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

Taking down Dr. Death

Dallas County prosecutors did something possibly unprecedented: They tried a local doctor for injuring his patients in the operating room.

Mary Efurd walked into Dallas Medical Center full of confidence in her smart, charismatic neurosurgeon, who was supposed to fix her lower back pain. After all, he had promised he could make her better.

But the surgery went horribly wrong. Her fellowship-trained surgeon, Dr. Christopher Duntsch, put spinal fusion hardware into her muscle and soft tissue instead of the bone. He amputated a nerve root, leaving her with a permanent drop foot, a gait abnormality due to nerve damage. He twisted a screw into another nerve, which caused her to scream in pain for days when she awoke. He left hardware so loose in her back that it moved when touched. The list goes on.

Every person in the operating room that day told the defendant he was doing the surgery wrong, but he refused to listen. When the operation was over, the medical device representative left his tools in the operating room because he knew someone would have to go back in and perform a revision surgery. As word spread throughout the hospital, the staff began to panic. Another surgeon was brought in to take care of Mary, lawyers were called, and staff was interviewed. But Dr. Duntsch simply said the surgery had gone well—and he wanted to operate on Mary again on Monday.

By Stephanie Martin, Jaclyn Lambert, and Michelle Shughart
(left to right) Assistant Criminal District Attorneys in Dallas County

"He had to have known how to do it right, and then did the opposite." That is how another doctor, Robert Henderson, characterized Duntsch's treatment of Mary Efurd. What Dr. Henderson saw was so unthinkable that he thought an imposter had done it. He even sent Duntsch's picture to the University of Tennessee, where Duntsch had trained, to find out if it was the same man. Tennessee confirmed. A real doctor had done this.

Mary now spends her days in a wheelchair.

If this had been a one-time occurrence, a single horrific surgery, the Dallas County Criminal District Attorney's Office would probably never have heard of Dr. Christopher Duntsch. Unfortunately, his bad outcomes on patients began piling up over a relatively short period of time. When doctors are lining up to testify against another doctor, you know something is wrong. Normally physicians will not go on the record to say bad things about another doctor. There is typically hemming and hedging because they understand that medicine is not an exact science, that patients react differently to treatments, and that even good doctors have bad outcomes.

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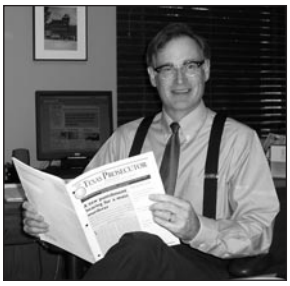
Show the love with a gift



By Rob Kepple
TDCAA Executive Director in Austin

I have the privilege and honor to work for some wonderful people—you. I have found that this profession is filled dedicated public servants striving to do the right thing. Y'all work hard and expect little in return; seeking the truth and (most of the time) getting justice is the reward you seek for your efforts.

So that is why I enjoy using "in honor of" and "in memory of" Foundation gifts as a way to recognize those who make the profession proud. Don't get me wrong, they aren't huge amounts worthy of a poster-sized cardboard check, but it is a little love and a way I can give back to the profession for the future.

If you see someone in our profession do something that makes you proud, think about letting the world know about it through a symbolic gift to the Foundation. You honor that person, and you support prosecution into the future. ❇

*Recent gifts to the Foundation**

Gordon Armstrong
Dusty Boyd
David Escamilla
David Finney
Staley Heatly
Kim Judin
Rob Kepple *in honor of Ray Rike*
Rob Kepple *in memory of Johnny Actkinson*
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Bill Torrey *in honor of Judge J. Bradley Smith*
Stephen Tyler
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* received between February 3 and April 7, 2017

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Texas District & County Attorneys Association

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Texas District & County Attorneys Foundation

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Reviewing *Locked In*, a new book on mass incarceration

By Rob Kepple
TDCAA Executive Director in Austin

By now you have read a lot about various groups seeking to end "mass incarceration" in the United States. In my column in the November-December 2015 edition of this journal, I discussed "the newest theory on 'over-incarceration.'" (You can read about it here: www.tdcaa.com/journal/annual-conference-wrap.) At the time, Fordham law professor **John Pfaff** was advancing his theory that mass incarceration has actually been driven by prosecutors. He noted that 20 years ago, prosecutors brought felony charges against one in three arrestees. Today, we are bringing charges against two of three arrestees, and that increase in indictments is the cause of prison growth in the last 30 years.

Pfaff has now firmed up his theory in a recently released book, *Locked In*. I was intrigued by his original theory, so I picked up a copy and read it (so you don't have to!). His main premise is that would-be reformers have missed the point by selling "the standard story." The standard story is that incarceration rates were driven by the war on drugs in the 1970s through the '90s, and we can significantly cut prison population by sweeping decriminalization of low-level, non-violent drug offenses. Pfaff spends the first part of his book detailing his research, which demonstrates that prisons are *not* filled with non-violent drug offenders but rather by mostly violent criminals. It's not that he doesn't care about the low-level drug offenders, just that reductions in those penalties won't lead to closing prisons.

Pfaff then turns his attention to what he believes is the real reason the prison populations have swelled since the 1980s: prosecutors. His research shows that the number of prison admissions per arrest rose, especially for violent offenders, and that drove up prison numbers. In other words, more people who got arrested for crimes were getting convicted. (By the way, Dr. Tony Fabelo, former director of the Texas Criminal Justice Policy Council and our resident criminal justice data guru, confirms that, indeed, in Texas the number of convictions per arrest has gone up over time.) He argues that nationwide, time served by violent offenders has not gone up much; it really is the increased percentage of arrested people who are convicted and sent to prison that has driven prison growth.

Pfaff acknowledges that prison expansion has played an important role in the drop in the crime rate, but nevertheless he feels that it is time to significantly reduce the size of our prison populations. And here is where it gets tough for the author: If the real driver of "mass incarceration" is that prosecutors have successfully convicted more violent offenders over time, how do you reverse that trend? And do you really want to? After all, ever since Texas passed the Professional Prosecutors Act in 1979, it has been the policy of the state to professionalize prosecution and make you better at what you do. And it is not like we go out and seek new violent crimes to prosecute; we are just prosecuting what the police (or, arguably, the criminals) give us.

It's in the "action item" department that the book falls short. Pfaff casts about with possible solutions, but by remaining general in his discussion, he loses relevance to Texas. I suppose some of his proposals could come to pass here, but it doesn't seem too likely in the near future. His three big solutions to slow down prosecutors are sentencing guidelines, which significantly reduce the top end and do not allow upward departures; plea bargaining guidelines that prosecutors are ordered to follow (as in New Jersey); and a significant increase in funding for the defense bar. Two more of his proposals already exist in Texas: alternatives to incarceration and more localized prosecution (I bet he doesn't know that Texas has 334 independent prosecutors). I felt like he was struggling a little when he suggested that maybe our language can make the difference—like, let's start calling violent offenders "people convicted of violent crimes." I recently heard someone use the phrase "a formerly vio-

lent offender," so maybe this idea is catching on.

In the end, I don't know what we should take away from the book. There was no real guidance for prosecutors in the way of introspection or examination of our practices. Perhaps in the future, Pfaff will take a few years away from the school environment and prosecute. I think he should come to Texas—crime may be down, but last time I checked, y'all were plenty busy and could use the help!

Finally, if you want to read the book just give me a call. I will send it your way.

Thank you, Perry Cunningham!

I have been a lawyer now for 35 years. As a young lawyer, I was a minion involved in billion-dollar oil and gas litigation. As a prosecutor, I did the complicated cases that you do on a regular basis. When called upon at the capitol to be a resource, I have been involved in the 1993 Penal Code reform, death penalty reform, stalking, hate crimes, discovery—you name it. I am not the best at any of that stuff, but I never mind jumping in and learning the law.

One area of the law, though, has always terrified me. DWLI. Yes, the dreaded driver's license suspension laws. It is a deceptively difficult area, and I respect those who wade in and prosecute these cases. Was the defendant driving without ever getting a license? Was the license invalid? Suspended? What was it suspended for? Do I have the right documentary evidence? Secretly, I have made a promise to myself that if possible, I would *never* in my career as a lawyer try to untangle the legal jumble that is DWLI. My recurring nightmare is that someone calls TDCAA needing legal assistance on this topic, and I happen to be the one to pick up the phone.

So with that in mind, I extend a hearty "thank you" to **Perry Cunningham**, an ACDA in Dallas County, for the cover story of the last issue of *The Texas Prosecutor*, "Untangling how to charge a DWLI." It's terrific. In fact, it might be in the Top 10 of the most awesome articles ever because it will save me—and undoubtedly thousands of prosecutors who have made that same secret pledge of ignorance—dozens of hours trying to figure out that law. Now I am ready for that phone call!

Thanks to a civil legend

It's official: **Ray Rike** has called it a career and retired from the Ellis County and District Attorney's Office. Ray has been a long-serving civil practitioner in Tarrant and Ellis Counties and has been a mainstay of TDCAA seminars for decades. He is a brilliant lawyer, and his desire to help others in the profession has been his trademark. We will still get to see Ray at our seminars, I am sure, if for nothing more than to enjoy his friendship and a story or two. Thanks, Ray, for your contributions to the cause!

Imitation is the sincerest form of flattery

There are many very active state prosecutor associations in the country, but I have to tell you I believe that *The Texas Prosecutor* is the flagship publication of them all. Our Editorial Board (**Jason Bennyhoff**, ADA in Fort Bend County; **Kathy Decker**, ACDA in Kaufman County; **Robert DuBoise**, ADA in Palo Pinto County; **Brian Foley**, ADA in Montgomery County; **Mike Holley**, ADA in Montgomery County; **Gabrielle Massey**, ACDA in McLennan County; **Kevin Petroff**, ACDA in Galveston County; **Scott Simpson**, ACDA in Bexar County; **Melissa Stryker**, ADA in Harris County; and **Bill Wirskye**, ACDA in Collin County) and our communications director, **Sarah Wolf**, continue to fill the pages with timely and relevant articles, legal pieces, and news of importance to our profession. And I like that the publication has inspired our friend associations to follow suit. Just this month I got a note from my counterpart and good friend in North Carolina, **Peg Dorer**, who has started publishing a newsletter inspired by *The Texas Prosecutor*. Indeed, Peg tells me that she regularly tears out articles from this journal and puts them in files as reminders to develop columns like them in the future. Way to go, *Texas Prosecutor*!

Welcome, Adalia Young

Next time you call in to our offices, you are likely to have the pleasure of talking with our new receptionist, **Adalia Young**. Adalia comes to us as a former school administrative assistant with a wealth of office experience, and she spent some time defending our state in the Texas Army National Guard as well. She is doing a great job of getting to know y'all, so please welcome her to the team next time you call in.

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Tarrant County's Annual Report

Last year I mentioned that Tarrant County CDA **Sharen Wilson** published her office's 2015 Annual Report. It was ground-breaking, complete with a well-thought-out mission statement. (You can read about it here: www .tdcaa.com/journal/schultz-v-state-bar.) She has just put out 2016's annual report, and it is worth a read.

One great thing to notice is the trends. Between 2015 and 2016, for example, there was a 42-percent increase in requests for protective orders and a 25-percent increase in filings for mental health commitments. Publishing such a report is a great way to educate the public on who works in your office, what your office is doing, and what challenges you are facing. You can download a copy of the report at our website, www.tdcaa.com; just look for this issue of the journal. ❇

THE PRESIDENT'S COLUMN

The Michael Morton Act passes the tests

By Randall Sims
District Attorney in Armstrong and Potter Counties

It has now been over three years since the Michael Morton Act (MMA) took effect on January 1, 2014. That law was perhaps the most significant change to Texas criminal jurisprudence since the new penal code was adopted in 1994. I am writing about the MMA now because the Court of Criminal Appeals recently handed down a significant opinion interpreting the Act, *In re Powell v. Hocker*, No. WR-85,177-01. This is one of a string of cases that has re-affirmed, in my mind, how the MMA was intended to function.

Prior to my involvement in the passage of the MMA, my opinion was that the 1965 version of Code of Criminal Procedure Art. 39.14 had served our evolving jurisprudence well. To this day, I commend those prosecutors, many of whom are no longer with us, for the wonderful job they did in creating a statute that lasted for almost 50 years. When I began as a prosecutor, the offices in which I worked had already adopted open-file policies under that statute and worked diligently to provide the defense with exculpatory evidence

My role in helping write what became the Michael Morton Act began when TDCAA Executive Director Rob Kepple texted me about a meeting between defense attorneys and prosecutors over then-SB 1611. "I need my closer at a meeting at 3 o'clock tomorrow afternoon," Rob wrote, and from that day forward, I attended every meeting on that bill on behalf of prosecutors. Many of those meetings were long, and most were very difficult, as every issue having to do with discovery was thoroughly debated and hammered out. I know that there are provisions of this bill that have been challenging to implement, but as attorneys for the State, we don't have a choice but to answer the call when our state leaders are going to open up our criminal statutes.

I believed that one of the strengths of the old system was that, although I turned everything over to the defense on a regular basis, I could hold back non-exculpatory evidence if I believed there was a risk to a victim or a witness. This discretion was critical in gang-related cases, for instance. In my view, this is why Texas, unlike many states, does not have a state-run witness protection program. As we went into the discussions about the new discovery system, of upmost importance to me and the other prosecutors was that our offense reports and witness statements did not get out onto the street and into the hands of those who

would intimidate and harm victims and witnesses.

While there were many heated moments while we drafted the MMA, I am absolutely convinced everyone involved believed we were trying to do what was best for the criminal justice system. In one of the final negotiation sessions with senators, representatives, and the lieutenant governor, the issue of victim safety and intimidation was discussed—and it was agreed that the MMA's language would keep offense reports out of the hands of individual defendants. That was important to all: a discovery statute that protects the interests of the accused, victims, and witnesses. I tried to remember that prosecutors are "to see that justice is done," so it was very important for the law to stand up to judicial scrutiny.

I watched with great interest when, in a Lubbock county court-at-law, a defendant challenged Art. 39.14(f), asking whether he had a right to personally keep a copy of any discovery material other than his own statement. The trial court ruled that yes, the defendant could retain copies. In response, Lubbock County Criminal District Attorney Matt Powell filed a writ of mandamus contesting that decision.

In its unanimous opinion—yes, you read that correctly: unanimous—the Court of Criminal Appeals conditionally granted relief to the district attorney and ruled that the defendant had no right to have personal copies of discovery materials. The Court found that the trial court should rescind its discovery order, or it would issue the writ of mandamus compelling it to do so. "The Legislature has the authority to pass laws regulating the means, manner, and mode of asserting [a] defendant's rights," the decision reads. "And if a discovery statute is clear, unqualified, and obviously applicable, then a trial court has no discretion but to follow it, and it hardly constitutes a legislative invasion of the judicial function for a higher court to compel the trial court to do so."

As for the discovery issues, the pleadings required the Court to thoroughly review the statute, and after doing so, the Court decided that the law should be read as a whole document as written. The Court found that Art. 39.14 requires prosecutors to provide discovery to the defendant's counsel, *not* the defendant himself. If the defendant is *pro se*, he is entitled to retain a copy only of his own statement; he is allowed only to "view" all other discovery. Neither defense counsel nor a trial court can provide the defendant with discovery. The Court concluded that this procedure does *not* violate due process or the right to effective assistance of counsel.

I was gratified and relieved that the Court's decision affirmed the discussions about protecting victims and witnesses that was so important to our state leaders. And I want to thank Matt Powell, the Lubbock County Criminal District Attorney, for filing his writ and acting to protect our victims and witnesses. ❇

News Worthy

Prosecutor booklets available for members

We at the association offer to our members a 12-page booklet that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to email the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

Victim Impact Statement revision

By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

This summer I have been invited to serve on the TDCJ-Victim Services Division's VIS Revision Committee. The committee will meet several times to review the format of the VIS form, VIS Quarterly Activity Report, *It's Your Voice* brochure, and VIS Recommended Processing Procedure. If you have suggestions that could aid our committee in making these documents user-friendly for victims as well as criminal justice professionals, please share your suggestions with me by email at Jalayne.Robinson @tdcaa.com.

In-office visits

Thanks again to each of the offices that invited me to come out for victim services assistance (here are some photos documenting my travels on this page and opposite). Traveling across Texas and visiting each of your offices is so exciting to me! It is such an honor to be able to help victim assistance coordinators (VACs) and prosecutors recognize services and resources available for crime victims and to share ideas on how VACs may assist the prosecutors with whom they work.

Please reach out to me at Jalayne.Robinson@tdcaa.com and I will develop either group or individualized victim services training for your office. ❇

ABOVE: In the group training for the Wharton County District Attorney's Office and Jackson County District Attorney's Office (left to right): TDCAA Victim Services Director Jalayne Robinson; Wharton County DA Dawn Allison; Jackson County CDA Pam Guenther; Jackson County ADA Keith Weiser; Jackson County secretary Kim Vasquez; Wharton County office staffer Niesha Hudlin; and Wharton County ADA Laura Dagley-Dowdy.

TOP PHOTO: In the Freestone County & District Attorney's office (left to right): County & District Attorney Brian Evans and Victim Assistance Coordinator Elizabeth Barnes. MIDDLE PHOTO: In the Uvalde County Attorney's Office, County Attorney John Dodson and Victim Assistance Coordinator Mindi Michael. ABOVE: In the Gregg County Criminal District Attorney's Office, VAC Tracy Robertson.

TOP PHOTO (at left): In the group training for the County Attorney's Office and District Attorney's Office in Grimes County (left to right): DA's VAC Brenda Williams; DA's Crime Victim Liaison Rosalia Mendez; Navasota Crime Victim Liaison Geralyn Backhus; Felony Legal Assistant Chrystal Lege; Misdemeanor Legal Assistant Kaitlin Mikulin; County Attorney's Legal Assistant and VAC Cori Mooney; and ADA Ronnie Yeates. MIDDLE PHOTO: In the Kendall County Criminal District Attorney's Office (left to right): VAC Glennda Wilke; CDA Nicole S. Bishop; and VAC Maria Valpeoz. BOTTOM PHOTO: In the Hood County Attorney's Office (left to right): VAC Maury Estrada; Office Manager and VAC Rowena West; and ACA Venisa McLaughlin.

New victim services resources from TDCAA

This month, TDCAA will unveil a few new resources to help prosecutor offices evaluate whether they are meeting the basic statutory duties required in providing victim services. The first, a 15-minute video called "Victim Service Essentials," highlights the most important component of victims' rights required by statute of prosecutor offices: notification of a variety of events and services.

By Diane Beckham
TDCAA Senior Staff Counsel in Austin

Narrated and produced by my voice actor son, Alex Beckham, this video describes the components of required notification to victims and gives tips for how to streamline the process. While the video is designed for victim assistance coordinators (VACs), prosecutors may also want to watch, because the statutory notification process includes information that a prosecutor is more likely to tell a victim (such as information about plea bargain offers required to be passed along to victims) and duties relating to the use of Victim Impact Statements.

The idea for the video came from TDCAA Victim Services Director Jalayne Robinson, who noticed that her in-person visits to prosecutor offices to assist new VACs tend to be more helpful after VACs have been working for a month or two, rather than during their first week on the job. But a resource outlining the basics required for VACs still seemed to be necessary for those in their first few days working as a VAC.

Jalayne and I wrote a PowerPoint, I wrote the script, Alex provided narration (and Jalayne recorded her voiceover introduction) from his home studio, and Alex then animated the information into an MP4 video. The video is included on the Victim Services page on the TDCAA website: www.tdcaa.com/victim-services. It's about 15 minutes long and well worth your time.

To go along with the video, I drafted a checklist of prosecutor-office statutory duties to victims that sets out the requirements for an elected prosecutor, a VAC, and a trial prosecutor. While it contains the same basic information as is included in the video, the checklist is a one-page snapshot of victim-related duties designed for prosecutor offices to make sure their victim services programming covers all the requirements. You can find the checklist on the TDCAA website here, www.tdcaa.com/victim-services, under the Criminal Justice Information header. It's also printed on the opposite page.

Of course, a victim services program in a prosecutor office can go far beyond the minimum required—and many do. With funding and personnel, prosecutor offices can reach beyond notification and paperwork to do things like:

- establish a Kids in Court program,
- host a variety of activities for victims and the community during Crime Victims' Rights Week each April,
- set up a waiting room designated for child victims, and
- collaborate with other local offices to plan and host training for criminal justice professionals and crime victim advocates.

Whatever goal you set for your victim services program, TDCAA is here to assist. We can help ensure your office is meeting the required statutory duties, or we can give you pointers to set up a program that does more (and find the funding to help you achieve the "more"). Call our offices (512/474-2436) or send an email to Victim Services Director Jalayne Robinson (Jalayne.Robinson@tdcaa.com) to ask questions, set up a telephone call, or schedule an in-person visit.

Let us know what you think about the video and checklist. Our hope is to produce more videos on victim services in prosecutor offices, and we want to make sure to cover topics that would help you the most. ❇

Checklist of Prosecutor-Office Statutory Duties to Victims

Elected Prosecutor:

- ❑ Designate a Victim Assistance Coordinator (VAC), which can be someone who:
    - Works part-time or full-time for the prosecutor office
    - Works for another office in the county
    - Works for a community-service non-profit
    - *Default*: Is the elected prosecutor

VAC:

- ❑ Send a notification packet no later than 10 days after indictment/information to all victims (or guardians, or close family members if victim is deceased) defined in CCP art. 56.02. [CCP arts. 56.03(c) & 56.08] The packet must include:
    - Cover letter, which includes:
        - ^ Case number and court to which the case is assigned
        - ^ Explanation of the victim's right to file a Victim Impact Statement (VIS)
        - ^ Explanation of the victim's right to complete a CVC application
        - ^ Name, address & phone number of VAC assigned to the case
        - ^ Offer by VAC to assist with the above paperwork
    - Request for current contact information from the victim
    - VIS and information sheet [forms available on TDCJ website]
    - Crime victims' rights brochure *(several required items could be combined into a brochure, such as:)*
        - ^ Criminal justice system overview
        - ^ Explanation of suggested steps to take if the victim feels threatened
        - ^ Referrals to community resources
    - VINE program brochure
    - Application for Crime Victims' Compensation (CVC)
- ❑ *For victims of sexual assault or abuse, stalking, or human trafficking*: Notify the victim about protective orders, including the right to request the prosecutor's office to file an application for a protective order under CCP art. 7A.01 on behalf of the victim. [CCP art. 56.021(d)]
- ❑ Provide statistics about the number of VIS forms returned to TDCJ every quarter. [CCP art. 56.05]

Prosecutors:

- ❑ Give notice of the existence and terms of any plea bargain agreement to be presented to the court. [CCP art. 56.08(b-1)]
- ❑ Consider the VIS before sentencing or acceptance of a plea and send a copy of a returned VIS to the court sentencing the defendant. [CCP art. 56.02(a)(12)(A)]

Prosecutors or VACs:

- ❑ As far as reasonably practical, give notice of any scheduled court proceedings, changes in the schedule, and requests for continuance. [CCP art. 56.08(b)]
- ❑ Forward a victim's contact information to CSCD, if the defendant is placed on probation. [CCP art. 56.08(d)]

Suggestion of overt racial bias allows for a look behind the curtain of jury deliberations

The no-impeachment-of-the-jury-verdict rule was created to prevent going behind verdicts and second-guessing decisions. Most jurisdictions, including Texas, do not recognize an exception to that rule. The Supreme Court of the United States has long recognized the substantial concerns of protecting jury deliberations from intrusive inquiry, understanding that if attorneys could use juror testimony to attack verdicts, jurors could be subjected to harassment by a defeated party and the finality of the process would be disrupted. Courts have also cautioned that attempts to impeach a verdict could potentially destroy freedom of discussion and conference during deliberations and undermine jurors' willingness to return an unpopular verdict. In a worst-case scenario, consistently questioning verdicts could potentially destroy the community's trust in a system that relies on the decisions of laypeople.

By Katie Davis
Assistant District Attorney in Harris County

Although parties have asked the Supreme Court to look behind the curtain and question what occurred in deliberations based on past concerns of juror misconduct, the Court has repeatedly declined to do so. However, in the face of extreme racial bias, the Supreme Court of the United States recently re-examined the no-impeachment bar and carved out an exception, going against years of its own precedent in *Pena-Rodriguez v. Colorado*.[1]

The underlying offense

The crimes occurred in 2007 in the women's bathroom of a barn at a horseracing track in Colorado. The three victims—sisters aged 14, 15, and 16—lived in the barn with their parents and siblings; their father was a horse jockey. Miguel Pena-Rodriguez, a Hispanic man, was one of the horse keepers at the track and had also lived at the barn for about a week prior to the incident.

One evening, the three sisters had been in the bathroom for about 15 minutes taking showers when Pena-Rodriguez walked in and asked if they wanted to party. The oldest sister demanded that he leave, but instead, Pena-Rodriguez turned out the lights. One of the sisters was able to escape the bathroom, but Pena-Rodriguez approached the other two girls. The sisters demanded that he turn on the lights, but he did not listen. In the dark, Pena-Rodriguez groped the two girls sexually. When the assault was over, the girls fled the bathroom and reported the incident to their parents.

Pena-Rodriguez was charged with attempted sexual assault on a child, unlawful sexual contact, and harassment. After a three-day trial, the jury found him guilty of misdemeanor unlawful sexual contact and harassment but failed to reach a verdict on attempted sexual assault of a child. Pena-Rodriguez received two years of probation and was required to register as a sex offender.

Post-conviction

After the verdict, Pena-Rodriguez's attorney spoke with jurors. Two of them informed counsel that another juror, identified as Juror H.C., had allegedly made racially biased statements during deliberations. The trial court allowed counsel to obtain affidavits from the two jurors, who alleged H.C. said the following:

- He "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."
- He stated his belief that Mexican men are physically controlling of women because of their sense of entitlement and further stated, "'I think he did it because he's Mexican, and Mexican men take whatever they want.'"
- He explained that, in his experience, "Nine times out of 10, Mexican men were guilty of being aggressive toward women and young girls."
- He said that he did not find Pena-Rodriguez's alibi witness credible because, among other things, the witness was "an illegal." (In fact, the witness testified during trial that he was a legal resident of the United States.)

Although the trial court

acknowledged the alleged statements were biased, it did not allow defense counsel to ask jurors questions on the racial bias or the deliberations based on the no-impeachment of a jury verdict evidentiary rule, Colorado Rule of Evidence 606(b).[2] The trial court additionally noted that none of the jurors expressed any reservations based on racial or any other bias during voir dire, despite being asked to inform the court of such bias.[3] The court denied the motion for new trial.

Both the court of appeals and the Colorado Supreme Court affirmed the trial court's denial of the motion for new trial. The Colorado Supreme Court based its decision on prior precedent from the U.S. Supreme Court that up until that point had stood for the crucial principle that "protecting the secrecy of jury deliberations is of paramount importance in our justice system."[4] The U.S. Supreme Court granted certiorari.

The SCOTUS decision

The Supreme Court ruled that there *is* an exception to the "no-impeachment rule" when a juror's statements indicate that racial bias was a significant motivating factor in his finding of guilt, going against precedent holding otherwise. The majority decision, written by Justice Kennedy, found that the current no-impeachment rule has substantial merit because it provides stability and finality to verdicts, but it also found that the rule must yield when there is evidence that a juror has relied on racial stereotypes or prejudice to convict a defendant. The Court noted that racial bias is different from and more serious than past concerns in front of the Court and concluded that a "constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is central premise of the Sixth Amendment trial right."[5]

Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is up to the discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.[6]

Justices Thomas and Alito both wrote dissents.[7] Both justices felt that the majority had good intentions, but they were concerned that the Court has now pried open the door for more intrusions into jury deliberations, something that has always been closely guarded.

Going forward

While it is not clear exactly what meets the test, it is clear that Juror H.C.'s comments do. The Court emphasized that he used a dangerous racial stereotype to conclude that Pena-Rodriguez was guilty and that he encouraged others to convict on that basis. But the Court stressed, "Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[8] The Court left the mechanics of acquiring and presenting such evidence to the states and local court rules.

It is important to keep in mind that the Court did not grant Pena-Rodriguez a new trial based on racial bias; rather, the Court held that all the jurors may be questioned about Juror H.C.'s comments during deliberations and the influence those comments had on the verdict in a new hearing on Pena-Rodriguez's motion for new trial. Thus, 10 years after the verdict and two jurors brought the statements to defense counsel's attention, all the jurors will be asked about their deliberations, the racial comments, and the effect those comments had on the verdict.

No one wants racial bias to have a role in determining defendants' guilt, and prosecutors do not want guilty verdicts to be called into question years later, when memories are faulty or feelings could change, losing the sense of finality. So how can we prevent racial bias from sneaking up on our juries? The short answer is, it cannot always be prevented. As the Court noted, not many people are willing to admit to racial bias in front of others during voir dire, but voir dire is a starting place. Perhaps prosecutors should ask more direct questions to a venire when a potential concern of racial bias applies to a case. Perhaps the trial judge, as part of jury instructions, can ask for

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jurors to alert the court if racial bias is used in deliberations. Catching any concerns early would always be better than later; having jurors write affidavits regarding any potential bias concerns immediately could help keep memories straight after a potentially lengthy appellate process.[9]

But what happens when potential racial bias is not addressed immediately? It is possible that a juror could come forward alleging racial bias years after a verdict, and we could potentially be asking jurors to recall a discussion during deliberations from one, two, 10, or 20 years before. Memories can fade over time, and an off-handed comment or inconsequential remark could be interpreted differently years later. In a motion for new trial or a writ hearing, the trial court could find itself in the position of making credibility determinations of jurors, having to separate intentional, racially biased comments (like those in the *Pena-Rodriguez* case) from a juror's off-handed comment that may have been misinterpreted.

The biggest question that we, as lawyers, have after this case is, What happens when we look behind the curtain to question the deliberations on racial bias and learn of other issues? How far can the inquiry extend? Again, I do not know. This article may raise more questions than it answers, but this case is important for prosecutors to be aware of so that we can further attempt to limit racial bias on our juries, which calls our verdicts into question. The justices of the majority opinion seem sure that the Court's holding will not raise a litany of issues; only time will tell if they are correct. Perhaps, though, this is another part of the burden we shoulder as prosecutors to ensure that justice is done and that someone is convicted because of the strength of the State's evidence, rather than because of the color of his skin or nationality. ❇

Endnotes

1 *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (March 6, 2017).

2 Like Texas's Rule 606(b) and its federal counterpart, Colorado's Rule 606(b) generally prohibits a juror from testifying as to any statement made during deliberations in a proceeding inquiring into the validity of the verdict. See Tex. R. Evid. 606(b); see also Fed. R. Evid. 606(b). The Colorado Rule reads as follows:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

3 The trial court asked the panel through a written questionnaire and in the open courtroom to let the court know if there was anything about a potential juror that would make it difficult to be a fair juror. The court instructed prospective jurors to speak in private if they had any concerns about their impartiality.

4 *Pena-Rodriguez v. People*, 350 P.3d 287, 292, rev'd and remanded sub nom. *Pena-Rodriguez v. Colorado*, 580 U.S. ____ (2017) (citing *Tanner v. United States*, 483 U.S. 107, 119 (1987) and *Warger v. Shauers*, 135 S.Ct. 521, 528 (2014)).

5 *Pena-Rodriguez*, 137 S. Ct. at 869.

6 See *Pena-Rodriguez*, S. Ct. at 869.

7 Justice Thomas dissented separately but also joined Justice Alito's dissent along with Chief Justice Roberts.

8 *Pena-Rodriguez*, S. Ct. at 869.

9 In *Pena-Rodriguez* we know that at least two affidavits were procured by the jurors who raised the concern to trial counsel.

Photos from our Prosecuting Violent Crimes Seminar in Houston

Photos from Train the Trainer

A roundup of notable quotables

"Who [else] can say they have a squirrel that guards their house?"

—Meridian, Idaho, resident Adam Pearl, whose pet squirrel, Joey, attacked, scratched, and bit a burglar who'd broken into Pearl's home to steal his guns. (http://www.guns.com/2017/02/16/mans-pet-squirrel-attacks-burglar-breaking-into-gun-safe-video)

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes one to this column will receive a free TDCAA T-shirt!

"It is a man, but we don't know more. The impact of the fall makes it more difficult to be able to identify him or the wounds he suffered."

—Antonio Garcia, a spokesman for the Mexican Institute of Social Security, about a man's body that landed on the roof of his institute's public clinic. Around dawn one day this spring, a low-flying airplane flew over Eldorado in Mexico, the old stomping grounds of drug lord Joaquin "El Chapo" Guzman, and started tossing bodies to the ground. It's the latest scare tactic in the Mexican drug wars. (http://www.chron.com/news/us-world/border-mexico/article/Mexican-narcos-drop-bodies-and-warnings-from-11073662.php)

"I don't understand the connection between having sex with your clients and the charge of compelling prostitution. I hear of attorneys having sex with their clients all the time. I've never heard of them getting in trouble."

—San Antonio lawyer Mark Benavides during an interview with detectives who questioned him after several of his female clients came forward to report Benavides had coerced them into sex. (http://www.mysanantonio.com/news/local/article/Accused-lawyer-on-video-played-in-court-tells-11024172.php)

"We're all brothers and sisters in this trade; you know, it's a calling. Serving your community is one of the best things you can do—besides serving your country."

—Bastrop County Sheriff's Deputy Dylan Dorris, who was attempting to arrest a resisting suspect, Kenton Fryer, at a gas station. Another customer (and Marine Corps veteran), Scott Perkins, saw the struggle and intervened, drawing his weapon and ordering Fryer to freeze. "I'm alive today because of him," Deputy Dorris says. (http://insider.foxnews.com/2016/02/03/armed-marine-veteran-saves-texas-deputy-struggling-suspect)

"We live in a world where Kardashians rule, making women feel what God gave them is not enough. Ross used that."

—Twitter user @DAnglinFox4, a Dallas journalist reporting on the trial of Denise Ross, quoting Dallas County prosecutors. Ross was charged with injecting industrial-grade silicone into women's buttocks and using Super Glue to seal the injection sites. One woman died from the procedure. (Contributed by Ryan Calvert, ADA in Brazos County)

"I found out that for me, propping my feet up just wasn't cutting it. You can only fish and hunt so much and damn, I missed working with people and having that focus on mission."

—Fred Spencer, an investigator with the Travis County District Attorney's Office, about coming out of retirement from the Austin Police Department to work for the DA. (This quote is from an article covering a recent trial of some armed robbers, and it's worth reading: http://austinpoliceassociation.com/eighteen-years/)

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Taking down Dr. Death (cont'd)

They are taught to fear lawyers and malpractice lawsuits. So when doctors, lawyers, and patients came banging on the district attorney's door, insisting that what Dr. Duntsch was doing was criminal, we paid attention.

Our investigation started with six patients and eventually expanded to include every surgery the defendant ever conducted in Dallas and Collin Counties. He went through four hospitals in just under two years, operating on 38 patients. Thirty-three of those patients were injured. Some were minor, strange complications or misdiagnoses, but most were life-altering mutilations. Two patients died.

Clearly, something had to be done.

Time constraints

By the time our office started looking at the case seriously, we had two months before the statute of limitations ran on Mary Efurd's case. We had to move fast. Lead prosecutor Michelle Shughart worked with four of the plaintiffs' attorneys who had represented patients in the civil suits against Duntsch to learn about the cases as quickly as possible. Kay VanWey was the attorney for 10 of the injured patients and was the most helpful in getting our investigation underway. The initial meeting with her was a flood of information and made little sense to us at the time because there was so much to digest. She gave us access to her files so we could filter through them to find what we needed. Michelle spent days going through binders and boxes of information to learn about the patients' injuries and the multitude of medical professionals they had seen.

The next step was to understand how bad Duntsch's behavior was from a medical standpoint; we had to determine whether his actions could constitute criminal behavior. Was this just professional rivalry between doctors? Were plaintiffs' attorneys trying to use the criminal system to aid them in getting money? Or was it possible that a surgeon could indeed be held criminally responsible for things he did to a patient during surgery? There was no way to know without understanding the medicine, so we had to talk to the doctors. Drs. Robert Henderson, Martin Lazar, and Randall Kirby were our starting point. Dr. Henderson was one of the first to ring the alarms about Duntsch after he was brought in to fix multiple patients (the first being Mary Efurd). Dr. Lazar is a brilliant neurosurgeon who analyzed many of the defendant's patients as an expert for the plaintiffs' attorneys. He testified the defendant had "no conscience" and that it was "inconceivable" Duntsch didn't know what he was doing to the patients. Dr. Kirby was a colorful vascular surgeon who had operated with Duntsch once and made it his mission to stop him from operating again. They spent hours with us three wide-eyed prosecutors as we barely followed all the medical terminology. We began to piece together what happened to each patient, and a bigger picture formed. The defendant was a narcissistic—possibly sociopathic—person with a license to legally butcher people. He had no empathy for his patients and accepted no responsibility for the trail of destruction he had left behind.

It had all the trademarks of criminal behavior, but what, if any, criminal offense could he be charged with? We did a great deal of research and found that doctors are rarely prosecuted for bad outcomes on procedures for which they had consent to perform. The few cases we found dealt with actions by doctors that resulted in patient injuries or deaths where the doctor's intent to assault or kill the patient was clear. Although we had two deaths, we knew proving intent to kill in those two cases would be difficult with our facts, and although Duntsch's behavior clearly indicated a pattern, there was no course of conduct offense in the Penal Code (like continuous sexual abuse, engaging in organized crime, etc.) that applied in this situation. We believed we had enough evidence to prove recklessness, so we settled on the idea of charging him with aggravated assault in the most egregious cases that occurred in Dallas County. Then it occurred to us that Mary Efurd was over 65 years old at the time of her surgery—bingo! We could charge him with injury to an elderly individual. That charge accomplished two things: It offered

us multiple mental states, and it gave us a larger punishment range to work with (third-degree up to first-degree felony, depending on which mental state the jury found).

After two months, the statute of limitations was banging on our door. The investigation into all of Duntsch's patients was far from complete, but we had overwhelming evidence against him. We presented information on six patients to the elected District Attorney and other chiefs at the office. Any time we explained the case to a fellow lawyer, the reaction was always the same: Their initial skepticism quickly escalated into overwhelming disbelief that a surgeon could have done these things. By the time we got to Patient No. 3, Patient No. 4, and so on, a scary pattern had clearly emerged. The reaction from the office leadership after hearing our pitch was no different: Our elected DA gave the green light to proceed with prosecution.

We sealed the cases so Duntsch would not know they were coming. He lived in Colorado at the time but would come to Dallas once a month to visit his children. We could not risk scaring him off. We coordinated with the Dallas Police Department to arrest him as soon as a warrant was issued. Sixteen days after receiving approval from our DA, we indicted six cases, unsealed them, and arrested Duntsch in his hotel room. A detective interviewed him just after his arrest, and he insisted the patients were 90 percent better, even though years of civil lawsuits and inquiries by the Texas Medical Board indicated otherwise. The man was clearly as unconcerned and mistaken about his legal predicament as he was about his patients' injuries.

Discovery

The discovery in this case raised a number of questions. Our own office had done the investigation, so there were no police reports or witness statements to turn over. We sent over 800 subpoenas for medical records and information on the defendant. We obtained thousands of pages of medical records that pertained not only to our named complainants, but also to every patient the defendant had operated on, which raised a number of privacy concerns.

We were lucky that most of the civil cases had finished; otherwise, it would have been much more difficult to get the information we needed from hospital administrators and staff. The hospitals' cooperation was instrumental to understanding the administration structure and process of peer review (more on that later); there were also hundreds of nurses, scrub techs, and radiologists to find. We worked with hospital attorneys to narrow down the personnel we needed to talk to, and they in turn set up days where we would just go sit at the hospital and interview person after person.

We interviewed hundreds of witnesses. Without knowing the defensive theory in the case, it was hard to discern what information could be construed as *Brady* material. The offenses occurred prior to the Michael Morton Act, so it technically did not apply to the case. The prosecution team talked about these concerns repeatedly. Given the complexity and sheer volume of the information, we eventually decided the safest course was to turn over everything, including our work product from witness interviews.

Selecting the jury

Voir dire presented a few complications. First, we were concerned about how much our venire members might know about the case. It had received national attention when the defendant's medical license was revoked. Plus, *D Magazine* had published an in-depth article in November 2016 titled, "Dr. Death," detailing the acts for which we had indicted the defendant. Second, we estimated that the trial would take three to four weeks, so we were highly concerned about the number of jurors who would be disqualified because of the time commitment alone. Further, we needed 12 people who could convict a doctor, who were smart enough to follow the intense medical terminology, who could understand and apply the mental states, and who could consider the full range of punishment from probation to life confinement. We used detailed questionnaires to dive through many of these issues.

We had planned to voir dire a full panel every day after the questionnaires were completed to get as many jurors as we could each day. However, this strategy quickly changed after we were left with only 17 jurors on day one; we lost a majority of the panel on their questionnaire answers—it was to the point where it was not worth doing a voir dire. The parties agreed to wait until we had enough qualified jurors from the questionnaires alone, which took three days of bringing up

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panels of 75. By the end of day three, we had 62 possible jurors when we did the actual voir dire. The State spent over two hours with the panel discussing the injury to an elderly individual law and whether the panel could convict a doctor for a surgery gone wrong. In the end, the jury consisted of retirees, business people, and medical personnel. The panel was very State-oriented, possibly because so many bad jurors had been struck for cause already. We also had a very good understanding of our jury once the 14 were seated after the onerous selection process.

Trial strategy

We decided to proceed on the injury to an elderly indictment for two reasons. First, Mary's case was the best from a factual standpoint because several witnesses in her surgery told the defendant his placement of the spinal fusion hardware was wrong, and the fluoroscopy images taken during the surgery clearly and unequivocally showed it was incorrect. Second, if we could prove that the defendant acted intentionally or knowingly, a first-degree punishment range would be available to the jury at punishment. We could then present several of the injured patients during punishment to—we hoped—get the maximum sentence and spare them from having to testify at numerous trials.

We knew we needed to find a way to admit some of the defendant's earlier surgeries to show his knowledge at the time of Mary's surgery. After much research, we determined that this extraneous evidence should come in under Rule 404(b) and the Doctrine of Chances. Justin Johnson, an appellate prosecutor on the team, drafted a very persuasive motion, which we presented to the trial court at a pretrial hearing. Our argument was that the defendant's extraneous surgeries were admissible to show intent, knowledge, absence of mistake, and lack of accident. The Doctrine of Chances was a more exciting argument for us, though, because it would allow us to present extraneous surgeries that occurred after our indicted cases. The doctrine recognizes that a series of unusual events that are unlikely to repeat themselves should be admissible so the events are not viewed in a vacuum. We argued that the defendant's surgeries and their outcomes were so unusual and rare that it is highly unlikely they would have occurred as frequently and as closely together in time unless they were done deliberately. Ultimately, the trial court granted our motion under both theories, giving us leeway to present as many patients as we felt necessary to prove the mental state.

Preparing for trial was then a balancing act. How many of the 33 injured patients should we present to the jury? It had to be enough to convince the jury of the defendant's knowledge and/or intent, but not so many that the jurors would think we were wasting their time or that an appellate court would think we went too far. In addition, every case we presented had to be proven beyond a reasonable doubt, which entailed calling the patient to describe his condition before surgery and injuries after, at least one doctor to explain what the defendant had done wrong to cause the patient's injury, and any other medical staff that was present and saw something out of the ordinary. Ultimately, we decided the best course of action was to show the jury that the defendant *knew*, before setting foot into Mary's surgery, that he had already had catastrophic outcomes in six of his most recent patients. We decided to hold the later surgeries for punishment.

String of injured patients

To understand the case, you have to understand the timeline of surgeries. The defendant had 11 mediocre surgeries when he first came to Dallas in late 2011. Most of these had a complication or strange occurrence of some sort but were not serious enough to draw attention. Surgery No. 12, on patient Lee Passmore, was when things really started to go wrong. From Passmore forward, almost every patient the defendant operated on was badly maimed.

There were a few pieces of Lee Passmore's story that we wanted the jury to hear. He was the first patient where we could show that Duntsch absolutely knew he had done something wrong because Duntsch had to take Lee in for a second surgery within a week to attempt to correct the problem he had created. (The second surgery did not fix anything.) Dr. Robert Hoyle was the vascular surgeon in Mr. Passmore's first surgery with the defendant. He testified that Duntsch was doing outrageous things in the surgery—to the point that that Dr. Hoyle had to physically stop him so he would not continue injuring the patient. Dr. Hoyle told Duntsch that he was dangerous, that he was going to hurt somebody, and that Hoyle would never work with him again. Lee currently has a screw

poking into his spinal canal that cannot be removed because he might bleed to death. It causes him constant, excruciating pain.

Barry Morguloff was the defendant's next patient. Barry walked into the hospital, but he awoke after surgery unable to move his legs. Duntsch labeled Barry a "drug seeker" and refused to administer any medication while he was screaming in pain in the hospital. Barry, in fact, had been sober for years. Eventually, Barry saw another doctor, Dr. Michael Desaloms, who identified what was wrong: Bone fragments were compressing a nerve root and had caused permanent damage. Barry now walks with a cane, is in constant pain, and has a bunch of other medical issues that have developed because of the damage the defendant caused.

The very next patient was Jerry Summers. Jerry had been the defendant's best friend since childhood. He moved with Duntsch to Texas and was basically his errand boy. But Jerry had a more sinister side. Various sources told us that Jerry was Duntsch's drug dealer and that he also sold drugs to high-school students in Plano. The defendant operated on Jerry in February 2012, and Jerry awoke a quadriplegic. The defendant again did not take care of his patient. Instead of immediately taking Jerry back into surgery or sending him for imaging to identify the problem, Duntsch opted to do elective surgery on another patient he had scheduled. Twelve hours later, the defendant came back to Jerry and decided to take him back in for a corrective surgery, but it was too late. Nothing could be done. For days Jerry laid in intensive care, not knowing why he could not move his arms or legs or that his condition was permanent—because the defendant would not tell him so. On day four, Jerry outcried to a nurse that he and Duntsch had done 8-balls of cocaine the night before the surgery. That finally got the hospital's attention. The defendant was removed from the case, a peer review investigation was started, and the defendant took a forced break from operating.

A peer review is a confidential internal investigation conducted by senior physicians to determine the cause of patient injury. It is initiated when there is a serious, unexpected outcome in patient care. The peer review committee reviews the medical records, talks to personnel involved with patient care, and uses experts to analyze whether the physician's actions met the standard of care. These peers may recommend future discipline against the physician, such as suspension and training.

But just a month after the Jerry's surgery, the defendant was allowed to operate again. He was told to do only very simple surgeries until the peer review on Jerry's case was finished. His first surgery was on Kellie Martin, and she needed an easy voluntary laminectomy (also known as decompression surgery). During the operation, the defendant punched too far through the spinal anatomy and slashed a major blood vessel. It is a known, but extremely rare, complication of the surgery. All the signs of major internal blood loss were there, but Duntsch ignored them. He denied to everyone in the operating room that there was a problem, and the other medical staff had no way to know what had happened or how to fix it. On her way out of surgery, Kellie was cold and clammy with mottled skin. She arrived at the intensive care unit, where medical staff immediately began resuscitative efforts. They worked on Kellie for three hours, but there was no way to reverse what the defendant had done without his help, and he was denying anything had happened. At the age of 54, Kellie Martin died from the simplest procedure that a spine surgeon performs.

At this point, authorities at Baylor Scott & White Medical Center in Plano knew they had a problem surgeon. They told the defendant he would never operate there again and started another peer review investigation. But the hospital made a huge mistake it would quickly come to regret: Authorities there allowed the defendant to resign instead of kicking him out of the hospital. This minor technical difference meant that the defendant would not be reported to the National Databank, which is an online database hospitals commonly use to investigate doctors applying to work at their facilities.

A few months later, the defendant sweet-talked his way into Dallas Medical Center. Dallas Medical Center's search of the National Databank revealed no red flags, so authorities there gave the defendant temporary privileges right away. In his first week, he operated on Floella Brown, and he cut one of two major arteries supplying blood to the brain and then, in an attempt to stop the bleeding, put too much pressure on the vessel and occluded (blocked) it. It was Floella's dominant artery, so

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the occlusion prevented oxygen-rich blood from going to her brain. Again, as usual, the defendant did not tell anyone what had happened during the surgery so doctors could monitor Floella closely. Overnight she had a stroke, and Duntsch did not respond to hospital pages for a couple of hours. When he finally arrived at the hospital, he abandoned Floella. Instead of caring for his dying patient, he decided to start another elective surgery that he could have easily postponed. That other patient was Mary Efurd.

Hospital officials were exasperated while the defendant was in Mary's surgery. They asked the defendant multiple times to take care of Floella or transfer her. The defendant wanted to drill a hole in Floella's head to relieve pressure, but the hospital refused for two very good reasons. First, the defendant was not qualified nor did he have privileges to do any type of brain surgery. Second, the hospital did not have the equipment or personnel for brain surgeries. The only viable option was to transfer Floella immediately, but the defendant refused. For hours Floella waited in a coma, her brain deprived of oxygen, for the defendant to do something. By the time he finally acquiesced and transferred her, she was essentially brain-dead. At about this same time, Mary was waking up from her surgery unable to feel her legs. Dallas Medical Center immediately suspended the defendant's privileges and called in Dr. Robert Henderson. Dr. Henderson had pioneered modern spinal surgery, and the hospital called him to "salvage" Mary's back. When he operated on her, he found her condition so appalling that he recorded his revision surgery—he didn't think anyone would believe what the defendant had done. It was after this surgery that he called the University of Tennessee to see if the defendant was an imposter.

Presenting the patients

We presented the cases involving these six patients—Lee Passmore, Barry Morguloff, Jerry Summers, Kellie Martin, Floella Brown, and Mary Efurd—during the guilt-innocence phase of trial. These events clearly demonstrated that the defendant had five horrible outcomes in a row before he stepped into the operating room to perform surgery on Mary Efurd. By this time, he was aware his conduct was reasonably certain to cause her injury, and he should never have put his scalpel to her back. We also argued that his actions in the surgery alone were enough to convict. Every person in the operating room told him that the hardware was not in the bone, and he knew that putting the hardware in the wrong place would cause her injury, but he continued. All in all, we presented 39 witnesses over eight days. It took the jury four hours to find him guilty on the first-degree.

Unfortunately for the victims, this is not the end of the story. After the defendant left Dallas Medical Center, he went on to two more hospitals, injuring 15 more patients. During punishment, we presented 10 more patients and another 24 witnesses over the course of five days. The jury heard from patients who can no longer feel half their body, who cannot talk from vocal cord damage, who have no control over urinary function, who lost their skin and hair because their bodies were so stressed, who cannot use entire limbs, who have no control over hand movements, who had feeding tubes for months, and the list goes on—all injuries sustained at the defendant's hands.

We finished the case with the defendant's final surgery on Jeff Glidewell. During the surgery, the defendant biopsied a neck muscle, which he called a tumor, slashed the esophagus leaving an unfixable hole, hit the patient's vertebral artery causing massive blood loss, stuffed a sponge inside to stop the bleeding, and sewed the patient up with the sponge still inside his neck. The sponge caused an infection that almost killed Mr. Glidewell. The defendant then abandoned him and even refused to return to the hospital after other doctors asked him to (they had discovered the sponge insides Jeff's chest). Jeff lay in his hospital bed on his way toward death for days until other doctors stepped in to save him. Finally, after weeks of harassment and insistence by multiple doctors, the Texas Medical Board suspended the defendant's license.

"Stone cold killer" email

From one of the civil attorneys, we obtained an email from the defendant to his girlfriend/physical assistant a few days before Mr. Passmore's surgery. It was a stream of consciousness message obviously written while he was high on cocaine. Its most damning statement was when Duntsch claimed he was ready to "become a cold-blooded killer." He also wrote, "What I am being is what I am, one of kind, a mother fucker

stone cold killer that can buy or own or steal or ruin or build whatever he wants [sic]."

The only way to authenticate the email was to call the girlfriend, Kimberly Morgan, but she came with problems. She herself was being sued civilly for some of the outcomes of Duntsch's surgeries under the premise that she knew he was doing drugs but did not report him. When we first spoke with her, she was less than cooperative and the month the trial was set, she was deployed overseas with the Air Force. Ultimately, we were able to develop rapport with her, and she testified via Skype from the Middle East. She ended up being a fabulous witness for the State.

Enabling factors

Many factors enabled the defendant to continue operating even with devastating results. First, the University of Tennessee, as the original gatekeeper, allowed him to leave his fellowship and endorsed his abilities. His supervisors there were well aware that Duntsch had a drug problem. They had sent him to a program after there was a complaint he was under the influence of drugs while at work. After that, he was not allowed to operate again without direct supervision. But still, supervisors signed off on his qualifications. That could be because they had a financial interest in Duntsch's success: He owned a valuable patent, and they had started a company with him. But things went south quickly, and the defendant moved to Dallas.

The second major problem was how the hospitals handled Duntsch. Baylor Scott & White allowed the defendant to resign so he would not be reported to the database and the hospital would not be exposed to lawsuits. Dallas Medical Center gave the defendant temporary privileges without waiting for the peer review file from Baylor. That would have told them about the appalling outcomes in the Summers and Martin cases. Further, Dallas Medical Center did not report the defendant to the databank either. The next two hospitals, Legacy Surgery Center of Frisco and University General Hospital, both had warning that the defendant had massive issues, but they ignored the warnings. In each of these situations, the defendant also manipulated the system. He lied to hospitals about his history and had a lawyer with him every time he negotiated his way in and out of jobs.

Third, the Texas Medical Board (TMB) failed. Early in our investigation, we approached the TMB for assistance in understanding what went wrong. We knew some investigation had been done because the board had suspended Duntsch's medical license. But when we contacted the person who actually performed the investigation, she was elusive. We were able to get basic records though a subpoena, but information was clearly missing. It became obvious that the TMB was not going to help us. After sifting through the records we understood why they wanted to stay as far away from the case as possible: It did not look good for TMB either. The medical board had complaints 10 months before the defendant's last surgery. In the meantime, 20 more patients were injured, and at least seven doctors complained to the medical board about the urgency to stop Duntsch, to no avail.

Finality

In the end, we argued that the defendant had sentenced each patient to a life of pain (or death). Many of his patients need walkers, wheelchairs, and canes. Their pain is constant and takes many forms: burning, stabbing, searing, and throbbing. Some had multiple surgeries in an attempt to fix the damage he caused. His patients collectively lost over 23 liters of blood—the equivalent of more than 11 two-liter Coke bottles—when their surgeries should have resulted in minimal blood loss (around two liters for all patients combined). Many still need more surgery to fix his damage, but they are afraid of doctors now. The defendant did everything wrong a spine surgeon could do, and we argued that he deserved the same lifelong sentence as he gave to his patients. Jurors took only an hour to agree: They gave him life in prison.

The trial was a cathartic process for many of the patients. Those who filed civil suits never testified, and some did not even have to file a lawsuit to get a settlement, so they never got to tell their story until the criminal case. Even the patients who had been reluctant to testify were glad they did in the end. Once they testified, they were able to listen to others tell their stories too. They began to bond, brought together by the dreadful circumstances. That was one of the most rewarding and unexpected results of the trial.

The jurors ended up being a fantastic venire. They listened closely throughout the trial and took diligent notes. They clearly comprehended the medicine, evidenced by nodding their heads with under-

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standing when they heard a medical explanation more than once on similar topics. Four of them cried as some of our victims testified. When we spoke to them after the trial, they were interested in the patients they had not heard about and many of the topics that we had decided not to cover in trial. A week after the trial was done, one of the jurors sent us personalized letters to forward to each injured patient.

Every other possible check in the system had failed, but our 12 jurors finally got it right. By sentencing the defendant to life, they ensured that he can never hurt another patient again. ❇

Contempt of court

Though contempt is certainly not as common as Hollywood makes it out to be, prosecutors should not be caught unaware of its ramifications.

Six years ago, I was a fresh-faced, baby prosecutor about to try his first case to a jury. It was a Class A resisting arrest case. I wasn't sure how it was going to turn out, but I knew that nobody could call me unprepared. To this day, I remember putting my trial notebook together. I had tried to anticipate different arguments to the admissibility of my evidence, and I prepared to counter them by having a case or two on point for almost everything. One of the last things I put in my trial notebook was a copy of Texas Government Code §21.002(d).

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

I included that statute because it made clear that an officer of the court (even a baby prosecutor like me) was entitled to a PR bond if held in contempt of court.[1] Why did I think this statute ranked as important enough to be included in my trial notebook? I'd seen the movies, of course. If I found myself in the company of Joe Pesci from *My Cousin Vinny*, I was going to be prepared.

I didn't need a handy copy of that statute in my trial notebook that day, nor have I ever needed it since. Turns out, real-life lawyering doesn't have quite as many contempt of court findings as Hollywood would lead us to believe. In fact, contempt comes up so rarely that it would be easy to simply forget about it. However, as most any prosecutor will tell you, as soon as you say something will never happen, it does.

What is contempt?

The Texas Supreme Court defines contempt as "disobedience to or disrespect of a court by acting in opposition to its authority."[2] Conduct that tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during a litigation, or otherwise tends to impede, embarrass, or obstruct the court in discharge of its duties will be considered contempt.[3] More specifically, contempt can be broken into two specific acts:

1) an act that is disrespectful to the court, and

2) an act that obstructs or tends to obstruct the proper administration of justice.[4]

Everyone reading this article has at least heard of a judge who got a little too big for his britches and ordered something outside the scope of his power. Because contempt issues arise so rarely, it's easy to imagine a judge being unclear on the

boundaries of his power in this area. The Texas Supreme Court has held that the ability to hold someone in contempt of court is a broad and "inherent power of the court,"[5] and we can be thankful that the Court encourages lower courts to exercise their contempt power with discretion. The Court of Criminal Appeals has referred to contempt as "strong medicine" that should be used as a last resort only.[6]

The only statutory mention of contempt in Texas comes from §21.002 of the Government Code, which states only that a court "may punish for contempt." Because the level of development for the statutory framework for contempt in Texas falls somewhere between sparse and nonexistent, we must look to common law for guidance.

Direct vs. constructive

Common law tells us that contempt may be "direct" or "constructive" (or indirect).

Direct contempt occurs in the presence of a court.[7] Here, the court must have direct knowledge of the behavior that constitutes contempt.[8] A good example of direct contempt would be failing to rise upon the judge's entrance into the courtroom.[9] Any act that is disrespectful to the court or impedes its ability to conduct its business and occurs entirely in the court's presence could be considered direct contempt.

Conversely, constructive (also called indirect) contempt occurs outside the court's presence.[10] Constructive contempt generally arises from violation of a court order, but there are situations where a party or an attorney could engage in behavior that would warrant a judgment of constructive contempt.[11] Acts of constructive contempt must "impede, embarrass, or obstruct the court in the discharge of its duties."[12] For example, in *Ex parte Privitt*, a criminal defendant was found in contempt for attempting to bribe prospective jurors outside the presence of the court.[13] In *Ex parte Murphy*, the Court of Criminal appeals affirmed a judgment holding an attorney in constructive contempt for failing to attend a hearing and a trial.[14] Constructive contemnors are entitled to more procedural safeguards than direct contemnors.[15]

Criminal vs. civil

Contempt may be criminal or civil in nature. The distinction between the two does not turn on whether the underlying litigation is civil or criminal; rather, the nature of the court's punishment dictates the nature of the contempt proceeding. To determine whether contempt is civil or criminal, we must determine the purpose of the contempt order.[16]

Contempt is civil when the purpose is "remedial and coercive in nature."[17] A civil contemnor "carries the keys to the jail cell in his or her pocket" because his confinement is conditioned on obedience with the court's order.[18] Once the civil contemnor has complied with the court's order, the period of confinement should end. Under no circumstances should the period of confinement exceed the punishment range for criminal contempt outlined in Texas Government Code §21.002(a) or (b).

Criminal contempt, on the other hand, is punitive. Criminal contemnors are punished for an act that "affronted the dignity and authority of the court."[19] The primary purpose of a criminal contempt proceeding is to vindicate the public authority.[20] With criminal contempt, the punishment is "fixed and definite, and no subsequent voluntary compliance on the part of the defendant can enable him to avoid punishment for his past acts."[21] The punishment range for criminal contempt is a fine up to $500 or a jail term of up to six months, or both such a fine and jail term.[22] Criminal contempt is considered a crime and can bar criminal prosecution for the same conduct.[23] So, for example, if someone is held in contempt for lying in a deposition, that individual could not also be prosecuted for perjury.[24] Unless the contemnor is an officer of the court (attorney, bailiff, clerk, court reporter, etc.), he is not entitled to a bond.[25]

In TDCAA's original guide to contempt of court (available online at www.tdcaa.com/node/2492), Andrea Westerfeld, an assistant criminal district attorney in Collin County, pointed out that it is possible for a contempt order to contain both civil and criminal elements. A judge may jail a lawyer for three days for failing to comply with a discovery order and further order him to remain in jail until he complies. The first part of the sentence is unconditional (three days in jail for failing to comply with the court order) and therefore criminal in nature, while the second portion (staying in jail until discovery is provided) is designed to coerce the lawyer into complying with the court order and is thus civil in nature.

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Varying due process requirements

The due process considerations for direct and constructive contempt are very different. In a direct contempt proceeding, the trial court may conduct a summary proceeding in which the alleged contemnor is not entitled to notice or a hearing.[26] A contemnor who commits direct contempt is generally found to be in contempt of court immediately after committing the offending conduct and accordingly punished.

That stands in pretty stark contrast to the due process requirements for constructive contempt. For those, the Court of Criminal Appeals has said that due process is satisfied when the contemnor is given notice, a hearing, and the opportunity to obtain an attorney.[27] Due process requires "full and complete notification" of the charges alleged with a reasonable opportunity to meet the charges by defense or explanation."[28] A contempt order rendered without such adequate notification is void.[29] Please note that you cannot accomplish full and complete notification by merely following the standard rules regarding service. Actual, personal knowledge of the contempt hearing must exist, or due process is denied.[30] Do not assume that full and complete notification has occurred simply because a copy of the show-cause order was faxed to an attorney or because a citation was printed in the local paper.[31]

Constructive contemnors' right to due process extends through the contempt hearing itself. Contempt proceedings in Texas are quasi-criminal, so they should conform as nearly as practicable to those in criminal cases.[32] Because contempt proceedings are triggered by actions that defy the State's authority and entail possible penal sanctions, Texas courts have consistently held that alleged constructive contemnors are entitled to procedural due process protections before they may be held in contempt.[33] This means that contemnors have the right to be represented by an attorney and have the privilege against self-incrimination.[34]

The U.S. Constitution's Sixth Amendment right to a jury trial comes into play for contempt proceedings only when the punishment is "serious,"[35] such as more than 180 days in jail; such a punishment may not be assessed unless there was a jury trial or a jury waiver.[36] Section 21.002(b) of the Texas Government Code provides that punishment for a single act of contempt is a fine of not more than $500, confinement in the county jail for not more than six months, or both.[37] Punishment within these limits is characterized as "petty."[38] A series of smaller punishments, which would ordinarily be petty, could be combined to amount to serious punishment.[39]

In cases of both direct and constructive contempt, a written order is required to commit the contemnor to jail confinement.[40] Merely making a written notation on the docket sheet in addition to an oral order will not be considered a written order.[41] The trial court's failure to enter a written order of commitment will result in the contemnor being discharged from custody.[42]

Evidence required to prove contempt

Because direct contempt occurs in the court's presence and because a summary hearing satisfies due process concerns, proving direct contempt is a non-issue. Constructive contempt, on the other hand, requires evidence that some sort of disobedience or disrespect of the court has occurred.

As stated before, an actual order is not always necessary. The contemnor in *Ex parte Privitt* was held in contempt for trying to bribe jurors outside the court's presence. Obviously, a court is unlikely to have a standing order that prohibits the parties from bribing jurors. For cases like *Privitt*, the State would prove the act of contempt much like any ordinary criminal case: by calling witnesses to testify and offering exhibits. Because disrespect and disobedience of the court can occur in an incredible number of ways, there is no one-size-fits-all approach to proving them.

A criminal contempt conviction for disobedience to a court order requires proof beyond a reasonable doubt of:

1) a reasonably specific order;
2) a violation of the order; and
3) the willful intent to violate the order.[43]

For purposes of constructive contempt, the Texas Supreme Court has ruled that an oral order cannot support a finding of contempt because the State "cannot be allowed to operate under a system whereby its citizens may be punished for contempt for violation of an order, the exact terms of which exist solely in the memory of the trial judge and the movants for contempt."[44]

Writ process

Courts of appeals lack jurisdiction to review contempt orders on direct

appeal.[45] A party pursuing review of a contempt order involving confinement may file a writ of habeas corpus; a party seeking review of a contempt order that does not involve confinement may file a writ of mandamus.[46]

An original habeas corpus proceeding is a collateral attack on a contempt order.[47] As such, the proceeding's sole purpose is to determine whether the contemnor was afforded due process or if the order of contempt is void.[48] A court will issue a writ of habeas corpus if the order underlying the contempt is void[49] or if the contempt order itself is void.[50] A contempt order is void if it is beyond the court's power to enter it or if it deprives the relator of liberty without due process.[51] Mandamus issues only when the mandamus record establishes both a clear abuse of discretion or the violation of a duty imposed by law and the absence of a clear and adequate remedy at law.[52]

Conclusion

Contempt is incredibly rare, and any prosecutor could be forgiven for viewing it as the kind of thing not to worry about. However, as many seasoned prosecutors will tell you, as soon you forget about something, a situation will arise that will make you wish you hadn't. Do yourself a favor and maintain a working knowledge of contempt. You won't want to rely on a hazy recollection of *My Cousin Vinny* when something that "never happens" happens to you. ❇

Endnotes

1 Tex. Gov't. Code §21.002(d).

2 *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding).

3 *Ex parte Norton*, 144 Tex. 445, 191 S.W.2d 713, 714 (Tex. 1946).

4 *Ex parte Krupps*, 712 S.W.2d 144, 149 (Tex. Crim. App. 1986).

5 *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976) (orig. proceeding).

6 *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex. Crim. App. 1988) (quoting *Willson v. Johnston*, 404 S.W.2d 870, 873 (Tex. Civ. App.—Amarillo 1966, orig. proceeding)).

7 *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding).

8 *In re Reece*, 341 S.W.3d 360, 365 (Tex. 2011) (citing *In re Bell*, 894 S.W.2d 119, 127 (Tex. Spec. Ct. rev. 1995)).

9 *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986); *In re Chase*, 468 F.2d 128, 132 (7th Cir. 1972).

10 *Gordon* at 688.

11 *Reece* at 365-66.

12 *Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

13 *Ex parte Privitt*, 77 S.W.2d 663, 664 (Tex. Crim. App. 1934).

14 *Ex parte Murphy*, 669 S.W.2d 320, 321 (Tex. Crim. App. 1983).

15 *Ex parte Werblud*, 536 S.W.2d 542, 546 (Tex. 1976) (orig. proceeding).

16 *Reece* at 365.

17 *Werblud* at 545.

18 *Reece* at 365 (citing *Werblud*, 536 S.W.2d at 545).

19 *Werblud* at 545.

20 *Werblud* at 545-46 (quoting *Ex parte Hosken*, 480 S.W.2d 18 (Tex. Civ. App.—Beaumont 1972)).

21 *Id.* at 546.

22 Tex. Gov't Code §21.002(a). For municipal courts, the range is a fine of not more than $100, confinement in a county or city jail for not more than three days, or both. Tex. Gov't Code §21.002(b).

23 *United States v. Dixon*, 509 U.S. 688, 696 (1993).

24 *Ex parte Busby*, 921 S.W.2d 389, 393 (Tex. App.—Austin 1996, pet. ref'd).

25 Officers of the court are entitled to a personal recognizance bond under Tex. Gov't Code, §21.002(d).

26 *In re Bell*, 894 S.W.2d 119, 127-28 (Tex. Spec. Ct. rev. 1995).

27 *Ex parte Krupps*, 712 S.W.2d 144, 147 (Tex. Crim. App. 1986).

28 *In re Houston*, 92 S.W.3d 870, 876 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding) quoting *Gordon* at 688.

29 *Ex parte Adell*, 769 S.W.2d 521, 522 (Tex. 1989).

30 *Ex parte Herring*, 438 S.W.2d 801 (Tex. 1969).

31 See *Ex parte Moore*, 567 S.W.2d 523 (Tex. App.—Texarkana 1978, no pet.) (holding that posting a notice of the show cause hearing on contemnor's front door was insufficient for due process purposes when contemnor received no personal notice); see also *Ex parte Lackey*, 522 S.W.2d 735 (Tex. App.—Dallas 1975, no pet.) (holding that when attorney for contemnor received notice two hours before the hearing but the contemnor received no personal notice of the hearing, due process was denied).

32 *Deramus v. Thornton*, 333 S.W.2d 824, 829 (Tex. 1960); *Ex parte Scott*, 123 S.W.2d 306, 311 (Tex. 1939).

33 *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983).

34 *Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976).

35 *Id.*; see also *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975) (holding that contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial and examining the boundaries between serious and petty offenses).

36 *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991) (orig. proceeding).

37 Tex. Gov't Code §21.002(b).

38 *In re Newby*, 370 S.W.3d 463, 466 (Tex. App.—Fort Worth 2012, no pet.).

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39 See *Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) (holding that a contemnor ordered to jail for 30 days and fined $104,000 for 208 separate violations was entitled to a jury trial as the large penalties made it a "serious offense").

40 *Ex parte Calvillo Amaya*, 748 S.W.2d 224 (Tex. 1988) (orig. proceeding); *Ex parte Supercinski*, 561 S.W.2d 482, 483 (Tex. Crim. App. 1977) (orig. proceeding).

41 *In re Griffith*, 434 S.W.3d 643, 646, (Tex. App.—Houston [1st Dist.] 2014, no pet.).

42 See *In re Griffith*, 434 S.W.3d 643, 646, (Tex. App.—Houston [1st Dist.] 2014).

43 *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

44 *Ex parte Wilkins*, 665 S.W.2d 760 (Tex. 1984).

45 *Tracy v. Tracy*, 219 S.W.3d 527, 530 (Tex. App.—Dallas 2007, no pet.

46 *Id.*

47 *Ex parte Rohleder*, 424 S.W.2d 891, 892 (Tex. 1967) (orig. proceeding).

48 *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979) (orig. proceeding); *In re Levingston*, 996 S.W.2d 936, 937 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding).

49 See *Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983) (orig. proceeding).

50 *Gordon*, 584 S.W.2d at 688.

51 *Ex parte Friedman*, 808 S.W.2d 166, 168 (Tex. App.—El Paso 1991) (orig. proceeding).

52 *Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994).

Juvenile certifications

A walk through the waiver of jurisdiction and discretionary transfer of juveniles to adult criminal court

"Juvenile commits capital murder!"

"Son in high school kills father!"

"Teen charged with murder in shooting death of couple!"

Headlines like these appear more and more frequently these days, it seems. But when faced with handling a minor committing a heinous act, how is a prosecutor to proceed? The crime demands justice—but what is justice when the offender isn't even 17 years old? How do we decide when it's appropriate to treat juvenile criminals as adults?

By Sarah Bruchmiller
Assistant District Attorney in Williamson County, and
Hans Nielsen
Assistant District Attorney in Harris County

While the purpose of the juvenile system is to rehabilitate, some criminal cases are too egregious to remain in the juvenile system. It is only for these extreme cases—and when other rehabilitative efforts have been tried and failed—that the State should seek to certify a juvenile to be tried as an adult. The enormity of such a decision is not something that prosecutors should take lightly.

Who qualifies for certification?

When considering certification of a juvenile offender to an adult criminal district court, first determine whether the juvenile and his criminal offense qualify for certification under the statute. Section 54.02 of the Texas Family Code sets forth the minimum requirements to seek a waiver of jurisdiction and discretionary transfer to adult criminal court. The youngest age at which the State may seek to certify a juvenile is 14; however, the only offenses that a 14-year-old can be certified for are capital murder; first-degree felonies; and any aggravated, controlled-substance felonies, which are defined as controlled-substance offenses that have a minimum sentence or fine greater than that for a first-degree felony.[1] For example, the first-degree felony of possession of a controlled substance (more than 400 grams of cocaine) fits this definition because the minimum sentence for that offense is 10 years in prison, while the standard punishment for a first-degree felony begins at five years. Once a juvenile reaches age 15, any felony offense is eligible for certification. The age of the juvenile at the time he committed the offense, not his age at the time of the hearing, determines whether he can be certified.

Before the hearing

The process of seeking to certify a juvenile begins in juvenile court with the State filing a petition that specifically states that the purpose of the hearing is for the court to waive its jurisdiction over the juvenile. In addition, a juvenile must be personally served with a copy of the certification petition and the summons.[2] If a juvenile is certified to stand trial as an adult and he was not personally served, or the certification petition does not state that it is requesting that the court waive its jurisdiction, then the case will be reversed. During the certification hearing, we always introduce into evidence a certified copy of the proof of personal service of the certification petition and summons by the law enforcement agency that served the juvenile. A parent or guardian must also be served, but if he or she appears at the hearing, then service is considered to have been waived. Also, a parent or guardian must be present at a certification hearing, and if one does not appear, then a court must appoint a guardian for the juvenile. It is important that a prosecutor state on the record the names of any parents or guardians who are at the hearing so that the appellate record is clear that the juvenile had someone present.

Prior to the certification hearing, the court must order a full diagnostic study, including a social evaluation and investigation of the child and the circumstances of the offense.[3] A juvenile may refuse to cooperate in making the report, in which case the report will be completed without his input.[4] In this situation, a prosecutor should state on the record that the State is not requesting that the court waive completion of the diagnostic study, social evaluation, and investigation of the child; instead, the report should be considered complete without the juvenile's cooperation. This report, as well as any other written documents either party wishes to introduce, must be made available to both sides at least five days before the hearing.[5] While this report is required for all discretionary hearings, it is not required for a mandatory transfer hearing.[6]

Hearsay is admissible

While the rules of evidence apply in juvenile proceedings, the courts have ruled that hearsay evidence is admissible in a certification hearing. Both of us spent most of our careers in adult courts where the rules excluding hearsay were strictly enforced by judges. When we were assigned to juvenile court, it was a paradigm shift to practice in a court where it was permissible and even expected of us to elicit hearsay from witnesses and from documents.

Hans remembers that when he first arrived in juvenile court several years ago, he was skeptical of a colleague who said that he could use just one officer to prove up the probable cause for a certification hearing involving an aggravated robbery. He had a hard time believing that this was the law and was flabbergasted when he learned that she was correct.

Sarah handled a certification hearing on a juvenile charged with murder in which the lead investigator hesitated before answering any question that called for hearsay. Sarah would ask the question, and he would pause and look at the defense attorney—as though bracing for an objection—before answering. Sarah didn't blame him—it is very unusual for an officer to be able to testify about what each witness told him during the investigation, and it's even more unusual for one officer to testify about witness statements in the police report that were given to other officers!

Appellate courts have ruled that a court's finding of probable cause in a juvenile hearing is the equivalent of a similar finding by a criminal district court or a grand jury, where hearsay is admissible. A judge can discern the credibility of any hearsay testimony and weigh it properly to make a finding as to whether the State has provided sufficient proof of probable cause. It is also our belief that the legislature permitted the admissibility of hearsay evidence to provide the judge with a complete picture of the juvenile and his offense without conducting a full-blown trial. In fact, the Family Code section dealing with these hearings specifically states that a court may consider written reports from different sources to make a decision.[7] The fact that the law allows hearsay during these hearings further highlights the fact that transferring a child to an adult court is a very serious proposition, and the law recognizes that the judge should be permitted to learn and evaluate every bit of information regarding the criminal incident, juvenile, and juvenile's history.

Admitting evidence at the hearing

All certification hearings must be heard by the presiding juvenile court judge and cannot be heard by an

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associate judge or magistrate. A juvenile does not have the right to a jury for this hearing.[8] The burden of proof is on the State, and the standard of proof in the hearing is a preponderance of the evidence. In some instances, a prosecutor may be handling an incident committed by several co-defendants (called co-actors in juvenile law). If the prosecutor is seeking certification on more than one co-actor, a court may hold the hearing for all of the juveniles at one time. If one of the juvenile's attorneys files a motion to sever, the decision to sever is at the court's discretion. Unless the juvenile can show some prejudice against him based on having his hearing with his co-actors, a denial of severance will be upheld on any appeal.[9]

Before a juvenile court may waive its jurisdiction, the court must make a finding that there is probable cause to believe that the child committed the alleged offense and that "because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires" criminal proceedings in adult court.[10] While this hearing is not a court trial, prosecutors certainly do not want to fall short on establishing probable cause. Even if a juvenile court finds probable cause but the evidence does not support this finding, the court's waiver of jurisdiction will not survive an appeal.

In addition to establishing probable cause, the Texas Legislature gave juvenile courts specific instruction to consider at least four factors when deciding whether to waive exclusive jurisdiction over a juvenile.[11] The factors are:

1) whether the offense was against person or property,
2) the child's sophistication and maturity,
3) the child's record and previous history, and
4) the protection of the public and the child's likelihood of rehabilitation within the juvenile system.

Seeking out evidence to support the §54.02 factors is similar to the research a prosecutor in adult court conducts to strengthen his punishment case at trial. The more evidence presented to the juvenile court on the four factors, the more likely the State will succeed in convincing the court to waive its jurisdiction and transfer to the adult system.

While hearsay is admissible and one officer may testify as to the entire investigation, the State may want to call additional officers and witnesses to highlight certain facts of the crime. Just keep in mind that with each witness who testifies at the hearing, a transcript of the testimony is created; that transcript could be used to impeach the witness in a future trial in adult court. Don't let this concern prevent prosecutors from calling all necessary witnesses to establish probable cause, or from providing evidence to support a finding of the four factors listed above.

We make it a practice to offer the diagnostic study, social evaluation, and investigation of the juvenile, which form the foundation of the evidence. Build upon these resources with additional evidence, such as testimony from the evaluating psychologist or psychiatrist, along with anyone else who contributed to the report, to assist the court in understanding the report. There may be instances in which the evaluator needs to explain how he came to his conclusions.

We also introduce:

- crime scene photos and videos,
- surveillance videos if the offense was caught on film,
- statements (confessions) from the juvenile or his co-actor,
- victim impact testimony from a complainant or a decedent's family,
- any judgments for the juvenile's adjudications in the juvenile system,
- testimony from any victims in the juvenile's past criminal cases, and
- any unadjudicated extraneous offenses if they can contribute to a favorable finding for one of the four factors.

Depending on the child's background, we might also call a gang expert to testify if the juvenile is a member of a criminal street gang. Such an expert can discuss the gang's criminal activity and possibly the role this juvenile played in the gang. This testimony could also contribute to a finding that the juvenile has an above-average level of criminal sophistication. For example, Sarah handled a case in which the juvenile was a gang leader, a decision-maker within the gang, and a recruiter of other juveniles. This information illustrated for the judge the juvenile's level of sophistication.

The juvenile's school records may also provide useful evidence of his sophistication and maturity level. Prior teachers or school administrators who taught or knew the juvenile can testify as to the child's intelligence, sophistication, and maturity. For example, a principal who describes the juvenile as someone

who makes his own decisions and doesn't follow another's instructions demonstrates that the child has a higher level of sophistication and maturity than the average juvenile of the same age. This testimony may seem repetitive, but it gives the judge a consistent description of the juvenile to consider.

We also try to include any testimony from the juvenile's prior probation officers to highlight rehabilitative programs in the juvenile system that the child has already been afforded. This could establish whether the juvenile was actually committed to his own rehabilitation. Any testimony stating that there are no additional rehabilitative services available for him in the juvenile system should be presented. If all available juvenile programs have been exhausted, it is less likely that remaining in the juvenile system would be beneficial. If the juvenile is close to 18 years of age—the maximum age of supervision by a juvenile court on an indeterminate petition—then introduce testimony that there is insufficient time left for juvenile programs and services to rehabilitate him. Furthermore, even if prosecutors are faced with a juvenile who successfully completed juvenile rehabilitation programs or probation, under the appropriate circumstances, prosecutors could make an argument that the juvenile failed to utilize what he had learned and that further rehabilitation attempts would be futile.

If the juvenile was placed in detention prior to the hearing, prosecutors should always review those detention records for any violation reports. If the juvenile was breaking the rules while in detention, present evidence of the violations along with detention records and testimony from detention officers. Sarah once had a certification hearing on an individual charged with three cases of aggravated robbery. While he was awaiting his certification hearing (and he presumably should have been on his best behavior), he attacked another inmate in the detention center. The assault was captured on surveillance video, and Sarah played it during his hearing. It was clear that he was acting on his own direction—he even waited until the officer was distracted before attacking the unsuspecting inmate. The incident supported an argument that this particular juvenile operated at a level of maturity and criminal sophistication to be able to evaluate when and whom to attack.

Hans once had a hearing in which the juvenile, whom he was seeking to certify for an aggravated robbery, was held in the detention facility. While the juvenile was there, he and two other juveniles escaped from the facility after overpowering a guard. A few weeks before their escape, he had been caught jamming one of the security door locks with a piece of plastic, which Hans argued was part of their efforts to discern potential flaws with the facility's security to gain their escape.

If the juvenile was released from detention under pre-trial supervision, look for evidence of any negative behaviors or violations of the rules of his release. Testimony from his supervision officer or any other witness who viewed the negative actions could be beneficial in the pursuit of certification.

The *Moon* case

For many years, the Court of Criminal Appeals (CCA) had not issued any significant opinions on juvenile certifications. That changed with the landmark Cameron Moon decision.[12] This significant case served not only as a basis for the reversal of several prior certifications, but it also provided guidance to courts and prosecutors on what is required in certification hearings and the resulting court orders.

In this Harris County case, a juvenile was charged with murder, certified in juvenile court, and convicted in adult court. After his conviction, he appealed the juvenile certification, and the case was sent back to juvenile court. Ultimately, he was re-certified, and this opinion became a must-read for all prosecutors seeking to certify a juvenile. The Court of Criminal Appeals directed juvenile courts to detail their findings and demonstrate their reasoning in their written certification orders and held that the record must be developed with sufficient facts and evidence to justify the court's findings and decision. This means that any prosecutor who conducts a certification hearing must make sure to provide sufficient evidence to support the court's findings in the written transfer order. The CCA made it clear in *Moon* that not every one of the four factors of §54.02 must be proven to support transfer to adult court—the State must persuade a juvenile court, with a preponderance of the evidence, that the welfare of the community requires transfer because of the seriousness of the offense, the background of the child, or both.

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However, the *Moon* decision also specifies that a juvenile court cannot just certify a juvenile based solely on the category of offense—and there must be more than just probable cause for that offense. Therefore, if a prosecutor is relying primarily on the first factor for transfer, that the offense was a crime against a person, *Moon* instructs prosecutors to provide as much testimony and evidence as possible for two reasons: one, to show how egregious the offense was and how dangerous the juvenile's behavior and actions were, and two, to ensure that the court's order details specific evidence of those facts and the reasoning that the court used to support its finding.

Another note about the *Moon* case: The defendant had to wait until he was sentenced in adult court before he could appeal his juvenile certification. The legislature changed this process effective September 1, 2015, by allowing the use of an interlocutory appeal.[13] Once the court grants the waiver of jurisdiction and signs the order certifying the juvenile, the case transfers to adult court, and the juvenile may appeal the certification decision immediately with an interlocutory appeal.

Before a juvenile and the alleged criminal incident officially transfer to adult court, the juvenile court must execute a written order with specific findings presented in the certification hearing. For many years in Harris County, we used a boilerplate fill-in-the-blank order that merely recited the language in §54.02. Created by the district attorney's office, the order was presented to the judge to sign immediately following the certification hearing. The *Moon* case ended that practice. Now a judge must show her work and detail the reasons and evidence she considered in waiving jurisdiction. The CCA noted in *Moon* that it is not the appellate court's job to "rummage" through the record to find facts that the juvenile court should have included in its written transfer order.[14]

The job of drafting the written transfer order is usually borne by a prosecutor. In those jurisdictions in which the judge writes her own order, this extra duty doesn't exist. However, it is incumbent upon all prosecutors to ensure that the order survives appellate scrutiny. Therefore, if the prosecutor drafts the order, the best practice is to draft an order and findings that the court can either adopt, modify, or use in some manner when drafting her own order. In Harris County, we now draft orders and findings that take the evidence presented at the hearing and apply them to the specific statutory factors of §54.02. If no evidence exists for one or more of the four factors, the order should state that the evidence supporting the other factors outweighs the absence of any evidence for that one factor. This is often the case where a juvenile is a first offender but has committed a particularly horrific offense or has committed multiple aggravated offenses.

Thus far, the findings and orders that have been appealed in Harris County post-*Moon* have survived appellate scrutiny. Sarah had a certification hearing on a juvenile whose first offense in the system was murder—before that, he had never had so much as a traffic ticket. However, his role in the murder was especially heinous. He confessed to killing another gang member with a machete and then left the body in a remote wooded area. The scene was incredibly gruesome and the photos even worse. Evidence was presented of the act itself, including crime scene photos, an autopsy report, and the juvenile's statement. A gang expert testified in great detail on the structure of the juvenile's gang and its rituals, rules, and expectations, as well as the danger the gang presented to the community. The expert was able to illuminate the dark role this juvenile played not only in the alleged offense, but also in that specific criminal street gang.

Once jurisdiction is waived

When a juvenile court waives its jurisdiction, it does so over a particular criminal incident that the juvenile is alleged to have committed, not over a particular statutory offense. This means that as long as the juvenile court waives its jurisdiction over a particular set of facts, the adult-court prosecutor is free to charge the juvenile with any specific offense that fits that criminal episode. For example, if a minor was charged in juvenile court with committing a capital murder involving a robbery, once that juvenile is certified, the adult-court prosecutor may proceed on a capital murder, murder, or even an aggravated robbery indictment—any offense that fits the crime.

Once a juvenile has been certified in one case, the law states that any subsequent felony offenses committed while the offender is still under age 17 shall be transferred as

well.[15] The mandatory transfer statute in the Family Code dispenses with the requirement of another diagnostic study, social evaluation, and investigation, but it does require that the juvenile court conduct an additional certification hearing.[16] It is not proper to simply file the new offense directly into the adult system without having this hearing. Of course, the adult-court prosecutor also may present the offense as an extraneous offense in the adult court trial rather than the juvenile prosecutor seeking certification of a new offense. This decision should be discussed with the prosecutor handling the certified case in adult court.

If a new transfer petition is filed in a juvenile court, the best practice is to say in the petition that the State is relying upon the mandatory transfer statute so that the juvenile and his attorney have notice of it.[17] At the hearing, the State should introduce evidence of the prior transfer order, evidence that the adult case has been indicted or that it resulted in a final conviction (for example, a copy of the pending indictment and proof of a pending future court setting or a judgment and sentence), and evidence of probable cause for the new offense. If the original (transferred) offense is not indicted or dismissed with prejudice, or the conviction was reversed and is final, then the State cannot rely upon the mandatory transfer statute.[18] In the unusual situation where the originally transferred case was reversed on appeal and the reversal is final, then presumably any conviction for the mandatory transfer case would be void. (We say "presumably" because it would be a very uncommon situation; we are not sure it's ever happened.)

"Over-18" certifications

In addition to the process of transferring a juvenile to adult court, there is also a mechanism for holding an adult responsible for actions he committed when he was a juvenile. The State may seek to certify the criminal incident that occurred in the past even if the offender is currently age 18 or older. The Family Code sets forth the procedure for "over-18" transfer petitions, as they're called, and a prosecutor must be aware of several hurdles that exist before the transfer can succeed.[19] For all offenses other than capital murder or murder, the law governing the age at the time of the offense controls.[20] For example, an 18-year-old who committed a first-degree felony (such as aggravated sexual assault) at age 13 cannot be certified, but if he committed the offense at age 14, he would be eligible for certification. Capital murder and murder are treated differently in the Family Code from any other offenses.[21] Transfer for these two offenses carries a minimum age of 10, which is the youngest age at which the State may prosecute any crime.

During an over-18 hearing, the prosecutor must prove that no adjudication has occurred for the criminal incident that he is seeking to transfer.[22] Probable cause must be established for the offense alleged in the petition,[23] and the State must prove by a preponderance of the evidence that one of the four situations eligible for an over-18 transfer occurred (explained below).

1 The first circumstance is that for a reason beyond the State's control, it was not practicable to proceed before the juvenile's 18th birthday.[24] A recent case decided by the Texas Court of Criminal Appeals, *Moore v. State*, is an example of how the State did not meet its burden under this statute.[25] In *Moore*, a child abuse investigator had a heavy caseload and took two years to complete an investigation before she handed the case over to a prosecutor. The investigator also made a mistake with regard to the perpetrator's age and mistakenly believed he was 17 when the investigator presented the case, but the perpetrator was actually 18. Prosecutors took a year to file a petition to transfer, and the case was transferred to an adult district court when Moore was 19 years old. The CCA held that the officer's heavy caseload was not a circumstance beyond the State's control and therefore the State had not met its burden. Unfortunately, both of us have had to inform officers that we could not file cases due to suspects turning 18 before the investigation was completed and turned over to us for review.

2 The second situation that allows the State to seek an over-18 transfer is when the State can show that there was no probable cause to file the case originally, and new evidence that provides probable cause to move forward has been found after the juvenile's 18th birthday.[26] For example, Sarah had an aggravated sexual assault in which the victim did not know her assailant and she was unable to identify the rapist. It wasn't until a few years later that the DNA recovered from her rape kit

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matched a CODIS hit and her rapist was identified. The offender was under 17 at the time of the sexual assault but in his 20s when the CODIS hit occurred. It was impossible to prosecute him when he was a juvenile because he hadn't yet been identified; however, once the identification was made, we sought certification utilizing the over-18 provision.

3 A third circumstance occurs when probable cause exists to file a certification petition on a juvenile before age 18 but the juvenile could not be found until after he turned 18.[27] It is vital to prove and put on evidence that the State exercised due diligence in its efforts to locate the juvenile prior to his 18th birthday. Without any evidence of attempts to locate him, the State will not prevail. In any serious offenses, such as a murder case with probable cause that a juvenile committed the offense before age 18, investigators must routinely search for the juvenile on a regular basis and document those efforts in the police report so that the court can make a finding of due diligence if the juvenile is not located before his 18th birthday.

4 The fourth and final circumstance is when a previous transfer order was set aside by a district court or there was an appellate reversal of a certification order and the State seeks to re-certify the offender, such as in the cases reversed after the *Moon* opinion.[28] So far there have been about five *Moon* reversals in Harris County, and they have all been refiled in the juvenile district court by utilizing this provision.

If prosecutors can prove any one of these circumstances, then the State may prevail on a transfer petition filed on an individual who is over 18 at the time of filing. Again, the most important part of this type of hearing is the due diligence finding. The State must prove that it exercised due diligence in handling these uncommon scenarios. Prosecutors must inform and train officers to diligently and swiftly investigate juvenile cases before the juvenile turns 18. If even one serious case is rejected because of error on our part, it is one too many.

Conclusion

Transfer hearings, whether discretionary or mandatory, involve myriad obstacles to challenge juvenile prosecutors. The decision to even seek certification is one not to be taken lightly, and the prospect of transferring a child to adult court must be scrutinized thoroughly. While remaining cognizant of the fact that rehabilitation is the cornerstone of the juvenile system, we must also keep community safety at the forefront of our minds and sometimes seek to certify a juvenile offender as an adult. This is the delicate balance of juvenile work. ❇

Endnotes

1 Tex. Fam. Code §51.02(1). Unless otherwise specified, all subsequent cites are to the Tex. Fam. Code.

2 §54.02(b).

3 §54.02(d).

4 *R.E.M. v. State*, 541 S.W.2d 841 (Tex.Civ.App. — San Antonio 1976, writ ref.d n.r.e.).

5 §54.02(e).

6 §54.02(n).

7 §54.02(e).

8 §54.02(c).

9 *In re D.R.M.*, No. 89-01192-CV, 1990 WL 159335 (Tex. App.—Houston [1st Dist.] 1990) (not for publication).There are no published opinions on this topic.

10 §54.02(a)(3).

11 §54.02(f)(1)–(4).

12 *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014).

13 §56.01(c)(1)(A).

14 *Moon*, 451 S.W.3d at 50.

15 §54.02(m).

16 §54.02(n).

17 §54.02(n).

18 §54.02(m)(1).

19 §54.02 (j).

20 §54.02(j)(2)(B)–(C).

21 §54.02(j)(2)(A).

22 §54.02(j)(3).

23 §54.02(j)(5).

24 §54.02(j)(4)(A).

25 *Moore v. State*, No. PD-1634-14, 2017 Tex. Crim. App. LEXIS 167 (Tex. Crim. App. Feb. 8, 2017) (op. on reh'g).

26 §54.02(j)(4)(B)(i).

27 §54.02(j)(4)(B)(ii).

28 §54.02(j)(4)(B)(iii).

Testing the limits of rationality

Deciphering when a defendant is entitled to a jury instruction on a lesser-included offense in the wake of *Bullock v. State* and *Roy v. State*

Historically, courts have required that the evidence establish a lesser-included offense as a "valid rational alternative" to the charged offense before instructing the jury to consider the lesser offense. But two recent decisions of the Court of Criminal Appeals—*Bullock v. State* and *Roy v. State*—test the bounds of what could be considered "rational." In each case, the Court flexed its creative muscles in reaching the conclusion that the trial court committed reversible error by failing to instruct the jury on a lesser-included offense.

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In light of those decisions, prosecutors should proceed with caution when arguing against the inclusion of such an instruction in the jury charge. This article is intended to help prosecutors avoid a fate similar to that in *Bullock* and *Roy* by examining when we should fight and when we should concede to the defendant's request for a lesser-included instruction.[1]

General principles

In layman's terms, a lesser-included offense is exactly what it sounds like: an offense that is included within the greater offense and imposes a lower range of punishment than the greater offense. A two-step test applies to determine whether a defendant is entitled to an instruction on a lesser-included offense:

1) whether the requested offense is actually a lesser-included offense of the charged offense; and, if so,

2) whether the jury could rationally find that the defendant is guilty only of the lesser-included offense.[2]

Step One: Is it a lesser?

Under the first step of the test, an offense is a lesser-included offense if it is within the proof necessary to establish the offense charged.[3] Luckily, because this determination is based on the pleadings and the statutory language rather than the evidence produced at trial, a prosecutor can figure out the answer *before* trial, when he has time to consult other sources. A prosecutor will also have time to decipher the concept of "functional equivalence," which somewhat complicates the first-step analysis.

Article 37.09 of the Texas Code of Criminal Procedure provides that an offense is automatically within the proof necessary to establish the offense charged if the lesser offense differs from the charged offense only:

1) in the respect that a less serious injury or risk of injury to the same person, property, or public interest is required; hence, assault by causing bodily injury is automatically a lesser-included offense of aggravated assault by inflicting serious bodily injury because of the less serious injury required;

2) in the respect that a less culpable mental state is required, which is why criminally negligent homicide is automatically a lesser-included offense of involuntary manslaughter based on the less culpable mental state required (negligence v. recklessness) in causing the same result (the death of another); or

3) because the purported lesser-included offense consists of an attempt to commit the offense charged or an otherwise included offense, as in the case of attempted theft, which is automatically a lesser-included offense of theft.

If the purported lesser-included offense does not fall within one of those three scenarios, the trial court must engage in the more daunting task of comparing the elements of the greater offense and any descriptive facts charged in the indictment with the statutory elements of the lesser offense.[4] A basic approach is to ask whether it is possible to prove every element of the greater offense as charged in the indictment without proving one or more of the elements of the lesser offense.[5] If the answer is yes, the lesser offense is not a true lesser-included offense.

To illustrate, one can prove every element of DWI—that a person operated a motor vehicle in a public place while intoxicated—without

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establishing that the defendant drove the vehicle in willful or wanton disregard for the safety of others, as required for reckless driving.[6] Thus, despite all those pleas you may have seen to the contrary, reckless driving is not a lesser-included offense of DWI.[7]

As previously warned, the concept of functional equivalence complicates the element-comparison analysis. Under this component, "the specific elements of the lesser offense do not have to be pleaded if they can be *deduced* from the facts alleged in the indictment."[8] To make this determination, courts must "examine the elements of the lesser offense and decide whether they are functionally the same or less than those required to prove the charged offense."[9] For example, because a habitation inherently provides notice that entry is forbidden, an indictment's mere allegation of a "habitation" in a burglary of a habitation case is functionally equivalent to an allegation of notice that entry into the habitation was forbidden for purposes of determining whether criminal trespass is a lesser-included offense of burglary of a habitation.[10] Thus, the mere difference in terminology between the elements does not necessarily remove an offense from consideration as a lesser-included offense of the greater offense.[11]

Even more confusing, criminal trespass is still not a lesser-included offense of burglary of a habitation because the "entry" element of criminal trespass—the intrusion of the entire body—requires proof of greater intrusion than burglary, which can be shown with only a partial entry of the body or simply the entry of a physical object connected to the body.[12] Therefore, the "entry" elements are not functional equivalents under a strict reading of the statutes.[13]

Notably, if the prosecution requests an instruction on a lesser-included offense, the analysis stops here. The State need only prove that the lesser offense is, in fact, included within the greater offense.[14] But this article focuses on the second step of the lesser-included instruction test, which is triggered by the defendant's request and which, in practice, we must perform at a moment's notice.

Step Two: Does the evidence presented at trial require an instruction?

Under the second step of the lesser-included instruction test, the trial court must determine whether there is *some* evidence—i.e., more than a scintilla—from which a rational jury could acquit the defendant of the greater offense while still convicting him of the lesser-offense.[15] This step requires examination of *all* of the evidence admitted at trial, regardless of which side it came from, to determine whether the lesser-included offense is "a valid, rational alternative to the charged offense."[16] While this threshold is low, it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser offense before an instruction is warranted.[17]

Be careful. Prosecutors and trial courts run into problems when they try to measure what would be "a valid, rational alternative" in the eyes of a jury. The analysis does not allow for credibility determinations or assigning weight to conflicting testimony, regardless of how unbelievable the conflicting testimony may sound. The better question is whether there is any evidence whatsoever, from any source, which rebuts or negates one element of the greater offense while leaving intact the elements of the lesser offense. This conundrum led to the State's downfall both in *Bullock* and in *Roy*.

Bullock v. State: The "mix and match" approach

Henry Richard Bullock, Jr. was charged with theft of a delivery truck.[18] According to the State's evidence, a delivery man was in his truck's cargo space when he heard the engine start and rev several times.[19] The delivery man went to the cab and saw Bullock with his hands on the steering wheel and his foot pushing the pedals. When confronted, Bullock ran away.

Bullock admitted at trial that he was inside the cab of the truck, but he denied having any intent to steal the truck, pressing on the pedals, turning on the engine, or attempting to start or move the truck. He also acknowledged that he intended to commit theft while inside the truck, but he claimed that he wanted to steal only some small items inside the truck, not the truck itself. He was found guilty of theft.

Bullock appealed his theft conviction, alleging he was entitled to a lesser-included instruction on attempted theft. Bullock's indictment for theft alleged that he unlawfully appropriated the truck with the intent to deprive its owner of the

property. Unlawful appropriation occurs when a person exercises dominion or control over property without the owner's consent.[20] Criminal attempt occurs when a person, with specific intent to commit an offense, commits an act amounting to more than mere preparation that tends to but fails to effect the commission of the intended offense.[21]

Bullock easily satisfied the first step of the lesser-included test because, under Article 37.09(4), attempted theft is a lesser-included offense of theft. The real issue was whether there was some evidence from which a rational trier of fact could have found Bullock committed attempted theft but not theft—i.e., whether attempted theft was "a valid, rational alternative" to theft.

The Fourteenth Court of Appeals determined that the record contained no evidence to support a conviction only for attempted theft because Bullock wholly denied having any intent to steal the truck. In other words, because the offense of attempted theft requires the specific intent to commit the offense of theft, Bullock's denial of his intent to steal the truck negated one of the elements of the lesser offense.[22] But the Court of Criminal Appeals disagreed, applying a "mix and match" approach to evaluating the evidence on the record in determining Bullock's entitlement to his requested instruction.

The Court noted that the jury may disbelieve or believe any part of a witness's testimony, including the defendant's.[23] Thus, it is possible to present more than a scintilla of evidence as to each element of a lesser-included offense by extracting only portions of a certain witness's testimony. Put another way, if any combination of the evidence will entitle a defendant to a lesser-included offense instruction, the defendant should get the instruction.

Applying this mix-and-match approach, the Court concluded that the jury could have determined Bullock was guilty only of attempted theft if:

1) it believed he committed an act amounting to more than mere preparation to commit theft but failed to exercise control over the truck, based on his testimony that he did not press the gas or brake pedals or try to start or move the truck;
2) it disbelieved the testimony that he never intended to steal the truck; and
3) it inferred that Bullock had the specific intent to commit theft of the truck based on the totality of the record.[24]

Regardless of how irrational this combination of facts may sound, the Court ultimately held that the jury could have rationally reached this exact conclusion.

To explain Bullock's intent to steal the truck, the Court distinguished this case from one in which a defendant takes the stand and wholly denies committing an offense, which is insufficient to raise the issue of a lesser-included offense.[25] The Court reasoned that Bullock's admitted criminal conduct of entering the cab without permission and with the intent to steal some items, coupled with other evidence in the record supporting an inference of a specific intent to steal the truck, provided some evidence to rationally support a finding that Bullock intended to steal the truck itself, despite his denial of such.[26]

It may seem obvious that Bullock should have received a lesser-included instruction for attempted theft because he never actually took the truck, but a long line of cases establishes that evidence is sufficient to establish theft when a defendant is behind the wheel of a vehicle without permission. Incidentally, the lower court relied on this counterpoint in concluding that there was no evidence from which a fact-finder could have rationally determined that Bullock was guilty only of attempted theft because, even if the jury believed Bullock's version of the events that all he did was sit at the wheel of the truck without permission, those facts were sufficient to establish theft under these circumstances.[27] The Court of Criminal Appeals, however, distinguished several decisions in which a person's sitting inside the cab of a vehicle without permission constituted sufficient evidence to support a conviction for theft of the vehicle by reasoning that Bullock's denial of ever touching the pedals, starting the ignition, or moving the truck was enough to allow a juror to rationally conclude that Bullock never exercised dominion or control over the truck.[28]

Accordingly, by mixing a portion of Bullock's testimony with a portion of the State's evidence—notwithstanding Bullock's express denial of that portion of the State's evidence—the Court concocted a scenario in which Bullock could be convicted of attempted theft and acquitted of theft. This apparent departure from precedent serves as a

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troublesome omen for future cases. Indeed, Judge David Newell questioned the Court's analysis in his dissenting opinion to the Court's denial of the State's motion for rehearing:

> Here, the Court has plucked one sliver of a defendant's testimony out of the record and examined it in isolation. According to the Court, [Bullock] was entitled to a jury instruction on attempted theft because the jury could have believed the portion of [Bullock]'s testimony that he did not press the gas or brake pedals on the truck. Even more problematic, this same jury was also supposed to rationally disbelieve the reason [Bullock] himself gave for not pressing the gas or brake pedals on the truck: he was not attempting to steal the truck. While [Bullock] may have testified to alternative facts, they were not a valid, rational alternative to the offense of theft of a vehicle. [Bullock] denied attempting to steal the truck, yet we held that he was entitled to a jury instruction on attempting to steal the truck.[29]

Nevertheless, prosecutors should be mindful of this "mix and match" approach before objecting to the inclusion of a lesser-included instruction after the defendant denies committing the offense.

Alas, some good news: If a prosecutor messes this up, he may be able to salvage the conviction by establishing that the error did not harm the defendant. Although the Court concluded that the trial court erred by denying Bullock's request for a lesser-included instruction, the Court remanded the case to the court of appeals to conduct a harm analysis.[30]

Roy v. State: The "blacked out" defendant

Two months later, the Court issued another debatable decision in *Roy*. Kelvin Lee Roy was charged with murder under Penal Code §19.02(b)(2). The State's evidence showed that Roy was driving with his girlfriend, Taralynn Brown, when he "snapped."[31] Roy lit a cigarette that had been dipped in PCP, drove erratically, and refused to pull over despite his girlfriend's screams of terror. Roy told Brown, "Oh, you're scared? I'm going to kill both of us." Roy then accelerated toward train tracks where two vehicles were waiting at a light, flew through the air, and crashed into one of the vehicles, ejecting Alexandria Bertrand from it and causing her death.

Roy testified at trial that he never "snapped" or threatened to harm Brown, and he never intended to harm Brown or kill Bertrand. Roy claimed that he "blacked out" while driving and had no memory of the crash, but he admitted that he drank alcohol, smoked marijuana, and smoked a "dip cigarette" while driving. The combination of these substances caused Roy to feel dizzy and faint before he blacked out. Roy conceded that he chose to drive that night despite knowing the risks associated with drinking alcohol, smoking marijuana, and smoking dip cigarettes while driving. He was convicted of murder.

Roy appealed his conviction, alleging he was entitled to a lesser-included instruction on manslaughter. Roy's indictment for murder alleged that he intended to cause serious bodily injury to Brown and committed an act clearly dangerous to human life—driving into another car—which caused Bertrand's death. A person commits manslaughter if he recklessly causes the death of an individual.[32] A person acts recklessly with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur.[33]

The majority opinion of the Court of Criminal Appeals acknowledged its previous holding that manslaughter is a lesser-included offense of murder and moved directly to the second part of the lesser-included test.[34] (As a reminder, Code of Criminal Procedure Art. 37.09(3) provides that a lesser-included must differ only in the respect that a less culpable mental state suffices to establish its commission). In its previous decision, the Court concluded that the elements of murder and manslaughter are functionally the same except as to the mental states of intent versus recklessness.[35] Having established the first prong of the lesser-included test, Roy had to show that he presented more than a scintilla of evidence raising manslaughter and rebutting or negating murder to be entitled to the instruction under the facts of this case.

The Court pointed to Roy's testimony that he never intended to hurt his girlfriend and quickly concluded that Roy had negated an element of murder as charged in the indictment.[36] Nevertheless, the evidence still had to show that Roy presented affirmative evidence to raise manslaughter, i.e., that he recklessly caused the death of Bertrand, specifically that he was aware of, but con-

sciously disregarded, a substantial and unjustifiable risk that the result—a death—would occur.

The Court began its analysis by distinguishing its previous decision in *Schroeder v. State*.[37] In that case, Schroeder attempted to support his request for an instruction on manslaughter by claiming that his murder victim pointed a gun at him, he wrestled with the victim over the gun, but Schroeder blacked out as they fell to the ground and did not remember the shooting.[38] The Court concluded in that case that, although wrestling with a gun may be a substantial and unjustifiable risk, Schroeder was not entitled to a manslaughter instruction because there was no evidence that he was aware of, but consciously disregarded, that risk.[39]

The Court in *Roy* clarified that *Schroeder* did not establish an absolute bar from receiving a manslaughter instruction to any defendant who cannot remember causing a death.[40] Instead, it is enough that the defendant is aware of and consciously disregards the risk of a particular result of his conduct—in this context, a death—so long as the same reckless conduct causes the necessary result. As applied to the facts of *Roy*, Roy presented evidence outside his inability to remember the crash that he was aware of the risk of driving while intoxicated, and he disregarded the risk of causing a death by doing so. Thus, because there was some evidence that Roy did not intend to harm his girlfriend and that Roy's reckless conduct of driving while intoxicated was part of the same conduct that caused Bertrand's death, Roy was entitled to the manslaughter instruction. The Court, in turn, reversed and remanded the case to the court of appeals to conduct a harm analysis.[41]

This conclusion seems precarious because the Court acknowledged that a defendant must present affirmative evidence that he was specifically aware of but consciously disregarded the risk of death, but Roy's testimony appeared to more generally acknowledge his awareness of risks associated with driving while intoxicated. Regardless, the takeaway from this case should be that a defendant's claim that he does not remember the offense does not necessarily preclude him from receiving a lesser-included instruction, and prosecutors should be careful in urging the trial court to deny an instruction under these circumstances.

Conclusion

Defense attorneys frequently ask for a jury instruction on a lesser-included offense, regardless of whether they are entitled to one, in an effort to invite the jury to split the proverbial baby.[42] And trial courts are reluctant to exclude defense-requested instructions because jury-charge error is one of the easiest ways to get reversed by an appellate court. *Bullock* and *Roy* exacerbate this fear, and prosecutors should be aware of their holdings.

Ultimately, *Bullock* warns us that the analysis of whether the evidence at trial supports the inclusion of a lesser-included offense instruction requires piecemeal evaluation of each element of the greater and lesser offenses, and whether to believe a witness's testimony, in whole or in part, is wholly within the province of the jury. *Roy* teaches us that a defendant's denial of having any memory of committing the offense does not automatically bar the inclusion of a lesser-included offense instruction, and the Court of Criminal Appeals is willing to overlook a lack of specificity in the defendant's testimony when evaluating whether the trial court should have instructed the jury on a lesser-included offense. ❇

Endnotes

1 Trial courts have no obligation to instruct the jury, *sua sponte*, on a lesser-included offense, and defendants must request the instruction before they can complain about its absence on appeal. See *Bowen v. State*, 374 S.W.3d 427, 430 (Tex. Crim. App. 2012). As such, a prosecutor need not volunteer the issue unless the obligation to include the lesser-included instruction is so evident that he or she is worried about a potential claim of ineffective assistance of counsel.

2 *Sweed v. State*, 351 S.W.3d 63, 67-68 (Tex. Crim. App. 2011).

3 *Id.* at 68.

4 See *Rice v. State*, 333 S.W.3d 140, 144-46 (Tex. Crim. App. 2011) (analyzing whether the elements of reckless driving are included within the facts required to establish aggravated assault with a deadly weapon).

5 See *id.*

6 Compare Tex Penal Code §49.04(a), with Tex. Transp. Code §545.401(a); see also *Wagner v. State*, 720 S.W.2d 827, 830 (Tex. App.—Texarkana 1986, pet. ref'd) ("It is obvious that proof of the elements of reckless driving are not necessary to establish the offense of driving while intoxicated").

7 See *id.*

8 *Evans v. State*, 299 S.W.3d 138, 143 (Tex. Crim. App. 2009).

9 *McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010), quoting *Farrakhan v. State*, 247 S.W.3d 720, 722-23 (Tex. Crim. App. 2008) (internal quotations omitted).

10 See *Salazar v. State*, 284 S.W.3d 874, 875, 878 (Tex. Crim. App. 2009) (holding that the lower

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court erred when it held that criminal trespass was not a lesser-included offense of burglary of a habitation because the element that notice that entry was forbidden was not included in the indictment).

[11] See *id.*

[12] *Compare* Tex. Penal Code §30.05(b)(1), *with* §30.02(b)(1)–(2).

[13] It is possible to alleviate these differences through the pleadings because, as previously stated, the first step of the lesser-included analysis requires consideration of all elements plus any descriptive facts that are alleged in the charging instrument. Therefore, if the intrusion of the entire body is alleged as the specific method of entry into a habitation, criminal trespass could be available as a lesser-included offense to burglary of a habitation.

[14] See *Grey v. State*, 298 S.W.3d 644, 649-50 (Tex. Crim. App. 2009) (holding that the requirement that there be evidence showing that the defendant is guilty only of the lesser-included offense applies only to a defense request for a lesser included offense; the State may request a lesser-included offense instruction without such a precondition).

[15] *Rice*, 333 S.W.3d at 145.

[16] *Id.*, quoting *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007).

[17] *Sweed*, 351 S.W.3d at 68.

[18] See Tex. Penal Code §31.03(a), (e)(5).

[19] *Bullock v. State*, 509 S.W.3d 921, 923 (Tex. Crim. App. 2016).

[20] See Tex. Penal Code §§31.01(4)(B), 31.03(b).

[21] Tex. Penal Code §15.01(a).

[22] *Bullock v. State*, 479 S.W.3d 422, 430 (Tex. App.—Houston [14th Dist.] 2016) (substitute op., orig. op. withdrawn).

[23] *Bullock*, 509 S.W.3d at 926.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Bullock*, 479 S.W.3d at 430.

[28] *Bullock*, 509 S.W.3d at 927-28.

[29] *Id.* at 932 (Newell, J., dissenting).

[30] *Id.* at 929.

[31] *Roy v. State*, 509 S.W.3d 315, 316 (Tex. Crim. App. 2017).

[32] Tex. Penal Code §19.04(a).

[33] Tex. Penal Code §6.03(c).

[34] *Roy*, 509 S.W.3d at 317.

[35] *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012).

[36] Remember, "more than a scintilla" is a nominal threshold; the relevant analysis does not care that the defendant lacks credibility and is just trying to save himself.

[37] *Roy*, 509 S.W.3d at 318; see *Schroeder v. State*, 123 S.W.3d 398, 399 (Tex. Crim. App. 2003).

[38] *Schroeder*, 123 S.W.3d at 399.

[39] *Id.* at 400.

[40] *Roy*, 509 S.W.3d at 318.

[41] *Id.* at 320.

[42] For the proverb itself, see 1 Kings 3:16–27 (NIV), in which King Solomon keenly identifies the true mother of a baby after suggesting the baby be cut in half.