THE TEXAS PROSECUTOR

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

The murderer next door

How Travis County prosecutors tried a gruesome murder case in front of the national media and laid groundwork for recognition of an inevitable discovery doctrine in Texas

By Bill Bishop and Stephanie McFarland
Assistant District Attorneys in Travis County

Jennifer Cave was a 21-year-old Austin resident who had grown up and graduated from high school in Corpus Christi. She enrolled in and attended classes at Texas State University in San Marcos, but Jennifer struggled academically and decided to move to Austin rather than return to college. She had several jobs in Austin, mostly as a waitress. Jennifer's friends and family knew of her battle with drugs, her attempts to resist them, and how she kept going back to them.


Stephanie McFarland and Bill Bishop

Colton Pitonyak, a 22-year-old junior at the University of Texas, was a National Merit Scholar from a private Catholic high school in Little Rock, Arkansas. He had no criminal history from Arkansas, and his high school records were spotless. His father owned a farm machinery company, and his family lived in an upper-middle-class neighborhood. He came to the University of Texas at Austin with scholarships and an admission into the business school, not an easy task for an out-of-state applicant. Pitonyak had been charged with DWI and POCS while at the university, so his family was aware of his problems with drugs and alcohol. They did not appear to know that he was also dealing drugs, nor the extent to which his drug use had escalated during the summer of 2005.

The relationship between Jennifer Cave and Colton Pitonyak was never very clear. Those who knew Jennifer describe Pitonyak as her source for drugs. No one reported seeing them on a date, and no one reported that they ever held themselves out as a couple.

The crime

On August 16, 2005, Jennifer Cave showed up at a local law firm in response to a posting for a one-day filing job. The firm was so impressed by her enthusiasm and good work that she was offered a full-time position to begin the next day.

That evening Jennifer talked to her mother, roommate, and ex-boyfriend, telling them how excited she was for her first day at the new job. At 8:30 p.m., in her pajamas, she said she was going to bed and asked her roommate to make sure she woke up in the morning. However, at about 9:30 p.m. that evening, she spoke to a friend, Michael Rodriguez, and told him she was going to spend some time with a friend named Colton, whom she said was having some problems.

Around 11:00 that night, Jennifer and Pitonyak saw several of Jennifer's acquaintances on 6th Street, an area of clubs and bars in downtown Austin. The two groups joined together, sat down at a table at Treasure Island, and each had a couple of drinks. While at the bar, Jennifer talked to a couple of girlfriends, and Pitonyak flirted with one of them. He also made a call on his cell phone to set up the purchase of an 8-ball, an eighth-ounce of cocaine.

Continued on page 12

Tribute gifts to the Texas District and County Attorneys Foundation

In honor

Tamara Yvette Schmidt-Keener in honor of Gerald W. Schmidt

In memoriam

Roe and Ted Wilson in memory of Di Glaeser
Betty Marshall in memory of Matthew Paul
Lisa McMinn in memory of Matthew Paul
The Honorable Cathy Cochran in memory of Matthew Paul

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Table of Contents

the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

Felony murder charges: Once more with feeling

In the last year we have had a number of successful felony-murder prosecutions of DWI felons who kill while driving under the influence. The general public, speaking as jurors, have again and again affirmed their belief in this charge by giving out sentences way above the 20-year limit on intoxication manslaughter. If you read our July-August 2006 edition of *The Texas Prosecutor*, you will find a great article by **Tanya Dohoney** on how to handle one of these cases from start to finish. You might also want to check in with **Jeri Yenne**, CDA in Brazoria County, for punishment tips. In March a jury sentenced a four-time DWI offender who killed a 32-year-old woman to life in prison. Congratulations again to all of the prosecutors who have worked to develop this area of the law. Y'all may yet be able to convince some of these people not to get behind the wheel.

The emergence of the felony-murder theory is a good example of how thoughtful prosecutors can use the law to find justice. Seems we have done that a lot lately in the area of DWI, where the legislature tends to move pretty slowly. Look at the area of breath testing: With breath-test refusals hovering around 50 percent, we still haven't seen a legislative solution. Enter prosecutor creativity and search warrants for blood. By all accounts there has been a dramatic increase in the use of search warrants to obtain blood in DWI cases, all using existing law.

Just goes to show that one way or another, prosecutors find a way to make these cases.

A Blue Star Texan

The passing of **Matthew Paul**, the State Prosecuting Attorney, was a shock. He was an intellectual force who chose to use his gifts in service of the state. Many of you have benefited from his wise advice, and our criminal jurisprudence flourished under his guiding hand. You have seen his many contributions at TDCAA training events.

But you may not appreciate the depth of his commitment to the state and prosecution. Four years ago, in the dark days of a state fiscal crisis, Matthew appeared before a beleaguered House Appropriations Committee. Believing that it was crucial for the state that his tiny little agency survive, he did something that is still talked of at the capitol: He offered to take a deep cut in pay to keep his staff. Stunned, the legislators quickly recovered and accepted the offer. They rewarded Matthew with a hastily drawn blue star on yellow legal paper.

To the day he died, Matthew was operating with a sliced budget; he took personal pay cuts to fund the other personnel and office duties. Ironically, the legislature is finally poised to pass a bill that would put the State Prosecuting Attorney into the Professional Prosecutor Act and pay that position a salary equal to that of a district attorney. That's a good thing, and Matthew would have been most deserving of it. But for a guy with such dedication to justice, a blue star may have been just fine.

Damned if you do, damned if you don't

In this issue of *The Texas Prosecutor* on page 6, our President and Chairman of the Board, **David Williams**, writes about the challenges facing prosecutorial independence in the wake of the recent TYC meltdown. Sometimes prosecutors can get in just as much trouble for prosecuting as not prosecuting.

Just ask **Johnny Sutton**, the United States Attorney for the Western District of Texas. Not long ago Johnny's office completed the successful prosecution of two Border Patrol agents, Ignacio Ramos and Jose Compean, for shooting and wounding an unarmed drug dealer

in the back after he abandoned his load on the U.S. side and was fleeing back to Mexico. The agents also got in trouble for covering up the shooting. Under the stringent federal sentencing guidelines, both got about 10 years.

This prosecution has raised an uproar amongst some in D.C. and some television pundits, notably Lou Dobbs, who accuse Johnny of being on the wrong side of the border war. Under the theory that at some point television talking heads should let the public know the facts, Johnny recently went on the Dobbs show and posted a discussion of the case on his website, www.usdoj.gov/usao/txw.

All of this highlights what y'all already know: Prosecutorial independence is healthy. An allegiance to the facts of a case is all that is required of an independent prosecutor, and that should be enough for an informed public.

One of the publicity problems that Johnny faces is that the agents both got double-digit sentences under the federal sentencing guidelines. I hope this case re-affirms our state's commitment to a model penal code that has broad categories of crimes with broad punishment ranges, with a ton of discretion for the court and jury to assess sentences. Maybe those mad at Johnny over the prosecution could redirect their attention at those guidelines.

Appellate specialists, rise up!

As this edition of *The Texas Prosecutor* goes to press, we are awaiting word from the State Bar as to whether there will be a new legal specialty: criminal appellate law. A hearing on the subject is set for April 25. The existing criminal law specialty can be hard to obtain for appellate practitioners because of the lack of trial work. Keep an eye on the Texas Board of Legal Specialization (TBLS) website, www.TBLS.org, for proposed standards and other news about the possible specialty.

Loan forgiveness update

It isn't moving fast, but there are some signs of life out of Washington D.C. The John R. Justice Prosecutors and Defenders Incentive Act has been filed as S. 442 by **Senator Richard Durbin** (D-IL), H.R. 893 by **Congressman Ted Poe** (R-TX), and H.R. 916 by **Congressman David Scott** (D-GA). A special thanks to Congressman Poe, a former assistant district attorney and district judge in Houston (and a lifetime member of TDCAA) for pushing this initiative.

In late February the Senate bill had a good hearing, with the witnesses led by NDAA Chairman of the Board **Paul Logli**. The bill itself would authorize $25 million in appropriations in FY 2008 and amounts as needed thereafter. This is all good news, but patience is required. Even if the bills get wings and pass, my guess is the appropriations to support the measure are not going to kick in immediately—that will take another round of work on the Hill. But a big thanks to Congressman Poe, the other sponsors, and the folks at NDAA for their hard work.

Your honor

Congratulations to **Dib Waldrip**, CDA in Comal County. Dib has been appointed to the 433rd District Court serving Comal County. Good luck, Dib!

Big-tent preachin'

By the time this edition of *The Texas Prosecutor* reaches your desk, the legislature will be just about done messing around with the laws. It will be time for us to get the new code books out. And while **Diane Beckham** and the TDCAA publications team compiles the best and most timely set of code books, **Erik Nielsen** and the training team gets our summer Legislative Update road-show together. Check out the schedule on page 9.

Once the legislature goes sine die on May 28, **Shannon Edmonds** gets to work putting together that invaluable book of wisdom, the 2007-2009 TDCAA *Legislative Update* book. And it seems to breed controversy, which undoubtedly comes when Shannon describes some of the bills that passed and how they might impact your business. You will recall that in the last year all sorts of folks twisted off when the *Legislative Update* pointed out that a fair reading of the laws under the Code Construction Act could apply the death penalty statutes to doctors who perform certain procedures relating to abortion. No one intended that, to be sure, but pigs is pigs. In addition, Shannon had the temerity to suggest that the new "traveling presumption" relating to carrying a weapon didn't constitute a get-out-of-jail free card. What nerve! By the way, Shannon's observations on these subjects have stood up quite nicely in the face of quite a bit of editorializing and even an AG's Opinion.

So I'm interested to see what kind of trouble Shannon can get into this summer just by making a few valid observations about the new laws.

the President's Column

By David Williams
County Attorney in San Saba County

TYC and prosecutor accountability

It started in December 2006 with a Public Information Act request to the Texas Youth Commission seeking data about reports of abuse and neglect at TYC. TYC's response: "Between 2000 and 2006, law enforcement was notified 6,652 times of reported abuse or neglect and 6,634 times chose not to participate."

That succinctly worded—and misleadingly simple—message touched off a firestorm of criticism of local law enforcement and prosecutors when it was repeated by legislators and the media in February. We all know the story by now: Accusations of sexual abuse of the kids at the TYC facility in Ward County and no action from the local prosecutor led to Governor Rick Perry putting TYC into conservatorship and sparked a major league game of "who knew what when."

We now know that TYC's response was downright deceptive because law enforcement and prosecutors did not get reports of abuse as they should. When they *did* receive word of abuse, those cases were investigated and prosecuted. It took the efforts of several prosecutors with TYC facilities in their jurisdictions multiple days of meetings with legislators to correct the false impression left in the wake of that TYC e-mail.

By the time you read this column, the legislature will have probably figured out what to do about prosecuting crimes at TYC facilities. But this latest dust-up over prosecutorial duties is just another verse to a song that lawmakers have been singing the last few years. The title is something like: "How Do We Control Our Prosecutors and Make Them do a Great and Timely Job (Yeah, Yeah, Yeah)."

My first reminder to our leaders and to those in our profession is the foundation of our jobs: *independence*. It's no mistake that Texas prosecutors, all 327 of us, are constitutional officers who answer to the people through the power of their vote. That means that from time to time, cases won't go the way some people want them to, but in the big picture, that is better than the alternative. We need only look at the flap over the Department of Justice's firing of United States Attorneys to appreciate the downside of centralized criminal prosecution.

But being independent does not mean we are unaccountable to our state's leaders. If a prosecutor falls down on the job, our state leaders have the right to ask how that can be prevented in the future. I was proud that the Board of Directors of the Special Prosecution Unit—district attorneys in jurisdictions with TDCJ units—offered to take direct responsibility for the quality of prosecution in TYC units while staying connected with state government. I've never known a time when prosecutors would not answer the call of a state leader to work through an important issue to the state.

As a profession, we also have a greater responsibility than just to the citizens in our districts. We all answer ready for the State of Texas, so we should do our part to help our neighbors when they need it. You will soon hear much more about your association's work to create a centralized special prosecutor bank, which is a list of names of prosecutors available to assist with cases when they're needed. After all, who better to handle criminal cases than a Texas prosecutor? Many of you already work together and swap cases to make sure the people are well-represented, so this special-prosecutor bank is not a new concept. Organized on a state-wide scale, it would be an important resource for all prosecutors and another means for you to carry out your responsibilities to the people of Texas.

Remembering Matthew Paul, State Prosecuting Attorney

By Diane Burch Beckham
TDCAA Senior Staff Counsel in Austin

On March 25, Texas prosecutors lost an irreplaceable ally with the death of State Prosecuting Attorney Matthew Paul. Those of us fortunate enough to count him as a friend lost something even more significant. Matthew's unique combination of brilliance, humility, fairness, warmth, and humor will be sorely missed by his friends and family.

Matthew loved learning more than anything, whether it was figuring out how to play guitar, exploring a new place outdoors, discovering a great new author, or researching an esoteric point of law. In part because of his curiosity about life and his joy in living it, Matthew had countless facets. For instance, before he went to UT law school (where he graduated first in his class), Matthew spent three years in medical school. Before that, he helped his doctor father deliver babies in Africa.

He would probably agree that some of his happiest moments were spent discussing criminal law with his beloved past and current colleagues at the SPA's office, Jeff Van Horn, Betty Marshall, and Lisa McMinn. He was generous in giving his time to any prosecutor who approached him for advice on a legal problem, and best of all, he never patronized or made any of us feel dumb for asking. Just the opposite: He made us all feel like he was happy to be asked and excited about the chance to investigate some new legal question. And equally importantly, he never failed to ask each caller or visitor how things were going. He remembered the names of our children and our ongoing life struggles and triumphs, and he always cared enough to ask about them and listen to the answers.

In that way, Matthew reminded a lot of us of former Fort Worth appellate chief C. Chris Marshall, who also was taken from the prosecutor ranks too early when he was killed in the Tarrant County Courthouse shooting in July 1992. Both men were big-hearted teachers and mentors and were always eager to share what their unmatched brains held. In 2005, Matthew received the C. Chris Marshall Distinguished Faculty Award from TDCAA, a perfect tribute to a man who followed in Chris's footsteps of fairness, generosity, and wisdom.

As bright as he was, Matthew could also laugh at himself for his very few weaknesses, notably, his befuddlement at technology. He needed (and was always grateful for) help with e-mail, PowerPoint, and most things related to the computer, such as font styles and point sizes. Matthew's office manager, Brenda Kunco, cheerfully served as his technology translator in the SPA's office, as did Theresa Garza and Pam Wood before Brenda. He once shouted his lunch order—repeatedly, unsuccessfully, and with increasing volume—to the wrong ordering station at a drive-through fast-food restaurant (a pole with no speaker, basically). For years after that, to make me laugh, he would turn to the nearest pole, pillar, or column and begin shouting a random lunch order.

State Prosecuting Attorney Matthew Paul, Assistant SPA Jeff Van Horn, and former Assistant SPA Betty Marshall posed in fatigues and berets in response to criticism from some members of the defense bar that the Court of Criminal Appeals and the SPA's Office were too radical. Matthew used this photo in many PowerPoint presentations in the years following, pointing out that he already owned "The Communist Manifesto" before it was used as a prop in the photo.

When he talked about his job representing the State before the Court of Criminal Appeals, he got most excited when he talked about the cases that required collaboration with other prosecutors. He was thrilled to win victories in *Saldano v. State*[1] alongside then-Collin County appellate chief John Stride and in *Margraves v. State*[2] with Brazos County District Attorney Bill Turner. In 2001, when the Court of Criminal Appeals ruled[3] that the SPA had the right to file the single petition for discretionary review for the State—thereby potentially shutting elected prosecutors out of the loop if the SPA chose to file—Matthew went well out of his way to reassure prosecutors that his office's policy of collaboration with local elected officials would continue. That generous approach was certainly not required by the law. But choosing to collaborate rather than asserting power was exactly the sort of choice you'd expect from Matthew.

I was lucky enough to work with Matthew on a few different publications, most notably the *Prosecutor Trial Notebook*. He devoted countless hours to helping write a resource that the

Continued on page 8

A recent PDR from Matthew

One of the last petitions for discretionary review Matthew Paul wrote was in *Curtis v. State*, No. 1820-06, in which the lower court of appeals had ruled that officers did not have reasonable suspicion to stop a motorist who had swerved in his lane of traffic. Jeff Van Horn brought smiles to the faces of those who attended Matthew's funeral service in Ballinger on March 29 when he read the following excerpt from Matthew's PDR:

> "The Court of Appeals noted that there are any number of reasons why a person might swerve or weave out of his lane of traffic, including dropping a sandwich on the floor. It is true that a driver might weave *once* because he dropped his sandwich on the floor of his vehicle. B*ut three times*? For a person to have that much trouble accomplishing the ordinary activity of feeding himself is alone evidence of significant impairment. One drop of a sandwich is understandable. Three unsuccessful attempts to move sandwich from hand to mouth is slapstick comedy."

Continued from page 7

TDCAA Publications Committee thought would help guide new prosecutors from first contact with a suspect through post-conviction procedures. We started from scratch, we usually worked right up until the last second (but never completely busted a deadline), and he never once complained about the amount of work required or the deadline pressure.

Even before that, Matthew was one of the first people I met when I moved back to Austin to work for TDCAA more than 10 years ago. Almost certainly, we first started talking because I needed his help answering a legal question. But he became my friend when he asked about how I was doing, and he helped me get through the worst days of my then-3-year-old son's autism diagnosis and how it had turned my world upside-down. He listened, helped me translate doctor-speak about brain terminology, and helped me laugh through the darkest days. Ten years later, with the crisis days long past and my son thriving beautifully as an A-student and budding actor, Matthew still never failed to ask how Alex was doing whenever we talked.

He wasn't as excited to talk about his own health concerns over the years. He was incredibly stoic and preferred to keep those to himself, so much so that even with his health issues, his death at 51 caught us all by surprise. He came in to the office and did his work on days when he felt horrible. When asked how he was doing or feeling, his answer was never any worse than, "Pretty good," even on days when you knew he just *wished* that were true.

Matthew was an enthusiastic supporter of all TDCAA efforts, whether that was teaching, writing a book, reading a manuscript from another author, or helping plan a seminar. We're humbled that his family has named the Texas District and County Attorneys Foundation as the recipient for memorial donations.[4] We will use all donations made in his name for educational purposes for prosecutors, and we will do our best to use the funds on projects that will honor Matthew best.

Matthew will be sorely missed by his wife, Lisa (whose bright smile and cheerfulness has long been part of our annual conferences); his mother, Dorothy; his siblings, Mark, Lauri, Holly, and Amy; and the rest of his fun-loving family. We at TDCAA extend our heartfelt condolences to all of them.

The Texas criminal justice community will miss Matthew's fairness, insight, and elegant way of writing and expressing himself. All of his friends will miss his laughter, his warmth and concern, and his generosity of spirit. Matthew loved learning about the law, being a prosecutor, and working with all of us. He will not be forgotten, and Texas is a richer place for all his contributions.

Endnotes

1 *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002) (elected district or county attorney, rather than the Texas Attorney General, has the constitutional and statutory right to represent the State on appeal and on writs of certiorari before the U.S. Supreme Court).

2 *Margraves v. State*, 34 S.W.3d 912 (Tex. Crim. App. 2000) (rejecting argument of defendant, a regent from Texas A&M University, that if a defendant can show a mixed use of state property—one for official business purposes and one for personal reasons—the defendant is not guilty of official misconduct).

3 *Ex parte Taylor*, 36 S.W.3d 883 (Tex. Crim. App. 2001) (the State can file only one PDR in any case; if the SPA files, that PDR is treated as the official petition for the state, leaving any other petition by the district or county attorney to be treated as an amicus brief).

4 Interested people can send any contributions to TDCAF, 1210 Nueces St., Austin, TX 78701. Please include Matthew's name on the memo line so that we can direct the funds accordingly.

Seminar schedule

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

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

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

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

Annual Criminal & Civil Law Update, Sept. 26–28, 2007, at the Omni Bayfront and Marina in Corpus Christi. Both Omni Hotels are full; we have procured overflow rooms at the Holiday Inn Emerald Beach. Rates are $85 for a single and $105 for a double; these rates are good until Sept. 11, or until sold out. Please call 361/883-5731 for reservations.

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

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

Law & Order Award winner

Senator Craig Estes was presented with TDCAA's Law & Order Award in early April for his work passing anti-meth legislation and his repeated support of prosecutors during the 79th Regular Session. Here, he is pictured with Shannon Edmonds, TDCAA's director of government relations, and Joe Brown, CDA in Grayson County.

Summer schedule for TDCAA's Legislative Updates

Once the legislative session is over, we travel to 18 cities to inform our members and others about changes to the law. Don't miss this chance to find out what happened during the 80th Legislative Session and earn 3 hours of CLE/TCLEOSE credit. All sessions (unless otherwise noted) are from 1 to 4 p.m. Sign up by calling 512/474-2436 for a faxed registration form, or go to www.tdcaa.com/seminars.

City	Date	Location
Austin*	Friday, July 20	DPS Auditorium, 5805 N. Lamar Blvd., Bldg. C
Bracketville	Thursday, July 26	Fort Clark Springs, Hwy. 90 West, Service Club
San Antonio	Friday, July 27	Bexar County Courthouse, 300 Dolorosa, Central Jury Room
Wichita Falls	Friday, July 27	MPEC, 1000 5th St., Theatre Room
Dallas	Thursday, August 2 (2–5:15 pm)	Frank Crowley Criminal Courts Bldg, 133 N. Industrial Blvd., Ste. B-4 (Central Jury Room, 2nd floor)
Edinburg	Thursday, August 2	UT Pan Am Int'l Trade & Tech Bldg., 1201 W. University Dr.
Midland	Friday, August 3	Midland College, 3200 W. Cuthbert, in the Business Training Lecture Hall (Advanced Technology Bldg.)
Beaumont	Thursday, August 9	Jefferson County Courthouse, 1001 Pearl, Jury Room, 1st floor
Houston*	Friday, August 10	University of Houston, downtown campus at One Main St., Wilhelmina Cullen Robertson Auditorium
Waco	Friday, August 10	Baylor School of Law, 1st floor auditorium
Lubbock	Thursday, August 16	Lubbock County Elections Office, 1308 Avenue G, Public Room
Amarillo*	Friday, August 17	Potter County Courthouse, 501 S. Fillmore, Central Jury Room
Llano	Friday, August 17	Ben E. Keith Bldg., 1604 Bessemer Ave. (State Hwy. 16 North)
Fort Worth*	Friday, August 17	Courthouse, 401 W. Belknap, Central Jury Room
Bryan	Thursday, August 23	Brazos Center, 3232 Briarcrest, Assembly 102
Jacksonville	Friday, August 24	Norman Activity Center
El Paso	Friday, August 24	Courthouse, 500 E. San Antonio, Commissioners Courtroom
Corpus Christi	Tuesday, Sept. 25	Omni Bayfront Hotel

*** Includes ethics training in the morning**

Photos from the Investigator School

Photos from Intoxication Manslaughter School

Continued from the front cover

Around midnight, the group decided to go across the street to Cheers Shot Bar. At the door of Cheers, Pitonyak pulled Jennifer away, and the two were last seen walking east on 6th Street.

Michael Rodriguez received a call from Jennifer at 12:08 on the morning of August 17, 2005. She told him that the only people who could help Pitonyak were in jail. Michael said that she did not seem afraid or anxious, and she said she would call him back. About an hour later, Michael again spoke to Jennifer. She was describing Pitonyak as drunk and angry. Jennifer yelled at him while on the phone, "What are you doing? That is not my car!" and "Oh my God, he is pissing on that car." Again, she did not want help or sound like she was afraid for her safety.

That was the last known conversation Jennifer had with anyone besides Pitonyak. Sometime between 1:05 and 3:30 a.m., Jennifer was shot and killed in Pitonyak's apartment just west of campus. Pitonyak remained alone in his apartment with Jennifer's body until his friend, Laura Hall, came over later that morning. Around nine that evening, Hall and Pitonyak left Austin for Mexico in Hall's green Cadillac, leaving Jennifer's body in the bathtub, her head and hands severed.

The morning after

The morning of August 17, 2005, Jennifer did not show up for her first day of work. The law firm called her cell phone several times and sent an office manager to her apartment to leave a note to call when she got home. Around 3:30 that afternoon, after not hearing from their new employee, Bill Thompson, Jennifer's boss, called Jennifer's mother, Sharon, in Corpus Christi to say that her daughter did not appear for work.

Sharon Cave was very close to her daughter and typically spoke to her several times a day. Obviously, the news from the law firm was distressing. Sharon called T-Mobile, Jennifer's wireless service provider, and asked about Jennifer's cell phone activity on the account, which Sharon maintained for her daughter. Sharon then called the last three numbers on her daughter's cell phone.

One of the people Sharon reached quickly was Scott Engle, Jennifer's ex-boyfriend. She also attempted to reach Pitonyak, but he did not answer Sharon Cave's call. When she reached Michael Rodriguez, Sharon was told about Jennifer's calls the night before. While talking to Michael on her business phone, Pitonyak returned Sharon's call on her cell phone. Pitonyak told Sharon that he had not seen Jennifer. Michael Rodriguez, still on the office phone, immediately told Sharon that Pitonyak was lying to her.

In Austin, Pitonyak had already gone to great lengths to cover up Jennifer's murder. At three in the morning, less than two hours after Michael Rodriguez last talked to Jennifer, Pitonyak went to the apartment of Nora Sullivan, several doors down from his own. While there, he told Nora a rambling tale about being in a gunfight with at least two Mexicans and claimed that he fired two shots and may have hit someone. He removed the magazine from his gun and asked Nora if he had blood on him. She pointed out a small smear on his arm that appeared to be blood.

Pitonyak's cell phone records showed that he exchanged text messages with Laura Hall after leaving Nora Sullivan's apartment. Although the content of text messages is not retrievable in phone records, one of the messages remained on Colton's cell phone when it was recovered. That message from Laura Hall read, "What do U mean." The text messages were followed by a 13-minute call between the two at 6:00 a.m.

About the same time that the law firm called Sharon Cave about Jennifer's absence, Pitonyak was in Breed's Hardware, about a half-mile from his apartment. In the hardware store, he asked for a saw to cut up a turkey he was frying. In addition to the 8-inch hacksaw, his receipt showed that he bought safety masks, ammonia, and other cleaning products. The surveillance video from the hardware store showed that he was alone. Another receipt in the apartment showed that he stopped at Burger King on his way home.

Around 6:30 in the evening of August 17, Scott Engle called Pitonyak. He asked about Jennifer's whereabouts and confronted him with the fact that he was the last person to see her. Pitonyak said repeatedly that he had not seen her and ended the phone call by saying, "That bitch is going to get me arrested."

At 8:34 p.m. the same night, Pitonyak again talked to Sharon Cave in response to her persistent calls. He said, "Dude, I am eating pizza with my friends," and again insisted that he had

At trial,Travis County assistant DA Stephanie McFarland gestures to a photo of defendant Colton Pitonyak and friend Laura Hall, who were all smiles in Mexico after dismembering Jennifer Cave's body and fleeing south. Photo from the Austin American-Statesman newspaper.

not seen Jennifer since the night before. Sharon told Pitonyak that she had contacted the police and that they were going to his apartment.

Pitonyak's cell phone records revealed that shortly after that call, his cell phone was traveling south on Interstate 35. He attempted numerous calls, with the tower hits showing a clear path from Austin to Del Rio on the Texas-Mexico border. Surveillance video later showed that Pitonyak and Hall crossed at the international bridge into Acuna at 2:41 a.m.

Desperate to find Jennifer, Sharon Cave and her fiancé, Jim Sedwick, came to Austin on August 18. Before they got to town, they heard from a missing persons detective with the Austin Police Department that Jennifer's car was parked on the street outside of Pitonyak's apartment. They went to the apartment and repeatedly banged on the door and windows calling for Jennifer. Officers from the Austin Police Department arrived, only to tell the distraught family that they could not enter. After the last officer left the scene, a locksmith was called, but he couldn't open the deadbolt of the apartment. Feeling they had run out of time and fearing for Jennifer's safety, Jim Sedwick entered the apartment through a window that they had managed to unlock.

As Jim Sedwick walked through the dark apartment, he had no idea what he was about to see in the bathroom. He did not stay long enough to fully comprehend that his fiancée's daughter was not only dead in the bathtub, but also that her head and both hands had been severed from her body and lay in a bag on the floor next to the tub. Once he saw Jennifer's body, he immediately left the apartment and called the police. He knew he had to prevent Sharon Cave from entering the apartment, even when it meant physically restraining her.

Pitonyak's apartment was cleared by APD officers and sealed until a search warrant was signed. In many ways, it was a typical college male's apartment except for the immaculate kitchen, two shell casings on the coffee table, and the mutilated body in the bathtub.

The autopsy revealed that the cause of death was a single gunshot, through the right arm, into the torso and lacerating the aorta before lodging just under the skin of Jennifer's left back. The other findings were grotesque: The head and hands were severed from the body, there were multiple post-mortem stab wounds to the chest and neck, and there was a bullet against Jennifer's skull that was fired into the head through the severed neck. The shell casing for that shot was discovered in the bathtub only after the body was moved by the medical examiner.

Police quickly discovered that Pitonyak's vehicle was still parked beneath the apartment complex. A search revealed a Smith and Wesson .380, which was later determined to be the weapon that fired all three casings in the apartment, as well as the two projectiles removed from Jennifer's body. Also in the vehicle was a road atlas, which was missing the page for southwest Texas.

As his apartment was searched,

Continued on page 14

Continued from page 13

Pitonyak was in Piedras Negras, Mexico, partying with Hall. They went with the clerk of the CasaBlanca Hotel to watch the Ultimate Fighting Championship, and Pitonyak inquired about extradition and the possibility of selling Hall's Cadillac to travel farther into Mexico. Crimestoppers tips led officials to their location, and Mexican authorities removed Pitonyak to the custody of United States Marshals at the international bridge in Eagle Pass.

Pre-trial

The first stage in our prosecution was preventing the exclusion of evidence found during Jim Sedwick's entry into Pitonyak's apartment. Although there was certainly no constitutional violation, Article 38.23 of the Texas Code of Criminal Procedure disallows the use of evidence discovered as the result of a violation of the law by any person. Caselaw has allowed for the fruits of apparent theft if the items were taken with the intent to turn them over to law enforcement,[1] but none of those cases covered evidence discovered as the result of criminal trespass.

The State argued that the evidence should not be suppressed on three grounds:

- Jim Sedwick's actions were the result of exigent circumstances that would have allowed entry by law enforcement.
- The facts as Jim Sedwick believed them at the time of entry warranted his entry as immediately necessary to cure harm or prevent future harm. This argument was new ground because the emergency doctrine has not been applied to non-state actors.
- Sedwick's actions, although they meet the elements of criminal trespass, were non-criminal by reason of the justification of necessity under §9.02 of the Penal Code. For pre-trial purposes, the judge was the factfinder charged with determining if Jim Sedwick was entitled to this affirmative defense.

Finally, the State presented evidence of and argued that suppression was not appropriate because of inevitable discovery (if that doctrine were applicable in Texas). Specifically, homicide detectives testified that the apartment had an odor of decay during their search. They further stated that based on training and experience, neighbors would be reporting the odor within 72 hours. During that time period, Pitonyak was in Mexico, having made no effort to return to his Austin apartment. We believed that inevitable discovery is an issue that must be re-examined by the Texas Court of Criminal Appeals.

The court denied the motion to suppress on those three grounds, making a specific finding that inevitable discovery would apply if recognized in Texas. This finding will negate the need for a future remand to the trial court if the doctrine is later recognized.

Brainstorming defenses

The process of trial preparation, beyond the normal fact gathering, consisted of many hours of brainstorming to determine what the defense would argue. One obvious strategy the defense might choose was to implicate Laura Hall in the murder. Swabs of the murder weapon contained a mixture of DNA, and neither Pitonyak nor Hall could be excluded as contributors. Hall's alibi witnesses were initially uncertain regarding exact dates when police interviewed her, so the State had to consider Hall a wild-card. She and Pitonyak's relationship appeared to be one-sided: Laura was in love or obsessed with Pitonyak, a feeling he did not appear to return. We anticipated that she would be called by the defense and take the Fifth, but we could not be certain. Of course the State had to explore any angle the defense might use to claim self-defense, accident, or mistake. We knew that when the jury saw the defendant, he would present as a clean-cut, handsome young man. If he testified, we were sure that he would be articulate and well-prepared for cross examination.

To force the defense's hand, we charged Pitonyak only with murder.[2] Options of lesser-included offenses would provide defense arguments more credibility and give soft jurors an out. Charging only murder put the onus on the defense to produce evidence of what happened between 1:05 a.m. and 3:00 a.m. if Pitonyak wanted a charge on manslaughter or criminally negligent homicide.

The trial

We knew that the case of *State vs. Colton Pitonyak* would be well-attended by local media, but it was the Friday afternoon before trial when the State was notified that CourtTV would also be present bright and early Monday morning to set up its equipment. Despite the need to make some adjustments for more microphones on our counsel table, the State made a conscious effort from voir dire on to try this case for what it

was: a straightforward murder. The gruesome dismemberment of the victim's body and the defendant's flight to Mexico had brought national media to the courtroom, but we had to focus on the facts that proved beyond a reasonable doubt that Colton Pitonyak intentionally and knowingly shot and killed Jennifer Cave in the early morning hours of August 17, 2005.

As early as voir dire, Pitonyak's attorneys said that he would testify. In the defense opening statement, the jury was told that Pitonyak would testify that he did not remember what happened that night. Even more surprising was the revelation that the defense was conceding that no one else was at the apartment and Laura Hall did not arrive until the next day—after Jennifer Cave was dead.

The State's case was presented in a very straightforward manner and proceeded quickly. One issue we wrestled with prior to trial was how to present the very disturbing photos of the crime scene and autopsy. It was important that the jury could see the true horror of this crime, but at the same time we did not want to overwhelm them. We went through all the photographs carefully a number of times, culling them until we could articulate a succinct argument stating how each photo was crucial to the presentation of our case.

The defense attorneys spent all of their energy attempting to confuse motive and premeditation with intent. They presented evidence that the murder weapon has no safety and no indicator that a round is in the chamber, even if the magazine is removed. At about midpoint at their case's presentation, the one person everyone had been waiting to hear from testified. Pitonyak said that he had no reason to murder Jennifer and would never have intentionally or knowingly hurt her. He also testified that, although he went to Breed's Hardware, Laura Hall did all of the mutilation of Jennifer's body.

On cross examination, any question as to the time period around the murder was answered with an "I don't remember" or an "I don't know." All along, the State felt it would be important to expose the other side of Pitonyak's personality, the one that lurked beneath his boy-next-door look and upbringing.

The inclusion of lesser-included offenses would provide defense arguments more credibility and give soft jurors an out.

During his testimony we were able to present to the jury Pitonyak's other face, the one that admired the drug and gangster lifestyle. The defendant admitted to screen names of "Cmoney" and "Ilovemoneyandhos"on his Facebook profile. We also showed that his favorite movies were *Donnie Brasco* and *Goodfellas*, both of which contain scenes of body mutilation. On his coffee table was a "Sopranos" DVD where Tony Soprano dismembers a murder victim in a bathtub, then removes his head and sticks it in a bowling ball bag. In his apartment the police found toy guns that were very realistic. The defendant had also done computer searches looking at different types of guns. The large *Scarface* movie poster hanging in his kitchen began to take on new meaning, as the defendant admitted to dealing drugs and how he came to possess the murder weapon. Pitonyak told the jury that a friend wanted to borrow his car after giving Pitonyak a tattoo and left the gun in the apartment as collateral. He further testified that this particular gun had been used in the past as payment and collateral in drug transactions.

At the conclusion of the evidence, the defense argued that the testimony about the gun and the lack of motive or premeditation warranted charging the jury on the lesser-included offenses of manslaughter and criminally negligent homicide. However, the court agreed that the defendant's testimony—that he did not remember what happened—was not evidence that warranted those instructions. In their closing arguments the defense attorneys tried to distance the defendant from Jennifer's mutilation by placing the blame on Laura Hall. They repeated their mantra that Pitonyak had no motive to murder Jennifer and attempted to confuse the jury about the meaning of intent.

The jury was out just over an hour before finding Pitonyak guilty of murder. Following powerful victim impact testimony from Sharon Cave, when she tearfully told the jury of the devastating effects of Jennifer's brutal murder on the emotional and physical well-being of her

Continued on page 16

Continued from page 15

family and friends, the State rested its punishment case. The defense put on a number of Pitonyak's high school friends, coaches, and teachers. In addition, his parents testified. His mother begged the jury to spare her son because "he is such a good man." All blamed Pitonyak's heinous actions on the influence of drugs and alcohol.

The jury deliberated about two hours before sentencing Pitonyak to 55 years in prison. The State had argued for life, but Sharon Cave and her family viewed the sentence as five years short of the maximum and were glad to see that the jury did not give credit to the defense's arguments minimizing Pitonyak's culpability.

Laura Hall is currently charged with hindering apprehension, and the State is considering adding a charge for tampering with physical evidence based upon statements she has made since her return from Mexico. Her trial has not yet been scheduled.

Endnotes

1 *Jenschke v. State*, 147 S.W.3d 398 (Tex. Crim. App. 2004); *Cobb v. State*, 85 S.W.3d 258 (Tex. Crim. App. 2002).

2 Penal Code §19.02.

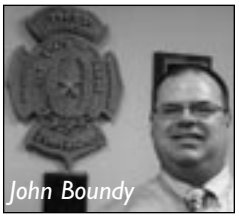
Criminal Law

By John Ernest Boundy
Assistant District Attorney in Nacogdoches County

Entertainment or expectation? How 'CSI' affects today's juries

As a recent aggravated sexual assault and injury to a child case illustrates, the forensic magic of television has ignited juries' thirst for technology and information that can thwart the pursuit of justice.

My life is a devilish dichotomy. At night I join millions of Americans in the delicious pursuit of crime-solving with "CSI" and its successful siblings in Miami and New York. But by day, I am a Texas prosecutor who doesn't have Horatio Caine or Gil Grissom to woo a jury. Oh, to make a case in 45 minutes, without commercial break, with such a stunning array of technology and science as to leave the jury with no doubt of a defendant's guilt!


John Boundy

We all know real criminal trials don't work that way. I recently had a case that ended in mistrial because of jurors' demand for fancy science and indisputable evidence, even though the law required neither. I hope this article helps other investigators and prosecutors with future cases.

The case

It was Friday, August 4, 2006, and it had the makings of a great day. Twenty-six-year-old Julia Thomas was celebrating her fifth wedding anniversary. Her aunt, uncle, and cousin had driven three hours from Louisiana to attend the party planned for that night. The rest of the weekend would be spent visiting family in the area.

Her uncle, Kenneth DeSelle, a truck driver, dropped in that morning as he

sometimes did on his way back to Louisiana from a haul. A little past noon, the others left to go visiting. DeSelle, after taking a shower, went to his truck and spent 20 to 30 minutes in the cab. (Though he was never tested and it can never be proven, I believe he was likely using methamphetamine; Julia says his demeanor changed completely after he returned from the truck, which is consistent with meth use.)

Around 12:30 p.m., Julia was in the kitchen making lunch for her 3-year-old daughter, Susan, and younger son. She heard a sound, and as she turned around, DeSelle charged her from the living room and demanded sex. He shoved Julia against the wall, and the two struggled. As she fought, DeSelle grabbed Julia around the throat and threatened to kill her and the kids if she didn't stop screaming.

DeSelle then stuffed a baggie of white powder into her mouth and again demanded sex. He continued to threaten to kill if she did not comply.

Spitting powder, Julia sobbed, begging for an explanation. "Why are you doing this? You're my uncle. That's gross!" DeSelle responded by ripping the buttons off her pants, forcing them down. Julia started screaming again. Hearing the commotion, young Susan ran in. Crying and screaming, she began kicking and slapping DeSelle. "Please don't kill my momma. Please don't hurt her!" DeSelle elbowed Susan, knocking her backwards several feet into a cabinet. Turning back to her mother, he forced his right fist into Julia's genital area before she found the strength to push him off.

Julia rounded up Susan and began throwing pots, dishes, and anything she could get her hands on. She screamed she'd call the law. As he left, DeSelle said, "Go ahead. The cops don't scare me."

Hysterical, Julia called Rachel Gray, her friend and cousin-in-law. Rachel in turn called 911 and immediately drove to Julia's house, as did her other family members after hearing about the incident.

Patrol Deputy Danny Kitchens responded to the 911 call. He saw the family crowded around Julia on the front porch as he arrived. Separating her from the rest, Kitchens tried to interview Julia, but she was hysterical. He called for investigators to respond to the scene.

EMS arrived. Julia refused to be touched by the male paramedic but agreed to be transported to the hospital only if a family member could ride along. Sheriff investigators Bill Ball and Larry Murphy arrived and photographed the home and those present. They returned to the sheriff's office and contacted DeSelle's employer. Using onboard GPS, they were able to track DeSelle's truck and his whereabouts. After securing a warrant, DeSelle was arrested later that day in Louisiana.

Meanwhile, Deputy Kitchens went to the emergency room and again tried to interview Julia. While calmer, she still couldn't relate the full events of the assault. They agreed Julia would come to the sheriff's office the next day and provide a written statement, which she did.

Sandra Williams, a sexual assault nurse examiner (SANE), collected evidence and performed her examination. The evidence was sent to the lab for analysis. Because of the nature of the assault, no forensic evidence (i.e., semen) was present. Nothing scientific would help in prosecuting the assault.

When this case first hit my desk, it seemed, sadly, routine. No red flags went up for a need of additional forensic evidence or evaluation. I had a credible and very believable victim. The SANE nurse was competent and confident in the facts. The deputy was strong and would make a good witness. Finally, there was adorable and precocious Susan, the 3-year-old heroine who tried to help her momma during a brutal assault.

The trial

Julia's testimony was as expected. She walked through a horrifying account of the attack. Nurse Williams ran through the exam and what she did as a sexual assault nurse examiner. Then Deputy Kitchens took the jury over his involvement from initial response to obtaining Julia's statement the next day. Out of court, young Susan was playful and talkative; however, the thought of talking to 12 strangers made her withdraw. Her grandmother took the stand instead to explain my efforts to get Susan to testify, then brought Susan in and introduced her to the jury.

Because the sexual assault examination didn't produce any usable evidence, no criminologist was called. Both investigators were tied up on other cases at the time of trial. Because their only actual involvement had been taking photos, they were not called either. And because the predicate for a photo is satisfied by

Continued on page 18

Continued from page 17

any witness who has personal knowledge of the scene and recognizes the picture as an accurate depiction of the scene or event it purports to portray,[1] the pictures of the scene and Susan's injuries were introduced through her mother, Julia.

The defense presented a two-pronged attack. First, because Julia had told everyone from the paramedic to the police that the defendant had "shoved his whole fist in me," defense counsel contested the physical findings as inconsistent: There were no vaginal tears or lacerations. Secondly, meth was found in Julia's urine, and she had "lesions" on her face and body, so the defense alleged she must be a chronic meth user and was lying about the assault.

Because she was living in Louisiana after the assault, I talked with Julia many times by phone in the weeks leading up to trial. While admitting meth use after the assault, she adamantly denied it in the period beforehand. As for the "lesions" documented in the medical records, she explained she had acne and reactions to Clearasil. In my pretrial interviews with the SANE nurse, she confirmed Julia's account of her acne and said she saw nothing consistent with meth use.

On cross-exam of Julia, the defense alluded to an alleged argument with the defendant the morning of the attack about drug paraphernalia she supposedly left on the kitchen table. Julia's response was not only that there was no argument, but also that there was no kitchen table. She pointed to a picture of the kitchen that had been introduced showing no table present. That line of questioning was quickly abandoned. When defense counsel attempted to question Julia regarding meth use prior to the assault, the court sustained our objection on grounds of relevance. The defense then went through the EMS and medical records introduced by agreement, focusing on Julia's recitation of the incident that the defendant had inserted his entire fist into her. Julia reiterated her explanation from direct testimony that the defendant had rammed his fist into her genital area and that the intensity of the pain felt like the defendant's entire fist was inside her.

With the SANE nurse, the defense pointed to the emergency room doctor's reporting of "lesions" on Julia's face and back. Inquiry about the nurse's experience with "crank bugs" was allowed by the court. Then the defense meticulously went through the physical examination and findings. Counsel concentrated on the lack of vaginal tearing or laceration. On re-direct, Nurse Williams testified there were no "crank bugs" and that the "lesions" were acne. Regarding the physical findings, Nurse Williams reaffirmed her direct testimony that the bruising of the victim's inner thighs she saw and documented, as well as a lack of tearing or laceration, were consistent with the assault history. Although I had interviewed her twice prior to trial, on cross-examination, I learned for the first time Nurse Williams had taken photographs of Julia. She had not told law enforcement or me of their existence. They were safe—and useless—locked away in a cabinet at the hospital.

For their case, the defense called three witnesses: Dr. Brown, the emergency room doctor; Rachel Gray, the cousin-in-law Julia called after the assault; and Rhonda Lowe, Julia's sister-in-law. Through Dr. Brown, defense counsel established the presence of meth in Julia's urine and "lesions" on her face and back. On cross, the doctor was happy to state he had examined Julia prior to taking the stand and the "lesions" on her face at trial were acne similar to what he had seen the day of the assault. Further, the presence of meth in Julia's urine was consistent with the history of having ingested white powder believed to be meth during the commission of the assault (when her uncle shoved a plastic bag of white powder into Julia's mouth to muffle her screams). Finally, the lack of vaginal tearing or laceration was also consistent with the stated history.

Witnesses Gray and Lowe were presented under TRE 608 to provide testimony of Julia's reputation of truthfulness. Both stated they were familiar with her reputation of being untruthful. On cross, Ms. Gray admitted that in response to Julia's call, she called 911 and frantically drove to Julia's home. Ms. Lowe conceded that her brother, Michael, is going through a rocky divorce with Julia. She denied threatening, just the night before, to take Julia's children in violation of a court order to prevent Julia from having custody.

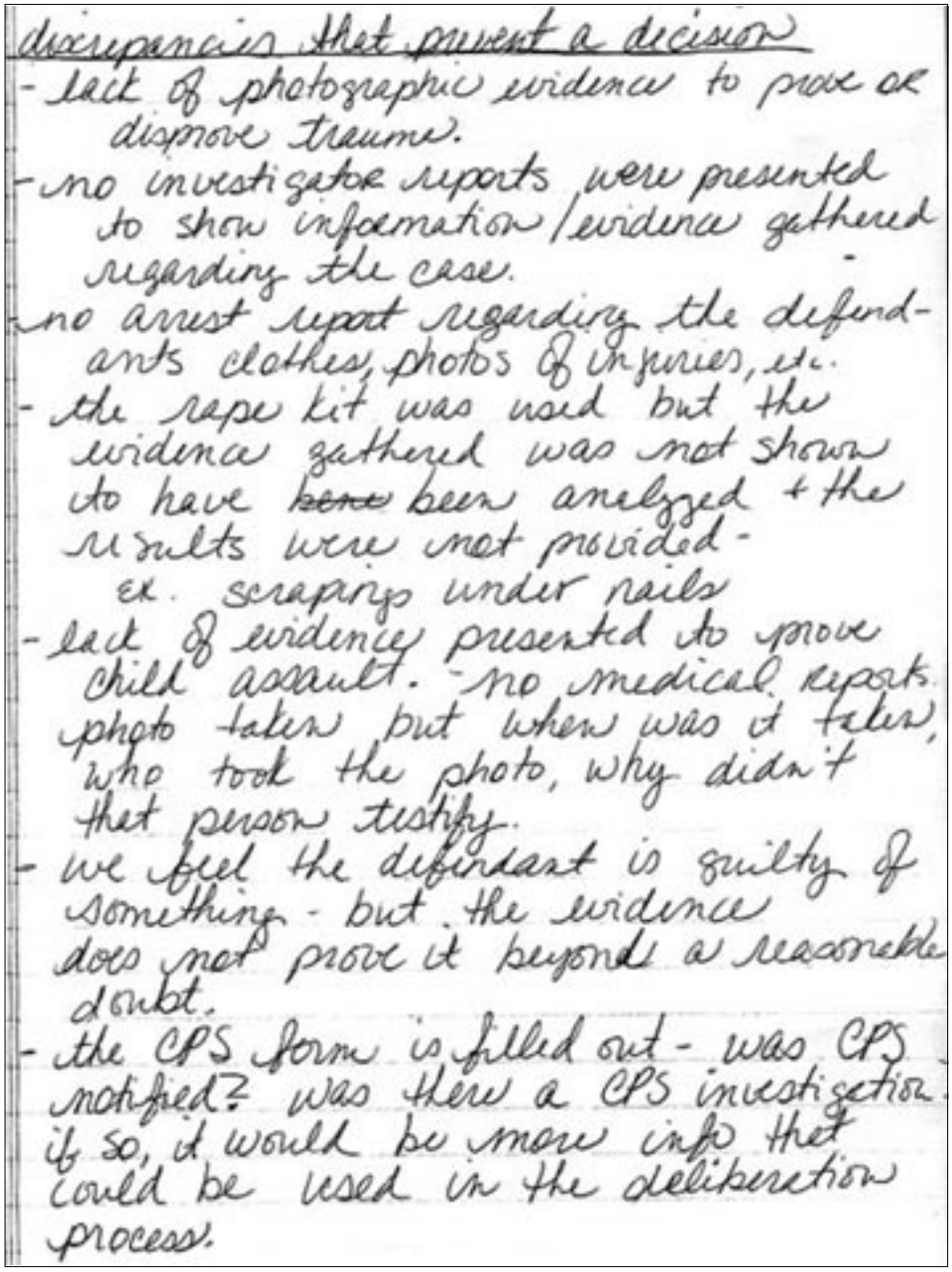
For the injury to a child charge, Julia testified 3-year-old Susan cried after being hit and complained of pain in her right shoulder where she hit the kitchen cabinet. Pictures taken on the front porch following the assault showed redness and slight swelling to the child's

shoulder. The defense attacked that Susan had not been taken to the emergency room that day and that Julia did not have any medical record or bills for a subsequent doctor's visit she testified taking Susan to days after the assault.

After closings, the jury began deliberations. The judge requested I begin working on a punishment charge because he felt a quick guilty verdict was coming.

Two hours later, the first note came out requesting information on when and where the defendant had been arrested. There was an immediate sinking feeling in the pit of my stomach. The jury was looking beyond the evidence and conducting an independent investigation. I could read their thoughts: They were looking for trace evidence. They had heard from Julia that she struck and tried to scratch the defendant. Then the deputy told them the defendant was arrested in Louisiana later the day of the assault. I knew they wanted to know if he had been forensically examined at the time of his arrest.

My fears were realized hours later when the coup-de-gras note entitled "Discrepancies that prevent a decision" came out. As I read it over, my head throbbed. (The note is reprinted here, right.)



discrepancies that prevent a decision

- lack of photographic evidence to prove or disprove trauma.
- no investigator reports were presented to show information/evidence gathered regarding the case.
- no arrest report regarding the defendants clothes, photos of injuries, etc.
- the rape kit was used but the evidence gathered was not shown to have ~~bene~~ been analyzed + the results were not provided - ex. scrapings under nails
- lack of evidence presented to prove child assault. - no medical report. photo taken but when was it taken, who took the photo, why didn't that person testify.
- we feel the defendant is guilty of something - but the evidence does not prove it beyond a reasonable doubt.
- the CPS form is filled out - was CPS notified? was there a CPS investigation. if so, it would be more info that could be used in the deliberation process.

I didn't have the pictures taken by the SANE nurse, a major source of irritation and self-flagellation. But Nurse Williams had testified to and the records documented Julia's injuries. As far as police reports, I couldn't explain that those are inadmissible hearsay.[2] The jury had heard from the victim and had seen photos of the scene and the child victim's injury. They listened to Nurse Williams correlate her findings with the assault. Yet they disregarded the court's instruction to consider only the evidence before it. Instead, jurors conducted their own investigation in the jury room and decided what evidence would be necessary to reach a verdict. They even disregarded the defense's theories in lieu of what they expected to see—save for the injury to a child charge regarding young Susan. There, the jury bit on the defense notion that there was no injury—even

Continued on page 20

Continued from page 19

though the charge had standard language that bodily injury includes pain, illness, or any impairment. Although they had the mother's testimony of Susan's complaint of pain and the photographs, the jury wanted more proof.

Outcome

The jury hung, and a mistrial was declared. Because of the logistics involved with a new trial, we reached a plea bargain with DeSelle. The defendant pled guilty and accepted a 10-year deferred probation and lifelong sex offender registration.

"Techiness"

We all have faced the "'CSI' effect," which I now refer to as "techiness" in honor of Stephen Colbert. Because of "CSI" and similar shows, the public has a misguided notion that police can go to a crime scene, pick up a single piece of evidence, feed it into a computer, and in a matter of seconds, know who the bad guy is. While television creates the illusion of unequivocal black-and-white crime solving, it just doesn't work that way in the real world. The public—our jury pool—has been fascinated by "CSI" and its successful spin-offs, but the backlash is that they have crossed over from entertainment to unrealistic juror expectations. That fictional combination of smooth police work and science, techiness, can sink a case if it's not neutralized early.

To combat techiness, I start at the outset. During my investigation, I look at what forensic testing, if any, was done. Then I put on a "defense hat" to anticipate the cross of an investigator: What more could have been done regarding forensic testing and the general investigation? (Some inevitable questions from the defense include: Did you test for DNA? How about running the evidence through the mass spectrometer?) Obviously, we can't anticipate everything, nor should we even *try* to run down every rabbit trail, but "case cleared" doesn't mean we stop investigating. Because of techiness, remember that juries have an expectation of hard forensic data and are less likely to convict without it. The more we can think of what evidence they blissfully believe we *should* have, the better armed we are to give them a reality check.

Unlike on television, real-life criminals aren't always as accommodating in leaving behind a smoking-gun epithelial cell.

In voir dire, I now ask in every case, "How many people watch 'CSI' or related shows?" I explain to the jury pool that there is no "CSI: Nacogdoches" and that Horatio and Gil are not on my witness list. I confirm their understanding of the difference between television fiction and real world investigation. It's updating the old "Is one witness enough?" question for the techiness age.

Point out the illogic in some of jurors' expectations for evidence. If you're trying a burglary case, for example, ask about the number of burglaries in a year's time in your jurisdiction. How many investigators are there to work that number of cases? What does the standard investigation consist of? What kind of time does a real investigation like that take? Is it realistic to dust every window on a building even if there is no indication the suspect was near that part of the structure?

In that vein, I also talk with my investigators before they take the stand. I explain what the jury is anticipating because of television fiction. I prep them that I'm going to ask, "Did you do this test or that test? Why or why not? Do we have the equipment to test for that? Does Dallas? Or Houston? Does that equipment even exist?" and so on.

If I have a criminologist, instead of just asking about the specific scientific method of whatever examination he performed, I ask more, though how much more depends on the case. I have him explain how many different instruments are used in various types of analysis. I also ask about the cost of such testing and who pays for it. Another reality check is how long it takes to get a result for various tests and how many submissions the lab generally receives in a given period of time. I ask whether techiness has had an effect on labs and if they are inundated with requests and demands to perform faster. Jurors are amazed that instead of the instant gratification of television, patient prosecutors wait months for results on drugs and forensic analysis. More amazing still is that there isn't a single information database that can provide all the answers as on television.

And though I am generally loathe to introduce uncertainty about the system, jurors need to know that while TV tests are instantaneous and accurate beyond contestation, real-life testing is done by humans. There is always a chance of error in performing the tests; analyses are done by highly trained people, but people nonetheless. As such, their results are often open to interpretation.

The "sorry man"

In a hotly contested case where I anticipate forensics to be a centerpiece of the defense, I now consider calling a negative expert. It's akin to a "sorry man" I employed when I was a kid; this "sorry man" (my best friend) would accompany me to tell my mother when I had done something wrong, the idea being: 1) he could help explain *why* I had done what I'd done, or in the alternative, 2) my punishment would not be as bad in front of a witness.

During a trial, someone with the expertise to explain why there is no forensic evidence in a particular area acts as a "sorry man" for the jury and assures them that nothing is out of the ordinary in the case before them. Unlike on television, real-life criminals aren't always as accommodating in leaving behind a smoking-gun epithelial cell.

Using as much demonstrative evidence as you can muster—pictures, diagrams, models, summaries, charts, and event chronologies—can only bolster your case. Anything that brings a jury closer to the trial of their expectations is helpful.

To close things out in final argument, I rely on the standard charge language our jurisdiction has: "During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you …" It's pretty standard and only one sentence long, but it's what I hang my hat on to pound home the point: Rely on the evidence before you, not what techiness you *think* should be there.

For those of you who want more science, technology, and law than any reasonable person should ever need, it's just a mouse click away at www.ncstl.org, the home of the National Clearinghouse of Science Technology and Law at Stetson University. The site is funded by the National Institute of Justice and provides a searchable database of legal, forensic, and technology resources and a reference collection of law, science, and technology material. A list of available topics is at right.

Conclusion

While juries have become increasingly demanding and expectant due to techiness, that does not make our burden insurmountable. With a little preparation and education, we can help jurors come to a just and right decision based on the evidence before them. Or as a crime fighter of yesteryear would say, "Just the facts ma'am." Thanks, Joe.

Endnotes

1 *Drone v. State*, 906 S.W.2d 608 (Tex.App.—Austin, 1995 pet. ref'd).

2 See TRE R803(8); *Cole v. State*, 839 S.W.2d 798 (Tex.Crim.App. 2000)(op. on reh'g).

NCSTL topics

- Arson/fire debris*
- Biometrics (body scans, retinal scans, facial recognition)
- Bioterrorism*
- Bloodstain pattern analysis
- Crime laboratories
- Cyber crime*
- Digital evidence
- Digital image enhancement
- DNA analysis
- Entomology
- Expert witness malpractice
- Explosives*
- Fingerprints
- Firearms
- Forensic accounting
- Forensic engineering*
- Forensic linguistics
- Forensic nursing*
- Forensic odontology (bite marks)
- Forensic pathology
- Forensic psychology
- Law enforcement technology (communications and interoperability, vehicles and personal equipment, computer software and hardware)*
- Locating, selecting, and evaluating experts
- Neuro-psychology
- Questioned documents
- Smart Cards
- Thermal imaging
- Toolmarks
- Toxicology
- Trace evidence (hair analysis, fiber evidence, glass, paint)
- Voice analysis

* Topic under research and soon to be added to the database

Criminal Law

By Roberto J. Ramos
Assistant District Attorney 34th Judicial District of Texas (El Paso)

Justice beyond the border

Any fugitive who commits a serious crime in this country and escapes to Mexico may be surprised to find himself handcuffed and still facing justice. Here are two ways that a Texas prosecutor can reach beyond the border and hold the fugitive accountable for his crimes.

On April 28, 2005, Maria Corral was out at a nightclub with a female friend. She was 20 years old at the time and the mother of three children, all under age 5. Sometime around 12:30 a.m., she asked her friend to take her to Richard Flores's house. Flores was the father of her three children, but they did not live together—he lived with his mother, and Maria lived with *her* mother. They had started dating when she was 16, and it had been a difficult relationship; Richard had already been arrested for assaulting her.


Roberto Ramos

Nevertheless, that night Richard was at home celebrating his birthday, and Maria apparently felt obligated to see him. It would prove to be a fatal mistake. When Maria's friend dropped her off at Richard's house, he was outside waiting for her. The next morning Richard Flores's mother found Maria's body bound, gagged, and stuffed in Flores's closet. She had been strangled to death, and there were signs someone had tried to sever her limbs. Flores, who had been drinking all night, was gone.

Richard Flores, a United States citizen, was indicted that May for Maria's murder, but by then he had vanished into Ciudad Juarez, Chihuahua, Mexico, just across the border from El Paso.

The border dilemma

Nothing can frustrate a prosecutor more than an indicted criminal—especially a murder suspect—who has fled into Mexico to escape prosecution. This problem can happen to any prosecutor anywhere in the country, not just to a prosecutor in a border city. To make matters worse, law enforcement officers often have a very good idea where the fugitive might be hiding, but given the sovereignty rights of each country, they are powerless to make an arrest. Not only do U.S. police officers lack jurisdiction in Mexico, but it is also plainly illegal for them to cross the border and attempt an arrest based on a Texas warrant. If caught by Mexican authorities, they are likely to face arrest themselves. For that matter, even Mexican police, who commonly assist their U.S. counterparts in locating fugitives in their jurisdictions, are also powerless to arrest anyone without a proper Mexican warrant.

Nonetheless, the victim, the victim's family, law enforcement, and of course our laws demand that these fugitives be brought to justice. A do-nothing approach, in the hopes that these fugitives would one day return and get caught, was not an option for El Paso District Attorney Jaime Esparza. To increase his office's efforts in tracking down, arresting, and prosecuting these fugitives, Mr. Esparza created the Foreign Prosecution Unit in our office to address such cases.

Extraditing a fugitive

Historically, the most common method of dealing with a fugitive who flees to Mexico is to have the fugitive extradited back to the United States. Once delivered to U.S. authorities, the accused is tried in the jurisdiction where he committed the crime. An extradition is pos-

sible based on an extradition treaty signed with Mexico on May 4, 1978. It became effective on January 25, 1980. Working with the Department of Justice's Office of International Affairs, the local prosecutor prepares an extradition package, which consists of the indictment, capias, statutes, various affidavits, and other documents that establish the probability that the fugitive committed the crime for which the extradition is sought. While assembling the package is not terribly complicated, it is tedious and must withstand the scrutiny of officials from both countries.

As a practical matter, the first step in an extradition is to obtain a provisional arrest warrant to ensure that the fugitive is quickly arrested, assuming his location is known. The request for the warrant is submitted to the Department of Justice. Through diplomatic channels, DOJ officials ask that Mexico issue the warrant. In Mexico, the SRE (the Secretaria de Relaciones Exteriores, the Secretary of State) will receive the request and forward it to the Mexican Attorney General's Office, or PGR (Procuraduria General de la Republica). Attorneys at the PGR will review the request and if they approve it, they will present the request to a Mexican federal judge. Once the warrant is issued and the fugitive taken into custody by Mexican federal authorities, he is not transported to the border and handed over to U.S. authorities. Instead, the fugitive is transported to Mexico City. Unlike an interstate extradition in this country, where the governor's office might issue a governor's warrant to retrieve a fugitive from another state, an international extradition is a matter strictly handled by the federal governments of the two countries involved—in this case, Mexico and the United States.

At that point, the extradition process begins in earnest and the clock begins to run on the treaty's requirements. Specifically, the requesting country (the U.S.) has 60 days from the arrest date to submit a complete extradition package and get it into the hands of Mexican authorities. The decision on whether an extradition request will be granted is made by the SRE based on a federal judge's advisory opinion.

Unfortunately, even if the extradition is granted, the matter may not be quite over. The fugitive has rights under Mexican law, one of which is the right to have an attorney, including the right to an appointed attorney, in the extradition process. So while the fugitive sits in jail in Mexico City waiting to be extradited, his lawyer is usually busy trying to block the extradition or, at the very least, delay it. Unfortunately, this dilatory practice by the defense can potentially result in delaying extradition for years. Exactly how long an extradition takes varies from case to case. Some cases have taken four years. Richard Flores, on the other hand, was extradited in nine months.

An Article 4 prosecution

There is an alternative to an extradition. If the fugitive or victim is a Mexican national and the fugitive is in Mexico, a prosecutor may request that Mexico arrest and prosecute the fugitive for a crime committed in the United States. This practice is commonly referred to as an Article 4 prosecution because it is based on Article 4 of the Mexican Federal Penal Code. This extradition alternative can be enormously resourceful in a variety of circumstances. The PGR has a unit in Mexico City dedicated exclusively to Article 4 prosecutions. The director of the unit, as well as his prosecutors (ministerios), are rigorously trained, are sharp, analytical, and completely dedicated to their jobs. Of course, the ministerios must work within their laws and judicial system. Perhaps the most prominent difference between our two judicial systems is that Mexico does not have a jury trial system. A jury does not sit and listen to witnesses. In Mexico, a case is tried by documentation. In preparing an Article 4 prosecution, therefore, the Texas prosecutor must assemble a package that includes all of the evidence in the case (i.e., witness statements, fingerprint and DNA evidence, photos, and so on), just as if the case were presented to a jury. Using what is presented to them, the Mexican prosecutors prepare the charges and the case for trial. Once the case is presented to the judge, he renders a decision and, if it's guilty, sentences the accused.

Mexico, as most prosecutors are aware, does not have the death penalty. In fact, when U.S. prosecutors request an extradition from Mexico in a capital murder case, we must assure the Mexican government that the death penalty will not be applied to the defendant. Therefore, a request for an Article 4 prosecution in a capital murder case will result in prison time only.

Continued on page 24

Continued from page 23

Trial by documentation is precisely what can make the Article 4 prosecution so useful to Texas prosecutors. If the case is already cold to begin with, for instance, and extradition will take another two to three years, problems for an eventual trial can mount. In an Article 4 filed by our office, for example, the lone witness to a homicide died years ago. But we had his statement. We pursued an Article 4 prosecution using the witness statement, and 26 years after the murder, the defendant was caught and prosecuted in Mexico. Witnesses can also forget. Or, as in one case in our office involving multiple victims, the victims wanted justice but did not want to relive the trauma of the crime or face the accused. These problems can be avoided in an Article 4 Prosecution where live witness testimony is not necessary for a trial.

Murder is as serious a crime in Mexico as it is in our country. In Mexico, certain homicides have a range of punishment of 30 to 60 years, without the possibility of parole or credit for good time served. Our Foreign Prosecution Unit, therefore, has taken ample advantage of the Article 4 prosecution. In fact, after a trip to Mexico City to file Article 4s and become acquainted with PGR personnel, we forged a close relationship with that office. Shortly thereafter, to continue the mutual cooperation and educate prosecutors and law enforcement, our office collaborated with the PGR to host our first International Extraditions and Article 4 Prosecution Conference in El Paso. We had speakers from the PGR, Mexican judiciary, and U.S. Department of Justice. Because of the conference's success and to continue building our relationship with Mexico, we are having another conference with newly appointed PGR personnel and new topics August 9–10 in El Paso.

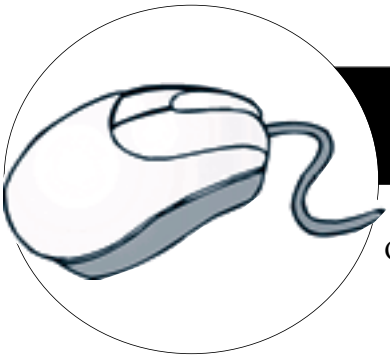
It might be interesting to note that at one time the Texas Attorney General's Office had an International Prosecution Unit that assisted prosecutors across the state with Article 4s. The unit no longer exists. Assistance and information is abundant from a variety of sources, however, beginning with the PGR. The Mexican Attorney General's Office has two regional attaché offices in Texas, one in San Antonio and one in El Paso. The attorneys in those offices are very helpful in answering questions, and an Article 4 can be filed at either office. Also, because our office has been very active in preparing Article 4s and extraditions and because of our involvement in the conference, we have received numerous calls from prosecutors and law enforcement officers from other states seeking help and information on Article 4 prosecutions. Recently, for example, our office filed an Article 4 on behalf of the district attorney's office in Hereford. We welcome the call for help.

Pursuit of Richard Flores

We requested a provisional arrest warrant for Richard Flores on August 5, 2005. While the warrant worked its way through the diplomatic system, local law enforcement officers, working with the U.S. Marshals Service and Mexican authorities, searched for Richard Flores in Ciudad Juarez. Rumor had it that he had been seen on the street and in clubs.

Once the arrest warrant was issued, Mexican authorities intensified their efforts to locate and arrest him. Finally, on September 24, at around 10:30 p.m., Flores was arrested in a Juarez hotel. Mexican federal authorities alerted PGR prosecutors and then transported him to Mexico City to wait for a disposition on the request to have him extradited. The saga of Flores's flight into Mexico finally ended March 24, 2006, when he was turned over to the U.S. Marshal Service in Mexico City; he was then flown to El Paso and handed over to local police. The mutual cooperation with the Mexican authorities in arresting and taking these fugitives off the streets paid off.

Richard Flores is scheduled to go to trial this year for the murder of Maria Corral.



TECH TALK

By John Brown
Operations Manager at TDCAA in Austin

Need a courtroom projector?

Here's an easy reference guide for investing in your first (or 15th) projector.

If you have been to a TDCAA seminar, you probably noticed that most of our speakers show all sorts of images up on the screens during their presentations; they are using LCD (Liquid Crystal Display) projectors owned by the association. Many simply use text, others venture into projecting images, and some actually play video clips. Using visual images aids an audience in learning and retention, whether you're speaking to a group of peers at a seminar or presenting your case-in-chief to jurors at trial. Projecting your exhibits and charts onto a large screen in the courtroom gives everyone, including the jury, a clear view of your evidence and will help them retain the information you're presenting. Buying a good projector for trial use is an excellent investment in educating the judge and jury at trial.


John Brown

This article will aid you in purchasing an LCD projector for your office that you can carry into your courtroom (if your judge allows it) so you can help your juries understand your case. I'll also pass on a few tips I've learned from doing the audio-visual work at the association for over eight years. I have probably purchased 10 or more projectors for the association and they have come down considerably in price during my tenure. What used to cost over $5,000 can now be purchased for around $2,000 or less. It's not that hard to pull off or all that intimidating—no one here at the association, including me, has ever had any formal training in using an LCD projector. We have merely learned as we go along.

1 How powerful (bright) of a projector do I need?

When you shop for an LCD projector, a very important thing to consider is how bright it will project an image onto your screen. The brightness is measured in lumens, or brightness measured in candles. Candles aside, just remember that the higher the lumens an LCD projector is rated, the brighter the image it will project. Brighter is *always* better (and consequently more expensive, but we'll cover expense later in the article). A good benchmark for a courtroom projector is between 2,500 and 3,000 lumens; a projector rated at 3,000 lumens should certainly enable you to keep the lights on in the courtroom and not have your audience struggling to see what you are presenting.

2 What will my projector cost and where do I get it?

Projectors' prices vary somewhat depending on brand, but a projector rated in the 2,500- to 3,000-lumen range will run anywhere from $2,000 to $3,000. Good brands will be those you generally recognize for their electronics: Sony, Epson, NEC, Toshiba, Sharp and Proxima, although there is at least a half dozen more to choose from. You can buy the projector online from your favorite computer hardware website, such as www.pcmall.com, where they are likely to be under the hardware category.

Another avenue to purchase a projector is from a local business, which can come with advantages. This is what I actually recommend. People at a local shop might know how to use it really well, pass on some of this knowledge to you, and come to your office or courthouse to help you set it up the first time or give you a demonstration before you buy. And, as an incentive to buy locally, these shops sometimes have a spare projector to loan out if yours needs servic-

Continued on page 26

Continued from page 25

ing. I've actually borrowed one from a local company when one of the association's projectors was in repair.

Another cost factor you might want to take into consideration is a replacement lamp for the projector. I have had only one lamp "zap" on me during one of our speaker's presentations, and luckily I had a spare lamp on hand and changed it in about 10 minutes, and we were back in business. Spare lamps are nice to have around, but they are somewhat expensive: They can cost hundreds of dollars each. Don't be alarmed. Lamp life can range all the way up to 2,000 hours (250 eight-hour days), which would be a heck of a long time in a courtroom. Just check the specifications of a projector you are interested in to see if its lamp life seems reasonable.

I have had good experiences with NEC, Proxima, and Viewsonic projectors. For those of you who already use projectors in your courtrooms, please e-mail me with the make, model, and lumens rating along with what you like and dislike about your current projectors. I can then pass this information on to others who are ready to take the plunge. My e-mail address is brown@tdcaa.com.

3 Tips and other things to keep in mind.

Showing videos: Most, if not all, new projectors can project videos from VCR tapes. Just make sure the specifications of the projector in the projector's manual list RCA inputs. To show the video on a screen, simply connect your VCR to the projector with RCA cables (which can be found in any electronics store). Then put the projector into "video" mode, either with a remote control or by pushing a button on the projector itself.

The audio from a VCR tape is a different matter. You'll need to purchase a small set of computer speakers to play the audio portion of a tape in court; Bose makes a great small set that I have used in rooms of up to 75 people.

Keep an eye on weight: If you are in a jurisdiction with courtrooms on more than one floor or more than one building, choose a projector that is not too heavy to lug around. Once you have narrowed your possible choices to two or three, I'd pick the lightest of the bunch. I've hauled big projectors around, and it is no fun at all when you have a bunch of other stuff to drag along with it.

Do a dry run: Long before our first speaker shows up at a seminar, we have set up the projectors and screens to make sure everything is placed properly and working. Cords have been taped down with gaffer's tape (a tough, fabric-backed tape) so that no one will trip during the presentation. If you have access to your courtroom when it is not in use, go ahead and set up your equipment to see how it will all lay out. Run through your presentation to see one important thing: how easy is it to read. Often, the image you see on your laptop or desktop does not look quite the same once it is projected on the screen. The wrong combination of background color mixed with text color can lead to some pretty unreadable images on the screen—although they look just fine on your computer monitor. Oh, and if it is set up and turned on and you don't see anything coming through the projector, there's usually a keystroke or two that will get the image up on the screen. (On most Dells, for instance, holding down the function key and pressing F8 does the trick.)

For a dictionary of projector technical terms, go to www.boxlight.com/guides/Dictionary_A.asp.

Conclusion

LCD projectors make great visual aids. Don't be afraid of trying one out in the courtroom. The technology has come such a long way that they are practically "plug and play." Good luck.

Editor's note: Todd Smith, an investigator at the Lubbock County Criminal DA's Office, has had great success in their courtrooms with his projectors purchased locally. Todd will happily pass on his experiences to you. Contact him at tsmith@co.lubbock.tx.us.

AS THE JUDGES SAW IT

By David C. Newell
Assistant County Attorney in Fort Bend County

Questions

1 Craig Hill Johnson was stopped solely because the license plate on his car was partially obscured by a license plate frame. Specifically, the frame partially obscured the word "Texas," fully obscured the nickname "The Lone Star State," and obscured a depiction of a space shuttle in a nighttime sky. After the stop, the arresting officer determined that Johnson was driving while intoxicated and arrested him for DWI. Before his trial, Johnson filed a pre-trial motion to suppress, arguing that he had not violated §509.409 of the Transportation Code which makes it a class C misdemeanor to attach an emblem or device on a license plate that obscures the name of the state, the letters or numbers on the plate, or another original design feature of the plate. The trial court granted the motion to suppress after saying, "Boy, I don't know. I am afraid that all these logo plates are going to do a little obscuring." The State appealed.

Can a police officer stop a car whose license plate frame partially obscures "Texas" or any other letters, numbers, or designs on the license plate?

yes _____ no _____

2 In 1990, Randall Lee Roemer was convicted of "involuntary" manslaughter. In 2003, Roemer was charged with driving while intoxicated. The indictment also included an enhancement paragraph that indicated Roemer had a 1990 conviction for "intoxication" manslaughter. Problem is, back in 1990, the offense of "intoxication" manslaughter was statutorily contained in Penal Code §19.05(a)(2), otherwise known as "involuntary" manslaughter. The State later amended the indictment to reflect that Roemer had been convicted of "involuntary" manslaughter under §19.05(a)(2) in 1990 rather than "intoxication" manslaughter under Penal Code §49.08. After being informed of the legal issue concerning the use of "involuntary" manslaughter to elevate his DWI conviction to a 3rd-degree felony, Roemer plead guilty and stipulated to the allegedly improper enhancement provision in exchange for a recommended sentence of four years (which, incidentally, is the sentence he received). Roemer then filed a writ of habeas corpus claiming that his sentence was illegal and that his attorney rendered ineffective assistance of counsel for stipulating to the allegedly improper enhancement.

Is Roemer estopped from claiming that his sentence is illegal because he stipulated to the validity of the enhancement?

yes _____ no _____

3 David Wayne Casey was charged with aggravated sexual assault of K.T., a young girl who worked as a "shot girl" at a topless bar in Dallas. Under the indictment, Casey was charged with sexual assault that became aggravated through Casey's administration of GHB to his victim. During the trial, the attorney objected to the jury charge because it referred to K.T. in the application paragraph as the "victim of the offense." According to Casey's attorney, the designation of K.T. as a victim was a comment on the weight of the evidence as it, in effect, designated K.T. as a victim as a matter of law. Casey's attorney suggested that the application paragraph simply require the jury to determine whether or not Casey had administered GHB to K.T. without designating her as a victim. The trial court overruled the objection.

Did the trial court's reference to K.T. as the victim of the offense amount to an impermissible comment upon the weight of the evidence?

yes _____ no _____

4 Christopher Jordan Bahm pled guilty to aggravated sexual assault of a child and was placed on deferred adjudication for eight years pursuant to a plea bargain. Within five months, the State moved to revoke his probation and

Continued on page 28

Continued from page 27

adjudicate his guilt. He plead "true" to allegations that he had failed to pay various fees, but he plead "not true" to allegations that he had not obtained suitable employment, that he had not completed community service hours, that he had not attended and completed sex offender counseling, and that he had admitted to having sexual intercourse with a minor child. The trial court found all the allegations true, except the ground related to sexual intercourse with a minor child, and sentenced him to 25 years. He filed an untimely motion for new trial, but later, upon habeas review, he was granted an out-of-time appeal. Bahm filed a second motion for new trial alleging, among other things, that he had received ineffective assistance of counsel. This motion was denied by the trial court without a hearing. Attached to the motion was Bahm's unsworn inmate declaration attesting to the truth of Bahm's statements; it complied with the Texas Civil Practices and Remedies Code for inmate declarations with one exception: Bahm's declaration qualified Bahm's assertions that the information was correct with the phrase "according to my belief." According to the court of appeals, this qualification disqualified the declaration under the statute because it failed to attest to the truthfulness of the facts.

Does the addition of the phrase "according to my belief" in an inmate declaration invalidate an otherwise acceptable motion for new trial?

yes _____ no _____

5 A jury convicted Ronald Herndon of driving while intoxicated. Herndon filed a motion for new trial alleging that the court reporter failed to record a bench conference at which Herndon objected to the prosecutor's closing argument. The trial court granted the motion for new trial, and the State appealed. The court of appeals determined that the trial court had abused its discretion in granting the motion for new trial because Herndon had not objected to this failure to record the bench conference during the trial. Under Rule 11(a) of the Texas Rules of Appellate procedure (the applicable rule at the time), Herndon was required to object to the failure to record a bench conference to preserve error for appeal. Everyone agreed that he did not object timely and preserve error for appeal.

Does the failure to preserve error for purposes of appeal preclude the trial court from granting a new trial based such unpreserved error?

yes _____ no _____

6 Lawrence Few was indicted for solicitation of capital murder in cause number 20030D05342. He was eventually re-indicted under a new cause number, 20050D04727. However, both the State and the defense continued to file documents under the first cause number, or, as it came to be known, the "03" cause number. The State then filed an "Agreed Motion to Carry Over" asking the trial court to allow the record from the "03" cause number to be carried over to the "05" cause number, as it became known. The trial court granted the motion and ordered that all motions, notices, and records from the "03" cause number be carried over to the "05" cause number.

Less than two weeks later, Few was convicted under the "05" cause number and filed his pro se notice of appeal, mistakenly citing the "03" cause number. A month later, the State moved to dismiss the "03" cause number because it had been re-indicted under the "05" number. The trial court granted the dismissal and also issued a certified right to appeal under yet another cause number (that's three if you're keeping track). The court of appeals sent the case back for the trial court to hold a hearing to determine which case is being appealed, the "03" or the "05." At the hearing, the State asked the trial court to deny the right to appeal because the "03" case was a non-final case (having been dismissed) and the time had run for filing notice in the "05" case. The trial court determined that the motion to carry over applied only to those documents in the file at the time of the order and not the later filed notices. Consequently, the trial court denied Few's right to appeal. Then, the State filed a motion to dismiss the appeal for want of jurisdiction, and the court of appeals did just that.

Did the defendant's pro se notice of appeal filed under the wrong cause number invoke the jurisdiction of the court of appeals?

yes _____ no _____

7 James Masonheimer was indicted for murdering his daughter Lucy's boyfriend. At a pre-trial hearing,

Masonheimer's attorney advised the court that his client intended to show that the defendant shot the victim in self-defense and in defense of his daughter. Shortly after the beginning of Masonheimer's first trial (you see where this is going), the defense discovered that one of the State's witnesses had told the police that Masonheimer had stated shortly after the shooting that the victim "had threatened his daughter and it was either him or her." The defendant moved for a mistrial for failure to disclose exculpatory evidence, but the trial court granted a continuance instead. Eventually, however, the trial court granted the mistrial because a death in the prosecutor's family resulted in an extension of the continuance. Soon after, the lead prosecutor left the district attorney's office to become a judge. Prior to the second trial, the new lead prosecutor who had been sitting second on the first trial, disclosed to the defense a second statement, this one from the ex-husband of Masonheimer's daughter Lucy. In that statement, the ex-husband related that Lucy had asked her ex-husband to keep their children the day before the victim was shot. He also stated that when he called her in the evening, Lucy had broken down because of the problems she had been having with the victim and that he had urged her to go to the police to get a restraining order. Masonheimer plead nolo contendere without a stipulation of evidence (thereby requiring the State to put on evidence of guilt). During this proceeding, the second trial if you will, the prosecution disclosed even more previously undisclosed evidence, which consisted of a statement from the victim's friend who had found several boxes containing steroids in the victim's apartment after the victim's death. Masonheimer again moved for a mistrial. At the hearing on the motion, testimony was presented that the lead prosecutor from the first trial and his investigator were aware of the evidence that the victim had boxes of steroids in his apartment prior to the first trial. However, none of this information was in the case file or the prosecutor's notes, and everyone agreed that the second prosecutor knew about this information. The State argued at the motion that there was no evidence that this information was withheld to goad the defense into moving for a mistrial. The trial court determined that the withheld information was exculpatory evidence that should have been disclosed before the first trial but that the prosecutor's conduct in this case was reckless. The trial court then granted the mistrial.

Masonheimer filed a pre-trial writ of habeas corpus seeking relief from double jeopardy relying heavily upon *Bauder v. State* for the proposition that double jeopardy bars a retrial after a mistrial is granted due to a prosecutor's reckless conduct. The trial court granted the writ, holding that double jeopardy had attached and that further prosecution was barred. The court of appeals, however, decided that further prosecution was not jeopardy-barred under either the state or federal constitutions because there was no evidence that the lead prosecutor on the second trial acted intentionally or recklessly. While the case was pending on appeal, the Court of Criminal Appeals overruled *Bauder*. Before the Court of Criminal Appeals, Masonheimer argued that the court was required to consider whether the lead prosecutor on the first trial had intentionally withheld exculpatory evidence rather that focus solely upon the intent of the prosecutor in the second trial.

Is the third trial of Masonhimer barred by the Double Jeopardy Clause due to the prosecution's intentional withholding of exculpatory evidence in the first trial?

yes _____ no _____

8 Michael Miller Euler was indicted for bribery, but he pled guilty pursuant to a plea bargain and was placed on probation for four years. Within three years, the State moved to revoke his probation, alleging that he had driven while intoxicated and consumed a controlled substance, namely cocaine. At the hearing on the motion to revoke, Euler plead "not true." The State presented evidence to establish the grounds alleged in the motion to revoke. Euler responded by introducing evidence from himself, an attorney, his friend, and a letter from his physician indicating that Euler may have appeared intoxicated because of a neurological disorder. After both sides had rested and closed, the trial court found that Euler had violated the conditions of his probation. When the trial court asked Euler if he had anything to say before he imposed sentence, Euler responded with a request that punishment be postponed until he could gather some evidence as to some alterna-

Continued on page 30

Continued from page 29

tive to the punishment assessed. The trial court denied the request. In his motion for new trial, Euler complained that he had been denied due process because the trial court had refused to grant him a separate hearing on punishment. The court of appeals affirmed the trial court's denial of Euler's request for a separate hearing on punishment because Euler had already been given an opportunity to present the mitigating evidence of his neurological disorder.

Does Euler have a due process right to a separate hearing on punishment at his probation revocation hearing?

yes _____ no _____

9 Hugo Alejandro Sierra, a Mexican national, was convicted of capital murder. During the investigation he was arrested and given his *Miranda* warnings, and Sierra gave a written confession of his involvement in the crime. Although the police knew he was a Mexican national, the Mexican consulate was never contacted and Sierra was never informed of his right to contact the consulate under Article 36 of the Vienna Convention. The Court of Criminal Appeals had previously held that a "treaty" was not a law for purposes of exclusion of evidence under Article 38.23 of the Texas Code of Criminal Procedure. However, the court asked for briefing on whether the Vienna Convention created a privately enforceable right in a criminal proceeding and, if so, whether a violation of that right justified the exclusion of a voluntary statement. Moreover, while the case was pending before the Court of Criminal Appeals, the United States Supreme Court granted certiorari to answer the very same questions.

Does the failure to inform a foreign national of his rights under the Vienna Convention or the failure to inform his consulate regarding his apprehension prior to taking a voluntary statement justify the exclusion of that statement?

yes _____ no _____

10 In October 2002, Marcus Druery went to the apartment of a friend known as "Rome." Druery asked Rome to travel with him to Bryan, Texas. Rome hesitated at first but eventually agreed to go. Rome, who was known to have sold marijuana, took his cell phone, approximately $400 to $500, his gun, and some marijuana. This trip would be his last. Druery indicated that he and Rome went to Bryan and they partied into the night until Rome wanted to go home. According to Druery, Rome's girlfriend picked him up in an orange Cadillac. The Texas Rangers were never able to locate an orange Cadillac. Druery's ex-girlfriend, Joquisha Pitts, and Druery's friend, Marcus Harris, told a different story. According to Pitts, Druery, Harris, Rome, and Pitts left a club in Bryan and drove out to some property owned by Druery's family. While on the property, the group took turns shooting Rome's gun at bottles they had thrown into the nearby stock pond. At this point, Druery informed Pitts that he intended to kill Rome to get his stuff, but Pitts thought he was only playing. She did notice that when they ran out of ammunition, Druery began wiping the bullets clean with a rag before he loaded them into the gun's magazine. Then, as Rome lit a pipe filled with marijuana, Druery skulked up behind him and shot him in the head and neck. After Rome's body had fallen to the ground, Druery fired another shot into his body. Pitts and Harris were screaming and crying hysterically, so Druery tried to calm them with $40 each. He had already retrieved Rome's wallet, marijuana, cell phone, and gun. Soon afterwards, Druery obtained some gasoline. He poured it onto the body and set it ablaze. Later, he instructed Pitts and Harris on how to respond to police questions so that their stories were consistent. He also returned with Pitts the next day and burned the body a second time. Harris also assisted Druery in disposing of the murder weapon.

Were Pitts and Harris accomplices to the capital murder?

yes _____ no _____

Answers

1 Yes. The Court of Criminal Appeals held that a motorist violates the Transportation Code if she drives a car that sports a license place frame that obscures or partially obscures some aspect of the original design of the license plate. Here, the trial court had suppressed the evidence on the basis that motorist has not violated the law by decorating his license plate with a license plate frame that partial obscured an aspect of the original design. However, the Fourth Court of Appeals in San

Antonio reversed the trial court by explaining that the legislature had changed the law in response to a federal case (*U.S. v. Granado*, 302 F.3d 421 [5th Cir. 2002] in case you are interested) that had interpreted the previous statute in favor of suppression. The Court of Criminal Appeals agreed with the court of appeals in a seven-vote majority opinion. The court also noted that the 5th Circuit itself had recognized that the legislative changes in the Transportation Code had proscribed the use of such license plate frames. The majority opinion also noted that there was a likelihood that some cars would not be in compliance with this statute. Interestingly, the concurring opinions were not as circumspect, demonstrating both a discomfort with an "uncommonly bad law" and a strong desire to use the phrase "doo-dad design" as often as possible. *State v. Johnson*, _____ S.W.3d _____, 2007 WL 461521 (Tex. Crim. App. February 14, 2007).

2 No. Roemer is not estopped from challenging the legality of his sentence. According to the Court of Criminal Appeals, Roemer's sentence is illegal because the statutory provision that allows for enhancement with proof of a prior "involuntary" manslaughter conviction also requires proof of an additional conviction relating to the operating of a motor vehicle while intoxicated. The only way that Roemer's DWI could have been enhanced with

Continued on page 32

Continued from page 31

only one prior conviction was if that prior conviction was for "intoxicated" manslaughter. Because Roemer had previously been convicted of "involuntary" manslaughter under §19.05(a)(2) instead of "intoxicated" manslaughter under §49.08, his offense was not properly enhanced to a 3rd-degree felony, and his sentence was illegal. Moreover, Roemer was not estopped from challenging the legality of his sentence because there was no invited error in this case because Roemer did not ask for something, get what he asked for, and then complain about it. While he did plead guilty to an offense at a higher level than he was eligible, it was not invited error. And, as a final epilogue, the court determined that Roemer's attorney was not constitutionally ineffective because he did base his advice to plead on existing caselaw, namely an unpublished case out of the First Court of Appeals. *Ex parte Roemer*, _____ S.W.3d _____, 2007 WL 601607 (Tex. Crim. App. February 28, 2007).

3 No. The trial court did not abuse its discretion by referring to K.T. as the victim in the jury charge. In this case, the court of appeals had reversed the case on two grounds, namely the introduction of pictures that the defense claimed were unfairly prejudicial and the inclusion of the word "victim" in the jury charge. According to the court of appeals, if the jury charge had simply required the jury to find that the defendant had administered GHB to K.T. with the requisite intent and without a reference to her as the "victim of the offense," the jury charge would not have commented on the weight of the evidence. The Court of Criminal Appeals affirmed the conviction and reversed the court of appeals by upholding the admission of the photographs and the use of the word "victim" in the jury charge. As the Court of Criminal Appeals reasoned, Article 36.14 of the Code of Criminal Procedure required the trial court to charge the jury on the law applicable to the case, and the statute in question here, namely §22.021(a)(1)(A)(i), specifically made it a crime for someone to commit sexual assault by the administration of GHB to "the victim of the offense." Because the State was required to prove the administration of GHB to a "victim" and because the inclusion of the word in the jury charge did not assume the truth of a controverted fact, the court affirmed the trial court's inclusion of "victim" in the jury charge. *Casey v. State*, _____ S.W.3d _____, 2007 WL 601629 (Tex. Crim. App. February 28, 2007).

4 No. The addition of the phrase "according to my belief" in an inmate's unsworn declaration attached to a motion for new trial does not invalidate an otherwise acceptable motion for new trial. According to the Court of Criminal Appeals, the addition of the phrase did not run afoul of §132.003 of the Texas Civil Practices and Remedies Code section dealing with unsworn inmate declarations. All that was required under §132.003 was that the unsworn declaration be written, that it was sworn to be true under the penalty of perjury, and that it substantially tracked the statutory language, "I … declare under penalty of perjury that the foregoing is true and correct." Bahm's declaration substantially complied with the statute and was therefore valid. Moreover, the Court of Criminal Appeals rejected the court of appeals reasoning that swearing that something is true and correct is not the same as swearing that you believe something is true and correct. According to the Court of Criminal Appeals, the perjury statute on its face applies equally to sworn affidavits and unsworn inmate declaration. The Court of Criminal Appeals explained the penalty of perjury language is entitled to great weight, while the phrase "according to my belief" is neither prohibited nor required. And, as if to add insult to injury, the court also noted that it uses the same "belief" language in its prescribed form for writs of habeas corpus, so invalidating Bahm's declaration would mean the court had been requiring that inmates use a legally invalid form for their writs of habeas corpus. Finally, the court explained that Bahm's assertions in his declaration that his attorney had not informed him of a plea offer was sufficient to show that reasonable grounds existed for a new trial. Consequently, the court of appeals decision was reversed and the case was remanded to the trial court for an evidentiary hearing on the motion for new trial. *Bahm v. State*, ____ S.W.3d _____, 2007 WL 601618 (Tex. Crim. App. February 28, 2007).

5 No. A trial court can grant a new trial based upon unpreserved error so long as the defendant's substantial rights

are affected. In reaching its decision, the Court of Criminal Appeals first points to the plurality opinion in *State v. Gonzales* for the oft-quoted proposition that a trial court has discretion to grant a new trial "in the interest of justice." The court even cites no less of an authority than Charles Allen Wright for the proposition that a trial court can grant a new trial based upon errors that would not result in an appellate reversal so long as the trial court believed that the proceeding resulted in a "miscarriage of justice." However, the court also notes that "interest of justice" does not include situations where a defendant's substantive rights weren't affected. All that is required is that the defendant articulate a valid legal claim in the motion, that he marshal evidence in the trial or outside the record to substantiate his legal claim, and that he show prejudice to his substantial rights. There is no requirement that a claimed error in a motion for new trial be preserved for appellate review before the trial court can consider it when hearing a motion for new trial. Thus, in this case, the court of appeals erred in determining that the trial court erroneously granted a new trial based upon an error that had not been preserved for appeal. *State v. Herndon*, ____ S.W.3d ____, 2007 WL 601625 (Tex. Crim. App. February 28, 2007).

6 Yes. In a unanimous opinion, the Court of Criminal Appeals held that Few's notice of appeal was sufficient to invoke the court of appeals' jurisdiction even though it was technically filed in the wrong case. Always eager to turn a phrase, the court in its majority noted that "to err is human, but to repair is now possible." The 2003 amendments to the Texas Rules of Appellate

Continued from page 33

Procedure allowed for the amendment of a defective notice of appeal at any time before an appealing party's brief is filed. Moreover, everyone involved in the case had effectively conceded actual knowledge of exactly which conviction Few wanted to appeal. Indeed, the State's motion to dismiss set out the defect with such particularity that it was impossible to doubt the State's awareness that Few intended to appeal his conviction under the "05" cause number. Most importantly, the court noted its desire to be more like the Texas Supreme Court in situations like this by declining to elevate form over substance and by disfavoring the disposal of appeals based upon harmless procedural defects. Consequently, the court of appeals' decision dismissing the appeal was reversed because Few's notice of appeal was sufficient to invoke the jurisdiction of the court of appeals. *Few v. State*, _____ S.W.3d _____, 2007 WL 677230 (Tex. Crim. App. March 7, 2007).

7 Yes. Double jeopardy bars a third trial of Masonheimer because the first prosecutor intentionally withheld exculpatory evidence even though the second prosecutor did nothing wrong, knew nothing about it, and moved to correct the problem as soon as he found out about the evidence. First, the Court of Criminal Appeals acknowledged that it had overruled *Bauder* and adopted the federal constitutional standard for determining when retrial is barred after a defense-requested mistrial. Under this standard the court was required to determine if the prosecution's conduct intentionally goaded the defense into requesting a mistrial. Central to this inquiry was the question of whether the first prosecutor had intentionally withheld exculpatory evidence in violation of *Brady*. Reasoning that the State encompasses the entire prosecutorial team, the court determined that because the first prosecutor had acted intentionally, the State's attempts to put the defendant to trial for a third time should be prevented. While Judge Cochran pointed out in her dissenting opinion that withholding exculpatory evidence is not conduct that would "goad the defendant into moving for a mistrial," the majority explained that *Oregon v. Kennedy*, the case setting out the federal constitutional standard for prosecution-induced mistrials, relied on cases where the Double Jeopardy Clause barred retrial because of intentional impropriety designed to avoid a defendant's acquittal. Thus, looking at the evidence in a light most favorable to the trial court's ruling, the prosecution was barred from trying Masonheimer again due to the intentional withholding of exculpatory evidence by the first prosecutor. *Masonheimer v. State*, _____ S.W.3d _____, 2007 WL 840780 (Tex. Crim. App. March 21, 2007).

8 No. The Court of Criminal Appeals affirmed the court of appeals' opinion by holding that due process did not entitle Euler to a separate punishment hearing after a hearing on a motion to revoke. Probation may be revoked without violating due process as long as the State employs procedures that are fundamentally fair. In particular, where the factfinder has the discretion to continue probation after finding a probation violation, a defendant must be entitled to an opportunity to show not only that he didn't violate probation, but also that he has a justifiable excuse for the violation or that revocation is not the appropriate disposition. In affirming the court of appeals, the majority explained that if Euler wanted to present punishment evidence on the motion to revoke, he should have been prepared to present that evidence upon the trial court's finding that he had violated a condition of his probation. Moreover, the court explained that Euler's reliance upon cases such as *Duhart v. State* and *Issa v. State* was misplaced because neither supports a claim that he was entitled to a separate hearing on punishment on a separate day. Four judges in a concurring opinion clarified that they agreed with the majority but wrote separately to explain that they did not believe Euler was entitled to a separate hearing at all because he had already been found guilty and sentenced pursuant to the plea bargain. Thus, at the very least, all of the judges unanimously agreed that due process does not entitle a probationer to a separate punishment hearing on a separate day after his probation is revoked. *Euler v. State*, _____ S.W.3d _____, 2007 WL 840493 (Tex. Crim. App. March 21, 2007).

9 Nope. Regardless of whether the Vienna Convention creates a privately enforceable right, a violation of that right does not justify the exclusion of an otherwise admissible and voluntary statement. In reaching its decision, the Court noted that the United States

Supreme Court in *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson* had addressed the very same concerns and had determined that even if the Vienna Convention conferred privately enforceable rights in a criminal trial, it would not entitle a foreign national to exclude evidence obtained in violation of the treaty. The court also noted that it had addressed the issue extensively in *Rocha v. State* and reached the conclusion that the Texas exclusionary rule (Article 38.23 of the Texas Code of Criminal Procedure) did not apply to a violation of the Vienna Convention. Though the court recognized that a violation of the Vienna Convention could still play a part in a general attack on the voluntariness of a statement, it refused to hold that such a violation should invoke either the Texas or federal exclusionary rules. Thus, seeing no reason to reconsider its decision in *Rocha*, the court affirmed the court of appeals opinion that the trial court had not erred by admitting Sierra's statement. *Sierra v. State*, _____ S.W.3d _____, 2007 WL 840483 (Tex. Crim. App. March 21, 2007).

10 No. Despite their assistance in the disposal of the body and the evidence, neither Pitts nor Harris were accomplices to the capital murder either as a matter of fact or as a matter of law. In his direct appeal of his capital murder sentence, Druery raised numerous issues, most of which stemmed from the claim that Pitts and Harris were accomplices either as a matter of fact or as a matter of law. While the trial court had instructed the jury to determine if Pitts and Harris were accomplices as a matter of fact, the Court of Criminal Appeals determined that they were not accomplices as a matter of fact or as a matter of law. To be an accomplice witness, a person must act with the requisite mental state and engage in an affirmative act to promote the commission of the offense with which the defendant is charged. Even if the witness knows about the offense and doesn't disclose it (or conceals it), the witness is still not an accomplice. As the court summarized, if the witness cannot be charged with the offense that the defendant is charged with, the witness is not an accomplice. In this case, neither Pitts nor Harris were charged with capital murder. Even though Pitts drove Druery and Rome to the property where Rome was killed, there was no evidence she knew of Druery's plans to murder Rome. Additionally, when Druery asked Pitts and Harris if they wanted any money, neither of them replied (he gave them $40 anyway). This evidence does not show that the two witnesses performed an affirmative act to assist in the commission of the offense. Moreover, their mere presence at the scene and their failure to warn Rome was not enough to establish them as accomplices either as a matter of fact or as a matter of law. *Druery v. State*, _____ S.W.3d _____, 2007 WL 984548 (Tex. Crim. App. April 4, 2007).

Introducing training sessions for VACs and appellate attorneys

TDCAA is proud to announce two summer training sessions specially tailored to victim-witness coordinators and appellate prosecutors. Both workshops will be at the Baylor School of Law in Waco, and they are free to all prosecutors and prosecutor office personnel who want to attend. Because of limited seating, preregistration is strongly encouraged. A registration form is available by calling 512/474-2436 or at www.tdcaa.com/seminars.

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Appellate Advocacy Workshop

August 9, 2007: Improving writing and oral argument skills will be the focus of this one-day workshop aimed at appellate prosecutors. The morning session features Wayne Schiess, director of the legal writing program at the University of Texas School of Law, who will teach attendees how to get their points across without using dreaded legalese. The afternoon session features Gena Bunn and Ed Marshall, appellate gurus from the Attorney General's Office, who will discuss how to maximize your time in oral argument and turn appellate judges' questions to your advantage. **Attendees**

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