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

So tell us already! Do we have to get a warrant or not?

The recent Supreme Court case, *United States v. Jones*, examines the legality of police use of a GPS tracking device. Three opinions, two majorities, and an additional test resulted—and we wade in to explain what it all means.

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

A recent case from the United States Supreme Court, *United States v. Jones*,[1] has created quite a stir over just exactly what the case might mean.[2] At issue was the constitutionality of police action in installing and monitoring global positioning system (GPS) tracking devices in criminal investigations. All the justices agreed that the police action in *Jones* constituted a "search," but they did not all agree on what conduct constituted the "search" and for what reason.[3] The case produced three opinions, two majorities, and an additional test for determining if a search has occurred. But no one on the court addressed what was, for some, the most pressing question: whether installing or monitoring a GPS device requires probable cause and a warrant.

The underlying facts in *Jones*

The FBI and Washington D.C. police department were investigating Antoine Jones, a nightclub owner, for narcotics trafficking.[4] Among other surveillance measures, officers attached a GPS tracking device to the underside of the Jeep Grand Cherokee that Jones drove exclusively.[5] When they installed the device, it was parked in a public parking lot in Maryland. The officers had gotten a search warrant to install it, but the warrant authorized installation in D.C., not Maryland, and it had expired the day before the device was installed. For the next 28 days, the device relayed the Jeep's location to within 50 to 100 feet, every 10 minutes, amassing over 2,000 pages of data about Jones's movements. Once, during the four-week period, the officers had to replace the device's battery, but again, they did so while it was in a public parking lot. The data from the tracking device established a pattern of movements that connected Jones to a stash house concealing 97 kilograms of cocaine and $850,000 in cash.[6]

Jones was then indicted for conspiracy to distribute cocaine, and he filed a motion to suppress

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It is more blessed to give than to receive, to serve than to be served

We at the Texas District and County Attorneys Foundation know both of these truths all too well—that's what we do! We *give* our members what they need and we *serve* them with all our heart!

By Jennifer Vitera
TDCAF Development Director in Austin

As we prepare to kick off our 2012 Annual Campaign, we'd like to remind you, our members, about some of the things the Foundation does for you. In the last four years we've funded our Train the Trainer seminar and the Advanced Trial and Appellate Advocacy Courses; published the *Domestic Violence Training Manual* and *Offense Report Manual* and sent them free to all prosecutor offices; put on two DWI Summits; sponsored last year's Intoxication Manslaughter Course; updated the TDCAA website; and hired a victim services director and a senior appellate attorney. We even manage to reimburse folks in your offices who attend our seminars for part of their food and hotel expenses. Whew! All for the good of our members—and, in turn, your community.

We're asking for you to return the favor, to give back to the Foundation so that we can continue to fund all sorts of endeavors for Texas prosecutors and staff. Here's a peak at what's in store for 2012 and beyond:

- free books for attendees at our Domestic Violence Seminar;
- a third DWI Summit;
- more specialized training for prosecutors and investigators; and
- a new endowment account through our Texas Prosecutors Society. The idea is to have funds available in the future to provide critical support to the association and our members.

The Foundation is always at your service, so please consider giving so that many others can receive. You will be receiving an Annual Campaign request in the mail in the next few weeks; you can send it back with a donation or log onto our website, www.tdcaf.org, to show your support.

Our goal is to have 100-percent support from every member of TDCAA. You may designate your gift for training or books, make a gift in honor or in memory of a loved one, or make an unrestricted gift for general operations.

1st Annual TDCAF Investigator Section Golf Tournament

We would like to invite you to participate in the Texas District and County Attorneys Foundation's Investigator Board Annual Golf Tournament. It's Saturday, March 24, at The Club at Concan in beautiful Concan, Texas (that's in Uvalde County, not far from San Antonio). Funds raised through the tournament will support the Foundation's Annual Campaign, so please join us for a beautiful day on the links. See www.tdcaf.org for details, or email vitera@tdcaa.com to reserve your spot on the golf course.

Another big thanks to our Investigators

It was a close race this year between the Investigator and Key Personnel Sections in the 2011 Annual Campaign Challenge, but the investigators were victorious yet again! We treated them to a well-deserved happy hour at TDCAA's Investigator School in Galveston in February (photos below) as a token of our gratitude for their generosity. Congratulations!

PowerPoint for the Courtroom

Polish your courtroom presentation

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skills while supporting the Foundation by buying the PowerPoint for the Courtroom CD. It walks through almost every element of PowerPoint, from creating new slides to importing and editing video clips. It's a must-have for every office, and it's only $20! Please visit our website, www.tdcaf.org, to order it. ❇

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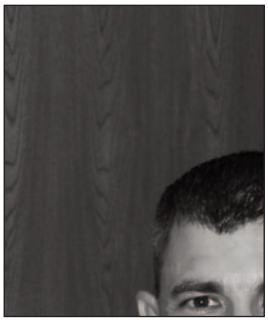
Reclaiming the moral high ground

If you've been following the news at all here lately, you've no doubt noticed a lot of discussion in the media concerning the issue of transparency, or the lack thereof, in prosecutors' offices in Texas and across the country. Whether it relates to a discussion of the need for mandatory "open file" policies, claims of *Brady* violations, or prosecutors taking the Fifth, it seems that every time you turn around some reporter or editorial board is suggesting that prosecutors are afraid of the truth.



By William Lee Hon
Criminal District Attorney in Polk County

How did this come to be? In civil practice, there's an old saying that "a lawyer's time is his stock in trade." Because prosecutors don't typically charge by the billable hour for their time, I would like to think a slight variation of that saying is more appropriate for us. I would suggest something along the lines of: "The truth is a prosecutor's stock in trade."

In a former life, I worked as a civil lawyer in an insurance defense law firm, which was frequently engaged by insurance companies to provide representation for companies sued in personal injury claims. Whether it was a "slip and fall," motor vehicle accident, or medical malpractice case, in the context of written discovery, almost every answer to an interrogatory or request for production of documents began with something along the lines of, "Objection. This request is overbroad/calls for a legal conclusion/seeks privileged information/ seeks information protected by the attorney-client privilege." It was as if we looked for creative ways to avoid revealing evidence that was important or potentially harmful to our side of the case. Of course, the plaintiff's lawyers did the same thing in response to written discovery propounded by the defense. All of this gamesmanship inevitably resulted in filing motions to compel discovery, hearings before the trial judge, orders compelling the production of evidence, requests for sanctions against the other side, and so on.

Aside from no longer having to keep a meticulous ledger of every single minute I spent during the work day for billing purposes, one of the most profound differences I noticed in the practice of law when I became an assistant district attorney was the lack of "paper pushing" as it related to discovery. My predecessor in office, John Holleman, for whom I went to work in February 1996, had an open-file policy in effect at the time and was very supportive of transparency by the State. Mr. Holleman was a very experienced prosecutor and trial attorney and explained to me many times how an open-file policy could cure various criminal discovery oversights related to *Brady* or "good faith" mistakes in the failure to list a trial witness or a prior conviction in response to a Rule 404(b) request. Our district judges knew that our office had such a policy and routinely made evidence available to the defense for inspection. I can recall several instances over the years where Mr. Holleman's open files really helped us out at trial or on appeal.

In spite of the that policy, one of the things I noticed during my time as an assistant was that there were still several defense attorneys—mostly from out of town—who persisted in filing voluminous "boiler plate" discovery motions and tying up our judges' time in pretrial hearings on those motions. I always thought this was a little silly and a waste of time in view of the fact that we routinely gave the defense attorneys access to all of the information in our files. When I took office as the elected criminal district attorney in 2007, one of my first objectives was to discourage the filing of these boiler-plate discovery motions. Ken Sparks, the county and district attorney in Colorado County, was kind enough to share a mutual discovery agreement he had been using very effectively, and I adopted Ken's policy with a few very minor modifications for Polk County. One of the things that Mr. Holleman had not allowed but that many of our local defense attorneys had been seeking was an opportunity to copy our files. When I adopted Ken's policy for our county, the deal I made with defense attorneys was that I would allow them to copy our files in exchange for their not filing written discovery motions. We still furnish them a witness list and extraneous offense notice if they request one, but I've found that in most cases, once they've been able to make a copy of our file, they no

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longer request written notice. The only exceptions we have to this policy relate to criminal histories, certain information pertaining to child victims or witnesses, or information otherwise confidential by law. Almost universally, this policy has been well-received by the defense bar in Polk County.

In view of the recent media interest in criminal discovery policies, or lack thereof, I must confess that it's kind of hard for me to relate to the controversy. From the day I first became a prosecutor, it's been the policy of the office that I've worked in to voluntarily share our information with defense attorneys and to work with them to address their various discovery needs. In short, we try to be transparent, and they seem to appreciate it. More importantly, I think they understand that our open-file and file-copy policies protect them and any judgment and sentence from post-conviction claims and grievances related to ineffective assistance of counsel.

As a matter of personal policy, it is my belief that prosecutors, more than any other type of lawyer, should strive for openness and transparency. Contrary to the claim of Colonel Nathan Jessep in *A Few Good Men* (he's the character made so famous by Jack Nicholson) we can and should be able to "handle the truth." The cover of this publication quotes Article 2.01 of the Texas Code of Criminal Procedure, stating that "it shall be the primary duty of all prosecuting attorneys ... not to convict but to see that justice is done." Justice, I submit, in any given case is based upon all of the facts, good and bad, as they relate to the particular case. How can justice ever be obtained if we aren't open, honest, and realistic with ourselves, the defense, and the trier of fact, about all of the facts of our case?

Understandably, there are times in any criminal investigation or prosecution where information should and must remain confidential. Before a suspect is developed or arrested, during juvenile proceedings, and during grand jury proceedings are a few of those situations that immediately come to mind. But in most cases there inevitably comes a time when we need to lay all of our cards on the table. It causes us as prosecutors to be realistic about the strength of our case. It helps defense attorneys to do their jobs better. And, at the end of the day, it increases the likelihood of obtaining a just outcome for that case.

I've heard some prosecutors argue that our system is an "adversarial" one and, to an extent, I do agree with that proposition. Both sides in any criminal case have rules of procedure and evidence which must be followed. Aaron Condon, one of my favorite law professors at Ole Miss, used to say that the word "objection" was "a sound you heard in the courtroom when the truth was about to break out!" With that said, I'm not sure that it's right to use procedural rules and tactics to resist the discovery of evidence or make life more difficult for the other side, at least as it relates to revealing the truth. Eventually, the truth always comes out and it does us no good—in fact, it makes us look bad—to prolong the inevitable.

Ultimately, we are purveyors of the truth. We are the ones in the white hats. We are the seekers of justice. Being obstructive, being disagreeable, or, heaven forbid, hiding the truth, is not who we are. When the media and other critics are coming after us for discovery or *Brady* shortcomings, I think it is even that much more important that we strive for openness and transparency. In doing so, we can reclaim the moral high ground on these issues, increase the likelihood of a fair and just result in each case, and ultimately restore and enhance public confidence in our profession. ❇

NEWS WORTHY

A note about death notices

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

There's a new sheriff in town

Move over, Walker, Texas Ranger. **Chuck Norris**, the legendary international karate champion turned action movie star, will now be sharing Texas with another martial arts master, **Steven Seagal**. The Associated Press is reporting that Seagal has been sworn in as a deputy sheriff in Hudspeth County, the sparsely populated border county just east of El Paso. Hudspeth County has had its share of notoriety recently, with a few famous folks being arrested for drug offenses at the border checkpoint near the county seat of Sierra Blanca. Celebrities such as actor Armie Hammer, rapper Snoop Dogg, and singer Willie Nelson got to visit the Hudspeth County Jail when busted for drugs at the checkpoint.

By Rob Kepple
TDCAA Executive Director in Austin

The AP reports that Seagal will help train local law enforcement in martial arts. It is probably a relief to the district attorney and county attorney, **Jaime Esparza** and **Kit Bramblett**, respectively, that Seagal won't be making cases that will require him to testify in court. Hey, we've seen his TV show and some of his 22 B-movies. He may be an aikido master, but I'd be worried about his performance on the stand.

TDCAA committees for 2012

Your TDCAA President **Lee Hon** (CDA in Polk County) has appointed the committees for 2012 (see the full list in the box below). TDCAA is a truly member-driven organization, and the work of the committees is vital to the association.

- The Training and Civil Committees, for example, do the heavy lifting to design our annual seminars.
- The Editorial Committee assists **Sarah Wolf**, our communications director, in developing timely and relevant content for this journal.
- The Publications Committee advises **Diane Beckham**, senior staff counsel and editor of an impressive library of TDCAA publications, on the content and topics of publications.
- The Nominations Committee works to identify emerging leaders of the association and folks who should be recognized for their work with awards such as the Prosecutor of the Year, Lone Star Prosecutor, and Oscar Sherrell awards.
- The Diversity, Recruitment, and Retention Committee has the task of designing training to encourage a dialogue on racial issues within our

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profession and to develop initiatives to raise the visibility of our profession at law schools and in the community at large.

- The Appellate Advisory Committee guides the work of our Senior Appellate Attorney, **John Stride**.
- The Finance Committee oversees the budgeting of TDCAA's various grant funds and fiscal operations, which continues to get more complicated as we provide more services to our members.

Finally, for 2012 Lee has appointed a Training Subcommittee on Emerging Issues to help hone TDCAA training on some of the topics of particular interest in our profession today, such as forensic science, eyewitness identification, DNA, and *Brady*. This committee will spend some time evaluating the issues and developing core training that will assist prosecutors in performing their duty to protect the public and do justice.

Thanks to all of those who will put in valuable work this year. If you have ideas in any of these areas, you can contact us here at the association or the committee chairs or members directly. Got ideas for leadership or award nominations? The committee would love to have them. Want to serve? Just give me or Lee a call!

LEMIT offers draft eyewitness protocol

Last year, the Texas Legislature tasked Sam Houston State University's Law Enforcement Management Institute of Texas (LEMIT) with drafting a model eyewitness identification policy. The purpose was to create a model policy that could be useful to law enforcement agencies, which must adopt their own eyewitness identification policy by September 1, 2012. The statute governing this policy is Article 38.20, Texas Code of Criminal Procedure.

You can review the LEMIT model policy here: www.lemitonline.org/publications/ewid.html. In addition, at that website LEMIT offers a Frequently Asked Questions page as a summary of the model policy. The key elements are a sequential presentation of photographs and a blind or "blinded" administration in which the presenter either does not know if a suspect's photo is in the presentation or the presenter cannot see or track which photo is presented to the witness. The policy has sample SOPs for the administration of photo lineups, live lineups, and showups, along with suggested instructions to the witnesses. Finally, the model policy outlines steps that should be taken to document the identification procedures used.

Obviously, prosecutors should meet with their local law enforcement departments this spring to see what policies they will implement come September 1. You will need to know those policies when you present an identification in court. Keep in mind that the failure to adopt a policy or to follow an adopted policy will not make an identification inadmissible, but it will certainly subject the administrator of the ID procedure to cross-examination concerning ID procedures.

Retirement of the "gentleman judge"

Congratulations to **Billy John Edwards** on his retirement December 31 from his post as the 259th Judicial District Attorney serving Jones and Shackelford Counties. Judge Edwards spent 20 years on the bench in Taylor County before returning to his home county as the district attorney. Judge Edwards represented the gold standard of judicial demeanor and continued to impress folks as the district attorney. Thanks for your 40 years of service! The good news is that the governor has already appointed the new DA for the 259th, **Joe Edd Boaz** of Anson. Joe Edd, an experienced criminal lawyer, has hit the ground running.

Technology and police work

If you keep up with the law through our weekly case summary emails, you read some excellent commentary January 27 on the recent Supreme Court decision of *United States v. Jones*. (Read a more in-depth article on our front cover.)

In *Jones*, federal agents tracked the movements of a car registered to a drug dealer's wife with a GPS device. The agents had a warrant for some period of time, but much of the 28 days of tracking was not covered in the warrant. The district court allowed evidence produced as a result of the tracking device when the car was in a public place, reasoning that there is no expectation of privacy when the car is on the streets. The appellate court reversed, and in a 4-1-4 opinion, the Supreme Court of the United States announced that the use of the tracking device constituted a search. As the TDCAA commentary pointed out, you likely heard a thud after the decision was issued—a pile of questions landing on your desk: Do you need a war-

rant or not for a GPS device? Based on probable cause or reasonable suspicion? Does any of this apply to laptops and cell phones?

As you might recall, it was not too long ago that the Supreme Court rebuffed law enforcement's warrantless use of thermal imaging technology in investigating a marijuana growing operation in a residence. (Apparently, with that technology a house concealing hundreds of growing lamps will light up like a Christmas tree.) But that was also declared a search in *Kyllo v. United States*, 533 U.S. 27 (2001).

So how many years will it take for the court to firm up the law on technology and searches? Once again, it has validated my theory that the line between great police work and unconstitutional conduct is razor thin. ❇

Lone Star grand jury selection and independence, part 2

The previous article in this two-part series considered the selection of grand jurors.[1] In this article the focus is on the authority of the grand jury.

By John Stride
TDCAA Senior Appellate Attorney

Interestingly, England—whence the American grand jury system can be traced going back to the years preceding the Magna Carta—abandoned grand juries more than three-quarters of a century ago and replaced them with committal proceedings, basically a process whereby if a defendant pleads "not guilty" and a magistrate reviews the strength of the prosecution's written evidence. Australia, Canada, and New Zealand also have abolished grand juries.[2]

In the U.S.A., only 23 states—including Texas—and the District of Columbia require indictment by grand jury for select offenses. Grand jury indictment is optional in 25 states and is not used at all in Pennsylvania and Connecticut (although the latter two retain grand juries for investigating, as do all other states). Texas, however, is one of few states that—like the federal government—has the distinction of charging all felony offenders by a jury of their peers.[3]

In the U.S.A., cynics assert that the grand jury is simply a prosecutor's "rubberstamp": The prosecutor presents a case and makes a recommendation, which the grand jury contentedly affirms. Hence that hackneyed culinary expression that a prosecutor can indict anything—including a ham sandwich.[4] No doubt an overbearing prosecutor can dominate a grand jury and influence its decisions, but one who does so, especially as a matter of course, denies himself the very protection the grand jury affords, performs a gross disservice to the community by stripping the grand jury of its independent role in determining the propriety of felony charges, and renders the grand jurors' service nugatory.

Today, there is an unparalleled fondness for "integrity units" to provide oversight of the prosecution's work. Not to denigrate their work, which has revealed some improper convictions, but Texas already has in place two *pre*-conviction integrity units—the grand jury and the petit jury.[5] Although most felony offenders never have their cases decided by a petit jury, they do have their cases evaluated by a grand jury.[6]

Pre-conviction integrity unit

A properly constituted and informed grand jury working within its discretion serves as the first pre-conviction integrity unit in a felony prosecution. While those routinely involved in the legal system, such as law enforcement, investigate and file cases, and counsel and magistrates serve to inform and protect defendants' rights, a grand jury, like its sister, the petit jury, is the opportunity for

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those not directly connected to the daily business of criminal justice to temper the adversarial process with common sense, compassion, non-technical review, and to bring to bear their diverse viewpoints. Free of the clutter of legal niceties but within a statutory framework, the jurors determine what they as a body believe is the proper and just result—a "true bill" or "no bill." Their input not only protects the innocent and pursues the guilty but also assists, shields, and guides the prosecution. By virtue of its role, a grand jury lends integrity to the felony offender justice system.

The authority of the grand jury is, if fully exercised, awesome—especially in light of the members' lack of uniform legal training (which may be their greatest asset as they are free from the restraint of technical rules[7]) and the powers they wield.

We all know that, traditionally, grand juries receive information, investigate, and deliberate.[8] In Texas, the express duty of the grand jury is to review all indictable offenses whether the information is presented by a prosecutor or credible person or learned through its members' own knowledge.[9] In the usual course of events, a grand jury hears evidence presented by a prosecutor. But, sometimes forgotten because of its infrequency, a grand jury can proceed without any input from a regular prosecutor (though the appointment of an attorney *pro tem* is appropriate) which permits a grand jury to "turn the tables" to investigate even those working within the criminal justice system, whether those in law enforcement, a member of the judiciary, court staff, a prosecutor's staff, or the prosecutor.[10]

The grand jury vis-à-vis the trial court

The foreperson of the grand jury, not the trial judge or the prosecutor, presides over and conducts the jury's proceedings.[11] The foreperson can issue summons or attachment for any witness presiding in the county and can do so without the involvement of a prosecutor,[12] although, of course, if a subpoena is challenged the trial court will adjudicate its propriety. Also, a grand jury requires the court's imprimatur to subpoena witnesses outside of its county.[13] Although a grand jury can consider incompetent evidence, it cannot violate privileges established by constitutions, statutes, or common law—for example, compelling a person to testify in violation of his Fifth Amendment right not to testify (unless adequate immunity is granted).[14] So, if a witness refuses to testify or produce subpoenaed documents, the grand jury must seek recourse from the trial judge.[15]

A grand jury that recommends charges as well as investigates—both in conjunction with the prosecution and independently—must have substantial powers. As the Supreme Court of the United States opined a quarter-century ago:

> [B]road powers are necessary to permit the grand jury to carry out both parts of its dual function [determining if there is probable cause to believe a crime has been committed and protecting citizens against unfounded criminal prosecutions.] Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.[16]

And much of the grand jury's power devolves from the trial court. Thus, a grand jury "remains an appendage of the court" and "may depend in large part on the enforcement powers of the court."[17] This relationship with the trial court provides the grand jury with its teeth and usually keeps grand juries operating within the bounds of the law.

A trial court's relationship with its grand jury, under either the key-man or random selection system, is a tight one. A grand jury is "very connected" to its appointing court, as the court exercises supervisory power … whether by impaneling, reassembling, qualifying, quashing subpoenas, or aiding investigation."[18] Nevertheless, the grand jury is of a "separate and independent nature" because, although it may seek advice from the court, it deliberates alone and in secret.[19] So theoretically, if not always practically, even a trial court has a limited ability to control a grand jury.[20]

The grand jury vis-à-vis the prosecutor

When interacting with grand jurors, a prosecutor really plays two roles.[21] First, the prosecutor has a limited right to appear before the grand jury. The prosecutor is "entitled" to appear to inform the grand jury of offenses. In this role, the prosecutor *may* examine witnesses; advise on questioning; issue summons, subpoenas, or attachments; but *shall* prepare indictments listing the witness's names.[22] The prosecutor does not attend or participate in the grand jury's deliberations.[23] The prosecutor also does not take part in presenting the signed indictments to the trial court or clerk—that is the foreperson's responsibility.[24]

Second, the prosecutor appears in an advisory capacity. In fact, the prosecutor assists the grand jury at its pleasure. The grand jurors *may* seek advice from the prosecutor on "any matter of law" or on "any question" concerning "the proper discharge of their duties."[25] But the grand jury can turn to the appointing court instead. Indeed, grand jurors can seek advice from the court "touching any matter before them," so long as they do not reveal the particular accusation before them.[26] On its face, then, the topics on which a trial court may advise are much broader than that of the prosecutor. Also, there is no statutory authority for a prosecutor to rein in a grand jury—although communicating any problem to the appointing trial judge should suffice with a cooperative judge.

A prosecutor, then, should have more of an advisory than supervisory role with a grand jury. As one appellate court has opined, a prosecutor is merely a "servant of the grand jury."[27]

Secrecy

An almost mystical aura pervades grand jury proceedings because they are shrouded in secrecy—the uninitiated may even suspect something like the practice of witchcraft. Indeed, in these days of open government and demands for full disclosure of the prosecution's files, this veil provides fertile grounds for conspiracy theorists. But the "covert" operations of the grand jury are also essential to its authority.

The maintenance of the grand jury's secrecy promotes its dual function by 1) concealing the identity of witnesses who would otherwise not come forward to testify, 2) preventing retribution to witnesses for full and frank testimony, 3) denying notice to those who might flee or influence witnesses, and 4) allowing those accused but exonerated freedom from public ridicule.[28] Therefore, when not abused, secrecy furthers both the protection of the innocent and the pursuit of the guilty.[29]

Conclusion

A wisely selected and properly advised grand jury—one cognizant of its responsibility and authority—does not operate recklessly and is no mere vessel of the prosecution or the trial court. Rather, it is a free-thinking, impartial body with the tools to investigate anyone in its jurisdiction, exercise sound group discretion, and fairly recommend felony charges or not. As their oath, in part, states:

> You shall present no person from envy, hatred, or malice, neither shall you leave any person unpresented for love, fear, favor, affection, or hope of reward, but you shall present things truly as they come to your knowledge, according to the best of your understanding, so help you God.[30]

If a grand jury is to serve as an effective filter—or if you prefer, felony pre-conviction integrity unit—in our criminal justice system, it must remain largely autonomous. As "Texas courts have long described … [a grand jury should be] a separate tribunal, independent of the control of judges and prosecutors."[31] A Texas grand jury should be both a shield and a sword—investigating and presenting—to protect the innocent and pursue the guilty. ❇

Endnotes

1 See *The Texas Prosecutor*, Vol. 42, No. 1, January–February 2012 issue.

2 See Wikipedia (ever a useful starting place for general research, but sometimes less than authoritative), available at: http://en.wikipedia.org/wiki/Grand_jury.

3 Most of the information in this paragraph is drawn from Professor Susan W. Brenner's website on grand juries in the U.S.A. available at: http://uspolitics.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=uspolitics&cdn=newsissues&tm=56&gps=231_486_1276_573&f=00&tt=2&bt=0&bts=1&st=11&zu=http%3A//www.udayton.edu/%7Egrandjur/index.htm. Professor Brenner is the NCR distinguished Professor of Law and Technology at the University of Dayton School of Law.

4 The saying is apparently attributed to Judge Sol Wachtler, the former Chief Judge of New York State. See www.websters-online-dictionary.org/definitions/grand+jury?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=grand+jury&sa=Search#906. May he be sorry he coined it!

5 I borrow this apt analogy from Williamson County District Attorney John Bradley's Grand Jury presentation at the 2011 TDCAA Elected Prosecutor Conference.

6 Traditionally, most criminal cases are resolved by plea bargain agreements and only a few felony proceedings are initiated by information.

7 See, e.g., *Costello v. United States*, 350 U.S. 359, 362 (1956) ("in this country … the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor").

8 See Tex. Code Crim. Proc. arts. 20.09, 20.17–19.

9 See Tex. Code Crim. Proc. art. 20.09.

10 A recent illustration of a grand jury's ability to investigate the elected district attorney is to be found in *In re Guerra, District and County Attorney for Willacy County, Texas*, 235 S.W. 3d 392, 415 (Tex. App.—Corpus Christi, 2007) (orig. proceeding) (conditionally granting writ of mandamus to have magistrate order's appointing an attorney *pro tem* set aside, but also observing that, in the face of a grand jury initiating an investigation of a prosecutor, a trial court may disqualify the prosecutor and appoint an attorney *pro tem* "to preserve the integrity of the court and aid in the administration

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of justice").

11 See Tex. Code Crim. Proc. art. 20.07.

12 See Tex. Code Crim. Proc. art. 20.10.

13 See Tex. Code Crim. Proc. art. 20.11.

14 *United States v. Calandra*, 414 U.S. 338, 346 (1974); *United States v. Dionisio*, 410 U.S. 1, 12-15 (1973).

15 See Tex. Code Crim. Proc. art. 20.15; *Ex parte Edone*, 740 S.W.2d 446, 448-49 (Tex. Crim. App.1987) (testimony); *Ex parte Marek*, 635 S.W.2d 35, (Tex Crim. App. 1983) (documents).

16 *United States v. Sells Engineering*, 463 U.S. 418, 424 (1983).

17 *Id.*

18 *Ex parte Edone*, 740 S.W.2d 446, 448 (Tex. Crim. App. 1987).

19 See *id.*

20 The irreverent analogy that jumps to mind is the relationship between someone and his dog.

21 See, e.g., *id.*, at 408 n.55.

22 See Tex. Code Crim. Proc. arts. 20.03, 20.04, 20.10, 20.11, 20.15, 20.19, 20.20.

23 See Tex. Code Crim. Proc. arts. 20.03, 20.11.

24 See Tex. Code Crim. Proc. art. 20.20.

25 See Tex. Code Crim. Proc. art. 20.05.

26 Tex. Code Crim. Proc. art. 20.06.

27 *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 621 (Tex. App.—Houston [14th Dist.] 1994) (writ denied) (referring to the prosecutors duty to take custody of evidence submitted for the grand jury's consideration).

28 See *id.*, quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979) (footnotes and citations omitted).

29 *Sells Engineering*, 463 U.S. at 424, quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943).

30 Tex. Code Crim. Proc. art. 19.34.

31 *Whittington v. State*, 680 S.W.2d 505, 512 (Tex. App. —Tyler 1984, pet. ref'd).

Crime Victims' Rights Week 2012

By Suzanne McDaniel
TDCAA Victim Services Director in Austin

The 2012 National Crime Victims' Rights Week (NCVRW) Resource Guide is available at http://ovc.ncjrs.gov/ncvrw2012/index.html. It contains everything you need to host and promote NCVRW in your community, including posters, camera-ready artwork, web ads, and a Spanish version. NCVRW will be observed April 22-28, 2012; "Extending the Vision: Reaching Every Victim" is the theme. Please send us articles and captioned pictures on activities in your community.

Your suggestions needed

It was great to see old friends and meet new ones at our Annual Criminal & Civil Law Update in Corpus and our KP/VAC training in Houston. Thank you all for your contributions and enthusiasm! Our interactive sessions were terrific largely due to your willingness to share frustrations and solutions with your colleagues.

We are in the midst of planning this year's seminars and need your suggestions again. Let us know the topics that interest and inspire you. Many of you mentioned that you would appreciate hearing about a case study from a prosecutor and VAC on how they worked as a team from grand jury through post-adjudication. Please let me know if you would like to share your experience. You can also contact your regional board director: **Chair: Cyndi Jahn**, Bexar County Criminal District Attorney's Office, cjahn@bexar.org; **Region 1: Laney Dickey**, Lamb County & District Attorney's Office, laneydickey@nts-online.net; **Region 2: Kara Welch**, Midland County District Attorney's Office, Kara_Welch@co .midland.tx.us; **Region 3: Kathy Dixon**, 33rd and 424th Judicial Districts' Office, vicser3@ burnetcountytexas.org; **Region 4: Christine Segovia**, Bee County Attorney's Office, Christinasegovia@hotmail .com; **Region 5: Nancy Ghigna**, Montgomery County District Attorney's Office, Nancy.Ghigna @mctx.org; **Region 6: Jalayne Robinson**, Wood County District Attorney's Office, jrobinson@co .wood.tx.us; **Region 7: Blanca Burciaga**, Tarrant County Criminal District Attorney's Office, beburciaga @tarrantcounty.com; **Region 8: Jill McAfee**, Bell County District Attorney's Office, Jill.McAfee@co.bell.tx .us.

Free technology and stalking resources

The Use of Technology to Stalk Online Course is a new resource produced by the Stalking Resource Center of the National Center for Victims of Crime with funding from the Office for Victims of Crime at the U.S. Department of Justice. The purpose of this self-paced, interactive online training is to increase the ability of criminal justice professionals and victim service providers to recognize how stalkers use technology and,

ultimately, enhance their ability to work with victims of stalking. The course begins with an introduction to the concept of stalking and then moves on to share how technology is used to stalk. Each technology module includes information on documenting evidence and investigation and considerations for victim safety. The course concludes with a discussion on how stalking affects victims and resources for additional information and assistance. Visit www.tech2stalk.com for more information and to register.

The Use of Technology to Stalk training video and discussion guide is another free resource produced by the Stalking Resource Center of the National Center for Victims of Crime with funding from the U.S. Department of Justice Office for Victims of Crime. This 15-minute video is designed to enhance awareness among professionals working with stalking victims and offenders of how stalkers use a vast array of technologies today. The video provides an overview of the most common forms of technology used by stalkers, victim testimony, and commentary from professionals on considerations for working with victims. The short format of the training video makes it ideal for situations in which time for training is short, such as law enforcement roll-call trainings or victim advocate training. To request a free copy, please visit the Stalking Resource Center website at www.ncvc.org/src.

Restitution toolkit

The National Center for Victims of Crime (NCVC) has e-published the final two sections of its Restitution Toolkit (featured in a fall 2011 MMM). You can now download the complete Toolkit at www.ncvc.org/ncvc/main.aspx?dbID=DB_MakingRestitutionReal171. I can't tell you how many times, when I worked at the Attorney General's Office, I answered a desperate call from crime victims trying to find out if they had been awarded restitution. Somehow the victim had gotten all the way through sentencing without hearing from the probation office or prosecutor that restitution had been ordered. NCVC has samples of brochures for victims about restitution that are especially useful and can be adapted for your office: www.ncvc.org/ncvc/main.aspx?dbID=DB_ToolkitResources412#SelfHelp.

A Texas Victim Assistance Timeline, Part I

The Crime Victim Rights Week Guide published by the Office for Victims of Crime contains a timeline for national milestones in victim assistance. It is often helpful to review the history of victim rights especially when financial and legislative issues are at stake. It is always interesting to note that the issue transcends politics with early champions like the liberal Ralph Yarborough and the conservative Ronald Reagan. We are in the process of updating our timeline for Texas events. Your input is welcomed. Thank you to Barry Macha, former Criminal District Attorney in Wichita County, for his.

1965 U.S. Senator Ralph Yarborough of Texas introduces the first federal crime victims' compensation bill in Congress (S.2155).

1977 Harris County District Attorney Carol Vance establishes the first victims' assistance program in a Texas prosecutor's office. Suzanne McDaniel is the program director.

1977 Texas becomes one of the first states to pass legislation requiring law enforcement to pay for forensic sexual assault exams.

1979 The Texas Crime Victims' Compensation Act establishes a fund to compensate victims of violent crime for their crime-related financial losses, to be administered by the Texas Industrial Accident Board.

The Texas Legislature also passes HB 1075, the first bill to provide protection and temporary shelter in a family-oriented environment for victims of domestic violence and their families until the victims may be properly assisted through counseling, medical care, legal assistance, and other aid. The act requires the Texas Department of Human Resources to contract for services with a maximum of 12 centers that provide shelter and services to victims of family violence with a maximum contract payment of $50,000 a year for each center. The act also amends the Family Code by adding Title 4 (Protection of the Family) and Chapter 71 (Protective Orders).

1980 The Texas Crime Victims' Compensation Program is established on January 1 with revenues collected from court costs. A total of 1,060 claims were filed the first year and only $417,000 paid in reimbursements. It becomes apparent to administrators that insufficient funds are available and a waiting list for awards is established on December 1.

See the next issue for a continuation of the timeline! ❇

Continued from the front cover

So tell us already! Do we have to get a warrant or not? (cont'd)

the GPS data. The trial judge ruled that Jones enjoyed the reasonable expectation of privacy only while the Jeep was parked in his attached garage, not while it was moving on public streets where it could be viewed by all. Consequently, the trial judge suppressed only the data showing the vehicle was in his garage. The remaining GPS data helped convict Jones, and he was given a life sentence. The D.C. Circuit Court of Appeals reversed the conviction, and the Supreme Court affirmed that decision.[7] The entire court agreed that the action police took to get the GPS data constituted a "search," but the justices disagreed over precisely what conduct constituted the search and why.[8]

The majority's concern

For the five justices in the majority authored by Justice Scalia, what mattered most was that police trespassed onto Jones's Jeep to monitor his movements.[9] Their decision breathed new life into a test that most people believed had been discarded: that law enforcement's physical intrusion onto property rights to find information (here, a trespass onto Jones's Jeep) constitutes a "search."[10]

Not all observations by the police are "searches" that trigger Fourth Amendment concern. Officers can walk or drive down the street looking for criminal activity and view what is exposed to the public without implicating the Fourth Amendment. But the Supreme Court has vacillated on what more is needed to establish a "search" under the Fourth Amendment. At one time, the definition of a search turned on whether police trespassed onto the defendant's property rights to gather information.[11] Famously, in 1928, in *Olmstead v. United States*, the Supreme Court held that a wiretap was not a search when it tapped into phone wires on the street instead of at the defendant's house or on his property.[12] Because no trespass occurred, there was no Fourth Amendment search. But 40 years later, the court reversed itself in *Katz v. United States* and found that a microphone taped to the outside of a public phone booth violated the Fourth Amendment, even though there was no violation of the defendant's property rights.[13]

Post-*Katz* cases adopted the analysis of the concurrence in *Katz*, which found a search occurred because the police action violated a "reasonable expectation of privacy."[14] Until *Jones*, nearly everyone understood that *Katz* replaced the old common-law trespass test with the newer reasonable-expectation-of-privacy test.

Scalia's majority changes that. He reasons that physical intrusion onto Jones's Jeep with the aim of collecting information would have been considered a "search" at the time the Fourth Amendment was adopted.[15] The text of the amendment, Scalia explained, was concerned with maintaining the integrity of particular property.[16] It reads: "*[t]he right* of the people *to be secure in their persons, houses, papers, and effects,* against unreasonable searches and seizures, shall not be violated" (my italics).[17] Without overruling any prior cases, Scalia declares that the common-law trespassory test had existed alongside *Katz* all along.[18] He distinguishes the post-*Katz* cases suggesting otherwise or adds them into the new formulation of the test for a "search."[19] *Oliver v. United States*, for example, had held that a search onto the defendant's open field, even though a trespass at common-law, was still not a "search."[20] To account for *Oliver* in the common-law trespassory test, the majority adds the requirement that the government intrusion or trespass must involve one of the protected areas enumerated in the Fourth Amendment (persons, houses, papers, and effects).[21] So, as the majority has now formulated a new test. To be a search, there must be:

1) either:

a) a common-law trespass onto the person, house, papers, or effects,[22] *or*

b) an invasion of a subjective expectation of privacy that society recognizes as reasonable (Katz), *plus*

2) an attempt to find something or to obtain information.[23]

Jones is sure to be credited for this newly articulated black letter law. Also, after *Jones*, there are sure to be more debates over whether certain police conduct constitutes a "trespass" at common law. In applying the test to the facts in *Jones*, Scalia and the four other justices who joined him (Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor) found that the officers' installation and use of the GPS tracking device was a common-law trespass onto one of the protected areas enumerated in the Fourth Amendment (an "effect") to obtain information.[24] Consequently, a search occurred. Scalia's opinion did not address whether it was also a search

under the *Katz* reasonable-expectation-of-privacy analysis.[25] And the opinion did not address the larger question of whether installation and monitoring of a GPS tracking device required probable cause and a warrant.

The concurrence's concern

The four members concurring in the judgment, led by Justice Alito, would have kept *Katz* as the sole test for determining what is a search.[26] Unlike the majority, these justices were not concerned with the installation of the GPS tracking device. The trespass onto the Jeep was "relatively minor," even trivial.[27] What mattered to these four Justices was the use of a GPS tracking device and the length of monitoring. Analyzing the issue under *Katz*, they decided that somewhere in the 28 days of tracking every movement Jones made in his Jeep, his reasonable expectation of privacy was violated.[28] They concluded that for most offenses, longer term GPS monitoring (beyond what officers would have been able to gather manually from visual surveillance) violates privacy expectations.[29] But these concurring Justices (Justices Alito, Ginsburg, Breyer, and Kagan) also determined that "relatively short-term monitoring of a person's movements on public streets" was permissible under *Katz*.[30]

Sotomayor's creation of a second majority

Justice Sotomayor signed onto Scalia's opinion, the majority decision holding that a common-law trespass (even without a reasonable expectation of privacy) can constitute a search. But she also wrote a separate concurrence of her own, announcing her views of the case under the *Katz* analysis. She predicted that in future cases, law enforcement would likely be able to monitor GPS devices without actually physically intruding on the defendant's property, and in such cases, Scalia's resolution of the issue would not provide any guidance.[31] In those cases, everything would turn on the *Katz* analysis. To guide those cases, Sotomayor announced her agreement with the Alito concurrence that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[32] With her vote, Sotomayor formed a second majority holding in *Jones* that long-term monitoring constitutes a "search" under the *Katz* analysis—regardless of whether officers trespassed on the defendant's property to obtain the GPS data. Sotomayor also had concern about short-term monitoring, but she was the only justice to voice her opinion in that direction.[33]

So is a warrant required?

None of the opinions in *Jones* addresses whether a warrant was required. The two majority holdings—that long-term monitoring or installation followed by monitoring constitutes a search—answer only whether the Fourth Amendment is implicated. Warrants are generally required for a search not to be an "unreasonable search," but there are notable exceptions.[34] The United States argued that there should be an exception in *Jones*, but the Supreme Court refused to consider the argument because the government had not argued it in the court of appeals.[35] And the law prohibits parties from laying behind the log and waiting until a lower court has already ruled on an issue before advancing a new argument. So that issue was left for a future case.

Jones takes no position on whether a warrant is required. At the same time, the safest approach is surely to seek a warrant. A search conducted without a warrant is *per se* unreasonable, subject only to a few specific, established, and well-delineated exceptions,[36] and there is no currently recognized exception that expressly allows the installation of a GPS device without a warrant. The automobile exception permits warrantless searches of vehicles but has historically required probable cause to believe officers will find contraband or evidence *within* the vehicle itself.[37] Further, in Texas, state law already requires an order from a district judge before installing a GPS tracking device, though the order requires only reasonable suspicion, not the probable cause that would be required with a warrant.[38]

But sometimes, GPS is needed to gather the probable cause required for a warrant. In such cases, our best argument[39] that a warrant is not required arises when officers do not have to install a tracking device and can merely monitor an already existing device or obtain data from GPS-enabled smartphones or vehicles with On-Star on a short-term basis. Although no opinion expressly waives the requirement of a warrant for short-term monitoring, the alignment of the justices in *Jones* suggests that the current court would

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likely vote that way. Alito and the three justices who joined him decided that, under *Katz*, short-term monitoring of a GPS device does not constitute a search. When the trespass is taken out of the equation, Scalia's majority holds that *Katz* controls. Only one of the justices from Scalia's majority (other than Justice Sotomayor) would need convincing that short-term monitoring was not a search under *Katz* (or that an exception to the warrant requirement should apply). Then Alito's four-judge concurrence would constitute a majority.

In such a case, a lot turns on the difference between short- and long-term monitoring. Justice Alito did not indicate where the line will be drawn. He suggests only that long-term monitoring for most offenses violates expectations of privacy—in part, because society does not expect law enforcement to monitor and catalogue every movement of a vehicle for weeks on end.[40] So the length of time that the police *would* surreptitiously follow a car or person itself may provide a guide for how long police *could* monitor GPS data without a warrant. But as Alito counsels, "where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant."[41]

Where we cannot seek a warrant, the State still has several good arguments that reversal is not warranted—either through an exception to the warrant requirement or a rule that the exclusionary rule is not the proper remedy for the failure to obtain one. Remember to advance the alternative arguments at every level, and—who knows?—maybe one day we'll get a clear answer. ❇

Endnotes

1 *United States v. Jones*, No. 10-1259, 132 S. Ct. 945, 2012 WL 17117 (U.S. 2012).

2 See, e.g., http://volokh.com/2012/01/30/why-united-states-v-jones-is-subject-to-so-many-different-interpretations.

3 *Id.*, 2012 WL 171117, at *3 & at *11 (Alito, J., concurring).

4 *Id.*, at *2.

5 The majority acknowledged in a footnote that the car was registered to Jones's wife but that he was "the exclusive driver." The State never argued that this distinction made a difference, and indeed the court did not consider the Fourth Amendment significance of Jones's status as an owner, either.

6 *United States v. Jones*, at *2-3.

7 *Id.* at *8.

8 *Id.* at *3; *Id.* at *11 (Alito, J., concurring).

9 *Id.* at *5-6.

10 *Id.* at *3, 5, 8.

11 *Id.* at *4; *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

12 277 U.S. 438 (1928).

13 *Katz v. United States*, 389 U.S. 347, 351 (1967).

14 *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

15 *Jones*, 2012 WL 171117, at *3.

16 *Id.*

17 U.S. Const. amend IV.

18 *Jones*, 2012 WL 171117, at *4-6.

19 *Id.*

20 *Oliver v. United States*, 466 U.S. 170, 183 (1984).

21 *Id* at *6 & n.8.

22 *Id.*

23 *Id.* at n.5.

24 *Id.* at *3.

25 *Id.* at *7.

26 *Id.* at *11 (Alito, J, concurring).

27 *Id.* at *15 (Alito, J, concurring).

28 *Id.* at *17 (Alito, J, concurring).

29 *Id.*

30 *Id.*

31 *Id.* at *8 (Sotomayor, J., concurring).

32 *Id.*

33 *Id.* at *9 (Sotomayor, J., concurring).

34 See, e.g., *Carroll v. United States*, 267 U.S. 132, 153 (1925) (establishing automobile exception).

35 *Jones*, 2012 WL 171117, at *8.

36 *Arizona v. Gant*, 556 U.S. 332, 338 (2009).

37 See, e.g., *California v. Acevedo*, 500 U.S. 565, 569, 579-80 (1991).

38 Tex. Code Crim. Proc. art. 18.21, §14.

39 For more educated guesses on how the current justices would rule on the questions left open by *Jones*, see Tom Goldstein, "Why *Jones* is still less of a pro-privacy decision than most thought," (Conclusion slightly revised Jan. 31), SCOTUSblog (Jan. 30, 2012, 10:53 AM), www.scotusblog.com/2012/01/why-jones-is-still-less-of-a-pro-privacy-decision-than-most-thought.

40 *Jones*, 2012 WL 171117, at *17 (Alito, J., concurring).

41 *Id.*

A year of massaging jury instructions

Over the last 12 months, the Court of Criminal Appeals has enlightened us more on jury instructions. In one week alone, four of its decisions addressed the subject. Given the State Bar's recent release of its third volume of the Texas Criminal Pattern Jury Charges (adding proposed instructions on homicide, kidnapping, sexual offenses, assaultive offenses, robbery, party liability, and transferred intent), it also seems an appropriate time to consolidate the court's musings. Lesser-included offenses have dominated the decisions with five opinions, but further opinions have been forthcoming on jury unanimity, comments on the weight of the evidence, self-defense, medical-care defense, DWI, Health and Safety Code penalty groups, the hypothetically correct jury charge, and charge harm analysis.

By John Stride
TDCAA Senior Appellate Attorney

Lesser-included offenses

That lesser-included offenses are the most frequently reviewed criminal jury instruction topic—probably each year—indicates they have troubling aspects. During the heat of trial in our adversarial system, decisions may be rushed, perceptions too narrowed, or the law confusing. So, assuming that you do not want to retry a case for jury charge error, the submission of lesser-included offenses is often the better practice if in doubt about their applicability.

Even a little evidence from any source will support a lesser-included offense. As the Court of Criminal Appeals has repeatedly stated:

> [T]here must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted. We consider all of the evidence admitted at trial, not just the evidence presented by the defendant. The evidence must establish that the lesser-included offense is a valid, rational alternative to the charged offense. Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. However, we may not consider [t]he credibility of the evidence and whether it conflicts with other evidence or is controverted.[1]

Goad, a burglary of a habitation in which the trial court denied the defendant's request for a lesser-included offense of criminal trespass, reminds that the victim's testimony also can provide the necessary evidence—in this case, the defendant's lack of intent to commit burglary because, on being interrupted at the crime scene by the victim, he told the victim that he was looking for his dog. Further, for those of us who may have become a trifle cynical about suspects' statements relating to their involvement in an offense, even the rank implausibility of the evidence is insufficient reason to deny an instruction on a lesser-included offense. Thus, the trial court should have given the requested instruction.

If the evidence shows that a charged offense is divisible, submit a lesser-included offense. In considering the application of a lesser-included offense, beware of evidentiary twists. A hiatus in the chain of events may carve up an action charged as a single ongoing crime into more than one offense. In *Sweed*, after stealing a nail gun from a work site, the defendant was chased by members of the construction crew whereupon he entered an apartment.[2] Minutes later, he left the residence without the nail gun and in a change of clothes. He then briefly visited with a group of people. Afterwards, he encountered some of the construction crew again, at which point he drew a knife.

Sweed was charged with aggravated robbery but requested a lesser-included offense of theft. He did not dispute that he had committed theft; rather, the only issue was whether he pulled the knife during or in immediate flight after committing the theft. The Court of Criminal Appeals held that, because of the interval between the theft and the assault, a jury could have rationally interpreted the evidence so as to believe that the defendant was no longer fleeing from the theft when he pulled the knife. Accordingly, the trial court should have submitted the lesser-included offense.

Lesser-included offenses of continuous sexual abuse obtain parity. As expected, the most useful novel offense of continuous sexual abuse has had to overcome numerous (mostly constitutional) challenges on appeal. In *Soliz*, it overcame another claim, this time in the context of lesser-included offenses.[3] The case teaches that the lesser-included offense analysis for continuous sexual abuse

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is the same as with other offenses—there is no additional step for the jury to determine whether a submitted lesser offense is in fact a lesser-included offense.

Justifications

Submitting instructions on justifications for crimes can render the propriety of giving lesser-included offenses tricky. *Alonzo* is a case in point.[4]

Self-defense and a lesser-included offense alleging recklessness. Following a prison fight, Alonzo's indictment charged one count of murder and a second, irrelevant count. Under the murder count, the trial court also submitted the lesser-included offenses of manslaughter and aggravated assault with a further instruction to acquit the defendant if the jury found that the defendant had acted in self-defense. In response to jury notes, however, the trial court advised that self-defense did not apply to aggravated assault if the jury found the defendant acted recklessly and did not apply to manslaughter.

The intermediate court decided that (a) by acquitting the defendant of murder the jury had necessarily found he had not committed the act intentionally and knowingly, and (b) manslaughter requires recklessness; therefore, to allow self-defense for manslaughter would be inconsistent because a person cannot simultaneously act intentionally and recklessly. The Court of Criminal Appeals disagreed. It ruled that, although a person cannot act recklessly *and* in self-defense, the defendant asserted his actions were justified and not intentional or reckless. Moreover, nothing in the Penal Code restricts self-defense to acts committed intentionally or knowingly. Finally, a defendant does not have to intend the death of an attacker to be justified in using deadly force in self-defense.

Instructions on the duty to retreat. The law on self-defense has changed and, if for the better, it is hard to comprehend how, given the convoluted statutory mess the legislature has left for practitioners to cope with. Unfortunately, though not its fault, the court's opinion in *Morales* addressing the law doesn't really assist in picking a passage through the maze.[5]

After the amended law on self-defense became effective in September 2007, the defendant killed another during a fight. The murder trial testimony was conflicting and the jury charge contained instructions on defense of a third person—incorporating instructions on self-defense *and the duty to retreat.* Of course, the duty to retreat was a requirement of the former self-defense statute but, under the amended statute, was replaced by provisions allowing a jury to presume when deadly force was reasonable and explaining when a person does not have to retreat. The inclusion of the duty to retreat in this charge, the court held, was not authorized by statute and constituted an improper comment on the weight of the evidence. Nevertheless, while a jury instruction on the duty to retreat may not be submitted, as with instructions on diminished capacity and inferring intent from words and actions, the parties can argue about the issue if raised by the evidence.[6]

Maybe the current statute will not be the last word on self-defense. We can hope, right?

Medical-care defense. The medical-care defense of Penal Code §22.021(d) does not arise often, but a closely divided court reached it in *Cornet*.[7]

In a pretrial statement and during his testimony, the defendant related that he had examined his 8-year-old step-daughter's genitals and anus by spreading and touching them after she told him that her brothers had sexually assaulted her. He explained that he was looking for evidence of sexual contact, swelling, scarring, or injury. The jury charge instructed the jury on aggravated sexual assault committed by the defendant digitally penetrating his step-daughter's genitals and orally contacting her anus. The trial court, understanding that the medical-care defense was limited to use by licensed medical professionals, denied a defensive instruction. The intermediate court, holding that there was no evidence that the defendant had admitted the offense and that the medical-care defense was not meant to apply where the parent was untrained, affirmed.

But the Court of Criminal Appeals overrode the lower courts. It held that the defense is available to non-medical professionals who conduct mere medical inspections, the doctrine of a confession and avoidance applies, and the defense was triggered by the particular facts of the case; thus, the trial court wrongly denied the defensive instruction. Readers should understand that sufficient "confession" has occurred "if the defendant can point to defensive evidence, originating in his own

statements, such that a trier of fact could reasonably infer that each element of the offense has been satisfied." Because an inference will suffice, this is not a high threshold to obtain the defense.

Jury unanimity

If lesser-included offenses have been troubling, jury unanimity has been bewildering. Generally, in reaching a verdict, a jury must unanimously agree about the occurrence of a single criminal offense, but it need not be unanimous about the specific manner and means of how that offense was committed. But as Judge Cochran reminds us in *Young*, what seems clear actually requires ongoing refinement.[8]

Using the definitions for culpable mental states. The current need for elucidation springs largely from the dearth of caselaw deciding whether a crime is a "result of conduct," "nature of conduct," or "circumstances surrounding conduct" offense—something that is determined by looking at the gravamen of a particular offense. But in *Young*, the court has now categorically instructed us that with:

1) "result of conduct" offenses, the jury must be unanimous about the specific result required by the statute;

2) "nature of conduct" crimes, the jury must be unanimous about the specific criminal act; and

3) "circumstances surrounding the conduct" offenses, unanimity is required about the existence of the particular circumstance that makes the otherwise innocent act criminal.

Accordingly, where a registered sex offender failed to report and the single count indictment included two paragraphs, one alleging the failure to report *before* the defendant changed residence and the other alleging that the defendant failed to report *after* he moved, the statute created a "circumstances surrounding the conduct" offense, i.e., the failure to report (whether before or after moving). And because the defendant was charged with a single offense committed by two alternative manner and means, jury unanimity was not required on whether the defendant failed to report before or after the move or both.

Understanding when the requirement of unanimity can be violated. Three months after *Young* and without a single reference to it, the court issued its unanimous decision in *Cosio*.[9] In this case involving proof of multiple sex acts that could have satisfied the fewer charged offenses, the court told us that non-unanimity may result in three situations when the jury charge fails to properly instruct the jury, based on the indicted offense(s) and specific evidence in the case. Non-unanimity may occur when the State:

1) presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed (e.g., theft of single item but proof of more than one stolen item—unanimity is required as to the specific item);

2) charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions (e.g., proof of repeated acts of indecency—unanimity required as to a single offense); and

3) charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute (e.g., credit card abuse by stealing, receiving, or presenting—unanimity required as to what statutory provision was violated).

OK, got all that? Well, now that jury unanimity law is crystal clear and much easier to apply (oh, in case you forgot, don't overlook applying the eighth-grade grammar approach to determine the elements of the offense at issue),[10] let's look at some other lighter—at least temporarily—developments.

Comments on the weight of the evidence

Over the last few years, the Court of Criminal Appeals has monitored the content of jury charges more restrictively and shown particular concern for instructions that are improperly included.[11] Prior opinions have naturally triggered concern about how best to respond to jury notes sent out during deliberations. Some practitioners have wanted trial courts to have more freedom in responding. *Lucio* provides some relief—although, not for the unwary.[12]

At punishment stage deliberations, the jury sent out two notes indicating that it wanted to know whether there were limitations on those who could testify for the defendant. The trial court brushed off the first inquiry with a conventional, terse response: "You have heard all the witnesses who were called to testify. Please continue your deliberations."[13] In response to a second, more specific inquiry—and

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over the defendant's objection—the trial court preceded the same language as its prior response with the statement: "The law does not prohibit a family member from testifying on behalf of a defendant so long as the witness has relevant evidence related to an issue in the case."

Both appellate courts upheld the trial court, but Judge Alcala, writing for the majority in her first opinion on the Court of Criminal Appeals, emphasized that where the jury—rather than the trial court—identifies specific evidence and the trial court responds with a neutral and impartial statement describing the applicable law, the prohibition against a trial court singling out particular evidence in instructions "does not necessarily apply."

Despite this recognized exception, trial courts are well-advised to circumscribe their instructions because:

> a trial court's answer to a jury's question must comply with the same rules that govern charges[. T]he trial court, as a general rule, must limit its answer to setting forth the law applicable to the case; it must not express any opinion as to the weight of the evidence, sum up the testimony, discuss the facts, or use any response calculated to arouse the sympathy or excite the passions of the jury.

Furthermore, if a defendant timely and specifically objects, he must suffer only "some actual harm" to obtain a reversal, and there really is enough caselaw already demonstrating the results of instructing the jury too loosely.

The hypothetically correct jury charge. *Malik* is now an aging teenager, but its standard for determining the sufficiency of the evidence in criminal cases continues to demand clarification. In *Adames*, though, perhaps almost complete transparency has been provided.[14]

In a non-death capital case, the jury charge alleged that the defendant committed capital murder either as the primary actor or as a party. Relying on *Malik* and measuring the sufficiency of the evidence against the hypothetically correct jury charge, the intermediate court held the evidence sufficient for guilt as the primary actor but not as a party because the application portion of the charge alleged the defendant as a party only to kidnapping—not kidnapping and murder. The court reversed and remanded. Not yet content (an acquittal being more desirable and available before *Malik*), the defendant challenged the court of appeals' decision asserting that, in applying the state standard of *Malik*, it had failed to address his claim that the evidence was insufficient under the federal constitutional standard of *Jackson v. Virginia*.[15]

The Court of Criminal Appeals put this rather bizarre or clever claim (depending on your point of view) to sleep with alacrity. *Malik* is nothing other than the state application of *Jackson*; therefore, the intermediate court had applied the proper and (post-*Brooks* abandoning a separate factual sufficiency standard[16]) only standard applicable to the sufficiency of the evidence in Texas criminal cases. The court has usefully tied up some loose ends for sufficiency of the evidence in criminal cases.

Health and Safety Code penalty groups. Perhaps most of us would rather not think of the catalogue of curiously named, bizarrely spelled, and hard-to-pronounce drug variations listed under the Health and Safety Code penalty groups, let alone identify the specific penalty group relied upon for a conviction. But we do so at our peril, as *Miles* demonstrates.[17]

When a jury charge and the indictment before it fail to allege one of the three applicable Health and Safety Code penalty ranges (1, 3, or 4) for a possession of codeine case, how does an appellate court evaluate the sufficiency of the evidence? The Court of Criminal Appeals held that, under *Malik*, the evidence must be measured against the hypothetically correct jury charge, which must adequately describe the particular offense for which the defendant was tried. Moreover, the evidence must be sufficient to prove that a particular offense occurred, and the *particular* offense must be that for which the defendant was tried. So the court reviewed the full record. Ultimately, it decided that, just as the defendant asserted on appeal, the relevant offense was one in Penalty Group 1. Further, the evidence was insufficient to support the conviction; therefore, it reversed and rendered a judgment of acquittal.

In her concurrence, Judge Cochran not only recognized that the law concerning possession of codeine was "confusing and incoherent" but also shed light on the different penalty groups. Please review her opinion if handling a possession of codeine case. Meanwhile, know that she, at least, understands your pain but cannot relieve you of your burden:

> Perhaps the Legislature will redraft

these statutes to make them a little more user (and jury) friendly. Until and unless it does, a witness must testify that the substance meets the statutory definition of codeine as that definition is statutorily set out in either Penalty Group 1, 3, or 4. And the jury charge must contain the statutory definition of the appropriate penalty group. Finally, if a defendant files a motion to quash the indictment for lack of notice, the State must allege which penalty group offense it plans to prove in the indictment.[18]

Driving while intoxicated. In *Ouellette* the trial court successfully—and properly—dodged the issue of including too much information in the jury charge.[19]

An officer arrested the defendant for DWI after, among other things, he smelled alcohol on her breath and found a pill bottle in the car. The charge tracked the information, which alleged DWI "by reason of introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances into the body."

The defendant complained about the charge's inclusion of the statutory language on drugs, but the Court of Criminal Appeals held that while evidence the defendant was intoxicated by way of drugs was circumstantial and not overwhelming, it was, nonetheless, present. Thus, the inclusion of the statutory language on drugs was not improper. The case not only puts circumstantial drug evidence on the same plane as circumstantial alcohol evidence in a DWI case, but it also serves as a cautionary tale to those drafting or reviewing charges to ensure that before simply reproducing the language of an accusation in a charge, the evidence supports all the allegations. (For a DWI charge actually alleging too much, see *Barron* under "Harm analysis," below.)

Unlike the previous case, the trial court in *Kirsch* over-instructed the jury by supplying a definition.[20] A unanimous Court of Criminal Appeals held the definition of "operate" in a DWI charge was improperly submitted, reversed, and remanded for a harmless error analysis.

In *Kirsch*, a citizen discovered the defendant astride his motorcycle at an intersection. As she watched, he toppled to one side. He declined her assistance. When she drove away, though, he did not rise, so she called the police. An officer found him trying to kick-start the motorcycle and, after noticing the usual symptoms, arrested him for DWI. At trial and over the defendant's objection, the trial court included a definition of "operate," namely, "to exert personal effort to cause the vehicle to function." But, the Court of Criminal Appeals opined, whether the defendant operated the motorcycle was a question of fact for the jury. The definition given the jury is one discussed in reviewing the sufficiency of the evidence, and the court has already condemned using such "judicial-review devices" in charges.[21] Because the term "operate" is a common term that has not acquired a technical meaning and may be interpreted according to common usage, submitting the definition improperly restricted the jurors' interpretation of the term and constituted an improper comment on the weight of the evidence. So beware of any non-statutory definitions in a jury charge.

Harm analysis

All too frequently, the cases have reflected a variety of harm analyses applied in jury charge cases. The court has repeatedly redirected the courts and counsel to the standards espoused in *Almanza*.[22] A quarter-century later, *Barron* is really no different.[23]

An officer arrested the defendant for DWI after—yes, again—he smelled the odor of alcohol, among other things, and found a blister pack of pills discerned to be hydrocodone or hydrocodeine in the defendant's purse. The State did not introduce the drugs at trial but the trial court submitted a synergistic effect instruction. The intermediate court held the instruction was improper because it was not raised by the evidence. Unfortunately, rather than perform a harm analysis under the well-established standards of *Almanza*, it merely repeated its error analysis. The Court of Criminal Appeals agreed with the ultimate conclusion of the lower court but itself assayed the harm under the proper factors. On appeal, jury charge error analysis is distinct from jury charge harm analysis. *Almanza*, and its substantial progeny, lay out the principle factors to be considered. Enough said. ❇

Endnotes

1 *Goad v. State*, No. PD-0435-11, 2011 Tex. Crim. App. LEXIS 4513 (Tex. Crim. App. Nov. 9, 2011) (internal citations and quotation marks omitted).

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News Worthy

E-books are here!

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

Investigator award nomination forms and scholarship app now online

Nomination forms for the Investigator Section Oscar Sherrell Award and the PCI, along with the scholarship application, are now online. Look in the Journal Archive under this issue's stories to download the forms in Word format.

And congratulations to 2011's scholarship winner, Jacqueline Hightower (pictured at left)! She is the stepdaughter of Board member Melissa Hightower in the Williamson County Attorney's Office.

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2 *Sweed v. State*, 351 S.W.3d 63 (Tex. Crim. App. 2011).

3 *Soliz v. State*, No. PD-0117-11, 2011 Tex. Crim. App. LEXIS 1344 (Tex. Crim. App. Oct. 5, 2011).

4 *Alonzo v. State*, No. PD-1494-10, 2011 Tex. Crim. App. LEXIS 1181 (Tex. Crim. App. Sept. 14, 2011).

5 *Morales v. State*, No. PD-1155-10, 2011 Tex. Crim. App. LEXIS 1508 (Tex. Crim. App. Nov. 9, 2011).

6 See *Jackson v. State*, 160 S.W. 3d 578 (Tex. Crim. App. 2005) (prohibiting instructions on diminished capacity); *Brown*, 122 S.W.3d 794 (barring instructions on appellate standards in jury charges).

7 *Cornet v. State*, No. PD-1067-10 (Tex Crim. App. Jan. 25, 2012).

8 *Young v. State*, 341 S.W.3d 417 (Tex. Crim. App. 2011).

9 *Cosio v. State*, No. PD-1435-10, 2011 Tex. Crim. App. LEXIS 1259 (Tex. Crim. App. Sept. 14, 2011).

10 The eighth-grade grammar approach was first espoused in *Jefferson v. State*, 189 S.W.3d 305, 315 (Tex. Crim. App. 2006) (Cochran, J., concurring).

11 See, e.g., *Brown v. State*, 122 S.W.3d 794 (Tex. Crim. App. 2003).

12 *Lucio v. State*, No. PD-0659-10, 2011 Tex. Crim. .App. LEXIS 1514 (Tex. Crim. App. Nov. 9, 2011)

13 Although, even this response is arguably more specific than many. Often, if not usually, wary trial courts unhelpfully instruct the jury that it has all the relevant law in the instructions and to continue deliberating.

14 *Adames v. State*, No. PD-1126-10, 2011 Tex. Crim. App. LEXIS 1346 (Tex. Crim. App. Oct. 5, 2011).

15 443 U.S. 307 (1979).

16 *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

17 *Miles v. State*, No. PD-1709-08, 2011 Tex. Crim. App. LEXIS 1665 (Tex. Crim. App. Dec. 7, 2011).

18 Many will recall Judge Cochran's comments about an impending state "train wreck" before continuous sexual abuse of a young child became a crime. See *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006). Maybe her comments will bear fruit this time too.

19 *Ouellette v. State*, No. PD-1722-10, 2011 Tex. Crim. App. LEXIS 1373 (Tex. Crim. App. Oct. 10, 2011).

20 *Kirsch v. State*, No. PD-0245-11 (Tex. Crim. App. Jan. 25, 2012).

21 See *Brown*, 122 S.W.3d at 797 (improper instruction that "intent or knowledge may be inferred by acts done or words spoken").

22 *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

23 *Barron v. State*, No. PD-1770-10, 2011 Tex. Crim. App. LEXIS1512 (Tex Crim. App. Nov. 9, 2011).

Not a single blood search warrant

Rusk County law enforcement netted just a handful of DWI arrests and not a single search warrant for blood during its inaugural no-refusal weekend—and prosecutors chalked it up as a grand success. Here's why.

On New Year's Eve 2011, Rusk County law enforcement agencies conducted the first no-refusal program in county history. The countywide effort yielded four misdemeanor arrests and two felony arrests. To the surprise of everyone involved, the need for a blood warrant never arose: All misdemeanor defendants provided a breath sample as requested, and while the seasoned felony defendants drew on their prior experiences with law enforcement and opted not to provide breath samples, those defendants were, of course, subject to the mandatory blood draw provisions of Chapter 724 of the Texas Transportation Code. The night went by without any intoxication-related wrecks or injuries.

By Zack Wavrusa
Misdemeanor Chief in the County and District Attorney's Office in Rusk County

We prosecutors spent the night on stand-by at our office. From 6 p.m. on New Year's Eve to 5 a.m. New Year's Day, First Assistant Richard Kennedy and I were available to help officers fill out blood draw warrants. Both of us anxiously waited for phones that never rang.

The next day I reported the results of the evening to County and District Attorney Micheal Jimerson. I was at a loss for words. It was the first no-refusal weekend in Rusk County, so we had been careful to do everything by the book, following every step in the National Highway Traffic and Safety Administration's (NHTSA) "No Refusal" Toolkit. The high refusal rate and the great number of arrests that I had expected simply didn't materialize. I was ready to chalk the whole weekend up as a disappointment and begin preparing for the next one when Mr. Jimerson reminded me that the goal of no-refusal programs is to prevent people from driving while intoxicated. Procuring blood evidence of drivers' intoxication through search warrants—a huge boon to prosecuting such cases—is only a secondary benefit of the program.

Mr. Jimerson encouraged me to focus on two things in my assessment of the weekend: the low number of arrests and the true no-refusal results from the misdemeanor arrests. When I stepped back and looked at the program from his point of view, it was obvious the weekend was a huge success—despite the unexpected results. Driving while intoxicated may be "only" a misdemeanor, but there is a legitimate chance of someone being seriously injured or killed during its commission. If we as prosecutors can do anything to stop even a single person from being hurt by an intoxicated driver, we should look at it as a victory.

Mr. Jimerson's whole point is something that I am reminded of regularly. Everyday I take Highway 13 into Henderson for work. At about the mid-way point, just outside the town of Price, there is a small, white cross by the side of the road. Everybody has seen crosses like this one. They crop up on the sides of highways all across the state as memorials to those who were killed on that particular road. The Highway 13 cross is a constant reminder to me about why I am a prosecutor. If I do my job right, if I'm aggressive and I make the most of the tools that I have available to me, then I can be a part of the prosecutorial team that sees the last little white cross erected on a Rusk County road.

The pitch

Rusk County has just one county court-at-law judge and a single district judge. They are the only two judges in the county who can sign warrants for blood draws. At this time, both have been extremely underutilized; it is very unusual for either judge to be called to sign a blood draw warrant because officers typically never request one. We in Rusk County need to do more work to get judges and law enforcement on the same page on requesting

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blood draw warrants.[1]

As a misdemeanor prosecutor this is extremely frustrating. Most misdemeanor DWI defendants are able to easily avoid supplying a sample if they simply refuse to blow. Absent the scientific evidence of blood alcohol content, many defendants refused to accept a plea offer and opted to take their chances with a jury, and our misdemeanor docket was bloated with DWIs. After only a short time on the job, I found myself searching for ways to more effectively prosecute these cases.

In July 2011, I attended the Prosecutor Trial Skills Course put on by TDCAA in Austin. The course was unbelievably helpful in a number of different ways, the most beneficial of which was that putting on a no-refusal program in Rusk County was an incredibly achievable goal. W. Clay Abbott, TDCAA's DWI Resource Prosecutor, and Warren Diepraam, an Assistant District Attorney in Montgomery County (both speakers at the seminar), championed the no-refusal program. With all the resources available through NHTSA and colleagues at other district and county attorney's offices, I left the course convinced that a program would work here.

When I returned from the school, I discussed the idea with Mr. Jimerson and after quick approval, planning for the event began. Going into the project, I thought that the most challenging task would be getting one or both of Rusk County's judges to give up their New Year's Eve to be on standby to sign blood-draw warrants. Without a judge to sign warrants, there was no way for the program to work, so I tackled this obstacle first.

I first approached the judge for the County Court-at-Law, the Honorable Chad Dean. Luckily, Judge Dean was on board from the outset. He readily agreed to be available by phone the entire evening and into the early morning hours of the New Year's holiday when the need for a blood draw warrant arose. (I approached the other judge about participating and told him that Judge Dean was already on board but that our office would certainly welcome his participation. He appreciated the gesture but took a pass.)

After securing Judge Dean's participation, it was no trouble getting the various local law enforcement agencies to buy into the program. By all accounts, it was something that each of the agencies had been wanting for a long time—the different law enforcement agencies just needed someone to step up to the plate and lead the effort. As it turns out, stepping up was the easiest thing to do. The only things that the agencies needed were copies of the required paperwork, and they were ready to go. To help ease the expected burden of getting the paperwork completed for blood-draw warrants, Richard Kennedy and I agreed to stay at the office all night long to provide assistance.

The philosophy

The unusual success Rusk County achieved wasn't the result of any one thing we did in preparation for the no-refusal program. Rather, it was a result of almost a decade of work by the elected county and district attorney and the staff that came before me. Mr. Jimerson has long held the belief that a strong law enforcement community is something that must be built over time, and our office is constantly talking with the community about the criminal prosecution. The idea behind such efforts is that if the community shares the serious attitude towards DWIs that the office does, then there will be greater success in terms of DWI convictions and punishments. Recent examples of success with these efforts include sentences of 50 and 58 years on our most recent felony DWI convictions.

Pre-event advertising

When I received the go-ahead from Mr. Jimerson to put together a no-refusal program in Rusk County, one of my first questions concerned the advertising budget. My question was greeted with a chuckle and then a pause. In his normal no-nonsense fashion, Mr. Jimerson informed me that I did not have an "advertising budget." I was going to have to get the word out about the program, and I was going to have to do it without spending a dime.

Luckily, finding a way to inform the public was not something that I had to do on my own. Rusk County is comprised exclusively of rural areas and small towns. The right people can really help get the word around town. For that reason, Mr. Jimerson set me up with speaking engagements at local civic groups such as the Kiwanis Club. In preparation for the talks, I put together a PowerPoint presentation that addressed the issue of driving while intoxicated in the simplest terms possible. Prior to the presentation,

Mr. Jimerson contacted a reporter with the local paper, the *Henderson Daily News*, and arranged for the reporter to be at the Kiwanis meeting, which was scheduled about a week before New Year's Eve.

I had three main points in my presentation. I dedicated the first part to discussing the law on driving while intoxicated crimes, and I discovered that many people had misconceptions about what did and did not constitute an offense. After fielding just a few questions, I made a point to walk through the different ways that a defendant can be charged with DWI.

For the second point, I focused on the dangers that DWI presents. Rusk County is a place where many people don't feel that DWIs are a problem unless someone gets hurt. It is almost a game to see how many times you can drive while intoxicated before being stopped for it. To combat this attitude, I pulled information relating to intoxication-related traffic wrecks from NHTSA's website. A plethora of information was available, but the intoxication-related fatality numbers were of particular interest to those at the meeting. I also included information about alcohol toxicology to illustrate the many different ways that alcohol affects a person's ability to control his own body and, in turn, operate a motor vehicle safely.

The final area I covered was the no-refusal program itself, which we discussed in detail. I began by telling the audience the reasons an officer might stop a suspect and walked through every step of the typical DWI arrest, spending a significant amount of time discussing the implied consent laws on requests for breath or blood samples. The presentation highlighted the consequences for refusing to provide a sample when requested and put special emphasis on the fact that a suspect's driver's license is suspended automatically if he refuses to provide a breath sample.

After I concluded the presentation, I answered a few more specific questions from the newspaper reporter. The next day, the paper published a front-page story about the county's plans to step up DWI enforcement efforts. The report thoroughly covered the plans for the event, and potential intoxicated drivers had all the consequences of driving while intoxicated laid out in front of them. The article, like the presentation, unmistakably portrayed the no-refusal program as a prevention effort. Anybody reading the article should have been encouraged to find a designated driver for the evening or abstain from drinking if they could not make such arrangements.

After the civic club presentations and newspaper story, we issued a general press release detailing the event on Thursday, December 29. The releases went out a couple days early to ensure that the respective news outlets had an opportunity to run the stories at least one full day before New Year's Eve that Saturday. Press releases ran in the only two newspapers with significant readership in the county, the *Henderson Daily News* and the *Tyler Morning Telegraph*, as well as all the local television stations.

On Friday the 30th, a Henderson-based radio station, KPXI 100.7, spoke with me over the phone for a radio spot that would air throughout the day on New Year's Eve. The message was brief and to the point: Like the newspaper articles and press releases before it, the emphasis was on DWI prevention and the different measures Rusk County law enforcement agencies took in preparation for the weekend.

The results

Every Rusk County law enforcement agency, from highway patrol to the sheriff's office to the local police departments, participated in the county's no-refusal program. No agency put any special "DWI units" on the road for this first attempt at a no-refusal program; they just operated with the usual number of officers.

Ultimately, DPS Highway Patrol was the only agency to make any DWI arrests on New Year's Eve: four misdemeanor arrests and two for felonies. In a county the size of Rusk County, six DWI arrests in a single night is a little above average, but the number still fell shy of what we expected. The night went by without any intoxication-related wrecks or injuries.

It is worth mentioning that the Henderson Police Department made one misdemeanor DWI arrest on the evening of January 1. It was technically outside the no-refusal window coordinated by the prosecutor's office and our judges, but the offender didn't know that. When the arresting officer requested a breath sample, the defendant agreed because the officer was "just going to get some kind of warrant anyways."

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Reception to the program

The public reception to the program has been overwhelmingly positive. In the wake of the program's completion, local civic clubs have invited our attorneys back to recap the program's success. We've also taken these opportunities to share the office's plans for future such programs and to continue developing a sense of seriousness about these issues within the community.

The local defense bar has not commented on it, which may very well be because no blood warrant was ever required. Our county's defense attorneys have been quite vocal with respect to DWIs. In the short time that I've been a prosecutor here, I've heard them object to everything from a county map of DWI convictions to a victims' tree set up on the first floor of the courthouse. I firmly believe that had there been a single case where a blood-draw warrant was issued, the appointed defense attorney would have made some sort of fuss. It will just be a fight saved for another day.

Going forward

The no-refusal program is certainly one that Rusk County will continue in the future. The results, while atypical, were certainly appreciated by the prosecutors, law enforcement officers, and judges involved. Currently, we anticipate conducting similar no-refusal weekends over the Memorial Day and Labor Day holidays. Like any good office, we learned a lot from this first go-round, and we will make some major additions to the program before we do it again.

One thing that will most certainly remain the same is the community-driven method of advertising. The efforts will be considerably more widespread, however. We will visit more civic clubs and also hope to present a DWI-related program to the local high school to educate students on the dangers and legal consequences of driving while intoxicated.

By the time Memorial Day weekend rolls around, beer and wine will be sold inside Henderson city limits for the very first time. This move was highly controversial and, despite its passage last election day, it has raised a number of concerns about DWIs within the community. For that reason, our office anticipates using some public signage that was absent from the first program. The primary targets for "Drive Sober or Get Pulled Over" signs will be grocery and convenience stores selling alcohol and restaurants and bars serving drinks.

The final significant change I foresee involves our office partnering with local community service organizations, such as the Kiwanis and Rotary Clubs, and churches to provide something akin to a designated-driver service during no-refusal weekends. Logistically, there will be quite a few hoops to jump through before this could happen, but the benefits of this move far outweigh the burden of putting it on. Similar services are offered every weekend in college towns across the state: Stephen F. Austin State University in Nacogdoches and Texas A&M University in College Station come to mind. We will look at both programs for inspiration when Memorial Day weekend rolls around.

One thing that will not change is the community work to make the no-refusal weekend a success. Again, it will be a joint effort of all law enforcement agencies, courts, prosecuting attorney's office, media, and community organizations to lower the number of DWI offenses committed in the county and simultaneously demonstrate the program's true goal: prevention. ❇

Endnote

1 As a side note, while preparing for the no-refusal weekend, Judge Chad Dean and I discussed the possibility of being a no-refusal county. He was extremely open to the idea, but much work remains before that becomes a reality.

Prosecution runs in these families

There are many families where both parent and child have gone into prosecution; two such pairs graciously agreed to talk with us about living in criminal justice households.

What would it be like to grow up with a parent who is a prosecutor? Our children see and hear things that other kids are oblivious to. As a mother or father, you hope that your children don't worry about your job or your safety, but God knows we worry about theirs more than the average parent. When you are a first-hand witness to all of the bad things that people can do to other people, it can be difficult *not* to be overprotective.

By Jana McCown
Assistant District Attorney in Williamson County

When I asked my 18-year-old daughter how she felt about my job, her response was, "I don't mind it. A lot of my friends do, though." She told me that they are scared of me until they get to know me (which is not necessarily a bad thing when you have teenage girls). In a small town, you are also likely to have information about your child's classmates and friends, their parents, and other people they know. How much do you tell them, when do you disclose, and when do you just keep it to yourself? All of these questions come up at one time or another and may be answered differently at any given time, depending upon the circumstances.

In Texas, we have in our ranks several prosecutors whose children grew up to also be prosecutors. A couple generously agreed to talk about what it was like to have prosecution all in the family.

Gene and Staley Heatly
District Attorney's Office in Wilbarger, Foard, and Hardeman Counties

Gene Heatly and his son Staley are not only a father-son prosecution pair, but both have also served as the elected District Attorney for Wilbarger, Foard, and Hardeman Counties. Gene was elected 46th Judicial District Attorney in 1976 at the age of 33. He served for three terms and left office in 1988. Before that, he served as the Wilbarger County Attorney from 1969–1976. His son Staley is currently the elected DA for the same three-county district, having been elected in 2006, exactly 30 years after his father first took office as the district attorney. Staley was also 33 when he became the DA, following in his father's footsteps.[1]

Gene's turn

My sons (Gene, Michael, and Staley) didn't really take an interest in my job, but then again I didn't talk a lot about work at home with my children. At one point, being in a small town, I had to prosecute some friends of the family and it was easier not to talk about work at home. When Staley was young I prosecuted a friend of mine who had a son Staley's age. They were good friends and played together a lot. It was an extremely difficult situation and very stressful. The defendant wound up going to prison and then moved away.

When he started law school, Staley wanted to be involved in international law. He had studied one summer after college at the Hague Academy of International Law and was really impressed by watching a trial at the International Criminal Tribunal for Yugoslavia. I never really thought about him becoming a prosecutor when he was young, but of course, when he became lawyer I wanted him to be a prosecutor as

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Gene and Staley Heatly

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opposed to a defense attorney, because a prosecutor's job is to seek justice. When we were in practice together, he handled a lot of criminal matters from the defense side. I can tell that he really enjoys what he is doing now much more.

When he ran for district attorney, I felt many things. Anxious. Proud. Excited. I knew he would win but it was nerve-wracking watching him run for office.

Staley's turn

My dad left office around the time I turned 16. It was about that time that I really understood what my dad did for a living. He kept any fears he may have had hidden from his children. Now, of course, I know that there were times when he was concerned about his safety and the safety of the family. He didn't bring his work home, and he didn't talk about it at the dinner table. I can't say the same for me. My wife is an attorney too so I often like to bounce ideas off her at dinner.

The case that I recall the most was one that he handled right after he went out of office. There was a capital murder and he was appointed to represent the defendant in the case. I remember going to his office and seeing the boxes of documents and looking through some of the crime scene photos. I remember that case being very difficult for him. And while I know he did everything he could under the law for his client, I remember thinking that he would much rather have been prosecuting that case than defending it.

I didn't always want to be a prosecutor. But during my third year of law school I externed for a federal district judge in New Orleans, and watching a federal drug-trafficking trial first-hand and then participating in trial advocacy classes at school really got me interested in prosecution. After considering the available jobs in prosecution—and the associated salaries—I took a job with a law firm in Washington D.C. after graduation. I had to start paying those loans down!

I met my wife at the D.C. firm, and we joined the Peace Corps and moved to Ecuador for two years. After that, I returned to Vernon and my dad and I formed Heatly & Heatly. When the district attorney decided he was going to run for judge, I had no doubt that I wanted to run for DA. My dad really encouraged me to jump in. It was a good feeling knowing that I would have his advice and counsel available when I needed it, and it has been a wonderful experience so far.

Terese and Allison Buess *District Attorney's Office in Harris County*

Terese Buess has been an Assistant District Attorney in the Harris County District Attorney's office since 1991. Her daughter, Allison, joined that same office a little over two years ago and now works on the same floor with her mother.

Terese's turn

Allison was almost 6 years old the day I took the oath to be an assistant district attorney. She had learned the routine of "Mom has to study for school" and was used to spending chunks of time with her dad, especially around finals. Her comprehension of my work at the beginning was merely a switch from letting mom study to letting her get ready for trial.

I don't remember discussing my cases in front of Allison, but I am sure she heard me talking with my husband. I am a firm believer in answering a child's questions in an honest but age-appropriate manner. Allison was the only child in her elementary class to know what a prostitute really does for a living—although she was not allowed to share that information with the other kids. When the musical *Les Miserables* came to Houston, my little one watched it with a comprehension of the plot line far beyond that of the common third-grader.

For a five-year period when I worked in the Child Abuse Division, I tried very hard to shield Alli from the types of cases I was handling. She volunteered along with her dad and me every December at the Children's Court Services Holiday Happiness party so she met some of the victims from my cases and she knew that they had been hurt by adults in their lives.

By the time she left for college Alli had frequently accompanied me to court for regular docket, seen bits and pieces of various trials, waited with me for jury verdicts, and watched a defense attorney get held in contempt of court for using the word "shit" in his closing argument (an interesting lesson for her carpool the next morning). Her observations led to the development of a keen ability to plea bargain and a strong notion of justice, each with their drawbacks. Little Alli's powers of negotiation and persuasion were fur-

ther honed by her involvement with an award-winning debate team in middle school and, much to our dismay, she attempted to use them to tackle almost every facet of her life. We tried to accommodate her within reason, but there were many times, much to her frustration, that parental authority had to win. The difficulty with Alli's sense of justice was that she expected it; the lesson that life is not always fair was a hard but inevitable one.


Allison and Terese Buess

The first time Allison showed a true interest in prosecution was in 2004 when I was preparing for a death penalty trial involving a defendant who shot a family of three children and their mother because the oldest daughter would no longer date him. She designed a chart of the defendant's criminal history that demonstrated his inability to comply with the basic rules of society. We had it enlarged and it made a great visual aid for the jury. Allison sat through much of the testimony and arguments of that trial and was present when the jury assessed the death penalty. I have heard her describing the facts of that case to my mother, the anti-death penalty faction in our family, to explain why the death penalty can be appropriate.

Allison went away to Indiana for her undergraduate work. She insisted that she did not want to be a lawyer, and we encouraged her to find a career in whatever area made her happy. She volunteered at the Bloomington Women's Shelter working their crisis hotline, then trained to assist the victims by accompanying them to court for their cases. In our phone conversations that year she spent much of her time telling me about what went on in court, and I knew Alli's feet were on the path to law school.

Successful semesters of trial advocacy and mock trial seemed to confirm that Allison was a natural in a courtroom, and after completing several internships with various divisions of the Harris County DA's Office, it was no surprise when Allison interviewed for a position as an assistant district attorney. When Allison was sworn in as a licensed attorney and then as an ADA was one of the proudest moments of my life.

Most parents of older children will understand what I mean when I say that I love hearing from defense attorneys and judges about how much they enjoy working with Allison (a frequent topic of elevator conversation) and yet her accomplishments are truly her own and not mine. She is not an appendage or apprentice to my credit. She is a true peer who sometimes challenges and questions my legal theories and trial strategies with frequent good cause and always sound logic. The gift that I have received from Alli is the ability to once again view everything we do as prosecutors through the eyes of a "new" ADA—eyes that are fresh, hopeful, sometimes simple, not yet jaded, and always striving for a better tomorrow and justice.

I am still not used to having Alli in the same building with me day in and day out. I remind my peers and her judges that her function in life is to make us all feel our age. Isn't that what all children do?

I fear more for her safety now than I ever did as she grew up. Part of that is the lack of control that happens when a child becomes an adult. Part of my fear is that she begins her career in a world that has a far greater negative view of our profession than 20 years ago. I pray that her sense of safety is never taken away from her.

I hope that Alli loves this career as much as I have. She knows the joy of working hard for a just result for victims of crime, the frustration of never really being "done" with your work, the pressure of dealing with large dockets and trying to treat each case as an individual situation and reach a disposition decision that is appropriate for both the defendant and our society. And I know that she firmly believes what Johnny Holmes told her in 2009 when she told him she was interviewing for her job: "Prosecuting criminals is the most fun and the best job anyone can have."

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Allison's turn

I don't remember ever being that interested in my mom's job when I was a child. I had a basic understanding that when adults misbehaved my mom had to put them in timeout, but beyond that, it all seemed like something boring that only adults really cared about. Think about it: When you're a kid playing cops and robbers on the playground, no one ever volunteers to be the prosecutor. My mom never tried to hide anything about her job; in fact, she always practiced a kid-friendly version of brutal honesty when I asked questions about what she did, a word I'd heard her use, or the existence of Santa Claus (although she definitely gave a lawyer answer on that one).

While I was never overly interested in my mom's work, it wasn't unusual for her to bring me with her to the office on days I was off from school or I wasn't feeling well. By the time I was 13 I'd probably seen more courtroom action than most civil attorneys see in their entire career.

It wasn't until middle school when my mother was moved to the Child Abuse Division that I started to get interested in her job. This was the first time I could relate to the cases my mother was handling. It was strange to go to her office and see toys and coloring books and to know that the victims she was dealing with were usually my age or younger. I know now how hard it must have been for her to explain that sometimes adults hurt children in the worst ways imaginable. The toughest realization was that sometimes the people closest to a victim, the people that were supposed to protect them, would side with the abuser. That was the first time I realized how important my mom's job was. She ensured that a child victim would have at least one person who believed them and was willing to stand up for them.

Throughout high school I became increasingly interested in the cases my mom was involved in. Even when I went away for college I still kept up with her cases. My first summer home from college my mom was trying her first death penalty case. It was a truly horrendous murder committed by a guy who had spent his entire life hurting other people. This was the type of case that most people wouldn't want to hear about because it was so brutal and so senseless that it made you physically ill. Over the course of my summer I was able to watch most of the trial and even helped prepare some visual aids for the punishment phase. Just playing such a small role in the trial made me feel like I was doing something that mattered.

When I started to think about law school, it wasn't because I wanted to be a lawyer, it was because I wanted to be a prosecutor. My mother constantly reminded me that I didn't have to practice criminal law. I was fortunate enough to participate in an internship with the Army JAG Corps that allowed me to practice in almost every legal field available. While I enjoyed my internship, I once again found that while I was perfectly capable of examining contracts and reviewing civil claims, I most enjoyed working in the field of criminal law. I know my mom was worried that I was passing up opportunities for higher-paying and lower-stress jobs, but it wasn't a hard decision to apply to the Harris County DA's Office.

Coming to work in Harris County was a lot like coming home for me. By now the court staff and attorneys all seem to know me and I find that I have a comfort level in the courtroom and in front of a jury that seemed to surprise other attorneys. I've never had an opportunity to actually try a case with my mother although I frequently hear her voice in the back of my head when I'm reviewing a case or in trial. More than being a source of legal wisdom, though, my mom continues to motivate me to be a better advocate for victims and a better prosecutor. She still inspires me every day, and I can only hope that I will live up to her legacy.

In closing

To me, it was most interesting—but not really surprising—that the "children" in this article took their parents' jobs for granted. I suppose they didn't think much about it because it was simply a fact of life and they didn't know any different. I personally found it reassuring that neither had an in-depth understanding until later in their teenage years, partly because I too have realized the effect our jobs can have on our kids.

Last year, I was deep in preparation for a murder trial that was starting in another week. My two defendants were a married couple and their names were Kevin (also my husband's name) and Jennifer (one of my daughter's names).[2] The two had lured Jennifer's ex-husband out to a rural location, killed him, and left his body there.

One night I was still working at home, and I was talking to a peace officer on the phone. My 11-year-old son was in the room playing when all of a sudden he stopped dead in his tracks and looked at me with a strange expression on his face. I realized I had been talking about the case in front of him and discussing the defendants' motive to kill the victim and how they did it. I stopped my conversation for a minute and told him to go in the other room and watch TV or something, that I had a little more work to do before I would put him to bed. He smiled and said OK, and I didn't think anything more about it until I was saying prayers with him at bedtime. It's not unusual for him to pray about keeping our family safe and helping those less fortunate than us—he says the sweetest things. But afterwards, while I was still sitting there, he looked up at me and asked very innocently, "Now why does somebody want to kill Daddy?"

We are lucky to have jobs that are challenging and more interesting than any other line of work that I can imagine. (Johnny Holmes was right.) After much thought, I decided that our children are both lucky and unlucky to have a prosecutor for a parent. Lucky because we show them everyday that there are adults who care about the community and work to keep them safe, but unlucky because they have parents who are fully aware of the capabilities of human beings to do horrible things to other people. It's a fine balance to raise children when you are a prosecutor. I would say that the parents in this article did a pretty darn good job! ❇

Endnotes

1 On a side note, Staley's uncle, Bill Heatly, served as DA in the neighboring 50th Judicial District in the 1970s and '80s for 18 years. He is currently the district judge in the 50th.

2 Kevin's ex-wife's name was Jana, so reading the case file was a little interesting at times.

Newsworthy

ABOVE: Outgoing Investigator Section Chair Melissa Hightower presents Brent Robbins, DA Investigator in Denton County, with the C. Chuck Dennis Award at TDCAA's Investigator School.. BELOW: A few of the PCI Award winners. Congratulations to all!

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NEWSWORTHY

Elected DAs from the Border Prosecution Unit presented State Senators Kirk Watson (D-Austin) and Tommy Williams (R-The Woodlands) with its Border Champion Awards in honor of their leadership on border issues. The award was presented in the hearing room for the Senate Transportation & Homeland Security Committee.

Pictured from left to right are: Ryan Larue, Committee Director, Senate Transportation & Homeland Security Committee; Sandy Guzman, Legislative Director for Senator Kirk Watson; State Senator Kirk Watson (D-Austin), Vice-Chairman, Senate Transportation & Homeland Security Committee; Bernard Ammerman, County & District Attorney, Willacy County; State Senator Tommy Williams (R-The Woodlands), Chairman, Senate Transportation & Homeland Security Committee; Rene Peña, 81st Judicial District Attorney; Martha Warner, 156th Judicial District Attorney; Danny Kindred, 38th Judicial District Attorney; Jaime Esparza, 34th Judicial District Attorney.