to protect us. In my own life, I really love hearing "Daddy's home!" at the end of the day, having a justice system that people by and large have faith in, that the lights come on, that I can work in an office without wearing gloves or speaking through an interpreter, that I no longer smell like we must have while there (a trunk of my things shipped home reeked when opened a month or so later), and that I have a wife who let me live my adventure and held down the fort with four kids and no relatives close by. (Kathy, thank you!) And chicken fried steak is even better after you haven't had it for a while.

I left many friends in Kabul and felt guilty over Christmas that I was home and many of them were still fighting the fight and helping the Afghans build a future for themselves. I wished I could have left with a system up and running for them, yet I know that it will not be done on any quick timetable. It takes years to achieve what we in the United States have. Look at the 200-plus years in our system—and we still have to work at it everyday. I believe that the future resides with the kids over there. The young Afghans I worked with love their country and want it to be part of the modern world, but it will take a generation or two. If we help them and stay the course, I see it happening. Afghanistan as a safe and secure place will be enticing to the world: The scenery is magnificent, the food is intriguing, and the people are extremely warm and friendly.

I hope that those who are working over there come home safely and those who follow them eventually see an Afghanistan where I can someday take my kids. I would love to show them where Daddy spent that Christmas we shared via webcam and let them taste the exotic flavors that were so much of my experience. Until then, I pray for those folks on the other side of the world and remember that when I get to announce that the State is ready, I hope my old friends in Afghanistan are seeking justice like I am. ✤

CRIMINAL LAW

By Eric Devlin
Assistant District Attorney in Harris County's Child Abuse Division

The doorway to a predator's lair

Investigators and prosecutors can be proactive in capturing child predators—before a child is actually hurt—by charging Online Solicitation of a Minor.

A good example of such a case was an investigation brought to me by Detective Russell Ackley of the Harris County Sheriff's Department. Ackley is assigned to the FBI's Houston CyberCrime taskforce and frequently trolls the chat rooms in an undercover capacity. Detective Ackley, while online in one of his undercover identities as a 13-year-old girl, was approached by an individual who used the screen name of DieHardWithU. This suspect was one of the most graphic chatters that he has had in his career. Detective Ackley on 19 separate occasions engaged in Internet chats with the suspect, and on almost every occasion, the suspect solicited a meeting for sex, sent him links to pornographic websites, or discussed all the sexual acts that he wanted to do with the minor. This suspect would constantly set up meeting dates, but a day or so before would reschedule for a different date.


Eric Devlin

On one occasion during a particularly graphic chat, the suspect told the undercover identity that his 13-year-old granddaughter was in the same room with him. During the chat session, he alluded to molesting his youngest grandchild. At this point the investigation had to kick into high gear due to the possibility of a real child being subject to sexual abuse. Detective Ackley, during his chats with the suspect, was able to capture his IP address, and this information, combined with good observation skills during the chats, was able to identify the suspect as Anthony Kelly.

After a search warrant was issued for his house, we entered to find three of the suspect's grandchildren living in the home with the suspect. During the course of the search we found sex toys in the house, and numerous images of child pornography on his personal computer. While conducting the search warrant, we also discovered a previous allegation that was reported to CPS, but had not shown up in our background check of the suspect. The report was never investigated because the suspect claimed that the child was mentally unstable and then shipped her off to live in another state before she could be interviewed. The items found and the layout of the house matched the child's description exactly. In this particular case the need to get the children out of reach of this sexual predator dictated that we move fast and not wait for a meeting.

Anthony Kelly has pleaded guilty to both online solicitation of a minor and possession of child pornography and is awaiting sentencing from one of the toughest judges in the courthouse at the time of this writing. This was the first of several different investigations that began as a simple chat session and have resulted in the recovery of actual abused children.

Cyber predators

The Internet is a wonderful place. You can meet people with similar interests and communicate with them almost instantly, and you can be anyone you want without others knowing the truth.

That's also the big problem with the Internet. The very anonymity that makes you feel so secure in venturing out into the unknown makes the online world ripe for scammers, hackers, and other criminals motivated only by greed. Most adults understand the dangers of sharing too much about themselves, such as

bank account numbers and personal identifying information, with strangers, but the same is not true of our children. The Internet, with its vast potential for growth and learning, is also a place for predators to lurk.

TV news magazines focus on the easy situations, cases where a "good guy" with an undercover identity chats online with a predator, who travels a great distance to meet someone he believes to be a minor. He is instead surprised to find a houseful of reporters, police, or both. In these cases some will confess, some will run, and many will claim the meeting was merely a fantasy or that they were just there to warn the child's parents. But again, these situations are the easy ones. What about those suspects such as Anthony Kelly, whose online chats are not the only way they're preying on children?

Our office

The Harris County District Attorney's Office Child Abuse Division handles both sexual and physical abuse of children up to age 13 from officers who work out of our local children's assessment center as well as cases that fit specific requirements. The division is composed of seven prosecutors, two investigators, and six support staff. At present the cyber-related cases are handled by me and an investigator, and we are assisted by a second prosecutor. We work these cases in addition to our regular child abuse division assignment.

In the area of online child exploitation we work with officers and agents on cases involving Online Solicitation of a Minor, Possession of Child Pornography and Promotion of Child Pornography. We work closely with the FBI Cyber Crime Taskforce, which is composed of FBI agents, Houston police officers, and Harris County sheriff's deputies; our local Internet Crimes against Children Taskforce (ICAC), which is run by Detective Matt Gray of Pasadena ISD; the Texas Attorney General's Office Cyber Division, and our Houston Area Child Sexual Exploitation Taskforce (HACSET) operated by Sgt. Gary Spurger of Pct 4 and the local office of the Immigration and Customs Enforcement Agency.

Online Solicitiation of a Minor

In years past, without a meeting there would be no effective way of charging the actions of a predator like Kelly. In 2005, however, the Texas Legislature created the criminal offense of Online Solicitation of a Minor. It can be found in §33.021 of the Texas Penal Code. This section makes it a felony offense to solicit a minor over the Internet, electronic mail (e-mail), or text message for the purpose of engaging in sexual activity with that minor. It also makes it a felony offense either to communicate in a sexually explicit manner or distribute sexually explicit material to a minor. The statute defines "sexually explicit" as any communication, whether it is language, meaning written or spoken word, or material, including photographs or video, that relates to sexual conduct. This definition means that a predator who gets his kicks from talking "dirty" to a minor can now be charged. The legislature was also on target when it created its definition for "minor" for this statute. A minor is defined in §33.021 (a)(1) (A)–(C) as not only a person that is actually under age 17, but also any person that the suspect believes to be under the age of 17, or any person who represents herself to be under 17 (your undercover officer). The legislature added one more feature that is incredibly helpful to prosecuting these predators.

Anyone who has ever seen Dateline NBC's To Catch a Predator will understand that one of the first things that comes out of the mouth of predators when they are arrested for this type of offense is that they never intended to go through with the sexual act or never intended to actually meet the child. It is especially true if the suspect never shows up at the pre-arraigned place. §33.021 (d)(1) states, "It is not a defense to prosecution under Subsection (c) that: 1) the meeting did not occur; 2) the actor did not intend for the meeting to occur; or 3) the actor was engaged in a fantasy at the time of commission of the offense." This language takes away the "fantasy" defense that many have tried to use in cases such as these. It is this author's opinion that the "fantasy" defense does not apply to the actions of communicating and distributing sexually explicit material because the main criminal act has already been committed by simply communicating in the sexually explicit manner and distributing the sexually explicit material rather than soliciting a meeting for some future act.

§33.021 makes it a third degree

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felony to communicate in a sexually explicit manner or distribute sexually explicit material to a minor unless the minor is under age 14, then it is a second degree felony. It is important to remember here that a minor, according to the statute, will be the age that your undercover officer has represented or that the suspect believes them to be, or the actual age if there is a real child involved. The act of soliciting a minor for the purpose of meeting for sex is a second-degree felony no matter the age. I have had a number of prosecutors, police, and federal agents comment on how much more effective our statutes seem to be.

Online Solicitation of a Minor also carries with it another useful feature. Upon creation of the statute, the legislature added the offense to art. 62.01(5)(J) of the Texas Code of Criminal Procedure as a reportable conviction/adjudication. It is not one of the lifetime registration convictions, as named in art. 62.101 of the Code of Criminal Procedure, so the duty to register is 10 years past the expiration of prison, parole, or probation.

Investigative tips

This area of criminal prosecution is fairly new, and to many people it may seem a daunting task because it brings up areas with which we are not familiar. When I tell people who are seeing these cases for the first time how good they can be, I am usually met with a blank stare. So what can you do to make your case rock solid? A well-trained officer will make sure that they follow a few very simple rules. First, only the predator is to initiate a chat; we don't want to be accused of entrapment. This may seem like a silly argument for the suspect when he is hanging out in a chat room called Daddy-Daughter Sex, but it's an unnecessary battle to fight.

Second, the officer must be very clear as to the age of his undercover identity when chatting with a suspect. This can be done in an obvious fashion by simply telling the suspect their age, usually in response to a suspect's inquiry as to ASL (age, sex, location). The officer can also reinforce the age of the undercover identity in the mind of the suspect by slipping in comments about parents, friends, activities, and grade in school.

Being able to show the jury the chat, rather than just reading it, will be a far more effective presentation.

Third, the undercover officer should not just rely on chat logs, but should have software activated that makes a real-time recording of the chat. Being able to show the jury the chat, rather than just reading it, will be a far more effective presentation.

Fourth, remember the power of the search warrant. Search warrants, while time-consuming to write, can get you into the lair of the predator and gain you access to his tools of trade. The computer that the predator is using will often contain his copy of the same chat logs as your undercover officer. It will also show the screen names belonging to the suspect, and the undercover identity will often also be on the suspect's "buddy list." There will often be other chat logs as well, showing other actual minors with whom he has chatted, which is dynamite at punishment. These predators also usually have more items in their home and on their computer that are important to get. These individuals are not usually just chatting online with minors but are often collectors or manufacturers of child pornography. Possession or Promotion of Child Pornography is an offense that requires lifetime registration as a sexual offender. One of the frequent shortcuts that a prosecutor or a police officer will often attempt is to avoid the search warrant and either just charge the suspect or to attempt a "knock and talk." While this may sometimes work, a simple refusal by the suspect pretty much guarantees that, by the time you come back with a search warrant, he has a lawyer on standby and the computer is at the bottom of the lake.

Lastly, and most importantly, make sure your officer or agent talks to the suspect in a formal capacity at some point in time. It may take some planning, but if you time the search correctly you can catch the suspect at home when executing your search warrant. By taking the time to also conduct an interview of the suspect in the midst of this search while he is being confronted with his chats, his resolve will often crater, and he will admit to both the chatting and the evidence you will eventually find on his computer during a forensic exam. With many of these individuals it is the

anonymity of the Internet that gives them the courage to act out on their sexual interests in children, and when that very same anonymity is pierced by law enforcement, their courage and bravado rapidly disappears.

Countering defenses

So after you have gathered all of your evidence and made the arrest, what is going to happen in court? The vast majority of your suspects will be intelligent, well-educated males who have the funds to hire very good lawyers and will do anything they can to avoid going to prison. Your defense lawyer will usually offer the standard defenses. The first is the "not me" defense, meaning that, whoever was the chatter, it was not our suspect. This defense is easily overcome with the interview of the suspect and the search warrant. In addition, during the chats the suspect will often give many clues to his actual identity. In the case of Anthony Kelly, the suspect had a personalized license plate with his screen name on his vehicle, and he hinted that he worked at a certain computer store. During the attempts to identify the suspect, Ackley went to that very store and was waited on by the suspect.

The next defense that will often be used is the idea that anything you found on the computer or the links of the IP address is a result of a virus or that he was being hacked. For this reason it is vitally important to get the computers with a search warrant. A good forensic examiner will run virus scans on the computer and check for evidence of hacking. This examiner can usually disprove this defense. The interview can also be used to defeat this argument.

The last major argument that the defense will use is in regards to punishment, and it is one that, without an effective attack, judges will often accept. The suspect, if the investigation is conducted right, will usually bow to the inevitable fact that he is caught, and will attempt to cut his loss with a plea bargain. I have never met a suspect that wants to go to prison. The defense attorney will often use the argument that no one was actually hurt, that it is a "victimless crime." The fact that this suspect was cruising the Internet looking for a minor child and that he stumbled upon an officer is fortunate. If that officer had not been there, more than likely he would have found an actual child. When the argument does not work on you, they will often take it to the judge or the jury. In the case of child pornography, it is important to remind the judge or the jury that there is still a victim there. The children in those pictures were victimized and sexually abused, and every time these pictures are downloaded, these children's abuse is brought about again. I often use a psychologist from my local Children's Advocacy Center to explain to the jury the devastating effect that sexual abuse can have on these children. Again, the interview with the suspect, the search warrant, and the examination of his computer are your best weapons against probation. Being able to place the suspect with access to real potential victims, the finding of child pornography, and often the multiple other actual minors with whom the suspect has chatted will bring the suspect's predatory nature into full view.

The claim that the defense will often make, that it is one-time mistake, will be put to rest if you can show not only the many times he has actively sought out minors for his own sexual interest, but also the active steps that he has taken to satisfy his lust for children through child pornography. After being presented with the predator's true instincts, the sentencing authority will be able to discard the concept that this is a victimless crime and one suitable for probation.

So why is it important to go after these predators if they aren't willing to show up to a meeting with a minor? The reality of the situation is that these predators are out there in incredible numbers. Our children will also continue to be on the Internet at ever increasingly younger ages. The fact that the conversation happened between the predator and an undercover officer is actually fortunate. The predator was looking for any child he could find. If he had not stumbled upon the undercover officer, it is likely that he would have found a real minor instead. As I have said before, these investigations give us the opportunity to pierce the anonymity that the Internet represents and to get into the home of the predator. Many of these predators do more than chatting online and collecting child pornography; they have a willing desire to molest children, and they have the access to do so.

Conclusion

We have a responsibility to children to move swiftly to prevent harm from happening to those within the reach of these

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predators, or to end the harm being already done to them. The officers that work on these cases have seen scout leaders, Sunday school teachers, and school teachers engaged in these pursuits. These are individuals who have actively placed themselves in a position of contact with children, and if we can get to these predators before they are able to hurt one of our children, then we win…and so do our children. ✤

AS THE JUDGES SAW IT

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

Questions

State Appeal of *Nunc Pro Tunc* granting additional back-time credit

1 During a routine strip search in the Kaufman County Law Enforcement Center, officers discovered that Jeremy Paul Collins possessed a packet of crystal methamphetamine in his underwear. Plea negotiations on the drug case resulted in an agreement for Collins to serve five years. The plea terms included several other conditions; one called for Collins to receive 34 days' credit for time already served. The plea documents and the judge's oral pronouncements discussed this 34-day credit.


Tanya S. Dohoney

After Jeremy's guilty plea, no motion for new trial or appeal followed. After the expiration of the trial court's plenary authority, Collins filed a combination Writ of Habeas Corpus/ Motion for Judgment Nunc Pro Tunc. The trial judge subsequently granted Jeremy an additional 271 days' credit for time served, and the State appealed the entry of the *nunc pro tunc* judgment.

Did the court of appeals have jurisdiction to hear this case and, if so, would a State's appeal succeed?

Capital murder of mother and fetus

2 During the summer of 2004, Terence Chadwick Lawrence dated two women. Upon learning that one girlfriend was pregnant, he told the other one that he would "take care" of this problem. Thereafter, he shot Antwonyia Smith, his pregnant girlfriend, causing the death of Antwonyia and the four-to-six-week-old embryo she carried. Dallas County prosecuted Lawrence for capital murder by killing more than one person during the same criminal transaction. Changes to a statutory definition advanced this theory. The definition of "person" includes an "individual," and the Texas Penal Code now defines "individual" under §1.07(a)(26) as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."

Is such a prosecution constitutional?

Submission of non-statutory defensive issues

3 John Arlin Walters shot and killed his brother in the Tabernacle Baptist

Church parking lot in Hopkins County with a gun that he typically used to shoot snakes and other varmints. Long-term strife over things such as land, cattle, fences, taxes, and bills permeated the brothers' relationship. On the day of the shooting, Walters' brother, Russell, confronted him about an unpaid water bill. Attempting to extract himself from the festering argument, Walters jumped into his truck and began to drive away. Russell pursued on foot, continuing to joust verbally with his brother. Although Walters initially sped up, he stopped suddenly, got out of his truck, and shot Russell twice. Walters returned to his truck, drove next door to his house, and called 911 for help, ultimately turning himself in to authorities.

Walters suggested at trial that he had to defend himself, and the jury received instructions on self-defense and apparent danger. Walters also requested submission of language allowing the jury to consider Russell's prior verbal threats in deciding the issue of self-defense based upon prior Court of Criminal Appeals' decisions.

Was he entitled to this additional non-statutory instruction?

Rule of optional completeness

4 More about those Walters brothers: When John Walters shot his brother in the neighboring church parking lot and returned home to call 911, he generically reported that a man had been shot. Other emergency calls pointed to Walters as the possible perpetrator and, armed with this suspicion, the 911 operator called Walters back at his house a few minutes after his first 911 call. During their second conversation, the dispatcher secured Walters' agreement to surrender peacefully. The officer also asked Walters if he wanted to talk about what happened. In response, Walters told the deputy that "my brother come over here threatening me, one of several times" and also that "he told me one time he was gonna kill me out there at the barn."

At trial, the State asked the 911 operator about this second call to illustrate Walters' incredibly calm demeanor but objected to any reference to his self-serving statements about his brother's prior threats. Walters contended that the State's limited proffer of the conversation violated the rule of optional completeness and also left a false impression with the jury that Walters failed to answer the deputy, was unnaturally calm after killing his brother, and was not forthcoming about killing his brother. Walters argued that the faulty impression undermined his constitutional right to present a defense.

Was this TRE 107 objection correct?

Hicks who have care, custody, and control

5 While a group of people partied in a country pasture during the wee hours of the morning, a 42-year-old mentally retarded man named Billy was rendered unconscious in a brief fight. Offering up a heaping dose of Cass County compassion, the partygoers stood around Billy's unconscious body for over an hour debating whether medical or police officials should be consulted. Our hero, James Corey Hicks, protested police intervention for fear of losing his jailer job at the Cass County sheriff's office. True to his name, Hicks maneuvered the group into dropping Billy along a country road outside of town. Hicks led the convoy to a remote location, left Billy there, returned to his home for a brief period, returned to the site, and finally called the sheriff's office to give them Billy's location. After a week-long hospital stay, Billy recovered from his subarachnoid hemorrhage and aspiration pneumonia.

A Cass County jury acquitted Hicks of two counts including intentional/knowing injury to a disabled person but convicted him of injury to a disabled individual by omission. Although the jury arrived at a three-year sentence, the judge probated Hicks.

Texas Penal Code §22.04(d) imposes a duty of care on those who have assumed care, custody, or control of children or elderly or disabled individuals. Does this provision equate with the PC §1.07 definition of "possession," which also includes the terms care, custody, or control?

How-to for submission of Article 38.23 instructions

6 Ryan William Madden drove lickety-split through a construction zone while following an also-speeding cohort in an SUV. Trooper Lily of Harris County noticed the two speeding vehicles, their drug-convoy driving conduct, and their Florida license plates. The

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trooper managed to pull them both over. Madden's explanation of his solo trip, distinctively described route, and his four-day-overdue Florida rental car did not mesh with the SUV driver's story about traveling in a group; also, Madden's verbalized arrest history differed from what dispatch unearthed. Due to these contradictions and what the officer described as Madden's uncontrollable shaking, Trooper Lily called for a K-9 unit. The dog arrived 15 minutes later and alerted on cocaine bricks in Madden's trunk.

The trooper's in-car camera recorded this episode and captured Madden's claim that he was driving with his cruise control set on 55 miles per hour. The tape's poor quality did not show Madden's nervousness with clarity. Defense counsel vigorously cross-examined Trooper Lily, seriously questioning the existence of Madden's "nervous" behavior, but the officer held fast to his original description and surmised that the tape's quality contributed to any inability to see the nervousness.

Madden requested two CCP article 38.23 instructions, one applying the exclusionary rule to the facts of the stop and another focusing on the legitimacy of the continued detention. What article 38.23 instructions, if any, were raised?

Intentional ineffective assistance of counsel

7 While representing Darrell Dewayne Cannon on a DWI arising out of a single-car collision in Collin County, defense attorney Chris Hoover showed up on the morning of trial with a written motion to recuse and also urged an oral motion for continuance. The recusal alleged judicial bias based upon events from a prior trial where the judge purportedly "personally attacked" Hoover; counsel claimed to be in the midst of drafting a judicial complaint. The alleged need for a defense expert underpinned the requested continuance.

After a denial of both the recusal motion and his subsequent request to have it heard before a neutral jurist, Hoover announced he was not ready for trial and that the court's rulings jeopardized his ability to provide effective assistance. Hoover declared that he would "not participate" in the trial. The trial continued with Hoover declining to participate in jury selection, arraignment, opening, and evidentiary matters such as objecting or cross-examining. No defense witnesses were proffered.

After the State rested and closed, Hoover presented a written motion for continuance which detailed his need for an expert on how the airbag's impact affected Cannon; no ruling was obtained. Hoover also unsuccessfully pressed a detailed oral motion for an instructed verdict pointing out an alleged defect in the State's proof. At that juncture, the trial judge afforded defense counsel the opportunity to recall each witness and examine them; Hoover declined. Hoover likewise refused to present oral argument, again claiming a lack of readiness. Fifteen minutes of deliberation lead to a guilty verdict. Finding no jury election in the file, the trial judge ultimately sentenced Cannon.

Does Cannon's claim of a denial of his Sixth Amendment right to effective assistance succeed?

6th Amendment violation vs. harm analysis

8 After Janet Lorraine Williams threatened to assault her child's elementary-school teacher, Brazoria County prosecutors charged her with terroristic threat. She pled not guilty and appeared for trial without representation. When she told the judge that she wanted to act as her own counsel, the court briefly discussed this choice with her. However, during the judge's admonishments, he never said that she was entitled to an attorney if indigent, nor did he make any indigency inquiry. Despite these inadequate admonishments, Williams represented herself, was convicted, and appealed.

Was this error subject to a harm analysis?

Jeopardy and multiple homicide convictions per victim

9 While driving home from a trip with his 8-year-old son in their heavily loaded SUV, Edwin Glen Bigon erratically drove for some distance, ultimately crossing the middle lane of traffic as he crested a hill and rounded a corner in Lampasas County. He slammed his SUV head-on into a vehicle driven by a woman, instantly killing her and her infant daughter. Blood samples taken at the hospital led to Bigon's indictment on two counts of felony murder (DWI with a child was the underlying felony), two counts of intoxication manslaughter,

and two counts of manslaughter.

After a one-day bench trial, the trial judge convicted Bigon on all six counts and sentenced him to 18 years' confinement on each, set to run concurrently. On appeal, Bigon raised several complaints but none pertaining to double jeopardy.

Was there a jeopardy issue and, if so, what should be the result?

Recorded police narratives

10 When Trooper Martinez approached John Robert Fischer's car window after stopping him for a seatbelt violation early one morning, the officer noticed the smell of alcohol, converting the traffic stop into a DWI investigation. As the investigation proceeded, the officer repeatedly removed himself from Fischer's immediate presence to dictate the details of his observations, including FST results, into his body microphone.

At trial, Fischer moved to suppress the audio portion of the in-car videotape, objecting that these contemporaneously dictated statements constituted bolstering, self-serving statements of the officer's observations. The trial court ruled that the audio did not qualify as a present sense impression due to its calculated character, calling it the functional equivalent of a police offense report. See Tex. R. Evid. 803(1). Was the audio admissible?

Answers

1 CCP article 44.01(a)(1) authorizes a State appeal from an order that modifies the judgment, and article 42.01, §1(18) lists "credit for time served" as part of a judgment, so jurisdiction existed. Hence, the State may appeal an order that modifies the amount of back-time received by a defendant via a judgment *nunc pro tunc*.

On the merits, the trial court erred in awarding the additional back-time because the terms of the plea bargain controlled. Under CCP article 1.14(a), a defendant may waive almost any right, including the right to pre-sentence back-time, by entering into a plea agreement. The extant plea bargain undermined Collins' claim to the pre-sentence credit. When the judge approved the plea agreement, he became bound to award the agreed amount of credit. No miscalculation or clerical error occurred that needed to be corrected and, therefore, the trial court erroneously entered the *nunc pro tunc* order. *Collins v. State*, PD-1203-06, ___ S.W.3d ___, 2007 WL 4146547 (Tex.Crim.App. November 21, 2007) (8:1) (Meyers).

2 Yes. The court upheld the conviction, dismissing Lawrence's claims of vagueness, failure to confer notice, and due-process violations. As for vagueness, because the plain language of the statute prohibits killing any unborn human, regardless of age, the wording leaves no ambiguity. As for notice requirements, the indictment's tracking of the statutory language conveyed adequate notice. Finally, on the substantive due process contention, the court disregarded the defense arguments that the instant prosecution ran afoul of *Roe v. Wade* jurisprudence because the *Roe* framework presupposes that the mother has chosen to abort the fetus; here, the State prosecuted a third party for ending the embryo's life by fatally shooting the mother. The compelling state interest test has no application to a statute that prohibits a third party from causing the death of a woman's unborn child against her will. *Lawrence v. State*, PD-0236-07, ___ S.W.3d ___, 2007 WL 4146386 (Tex.Crim.App. November 21, 2007) (6:3:0) (Keller).

3 No. The trial judge correctly denied submission of the requested non-statutory jury instructions on prior verbal threats. Trial courts must instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised. Appellate decisions after the 1974 Penal Code was written slowly recognized that non-statutory defense instructions ran counter to the legislature's intent if the charge merely negated an element and was already sufficiently embraced in submitted language. Since then, appellate holdings have denied instructions on accident, good faith, alternative cause, independent impulse, suicide, and alibi. Judge Cochran opines that special instructions not expressly based on statute have no place in a jury charge, even though the instructions related to a statutory defense. Indeed, the court's charge already authorized consideration of the prior verbal threats because the trial judge included instructions on "apparent danger" and "reasonable belief." Present verbal provocation, by itself, is insufficient to support self-defense, yet the statute does not limit the relevance of prior verbal threats as

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they may affect a person's reasonable belief that defensive action may be immediately necessary to protect against the decedent's use of present unlawful force.

Here's the general test. Neither the State nor the defense is entitled to a special jury instruction relating to a statutory offense or defense if that instruction 1) is not grounded in the Penal Code, 2) is covered by the general charge to the jury, and 3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or defense (because it would constitute an improper comment on the weight of the evidence). *Walters v. State*, PD-1952-06, ___ S.W.3d ___, 2007 WL 4245387 (Tex.Crim.App. December 5, 2007) (8:0) (Cochran).

4 Yes. TRE 107 required the introduction of otherwise inadmissible evidence—Walters' self-serving hearsay statements to the 911 operator—when the State introduced the recording of the first 911 call and testimony about the second call. Rule 107 authorizes admission of evidence to fully and fairly explain a matter "opened up" by an adverse party to prevent the jury's receiving a false impression from hearing only part of an act, conversation, or writing. TRE 403's balancing test still limits Rule 107.

While holding that the trial court abused its discretion in excluding evidence of Walters' response to the operator's question, the court determined that only a non-constitutional harm analysis should be applied on remand. Generally, the erroneous exclusion of evidence constitutes non-constitutional error except when the exclusion precludes the presentation of a vital portion of the defense case. Here, because the evidence already revealed the brothers' long-standing ill-will, the error did not impact Walters' constitutional right to present a defense. *Walters v. State*, PD-1952-06, ___ S.W.3d ___, 2007 WL 4245387 (Tex.Crim.App. December 5, 2007) (8:0) (Cochran).

5 Nope. Penal Code §22.04(d)'s general duty of care is statutorily limited to those who "by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care." When considering sufficiency issues on appeal, the Texarkana appellate court analogized this statutory duty to Penal Code §1.07(a)(39)'s "possession," which likewise includes the terms "care, custody, and control." Judge Keasler humorously points out that this analysis presents the Logic 101 fallacy of the undistributed middle [I am a mammal, a dog is a mammal; therefore, I am a dog]. Because the Texarkana court improperly interpreted and broadened the statute in question, remand for reconsideration of the sufficiency claims without grafting the possession definition onto the duty-of-care provision was ordered. *Hicks v. State*, PD-0154-06, ___ S.W.3d ___, 2007 WL 4322001 (Tex.Crim.App. December 12, 2007) (8:1:0) (Keasler).

6 The record warranted one article 38.23 instruction because Madden's driving speed was the only affirmative factual dispute relevant to legally obtaining evidence.

Setting out a useful framework, Judge Cochran explains that fulfilment of three elements entitles a defendant to an article 38.23 instruction: 1) evidence before the jury 2) must affirmatively raise a fact issue 3) which is material to the lawfulness of the challenged conduct. Here, Madden's State-played, tape-recorded comment about driving 55 miles an hour conflicted with the trooper's assertion that Madden was speeding and, of course, speeding was the basis for the stop. Judge Cochran praises the trial judge's article 38.23 instruction applying this conflict to the concept of reasonable suspicion and sets the exemplary charge out in a footnote.

Although a factual dispute existed on the speeding issue warranting one prophylactic instruction, the evidence did not conflict on the continued-detention issue because no affirmative evidence questioned the factual basis for continuing the stop. Vigorous cross-examination (here, of the officer) cannot place facts in dispute unless the witness concedes a fact—only the answers, not the questions, are evidence. Madden attacked the trooper repeatedly about the nervous behavior he reported, strongly insinuating that the video showed a lack of nervousness. The trooper's firm responses and poor-video-quality explanation did not result in an affirmative factual dispute. Although the video was not preserved for the record, Judge Cochran deferred to the trial court's determination that it did not confute any fact. Also, the judge noted

that the video's contents would mandate an instruction only if it affirmatively challenged another fact.

Other reasons for denying the second 38.23 instruction existed. First, multiple observations supported the continued detention, and Madden only contested one: the existence of his nervous conduct. Additionally, Madden submitted an erroneously worded instruction (also quoted in the opinion) which failed to set out any specific historical fact, merely focusing on the law. Had consideration of this mistakenly worded instruction been somehow necessitated, it would have simply shifted the standard of review to that of unpreserved charge error. *Madden v. State*, PD-1243-05, ___ S.W.3d ___, 2007 WL 4404270 (Tex.Crim.App. December 19, 2007) (9:0) (Cochran).

NOTE: This thorough opinion is a veritable how-to guide for submission of article 38.23 instructions and should be placed in everyone's trial notebook.

7 Yes. The Sixth Amendment right to counsel means more than simply having a warm-bodied attorney present; it includes the effective assistance of a lawyer. Hoover's boycott of the proceedings constituted an abandonment of his role as defense advocate, obliterating the necessary crucible of meaningful adversarial testing. On these facts and in line with *U.S. v. Chronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), another case where the adversarial process was completely

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upended, prejudice from this wholly deficient representation was presumed and reversal required.

The record does not include information about Hoover's trial strategy or motivation, nor does it indicate whether Cannon directed, agreed with, or acquiesced with his attorney's conduct. Cognizant of a concern regarding Hoover's motivation, Judge Holcomb chose to accept the attorney's statements regarding lack of readiness as true, especially in light of the criminal defendant's silence on the issue. A different outcome might have been achieved, though. Trial judges may attempt to mitigate the threat of attorney non-participation by ascertaining whether the defendant understands the implications and consequences of his lawyer's conduct and whether the defendant is knowingly, intelligently, and voluntarily waiving the right to effective assistance of counsel.

Although retrial appears to be in Cannon's future, the court remanded the case back to the Dallas COA to consider an unresolved cross-point from the State first. As for Hoover's expectations, Judge Holcomb ordered that the opinion be forwarded to the Office of the Chief Disciplinary Counsel for the State Bar to take any appropriate action. *Cannon v. State*, PD-1084-05, ___ S.W.3d ___, 2008 WL 141902 (Tex.Crim.App. January 16, 2008) (5:4) (Holcomb) (Note that the original October 17, 2007 opinion was vacated).

8 No. Automatic reversible error occurred. A complete denial of the constitutional right to trial counsel is a structural defect that affects the framework of a trial and, hence, is not subject to a harm analysis. Here, Williams was denied her right to trial counsel because the trial court's admonishments regarding self-representation did not obtain a valid waiver of her right to counsel. Without a valid waiver, her right to counsel remained intact and, therefore, her self-representation breached her right to counsel. Williams' failure to request counsel was irrelevant because a defendant cannot be expected to assert a right for which she had received no admonishment. The trial court's insufficient *Faretta* warnings resulted in automatic reversal without resort to any harm analysis. See *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). *Williams v. State*, PD-1245-06, ___ S.W.3d ___, 2008 WL 141910 (Tex.Crim.App. January 16, 2008) (8:0) (Keasler).

9 Jeopardy prevented convictions for felony murder at the same time as the remaining counts (intoxication manslaughter and manslaughter) even though the issue was not raised nor briefed on appeal. The Court of Criminal Appeals previously found a multiple-punishment violation when reviewing convictions for intoxication manslaughter and manslaughter arising from the same victim's death. *Ex parte Ervin*, 991 S.W.2d 804 (Tex.Crim.App. 1999). The court, therefore, turned to consideration of whether felony murder under these facts and intoxication manslaughter also constituted the same offense for jeopardy purposes. Finding that they do, Judge Meyers recognized that the two offenses were not the same under a straight *Blockburger* analysis based upon their statutory construction. See *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932). Yet *Ervin* set out a list of nonexclusive, post-*Blockburger*-test considerations for further determining whether two offenses are "the same." Those factors include the provisions' focus, location, name, and legislative history, among others, with a goal of discerning whether the legislature sought to allow the same conduct to be punished under both provisions. Based upon intoxication manslaughter's historic consideration as a type of homicide, the sameness of the focus of both provisions, and the fact that the underlying felony was DWI with a child, the court reasoned that the legislature did not intend to impose multiple punishments for felony murder based on an underlying felony DWI and also intoxication manslaughter.

Finding a jeopardy violation, the court utilized the most-serious-offense test and left only the two felony murder convictions intact. *Bigon v. State*, PD-1769-06, ___ S.W.3d ___, 2008 WL 141929 (Tex.Crim.App. January 16, 2008) (8:1) (Meyers).

Presiding Judge Keller dissented. While agreeing with the jeopardy aspect of the majority decision, she parted ways on the result, differing with the majority's application of the most-serious-offense test. She noted that in more complex cases where the sentences do not differ, considerations of factors such as effect of an affirmative finding on parole or future enhancement potential require a subjective analysis that should

fall to the prosecution's discretion, not the court's. She would have remanded the case to the trial court to give the prosecution a voice in deciding which convictions should be retained. She also believed that the court's prior decisions rejected the degree-of-felony analysis used by the majority.

10 No. The officer's factual observations, contemporaneously dictated in a calculated fashion on his patrol-car video, were inadmissible as present sense impressions because they were not unreflective statements, unaided by retrospective mental processes. While police officers can utter spontaneous, unreflective present-sense-impression comments that qualify for admission under TRE 803(1), the instant narration revealed that the officer was making conscious "thinking-it-through" assertions while he was engaged in the enterprise of ferreting out crime. Judge Cochran explicated that "calculation and criminal litigation shimmered in the air" and analogized to the anticipation-of-litigation basis for TRE 803(8)(B)'s exclusion of police reports. Nevertheless, an officer may testify to sights and sounds seen and heard during an investigative detention when they are spontaneous, unreflective, and contemporaneous. The court also remarked favorably on law enforcement's use of in-car audio/video equipment. *Fischer v. State*, PD-0043-07, ___ S.W.3d ___, 2008 WL 141850 (Tex.Crim.App. January 16, 2008) (5:4) (Cochran).

Judge Hervey's dissent suggests that, while the majority did not expressly hold that Rule 803(8)(B) trumps Rule 803(1), that was its result. The dissent would have analyzed the substantial contemporaneity of the statements in addition to their spontaneity. Judge Hervey also noted that Fischer's recorded statements about his alcohol consumption were not excluded by the majority's decision. ✤

How will your office observe National Crime Victims Rights Week?

The Texas Attorney General's Office wants to know because it would like to include your local observances on its website. The goal is to list as many Texas events as possible to show the widespread strength of community support for crime victim rights. (Crime Victims Rights Week is April 13–19.) Please let us know what type of events, memorials, remembrances ,and educational activities you have planned, as well as the time, dates, and locations. We also would like to list a primary contact for your event.

Download a form from TDCAA's website (search for "CVRW"), complete it, and fax it to 512/370-9862 by March 28, 2008. You ay also email the requested information to Karen.Martin@oag.state.tx.us or Suzanne.McDaniel@oag.state.tx.us by the same date. Feel free to make extra copies of the form or use an additional sheet of paper if necessary.

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