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

Knock and announce

Even in cases involving known drug dealers, police officers cannot automatically force entry without knocking to serve a warrant without following recent Supreme Court guidelines.

By Tom Bridges, former District Attorney in San Patricio County, and
L.E. "Ted" Wilson, former Assistant District Attorney in Harris County

Excerpted from *Warrants Manual for Arrest, Search & Seizure* (3rd edition)

Thankfully enough for police officers and prosecutors, the courts continue to provide some direction with respect to search warrant execution, particularly in the area of no-knock entry. With more cases where officers attempt to execute search and/or arrest warrants in potentially dangerous situations—such as on the home of a known drug dealer—knowing the rules is important for ensuring the search will be upheld in court. (Note, however, that nothing is more important than officer safety.)

In the knock-and-announce realm, as in most search and seizure questions, the first test for Fourth Amendment compliance is reasonableness.[1] The courts are charged with responsibility to tell us what that means. In this area, the U.S. Supreme Court has spoken in the cases of *Wilson v. Arkansas*,[2] *Richards v. Wisconsin*,[3] *U.S. v. Banks*,[4] and *Hudson v. Michigan*.[5] The four Supreme Court cases have established:

1) the rule (generally unreasonable not to knock and announce);
2) the exceptions to the rule (futility, danger, frustration of the search's purpose);
3) guidelines for the length of time officers must wait after complying with the rule; and
4) the federal exclusionary rule is inapplicable to cases wherein officers fail to knock and announce.

In *Wilson*, the Court said that announcing their authority and purpose before officers enter a dwelling is a long-standing common law practice surely contemplated by the Constitutional framers when they prohibited

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In memoriam

As this issue went to press, Tim Curry, longtime Criminal District Attorney in Tarrant County, passed away. Please see the next issue of *The Texas Prosecutor* for his friends' and colleagues' memories of a great prosecutor and man.

Guarding Texas Roadways: 2010 DWI Summit

Many of you attended the Guarding Texas Roadways: 2008 DWI Summit. This day-long program was one of the most wildly popular and valuable training events we have ever produced, and it was made possible by the Texas District and County Attorneys Foundation. Working with a generous grant from the Anheuser-Busch Companies and the full support of the Budweiser Satellite Network (BSN) and their production crews, the foundation supported the production of a world-class training event: four hours of action-packed, high-quality, interactive training. It was broadcast live from the BSN studios in St. Louis to 36 Anheuser-Busch distributorships all around Texas. We originally planed for an audience of 700 but trained more than 1,400 prosecutors and police officers at great facilities, some of which were standing-room-only for the event.

By Rob Kepple
TDCAA Executive Director in Austin

The training has made a difference in our communities. The sessions on crash reconstruction, blood draws, SFSTs, and courtroom testimony not only delivered timely and relevant training, but they also connected prosecutors and law enforcement to new ideas and continued training opportunities through our DWI resource prosecutor, Clay Abbott, who is in high demand for his seminars these days.

And now this great news: The Anheuser Busch Companies are eager to build on the success of our first summit, and we have tentatively set the Guarding Texas Roadways: DWI Summit for November 2010. That is perfect timing as it comes just after our big Annual Criminal & Civil Law Update and right before the busy holiday season. I can tell you that the crew in St. Louis enjoyed producing the program and are anxious to keep this valuable training going.

I want to take this opportunity to thank some folks at AB Corporate Social Responsibility whose efforts to support this program we really appreciate: **Carol Clark, Kim Stettes, Aurelio Rueles, Steve Mastorakos, Bill Conerly,** and **Mark Bordas**. Thank you so much!

This is the kind of program that would be impossible to produce without the Texas District and County Attorneys Foundation and the generous support of sponsors like the Anheuser-Busch Companies. Thanks for their support and your contributions too. It's working for you and for a safer Texas!

Recent gifts to TDCAF

David L. Finney
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Many plans in the works at TDCAA

"If you don't know where you are going, any road will get you there" is a famous Lewis Carroll quote about planning your future. Me personally, I like Yogi Berra's remix of that old saw: "If you don't know where you are going, you may end up someplace else." The lesson is the same: We need to plan our course, then follow the plan. That's what we are doing at TDCAA.

By Barry Macha
Criminal District Attorney in Wichita County

TDCAA exists to serve you, the people on the front lines of crime-fighting in our state. To make sure we stay true to the mission, TDCAA operates from a series of five-year plans. We are now three years into a plan adopted in 2006, and we have made substantial progress. First and foremost, of course, is the creation of our groundbreaking Texas District and County Attorneys Foundation (TDCAF), which in short duration has paid for significant training and educational resources and promises to be a big part of our future. Thanks for your support and leadership in this effort!

One major goal is to continue to bring TDCAA services to you in a more timely and efficient manner. To that end, we have transitioned away from written case summaries that in the past would get to you weeks or even months after the opinions were issued. We now e-mail case summaries every week, complete with insightful commentaries from experienced prosecutors. Additionally, we have eliminated the huge binders of seminar materials that invariably gathered dust on the bookshelves in favor of an electronic delivery of the course materials through a simple download.

Finally, we continue to beef up the TDCAA website, with new additions such as the DWI resource section, which now features Richard Alpert's constantly updated collection of DWI caselaw.

Another big area in our long range plan is TDCAA's ability to offer expert legal assistance. Very soon, TDCAA will increase its technical assistance in a couple of major ways. First, through the foundation's support, TDCAA will hire an expert appellate attorney who can assist prosecutors around the state as they develop criminal jurisprudence in our intermediate appellate courts. This new attorney will coordinate with the State Prosecuting Attorney's Office on approaches to major legal issues as well as giving direct assistance to prosecutors all over the state.

In addition, prosecutors continue to need special prosecutors in cases where they have a conflict. It has been a great need this last year, in which 76 newly elected prosecutors took office and were required in many instances to avoid prosecuting former clients. We know that you can get some help from the AG's office, but its resources are limited. TDCAA is committed to developing a resource bank upon which you can draw when you need a special prosecutor. This is a "shareware" concept that many of y'all already use in practice—you might handle a case for a neighbor, and she in turn prosecutes a case for you when you need it. And the good news is, there may be some funding to support the costs of that work. Stay tuned for details.

Finally, TDCAA is committed to helping you serve crime victims in your community. It is your duty to protect and serve the victims of crime, yet you are painfully aware that the state has never funded the statutory requirements of victim-witness services mandated to occur in your office. It's time that TDCAA gets active in helping you with this important aspect of your work as a champion for justice.

First, TDCAA will develop a victim services section dedicated to provide the services to the crime victims in your community. Second, through the work of the foundation, TDCAA intends to create a victim services staff position. That person will be dedicated to training and assisting victim assistance coordinators in prosecutor offices all over the state and act as a valuable resource for prosecutors and their victim services professionals.

I am honored to serve our profession and am lucky to be in a position to shepherd the growth of TDCAA's services to our members. And if you have ideas about how TDCAA can better serve your needs, let's talk. We always do your best work when we do it together.

Upcoming Legislative Updates schedule

It's about that time of the biennium again! We will travel to 18 Texas cities to tell folks what changed during the 81st Legislative Session. Each session is from 1:30 to 5 p.m., is worth three hours of TCLEOSE/CLE credit, and costs $75 for paid TDCAA members and $100 for non-members. All attendees will receive a copy of the 2009 *Legislative Update* book on new criminal laws with a Penal Code table of offenses. Registration is online only; go to www.tdcaa.com/training and choose the city near you.

City	Date	Location
Austin*	Friday, July 17	Doubletree North Hotel, 6505 IH-35
Del Rio	Thursday, July 23	Val Verde County Judicial Center, 100 E. Broadway
San Antonio	Friday, July 24	Grand Jury Room, Bexar County Courthouse, 300 Dolorosa
Beaumont	Thursday, July 30	Jury Room, 1st floor, Jefferson County Courthouse, 1001 Pearl
Houston	Friday, July 31	Garrett-Townes Hall, South Texas College of Law, 1303 San Jacinto St.
Fort Worth	Friday, July 31	Convention Center, 1201 Houston St.
Midland	Thursday, August 6	Business Training Lecture Hall (Advanced Technology Bldg.), Midland College, 3200 W. Cuthbert
El Paso	Friday, August 7	Commissioners Courtroom, 500 E. San Antonio
Llano	Friday, August 7	Ben E. Keith Bldg., 1604 Bessemer Ave. (State Hwy. 16 North)
Dallas	Friday, August 14	Ste. B-4 (Central Jury Room, 2nd floor), Frank Crowley Criminal Courts Bldg, 133 N. Industrial Blvd.
Edinburg	Friday, August 14	UT Pan Am Int'l Trade & Tech Bldg., 1201 W. University Dr.
Waco	Friday, August 14	1st fl. auditorium, Baylor School of Law, 1114 S. University Parks Dr.
Lubbock	Thursday, August 20	Lubbock County Central Jury Pool, 1308 Crickets Ave.
Amarillo	Friday, August 21	Central Jury Room, Potter County Courthouse, 501 S. Fillmore
San Angelo Beauregard	Friday, August 21	Courtroom A, Tom Green County Courthouse, 112 W.
Bryan	Wednesday, Aug. 26	Assembly Rm. 102, Brazos Center, 3232 Briarcrest
Austin*	Friday, August 28	DPS Auditorium, Bldg. C, 5805 N. Lamar Blvd.
Jacksonville	Friday, August 28	Norman Activity Center, 526 E. Commerce St.
Corpus Christi	Tuesday, Sept. 22**	Omni Bayfront Hotel, 900 N. Shoreline Blvd.

*** Note that there are two legislative updates in Austin. Please be sure to register for the right session.**

**** The legislative training in Corpus Christi is the same week as our Annual Criminal & Civil Law Update;**

The future of the Annual Criminal and Civil Law Update

The forecast for future annual conferences: great training, affordable registration fees, discounted hotel rates, and breezy and sunny weather with a chance of hurricanes. Here's the full story.

In the past few years, we have had one near-miss and another hurricane-related wash-out of our big seminar, historically held in September on the coast. After the two cancellations (in Corpus three years ago and in Galveston in 2008) we hosted make-up annuals in Corpus and Austin, respectively, and had pretty sizable crowds. Given two hurricanes in three years, though, we needed to explore other options for the conference in terms of location and time of year.

By Rob Kepple
TDCAA Executive Director in Austin

Because this conference usually attracts about 1,000 attendees, speakers, and staff, we are limited in our hotel choices; not many places can accommodate that crowd. Plus, we are further limited in hotel options because we like to offer state rate to our members with as few add-ons (such as parking and Internet fees) as possible. In the past, only three cities (Galveston, Corpus, and South Padre) have worked with us on all points—as long as we plan our conference during the cities' off-season (September or later, the tail end of hurricane season).

At the Annual Criminal and Civil Law Update in Austin this last January, **Erik Nielsen**, our training director, and **W. Clay Abbott**, our DWI resource prosecutor, polled the audience concerning the future of the Annual conference. We asked 1) if you preferred to move the conference away from the coast, 2) if you could tolerate the increase in hotel cost that would entail, and 3) if you wanted the conference at a different time of the year.

Your answer by a resounding majority: "We are fine with the coast during hurricane season, thank you very much." Most conference attendees preferred coastal spots for the Annual conference but also ranked Austin, San Antonio, and Fort Worth high on the list as possible venues. But here is the kicker: Our members have a strong preference for state rate at hotels; in fact, attendance at our conferences could be hard if hotels get too expensive. Apparently, folks don't mind the inconvenience of a hurricane every now and then as long as hotel rates are low.

Now that the tribe has spoken, it looks like we will be stay with the coastal cities for state hotel rates and the waterfront locations you want. If we can get good deals inland from time to time, we will host conferences there, but it looks like we will be heading to the coast in September, hurricanes notwithstanding, for the foreseeable future.

John R. Justice Student Loan Repayment Assistance

As you know, the John R. Justice Student Loan Repayment Assistance Act has passed Congress. The National District Attorneys Association is working to fund it. Unfortunately for prosecutors with student loans, funding for the bill did not make it into the recently passed stimulus package. We now have to hope that the funding can find its way in to the 2009–2010 federal budget. We'll keep you updated on any changes.

The National Academy of Science and Forensics

By now you have read the many newspaper articles about the study released in February by the National Academy of Sciences. As with most reports critical of criminal investigation and prosecution, there was plenty of pre-release publicity concerning potentially flawed DNA, fingerprint, bite mark, and other forensic evidence collection and analysis methods. To actually read the report, you will need to skim samples of it or actually buy it at http://books.nap.edu/catalog.php?record_id=12589.

The report's general tenor seems to be that forensic investigations need to be conducted by trained analysts in an independent setting. Different media outlets have plucked out portions of the report to criticize certain areas, such as fingerprint analysis, bite mark analysis, and DNA test procedures.

To that end, I thought you should be armed with a copy of the National District Attorneys Association statement concerning the NAS report. It is a pretty good summation of how prosecutors around the country feel about the subject:

Statement from the National District Attorneys Association Regarding the National Academy of Sciences February 2009 Study

A recent study released by the National Academy of Sciences includes a few notorious cases in which established forensic protocols were not followed or otherwise valid scientific methods were not accurately reported to juries. It appears the main problem in these cases was not bad science. Rather, good and well-established scientific techniques were used improperly or their ability to identify suspects was grossly over-exaggerated. In other words: Good Science, Bad People.

These mistakes have occurred. They are extremely rare but they are unacceptable.

Prosecutors are the one party in a trial whose sole allegiance is to the truth.

No prosecutor wants an innocent person in the defendant's chair, much less wrongly convicted. We hope the NAS study will be an opportunity to re-dedicate resources that go into the front end of criminal investigations including training on the correct collection, analysis, and admissibility of forensic evidence.

Investments should be made in money and technology that will help ensure that police arrest and we prosecute the right people before they get convicted. Law enforcement officers must be trained to recognize and collect critical forensic evidence. Forensic laboratories must be adequately funded and their practitioners well-trained. Prosecutors who present that scientific and technological evidence also must be well-trained to understand its proper scope before they present it to the jury.

In other words: an ounce of prevention is still worth a pound of cure thus ensuring juries are able to reach sound and just resolutions in criminal cases.

The larger question resulting from the NAS findings is whether the study will advance commitments to better equip, train, and fund good science and good people, or divert that money and time to focus on the rare but unacceptable injustices that occur when forensic science is misused by any criminal justice practitioner whether on the part of the State or the defense bar.

There is an urban myth that prosecutors measure success largely by the number of years to which felons are sentenced to prison. Instead, we succeed when we are contributing to a safe and secure community where the residents feel justice is fairly administered. That is the whole nature of local prosecutors who are accountable to their local communities.

Most prosecutors live where we encounter both the families of victims and the families of defendants—in the supermarket check-out lines and coffee shops. They hold us to answer for whether we helped bring real justice to every case. That is why it is so important to NDAA that resources be targeted to those areas that will help achieve justice in our communities. This should be the goal of all criminal justice practitioners.

New NDAA Executive Director

The NDAA has announced that it has selected a new Executive Director. He is **Scott Burns**, a long-time district attorney in Iron County, Utah, and former deputy director of the Office of National Drug Control Policy. He was selected from a pool of more than 60 applicants.

Joe Cassilly, NDAA President, said that he was confident in Burns' personal experience as a prosecutor, his years in high-level Washington posts, and his personal commitment to the mission of prosecution.

Burns himself says, "Prosecutors measure their success not by conviction rate but by whether justice is done in their communities and, as importantly, whether the people in those communities feel that justice is being done."

Welcome aboard, Scott!

Dressing for a mess

We all have had situations in which witnesses have appeared in court dressed, well, let's say, inappropriately. What can be even more perplexing to defense attorneys is why their clients dress as they do for one of the most important days in their lives.

This situation takes the cake. **Roy DeFriend**, County and District Attorney in Limestone County, reports that he recently pled out a defendant for what we call statutory sexual assault (consensual sex with a 15-year-old girl). The 50-year-old defendant was very properly dressed for his morning court proceeding in which he was placed on deferred

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adjudication. He needed to report to the probation department in the afternoon, however, for which he changed into something a little more comfortable during the lunch break: a tee shirt, overalls, and a baseball cap, which said, "Slut Hunter" on the front. The probation officer, not amused, marched the defendant to court. The judge promptly ordered him to immediately start serving jail time as a condition of his supervision.

Photos from Train the Trainer

Save the date for our Advanced Appellate Advocacy Seminar this

Coming this August to the Baylor Law School: TDCAA's Advanced Appellate Advocacy Seminar. This intensive course (August 10–13) will include excellent instructors advising on both oral and written appellate advocacy, sample arguments, brief writing, and seasoned faculty advisors for unsurpassed one-on-one critiques, advice, and counseling. Plus, the unbelievable facilities at Baylor Law School have four courtrooms complete with audio and video recording.

And the best part: It's totally free! TDCAA reimburses every attendee for travel, pays $30 per diem for meals, and requires no registration fee. Class size is limited to 32, and registration will be open only to appellate prosecutors with three years' experience.

Watch TDCAA.com and upcoming issues of this journal for further updates, and mark your calendar for mid-August in Waco with TDCAA.

Applications for investigator scholarship, PCI, Oscar Sherrell award now online

Applications for the Investigator Section scholarship, PCI award, and Oscar Sherrell award are now online. Look in the newsletter archive under this issue (May-June 2009) on www.tdcaa.com. The submission deadline for all three applications is July 1.

New online resource for DWI information

Our website, www.tdcaa.com, has a new feature for investigating and prosecuting intoxication offenses. Click on the DWI Resource button in the gold bar at the top, and you'll be directed to a wealth of information on standardized field sobriety tests (SFSTs), vehicle stops, voir dire, and dozens of other subjects. The section is still in its early stages, but soon we plan to upload articles that have to do with DWI and related offenses, plus video clips. Keep checking back to see the new items we post.

What previous job prepared you for working in a prosecutors' office?

Boyd Kennedy
Texas Parks and Wildlife

After my first year at Stephen F. Austin University, an uncle invited me to come spend the summer in Atlanta working for him at a big wholesale lumberyard. Most of the work was stacking lumber in the sun, but on occasion a rail car came in from the West Coast packed to the ceiling with redwood. Because I was the youngest and skinniest, I got to crawl in on top of it all and hand out boards one by one while getting muddy with sweat and red sawdust and getting a few burns from brushing the top of the car with bare skin. It's been 30 years and I vividly remember clocking out on the last day and thinking, "I will never punch a timeclock again." I can still hear and feel the thump on the card.

It was my first experience in a big city. That is where I worked alongside the guy who stole bicycles from front yards. He cheerfully told me he drove around the block twice, and if a bike were still there, he figured the owner didn't want it any more. He also knew where to buy beer on election day (which was illegal in Georgia). Several of my coworkers routinely cashed their checks every Friday at the closest liquor store. I was unusual in that I had a bank account. Another eye-opener was riding with a coworker on an errand as he detoured to an apartment complex and bought drugs through a window. One day a guy who came out to apply for a job tried to steal a car after the interview and had to be run off. The forklift drivers threw their empty vodka bottles behind stacks of lumber where they might not be found for months. I almost got in a fight by insisting that Texas was a lush, green place to a guy who accused me of lying because he had once driven all the way across Texas on I-20 and knew for a fact it was a desert. (He came through northeast Texas at night.) There were also some very fine men there, and to a man, everybody worked hard and got along well with each other.

It was great motivation to stay in school. I think it also gave me a better sense of how most people, including jurors and criminals, live and think and an appreciation for the good things in life, such as sick leave and air conditioning. That was not my only manual labor job but it was by far the most educational.

Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

My recurring job throughout college and law school was temping. I worked in just about every size of office, doing any kind of administrative task they needed, and worked with a huge variety of people. I always thought it helped me be flexible in any situation, which is certainly helpful as a prosecutor. I also don't think there's a better way to learn how to be organized than to work as a file clerk. The most important thing I learned, though, was that support staff rule the world. It was amazing seeing how a helpful secretary could squeak something through when you'd forgotten to get something in on time or how one you'd annoyed could make sure your work was always at the very bottom of the stack. And believe me, being rude to the receptionist would guarantee you a one-way trip to hold-music purgatory! I learned that having a good relationship with all support staff—not only in your office but also in the courts and even in opposing counsels' offices—will help you get things done when seconds count.

David Newell
Assistant District Attorney in Harris County

I have found that my job at Blockbuster Video provided me with tools for my later work as a prosecutor. For example, anticipating and identifying people's likes and dislikes based on limited information proved pretty good training for voir dire. Sure, there are definitely prosecutors who are better at voir dire (and at selecting movies for that matter) than I am, but I do think it enhanced my communication skills.

Also, trying to explain late fees has proven valuable as well, at least in the context of plea bargaining. I was often called upon to support this unpopular (but necessary) policy while maintaining a level of civility and without backing down. It enhanced my appreciation for consistent application of rules. I quickly learned how departing from accepted practice would be met with hostility from my boss and the patrons if I were not able to articulate a reason for that departure.

Learning to weather criticism for things beyond my control has also helped me as a prosecutor. While I certainly had no control over the quality of the rented movies, I was still the focal point for the customer's disappointment. Learning to accept it with humility so that the customer would continue to rely upon the services of my employer was a great lesson for work in the public sector.

And finally, as Steve Martin said in the movie *Grand Canyon*, "All of life's riddles are answered in the movies." Being able to relate a particular thought or idea to a popular movie establishes a connection between me and anyone I might be trying to persuade. Seeing a lot of movies has provided me with a wealth of such touchstones to utilize when trying to communicate.

Jeff Bray
Senior Legal Advisor, Plano Police Department

I was a prosecutor for 11 years in Collin, Dallas, and Gregg Counties. Before that, I interned in the Galveston County DA's office, Oklahoma County (OK) DA's office, and Brazos County DA's office. While at Brazos County one of the prosecutors, Margaret Lalk, suggested the best preparation for being a prosecutor is not necessarily working in a law firm or prosecutors' office; it's getting experience and rubbing shoulders with the people who will be your jurors, witnesses, and the like. Therefore, that summer I worked a glass pane washing machine at the Alenco window factory in Bryan. It was fantastic experience working with people that college students and law students do not typically fraternize with. Before and after that, I made my bread and butter as a waiter. That also is excellent preparation for being a lawyer, as you always have to smile, be polite, and figure out what the customers want and whether they can be satisfied reasonably or if they're kooks. Sound familiar? It's the same thing we do during jury selection and conferences during docket. Even the kooks need to be smiled at and politely sent on their way, though they may leave you a one-dollar tip.

Edna Hernandez
Assistant District Attorney in Waller County

Before I went to law school, I had a lot of jobs. I worked my way through college usually with two jobs at a time. One that stands out is my first job out of college: a food stamp caseworker at the Texas Department of Human Services. That job taught me how to ask probing questions—for instance, try pulling out the name of a baby's father from a woman who doesn't want him turned over to the AG's office. It also taught me how to dig for the truth. We would get quarterly reports from the IRS and the caseworkers would have to verify whether our clients had worked at the places they listed. Often they were working there, but sometimes they were the victims of ID theft. We also had to defend ourselves when clients filed appeals about our decisions. They would show up to the administrative hearing with their legal-aid lawyers in tow. We would sit alone and had to explain to the administrative judge why we did what we did. And the caseloads were huge. The investigation had to be worked in between the eight- or nine-hour-long interviews scheduled daily, and no overtime was allowed. So being a caseworker at DHS was a nice preview for what was in store as a prosecutor.

Another job that stands out, for less obvious reasons, was my very first job: I started working in the fields before my 10th birthday. (Think a couple of notches up from the movie *Slumdog Millionaire*—but only because I didn't have to steal for food.) How can hard manual labor compare to being a prosecutor? Well, aside from the long hours, both jobs help me put things into perspective, and the memories give me a healthy dose of reality. It also makes me appreciate the little I have now and lets me know I can do anything I put my mind to.

Continued from the front cover

Knock and announce (cont'd)

unreasonable searches and seizures.[6] As a consequence, it is unreasonable to enter a home with a warrant before giving the homeowner/occupants notice of purpose and authority. This is known as the "knock and announce" rule because it requires officers to knock on the door and announce their purpose before making a forceful entry. While this sounds reasonable, in practice it can become difficult, if not downright dangerous.

Richards v. Wisconsin reaffirmed the knock-and-announce rule but gave us a standard to apply when trying to establish an exception to the rule. Mr. Richards tried to deny entry to police when they were executing a search warrant of his hotel room. They had to force their way in, and Richards was convicted of felony possession of the cocaine found in the hotel room. Before the trial, he asked the trial court to suppress the evidence because the officers did not knock and announce their presence before forcibly entering. The Wisconsin Supreme Court affirmed the conviction and used the case to try to establish a blanket exception in all felony drug searches, saying officers' safety and evidence destruction circumstances were always present in drug cases. The U.S. Supreme Court would not approve this blanket exception. It upheld Richards' conviction, however, because the particular facts in his case justified forceful entry without first knocking, announcing, and waiting for submissive compliance by the search target.

Here is the test: Executing officers must "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[7]

If officers can articulate this suspicion with good reasons, entry will still be considered reasonable even if they do not knock and announce. Officers may determine when these circumstances are present or applicable either before acquisition of the warrant or during its execution.

If the facts and circumstances that create the probable cause include likelihood that knocking and announcing would be dangerous, futile, or would inhibit the effective investigation of the crime (for instance, that the defendant is likely to destroy evidence),[8] these facts should be expressly articulated in the narrative portion of the affidavit that becomes the basis of the warrant. Accordingly, the affidavit or application for the warrant should request entry without knocking or announcing, and the warrant should show on its face whether the magistrate approves such entry at the time the warrant is issued.

If the affiant cannot in good faith articulate the need for the exception to the rule, the affidavit and warrant may remain silent on this issue. Then, if at the time of execution, as in *Richards v. Wisconsin*, the officers are presented with circumstances giving rise to the necessary reasonable suspicion explained in the no-knock test, they may make a forcible entry without knocking or announcing. They will be expected to explain those circumstances in their reports and on the witness stand if the method of entry becomes an issue in subsequent litigation.

The U.S. Supreme Court added a new variation on the exceptions in *Banks*: The time officers must wait after knocking and announcing is determined by the same considerations that apply to the exceptions generally. In other words, anything that the executing officers know that will establish one or more of the exceptions (futility, danger, frustration of search purpose)—including the effect of knocking and announcing—continues to justify forceful, non-consensual entry until actual entry is made.[9] This means the time delay will be evaluated by the same criteria as the exceptions.

In *Banks*, the Supreme Court ruled that 20 seconds was sufficient time to allow people in the apartment to come to the door. More important, it was also time enough for people inside to begin destroying evidence. Banks said he was in the shower when the officers knocked, but the Supreme Court said that police are not responsible for that, or for ascertaining whether Banks actually heard the officers before their entry.

Note, however, that *Banks* does not remove the requirement that officers articulate why the facts of each case establish one of the excep-

tions to the knock and announce rule. The Court did not establish an automatic 20-second reasonableness rule. Instead, it held that in the *Banks* entry, 20 seconds was reasonable.

Similarly, Texas cases affirm the Supreme Court rule that officers executing a warrant may not use general concepts to justify an exception but must give specific facts material to the particular place and circumstances of the search.[10] There is no blanket knock-and-announce exception for cases enforcing drug laws.[11]

After a few years of windfall dismissals for criminal defendants due to evidence being suppressed for failure to knock and announce, the Supreme Court declared the party was over in *Hudson v. Michigan*. Saying that the nexus between method of entry and seizure of evidence is absent, plus the societal cost is too high, the Court declared exclusion of evidence an inappropriate remedy for this brand of unreasonable government behavior. Quickly taking the hand-off for Texas, the First Court of Appeals reversed a suppression order in *State v. Callaghan*,[12] saying that there was no causal connection between the manner of police entry and collection of the evidence.

The authors strongly recommend that officers continue to abide by the pre-*Hudson* rulings in this area. The potential exclusion of evidence from the courtroom is not the only consideration here. Because the method of entry is no less a factor when considering Fourth Amendment reasonableness, other remedies are available to those individuals who can show harm when officers fail to knock and announce. Saying "civil liability is an effective deterrent here,"[13] the Supreme Court practically invited aggrieved parties to initiate civil rights suits while observing such suits are proceeding in the lower courts "unimpeded by assertions of qualified immunity."[14] Ouch! One could win a battle here but lose the war, or more specifically, lose his pension due to a bad turn of events during execution of a search warrant. Numerous unexpected contingencies are the rule rather than the exception during warrant executions; when those circumstances give rise to liability claims, one needs to be able to show he operated within procedures approved by the courts and the legislature. Continue to follow the presumption that execution of search warrants will be preceded by knocking and announcing presence and purpose. Be prudent when you believe the facts of a particular case rebut that presumption.

Endnotes

1 See *Board of Education v. Earls,* 536 U.S. 822, 828 (2002) ("'reasonableness' … is the touchstone of the constitutionality of a government search").

2 *Wilson v. Arkansas*, 514 U.S. 927 (1995).

3 *Richards v. Wisconsin*, 520 U.S. 385 (1997).

4 *United States v. Banks*, 540 U.S. 31 (2003).

5 *Hudson v. Michigan*, 547 U.S. 586 (2006).

6 This principle is also long-standing in Texas law. It is statutorily incorporated in the directive concerning execution of felony arrest warrants. CCP art. 15.25 provides forceful entry may be made into a house by an officer "if he be refused admittance after giving notice of his authority and purpose."

7 *Richards*, 520 U.S. at 394.

8 See, e.g., *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998) (relying on concept of exigency, 15- to 20-second wait was reasonable).

9 *Banks*, 540 U.S. at 41-42 (disapproving of 9th Circuit's "four-part scheme for vetting knock-and-announce entries").

10 *Stokes v. State*, 978 S.W.2d 674 (Tex. App. — Eastland 1998, pet. ref'd) (officers' testimony that residence contained marijuana and guns established the danger predicate when officers waited two seconds before ramming the door); *Robinett v. Carlisle*, 928 S.W.2d 623 (Tex. App.—Fort Worth 1996, pet. ref'd) (potential danger and feared destruction of evidence justified entry; police conduct found "objectively reasonable"); compare *Price v. State*, 93 S.W.3d 358 (Tex. App. — Houston [14th Dist.] 2002, no pet.) (officer's testimony that people who possess drugs are "normally in possession of firearms" and therefore presumed dangerous insufficient to establish facts specific to the case to support an exception); *Ballard v. State*, 104 S.W.3d 372, 383 (Tex. App.— Beaumont 2003, pet. ref'd) (general testimony about meth labs and the people who operate them insufficient to justify an exception: "the mere presence of a handgun, functional or not, is insufficient, as an exigent circumstance exception to the knock-and-announce rule, where the State does not also prove the authorities possessed information that the individual(s) subject to the warrant was likely to use the weapon, was likely to become violent, had a criminal record reflecting violent tendencies, or a verified reputation of a violent nature").

11 *Richards*, 520 U.S. at 394; *Brown v. State*, 115 S.W.3d 633, 639 (Tex. App.—Waco 2003, no pet.) (testimony about general propensities of meth labs and their dangers not sufficiently specific to the case to justify exception); *Ballard*, 104 S.W.3d at 381 ("the fact that it is 'the nature of the beast' for methamphetamine labs to explode along with testimony of possible triggering factors in no way explains why breaching a door without first implementing the knock-and-announce doctrine makes it more likely that an explosion will be prevented").

12 *State v. Callaghan*, 222 S.W.3d 610 (Tex. App. —Houston [1st Dist.] 2007, pet. ref'd) (decided under Texas' exclusionary rule, CCP art. 38.23).

13 *Hudson v. Michigan*, 547 U.S. at 598.

14 *Id.*

Editor's note: A newly updated edition of Warrants Manual for Arrest,

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Search & Seizure *by Tom Bridges and Ted Wilson features significant new information on DWI blood search warrants and sealing affidavits, as well as updates on the knock-and-announce rule excerpted here.*

The 2009 edition also marks a significant revamping of the arrest and search warrant forms found in Appendices D and E. In this edition, Tom and Ted have included three different types of forms for each affidavit example in Appendix E. The first format ("Format A—Traditional") relies on the language used for many years in pre-printed search warrant affidavit forms. The second format ("Format B—Condensed") often used by affidavit writers omits the numbered paragraphs and sections, condensing the information into a format familiar to readers of legal documents often found in court filings. A third format ("Format C—Constitutional"), not often seen but recommended by the authors, establishes probable cause for the search before designating any specific requests of the magistrate. Format C recognizes the need to prioritize and highlight the probable cause to establish reasons why certain locations should be searched, why certain property is evidence of an offense, why special entry needs will be present, why certain individuals are expected to be at the search premises, etc.

Both appendixes are set off with black ("bleed") tabs on the side of the book so the reader can more easily turn to those sections.

For more information or to order a book, call 512/474-2436 or see the TDCAA website at www.tdcaa.com.

When is a court order needed to destroy evidence?

The last in a series of three articles on how to destroy unneeded evidence from criminal cases

When is a court order required in order to destroy evidence? Which judges may sign the order? Is there a time limit during which the order must be signed? Searching through the assorted statutes governing evidence destruction shows, yet again, that the legislature never intended for police agencies to keep evidence indefinitely. The key to the decision to destroy evidence is to examine when and why it might be helpful to retain evidence. And the answer is definitely *not* a vague "somebody might need it someday." That's a packrat's answer.

By Jana K. McCown
First Assistant District Attorney in Williamson County

Has the legislature already addressed the potential future need for evidence in the "biological material" retention statute in Article 38.43 of the Code of Criminal Procedure? Actually, I believe so. I have not been able to think of a single additional category of evidence where one could conclusively establish the guilt or innocence of a defendant other than with DNA. I know that DNA isn't always the smoking gun, but it may come closer than any other category of physical evidence. By requiring an extended period for retention of DNA evidence, our laws have addressed the when and why questions. So *why* are you keeping that beer can in evidence?

Court order required

If you look at all of the destruction statutes, you may be surprised to find that no court order is required in some of them. Certainly the courts don't want to be bothered every time some piece of abandoned or unclaimed property is disposed of. Frankly, neither do you. Remember in the first article of this series when I covered all the kinds of unnecessary items that end up in an evidence room? (Find it online at www.tdcaa.com/node/3894.) They are still there. So let's look to see when you *must* obtain a court order before we talk about when you don't have to get one.

1 **Firearms and other seized weapons.** Weapons seized in connection with an offense involving the use of a weapon or under Chapter 46 of the Penal Code (weapons offenses except prohibited weapons and weapons that are stolen property) shall be held by the law enforcement agency making the seizure. If it was not seized pursuant to a search or arrest warrant, an inventory of the seized weapons must be delivered to a magistrate.

If there is a prosecution ending with a conviction or deferred adjudication for an offense under Penal Code Chapter 46, the defendant may request the court in which the case was handled to return the weapon. The request must occur before the 61st day after the date of the judgment.

The weapon shall not be returned but ordered destroyed or forfeited to the state for use by the law enforcement agency or by a county forensic lab if:

- no request for return has been made before the 61st day;
- the person has a previous conviction under Penal Code chapter 46;
- the weapon is a prohibited weapon;
- the offense was committed in or on the premises of a playground, school, video arcade facility, or youth center; or
- the court determines based on the defendant's prior criminal history or the circumstances surrounding the commission of the offense that possession of the seized weapon would pose a threat to the community or one or more individuals.

If the person found in possession of a weapon is convicted of an offense involving the use of a

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weapon (presumably other than under Chapter 46),[1] the court entering judgment shall order the destruction of the weapon or forfeiture to the state for use by the law enforcement agency or county forensic lab within 61 days of the date of the conviction. If no order is made, the law enforcement agency may request an order of destruction or forfeiture from any magistrate.

If there is no prosecution or conviction for an offense involving the weapon seized, the magistrate to whom the seizure was reported shall, within the stated time period (61 days after determining there will be no prosecution), notify in writing the person found in possession of the weapon that the person is entitled to the weapon upon written request to the magistrate.

If the person makes the written request within 61 days of the notification, the magistrate shall order the weapon returned.

If the person does not make a timely written request (within 61 days from the date of notification), before the 121st day after the date of notification the magistrate shall order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon or by a county forensic laboratory designated by the magistrate.

The law enforcement agency holding the weapon may request an order of destruction or forfeiture from the magistrate if no order has been made within the 121 days from the date of notification.

2 Gambling evidence, prohibited weapons, obscene materials, et al. Article 18.18 of the Code of Criminal Procedure is the statute that deals with items that are generally illegal to possess and should not be returned to the owner. In addition to prohibited weapons, it consists of a jumble of categories including gambling paraphernalia, criminal instruments, obscene devices or material, child pornography, scanning devices or re-encoders, and dog-fighting equipment.[2]

3 Prohibited weapons. Prohibited weapons are treated differently from the disposition of other firearms or seized weapons covered by Article 18.19. Texas, more so than many states, respects the rights of gun owners to keep their firearms except in specific situations. Not so for prohibited weapons.

When there is a conviction for an offense involving a prohibited weapon, the court entering the judgment of conviction shall order the prohibited weapon be destroyed or forfeited to the law enforcement agency that initiated the complaint. Notice that the statute says "an offense involving a prohibited weapon," which presumably means any offense, not just a weapons charge under Penal Code §46.05. If the murder weapon is a sawed-off shotgun (a short barrel firearm), then this statute governs, meaning that the prosecutor in a case involving a prohibited weapon should be thinking about that weapon when negotiating a plea agreement. It should be made clear to the defendant that the weapon will not be returned. Furthermore, the judge should be asked to include a sentence ordering the destruction (or forfeiture) of the prohibited weapon in the judgment.

The statute anticipates that the destruction order by the convicting court will be entered within 30 days. If more than 30 days have passed since sentencing, any magistrate in the county of the offense may enter the order. Notice the short time frame?

If there is no prosecution for the prohibited weapon that has been seized, the law enforcement agency must make a motion "in a timely manner" after the prosecutor informs it in writing that no prosecution will arise (preferably right after notice). There are some additional notice requirements to the person found in possession and an opportunity to appear and show cause before a magistrate why the prohibited weapon should not be destroyed, but the bottom line is that unless that person can show by a preponderance of the evidence that the weapon is *not* a prohibited weapon and that he is entitled to possess it, destruction is mandatory.[3]

4 Other illegal items. What do gambling devices, criminal instruments, obscenity, child pornography, and scanning devices or re-encoders have in common? They are all included in the same statute for destruction. Why? Because when it is illegal in most situations to possess or use something, prosecutors shouldn't put it back into circulation!

When there is a final conviction[4] for the following offenses, the court entering the judgment of conviction shall order that the machine, device, gambling equipment or gambling paraphernalia, instrument, obscene device or material, child pornography, or scanning device or re-encoder by destroyed or forfeited to the state.[5] The offenses include:

- possession of a gambling device

or equipment, altered gambling equipment, or gambling paraphernalia (Penal Code §47.06);
• offenses involving a criminal instrument (Penal Code §16.01);
• offenses involving an obscene device or material (Penal Code §§43.22-23, 43.25);
• offenses involving child pornography (Penal Code §43.26);
• offenses involving a scanning device or re-encoder (Bus. & Com. code §§35.60 and 522.001); and
• offense involving dog-fighting (Penal Code §42.10).

If there is no final conviction, the same procedure as that used for prohibited weapons is specified.[6] Again, the person found in possession or any person interested in the evidence may appear before the magistrate and show cause why the item should not be destroyed. Unless the item can be proved by a preponderance of the evidence that it is not from a prohibited category, it will be destroyed or forfeited.

Interestingly enough, the statute allows any magistrate in the county to enter a destruction order for prohibited weapons after 30 days, but the same permission is not specifically granted for the remaining categories. Frankly, this is probably an oversight in the statute.

5 **Stolen property.** Chapter 47 of the Code of Criminal Procedure governs the disposition of stolen property and any other property acquired in a manner which makes the acquisition a penal offense.vii When an officer seizes property alleged to be stolen, he is supposed to immediately file a schedule of the property and its value with the court having jurisdiction of the case. The officer is also supposed to notify the court of the names and addresses of each party who has a claim to possession of the seized property.[8] If the ownership of the stolen property is contested or disputed, the officer with custody of the property shall hold it subject to the order of the proper court.[9]

This all sounds very logical and organized, but in many counties the "court having jurisdiction of the case" may transfer from a JP or municipal court where a complaint is filed and warrants issued, to a county or district court where the criminal charges will actually be prosecuted. If a criminal action related to the stolen property is not pending, certain judges may hold a hearing to determine the right to possession of the property. This "property hearing" may be done by a district judge, county court judge, statutory county court judge, justice of the peace having jurisdiction as a magistrate, or a municipal judge having jurisdiction in the city where the property is held. In Williamson County, most property hearings are done at the municipal or JP level.

The court that conducts the hearing has three choices:
• order the property delivered to whomever has the superior right to possession, without conditions;
• order the property delivered to whomever has the superior right to possession, subject to the condition that the property be made available to the prosecutor if needed for future prosecutions; or
• award custody of the property to a peace officer pending resolution of any criminal investigation regarding the property.[10]

If the actual owner can't be determined, the court shall order the peace officer to:
1. deliver the property to a government agency for official purposes,
2. deliver the property to the person designated by a municipality (PDA), county purchasing agent (CPA), or sheriff to be treated like abandoned or unclaimed property, or
3. destroy the property.

There is no specific time by which the property hearing must occur. Clearly from the statute's wording, the hearing may even occur before an investigation is complete when charges may be anticipated but have not yet been filed. Most of the time when a true owner is known and not in dispute, law enforcement will return the property to the owner without the necessity of a property hearing. It is only when ownership is uncertain that the officer is required to hold the property subject to a court order.

When there is a trial for theft or any other illegal acquisition of property that is a crime, the trial court shall order the property be restored to the "person appearing by proof to be the owner." While the case is still pending, the trial judge may, upon hearing, make a written order directing the property to be restored to the true owner.[11] Article 47.04 is nearly identical but calls the hearing an examining trial and, upon motion by the state, authorizes the court to make a written order directing the property be restored subject to the condition that it be made available to the state or by order of any court with jurisdiction over the offense to be used as evidence.

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If the prosecuting attorney gives written consent, any magistrate having jurisdiction in the county where the case is pending may hold a hearing to determine the right to possession of property subject to the Certificate of Title Act found in Chapter 501 of the Transportation code. If (stolen) property is not claimed within 30 days from the conviction, it is treated like abandoned or unclaimed property.[12]

Court order optional

1 Biological material evidence. Although Article 38.43 of the Code of Criminal Procedure requires that the convicting court be notified when the decision to destroy evidence containing biological material is made, there is no follow-up requirement that the court enter an order actually permitting the destruction. My recommendation still stands, however, that prosecutors apply for an order authorizing the destruction once the defendant and last attorney have been notified and the applicable time periods have passed without any objection being received. It's a simple process to tell the judge that notice has been properly given and no objection has been received. It takes away the appearance that the prosecutor, clerk, or law enforcement agency has unilaterally decided to destroy evidence, thereby avoiding accusations of improper destruction.

2 Controlled substance plants. A controlled substance plant is a plant from which a Schedule I or II controlled substance may be derived. Marijuana is a controlled substance plant. §481.152 of the Health and Safety Code specifically authorizes the seizure and forfeiture to the state without the necessity of a court order if the plants are wild growth, the owners or cultivators are unknown, or the plants have been planted, cultivated, or harvested in violation of the Texas Controlled Substance Act.[13] Don't ask me why, but unharvested peyote growing in its natural state is excepted from summary forfeiture.[14]

If a controlled substance plant is seized and summarily forfeited, the department or a peace officer may destroy the controlled substance plants under the rules of the department and without a court order *or* a court order for destruction (or other disposition) may be obtained under §481.159.[15]

3 Controlled substance property.[16] Controlled substance property is defined to include controlled substances, mixtures containing a controlled substance, controlled substance analogue, counterfeit controlled substances, drug paraphernalia, chemical precursors, chemical lab apparatus, and raw materials.[17] Marijuana is also a controlled substance.[18] The Health and Safety Code authorizes the forfeiture without a court order and/or the destruction without a court order according to the rules of the department. However, as in §481.152, a court order may be obtained pursuant to §481.159 for the disposition/destruction of controlled substance property.

For both controlled substance property and plants, there is no specific time frame set out for the destruction, nor does it specify which courts may issue the optional court order. This may differ from jurisdiction to jurisdiction. In Williamson County, the justice of the peace courts are generally used in all drug cases except those involving a trial.

No order required

1 Abandoned or unclaimed property.[19] The category described as "abandoned or unclaimed property" encompasses a wide range of property that may end up in the evidence room. Law enforcement acts as a repository for all sorts of abandoned vehicles, bicycles, found weapons, and assorted items that are turned in because the owner is unknown. The statute does *not* cover the following:

- contraband subject to forfeiture under Chapter 59,
- whiskey, wine, and beer,
- property that has been ordered returned by a magistrate to the person entitled to possession, or
- property held as evidence (i.e., property related to a charge that has been filed or a case under investigation).

When this type of property remains unclaimed for 30 days,[20] it should be delivered to either 1) the PDM if seized by a municipal peace officer or 2) the CPA where it was seized if seized by any other peace officer. If there is no county purchasing agent, the property shall be disposed by the sheriff.[21]

If the owner is known, notice of the intended disposition shall be sent by certified mail to the last known address of the owner, giving the owner 90 days to claim it. If the owner or address is unknown and the value is $500 or more, the PDM, CPA, or sheriff must publish in a

newspaper and allow 90 days to claim from the date of the publication. If unclaimed, there must be an additional notice published in the newspaper 14 days before the date of sale. If the owner or address is unknown and the value is less than $500, the PDM, CPA, or sheriff may sell or donate the property. No notice by publication is required.

If all the provisions of the statute have been met and the property is scheduled for disposition, the law enforcement agency that originally seized the property may request and have the property converted to agency use. The statute does not specify to whom that request should be directed, but in the absence of specific instructions, it appears that the request may be simply directed to the PDM or the CPA. The property may also be transferred to another law enforcement agency for that agency's use. When the property is no longer useful, it should be returned to the PDM, CPA or sheriff for disposition.

2 Excess quantities of drugs.[22] When a large seizure of controlled substance property or plants is made, the law enforcement agency which made the seizure is authorized to destroy the excess quantity before the case is disposed and without obtaining a court order. There are very specific steps which must be followed to preserve a sufficient quantity for testing and for discovery. These steps were discussed in a previous article and will not be repeated here.

Included in the excess quantity statute you will also find the authorization to destroy without a court order items which consist of hazardous waste, residuals, contaminated glassware, associated equipment, or by-products for illicit chemical laboratories. When the items either created a health or environmental hazard or are not capable of being safely stored, they may be forfeited and destroyed rather than placed into evidence.

3 Explosive weapons and chemical dispensing devices. In CCP Article 18.181, the legislature clearly recognizes the inability of certain types of evidence to be safely stored and preserved. Without requiring a court order or any other type of intervention, law enforcement is authorized to destroy explosive weapons after steps are taken to photograph and document the weapon prior to destruction and the effects of any destruction. Because the destruction is allowed prior to any criminal case conclusion, the statute specifically makes admissible representative samples, photographs, and records made of the destruction process in lieu of the actual weapon itself.

The moral of this story

Having made this journey through the land of evidence destruction, I have come back to my initial conclusions. The evidence destruction statutes are scattered all over, overlap in some instances, are hard to understand, and are occasionally vague. There are too many courts involved and not enough direction for a prosecutor or an evidence technician to ever be absolutely sure that they are doing it correctly. The time schedules are inconsistent depending upon who must be notified and what manner of notification is required.

There is some good news, however. Somewhere along the way somebody gave some thought to whether and when evidence in a criminal case should be released, returned, or destroyed. While they may not have gotten it perfect, the underlying concepts are solid. Evidence is useful only for a specific case and for a finite amount of time. When the investigation and prosecution are concluded, the evidence should be disposed of once any applicable statute mandating retention has been complied with fully. Let's be careful out there!

Endnotes

1 The Texas Parks & Wildlife Code also allows a weapon to be forfeited or destroyed when there is a conviction for certain Parks & Wildlife Code offenses. Tex. Parks & Wildlife §§61.0221 and 62.017.

2 Dog fighting equipment includes the dogs which may be forfeited or destroyed. If destruction is necessary, it must be performed by a veterinarian licensed in Texas or by trained personnel in an animal shelter or humane society if not vet is available. Tex. Code Crim. Proc. Art. 18.18(a).

3 Tex. Code Crim. Proc. Art. 18.18(b-e).

4 Deferred adjudication is not a final conviction for purposes of this section.

5 Tex. Code Crim. Proc. Art. 18.18(a).

6 Tex. Code Crim. Proc. Art. 18.18(b-e).

7 Tex. Code Crim. Proc. Art. 47.11.

8 Tex. Code Crim. Proc. Art. 47.03.

9 Tex. Code Crim. Proc. Art. 47.01. Note: Property governed by Chapter 371 of the Finance Code must be held regardless of whether ownership is disputed.

10 Tex. Code Crim. Proc. Art. 47.01A.

11 Tex. Code Crim. Proc. Art. 47.02.

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Court of Criminal Appeals update

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12 Tex. Code Crim. Proc. Art. 47.06.

13 Tex. Health & Safety Code §481.

14 Tex. Health & Safety Code §481.152(b).

15 Tex. Health & Safety Code §481.152(d).

16 Tex. Health & Safety Code §481.153.

17 Tex. Health & Safety Code §481.151(1).

18 Marjuana is a Schedule I hallucinogenic substance in the 2009 Controlled Substance schedules as published in the January 2, 2009 issue of the *Texas Register.* See also www.dshs.state.tx.us/dmd/control_subst_sched.shtm.

19 Tex. Code Crim. Proc. Art. 18.17.

20 Although the start date is not specified, the 30 days should begin with the discovery and collection of the abandoned or unclaimed property.

21 Tex. Code Crim. Proc. Art. 18.17(a).

22 Tex. Health & Safety Code §481.160.

Questions

By David C. Newell
Assistant District Attorney in Harris County

1 Mark Ivey committed misdemeanor DWI and elected to go to the jury for punishment. He did not fill out the paperwork for probation, thereby making it impossible for the jury to recommend probation. The jury sentenced him to 35 days in jail. After conferring with the jury informally, the judge placed Ivey on probation. Ivey appealed on the ground that the trial judge lacked the authority to suspend any sentence the jury assessed. (That's right, the defendant was upset that he got probation on a DWI.) Can the judge put someone on probation even though the jury did not recommend or consider it?

Yes _____
No _____

2 A jury convicted Forrest Stokes of felony theft, and Stokes timely filed a motion for new trial alleging ineffective assistance of counsel. No hearing was held on the motion, and it was overruled by operation of law. The only evidence that the motion had been "presented" to the trial court (a pre-requisite for complaining about the denial of a hearing) was an unsigned notation on the trial court's docket sheet "Motion New Trial presented to court not ruling per judge." The court of appeals held that Stokes had failed to meet the threshold showing of presentment so he could not complain about the denial of a hearing on his motion for new trial. The court reasoned that the docket notation was unsigned and gave no indication that it was signed by the judge. Therefore, the trial court did not abuse its discretion in declining to hold a hearing on the motion. Has Stokes "presented" his motion for new trial to the trial court (as opposed to just the court clerk)?

Yes _____
No _____

3 David Billodeau was charged with aggravated sexual assault. He had been injured in a bicycle accident and stayed in the home of J.B., (no relation to John Bradley) the then-8-year-old complainant, to recuperate. At one point, Billodeau gave J.B. two remote-controlled cars. (Trust me, this random detail will become important later.) When J.B.'s mother told him he could not accept the gift, J.B. flew into a rage (he had been diagnosed with ADD and bi-polar disorder the year before) and threw the cars at Billodeau. After Billodeau moved out of the house, J.B. made outcry to a neighbor that Billodeau had

taken J.B. to a motel and sexually assaulted him. (Though factually it looked like it happened several months later, J.B. testified that he thought he made outcry to his neighbor the very next day.) Doctors found no sign of trauma, but that isn't uncommon. CPS removed J.B. and his sister from the home (which J.B. had wanted to avoid—he and his sister had previously been molested by someone else, making it look as though his parents were failing to protect him), and he returned from CPS custody 11 months later even more prone to fits of rage.

At trial, Billodeau sought to question the child about threats he had made to his neighbors, the Klines, after the sexual assault occurred. J.B. had threatened to call CPS and falsely report that the Klines had molested him. The child also threatened Mrs. Kline's son in the same manner when he got angry with him. J.B. denied making these threats outside the presence of the jury, and the trial court refused the defense request to question J.B. about the threats because they happened after the sexual assault, thus preventing the defendant from calling the Klines to impeach J.B.'s denials about the threats. Does it matter that Billodeau made the false allegations after the offense?

Yes _____
No _____

4 Gregory Pollard was charged with retaliation against Christopher Kirk who had given a statement to police implicating Pollard in an aggravated sexual assault case. After Kirk gave his statement to police, he recanted because Pollard had threatened to hurt him or have a biker named "Wolf" hurt him. (Aside: Do bikers have their own naming ritual like in Animal House?) Kirk testified that he believed Pollard would carry out his threat because he knew about Pollard's "violent past," which included a 1986 murder conviction. However, this did not contribute to his fear of Pollard. Kirk also testified Pollard's past did not contribute to his recanting of his statement to police or caused Kirk to be more likely to believe that Pollard would carry out his threat. The State introduced Pollard's 1986 murder conviction and argued that Kirk's statements that he knew about Pollard's statements to Kirk about the past murder were relevant to show Kirk's state of mind. The court of appeals held that the conviction itself should not have been admitted. Are Pollard's statements to Kirk about the past murder also inadmissible?

Yes _____
No _____

5 Donny Davis and his buddy Justin Schimpf broke into an Amarillo apartment and stole a Playstation 2, opting to go retro despite the advent of a number of superior next-generation gaming consoles. They later pawned it. Several people, including the owner of the burglarized apartment, saw Davis lurking around the complex with Schimpf. However, Davis admitted to police that he had been in the area but that he'd met up with Schimpf who asked him to accompany him to pawn a Playstation 2. Of course, Schimpf testified against Davis, but trial counsel did not request an accomplice witness instruction, nor did the trial court instruct on accomplice witness testimony on its own. Davis was convicted and (because of his two prior felonies) sentenced to 67 years in prison.

At the hearing on the motion for new trial, the trial court held that the failure to request the instruction was not part of strategy, but given the state of the evidence and the totality of the representation, trial counsel had not rendered deficient performance. Additionally, the trial court held that no reasonable probability existed that the outcome would have been different had the instruction been included because of the totality of the evidence. Was there ineffective assistance?

Yes _____
No _____

6 Antonio Schmidt struck his girlfriend, Kimberly Lee, after he found out that she'd given a statement to police about "some stuff" that happened in Dallas. Schmidt struck the victim during a prolonged attack that included yelling, cursing, grabbing, pushing, kicking, dragging, and punching. (Schmidt argued that he struck her not in retaliation but just because he's a jerk.) A jury found Schmidt guilty of retaliation for threatening to harm the victim "by an unlawful act, to wit: striking." On the first trip to the Court of Criminal Appeals, the court held that someone can threaten harm by actually causing it. In other words, Schmidt threatened to

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strike Lee by actually striking her. On remand, Schmidt complained that the trial court erroneously failed to instruct on the lesser-included offenses of misdemeanor assault by causing bodily injury and misdemeanor assault by threat. Are misdemeanor assault by threat and misdemeanor assault by bodily injury lesser-included offenses of retaliation?

Yes _____
No _____

7 A woman in a "medium-crime" subdivision flagged down a patrolling officer at 10:30 p.m. to report a white male dressed all in black who was walking around and looking into houses. The officer did not know if this meant he was merely looking at them or if he was walking up to them and looking into the windows. Both the woman and the officer knew there had been several burglaries in the neighborhood. The officer drove off in the direction the woman had seen the man walking. A few blocks away, the officer saw Baldwin, a man matching the description. He made eye contact and Baldwin began walking quickly away from the officer. The officer stopped his patrol car, got out, approached Baldwin, and asked for identification and asked where he lived. Baldwin did not respond to the question about where he lived and instead asked why the officer wanted to see his ID. According to the officer, Baldwin looked nervous. Because this behavior was consistent with other uncooperative persons that the officer had encountered, the officer feared for his safety, and he handcuffed Baldwin. The officer asked where Baldwin's identification was, and Baldwin indicated it was in his right pants pocket. The officer considered this permission to reach into Baldwin's pocket, so he did, and he retrieved the wallet. The officer took Baldwin's ID out of the wallet; doing so revealed a baggie with cocaine in it behind the wallet. According to the Court of Criminal Appeals, which illegal action of the officer rendered the seized evidence inadmissible?

Handcuffing the defendant ___
Searching his pocket ___

8 The trial court found David Weir guilty of burglary of a habitation after he violated the terms of his deferred adjudication. The trial court orally sentenced him to 10 years in prison but added restitution, court costs, and attorney's fees in the written judgment. The court of appeals modified the judgment to exclude some of the financial obligations because some of them were actually part of the sentence and should have been orally pronounced to be part of the judgment. Which monetary requirements don't have to be orally pronounced to be part of the judgment?

Restitution _____
Attorney's fees _____
Court costs _____

9 Mark De La Paz was prosecuted for his involvement in the Dallas County "fake drug scandal." De La Paz was ultimately charged with tampering with physical evidence for knowingly making a false statement in an offense report and aggravated perjury for making those same false statements under oath. The prosecution specifically focused on De La Paz's involvement in the wrongful arrest of Jose Vega. Roberto Gonzalez and De La Paz's confidential informant, Daniel Alonso, manufactured 22 one-kilo packages of pool chalk and planted them in a Cadillac parked in a garage where Vega worked.

Gonzalez and Alonso met with De La Paz and another officer to arrange a "buy-bust" deal with Vega. Both in his offense report and under oath at his previous trial, De La Paz testified that he and his partner drove by the garage and observed Alonso contact Vega. No one else witnessed the contact. When the case came under scrutiny, De La Paz asked his partner to lie that they had actually seen the contact. De La Paz argued at trial that he had not lied because he'd actually seen the contact and presented a demonstration to show that his angle was different from the angle of the surveillance camera. However, the State, on rebuttal, introduced evidence of two other "buy-bust" deals that De La Paz had participated in as extraneous offense evidence to rebut the defensive theory that everyone else was lying and De La Paz was telling the truth. This other evidence demonstrated that De La Paz had previously said he'd seen an exchange or contact between the informant and the subject under investigation. The State argued that De La Paz had lied in each of these instances. Are the other two suspicious drug deals admissible to show De La Paz lied?

Admissible _____

Inadmissible _____

10 An officer was investigating a theft near Darrell Keehn's house. When he arrived, a man and a woman ran to the back of the house and a few minutes later, a minivan left. Keehn and his girlfriend lived at the house. Ever vigilant, the officer kept coming around the house to look for the minivan. One day when he saw it parked in the driveway, he decided to ask the residents about the theft. On his way to the front door, he saw a propane tank through the windows of the van. The "cutting of the tank" had a bluish-green discoloration that indicated to the officer that the tank contained the dreaded anhydrous ammonia. He knocked on the door, but not one answered at first. More officers arrived, including one from the drug task force. This time, Keehn answered the door. He let police in and they asked about the theft. An officer with the drug task force went out to look in the windows of the van after talking with Keehn. He also saw the tank and the discoloration. In his opinion the tank contained anhydrous ammonia, so he went in the van, got it out, and tested it for ammonia. Sure enough, ammonia. What theory justifies the officer's entry into the van?

Plain view _____
Automobile exception _____

Answers

1 Yes. The Court of Criminal Appeals held that a trial court has the authority to place an eligible defendant on probation even when the jury doesn't recommend it. *Ivey v. State*, 277 S.W.3d 43 (Tex. Crim. App. February 11, 2009)(Price, J.)(6:3:2). Judge Price, writing for the majority, noted that the statute gives the trial court broad discretion to suspend the imposition of sentence when it is the best interest of justice, the public, and the defendant to do so. The trial court must suspend a sentence when a jury recommends it, and a jury may recommend suspension of sentence even in circumstances where the judge may not. There are also several limitations on when a jury can suspend a sentence, such as when a defendant has previously been convicted of a felony. However, nothing expressly prohibits the trial judge from doing so when the jury doesn't even consider probation, must less recommend it. While previous cases have suggested that a trial court lacks the authority to do so, those cases didn't consider probation probation, but rather the first Suspended Sentence Law. According to the court, trial courts had always had the authority to suspend a sentence. In 1965 the legislature codified that authority in the Code of Criminal Procedure. Sure, the legislature later took those sections out of the code, but it intended no change to the law. It had been in use for 28 years and there was no longer any danger that Article 42.12 would be misinterpreted by courts.

Presiding Judge Keller dissented along with Judges Cochran and Holcomb to opine that a judge who overrides the jury's punishment verdict in contradiction of the defendant's wishes has overridden his election of the one who assesses punishment. Judge Holcomb also dissented by himself to note that the probation terms were much harsher than the defendant's jail sentence. Thus, Judge Holcomb expressed concern that the majority holding could give rise to a situation where a jury could sentence a defendant to a minimum punishment but the judge could assess a harsh probation. Judge Holcomb also expressed concern that there appeared to be a cause-and-effect relationship with the sentence and the trial court's *ex parte* communication with the jury. This seemed to Judge Holcomb as a potential violation of due process to place the defendant on community supervision after an *ex parte* communication between the trial court and the jury.

2 Yes. A unanimous CCA held that the docket notation in *Stokes* was sufficient to show presentment. *Stokes v. State*, 277 S.W.3d 20 (Tex. Crim. App. February 11, 2009) (Womack, J.)(9:0). While the court had given some indication in *Carranza v. State* that a notation in the case file (in *Carranza* it was a judge's note on the motion itself) must be a "judge's notation" to establish presentment, in this opinion, the court made clear that an unsigned docket notation qualifies as such a notation. The CCA also rejected the State's contention that disturbing the court of appeals opinion meant interfering with the court of appeals' factual determination that the docket notation was not reliable. According to the CCA, the court of appeals was not making a factual determination regarding the reliability of the docket notation but rather a procedural requirement subject to modification by the rule-

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making power of the court.

3 No. The Court of Criminal Appeals The CCA unanimously held that Billodeau should have been allowed to question J.B. about his threats against the Klines even though they took place after the sexual assault in question. *Billodeau v. State*, 277 S.W.3d 34 (Tex. Crim. App. February 11, 2009)(Johnson, J.)(9:0). Judge Johnson, writing for the majority, distinguished this case from *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000) by noting that in *Lopez*, the false accusations were against a mother for physical abuse, but here J.B.'s threats against the Klines concerned the same subject matter as the instant case: molestation. The court explained that the court of appeals erroneously focused upon the fact that the false allegations occurred *after* the charged offense under a theory that J.B.'s credibility was important only at the time of the report to police. The court rejected any suggestion that Billodeau was required to show the false threats occurred before the charged offense and noted that the evidence showed that when J.B. was angry about perceived injustices, he threatened the Klines. Similarly, this might have helped the jury determine whether J.B. had falsely accused Billodeau as vengeance for the remote-controlled car incident. Significantly, the court reached its conclusion by interpreting Rule 613 of the Texas Rules of Evidence, which allows impeachment with specific acts to show bias or interest. The court could have held that the evidence was inadmissible under the Rules of Evidence but nonetheless admissible by virtue of Billodeau's constitutional right to present a meaningful defense. However, even though the error in this case was non-constitutional, the court held that it had affected a substantial right.

4 Yes. According to the Court of Criminal Appeals, Kirk's testimony about what Pollard had told him about the 1986 murder was inadmissible because it didn't tell the jury anything about Kirk's state of mind. *Pollard v. State*, 277 S.W.3d 25 (Tex. Crim. App. February 11, 2009)(Hervey, J.)(8:1:0). The CCA explained that a defendant's saying, "I've killed before, and I'll do it again" could very well be relevant in a retaliation case when the statement comes after a threat to kill a potential witness. However, in this case, there wasn't any evidence that Pollard had ever said anything to that effect. While Kirk knew Pollard had killed someone, the evidence was presented as a fact that Pollard had actually killed someone, not merely to show the effect of that knowledge on Kirk, making that evidence somewhat free-wheeling and unconnected to anything of real consequence in this case. The evidence, standing alone, that Pollard had killed someone wasn't relevant, and even if Kirk's knowledge of Pollard's past murder had any marginal relevance, it would not have changed the outcome of the court of appeals' determination that Pollard was harmed by the erroneous admission of the fact of his 1986 murder conviction. Eight judges joined the majority. Judge Price concurred without an opinion.

5 Yes, but there is no prejudice. The Court of Criminal Appeals held that although trial counsel's conduct fell below prevailing professional norms, Davis had failed to show prejudice. *Davis v. State*, ___ S.W.3d ___; 2009 WL 455495 (Tex. Crim. App. February 25, 2009)(Holcomb, J.)(8:1:0). Judge Holcomb, writing for an eight-judge majority, made clear that trial counsel's representation was objectively deficient, thereby disagreeing with the trial court's holding to the contrary. Then the court turned to the larger question of how to evaluate prejudice from the lack of a jury instruction on accomplice witness testimony. According to the court, the State presented a significant amount of non-accomplice testimony to implicate Davis, *and there was no rational basis on which the jury could have doubted or disregarded that evidence.* The court of appeals had erred by focusing solely on whether the evidence was legally sufficient. The proper analysis should focus on 1) whether there is a "substantial" amount of non-accomplice evidence, *and* 2) whether the record reveals any rational basis on which the jury could have doubted or disregarded that evidence. Judge Keasler concurred in the result without an opinion.

6 Yes. In a unanimous opinion, the Court of Criminal Appeals held that Schmidt should've gotten instructions on the lesser-included offenses of assault by causing bodily injury and assault by threat. *Schmidt v. State*, ___ S.W.3d ___; 2009 WL 605355 (Tex. Crim. App. March 11, 2009)(Hervey, J.)(9:0). The court

rejected the State's argument that the indictment required the State to prove only a threat and not a strike. The State had pretty much taken the position from trial through *Schmidt I* that you could threaten harm by either threatening to strike or by actually striking, so the State was judicially estopped from arguing that the indictment meant only *threaten* to strike. Thus, the court of appeals got it right that assault by threat and assault by bodily injury were lesser-included offenses based upon the indictment. The CCA also rejected the argument that the "striking" portion of the indictment was surplusage because the State had to prove only that Schmidt had threatened the person, not the content of the threat or whether the threat was carried out. This, according to the CCA, would amount to a strict-statutory approach rather than the cognate-pleadings approach.

7 Searching the pocket. I know that's maybe a little unfair, but I wanted you to see the case "as the judges saw it." It does seem clear that placing the defendant in handcuffs generated a lot of the problems in this case. There seems to be some disagreement as to whether this was an improper arrest without probable cause or merely a detention that could arguably have been based on reasonable suspicion. However, the specific holding appears to be that regardless of whether seizing the defendant was bad, everyone agrees that the officer impermissibly went into Baldwin's pocket without authorization. *Baldwin v. State*, ___ S.W.3d ___; 2009 WL 605368 (Tex. Crim. App. March 11, 2009)(9:2:1:0). A unanimous Court of Criminal Appeals, led by Presiding Judge Keller, held that regardless of whether Baldwin was arrested or detained, there was no valid basis for reaching into his pocket. Had Baldwin been under arrest, the search of the pocket would've been justified as a "search incident to arrest," but there would have had to have been probable cause to arrest. There was not. And even under a proper investigatory detention justified by reasonable suspicion, the officer can do a pat-down for weapons and go into a pocket if he feels something like a weapon, but in this case, he didn't. If he wanted to go in for contraband, he needed probable cause. He didn't have it. Just because he can ask for identification doesn't mean he can go into the pocket to confirm it. And as for consent, the officer's belief that the defendant consented to entry into the pocket was objectively unreasonable.

Judge Cochran concurred to basically agree that Baldwin was arrested without probable cause when he was handcuffed. While Judge Cochran acknowledged that handcuffing a defendant does not automatically escalate a detention into an arrest, the handcuffing must be reasonably necessary to allow the officer to pursue his investigation without fear of violence. "The fact that a pedestrian is nervous when approached by a police officer at night, without more, is insufficient reason to handcuff him," Judge Cochran wrote. Judges Keasler and Hervey concurred as well but wrote to specifically reject Judge Cochran's view that this was an unlawful arrest rather than an unlawful detention.

8 Attorney's fees and court costs. The Court of Criminal Appeals affirmed the court of appeals' determination that attorney's fees are not part of the sentence, so they do not have to be orally pronounced. *Weir v. State*, ___ S.W.3d ___; 2009 WL 605362 (Tex. Crim. App. March 11, 2009)(Hervey, J.)(9:0). However, the CCA reversed the court of appeals on the issue of court costs. According to the court, court costs are just to recoup the expenses of judicial resources expended in the case and were not intended to be punitive. Unlike fines, which are called fines, court costs are called court costs, and they are not listed in the "Punishments" chapter of the Penal Code. Court costs are also different from restitution, which is punitive in nature (having been authorized in the Code of Criminal Procedure). Finally, requiring a defendant to pay court costs does not alter the range of punishment, and orally pronouncing court costs isn't the same as orally pronouncing multiple sentences that will run consecutively. So the CCA restored the requirement that the defendant pay court costs to the written judgment because such costs are not punitive. Court clerks rejoice.

9 Admissible. The Court of Criminal Appeals held that De La Paz had not only opened the door to the admission of the evidence, but also that it was admissible under a "doctrine of chances" theory. *De La*

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A note about our Capital Murder Seminar

There's still space available for TDCAA's 2009 Capital Murder seminar. It is June 23–29 at the Inn of the Hills Resort in Kerrville.

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Paz v. State, ___ S.W.3d ____; 2009 WL 774846 (Tex. Crim. App. March 25, 2009)(8:0). As in *Bass v. State*, 270 S.W.3d 557 (Tex. Crim. App. September 10, 2008) the defense had opened the door to the admission of the extraneous offense testimony in the opening statement by attacking De La Paz's partner, one of the State's star witnesses. While Herrera himself testified that he was cooperating with police in hope of getting a lighter sentence, the appellant also directly accused Herrera and Vega of being liars during his own cross-examination. Because reasonable people could disagree as to whether the defendant or the State opened the door, the trial court did not err in admitting the evidence. Moreover, Wigmore's "doctrine of chances" also provided a theory of admissibility. Highly unusual events are unlikely to repeat themselves. That De La Paz reported on three separate occasions that he saw what no one else saw decreases the likelihood that De La Paz saw any such drug deal. Finally, the admission of the evidence did not run afoul of Rule 403. While officers setting up innocent people carried with it the potential to influence the jury in an emotional way, the accuracy of De La Paz's statements was a hotly contested issue. The extraneous acts had high probative value, and the circumstantial nature of proving the intent to defraud made the State's need for the evidence great.

10 Automobile exception. ("But Dave, he saw it in plain view!") Well, the CCA held that the court of appeals correctly upheld the trial court's denial of the motion to suppress but erred in basing that upholding on the plain view doctrine. *Keehn v. State*, ___ S.W.3d ___; 2009 WL 774854 (Tex. Crim. App. March 25, 2009)(Keasler, J.)(8:1:0). According to the court, the officer did not have a right to access the tank inside the van; therefore, the plain view doctrine did not authorize entry. However, under the automobile exception, the narcotics officer could enter the van because it was readily mobile and subject to regulation and the officer had probable cause to believe the tank contained anhydrous ammonia. The court rejected Keehn's narrow reading of the U.S. Supreme Court case *California v. Carney*, which upheld a search of a mobile home. There, the Supreme Court found significant the fact that the mobile home hadn't been parked at a place "regularly used for residential purposes." Keehn tried to argue that his van was parked at a place regularly used for residential purposes so the automobile exception did not apply. The court rejected this argument and distinguished *Carney* by essentially noting that we care about where a mobile home is parked because that might indicate that the vehicle is used as a residence rather than a vehicle. In this case, the minivan raised no such concern even though it was parked at a place "regularly used for residential purposes." So the automobile exception justified the search because the officer had probable cause to believe that the van contained contraband.

Seven years for dog-fighting

Officers responding to a 911 call busted a group of people in the act of fighting dogs. Here's how prosecutors secured a conviction for one of the dog owners.

By Tameika Badger
Assistant Criminal District Attorney in Tarrant County

Until a dog-fighting case landed on my desk, I had not even thought about the issue since former NFL quarterback Michael Vick was sent to federal prison a couple of years ago. The last time I looked at the statute, causing a dog to fight with another dog was a Class A misdemeanor unless the defendant was earning money on the fight. That changed in the last legislative session; now, that offense [in Penal Code §42.10 (a)(1)] is a state jail felony, even if there is no "pecuniary benefit." I brushed up on the new law while preparing for the case.

The case

Last May at about 12:30 a.m., Manuel Cortez and his wife were at home sleeping when he was awakened by his dogs barking. Cortez went out to his backyard to see what was going on. A big commotion was coming from the backyard of the home across the alley—it sounded like dogs fighting (he heard dogs growling in an aggressive manner and yelping like they were in pain). He also heard a crowd of people yelling, cheering, and chanting, "Get him" and "Kill him."

Cortez had heard dog fighting from this neighbor's yard before and figured it was happening again, so he told his wife to call 911. In the meantime, he kept watch over the goings-on and saw his neighbor, Mark Mitchell, holding a brown pit bull on a chain while a second man held a black pit bull on a chain. It looked like the men were encouraging the dogs to fight. In fact, at one point he heard a man's voice bet $100 that his dog would kill another dog.

Officers arrived without their lights or sirens activated. As soon as they got out of their cruisers, they could hear dogs growling and people yelling ("Get him!"; "Kill him!"; "Let him go!") from the backyard. Once they passed through a gate, the officers observed seven people in a semi-circle around two pit bulls. Mark Mitchell was holding a brown pit bull by a chain, and another man was holding the chain of a black pit bull while the brown dog was tearing into the other's neck. The peace officers ordered them to separate the dogs, at which point Mitchell pulled the chain and the dog released its grip on the other dog's neck—but not before chomping down on the black dog's leg before Mitchell could pull it completely away. Both dogs were bloody and had several bite wounds on their faces and necks. Officers called Fort Worth Animal Control to seize the dogs.

Animal Control Officer Berry Alexander, who has participated in dog-fighting busts throughout the state, arrived on the scene within an hour. To his experienced eye, he knew the dogs' injuries were consistent with fighting, and he seized them for medical treatment.[1] He loaded them into the cage on the back of his truck and photographed both their injuries as well as the yard where the fight occurred.

Neither responding police officer had ever handled a dog-fighting case like this one; they had both answered calls but neither had arrived on the scene while the fight was still underway. After breaking up the fight and detaining all of the people at the home, they consulted a sergeant with how to proceed. The higher-ups instructed the officers to identify everyone and write them all Class C tickets, which ranged from "not having rabies vaccinations" to "failure to provide medical treatment for the animals," plus other miscellaneous city ordinance violations. Not a single person, not even Mitchell, was arrested that night.

Naturally, once I was assigned the case, I wondered why the officers hadn't arrested anyone. Not only did the officers themselves see the fight, but they had several civilian witnesses too. I could already hear the defense's closing argument to the jury: "If these trained officers weren't sure this was a dogfight, how can

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you find my client guilty beyond a reasonable doubt of dog-fighting?" I emailed the responding officers hoping for a reasonable explanation, and they replied that writing the Class C tickets was a mistake. They did indeed believe that the defendant was engaged in dog-fighting, but they wanted Detective Wade Walls, the main animal cruelty detective for Fort Worth Police Department, to review the case before making any arrests. I didn't like that explanation, but at least it was honest.

I expected to see arrest warrants for more than just Mitchell—after all, the responding officers had identified everyone at the fight and taken their pictures. However, Detective Walls explained that when he received the case, he discovered that a couple people had given false names so he decided not to seek arrest warrants for anyone unless and until he could confirm their identities. To date, nothing has come of those cases.

A few days after the fight, Detective Walls attended the animal seizure hearing at the Fort Worth Municipal Court, hoping that the dog owners would appear to claim their animals—and Mark Mitchell did just that. During the hearing, Mitchell told the judge that the dogs started fighting on their own and he was trying to break them up. The judge didn't buy it and denied his request to take back his pit bull. The City of Fort Worth maintained possession of both seized dogs.

After the hearing Mitchell agreed to meet with Detective Walls and to give a written statement, where he maintained that he was trying to break up, not instigate, the fight. Walls asked if he were willing to take a polygraph. Mitchell agreed but never showed up for the test. After obtaining written statements from Mr. and Mrs. Cortez (the neighbors who called 911) and one of the spectators at the dogfight, the detective obtained an arrest warrant for Mitchell.

At first, I was pretty sure this case was going to plead out: We had eyewitnesses and Mitchell had a 2nd-degree state jail enhancement. I offered him four years at TDCJ, figuring the defendant would not risk going to trial with those facts and his criminal history. Within a few days, though, defense counsel informed me that he would accept only misdemeanor time. There was no way I was going to sign off on that. I felt we had a pretty strong case, and Fort Worth Animal Control Officer Chris Berry informed me that the defendant's pit bull had old scars, which indicated that it had been fought before, so we prepared for trial.

Jury selection

My trial partner, Robb Catalano, and I knew that jury selection would be especially important in this case. Because the defendant had prior felony convictions, probation was not an option. We knew most potential jurors would say they were opposed to dog-fighting, but we weren't sure how people would feel about sending a man to the penitentiary for it.

Getting people to talk about dog-fighting was pretty easy. I started by asking the panel if they knew that dog-fighting was an offense for which a person could receive jail time. Several people said that they hadn't known that until the Michael Vick case. (It was inevitable that someone was going to bring up the Vick case, so I used that opportunity to ask the panel how they felt about it. The defense did not object.) I wanted to identify and strike people who believed Vick should not have been sent to prison or even prosecuted. There were only a few such folks.

Next we talked about dog-racing and hunting—were they similar to fighting? The consensus was that none of that compared to dog-fighting. Most people on the panel felt that dog fighting was cruel and barbaric and should not be allowed, even if regulated. One person stated that because dogs are domesticated, they should receive more protections than other animals. Most people agreed.

Next we moved to the punishment range, which is where I requested the most challenges for cause. Some people on the panel felt that the state jail punishment range was too high for dog-fighting and, even if instructed and regardless of the facts, could not sentence anyone within that range. When I talked about the enhanced punishment range, I lost a few more people. One man said, "We're talking about dogs. You can harm a human and get less time." Needless to say he didn't make it onto the jury. I asked for about eight people to be struck for cause on punishment alone. Thankfully we ended up with a good, dog-loving group. The foreman owned a pit bull, which he described as his best friend.

Defeating the defense

theory

The most difficult part was proving that the dog fight was intentionally organized and disproving the defense's theory that the dogs started fighting on their own. After all, pit bulls have a reputation for being vicious and dangerous, and it seems plausible that if two such dogs did start fighting, it would be difficult to break them up. The neighbor's testimony, then, was going to be critical. Mr. Cortez testified that he heard the constant chants of "get him" and "kill him." He equated the mood of the crowd to fans at a football game. He also testified that when he looked through the fence, he never saw the defendant struggling to pull the dogs apart. In fact, the only signs of distress he heard were coming from the dogs when they yelped in pain. This testimony was corroborated by what the responding officers saw and by the dogs' injuries.

Animal Control Officers Chris Berry and Barry Alexander both testified that the dogs were not human aggressive, only animal aggressive. Officer Berry explained that people who fight dogs usually train them to be submissive to people so that whenever they need to separate the dogs, the animals would not the bite the owner or the person controlling the fight. Officer Berry testified that she could photograph, examine, and treat the dogs without any problems. We even had pictures of the officer with her hands around the dogs' mouths to check their teeth. The fact that the animals were not aggressive towards any of the officers, coupled with the fact that the men were able to separate the dogs once police arrived, helped prove that the defendant had not been struggling to break up the fight as he claimed. In spite of the fact that the dogs were not human aggressive, they still had to be euthanized. They were not "adoptable" because they were taught to be aggressive and there was a likelihood that they would attack other animals or small children.

Another factor that helped to disprove the defense's theory was the dogs' injuries, which were concentrated on their faces and necks. Officer Berry acknowledged that dogs do get into random fights; however, she said that in those cases it's common to see a few bites on the body, but once one of the dogs establishes dominance, the other dog flees. With forced dog-fighting, as we had in this case, injuries are concentrated on the face and neck because the dogs must face and attack each other in a confined space until the fight is stopped.

On cross examination, the defense highlighted that fact that the defendant expressed great concern for his dog after the fight, implying that a person who cares so much for his dog would not fight it. Officer Berry explained that in her experience, people who fight dogs often care about the dogs and invest money in them. She told the jury a story from her days as a veterinary technician of a man who would fight his dogs but then spend a lot of money getting their wounds stitched up. She had told me this same story during our meeting, but I didn't expect the defense to let it in. The defense passed the witness shortly thereafter.

In the defense's case in chief, counsel called the defendant's son, Mark Mitchell, Jr., who is 25. He testified that on the night of the incident, Mitchell's dog was being kept at their cousin's house (the location of the fight) to separate it from another dog at their house that was pregnant. Mark Jr. was at the cousin's house while Mitchell was at home. He then laid out a timeline for that night: Mitchell's dog and another pit bull were in the backyard, and they started fighting. He said he and his cousin tried to separate the dogs but couldn't. He then drove to his Mitchell's house (about 15 minutes away) to pick him up so he could come and separate the dogs. This was around 10 p.m. When they got back to the cousin's house, the dogs were still fighting. He was adamant that the defendant was only trying to separate the dogs when officers arrived after midnight.

On cross examination, Robb Catalano did not have to ask many questions. The goal was to highlight the inconsistencies with his timeline and save the rest for closing arguments. We also wanted to show that he had a clear motive to lie. When asked if it would have a negative impact on him if his father was convicted, he said it would. He said that his father had already been to prison and he didn't want him to go back.

Verdict

The jury stayed out about an hour before returning a guilty verdict. During the punishment phase, the defense called Mitchell's fiancée, Janis Philips. I later learned from the jury that she actually hurt him more than she helped. She testified that the defendant had changed and was

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now a "good person" and had a "good sense of humor," in spite of his extensive criminal history. On cross-examination she could not explain how the defendant had changed. When I asked her about his work history, she stated that Mitchell had not been employed for at least five years. Jurors later said that this factored heavily in their decision on punishment.

During closing arguments, the defense explained that but for the defendant's criminal history, the maximum punishment for dog fighting was two years, so that's what she asked for. Defense counsel told the jury that Mark Mitchell was not Michael Vick and that they should not allow that case to influence them. When I gave my closing argument, I didn't ask for a specific number; I told them that although this was not a 20-year case, because of the defendant's criminal history and because we had not heard about anything positive that he had contributed to society, they should start at five years and work their way up. They deliberated just under an hour before they returned with the seven-year sentence.

The animal control officers were ecstatic about the verdict. They explained that they have a difficult time getting these cases to court because dog-fighting is such an underground activity. In most cases, they find only the results of the fight, like a dead dog in the alley with blood splatter on the wall and no one around to arrest. But it is still important that we continue to prosecute these cases. Jay Sabatucci, Texas State Director of the Humane Society of the United States (Central Regional Office), explained to me that dog-fighting is a symptom of a criminal lifestyle. He explained that in his experience, many dog-fighting busts lead to arrests for ancillary organized criminal activity such as weapons and narcotics trafficking. Thus, what starts out as a dog-fighting or animal cruelty investigation, may lead officers to more underground illegal activity.

Endnotes

1 Tex. Health and Safety Code §821.022(a).

Churck Dennis Award winner

Diane Wilson, investigator in the District Attorney's Office in Tom Green County, was given the Chuck Dennis Award at this year's Investigator School. She is pictured at left with Todd Smith, DA's investigator in Lubbock County, and Marletta Scribner, CDA's investigator in Collin County. Congratulations on winning this much-deserved award!

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

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