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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

Hurricane Ike clobbers coast

Hurricane Ike crashed into Texas on a September Saturday, leaving behind devastation and disbelief. Those at the Galveston County Criminal District Attorney's Office tell their stories about preparing for the storm and dealing with its aftermath.

By Thuy Le
Assistant Criminal District Attorney in Galveston County

For many of the 300,000 people living and working in Galveston County, the upcoming months will be a time to rebuild and reflect on the devastation caused by Hurricane Ike, which ravaged the island on Saturday, September 13. Many of us are grateful that we survived the Category Two hurricane that caused a reported 25-foot storm surge and changed the landscape of Galveston. "It will affect the people of this island for many years," says Assistant Criminal District Attorney Larry Drosnes. "Some will leave and not come back, some will not have work, and some will reassess where and how they live."


Thuy Le

Calm before the storm

On September 11, while the rest of the country was commemorating the anniversary of the terrorist attacks in New York City and Washington D.C., the people of Galveston began to prepare for Hurricane Ike. The storm was predicted to make landfall on Saturday, September 13. The staff at the district attorney's office began covering computers with trash bags, unplugging phones, and moving equipment and furniture

Continued on page 13

Also in this issue:

Nearly 100 percent of the Annual Campaign goal achieved

By Emily Kleine
TDCAF Development Director

What a wonderful 2008 it has been for the Texas District and County Attorneys Foundation! We are nearing the end of our second Annual Campaign and are very close to reaching our goal. Over $94,000 has been raised by you, our members, TDCAF friends, and others who keep the goal of improving prosecution and protecting crime victims in the forefront of their minds. Please help us surpass our goal of $100,000! You have until December 31, 2008, to make a difference and show your support. In fact, in this very issue is a remittance envelope you can return with your donation, just in time for last-minute, tax-deductible charitable donations.

Matt Powell

A big thanks goes to **Matt Powell**, Lubbock County Criminal District Attorney, for leading the way in West Texas. Matt went above and beyond to convey the message to area businesses, individuals, and others the important work that the foundation and TDCAA does in the Lubbock community and beyond. Several thousand dollars were raised on my visit to Lubbock, with many more annual commitments and a promising event to be held in 2009. Thank you, Matt.

Another round of applause goes to **Tony Hackebeil** (38th Judicial District Attorney), **John E. Terrill** (266th Judicial District Attorney), and **John T. Hubert** (105th Judicial District Attorney). These individuals made substantial gifts to the foundation. Another thank you goes to **Carl Dorrough**, Criminal District Attorney in Gregg County, for speaking to a local community group about TDCAF. We appreciate Carl spreading the word and gaining interest for the foundation and TDCAA. We appreciate you all.

I have been on the road plenty and enjoying every stop I make. **James Eidson**, Criminal District Attorney in Taylor County, kindly invited me to speak to the Abilene Crimestoppers in August. I also attended a law enforcement luncheon in Midland and met several new people with a vested interest in TDCAF's and TDCAA's mission. I will be heading to Dallas and the surrounding area soon to meet with potential donors.

On December 4, we will be honoring **Ronnie Earle**, longtime Travis County District Attorney, at the Champions for Justice event at the Omni Southpark in Austin. Please call the TDCAF office at 512/474-2436 soon to learn more about sponsorship and tickets.

Last but not least, don't forget to check out our new website: **www.tdcaf.org**. You will be amazed at how far the foundation has come since its inception in 2006.

For a list of recent gifts to the foundation, please turn to page 9.

On October 15, Harris County District Attorney Ken Magidson (pictured third from left) presented TDCAA Executive Director Rob Kepple and TDCAA Board President Bill Turner with a check for $500,000 for the Texas District and County Attorneys Foundation. (Also pictured is Karen Morris, the assistant DA who handles asset forfeiture cases.) The money will fund TDCAA's annual Advanced Trial Advocacy and Advanced Appellate Advocacy Courses at Baylor School of Law, which are especially important now that the National Advocacy Center in South Carolina has lost funding. Thank you for your generosity, Ken!

Table of Contents

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members.

TDCAA: The anatomy of success

This publication regularly spotlights the good work of our members. Prosecutors, investigators, and key personnel are improving the state from Amarillo to Brownsville and from Beaumont to El Paso. As an organization we come together to share our skills and improve our profession. At center stage in that theater is the staff of TDCAA. These are the folks who plan our meetings, answer our questions, put together our training, produce our publications, and organize our legislative initiatives. If you keep up with TDCAA, you have to be impressed with the quality of work that comes out of that office. Not only that, I am sure you will agree that putting up with us is no easy task.

By Bill Turner
District Attorney in Brazos County

Who are these people on staff at our association? I decided that it would be worthwhile to get better acquainted with those who keep TDCAA afloat. Space constraints prevented me from spotlighting every member of the staff, but the folks I was able to interview gave interesting insight into the anatomy of our success. Here's what they had to say.

Diane Beckham
Senior Staff Counsel

Who are you?

Being a proud parent of a 15-year-old son with autism is a big part of who I am. Working with him and helping him maintain through adversity has made me an optimist. I throw myself into a problem 100 percent and believe that no road comes to an end, nothing stops the journey, and sometimes you just have to laugh.

I am an introvert, but I can fake being an extrovert for short bursts. After a party I need my time alone.

Why are you at TDCAA?

I accidentally fell into legal publishing as a career just before I joined TDCAA but, as a lawyer, this career makes the most sense to me. I would hate the day-to-day confrontation most lawyers go through. This job allows me to work by myself or spend time nurturing others. I am building lifetime relationships with the authors I work with and am producing a positive product that helps people.

TDCAA has been my family. The TDCAA staff stuck with me during the early brutally hard days after Alex's autism diagnosis and all that required, and I am committed to those relationships.

Why is TDCAA successful?

It starts with the hiring decision. We look for people who are passionate about what they do. No one here is ambivalent about their work. We feed off of each other's commitment and when we see others working hard, we are eager to pitch in. We are very different people but all believe we are part of something bigger. We share a common cause of seeing that justice is done.

I think it's important to spend time talking about non-work issues. We get to know each other and we end up working like a family.

Oops—gotta go! My son is on the other line.

Ashlee Myers
Meeting Planner

Who are you?

I like to help and enjoy seeing people smile. I'm independent, loud, and opinionated, and I love my quiet space. I would much rather experience something than hear about it. I can be headstrong, and if you tell me I can't do something, I take it as a challenge. When I'm faced with a problem I look at all the angles and analyze all the steps before I decide on a plan. I have a painting of a monkey on my wall to remind me not to take things too seriously.

Why are you at TDCAA?

I love what I do. I love what prosecutors do, defending what is right. As a meeting planner, I want to provide the best environment for prosecutors to learn so they can increase their knowledge and go back and help their communities.

I also like the social aspect of this job. People are fascinating and I love to sit back and listen to the stories.

Why is TDCAA successful?

We have a unique mix of people who have a love for life. We love to work and love to play. I have worked in offices where the people drain your energy, but that's not here. You can walk down the hall and hear some-

one laughing and it's contagious.

There is a great balance of personalities here. While everyone is home-grown, some people can thrive with a legislator at a five-star restaurant while others can kick back on the porch with anyone. When it's time to shine, it's fun to see people roll up their sleeves and step up. It's not really work, it's fun.

Gail Ferguson
Administrative Assistant

Who are you?

"The long-timer" (I beat Rob by seven months) and the only grandmother on staff. Ashlee calls me the "mother hen."

Why are you at TDCAA?

I had the good fortune to work for a very dedicated DA in a small town and being involved in every aspect of a case from beginning to end; it made me proud to hear him say, "The State is ready, Your Honor." I felt I had been a part of keeping our community safe, and now I feel like I'm helping prosecutors all over Texas do the same. Someone once told me when you pull in the parking lot each morning and you're smiling, then you're in the right spot. After all these years, I'm still smiling.

Why is TDCAA successful?

The staff. Everyone here will go that extra mile for our members.

Erik Nielsen
Training Director

Who are you?

I'm a family man with two sons and a wife of 13 years. I was born and raised a Nebraskan and was taught always do your best no matter how small the job. I don't necessarily want to be viewed as the best, but I do want to do my best. I'm energetic but I also feed off the energy of other people. I'm loyal, especially to the people and institutions I respect.

Why are you at TDCAA?

When I was growing up my mom worked at the courthouse. After school I watched trials and it seemed like prosecutors were in the right because they were putting someone bad away. At TDCAA I feel like what we are doing is important. It's not about money or satisfying yourself; we are taking affirmative steps to make our state a better place.

Why is TDCAA successful?

The executive team looks for people who "get it." Our people are in it to help each other. There is no real division or hierarchy. When something needs to be done, we all roll up our sleeves and do it. At TDCAA you can have fun and still do a great job.

Sarah Wolf
Communications Director

Who are you?

I'm the creative kid of practical parents, a student of chemical engineering who switched my major to English, and a girl with a Midwestern work ethic living an Austin lifestyle. My friends think I'm an old lady at heart because I enjoy crafts and cooking. At the end of the day I want to do all the good I possibly can.

I grew up in a community where people constantly stopped to help people out of a snow drift or patch of ice, where each of us was charged with the well-being of the community. As a result, when I see an injustice, I have an urge to fix it. Sometimes I think I'm too soft for this work; when I read about some of the cases our members deal with, it's difficult to put it out of my mind. I have taken up yoga to help quiet the stress.

I am a writer. My mom can show you poems I wrote when I was 3 years old. Writing is as natural to me as breathing. It can be creative or practical. Most of my work at TDCAA involves the practical side of writing, so I indulge the creative side by writing at home.

Why are you at TDCAA?

I am inquisitive and a good editor, but I need help with the subject matter—I'm not a lawyer, after all. The people here at TDCAA are great teachers and are so generous with their time. For me, writing about Texas criminal law is the cake, and the icing is that I'm one of the good guys. It is satisfying that we are helping keep our communities safe.

I work with amazing people who run the gamut of experience. We are a tight-knit group that keeps up with each other's families and regular lives. We are all self-aware and know what we need to do our jobs.

Why is TDCAA successful?

I think we have highly educated people who are self-starters and work well together. Our office works like cogs in a machine. We have people who are good fits for their jobs and are quick to pitch in and help the rest of us.

Continued on page 6

Continued from page 5

We have hired the right people to do the right jobs, and Rob empowers us to do our work as we see fit. He has a genuine interest in what we do and trusts us to do the job right.

Rob Kepple
Executive Director

Who are you?

I'm the son of a 30-year auto worker. He was the first person in his family to get an education, and I was raised to have a real appreciation for hard work and the opportunities you are given. My dad was grateful to a country that gave him an education through the G.I. Bill, so he taught me that you've gotta give back. Important work was work that helped other people, and my parents insisted I do something important with my life.

Part of who I am comes from a heart problem I had as a kid. Even after an operation, the school barred me from physical education classes. I took up tennis and went on to fence for Ohio State. The heart problem caused me to take things more seriously, and I learned that I can do some things when other people say I can't.

I'm a trusting person. I like most people just fine. I'm pretty nonjudgmental but when I do evaluate people, I don't look at how they treat me but rather at how they treat people they might consider insignificant.

Why are you at TDCAA?

I worked hard at law school to make the best grades I could. My grades helped me get a job at Fulbright & Jaworski, but I was bored. They were great lawyers with great clients, but I just didn't get it. I had some friends who were prosecutors and when they talked about their cases, it snapped. I remember saying: "That sounds like something important."

I love the profession of prosecution. In my mind, y'all are a bunch of superheroes who have chosen to use your powers to do good. I love what prosecutors stand for, so it is our job at the association to do what we can to help. At a statewide level we are training, educating, and helping prosecutors become more professional. I think all the hard work is paying off.

Why is TDCAA successful?

TDCAA is a membership-driven organization. I believe organizations like this fail when the staff makes all the decisions. That's why we spend time on long-range plans and reaching out to our members to make sure we are getting them the training and services they need.

Our staff is well educated, professional, and the top in their respective fields. They are brilliant, dedicated, and committed from the bottom up. They all have a sense of purpose, and we never forget that we are here to serve the membership.

My staff has the authority to make decisions without being second-guessed. I trust them and rely on their judgment. My role is to support them and see how I can help. I remember Ishmael, the storyteller in *Moby Dick*, who felt like he was in the midst of great people watching them do great things. That's how I feel when I watch the TDCAA staff at work.

The best decisions we make are when we, as a group, sit around and talk things through. When we get together, there is always a lot of firepower in the room.

Conclusion

To make a quality product, you start with quality parts. The success of our organization is not an accident; it's the result of good people working very hard at jobs they do very well.

Each member of the staff I spoke with was quick to give us, the membership, all the credit for how well we are doing. It is precisely that attitude that makes *them* so successful.

If you haven't taken the time to get to know the staff, I think you would enjoy it. If you haven't told them thanks in a while, now is a good time. They do amazing work, and they do it for us.

Oh Galveston!

A couple months ago, we all watched intently as Hurricane Ike churned its way to the Texas coast. After landfall, we did the best we could to stay in contact with our friends on Galveston Island; I talked to the local CDA, **Kurt Sistrunk**, the morning before the storm hit as he moved his office's intake to the safe refuge of the San Luis Hotel; it was a little like talking to a submarine commander who was closing the hatch and disappearing beneath the surface for a few days.

By Rob Kepple
TDCAA Executive Director in Austin

We had a chance to talk with Kurt and his staff in the weeks that followed on everything from a temporary courthouse location, to looting, to price gouging, to some local guy who was collecting all the stray beach toys in his backyard. We know it has, and will be, tough for our folks in Galveston and along the entire upper coast—and things ain't getting back to normal soon. Here is an excerpt from Kurt's email to us a couple weeks after Ike's visit: "I'm powering down, unplugging the little generator and getting out of here and off the island before dark, and believe me there's a new meaning to dark down here." I believe him.

We'll be back!

You must admire the "can do" spirit of the Galveston Convention Centre folks. On Sunday morning, the day after the storm passed, they were on the phone to **Ashlee Myers**, one of our meeting planners, to offer some new dates for our annual conference—in October. Indeed, when I talked to them a week later, they announced all the hotels and a growing number of restaurants were open for business. Powered by generators, sure, but the hotels were full and serving 1,500 meals a day! Despite those assurances, we took a pass on an immediate return.

Instead, our training team of **Erik Nielsen, Ashlee Myers**, and **Manda Helmick** turned this training ship on a dime and came up with a great Annual Criminal & Civil Law Update location and date (Austin in January—it will replace our usual Prosecutor Trial Skills Course) and a full agenda that keeps virtually all the firepower of the original. Thanks to **Sarah Wolf, Sherry Chen, Dayatra Rogers**, and **John Brown** for reloading the brochures, registration materials, and online registration options. (You can register on our website at www.tdcaa.com/austin.) As you can imagine, it's no small feat to plan a conference of this size, let alone reschedule it in a couple of short weeks—yet this team has done it.

A couple of notes about this conference: We have fielded more than a few calls from members asking why we locate our annual conferences on the coast in the midst of the hurricane season. First, we historically have tried to schedule our seminar for the same week as the judges' annual conference, thus upping the chances that y'all can attend because you won't be in trial if your judges are gone. Second, we book hotels that offer state rates for a large group; not every hotel during every time of year will give us such a large block of rooms at that low price. Add to these two reasons that there is huge attendance when we have our Annual at the coast—fully 25 percent more than when the seminar is inland—and we've been inclined to not fix what ain't broke.

That said, having been run off the coast twice in five years, we are already talking about some new venues. Galveston is still on the list, of course. Those folks have been great to deal with, the city has a great convention center, and by all accounts we had our biggest and best annual ever in Galveston in 2001, so we'll be back.

Regarding the January Trial Skills Course: Although we have usurped the date and hotel that was at one time reserved for what we affectionately call "baby school," we have the same course coming up in July. We will increase our hotel block for the July course to accommodate everyone who had originally planned to attend in January. As some of y'all might recall, several years ago we created two Trial Skills Courses per year—the July course was once the only one—so we figure we can pull off the bigger course with no problems.

Continued on page 8

Continued from page 7

TDCAA Annual Business Meeting and Board Elections

The association still has some unfinished business in the wake of the Galveston cancellation. The annual business meeting scheduled during the Annual will be held instead at the Elected Prosecutor Conference on Wednesday, December 3 at 5 p.m. at the Omni Southpark Hotel in Austin. As a refresher, the membership will consider the following nominations: for President-Elect, **Scott Brumley** (CA in Amarillo); for Secretary/Treasurer **Mike Fouts** (DA in Haskell); and for Criminal District Attorney at Large, **Joe Brown** (CDA in Sherman). According to TDCAA bylaws, this year's President, **Bill Turner** (DA in Bryan) will move up to the Chairman of the Board spot, and **Barry Macha** (CDA in Wichita Falls) will become the TDCAA President. As this edition of the *Texas Prosecutor* goes to press, we do not yet have a nomination for County Attorney at Large. **Jaime Tijerina** (CA in Sarita), who had originally been nominated, has withdrawn his name because he will be heading to Iraq in early December for a tour of duty. Good luck, Jaime! We'll keep a spot open for you when you get back.

Happy trails to some professional prosecutors

This will be a big year for turnover in the ranks of elected Texas prosecutors. By my count, we have more than 30 elected district and county attorneys hanging it up at the end of December. I won't even try to print a complete list here, but I want to extend a special recognition to those who, as demonstrated by their 20-plus year tenures, have made prosecution their chosen career. This list includes some great professional prosecutors: **Johnny Acktinson** (DA in Farwell); **Jim Anderson** (CA in Rockport); **Ronnie Earle** (DA in Austin); **Jim Kuboviak** (CA in Bryan); **Bruce Roberson** (DA in Perryton); **Joe Rubio** (DA in Laredo); **Tully Shahan** (CA in Brackettville); **Ricky Smith** (DA in Lamesa); **Ron Sutton** (DA in Junction); **John Terrill** (DA in Stephenville); **Duncan Thomas** (DA in Greenville); and **David Williams** (CA in San Saba). If you've retired with over 20 years and I've missed you, please let me know.

Thanks to you all for your dedication, commitment, and leadership. I believe that our chosen profession has made great strides in the last 20 years, and because of your work we are well-prepared for the next two decades.

An honor for Carol Vance

Congratulations to **Carol Vance**, who served as the Harris County District Attorney from 1966 to 1979, on his recognition by the Texas Bar Foundation as one of this year's Outstanding Fifty Year Lawyers. These have been an awfully good 50 years for our profession: Carol not only served as the Harris County DA, but he also established TDCAA as the home for Texas prosecutors, served as President of the National District Attorneys Association, and is a sustaining Life Fellow of the Texas Bar Foundation.

Carol is a great friend and leader. He truly deserves this recognition.

The Incredible Hawk

Did you ever go to a TDCAA seminar and see this big, burly, bald guy built like a brick firehouse with the nametag "Hawk," and say to yourself: "Man, I bet he'd win one of those ultimate fighting championships!" Well, you'd be right.

I had the pleasure of meeting **Pat "Hawk" Hardy** many years ago at one of our conferences. Pat now serves as an investigator for the Kaufman County DA's Office, but he has also prosecuted in the past, most notably as part of the prosecution team on the notorious Jasper dragging murder. This past summer Pat captured the gold medal at the International Brazilian Jiu-Jitsu Federation 2008 World Championships in California. He competed in the Black Belt Senior category in the ultra-heavy division. This shouldn't be a surprise to those who know Pat, as he has been fighting on the world stage in full contact karate since the 1970s. Me, I'm just glad this guy's on my team.

The real brains behind the operation

For years, you have heard **Shannon Edmonds** and the TDCAA staff on the road at our legislative updates talking about how laws are made (the proverbial sausage grinder). Well, the truth of the matter is that one guy had our backs when it came to the Penal Code. For over 20 years, a lawyer at the Texas Legislative Council, **Gary Kansteiner**, has quietly molded Texas criminal law. His

job was to take a law suggested by a legislator and draft it in a way that fit the current law—and to not miss a single cross-citation or comma along the way. He kept the legislators out of trouble and, without a lot of fanfare, was largely responsible for keeping the Texas Penal Code as clean and consistent as it is. Well, Mr. Kansteiner went and retired on us in September, and we will all miss him, even if you never met him.

The President's Column

Bill Turner put his stamp on the President's Column when he interviewed other prosecutors about their work in the profession. I very much enjoyed reading why y'all do what you do, the cases that have left a mark, and how you handle your discretion. I'm impressed by how hard y'all work to get it right. At the end of the day, I think **Jaime Esparza** (DA in El Paso) summed it up best when he observed that, "Our job is as simple as right and wrong—and also that complicated."

In this edition of the *Texas Prosecutor*, Bill finished his series by interviewing TDCAA staff members about their role in prosecution. Thanks to Bill for giving us the chance to tell you how much we respect your work and how much we enjoy helping you do what you do so very well.

Welcome to Andria!

If you've called the TDCAA offices in the past several weeks with a legal question, chances are you've spoken with our new research attorney, **Andria Brannon**, who comes to us from St. Mary's University School of Law in San Antonio. Before law school, Andria worked at Make-A-Wish Foundation of North Texas, New Beginning Center (a domestic violence agency), and Children's Medical Center Dallas; while at St. Mary's, she interned at the Kendall County Attorney's Office, Texas Municipal Courts Education Center (TMCEC), and the Travis County Juvenile Public Defender's Office. She likes TDCAA because "everyday is something different. I never know what question will be on the other end of the phone."


Andria Brannon

In her spare time, Andria is a creative type who bakes, reads, makes jewelry, and hangs out with her rescued dog, Ace. We're thrilled to have her at the association, so please welcome her!

Recent gifts to TDCAF

Eduardo Arredondo, County Attorney, Burnet County
J. Russell Ash, County Attorney, Reagan County
Geoff Barr, Criminal District Attorney, Comal County
Bobby Bland, District Attorney, Ector County
Craig D. Caldwell, County Attorney, Cherokee County
City Bank, Friend of TDCAF, Lubbock
Tim Curry, Criminal District Attorney, Tarrant County
William Jewell Davis, M.D., Friend of TDCAF, Lubbock, *in honor of Matt Powell*
Patrick L. Flanigan, 36th Judicial District Attorney
Tim Flathers, Assistant District Attorney, Midland County
Judge Leonard Giblin, Port Arthur, *in honor of John R. (Jack) DeWitt*
Judge Larry Gist, Beaumont, *in honor of John R. (Jack) DeWitt*
David M. Green, District Attorney, 69th Judicial District Attorney
Tony Hackebeil, 38th Judicial District Attorney
Tom Hanna, Nederland, *in honor of John R. (Jack) DeWitt*
Russell Hardin, Jr., Friend of TDCAF, Houston
John F. Healey, Jr., District Attorney, Fort Bend County, *in honor of Bill Meitzen*
Herring Bank, Friend of TDCAF, Vernon
John T. Hubert, 105th Judicial District Attorney
Richard D. Hughes, Nederland, *in honor of John R. (Jack) DeWitt*
Mike Laird, Beaumont, *in honor of John R. (Jack) DeWitt*
W.C. Lindsey, Port Neches, *in honor of John R. (Jack) DeWitt*
Steve Lupton, 51st Judicial District Attorney
Cheryll Mabray, County Attorney, Llano County, *in memory of Jack Redford*
Elton R. Mathis, Criminal District Attorney, Waller County
McDougal Companies, Friend of TDCAF, Lubbock
Richard Miller, County Attorney, Bell County
Elizabeth Murray-Kolb, County Attorney, Guadalupe County
David Newell, Assistant District Attorney, Harris County, *in memory of Matthew Paul*
Lisa Peterson, County Attorney, Nolan County
Matthew D. Powell, Criminal District Attorney, Lubbock County
Fred G. Rodriguez, Friend of TDCAF, San Antonio
Lynda K. Russell, 123rd Judicial District Attorney
Kurt Sistrunk, Criminal District Attorney, Galveston County, *in memory of Jimmy Vaughn Allison*
Melanie Spratt-Anderson, County Attorney, Upton County
Lynn Switzer, 31st Judicial District Attorney
John E. Terrill, 266th Judicial District Attorney,
Manny Tovar, District Attorney's Office, Webb County

What's the most valuable thing you've learned from talking to a jury post-trial?

Robert DuBoise
Assistant District Attorney in Parker County

After nine years of civil litigation in Houston, I decided I wanted to be a prosecutor. I started my new career in San Jacinto County, a small rural county in Southeast Texas. Our office at that time consisted of the elected district attorney and two assistants. As the new guy in the office, I was assigned to prosecute all misdemeanors. During that first year, I learned numerous lessons from speaking to juries after trial. One particular case from that first year still factors into every trial I handle.

In the next issue, tell us what book, legal or otherwise, has taught you more than any other. Email your anecdote to the editor at wolf@tdcaa.com and write "War Stories" in the subject line.

The defendant shot and killed his neighbor's two Siberian Huskies. The defendant admitted shooting the dogs but stated that in the days prior to the shooting, the dogs had killed a number of calves on his property. The fact that the dogs had previously killed the defendant's cattle was undisputed. However, it was also undisputed that at the time the dogs were shot, they were not in the process of, nor had they recently finished, attacking the defendant's cattle. The exact location where the defendant shot the dogs was contested, but the animals were found dead on the edge of their owner's property. In the black-and-white mind of a new prosecutor, this shooting was a clear violation of Tex. Pen. Code §42.09 as it existed at the time.

I filed the complaint and information, and the defendant retained an attorney. After fruitless plea negotiations, a trial date was set. It was during voir dire that I realized I wasn't in Harris County anymore. Venireperson after venireperson was excused for cause when they stated they could not follow the law and would not find someone guilty for shooting a dog that killed their cattle.

Ultimately, a jury was seated and trial began. At the end, I argued to the jury that despite their personal feelings on the matter, the law prohibited the defendant's actions in this case. A short time later, the jury returned with a "not guilty" verdict.

As I spoke with them afterwards, the jurors told me that although I was technically correct and that they wanted to vote for me, that they could not find the defendant guilty for the very action they would have taken in the same circumstances. It struck me then that I had failed to consider one of the first things my communications professor taught in his college freshman communications class: Know your audience.

Since then, I have taken the time to consider the nature of the case versus the nature of the audience that will ultimately hear it. Every county has a distinct local personality. If you take time to study and learn it, your cases become clearer and your presentation and prosecution of them much more successful.

Robert Cole
Assistant Criminal District Attorney in Upshur County

After nearly 17 years of criminal trial practice, it has become quite clear to me that it is simply impossible to clearly know just what a jury might be thinking about during a trial. Every chance I get to speak with jurors following a verdict, I learn something new, and in every case I take a little nugget of truth back to my office to ponder what I learned and to cuss and discuss the revelation with my coworkers.

One critical thing I have learned is that jurors watch what the lawyers are doing as much as they pay attention to what the witnesses are saying. One juror told me after a trial that I needed new glasses because mine kept slipping down my nose. I learned from that comment to dress uniformly and ensure nothing about me or what I wear is a distraction. My haircut is not extreme, my glasses fit, and my shoes are polished. (Guys, please make sure your fly is zipped; I saw a poor defense lawyer turn crimson one day when he realized his error.) One well-known East Texas lawyer always wears a three-piece navy suit with a burgundy tie when in trial. He has seven suits just like it. In trial he knows that the

focus during his portion of examination or argument is not on his clothing but rather on what he wants the jurors to hear.

Also, I learned that jury nullification is real, even when the defense is not trying to raise the issue. The character of the victims matters; whether injuries are actually inflicted matters; and whether a certain statute offends the public sense of order matters. During one trial of attempted kidnapping, my elected boss had a credible high-school-age victim who was chased down the highway by a suspect in a box van owned by his employer. The suspect grabbed her and pulled her into the back of the van briefly before she broke free and ran down the center stripe of a highway where several independent witnesses saw her running. She asked for help and told them what happened. These witnesses also saw the defendant turn the van around and speed off, and they alerted police to the company name on the van's side. Officers showed up at the business and when the defendant spotted them, he hopped a fence and ran. The evidence all came in clearly without problem, but the jury acquitted. Why? Because the victim didn't have any actual physical injuries. My boss was stunned. He had no burden to prove injury. He told the jury about the defendant's prior criminal history after trial.

Lastly, juries really do like to see exhibits. In a recent DWI case where the defendant refused both a breath and blood test and the video was OK but not stellar, my talented investigator, Jon Warren, went to great lengths to help a fellow assistant DA put together a PowerPoint presentation. We included a video showing horizontal gaze nystagmus so the officer could explain what he was looking for when he was waving that pen around on the roadside. Jon took photos of the bar the defendant was seen leaving just before she ran someone into a ditch; that other driver followed the defendant until police joined in. Jon also took photos of where the stop occurred, mapped the area using Google Earth, and computed the mileage from the bar to the stop. He also projected the route from the bar to where the defendant said she was going (a tip he gleaned from one of TDCAA's DWI courses). The cherry on top was the slide he made for closing argument that showed all the signs of intoxication, which came on the screen one by one. The jurors liked the visual aid and found the defendant guilty—to the astonishment of her counsel. The jury appreciated the tools Jon gave them. They liked having a reference beyond the in-car video.

I have learned to take care of all that I can before trial. Know the case, know the witnesses, and anticipate the defense just like we all learned in law school, but also be aware of distractions under our control, and be ready for a jury to focus on odd facts that should not matter—but do.

Carolyn Olson
Assistant County and District Attorney in Colorado County

Prosecuting misdemeanor DWI, marijuana possession, and family violence assault cases in a small rural county for the past 10 years, I have learned that when you decide to try a case in front of a jury, you must remember that they know nothing about the law, legal reasoning, the rules of evidence, and what it means to prove the elements of a case beyond a reasonable doubt. No matter how brilliant your voir dire, opening statement, or cross-examination of the defendant, a jury does not see a case in the legal, technical, logical way a prosecutor does. In the short time you spend with them in voir dire, you cannot educate them enough about the law, change a lifetime of personal experiences, nor overcome the effects television has on their perceptions of what law enforcement can and cannot do. I have learned that even when you get a "guilty" verdict from a jury, it is sometimes not at all because the jurors saw the case the way the prosecutor did.

Once, after a guilty verdict in a DWI refusal case, several jurors told me that they were totally undecided until they heard my co-prosecutor's closing argument. They couldn't say enough about how the closing saved the case. In another DWI case where the defendant exhibited strong positive clues on all SFSTs and the officer had observed him driving on the wrong side of the road, the jury told me they found him "not guilty" because he didn't look drunk on the videotape. In fact, the foreman was so angry that the case went to trial that he asked me whose decision it was to even file the case!

Another time, we tried a routine possession case, where the defendant claimed a lack of intent because of

Continued on page 12

Continued from page 11

involuntary intoxication. He was found comatose behind the wheel of his car with cocaine on his shirt and jacket, almost an entire cookie of crack in the front cup holder, and someone else's prescription narcotics. After trial, one of the jurors said, "I knew you had him when I looked at the dates on the pill bottle." There had been no testimony regarding the date the medication had been prescribed; it was simply irrelevant. I could not help but wonder why we didn't "have him" when the officer testified about the cocaine on his clothes and in plain view.

It always angers me to have to decline to file a case, change a plea offer, bargain a charge down, or dismiss a charge when I know a defendant is guilty, but the reality of a jury trial and the way juries look at the facts sometimes makes that inevitable.

Richard Alpert
Assistant Criminal District Attorney in Tarrant County

I find body language, facial expressions, and the inferences we draw from their nuances fascinating. I also believe that eye contact with jurors is imperative. During every closing argument, I purposefully seek out a non-verbal connection with or a response from each juror as I try to confirm that my message is reaching them.

Nevertheless, I have learned that my perceptions and interpretations often miss the mark. One example seared into my memory involved an aggravated sexual assault of a child case I tried years ago. The stepfather defendant enjoyed his entire family's support and, sadly, this group vilified the young victim. As is so often the case, the child's mother and siblings adamantly denied the possibility that abuse opportunities even existed when, on the contrary, we believed that the child had endured years of suffering. My entire case rested upon the child's credibility, and I absolutely believed her.

During my closing in the guilt-innocence phase, I hoped to convey the earnestness of my belief in this child's credibility to the jury. Yet, as a woman on the front row of the jury box listened to my argument, she hostilely crossed her arms, shook her head repeatedly, and appeared to be downright upset with me. Floored, I felt she and I shared no positive connection during the argument. Deliberations began and continued through the remains of the day. I fearfully hoped for a hung jury, strongly believing that this unsympathetic juror had voted against convicting this child molester. Seven hours later, the jury returned a guilty verdict, and we put on our punishment evidence. Argument during this phase felt like a Groundhog Day reprise with this same juror's unfriendly body language continuing to cause me concern. Yet the jury promptly served up a 99-year sentence, pleasantly surprising me.

Prosecutors can learn great lessons by visiting with jurors post-trial and, in this case, I was desperately curious to talk with this seemingly unapproachable woman whose demeanor had so confounded me. As I began to visit with her and told her of my concerns, she appeared shocked. She described her furor at the defendant's reprehensible conduct and her resolve to hold him accountable. The disapproving body language had been aimed at the defendant, not me. Since that case, I still try hard to connect with my jurors, but I also work to resist the temptation to read too much into their body language. I now know that any visible ire might well be directed at the defendant—as it should be—and not my arguments. At least, I hope that's the case!

Tracy Gaines
Assitant District Attorney in Fort Bend County

I have learned that juries can pick up on the most inconsequential, minute detail in the trial and run with it. For example, in a DWI case, on the video, the officer spent a good five minutes explaining horizontal gaze nystagmus. After the jury found the defendant guilty, one juror said those five minutes of HGN testimony clinched the verdict. The juror explained that the defendant wore glasses, so he must have been to an eye doctor, which means he would have known how to follow instructions concerning eye examinations. Therefore, on the night in question, because he could *not* follow the officer's instructions, he must have been intoxicated.

Continued from the front cover

Hurricane Ike clobbers coast (cont'd)

away from the windows, a routine performed just a month earlier in preparation for Hurricane Gustav.

Assistant Criminal District Attorney Lindsay Lopez had moved to Galveston from Alaska less than a year ago. She thought nothing more than rain would come of Ike. "Just like Gustav, we thought we'd get a day off—it wouldn't be anything special," Lopez says. "People were joking about it being no big deal because it was only a Category Two." On September 12, Galveston Mayor Lyda Ann Thomas issued mandatory evacuation orders for the people of Galveston Island. "When I heard the mandatory evacuation, I thought it meant everyone, so I left right away," Lopez added.

Larry Drosnes ignored the evacuation order (like so many thousands of others) and rode out the storm in his West End home. He had weathered numerous hurricanes having lived 61 years in Galveston. "I've been through stronger storms," Drosnes says, referring to Hurricane Alicia that pounded Galveston in 1983. "Although I listened to the reports, I discounted them. That was a mistake, one I'll not make again."

Criminal District Attorney Kurt Sistrunk had been through numerous hurricanes during his 20 years in the city. Sistrunk stayed at his home on Galveston Island while his wife and two children evacuated to San Antonio. It was important to be available to offer guidance to police and other law enforcement officials after the storm, Sistrunk says of his decision to not evacuate: "Crime doesn't take a holiday just because a hurricane is coming." Sistrunk had spent the afternoon boarding up his house when he received a phone call from Drosnes about the rising water. Both men decided to evacuate to the sheriff's office. On the drive there, they could see the power of the approaching storm. Waves were being thrown against the seawall like "Old Faithful geysers, going 40 to 50 feet in the air," Sistrunk says. The seawall is an 18-foot structure built after the Great Storm of 1900, which killed over 6,000 people, to protect the island from the waters of the Gulf of Mexico. "It was painfully obvious that we were in store for something devastating," Sistrunk says. "It was shocking."

Victims advocate Rachel Leal waited until the day before Ike's arrival to evacuate. She was born on Galveston Island and remembers how the seawall protected her home from Hurricane Alicia, but she became worried when she saw the waves going over the seawall and covering the street. "I was in total awe of the water," Leal says. "It was unbelievable how fast it was rising." She and her family evacuated to her daughter's house in northwest Houston after seeing the rising flood waters.

The fury of Ike

As Ike approached the Galveston-Houston area, the wind and rain began knocking down trees and power lines.

The home where Leal was staying with her family lost power late Friday night. She and her family decided to flee farther north to College Station because she was afraid that the wind would knock the dozen or so trees on the property into the home. "We got scared and panicked," Leal says of her decision to get on the road despite warnings from Houston's mayor to "hunker down." Leal drove toward College Station in total darkness. "The wind was blowing. The lights were out. There were two or three people out on the road," she says. She could feel the wind tossing her car from side to side. "My husband's knuckles were white from holding onto the steering wheel so tight."

On Galveston Island, Larry Drosnes was taking shelter at the sheriff's office. The power went out late Friday night for most of Galveston Island. Drosnes says he could see the swaying of the trees and hear the wind.

The wind woke Sistrunk up from his sleep at the sheriff's office. He and 10 other people slept in one room on prisoners' cots. "I woke up to the noise and everyone checking out the water level," Sistrunk says. He could see that they were surrounded by water despite the total darkness outside. "It looked like a lake. Think about a castle surrounded by a moat. We were the island surrounded by water. You could hear waves lapping in the distance and metal flapping and hitting something."

Lopez was sleeping at her sister-in-law's house in Houston when she

Continued on page 14

Continued from page 13

was awoken late Friday night. Her sister-in-law had warned her to get away from the windows and to move into the hallway because of the wind. Lopez remembers looking out and seeing the buckling windows and trees. "The windows were like a bag in the wind. I could see them go in and out," Lopez says. "I remember the trees bending to the point of breaking."

Things we lost during the storm

The morning after the storm, people were shocked at the damage. "It was like a bomb had gone off," Leal says. Whole houses and been picked up and moved, and debris was everywhere.

Leal lost her parents two months before the storm. However, she's grateful to have survived. "You lose your parents, your mom and dad, and a storm comes and washes everything away—but you're still alive," Leal says of the damage caused to her parents' house. "I freaked out when I saw the trees down in the yard, but when I ran up to my house and opened the door, I started screaming," Leal says. "I screamed because nothing had happened to my house. I was so grateful." The storm had flooded her garage and destroyed her cars. She is in the process of cleaning the debris from her home.

The people who had evacuated Galveston Island had to wait two weeks before authorities let them back onto the island to view their property. "The worse part is not knowing," Lopez says about not being allowed to return home. "I couldn't control the situation." She started to cry when she first saw pictures of Galveston Island. "We were still hopeful, but we were sure we lost everything," she says. "When we saw the pictures, we knew we lost everything. We thought about our stuff, the clothes on the floor."

Drosnes says the damage on the island caused by the storm was incredible. "There was complete devastation the likes I've never seen in the 61 years I've been in Galveston," he says. "There were boats on the street. Buildings were completely gone. Houses where there was nothing but a slab. There was debris and destruction everywhere." Drosnes lost the bottom half of his home but is grateful to have lived through the storm. "Once we survived the surge, everything else is insignificant," he says. "As a result of the storm, I recognize how short life is and how some of the things we worry about during our lives are insignificant." Drosnes plans to rebuild his home.

On his return to check on his home, Sistrunk could see Blackhawk helicopters circling the island. "This is what it's like when you're in the zone of destruction," Sistrunk says. "You couldn't drive one block down Seawall Boulevard because there was so much debris" from downed billboards to uprooted light poles. "There were rocks and boulders everywhere." He returned home expecting to see a water line that reached almost to the roof of the house. "When I took the boards off, I was shocked and elated when I didn't see the water and didn't smell anything inside," he says. "The fact that it hadn't flooded was truly a miracle." It was important to him to restore the house to the way his children remembered it before the storm.

In Houston, Lopez saw the damage downtown caused by the storm. "That was a scene," she says. "The streetlights were hanging by one spare wire. Power lines were on the street. It's a pretty amazing sight. It made you feel even worse because Galveston was five times worse." Lopez lost everything in her first-floor apartment. When she returned home, books were littered on the floor and mold was growing on her clothes; "our shoes had actually split and mold was growing on them." She says it's hard to imagine how quickly she lost everything. "When you don't see your stuff disappear, you keep remembering about the last time you saw it," she says. Lopez relocated to Webster, a town 20 miles from Galveston Island, with her husband.

Assistant Criminal District Attorney Brian Carter fled with his fiancée to San Antonio during the storm. When he returned, he found his house completely destroyed by the storm. Everything in his house had molded over, including his beloved Aggie Corps of Cadet boots. He and his fiancée spent days sorting through the items in their home. "I wish the storm had washed away the whole house instead of just damaging and leaving things sitting there ruined," Carter says. He says the storm forced him to purge the place and go "through each individual memory." He is currently living with a coworker and will return to the

island next month.

Assistant Criminal District Attorney Susan Martin says her dream was always to own a home on the water. She had evacuated from hurricanes in Florida but never had any hurricane caused damage in her 15 years living there. Two days after evacuating from her home in Bacliff, Martin returned to a home covered in a concrete-like mud. (Photos of her house are above and to the left.) Her first reaction was to "abandon ship and sell the place," but her husband convinced her to see the devastation not as a catastrophe but an adventure. Her neighbors helped Martin put up her fence so they could pen in their dogs, and her family "spent hours in the heat picking up thousand of rocks from our yard and returning them to the bulkhead." She is still in the process of rebuilding.

Assistant Criminal District Attorney Benton Sullivant evacuated from his home on the East End for two weeks after the storm. When he returned, he found a house

Continued from page 15

destroyed by a foot of floodwater. Outside, blocking his driveway was a large boat and a golf cart. (See photos to the right.) He got a bronchial infection from breathing the air during the extraction work, and his brother, who had come to help him, got food poisoning from eating the food on the island. As of press time, he still does not have gas, hot water, or electricity. He is in the process of rebuilding his home.

Legal secretary Kim Williams was born on Galveston Island and has lived there for over 41 years. The storm destroyed her home. "I lost everything. A lot of my memories are gone. My home is gone; everything is destroyed," Williams says. She compares the devastation caused by the storm to a divorce. "You've been with someone a long time and then dramatically you're forced to separate and you'll never get what's gone. You lose your friends and your life as you knew it."

However, like many long-time residents of Galveston, Williams is confident life in Galveston will get back to the way it was. "I'm optimistic that everything will come back to normal. We'll be productive again. The children will come back and regain the family life they had." Williams currently lives in Texas City. She does not intend to return to the island.

Leal says that the storm has reminded her about the important things in life. "It's taught me to be more humble, more appreciative," she says. "I'm more grateful for everything I have in life: running water, lights, power." For the first time in many years, she is getting to

know her neighbors.

Martin was reminded of all her family and friends who called and emailed to check on her. "I will remember the bonds I developed with my neighbors when we really talked for the first time in three years because we weren't distracted by cable TV or other activities," she says. "I will remember all the volunteers, police, and military personnel who took time away from their lives to give us ice and water and meals."

Sistrunk was reminded that "the force of mother nature can be overwhelming." He is grateful that he, his family, and the staff of the DA's office survived the storm. His thoughts and prayers remain with those affected by Hurricane Ike. "We were very fortunate considering the untold numbers that lost their homes and loved ones. I hope that it is a once-in-a-lifetime storm for everyone that suffered a loss."

Epilogue

The attorneys and staff at the district attorney's office were assigned to various locations in Galveston County for two weeks after the storm. They have returned to their offices at the courthouse, which were undamaged by the storm.

If you'd like to help the people of Galveston County who were affected by Hurricane Ike, please contact the Galveston County Office of Emergency Management at: 281/309-5002.

Editor's note: Author Thuy Le had moved to her new home on Galveston Island six days before the storm hit. She is living with her parents in Houston while she is waiting for electricity to be restored to her house. She can be contacted at thuy.le@ co.galveston.tx.us.

Counts, paragraphs, and jury unanimity

Recent developments in the law impact how an indictment should be structured, how the jury can be charged, and whether you get to keep your hard-earned convictions.

By Holly Taylor
Assistant District Attorney in Travis County

Two years ago in an article in the *Texas Prosecutor*, Harris County ADA Alan Curry warned of the dangers of charging the jury in the disjunctive for conduct alleged in separate counts. He explained that, under the seminal cases of *Ngo v. State*[1] and *Francis v. State*,[2] charging distinct offenses disjunctively in the jury charge could cause a violation of the defendant's right to "jury unanimity." As Alan predicted, although the law of jury unanimity originally came up most frequently in child sex abuse cases, it has now been applied in numerous criminal cases with varying results. In addition, in 2007, the Court of Criminal Appeals handed down an important case impacting how indictment language should be interpreted.[3] Together these two lines of cases have complicated the process of constructing and construing indictments and charging juries.

Counts or paragraphs—what's the big deal?

The State may join separate offenses in one indictment with each offense alleged as a separate count as long as the offenses arise out of the same criminal episode. The term "criminal episode" is defined as offenses committed pursuant to the same transaction or scheme or the repeated commission of the same or similar offenses.[4] As a general rule, the term "count" in an indictment is used to charge each offense itself, and "paragraph" refers to the portions of a count that charge the methods, theories, or "manner or means" of committing that offense.[5] Texas courts of appeals have historically looked at the substance of the allegation in an indictment, not the terminology or headings used, to determine its character as a "count" or "paragraph."[6] Though the Court of Criminal Appeals has subscribed to this understanding, it has not been as explicit about it as the courts of appeals.[7]

Nevertheless, without overruling or limiting this line of authority, the Court of Criminal Appeals held in 2007 that labeling a section of text in an indictment as a "count" restricts the State to only one conviction for that section of text, regardless of how many criminal acts were actually alleged therein.[8] In *Martinez v. State*, a three-count indictment charged the defendant with indecency by contact, indecency by exposure, and aggravated sexual assault of his minor stepdaughter. These three counts contained a total of eight paragraphs, each of which actually alleged a separate criminal act and a distinct offense (e.g., "penetrated the complainant's anus with his sexual organ" and "caused the complainant's sexual organ to contact his mouth").[9] Realizing the potential for a jury unanimity error if the jury were allowed to choose among these criminal acts in reaching a general verdict, the trial court instructed the jury to unanimously find (on separate verdict forms) whether the defendant committed each of six different criminal acts.[10] The defendant ultimately received four convictions based on the three-count indictment.[11] Citing the defendant's due process right to notice and right to grand jury screening of the charges, the court held: "Because there were only three counts … the indictment authorized only three convictions (and only one conviction per count)."[12] The court set aside one of the convictions, leaving the defendant with one conviction per count.

There are not a lot of cases on the books yet interpreting *Martinez*. The Third Court of Appeals (whose original decision was reversed in *Martinez*) has steadfastly adhered to the precedent set by *Martinez*.[13] Meanwhile, in other contexts, courts of appeals have continued to rely on the line of cases holding that the indictment should be interpreted according to the true meaning of its language.[14] However, the result in those cases has not contradicted the court's holding in *Martinez* that a defendant may not receive more convictions than the number of counts in the indictment.

The more you *Ngo* (about jury instructions)

Texas law requires a unanimous jury verdict in felony criminal cases,[15] meaning that the appellate court must be able to tell from the jury instructions and verdict forms that the jury was in unanimous agreement as to each element of the particular felony offense at issue. Courts have also extended the unanimity requirement to lesser-included offenses and attempted (inchoate) offenses.[16] How the jury instruction should read depends on whether you are dealing with different manner and means or different offenses.

In general, if an indictment alleges different methods of committing an offense in the conjunctive (acts separated by "and"), it is appropriate to submit the different methods to the jury in the disjunctive (acts separated by "or").[17] Prosecutors often repeat the rule of thumb, "Plead in the conjunctive; charge in the disjunctive," though it is getting harder and harder to use that as a general rule. Jurors can pick and choose among the acts and render one unanimous general verdict, so long as their choices merely involve theories ("manner and means") or "underlying brute facts" of one criminal offense.[18]

On the other hand, acts that are really "separate offenses" should not be submitted to the jury in the disjunctive (that is, separated by "or").[19] If distinct offenses are charged disjunctively to the jury and the jury reaches a general verdict, then the appellate court cannot tell what criminal act the jury agreed on, if any. The jury is effectively allowed to come to a non-unanimous verdict and the defendant's constitutional rights are violated.[20]

This distinction may sound simple in theory, but it is not so simple in practice. The trick is in determining from the statutory language what represents a different method, theory, or "manner and means" and what constitutes a different offense altogether. The Court of Criminal Appeals has historically focused on whether the statute is conduct-oriented, result-oriented, or a "nature of circumstances" offense. If the offense is a "result of conduct" crime, then different types of results are likely to be separate offenses and different types of conduct may be manner and means. On the other hand, if the offense is a "nature of conduct" crime, then different types of conduct set out in the statute are likely to be separate offenses, but their results may be manner and means. Likewise, if the statute sets out a "nature of circumstances" offense, the jury must be unanimous about the statutorily defined circumstances surrounding the offense.[21]

Unfortunately for those of us who long ago threw away our middle school textbooks, the Court of Criminal Appeals has in recent years employed an "eighth-grade grammar test" in determining whether an offense is result-oriented or conduct-oriented and in identifying the specific elements about which the jury must agree.[22] The essential elements of an offense are generally: 1) the subject (the defendant); 2) the main verb; 3) the direct object if the main verb requires a direct object; the specific occasion; and the requisite mental state. Generally, the offense is result-oriented if the verb used in the statute is "causes" and the direct object is some type of injury.[23] The manner and means of commission (or nonessential elements) are generally set out in "adverbial phrases" introduced by the preposition "by" that describe how the offense was committed.[24] The jury usually does not have to be unanimous about the conduct contained in such adverbial phrases.

In addition, the court looks at whether the statute uses the conjunction "or" to distinguish different conduct and whether the subsections of the statute specifically define conduct in ways that usually require different and distinct acts. If so, the court is likely to interpret those statutory subsections as separate offenses about which the jury must be unanimous, rather than manner and means.[25]

Eighth-grade grammar lessons

Texas courts have had a chance to exercise their elementary grammar skills in applying jury unanimity law to various penal statutes. The results have been mixed.

Homicide

Jury unanimity issues have arisen in all types of homicide cases. As a general matter, the courts have held that different homicide theories involving the death of the same victim are simply alternate methods of committing the same offense. This is because murder is a result-oriented crime, and the death of the victim is the gravamen of the offense.[26]

Accordingly, courts have not required unanimity in murder cases regarding Penal Code §19.02(b)(1)

Continued on page 20

Continued from page 19

and (2)—i.e., whether a defendant intentionally caused the victim's death or intended to cause the victim serious bodily injury and committed an act clearly dangerous to human life.[27]

In *White v. State*,[28] the felony-murder indictment alleged in two paragraphs that the defendant caused the victim's death during the commission of unauthorized use of a vehicle and during the commission of evading arrest. The jury charge allowed the jury to convict the defendant of felony murder if it found that he caused the victim's death while committing either one of these two felonies.[29] The Court of Criminal Appeals noted that the transitive verb of §19.02(b)(3) was "commits" followed by the term "felony." Thus, the court held that the jury had to be unanimous about whether the defendant committed a felony, but not any specific felony. The various specific felonies the defendant may have committed were merely manner and means and did not require jury unanimity.[30]

On the other hand, the Court of Criminal Appeals found reversible error where a jury was not instructed that it must unanimously agree upon any one of the three different criminal acts: the murder of the defendant's mother, the murder of his father, or the murder of both.[31] Although the court did not fully explain its holding, these allegations clearly involved the death of more than one victim.

Assault and aggravated assault

Appellate courts have really struggled in applying jury unanimity principles in assault cases. In *Dolkart v. State*, the defendant became impatient with a slow-riding bicyclist who was blocking her path and ran into him with her car. The bicyclist grabbed her bumper on the way down and was dragged underneath her car.[32] The court's charge allowed the jury to find the defendant guilty of aggravated assault by threat *or* by bodily injury with the use of a deadly weapon (her car). The court noted that bodily injury assault is a "result of conduct" offense that can be committed intentionally, knowingly, or recklessly and focuses on the result of actual bodily injury. In contrast, assault by threat is a "nature of conduct" offense that can only be committed intentionally or knowingly and focuses on the conduct of "threatening others." The court also observed that the different types of conduct proscribed by Penal Code §22.01(a) are found in different subsections, include different transitive verbs, and are separated by "or."[33] Therefore, the court held that the legislature intended assault by threat and assault by bodily injury to be different statutory offenses, not just different manner and means of committing an assault.[34] Because the charge allowed the jury to convict the defendant without requiring it to unanimously agree whether she committed aggravated assault by bodily injury or aggravated assault by threat, the charge was erroneous.[35]

However, the courts have held that jurors do *not* need to be unanimous about the means that the defendant uses to commit a particular bodily injury assault or assault by threat. The Third Court of Appeals held that the jury need not be unanimous about whether the defendant smothered the victim with a plastic bag, strangled her with a piece of a plastic bag, or smothered her by putting his hand over her mouth and nose. These violent acts all fell under the same statutory subsection.[36]

On the other hand, in *Landrian v. State*, the First Court of Appeals held that a defendant was denied the right to a unanimous jury verdict where the charge allowed the jury to convict him of aggravated assault without unanimously determining whether he intentionally or knowingly caused bodily injury with a deadly weapon or recklessly caused serious bodily injury.[37] The defendant threw a broken bottle or smashed a bottle, injuring the victim and causing him to lose his left eye. The Houston court held that there are at least three separate and distinct offenses of aggravated assault and the jury must be unanimous about which of these offenses the defendant committed.[38] The two statutory subsections at issue—Penal Code §22.02(a)(1) and (2)—have different direct objects (serious bodily injury vs. bodily injury). The court concluded that they were distinct criminal acts about which the jury must be unanimous.[39]

The Court of Criminal Appeals recently overturned the Houston court's decision.[40] The high court focused the eighth-grade grammar lens on the aggravated assault statute to identify the subject ("the defendant"), the verb ("causes"), and the direct object ("bodily injury"). These are the elements about which the jury must be unanimous in this result-oriented offense. The court said that the precise act committed

by the defendant is "inconsequential." Further, the jury need not be unanimous about the culpable mental state (intentional, knowing, or reckless). And because serious bodily injury is always inflicted with a deadly weapon, the jury need not be unanimous about the aggravating factors (causing bodily injury with a deadly weapon or causing serious bodily injury).[41] In either case, it "is still the same single criminal act and still the same single bodily injury to the victim."[42] Although the court was unified in its result, some judges disagreed about aspects of the court's reasoning. Judge Price's concurring opinion warns that, under different facts, a jury unanimity problem could occur.[43]

Injury to a child

The Court of Criminal Appeals has already handed down two important opinions applying jury unanimity law to injury to a child cases. In *Jefferson v. State*, a couple had severely abused their child and failed to obtain medical care for him until the baby finally died from their abuse. Yet it was not totally clear whether the defendant (the father) personally inflicted the fatal blow. The jury charge allowed the jury to convict him if they found that he caused the injury by kicking the child, causing the boy's head to strike an unknown object, failing to intercede to stop the abuse, or failing to seek necessary medical care for the boy. The court examined the text of the statute and found that its essential element or focus was the result of the defendant's conduct (in this case, serious bodily injury to a child) and not the possible combinations of conduct that might have caused the result.[44] In Judge Cochran's concurring opinion, she noted that the active verb in the statute was "causes," which requires a direct object ("serious bodily injury"). She explained that this combination of verb and direct object creates the *actus reus* of the offense about which the jury must be unanimous.[45] The jury does *not* have to agree about whether the defendant caused the injury to the child by a particular act/omission, just that he caused the injury.[46]

Accordingly, in *Stuhler v. State*, the court held that the jury *must be unanimous* about the different *results* of the injury to the child (i.e., "serious bodily injury," "serious mental deficiency, impairment, or injury," or plain "bodily injury").[47] In *Stuhler*, the defendant, who returned home tired from her morning paper route each day, repeatedly duct-taped her 3-year-old stepson to the toilet seat for hours on end. The evidence showed the little boy was seriously traumatized and suffered from severe constipation. The appellate court reversed her conviction. The court held that the jury charge impermissibly allowed the jurors to find Stuhler guilty without necessarily agreeing whether she caused serious bodily injury or serious mental injury.[48]

Sexual offenses

Reversals on jury unanimity grounds continue to be a problem in child sexual abuse cases. In *Pizzo v. State*, the indictment alleged that the defendant touched the child victim's genitals and breasts, and the evidence at trial showed that he had touched *both* the genitals and breasts of the child.[49] The jury charge allowed the jurors to convict him of indecency if he touched the child's genitals *or* breasts. The Court of Criminal Appeals parsed the indecency with a child statute, Penal Code §21.11, according to the rules of grammar. The court observed that the main verb is "commits" and the direct object is "offense," referring to the subsequent direct object, "sexual contact." The court found that the specific conduct was the focus of the definition of "sexual contact" (e.g., touching the anus, touching the breast, or touching the genitals with the required mental state). This was the element about which the jury must be unanimous, yet the *Pizzo* jury charge did not ensure such unanimity. The court found error and remanded for a harm analysis.[50] On remand, the Corpus Christi Court of Appeals held that the error was harmful and the defendant received a new trial.[51]

Failure to stop and render aid

In a case handed down this October, the Court of Criminal Appeals held that various statutory methods for committing "failure to stop and render aid" (Transportation Code §550.021) do not constitute separate offenses but are merely alternate means of committing the same offense.[52] The majority determined that "failure to stop and render aid" is a "circumstances surrounding the conduct" offense because what makes the conduct unlawful is that it was done under certain circumstances. Therefore, the gravamen of the offense is the occurrence of a wreck under the prescribed circumstances. "Failing to stop," "failing to

Continued on page 22

Continued from page 21

return," and "failing to remain" are simply alternate manner and means of committing the same offense.[53] Judge Cochran wrote separately to explain that, had the majority clearly applied eighth-grade grammar rules to this statute, it would have reached the same result. The legislature used a single verb phrase within a single subsection of the statute (subsection (c)) to create a single criminal offense (failing to stop or comply with the statutory requirements). The conduct set out in subsections (a)(1), (a)(2), (a)(3), and (b) simply defines the "requirements" with which the person must comply.[54]

Other offenses

Resisting arrest, resisting search, and resisting transport under Penal Code §38.03 are merely three means by which a defendant commits the offense of preventing or obstructing a police officer's completion of his duties. The jury does not have to be unanimous about these methods.[55] Also, the jury is not required to agree unanimously on the specific component of self-defense it is rejecting.[56] Aggravated kidnapping is a result-oriented offense. The allowable unit of prosecution is the abduction of a single victim and the statutory aggravating factors are merely manner and means.[57] In addition, in a DWI case, the jury does not have to be unanimous about which way they think the defendant is intoxicated under the definitions of "intoxicated" contained in Penal Code §49.01. These types of intoxication are not separate offenses or even manner and means. They are simply ways of showing evidentiary proof of the element of intoxication.[58]

Electing a sex act

Texas appellate courts have long held that, if more than one sexual act is shown by the evidence that matches the description under a single count in the indictment, upon a defense motion the State must elect the particular incident ("transaction") it will rely on for conviction.[59] Originally these cases were based on the defendant's right to notice, but recently the courts have tied these cases into the law of jury unanimity.[60]

Before the State rests its case-in-chief, the trial court has *discretion* to direct the State to make the election. Once the State rests, upon a timely request by the defendant, the trial court *must order* the State to make the election, and failure to do so constitutes error.[61] Absent a motion by the defendant, however, the State is not required to make such an election.[62] Once the State elects the sexual act it will rely on for conviction, the defendant is entitled to an instruction telling the jury to consider only the elected act in deciding guilt. The instruction should limit the jury's consideration of the other (now extraneous) sexual acts to the purposes for which they were admitted.[63]

There is an exception to the rule requiring election. The State need not elect where several acts of intercourse were committed by one continuous act of force and threats and were part of the same criminal transaction.[64] For example, the Court of Criminal Appeals held that the State was not required to elect a sex act in a case in which the defendant met the victim at a nightclub and then raped her at knife and gun point twice within a two-hour period.[65] This exception has proved to have very limited applicability; it does not apply where the victim was molested over a period of months or years, even if the defendant continued to threaten the victim.[66]

Although the election requirement is mandatory, failure to properly elect may be harmless under some circumstances, for example, where the testimony at trial focused on one offense and the others were simply mentioned in passing.[67] Also, failure to elect a sexual act may be found harmless where the victim is particularly young and does not distinguish in her testimony among the many offenses. For instance, in *Dixon v. State* the child victim (the defendant's 6-year-old niece) testified that the abuse occurred 100 times. A gynecological examination of the little girl showed serious damage to her hymen and the beginnings of genital warts.[68] The Court of Criminal Appeals held that the error in not requiring an election did not harm the defendant because the only distinction the victim made between the 100 incidents was that one occurred during the day.[69]

The new continuous sexual abuse of a child statute (Penal Code §21.02) may help alleviate jury unanimity problems in child sex abuse cases by allowing prosecutions for a continuing pattern of sexual abuse of a particular victim over the course of months or years. This statute provides that "members of the jury are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed." The statute requires that the "jury must agree

unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse."[70]

What if the defense does not object?

The defendant's failure to object to jury unanimity error does not waive error, but it does affect the analysis used by the court. This area of the law is so confusing that it confounds prosecutors, trial judges, and defense attorneys alike. As a result, jury unanimity errors often pass through a trial undetected, encountering no objection. Prosecutors may breathe a sigh of relief seeing no objection to the charge, yet that sigh of relief may be premature. Even when a defendant urges jury charge error for the first time on appeal, he is not out of luck if he can show "egregious harm."[71] "Egregious harm" means that the error affects "the very basis of the case," deprives the defendant of a "valuable right," or "vitally affects a defensive theory."[72] If the appellate court decides that the jury charge error does one of those three things, the case will be reversed despite the fact that the defendant may not have objected to the charge.[73] In fact, even if defense counsel affirmatively stated that he had "no objection" to the charge, the defendant can still obtain a reversal if the court decides there is egregious harm.[74]

In assessing harm, the appellate court will look at the whole trial, especially any questions asked by the jury and the State's jury arguments. Neither party bears a burden of proof.[75] If the State has made a mix-and-match jury argument contending that the jurors need not all agree on which one of the disjunctively-charged acts the defendant committed, it can contribute to finding of egregious error. This is what this "mix-and-match" jury argument looks like:

> The important thing with this is that if three of you who end up sitting on the jury panel feel like he stole the credit card and used it, six of you think that he received it, and three of you think he presented it, it doesn't matter which one you think he did. It can be a mix and match, whichever one you believe.[76]

A mix-and-match jury argument like this one compounds the jury-charge error because the prosecutor has effectively informed the jurors that they need not be unanimous.[77]

However, jury unanimity errors have occasionally been found to be harmless. For example, in *Martinez v. State* (a court of appeals case unrelated the *Martinez* decision mentioned earlier), although the trial court erred in allowing a conviction upon a disjunctive finding between two separate offenses (contact with sexual organ *or* anus), the appellate court found that the error was harmless.[78] The defensive theory was that the charges were completely baseless. The First Court of Appeals explained that a juror would either have found that the defendant committed the aggravated sexual assaults or that he had not sexually assaulted the complainant at all. There was simply no reason for any individual juror to differ on whether defendant had vaginal or anal contact with the complainant.[79]

Fixing the problem

In an ideal world, penal statutes would be written clearly, and it would be easy to tell a distinct offense from mere manner and means. Every criminal act alleged in an indictment would be contained in a separate count, and only true manner and means would be alleged in paragraphs.[80] But in the real world, you may not realize your indictment has a potential unanimity problem until after trial starts or even until the charge conference. What can you do to protect your verdict?

It is important to examine the indictment in advance of trial to determine if each count alleges a single, distinct offense and that all paragraphs are truly manner and means. If you find a problem, the indictment could possibly be amended with adequate notice to the defendant in compliance with Texas Code of Criminal Procedure Article 28.10. Prosecutors should be prepared to allow the defense 10 days to respond to the amended indictment and to explain to the court why the change does not charge the defendant with an additional or different offense under Article 28.10.

If the indictment cannot be amended, then prosecutors must take steps to ensure that the jury verdict will be unanimous. In *Ngo,* the Court of Criminal Appeals noted, "The error here is not in submitting the three separate offenses 'in the disjunctive.' The error is in failing to instruct the jury that it must be *unanimous* in deciding which one (or more) of the three disjunctively submitted offenses it found appellant committed."[81] Thus, the court

Continued on page 24

Continued from page 23

left open the possibility that a jury charge could contain multiple distinct offenses separated by "or," so long as the charge clearly instructed the jurors that they must unanimously find that the defendant committed at least one of the enumerated offenses.

How should this "unanimity instruction" be phrased? Judge Cochran in *Ngo* explained that, if each of the application paragraphs submitted to the jury had included "just one additional word: 'unanimously,'" all 12 jurors would have known that they had to unanimously agree on at least one specific paragraph, and no error would have occurred.[82] She suggested introducing each application paragraph with the following phrase: "If you unanimously find from the evidence beyond a reasonable doubt …"[83] Conversely, a boilerplate statement in the charge telling the jurors that their verdict must be unanimous usually will *not* cure a jury unanimity problem.[84]

The Court of Criminal Appeals has endorsed another possible solution when addressing the grand jury screening issue. When indictment paragraphs appear to allege acts that are really distinct offenses, the trial court can provide separate application paragraphs—and corresponding separate verdict forms—ensuring that the jurors render a unanimous verdict for each criminal act alleged in the indictment. Then, after the jury renders its verdict(s), the trial court should check to see if there is more than one guilty verdict for conduct alleged in a single count of the indictment. If so, the trial court should retain the verdict for the most serious offense and strike or refuse to accept the other convictions arising from the same count.[85] If you follow this approach but the trial court does not appropriately strike the extra convictions, you may lose some of the convictions on appeal, but you should not suffer a full reversal.

Alternatively, after the close of evidence, the State can waive or abandon some of the conduct alleged in the indictment, electing to proceed on only one criminal act/paragraph (and one verdict form) per count.[86] The negative aspect of this approach, of course, is that the prosecution may not know what evidence the jury found most compelling. The State might end up with a not-guilty verdict when the jury was ready to convict the defendant for an indicted act that was never presented to them.

In addition, in the event that the evidence at trial reveals that the defendant committed a particular sexual act more than one time that matches a single allegation in the indictment (e.g., aggravated sexual assault by causing the penetration of the victim's sexual organ), the defense may move for an election. If the defense so moves, after the State rests, the State must elect the particular incident it will rely on for conviction. This election must be communicated to the jury as clearly as possible under the circumstances. Admittedly, this can be difficult when the victim is a very young child.

Whichever approach prosecutors take, please proceed with caution. The potential for reversals or loss of convictions even without any defense objection shows that this is an area in which it pays to do some research. Good luck!

Endnotes

1 *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005).

2 *Francis v. State*, 36 S.W.3d 121, 124-25 (Tex. Crim. App. 2000) (op. on reh'g).

3 *Martinez v. State*, 225 S.W.3d 550 (Tex. Crim. App. 2007).

4 See Tex. Code Crim. Proc. Art. 21.24; Tex. Penal Code §3.01.

5 See *Id.*; *Owens v. State*, 96 S.W.3d 668, 673 (Tex. App.—Austin 2003, no pet.); *Renfro v. State*, 827 S.W.2d 532, 535 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

6 See, e.g., *Tyson v. State*, 172 S.W.3d 172, 177 (Tex. App.—Fort Worth 2005, pet. ref'd); *Patterson v. State*, 96 S.W.3d 427, 433 (Tex. App.—Austin 2002), *aff'd by* 152 S.W.3d 88 (Tex. Crim. App. 2004); *Gahl v. State*, 721 S.W.2d 888, 895 (Tex. App.—Dallas 1986, pet. ref'd).

7 For instance, see *Bates v. State*, 587 S.W.2d 121, 129 (Tex. Crim. App. 1979) (the CCA upheld a trial court's refusal to quash an indictment that contained multiple manner and means of committing bribery in one indented section connected by "and's" because the single paragraph did not allege more than one offense); *Hebert v. State*, 586 S.W.2d 529, 531 (Tex. Crim App. 1979) (the CCA read the second unlabeled paragraph of Count II as really being an additional count because it charged a separate offense); and *Villarreal v. State*, 143 Tex. Crim. 298, 158 S.W.2d 490 (Tex. Crim. App. 1941) (the CCA read the first two indented paragraphs of each count of the indictment together to form each count and ignored confusing surplusage, then held that the indictment contained sufficient allegations, when considered as a whole, as to the three principals).

8 *Martinez*, 225 S.W.3d at 554 (because each "count" alleges a single offense, an indictment cannot authorize more convictions than there are counts).

9 *Martinez*, 225 S.W.3d at 552; see also *Vick v. State*, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (holding that the separately described conduct in Penal Code §22.021(a)(1)(B) is a separate statutory offense).

10 The State waived two of the eight paragraphs. *Id.*

11 *Id.* at 553-554.

12 *Id.* at 554.

13 See *Sledge v. State*, 2008 Tex. App. LEXIS 6463 (Tex. App.—Austin Aug. 19, 2008, no pet h.) (pet. to be pending soon) ("appellant's failure to object to the jury charge is irrelevant because the error did not occur until after the charge was given, the verdicts were returned, and the judgments of conviction were rendered"). See also *Fowler v. State*, 240 S.W.3d 277 (Tex. App.—Austin 2007, pet. ref'd) (where jury convicted of six offenses on a three-count indictment, appellate court struck three of the convictions even though counsel did not object to the charge on these grounds—appellate court did not even consider the issue of error preservation).

14 See, e.g., *Gibson v. State*, 2008 Tex. App. LEXIS 4915 (Tex. App.—Texarkana delivered July 2, 2008, no pet. h.) (not designated for publication) ("As a matter of housekeeping, we point out that the two pieces of conduct alleged in the indictment are more accurately termed 'counts' as opposed to 'paragraphs'"); *Hernandez v. State*, 2008 Tex. App. LEXIS 4231 (Tex. App.—El Paso delivered June 12, 2008, no pet. h.) (not designated for publication) ("Although the State lists two 'counts' in the indictment, the State was merely describing the alleged methods Appellant used in committing the offense of murder").

15 Tex. Const. art. V, §13; Tex. Code Crim. Proc. art. 36.29(a).

16 *Hisey v. State*, 161 S.W.3d 502 (Tex. Crim. App. 2005); *Rangel v. State*, 199 S.W.3d 523, 540 (Tex. App.—Fort Worth 2006, pet. improvidently granted).

17 See *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied,* 504 U.S. 958, 112 S. Ct. 2309, 119 L. Ed. 2d 230 (1992); *Johnson v. State*, 187 S.W.3d 591, 605 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd); *Jones v. State*, 184 S.W.3d 915, 922 n.6 (Tex. App.—Austin 2006, no pet.).

18 See *Ngo*, 175 S.W.3d at 747 (the jury must unanimously agree on each "element" of the crime in order to convict but need not agree on all the "underlying brute facts [that] make up a particular element"); *Francis*, 36 S.W.3d at 125.

19 *Francis*, 36 S.W.3d at 124-25.

20 See *Ngo*, 175 S.W.3d at 748; *Francis*, 36 S.W.3d at 125; *Martinez v. State*, 190 S.W.3d 254, 259 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (the trial court erred in allowing a conviction upon a disjunctive finding between two separate sexual offenses).

21 *Huffman v. State*, ___ S.W.3d ___, No. PD-1539-07 (Tex. Crim. App. delivered Oct. 1, 2008).

22 See, e.g., *Landrian v. State*, ___ S.W.3d___, No. PD-1561-07 (Tex. Crim. App. delivered October 8, 2008).

23 See, e.g., *Id; Huffman*, No. PD-1539-07; *Stuhler v. State*, 218 S.W.3d 706, 718-719 (Tex. Crim. App. 2007).

24 *Pizzo v. State*, 235 S.W.3d 711, 714-715 (Tex. Crim. App. 2007); *Jefferson v. State*, 189 S.W.3d 305 (Tex. Crim. App. 2006) (Cochran, J., concurring); *Ngo*, 175 S.W.3d at 745-46, n. 24.

25 *Vick*, 991 S.W.2d at 833.

26 *Huffman*, No. PD-1539-07.

27 *London v. State*, 2008 Tex. App. LEXIS 6995 (Tex. App.—Dallas Sept. 22, 2008, no pet. h.); *Yost v. State*, 222 S.W.3d 865, 877-78 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); see also *Ngo*, 175 S.W.3d at 746, n. 27 (noting that the gravamen of the offense of murder, on which the jury must be unanimous, is causing the death of a person, such as Rasputin; but the jury need not be unanimous on the manner and means—"by poisoning, garroting, shooting, stabbing, or drowning"—of how Prince Yussupov caused Rasputin's death); *Kitchens*, 823 S.W.2d at 258 (no unanimity requirement for methods of committing capital murder); *Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987) (op. on reh'g).

28 208 S.W.3d 467 (Tex. Crim. App. 2006).

29 *Id.* at 467-468.

30 *Id.* at 469. Similarly, the El Paso Court of Appeals has held that the jury need not be unanimous about which reckless act the defendant committed in a manslaughter prosecution. *Rubio v. State*, 203 S.W.3d 448 (Tex. App.—El Paso 2006, pet. ref'd).

31 *Hisey*, 161 S.W.3d at 502-503.

32 *Dolkart v. State*, 197 S.W.3d 887 (Tex. App.—Dallas 2006, pet. ref'd).

33 *Dolkart*, 197 S.W.3d at 893.

34 *Id.*

35 *Id.* at 893.

36 See *Marinos v. State*, 186 S.W.3d 167, 175 (Tex. App.—Austin 2006, pet. ref'd) (it was not necessary for the court to require jurors to agree that the appellant used a bag, a piece of a bag, or his hand to inflict the bodily injury, or that it was the bag or his hand that the appellant used or exhibited while making the threat).

37 2007 Tex. App. LEXIS 6290 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, pet. granted).

38 *Id.* at *17-18; citing *Gonzales v. State*, 191 S.W.3d 741 (Tex. App.—Waco, 2006, pet. ref'd).

39 *Id.*; see also Penal Code §22.01(a)(1).

40 *Landrian v. State*, ___ S.W.3d___, No. PD-1561-07 (Tex. Crim. App. delivered October 8, 2008).

41 *Id.*; see also *Blount v. State*, 257 S.W.3d 712 (Tex. Crim. App. 2008).

42 *Id.*

43 *Id.* (Price, J., concurring).

44 *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006).

45 *Id.* at 315 (Cochran, J., concurring).

46 *Id.*; see also *Villanueva v. State*, 227 S.W.3d 744 (Tex. Crim. App. 2007) (the act and omission were simply two means of alleging and/or proving the same offense for double-jeopardy purposes).

47 *Stuhler v. State*, 218 S.W.3d 706, 718-719 (Tex. Crim. App. 2007).

48 *Id.* at 719-720.

49 *Pizzo*, 235 S.W.3d 711.

50 *Id.* at 718-719. This holding was consistent with the court's interpretation of Penal Code §22.021 in *Vick v. State*, 991 S.W.2d 830.

51 *Pizzo v. State*, 2008 Tex. App. LEXIS 5282 (Tex. App.—Corpus Christi July 17, 2008, no pet. h.) (unpublished); see also *Rangel*, 199 S.W.3d at 540-541 (the attempted breast-touching, asking the child to touch the defendant's genitals, and offering the child money so that defendant could touch her "private" were all different offenses and should not have been charged in the disjunctive within the same count); see also *Clear v. State*, 76 S.W.3d 622, 624 (Tex. App.—Corpus Christi 2002, no pet.) (finding egregious harm to defendant's right to a unanimous jury verdict when jury charge allowed conviction upon disjunctive submission of three separate sexual assault of a child offenses).

52 *Huffman*, No. PD-1539-07.

Continued on page 26

Continued from page 25

53 *Id.*

54 *Id.* (Cochran, J., concurring).

55 *Clement v. State*, 248 S.W.3d 791, 801 (Tex. App.—Fort Worth 2008, no pet.).

56 *Harrod v. State*, 203 S.W.3d 622, 628 (Tex. App.—Dallas 2006, no pet.).

57 *Gonzales v. State*, ___ S.W.3d ___, No. 07-07-0302-CR (Tex. App.—Amarillo delivered October 3, 2008, no pet. h.).

58 See *Barbernell v. State*, 257 S.W.3d 248 (Tex. Crim. App. 2008) (the definitions of "intoxicated" in Tex. Penal Code §49.01(2) are evidentiary and do not need to be alleged in a charging instrument); see also *Fulenwider v. State*, 176 S.W.3d 290, 298 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (trial court did not err by charging the jury disjunctively on the means of intoxication); and *Bradford v. State*, 230 S.W.3d 719, 723 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (appellant fails to demonstrate that jury unanimity is required on DWI as between the loss of mental and physical faculties).

59 See *O'Neal v. State*, 746 S.W.2d 769, 771 (Tex. Crim. App. 1988); *Crosslin v. State*, 235 S.W. 905 (Tex. Crim. App. 1921).

60 See *O'Neal,* 746 S.W.2d at 771-772 (a defendant might find himself without notice as to which of a multitude of acts he might be called upon to defend); and compare *Phillips v. State*, 193 S.W.3d 904, 910 (Tex. Crim. App. 2006) (forcing State to elect ensures unanimous verdicts).

61 *Phillips*, 193 S.W.3d at 909 (State has the privilege "to delay election until such stage in the development of the evidence as would give the State an opportunity to intelligently determine upon which transaction it prefers to rely for a conviction").

62 *O'Neal*, 746 S.W.2d at 771 n.3; cf. *Phillips*, 193 S.W.3d at 912 (defendant preserved his right to a unanimous verdict by calling for an election at the close of the all evidence).

63 See *Isenhower v. State*, 2008 Tex. App. LEXIS 4167 (Tex. App.—Houston [14th Dist.] June 10, 2008, no pet. h.); *Rivera v. State*, 233 S.W.3d 403, 406 (Tex. App.—Waco 2007, pet. ref'd); *Martin v. State*, 176 S.W.3d 887, 905 (Tex. App.—Fort Worth 2005, no pet.).

64 O'Neal, 746 S.W.2d at 771.

65 *Steele v. State*, 523 S.W.2d 685, 686 (Tex. Crim. App. 1975); see also *Bethune v. State*, 363 S.W.2d 462 (Tex. Crim. App. 1962) (the exception applied where the victim was held by force and raped and forced to commit deviant sex acts several times in one night).

66 See *Phillips*, 193 S.W.3d at 911 (exception did not apply where complainants were molested at different locations over a period of months or years).

67 See, e.g., *O'Neal*, 746 S.W.2d at 772 ("By the close of the State's case, it was clear that the act upon which the State would rely for conviction").

68 *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006).

69 *Id* at n. 26.

70 Tex. Penal Code §21.02(d) (2008); see also Acts of May 18, 2007, 80th Leg., R.S., ch. 593, art. 1, § 1.17, 2007 Tex. Gen. Laws 1120, 1127-28.

71 *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984); *Abdnor v. State*, 871 S.W.2d 726, 731-32 (Tex. Crim. App. 1994).

72 *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006).

73 See *Stuhler v. State*, 218 S.W.3d 706, 716 (Tex. Crim. App. 2007) ("We agree with the court of appeals that the application paragraph did violate the appellant's right to a unanimous jury verdict and hold that this defect would require reversal of the conviction even under an egregious-harm standard of review").

74 *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004).

75 *Warner v. State*, 245 S.W.3d 458, 464 (Tex. Crim. App. 2008) (burdens of proof or persuasion have no place in a harm analysis conducted under *Almanza*).

76 *Ngo*, 175 S.W.3d at 750.

77 See *Clear*, 76 S.W.3d at 623-24 (egregious harm found where the prosecutor told the jurors that they didn't "all have to agree on which manner we've proven it to you, as long as we've proven one of these").

78 *Martinez*, 190 S.W.3d at 261-262.

79 See also *De Los Santos v. State*, 219 S.W.3d 71, 79 (Tex. App.—San Antonio 2006, no pet.) ("the *De Los Santos* jury was never told they could return a 'mix and match' verdict with some jurors finding De Los Santos guilty of one application paragraph and other jurors finding him guilty of the other application paragraph. There was no affirmative misstatement of the law on jury unanimity in this case").

80 Actually, in a truly ideal world this would all be a moot point because there would not be any crime!

81 *Ngo*, 175 S.W.3d at 749; see also *Warner*, 245 S.W.3d at 464 ("the jury charge is incorrect because it does not make clear that the jury had to find unanimously on at least one statutory offense").

82 *Ngo*, 175 S.W.3d at 749, n. 44.

83 *Id.*

84 See *Ngo*, 175 S.W.3d at 745 (the word "unanimously" appeared in jury charge only once, in section dealing with selection of jury foreman); *Soto v. State*, 2008 Tex. App. LEXIS 5654 (Tex. App.-Corpus Christi July 29, 2008, no pet. h.) ("We conclude that the 'boilerplate' unanimity instruction in the jury charge was insufficient to mitigate the harm caused by the prosecutor's confusing and erroneous argument.").

85 See *Martinez*, 225 S.W.3d at 555:

> When confronted with a single count that contains multiple allegations that are really separate offenses, the trial judge should protect the rights of both parties by submitting the separate allegations to the jury, but in such a way as to ensure that each allegation is decided unanimously. Perhaps the simplest way to do that is to submit separate verdict forms, as was done in the present case. … Once the judge receives the jury's verdicts, he should perform the task of deciding what judgment is authorized by those verdicts in light of the controlling law, the indictment, and the evidence presented at trial.

86 See *De Los Santos*, 219 S.W.3d at 78 n. 2 ("The problem created by this jury charge could have been avoided if the court had instructed the jury to reach a separate verdict on each count").

How to apply for free DWI training for peace officers and prosecutors

Thanks for your tremendous support of last year's Guarding Texas Roadways: DWI Summit. It is time to take that material and more to Texas communities for local officer and prosecutor DWI training.

The application process has changed and improved. To save gas and other resources, we have dedicated certain weeks to each TDCAA region (see a regional map below). Five training programs are scheduled in TDCAA regions 7 and 8 before the end of 2008:

- San Antonio on November 7,
- Vernon on November 20,
- Brownwood on November 21,
- Austin on December 5, and
- Fort Worth on December 12.

Promotional brochures and registration for those programs can be found at www.tdcaa.com/training. Registration for each school will open 30 days before the scheduled date. Space may be limited so spread the word quickly!

Each school needs a local prosecutor's office to host, and only a prosecutor's office can apply. Hosts commit to finding meeting space, promoting the training to local law enforcement, and providing refreshments. The responsibilities of the local host can be found in the instructions document at www.tdcaa.com/node/3246.

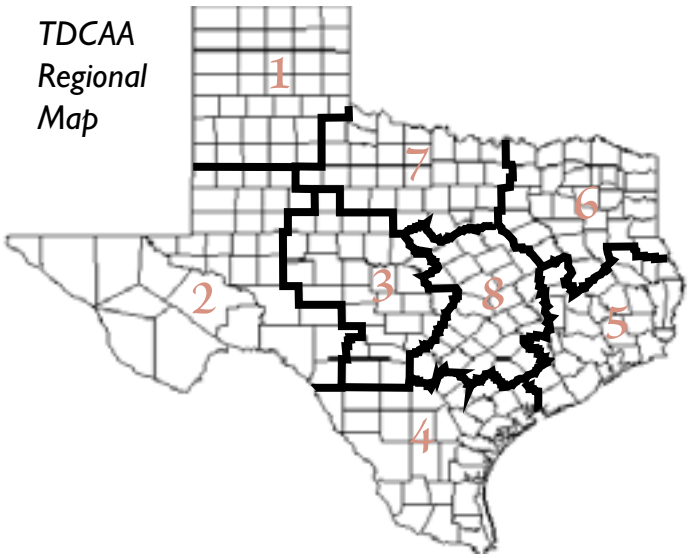
Here is a general calendar for the regions not covered by those five cities already noted:

Region 1: week of April 13
Region 2: week of April 27
Region 3: week of January 26
Region 4: week of May 11
Region 5: week of February 16
Region 6: week of June 8

In more rural areas we strongly encourage neighboring counties to coordinate in selecting a site and sharing the hosting responsibility. Due to limited resources, serving more than one office at one location is paramount! Because demand has constantly outstripped resources, we may have to tell some folks no.

To apply for DWI training in your jurisdiction, the prosecutor's office must complete the application online. Go to www.tdcaa.com/training and look for "Apply to host a DWI regional." Please gather local partners and apply before December 12; after that we will select all of our sites for 2009. We look forward to seeing you during the 2008-2009 grant year for more relevant, high quality, no-cost DWI training. Sign up to host a DWI seminar now!

TDCAA Regional Map



Applications for Chuck Dennis Award due Jan. 11

Applications for the Chuck Dennis Investigator of the Year Award are now being accepted. This award is given annually at the Investigator School in February to the TDCAA investigator who exemplifies the commitment of the law enforcement community to serving others, serving his or her office, and remaining active with TDCAA. Anyone in any prosecutors' office may nominate an investigator for this award; download a nomination form from www.tdcaa.com. Just search for "Chuck Dennis award." E-mail completed applications to Samme Glasby, the investigator board chair, at sglasby@co.collin.tx.us.

The award is named after Chuck Dennis, the first DA investigator in Victoria County.

Seven tips for trying one-witness DWI cases

Another misdemeanor DWI is set for trial—and it's almost identical to the other 248 DWIs you have prosecuted. This article will remind you to present each case in court as though it were the first one you ever tried to keep your jury motivated and attentive.

By Suzanne Jost
Assistant County Attorney in Kendall County

Not long ago, I successfully tried a run-of-the-mill DWI with a peace officer as my only witness. The defendant was a pleasant-looking older woman who dressed for court as though she were attending church. On the night of her arrest, she ran her truck into a yield sign, drove a few hundred yards down the road, and hoped that AAA arrived before the police noticed her. When it did not work out that way, she admitted drinking two Bud Lights with friends during a party at a retirement home.

The inventory of her vehicle included a partly-empty jug of Canadian Mist whiskey and nine full, cool-to-the-touch Dos Equis beers. In my small county, blood draw warrants are on my Christmas wish list but not yet available, so this traffic stop included standardized field sobriety tests, one of which she passed, and a defendant who agreed to blow into the Intoxilyzer, which malfunctioned. I didn't have a breath test *or* a refusal on which to rely!

The evidence was not overwhelmingly strong. However, this woman looked intoxicated on the roadside video, with noticeable sways and a couple of instances of leaning on her truck for support. She also had a strong odor of alcohol, slurred speech, red and bloodshot eyes, and the inability to follow simple instructions. After she was arrested and read her *Miranda* rights, she repeated her "I had a couple of beers" story but also admitted that she and some friends consumed the whiskey. She never offered any explanation for why three bottles of Dos Equis were missing from the 12-pack.

To win this trial, I made the most of the available evidence and educated my jurors on all the intricacies of DWI detection—without putting them to sleep. My only witness, Officer Pete Moncada, testified with a lot of reiteration, repetition, and re-wording from me, and I presented several visual aids to reinforce my key points with the jury. Officer Moncada knows the law extremely well, is a good communicator, and does not show signs of nervousness, but he does not smile, relax, or appear completely comfortable on the witness stand. (Like most officers, he would much prefer to be out on the street than in a court of law.)

I focused my preparation in the following areas to maximize the circumstantial evidence in a one-witness DWI trial.

1 **Prepare with the officer.** First and foremost, the arresting officer must be invested in the trial's outcome. Officers who care about our cases are absolutely essential to our success. The "false alarm" syndrome, where officers are routinely summoned to court and sit for docket call, only for a case to plead out, creates a false sense that they'll never go to trial. Don't let them get used to these false alarms! Instead, meet with them for each case.

Watching the in-car video together is indispensable for a number of reasons. First, your direct examination will be more conversational. Officers are stressed enough about testifying without being unfamiliar with or intimidated by the prosecutor. Second, you will both know the exact locations on the video that illustrate your important points. For example, if the officer noted observations of the defendant or her driving in his report, I make him show me on the video where each occurred so I can point them out to the jury. Third, watching the video gives the officer the opportunity to show where he made mistakes. We've probably all been hit in court by some unanticipated investigatory error, and it's best to find these before defense counsel hands the officer his lunch on cross.

Finally, these conferences emphasize that the officers are the most important persuasive element during trial. Often, officers believe that the video does their job for

them and that the jury will watch the video and understand the significance of what they see. Numerous times I have had officers tell me, "Well, I'm not exactly an *expert*." Of course, I reply that it's time to become one because that is what the State of Texas, judge, and jury expect of an officer as a trained administrator of the SFSTs. The officer must explain to the jury what his experience and training have taught him and make that expertise visible on the video.

If I have a less seasoned witness, I cover all the basics in this meeting. I discuss body language, eye contact, tone of voice, and reiterate that simply saying, "I do not know" is perfectly OK sometimes. I remind officers that they can always refer to their reports for details, and their training manuals should be used while on the stand, especially if the defense attorney is using one as a source for cross-examination. I also make it clear that the offense report and training manual are only "escape hatches" and that the officer should be able to tell the narrative of the arrest, all indicators of intoxication, and all instructions he gave the defendant without reference to the video or any reports.

Officer Moncada responded well. He reviewed the video before he and I met, and we watched it again together. This officer knew that each defense attorney has a particular style and strategy and came prepared with questions on what he could expect from the defense. I suggested that he take care not to sound argumentative, which is a difficult balance for officers: to show they are confident that they have made a correct assessment of intoxication while not appearing closed-minded or too quick to judge.

2 Be sure jurors can convict on a single witness's testimony. Before starting the "one witness" line of voir dire questions, allow the jury to see that even without all the science that the trained and experienced officer applied to make this arrest, most regular citizens can pick out a drunk. Use a poster board to write veniremembers' answers to this question: "What signs would you look for outside of this courtroom to know that a person is intoxicated?" Usually the jurors will say "stumbling," "slurred speech," and "smell of alcohol." In this way, the jury creates a list of indicators of intoxication that the officer has seen in the defendant. Then I point out to the jury that those red flags do not require expertise, just common sense.

I continue by asking what the jury would like to see in a DWI trial to determine whether a defendant is guilty. I make a second list on the same chart as the list of red flags. These almost always include a videotape, an officer's testimony, and a blood-alcohol concentration (BAC) level. I have never had any jury tell me during this line of questions that they would like a second officer or an eyewitness to the offense, even as they are making a wish list. By laying the situation out in this commonsense approach, the normal "one witness" situation in a DWI trial is not as insurmountable as with other types of offenses because your jury will see that the evidence presented in court is exactly what they asked for during voir dire.

Of course, prosecutors must also ferret out any jurors who distrust law enforcement or those who distrust evidence from a single witness. Those people may or not be swayed by the above demonstration, and prosecutors must find those jurors and ask questions for two purposes: to use a challenge if a particular juror cannot be unbiased toward law enforcement and to educate other jurors who might be hesitant to convict on the testimony of one person.

The "one-witness" line of questioning requires a prosecutor's willingness to distinguish between two answers that sound similar but have opposite results under the law. The prosecutor should ask: "Imagine that each of you are sitting on a jury panel, and after hearing all of the evidence presented by the State, you are persuaded beyond a reasonable doubt of all of the elements we are required to prove. Is there anyone who would be unable to find a defendant guilty because the State called on only one person to testify?" Note that this question doesn't say that all of the evidence came from one place because it didn't (unless you don't have a video or a refusal or a blow). It's a subtle but important distinction.

Whether a prospective juror can be properly challenged for cause has to do with her stance on reasonable doubt. The caselaw in this area distinguishes between a juror who is holding the State to a higher burden than reasonable doubt (properly challengeable for cause) and a juror whose own personal version of reasonable doubt would never be met by one witness alone (not challengeable for cause). Any juror who holds

Continued on page 30

Continued from page 29

the State to a standard of certainty is properly challengeable. Even if you can't remove a juror for cause, use a peremptory strike if you still do not believe that juror could follow the law.

The most important distinction is to keep your hypothetical limited to the one-witness situation. The defense's attempted rehabilition would include opening the door to the idea that more witnesses would allow more evidence to achieve proof beyond a reasonable doubt. However, the prosecutor must keep the jurors focused on the situation where there is only one witness and there is proof beyond a reasonable doubt in that juror's mind.

3 **Visual aids are essential.** Because these trials don't have victims a prosecutor can put on the stand to pull heartstrings, it is essential to give jurors something visually stimulating. Whether trial visuals are hand-drawn charts, professionally produced posters, or electronic PowerPoint presentations, they must be large and readable. These visual aids must also be in color or the jury will lose interest.

Up until recently, I had a number of reusable posters on hand so I didn't have to reinvent the wheel for every DWI trial. (I admit that I copied them from TDCAA's *DWI Investigation and Prosecution* book, which is available at www.tdcaa.com/publications. See pages 131-132, 145-147, 154, 161, and 175 of the book for the charts I used.) We added color and blew up the size; the words and layout in the book are clear, concise, and a perfect starting point. Since attending TDCAA's recent training on digital evidence in the courtroom, I have replaced my paper charts with PowerPoints and hyperlinks. Either method serves the same purpose: keeping the jury motivated and interested in the trial.

If the defendant blew into the intoxilyzer, make a poster size version of the intoxilyzer slip. When the intoxilyzer operator testifies, get the slips admitted first, then ask to publish a large version so that as he is explaining what the different numbers mean, the jury can have a reference point. Don't hesitate to add color or arrows for your jurors' focus. Remember, this information is all new to them, and in-court demonstratives should not require inferences and should be memorable.

If the defendant did not provide a breath sample, use the DIC-24 instead. This paper is statutorily admissible and states explictly that the refusal will be used against the defendant. Blow up the area where this is explained along with the defendant's signature. Also note that if the signature on the DIC-24 looks substantially different from the signature on the bonding sheet or any other signature given, blow that one up as well for a comparison. If a defendant's normal signature is affected by alcohol, how could her driving not be?

Keep in mind while preparing a DWI case that jurors will remember what they see *and* hear much better than what they only hear. In addition to telling the jury that the defendant stumbled, fast-forward to the location of the stumble on the videotape and show it to the jury. If you have the capability, clip a video of the stumble and play it in court. I have had numerous DWI juries tell me that they do not even watch the video in the jury room because by the time the trial is over they have seen the tape three or four times, so make sure you show them all of the portions that illustrate the defendant's intoxication while everyone is in the courtroom.

Maps are an easy way to get some color and interest into the officer's testimony. In my small county, most of the road names that come up in testimony are obvious to jurors, but that won't be the case everywhere. Also, when the officers use mile markers on the interstates or blocks of particular streets, they have an opportunity to show the jury exactly where this defendant was driving and what dangers lurked there for sober, defenseless drivers. Often, intoxicated drivers are lost when the officer stops them. When the map is shown in court, the defendant's direction of travel is not even close to where she claimed to be headed. If a wreck occurred, show its exact location on the map.

In my Canadian Mist case, in addition to our maps, we pinpointed the spot on the videotape where the officer pulled the whiskey jug out of the defendant's truck. He set it on the hood of his patrol car, along with the numerous unopened beer bottles. We also had video clips of the defendant's multiple explanations for how much and what types of alcohol she drank. During direct examination, we reviewed the places where she noticeably swayed on tape and leaned on her truck for support.

One of my favorite pictures, which we showed in the PowerPoint presentation, was simply a Canadian

Mist jug by itself. The officer testified that the amount missing from the jug in the defendant's car was equal to nine shots of alcohol. During this testimony I left the jug up on the screen. I prepared another clip with nine whiskey glasses with liquor in them and two Bud Lights (the amount of beer the defendant admitted to drinking) to use in closing. Often, defendants are vague about their numbers by saying they drank "a couple of beers" or shared "some whiskey" with friends. Show the jury exactly what those vague amounts look like in actual liquid measure. If the defendant admitted to margaritas, put a picture of tequila in shot glasses on the screen to remind the jurors that the basis of drinks is not limeade and salt but rather hard liquor that makes for a dangerous driver. Use these visuals in closing while referring to your expert's testimony, whether it was an officer or an intoxilyzer supervisor, about how long each shot takes to completely go through a person's body.

4 Explain that the SFSTs are divided-attention tests. Many jurors have taught their own teenage sons and daughters how to drive, ridden with a bad driver, or cringed at other drivers talking on cell phones while behind the wheel. Anyone with a license understands that driving requires thinking about multiple things while performing intricate physical actions. Turning the steering wheel one inch can mean the difference between sideswiping or avoiding another vehicle; two seconds late on the brake can mean rear-ending another car. The jury will understand the concept of divided attention, and the prosecutor should repeat it often when discussing the SFSTs.

My clearest illustration of how divided attention is used in the sobriety tests is when the officer is instructing the suspect on how to perform the Walk-and-Turn test. I always watch this part of the video multiple times to see how best to use it in court. The test requires the suspect to stand heel-to-toe and balance while listening to a list of instructions—in other words, using mental and physical capacities at the same time. Usually, the defendant starts out in the correct stance. Then the officer begins the demonstration, and as the suspect concentrates on the officer's directions, she falls out of the starting position. This fall is more than simply bad balance; it's a failure to divide one's attention between multiple tasks. Do not leave it to the jury to draw this inference on their own; explain to them in detail that no part of these tests is accidental or coincidental, and replay that part of the video during direct-examination to make that point.

Another behavior that happens routinely is the suspect fails to hold the starting position solidly but concentrates very hard to maintain her balance. These suspects miss most of the clues during the walking stage because they are focusing so hard on their balance that they ignore every instruction. Again, make this failure clear to the jury. The tests' instructions are not complicated, especially when compared with all the motor and mental skills required for driving. Show the jury that someone who cannot stand on a straight line and listen to an officer talking at the same time has no business behind the wheel of a 2,000-pound car that requires reflexes and judgment to safely operate.

The best part about divided attention may lie in its scientific basis—yet the jury can understand it by applying common sense. With the prosecutor and officer's in-court education on SFSTs, the jury will watch and judge the video not by a layperson's standard but rather with the knowledge that safe driving requires multi-tasking, and these tests are gauging the defendant's ability to do just that.

In my case, the defendant consistently argued that we could not prove that her intoxication caused the wreck. However, our maps showed that she was driving in the opposite direction from her home address and the video showed her repeatedly saying she was heading home from the party. Additionally, when I asked the officer about divided attention, we played the video through the Walk-and-Turn, and I re-wound it to replay the instruction phase where the defendant's face was puckered in concentration. Then we counted the clues that showed she missed the officer's simple instructions. During deliberations, the jurors did not watch the video at all and returned with a guilty verdict.

5 Remind jurors that sober people pass the SFSTs. Jurors are often (understandably) under the impression that every citizen given SFSTs is eventually arrested for DWI. While prosecutors and police officers know differently, it's important to clarify that point for the jury.

The one question I ask every

Continued on page 32

Continued from page 31

single officer in a DWI trial is whether drivers ever pass the SFSTs. (I do so because more than once, I've heard comments from spectators, lay persons, and defense attorneys who say, "Nobody could perform those tests even *sober*!") The officer usually looks at me when answering like it's a silly question and replies, "Of course"—as though any dummy would know that. That answer tells jurors in no uncertain terms that drivers who are pulled over for traffic violations but pass the SFSTs don't end up in court—they drive themselves home safely, perhaps with a warning or ticket for the violation, but they are not under arrest for driving while intoxicated. You want the jury so well educated that they do not submit to the theory that the tests are impossible to pass.

6 Speak clearly and use common words. Don't let the officer fall into law enforcement-speak, such as, "The vehicle was occupied three times" when he means that there were three people in the car. If the officer describes the "totality of the circumstances," tell him to use more common words—"all the stuff that I knew at the time"—instead.

The same holds true for the testimony on Horizontal Gaze Nystagmus (HGN). Sometimes it's the only scientific, objective, and arguably the most persuasive evidence that we present, so it especially requires careful and repeated explanation. If you have the previously mentioned posters or PowerPoints, HGN is the perfect topic to present using those methods.

Also prepare with the officer so that your questions do not confuse him and his answers do not confuse the jury. He should practice explaining HGN to the prosecutor and to a family member who has never read the NHTSA manual to see if his explanation is effective and understandable. If not, he should keep practicing until it is.

In my recent trial, the officer and I knew the HGN evidence would need explanation because this defendant had only four clues out of a possible six on the test. Even though her score is considered a failure and an indicator of intoxication, the officer had to practice explaining that a lack of the last two two clues was not evidence of sobriety. After trial, the jurors specifically told me that they were interested in the HGN testimony because it was new to them and the SFSTs were more objective than they realized. I have had multiple juries state similar opinions on their newly acquired knowledge of DWI investigations. If the HGN is the only science we have, our "'CSI' standard" requires that we use it as effectively as possible.

7 Empower the jury to protect the community from intoxicated drivers. Even if this is your 145th DWI trial, it is likely your jurors' *first* participation in the criminal process. These citizens have completely rearranged job duties, daycare, and perhaps travel plans to perform their civic duty as jurors; they show up in county court and see what appears to be an average-looking Jane in the defendant's chair. Help these good folks understand that even cases that don't make compelling scripts for "Law and Order" are prosecuted for good reason.

The voir dire process is your chance to begin to remind the jury that rules of the road are important to follow for everyone's safety. Closing argument is when you get to hand the torch to your jury. Charge the jury with the responsibility to hold normal, everyday people accountable for judgment so poor it amounts to a dangerous crime. In my quaint and touristy community, I always remind my jurors that a defendant being "very sorry" at trial does not neutralize her committing a crime. Likewise, the fact that a proactive officer stopped the defendant's car and arrested her before anyone was injured does not lessen the defendant's dangerous behavior.

One voir dire hypothetical that starts this ball rolling involves the differentiation between a DWI with no collision, a DWI with a one-car wreck, and a DWI with a death. I ask potential jurors to describe a driver with all of the clues of intoxication that the jury offered on the chart I spoke of earlier. I then ask what is the difference between that driver ending up as a DWI defendant versus an intoxication manslaughter defendant? Ask the jury if that driver took any precautions to make sure her intoxication did not endanger anyone else. Of course, the answer is "no." The only difference between the two crimes works in the State's favor in two important ways: First, if the defendant had a wreck and no one else was injured or affected, it was just blind luck. Second, if your defendant was stopped before she caused a wreck, it was solely thanks to the diligent efforts of law enforcement—at least the officer stopped her before she hurt somebody. Allow your jury to see equal culpability in the acts of the defendant in either

scenario.

Conclusion

Misdemeanor DWI trials require determination and thought to make the most of what evidence we have. I hope this article has been a good reminder of seven areas where the mode of preparation and presentation can have a powerful and successful impact on your trials and on your community.

Scholarship applications due Dec. 1

Applications for the Investigator Section scholarship are due to TDCAA December 1; it is open all all TDCAA investigators, and the $750 scholarship will be awarded at February's Investigator School. Download an application form from TDCAA's website by searching for "scholarship" or by looking in TDCAA News on the front page.

If you have questions, email Maria Hinojosa at maria.hinojosa@dentoncounty.com.

Trying police officers for use of force

These cases are notoriously hard to investigate and try; here's the story of a police shooting in Houston that offers valuable lessons to prosecutors across Texas.

As is almost always the case when a police officer is tried for an offense involving the use of force under color of law, the inescapable hue the trial prosecutor faces is gray. Officers operate in a dangerous world and are often characterized as "just doing their job." Jurors are not apt to second-guess their actions. Of the more than 100 cases submitted to Harris County grand juries in the last five years, only two police shootings have been true-billed. This article details the one where the officer was found guilty; in the other, the officer was found not guilty by a jury.

By Joe Owmby
Assistant District Attorney in Harris County

Houston is a big enough city that the DA's office has an entire unit, the Police Integrity Division, responsible for determining whether incidents involving officers' use of force will result in criminal charges. In every case, including the one I describe later where 14-year-old Eli Escobar was shot by Officer Arthur Carbonneau of the Houston Police Department, the investigation is referred to a Harris County grand jury to determine whether charges should be filed. Use of the grand jury follows our office's policy when a citizen is injured or killed by a police officer's firearm, regardless of whether investigators think criminal liability is involved. Consistently submitting serious accusations of police misconduct to the grand jury produces transparency in the judicial process and increases community confidence in the outcome.

For shooting Eli Escobar, the grand jury handed down an indictment for Officer Carbonneau, and we tried him for criminal homicide. After two hours of deliberation, a jury found him guilty of criminally negligent homicide and sentenced him to probation. The investigation and trial provides valuable lessons for prosecutors facing use of force cases.

The shooting

Ed Porter was on call for our office's Police Integrity Division November 21, 2003, when he received a dispatch on a fatal shooting in an apartment complex in Houston's near northwest side. The late afternoon call was not completely surprising as the complex is in an area known for violent gang activity. Porter had been an on-call prosecutor for over 15 years and Harris County had averaged nearly 30 shootings a year in the five years preceding, and there was no reason to assume this investigation would be complex or sensitive. In fact, a few weeks before, on Halloween night, the division had responded to a scene on the southwest side where a 15-year-old Hispanic youth had been fatally shot while attempting to flee from police. The investigation of that tragic incident had scarcely begun and the controversy in the media had hardly died down when this new call came in. One wishes that controversial incidents be separated by more than three weeks, but alas, that's not how it happened during this particular stretch of time.

Harris County sends an attorney and investigator to each shooting scene, though some smaller municipalities in the county turn police shootings over to the sheriff's department, which has overlapping jurisdiction. In every jurisdiction, no matter the size, I recommend that an assistant DA and investigator be on-call and dispatched to every incident that results in a fatality. Survivors of a shooting (or their attorneys) will be able to speak for themselves during the investigation, but a prosecutor must provide a perspective on events that may be missing in a fatality scene. The prosecutor will also insure that questions related to the legal elements justifying the use of force are addressed. It would be grossly unfair for a truly justified use of force to attract controversy because no one thought to document the answers to valid questions on the scene.

Arriving at the apartment complex, Porter found that 14-year-old Eli Escobar had been shot once above the right eye and lay dead on the sidewalk near the patio fence of apartment No. 35. Stippling—the particles of burned powder that are emitted from a gun along with the

bullet and etch a pattern on whatever surface they encounter within 2 feet of the muzzle—was plainly visible on the teen's face, meaning the shot had been fired from close range, most likely less than a foot. Even more disturbing was that among the Internal Affairs officers, homicide investigators, patrol officers, and evidence technicians grimly preparing to spend the next several hours documenting the scene, no one had a plausible hypothesis as to why the teenager was shot.

Initial scene investigation

The most important aspect of a police shooting is the initial scene investigation, which is the responsibility of the involved police agency; the DA's office runs a parallel investigation. In this case, prosecutors Ed Porter and Don Smyth conducted preliminary interviews with witnesses and consulted with homicide investigators to ensure that witness statements were captured on audio or video tape. It is extremely important to aggressively canvass for witnesses. In a high-density residential neighborhood, many people may have noticed the initial police activity and seen the shooting. Rumors of what may have happened spread quickly, and folks who didn't see anything may start giving "eyewitness" accounts to the news media. Sometimes police investigators decide that off-the-wall witness accounts are not worth tracking down, but I urge prosecutors to follow up even the most bizarre stories, even if the police agency won't. The only way to squelch rumors and insure the integrity of the investigation's final product is to track down every potential witness and dispel or confirm the credibility of each account.

Porter and Smyth started the parallel investigation, assuming Eli Escobar's death was a criminal homicide.[1] No matter how rigorous the integrity of the police investigation—and in Harris County it is extremely rigorous—it would be against human nature for the police to not seek justification for the actions of one of their own, and it's vital that prosecutors thoroughly investigate every avenue.

For prosecutors, the initial scene is critical. Our investigations include the following:

- the involved officer and sometimes civilian witnesses participate in a walk-through of the incident (though the officer cannot be compelled to participate);[2]
- their statements are recorded on video, but the involved officer is not in custody and his statement is voluntary;
- from the walk-through, photographs of each witness's point of view may be arranged;
- the involved officer's and any suspect's weapons are charted, either at the scene or after secure transport to the firearms lab;
- the functionality of the weapon(s) and the number of rounds fired, their brand, and their type are noted;
- the weapons of officers who claim not to have fired are checked to document the examiner's opinion;
- blood spatter evidence and stippling on clothing is noted so the medical examiner can be notified of evidence collection priorities before the body is moved; and
- next of kin are notified and in some circumstances the victim's background is obtained during a recorded interview with a relative or companion who saw the decedent last.

Escobar's shooting

The events leading up to Escobar's shooting began when Officer Ronald Olivo was dispatched to an assault call at an apartment complex off Antoine Street. Olivo was joined by Officer Arthur Carbonneau; they met a man and his 10-year-old son. These two complainants explained that there had been a quarrel involving another juvenile named Oscar; a window was broken during the goings-on and Oscar was now likely in apartment No. 35 in the neighboring complex. Olivo, Carbonneau, the boy, and his father all went to that apartment to continue the investigation.

Eli Escobar and two friends, all age 14, were playing video games in that apartment. Eli was not usually allowed to hang out in the apartment complex after school; his father, Eli Escobar Sr., later testified that his son was under a strict curfew after school and that he was respectful of authority. Prosecutors also learned during interviews that the teenager was taught that if trouble started while he was with his friends, he should come home. The presence of the police at the apartment likely equated to trouble in Escobar's mind, which might explain some of what happened next.

The investigation might have ended when the witnesses confirmed that none of the boys in the apartment was Oscar, nor were these

Continued on page 36

Continued from page 35

teenagers involved in the quarrel that prompted the police call. However, the officers continued questioning the boys as they were detained on the patio. Escobar became agitated and pushed past Officer Carbonneau, reportedly saying he had done nothing wrong and was going home. Carbonneau began to struggle with the young man. Some witnesses reported that while Escobar was on his back and Officer Carbonneau was on top of him, the teen told Carbonneau he would submit. It appeared he was still twisting and resisting as Officer Olivo joined in the struggle by grasping Eli's legs to control his lower body.

According to one witness, Escobar kicked Carbonneau in the groin before the shot was fired. Two women viewing from a balcony directly across the sidewalk said that Officer Carbonneau pulled his gun and fired while Escobar lay on his back. After the shooting, Carbonneau "just walked away," leaving Officer Olivo shocked and distraught at what had just occurred. Carbonneau was sitting in his car when the first officers responded to the scene; he complained of pain in his groin and was transported to the hospital along with his weapon, a 40-caliber Glock. He did not participate in a scene walk-through.

The key evidence at trial, first revealed and documented during the initial scene examination, was the stippling pattern on Escobar's face. Its presence enabled a distance determination, which fixed the muzzle of the weapon 10 inches from Eli Escobar's face. That distance, combined with the wound characteristics determined from the autopsy, fairly established the distance and angle from which the Glock discharged. Knowing the Glock's position allowed a credible reconstruction of Carbonneau's position when he fired the weapon.

The Glock's functionality was immediately established by Kim Downs of the Houston Police Department Firearms Laboratory and eventually confirmed by the state's expert witness at trial, Lucien Haag. The Glock handgun has a fairly unique safety mechanism: The safety is automatically engaged as long as there is no pressure on the trigger. The chance of an accidental discharge with a Glock without some human action to pull the trigger is remote.[3]

The question presented to the grand jury, as it would be in any similar case, was whether Escobar's shooting was without justification. Police officers have the benefit of all justifications mandated in Chapter 9 of the Penal Code, including self-defense, necessity, and defense of third persons. The law applicable to justification in the Carbonneau case is contained in §9.51 of the Penal Code. Would a reasonable officer believe[4] it was legal to detain Escobar in this situation? If so, the officer could use only non-deadly force unless he reasonably believed the subject had committed a crime involving the use of deadly force or that the subject presented such an imminent threat to the public that the arrest could not be delayed.[5] If the detention were not legal, then the officer would not be justified in using deadly force.

In this case, the grand jury saw no evidence justifying the employment of deadly force; after sorting through the evidence, jurors indicted Officer Carbonneau for murder.

The trial

Don Smyth and I tried the case before Judge Mary Lou Keel in the 232nd District Court. In part because of publicity surrounding the case, a questionnaire was employed to aid in jury selection.[6] The questionnaires allowed both parties to identify jurors who were influenced by the extensive media coverage. Voir dire in this case was more an exercise in explaining the ultimate issues, and the questionnaire saved time for that valuable function.

The defendant's opening statement, as expected, laid the groundwork for his defense. According to defense attorneys Aaron Suder and Brett Ligon (now the district attorney-elect in Montgomery County), representing Carbonneau for the Houston Police Officers' Union, Carbonneau had always wanted to be a police officer; he volunteered to take this call, and he made the best of a bad situation. The defense claimed that Eli Escobar flew off the handle, yelling, "Leave me the f— alone!" and pushed Carbonneau. Escobar had not been patted down for weapons, which according to the defense, heightened the officer's apprehension. The defense also asserted that Carbonneau had no conscious recollection of pulling the trigger after he felt "something" hit his hand.

The defense next introduced Bill Lewinsky, a police consultant and expert witness who testified to a human reaction called the clutch reflex. The clutch reflex is a common

reaction to a blow to the arm; a person holding a weapon will often react to that blow by clutching or squeezing an object in his hand, in this case the 40-caliber Glock Carbonneau had pointed at Escobar.

Don and I both realized this case would come down to the cross-examinations of Officer Carbonneau and expert Lewinsky. We decided that Don would cross Carbonneau and I would cross Lewinsky, but before that time arrived we had to establish a few irrefutable facts through the testimony of forensic firearms expert Lucien Haag and the eyewitnesses whose testimony he corroborated.

Before we presented the case to the grand jury, all of the witnesses were re-examined and each person was photographed while demonstrating the positions of Carbonneau, Escobar, Olivo, and the weapon at the moment the shot was fired. The examinations produced some curious results. One witness positioned all the elements of the scene in mirror image, placing Carbonneau on Escobar's left side instead of his right. (This witness did not realize his mistake until he attempted to recreate his testimony for the defense at trial.) One witness positioned the weapon in contact with Eli Escobar's face, while another put the weapon 2 feet away.

Officer Olivo was positioned across Eli's legs during the final moments of the struggle. Olivo was shocked by the weapon's discharge; he never knew Carbonneau had even drawn his gun until it fired. Officer Olivo never offered a justification for employment of deadly force; he, like other peace officer witnesses, allowed that until a thorough search was conducted in any suspect encounter, anything is possible. He offered no testimony beyond speculation that would justify employment of deadly force at the time Carbonneau fired or at any point before that. Olivo said his colleague appeared dazed after the shot was fired. Carbonneau complained of an injury to his groin but never explained why he left his partner alone at the scene to face a gathering crowd of hostile bystanders.

We were unable to corroborate which story was most accurate until we received Lucien Haag's analysis of the stippling evidence. Haag, a noted forensic firearms examiner, relied on his own test firings of Carbonneau's Glock using the spare ammunition the officer was carrying at the time of the shooting. Haag recreated the stippling pattern on a type of paper that best simulates human skin. (In previous tests, Haag had concluded that next to pigskin, this paper produced the most accurate patterns from which he could count and compare the number of individual powder impacts per square inch.) Haag's PowerPoint presentation included illustrations of the steps he used to reach his conclusion. The visual impact on the jury was compelling. The results corroborated and closely fit the eyewitness picture painted by Jose Salmeron, one of Eli Escobar's young friends. Notably, this witness (and others) placed Officer Carbonneau in a position where it would have been difficult for Eli to strike the officer's arm with any force before the weapon was fired. At this point Carbonneau was effectively boxed in; his account would have to agree with Haag's unassailable findings.

Don Smyth's cross-examination of the defendant effectively demonstrated Carbonneau's lack of justification. What were the circumstances, from Carbonneau's standpoint, that called for deadly force? Don asked Officer Carbonneau, "Why did you pull your gun and point it 10 inches from Eli Escobar's face when both you and your partner had him subdued?" It is virtually a rhetorical question and one Carbonneau could not answer.

Defense expert Bill Lewinsky has a wealth of experience with police shootings. Although he testifies almost exclusively on behalf of police officers and might be accused of bias, his studies in reflex and motion offer valid insights that aid in reconstructing shootings. In many police shootings, reaction time—the time between an officer perceiving a threat and when he pulls the trigger—can be valuable in determining whether a shooting is justified.

In this case, however, Lewinsky relied solely on witness testimony that favored the defense theory and ignored witnesses who testified that Carbonneau was not likely in a position where his arm could be hit. Aside from that, Lewinsky's testimony was limited to an explanation favoring involuntary discharge by reflex action because the possibility of weapon malfunction was clearly eliminated by Carbonneau's prior statements that he didn't intentionally pull the trigger and expert testimony concerning the functionality of the Glock. That was not the only question facing Carbonneau, howev-

Continued on page 38

Continued from page 37

er; equally important was why he pointed his weapon at Escobar in the first place. Lewinsky was not in a position to address that question.

We did not ask Carbonneau or Lewinsky these ultimate questions on cross-examination. Carbonneau was unable to adequately explain why application of non-deadly force—his metal baton or chemical spray, for example—was not sufficient to subdue Escobar, and Lewinsky's opinion on the matter would have amounted to no more than pontification.

The issues narrowed, and the jury was charged with all three degrees of criminal homicide. Our emphases on closing were Officer Charbonneau's clearly intentional acts that caused Escobar's death, his employment of deadly force without justification, and the reckless or negligent act of placing his finger on the trigger. There was no proof of a motive to kill Eli Escobar—legally none was needed—but it is always difficult to prove to a jury that it was an actor's conscious objective to kill without some circumstances explaining why. Consequently the jury's finding on the lesser offense of criminally negligent homicide was understandable. Carbonneau was stripped of his ability to be a police officer. As a condition of his probation, he was forced to voluntarily surrender his TCLEOSE license for life and spend 60 days in the Harris County jail.

Lessons from the trial

This trial illustrates the difficulties of trying police officers. Eli Escobar was certainly a sympathetic victim, but one could argue that the incident could have been avoided had the teenager submitted to police instructions at the time, whether the instructions were lawful or not. The other difficulty in this trial was a police officer who embarked on a task clearly in service to the public that went horribly wrong. These are obstacles to prosecution that can be overcome only by meticulous preparation and a compelling appeal to follow the applicable law. It is necessary for prosecutors to plan ahead and be prepared to address the issues whether the shooting results in a no-bill or a trial:

- respond quickly to the scene and never assume the shooting was justified (that will eventually be revealed during the course of a complete investigation);
- formulate consistent policies and procedures for investigation and for submitting cases for grand jury review;
- follow up on all witness testimony until the evidence shows it is unreliable. Prosecutors must conduct a fair investigation as well as give the *appearance* of a fair investigation by going the extra mile; and
- make decisions based on the law and evidence, not the character of victims or sympathy for the officers.

Obviously, it is beyond the scope of this article to explore all the issues involved in prosecuting the police. The key is to think through the issues that will arise and have a plan before it happens. None of us expect the day to come when you must prosecute an officer, but perhaps when you are actually faced with the situation, you can be prepared.[7]

Endnotes

1 Criminal homicide is murder, manslaughter, or criminally negligent homicide (Tex. Penal Code §19.01). Murder is an intentional killing; most fatal shootings by police are intentional killings. Assuming that the killing is unjustified tends to focus the investigation in the most critical area.

2 "When a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (discussing *Garrity v. New Jersey*, 385 U.S. 493 (1967). Officers are usually represented by attorneys at the scene. Most attorneys encourage officers to participate in the walk-through because it is usually to the officer's advantage to offer an explanation. Some defense attorneys request that the officer give a statement only under the protection of *Garrity*. I recommend never allowing an officer to give a *Garrity* statement at the scene because there is no good reason to take an immunized statement from the target of a criminal investigation at this stage of the process.

3 For a discussion of the triple safety features of the Glock firearm designed to prevent accidental discharge when the weapon is hit or dropped; see en.wikipedia.org/wiki/Glock_17; see also "Firearm Function Testing," www.firearmsid.com/a_Firearm Function.htm.

4 The standard is not strictly objective. The question is whether, from the officer's standpoint, would he reasonably believe the detention was justified. (Tex. Penal Code §9.51).

5 Tex. Penal Code §9.51.

6 I credit Don Smyth with setting the policies and standards of the Police Integrity Division since its inception. He investigated or tried the majority of controversial police shootings in Houston until he was promoted to bureau chief during a reorganization several years ago.

7 For more on this topic, see Laeser, Abraham, "When the Ally is the Enemy," *The Practical Prosecutor*, National College of District Attorneys, 2005.

Court of Criminal Appeals update

Questions

1 Code of Criminal Procedure article 12.01(4)(A) prescribes a five-year limitations period for theft crimes. In 2005, a Harris County grand jury returned four aggregated theft indictments against Christopher Tita. Each alleged a different several-month time period falling between 1999 and 2000. A fifth indictment issued in 2006; on its face, this indictment's language fell outside the limitations period because it contained no tolling provision.

By Tanya Dohoney
Assistant Criminal District Attorney in Tarrant County

Tita sought dismissal on limitations grounds. In reply, the State obtained judicial notice of the 2005 indictments and argued that the prior indictments (which were ultimately dismissed) tolled the limitations period because they alleged the same criminal conduct. The trial court rejected the motion to quash and, in turn, the 14th Court of Appeals denied Tita's request to review the pretrial limitations claim. The appellate court held that limitations claims are akin to legal defenses that need not be pled by the State. Was this holding correct?

____ yes ____ no

2 Turning back to the Harris County aggregated theft prosecution, legal insufficiency became an issue, too. During trial, Tita unsuccessfully moved for an instructed verdict (twice), piggybacking this sufficiency claim on his limitations argument. The State proffered no evidence on the limitations issue at trial, and nothing was submitted to the jury on the issue either. Did Tita's insufficient-evidence claim prevail?

____ yes ____ no

3 Curtis Lee Bass ministered to a local Harris County congregation. In 1994, he used his pastoral position to molest a 16-year-old church member in his church office and the parking lot. The victim failed to officially report the abuse until 10 years later when she learned Bass had victimized another young woman.

When Bass' trial began, his attorney presented an opening statement and described the victim's allegations as "pure fantasy" and "fabrication." Bass' counsel also asserted that the sexual-abuse allegations were unworthy of belief because Bass was the "real deal" minister-wise. Defense counsel also mentioned that the State might attempt to "prop up" the victim's "scattered, crumbling accusation" with extraneous unadjudicated allegations that never resulted in prosecution.

The trial continued, and the young woman detailed the minister's assaultive behavior. Defense counsel attacked the victim's credibility on cross-examination and exposed that, when the young girl had outcried 10 years earlier, neither her mother nor three educators believed her (which is why no charges were pursued). After the victim's testimony, the State proffered evidence that Bass had also molested two other children in his church office: a 5-year-old in 1995 and an 11-year-old in 2000. Again, in those extraneous cases, no criminal charges resulted. Limiting instructions followed this testimony. Convicted on both counts, Bass was sentenced to 10 years' confinement on one and probation on the other.

The 14th Court of Appeals reversed the convictions, holding that the trial judge abused his discretion by allowing the extraneous acts into evidence. The court distinguished between a "fabrication" defense and a "frame-up" defense and found that a "mere fabrication" claim did not open the door to extraneous rebuttal evidence.

The State sought review. One of the State's grounds focused on whether defense counsel's sweeping opening-statement comments, which gushed about Bass' impeccable reputation as a minister, authorized the State to introduce extraneous crimes in rebuttal. Can the door to admission of extraneous offenses be kicked in during opening argument? Is the court of appeals' fabrication distinction meritorious?

____ yes ____ no

4 Sergio Barrera stabbed his sister-in-law more than 60 times, killing her. A Hidalgo County jury convicted him of murder, heard punishment evidence, and maxed him out with a 99-year sentence and a $10,000 fine. When imposing this

Continued on page 40

Continued from page 39

prison sentence, the trial court ordered Barrera to pay the victim's family for funeral expenses. No evidence had been admitted on this matter, but at the sentencing hearing, the trial judge asked the prosecutor to quantify the expenses; the prosecutor asserted that the funeral had cost $12,000. Barrera did not object to the prosecutor's valuation assertion or to the entry of this restitution order.

Barrera changed his tune on appeal and claimed that insufficient evidence supported the restitution imposed. The court of appeals agreed and deleted the restitution order. Was this the proper remedy on the restitution issue in a case where incarceration was assessed?

____ yes ____ no

5 Robert Henry Shepherd lived in a neighborhood where people looked out for each other. Shepherd typically kept his front door shut and also customarily accessed his house via his garage. Knowing Shepherd's habits for more than 16 years, one neighbor became concerned after noticing Shepherd's front door standing wide-open one day. The neighbor worried that Shepherd's home had been burgled, especially because Shepherd's car was not in the driveway. After enlisting another neighbor, the two called inside the open front door but received no response. The neighbors' anxiety over the situation mounted, so they called police.

Officers apparently receive open-door calls with some frequency. From these experiences, they believe that an open portal indicates a possible burglary. Protocol in these instances requires that officers announce themselves at the door and, if no answer is received, they must enter and clear the premises, discerning whether a suspect or injured party is inside. If no one is discovered, the officers secure the building and attempt to find the owner to determine why the door was open.

When officers responded to the open-door call at Shepherd's home, officers heard no reply after announcing. They drew their weapons and entered to avert or respond to any possible danger to the homeowner. The officers found no one when checking the house and its closets; they did not open drawers. While sweeping through the premises, the officers saw and seized a bong and a baggie of marijuana resting in plain view on a living room table. Was this a good search?

____ yes ____ no

6 Twenty-two-year-old Arsenio Clarke moved from New York to live with his extended family in Harris County. That family included a 14-year-old stepcousin whom Arsenio sexually assaulted. After an open pleading to the trial court, the judge found him guilty and ordered a PSI. During the subsequent sentencing hearing, defense counsel objected to statements made by the victim's mother THAT contained innuendo regarding a possible extraneous crime back in New York. The State presented additional evidence, and the court sentenced Arsenio to 10 years' confinement.

Clarke moved for a new trial, asserting grounds pertaining to the mother's unfounded PSI allegations. At the hearing on this motion, defense counsel threw in a new legal argument pertaining to the unfounded allegations. Without saying "*Brady*," the defense accused the prosecutor of knowing that the victim's mother's PSI statements had been false and not informing defense counsel or correcting the trial court's false impression. At this post-trial hearing, the prosecution apparently presented no evidence or argument. The trial court denied the defense motion.

On appeal, Clarke argued that *Brady* applied. The State pointed out that this contention was not raised in the written motion for new trial but argued only at the hearing. Was this legal issue preserved despite not being included in the written motion for new trial or in a timely amended motion?

____ yes ____ no

7 Robert Huffman killed Rafael Garcia in a hit-and-run collision in San Antonio. By the time officers arrived at the crash scene, Huffman had fled, but he was later charged with failure to stop and render aid (FSRA). The Transportation Code proscribes the conduct that constitutes this offense as follows: When a motor-vehicle operator is involved in an accident resulting in injury or death, that person must immediately stop the vehicle at the scene or as close to the scene as possible; immediately return to the accident scene if the vehicle is not stopped; and remain at the scene until complying

with various notification and safety provisions. (Tex. Transp. Code §550.021.) At the conclusion of Huffman's FSRA trial, the unobjected-to court's charge set out three methods of violating this provision in the disjunctive. On appeal following his conviction, Huffman contended that the disjunctive wording of the court's charge violated his constitutional right to a unanimous verdict. The San Antonio appellate court agreed but found the error harmless.

The State petitioned for review complaining of the jury unanimity violation. Did the charged conduct (failing to stop, return, or remain) set out three separate offenses requiring unanimity or merely three different methods of committing the same offense?

____ yes ____ no

8 Shortly after returning to school following winter break, a highly intelligent 10-year-old informed her school counselor, Ms. Batchelder, that her father had been messing with her. This young girl specified that her daddy, Nicholas Klein, had routinely touched her between her legs using his fingers and tongue. After outcrying to the counselor, the child repeated her allegations to other officials.

Denton County indicted Klein on eight counts spread over four dates with two separate acts, digital penetration and lingual contact, set out on each of the four dates alleged. Evidence pertaining to the date of the offenses came from many sources. The young girl narrowed the time of her abuse to her fifth-grade school year, and she explained that the molestation happened "most nights" and "many times" when her mother was away at dance class. The mother claimed that her dance classes occurred only on Monday nights over a six-to-eight-week period; she agreed that, during these times, the victim was home alone with her father. Of the four dates listed in the indictment, three preceded the child's fifth-grade school year and only one fell within that time frame. The trial court included a statute-of-limitations instruction in the jury's charge, and the jury returned a guilty verdict on each count.

The Fort Worth Court of Appeals reversed this child-sex conviction after finding legally insufficient evidence supporting the commission of the crimes on the three pre-fifth-grade dates, reversing and entering acquittals on six counts. Was this ruling correct?

____ yes ____ no

9 In the same eight-count Klein child-sex case, shortly after the victim reported abuse to her school counselor, she repeated the story to a CPS investigator and a police officer, then changed her story, denying ever being victimized.

When trial rolled around, the prosecutor introduced the counselor's testimony as substantive outcry evidence and was unsure what the child's testimony would entail. When the young girl began her testimony, she informed the jury that her father did not molest her, but she admitted making allegations about his prurient misdeeds. Still on direct, the prosecutor asked her about the quality of her memory and remembering when "it started." The victim proceeded to describe how her father had entered her room at night while her mother was gone. She explained that his acts were just as she had previously described to her school counselor, and she specifically agreed that he touched her vagina with his fingers and tongue; yet, the girl reverted back to claiming that no abuse occurred later on direct. In other words, the girl's testimony contained substantial internal conflicts. On cross-examination, defense counsel sought to reaffirm the victim's recantation and implied that any other claim was recently fabricated.

In an effort to rebut the defensive theory, the prosecution sought to introduce the victim's statements to the CPS investigator and officer as prior consistent statements. Objecting vehemently, defense counsel contended that the prosecutor's devious questions "seduced" the girl. The trial court ruled the evidence admissible, allowing both witnesses to repeat the girl's prior consistent statements. During closing argument, Klein's attorney repeated his contention that the prosecutor's questioning improperly influenced the girl's testimony to the extent that she admitted the accusation. Did the victim's conflicting testimony give rise to the prior statements' admission?

____ yes ____ no

10 Stephon Lavelle Walter and his buddy Markel Henson robbed the Texarkana Outback

Continued on page 42

Continued from page 41

Steakhouse, shooting three employees in the head, execution-style. The next morning, Markel Henson enlisted his brother, Roderick, in burning and storing evidence of the crime. He also told his brother about the robbery-murder. Shortly thereafter, Roderick's actions resulted in the arrest of the two capital perpetrators.

The prosecution sought to introduce Markel's statements to his brother under the statement-against-interest hearsay exception (Tex. R. Evid. 803(24)). When Roderick saw his brother the day after the murders, Markel said that he and Walter went to the Outback to "hit a lick," meaning make some money. Markel said that Walter went into the office, got the money, gave it to Markel, and returned to the office. Markel believed that Walter was looking for a safe key. While standing in the hall, Markel heard six gunshots after hearing people begging for their lives, asking Walter by name to not shoot. Markel said that they planned to get the money out of the safe but could not find a key. Afterwards, they split the $800 at Walter's apartment where, Markel said, Walter put a gun to Markel's head and threatened to kill him if he told anyone.

Roderick testified to this narrative in Walter's trial, pointing the finger at Walter as the sole shooter while also implicating himself. The defense agreed that the brother could relate Markel's self-inculpatory statements, but they objected to Roderick describing Markel's assertions that inculpated only Walter, contending that those hearsay statements were Markel's attempts to shift blame to Walter and minimize Markel's culpability. Was this entire conversation admissible as a statement against interest?

____ yes ____ no

Answers

1 No. Code of Criminal Procedure article 21.02(6) sets out indictment requisites and mandates that they facially reveal their limitations validity. Where an indictment's face reveals that the statute of limitations bars prosecution, article 27.08(2) rewards a dismissal to a defendant who objects on this issue. *Tita v. State*, No. PD-1574-07, ___ S.W.3d ___, 2008 WL 4149708 (Tex. Crim. App. September 10, 2008) (Holcomb) (7:1:0). Tolling paragraphs or explanatory averments suffice to show a valid prosecution within the limitations period. Therefore, the Harris County trial judge should have dismissed Tita's indictment.

2 No. Tita never raised the issue before the jury. If some evidence, regardless of the source, suggests that the prosecution is limitations-barred, a defendant may assert this defense by requesting a limitations jury instruction. When a court submits such an instruction, the State must prove beyond a reasonable doubt that a limitations bar does not apply. Because no limitations instruction was requested or submitted here, the State bore no obligation to prove that its prosecution was not barred, and Tita's sufficiency claim fails. *Tita v. State*, No. PD-1574-07, ___ S.W.3d ___, 2008 WL 4149708 (Tex. Crim. App. September 10, 2008) (Holcomb) (7:1:0).

3 Yes and no. An opening statement can open the door to the admission of extraneous-offense evidence to rebut the defensive theory presented in the opening statement. *Bass v. State*, Nos. PD-0494,0495-07, ___ S.W.3d ___, 2008 WL 4149701 (Tex. Crim. App. September 10, 2008) (Hervey) (8:1:0). However, the "fabrication" distinction drawn by the interim appellate court fails. Extraneous evidence is admissible when it harbors some logical relevance aside from character conformity. Evidence that suggests either fabrication or a frame-up/retaliatory motive can possess relevance aside from character conformity. Here, the trial judge did not abuse his discretion in admitting extraneous crimes to counter the defense theory voiced in the opening statement.

4 No. Public policy favors restitution to crime victims. Because constitutional jeopardy protections do not apply to noncapital sentencing per *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246 (1998), remanding the restitution matter to the trial court is the best way to solve the restitution question. *Barrera v. State*, No. PD-1642-07, ___ S.W.3d ___ 2008 WL 4149709 (Tex. Crim. App. September 10, 2008) (Holcomb) (8:0).

5 Absolutely. *Shepherd v. State*, No. PD-1551-07, ___ S.W.3d ___, 2008 WL 4149707 (Tex. Crim. App. September 10, 2008) (Keller) (7:2). The Fourth Amendment does not prohibit a warrantless home entry and search when officers reasonably believe that a person within the premise is in need of immediate

aid. *See Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct 2408 (1978).

The emergency doctrine applies when officers reasonably believe that their actions are immediately necessary to protect or preserve life or avoid serious injury; it does not apply when police are carrying out their crime-fighting role. Such searches are strictly circumscribed by the exigencies that justify their initiation, but anything in plain view may be seized during the officers' legitimate emergency activities. When reviewing these Fourth Amendment cases, a court must consider the objective facts and inferences known to the officers, including the officers' training and experience. *Shepherd*'s facts pass this objective test since a reasonable officer could have believed that entering the house was necessary to protect or preserve life or to avoid a serious injury. Under the circumstances known to the officers, the Fourth Amendment certainly did not require them to walk away.

6 Yes. The gist of the *Brady* argument was strenuously voiced during the hearing on the motion for new trial, and *the State did not object*. Although the defense argument did not contain the constitutional legal support underpinning it and the "gussied up" appellate complaint did, the overarching theory voiced by the defense has remained the same: The prosecutor had a duty to inform defense counsel and the court that the extraneous matter in the PSI was false. Furthermore, trial courts are authorized to consider the merits of untimely new-trial amendments when the State fails to object, so the issue was preserved for appeal. *Clarke v. State*, No. PD-1454-07, ___ S.W.3d ___, 2008 WL 4331008 (Tex. Crim. App. September 24, 2008) (Cochran) (6:3).

7 Failing to stop, failing to return, and failing to remain are simply alternate methods of committing the same offense and therefore, the jury's disjunctive consideration of these acts did not violate Huffman's right to a unanimous verdict. *Huffman v. State*, No. PD-1539-07, ___ S.W.3d ___, 2008 WL 4414520 (Tex. Crim. App. October 1, 2008) (Keller) (6:1/1/1/4:0);[1] Tex. Transp. Code §550.021.

Presiding Judge Keller's decision thoroughly discusses, with examples, the eighth-grade-grammar analysis developed by Judge Cochran to analyze unanimity complaints. Judge Keller concludes that failure to stop and render aid is a circumstances-surrounding-the-conduct offense because the driving conduct becomes criminal only due to the driver's knowledge of circumstances surrounding the conduct: a wreck and an injured victim. Hence, each wreck and each victim constitute an allowable unit of prosecution. Also, the language of the statute includes acts—stop, return, and remain—that are serial requirements that relate, step-by-step, to what a driver must do at the scene of a car collision. The offense arises when a driver fails to comply with any of these acts.

Concurring, Judge Cochran also relies on her eighth-grade-grammar analysis, but she believes that the majority applied this test to the wrong subsection of the statute. The final clause of this Transportation Code section innocuously reads: "A person commits an offense if the person does not stop or does not comply with the requirements of this section." Applying the sentence-diagraming formula to this offense-defining phrase, Judge Cochran concludes that the main transitive verbs of the sentence are "stop or comply." She writes that the failure either to stop or to comply with the provision's other requirements is the forbidden conduct, while the earlier statutory language about stopping, returning, and remaining (along with providing information and assistance) statutorily defines the requirements with which a driver must "comply."

Editor's note: For more on disjunctive jury charges, see page 18.

8 No. *Klein v. State*, No. PD-0502-06, ___ S.W.3d ___, 2008 WL 4414498 (Tex. Crim. App. October 1, 2008) (Hervey) (5:4/4).[2] At a minimum—and giving unwarranted credence to the mother's defense-serving testimony which limited her dance schedule to several weeks—the evidence showed that the child suffered sexual assaults on at least four separate occasions on Monday nights while her mother attended dance lessons during the fall semester of the child's fifth-grade year. Specific testimony recounted at least four separate sexual assaults. Therefore, the court of appeals erred by finding that the record was void of any specific evidence of separate incidents constituting the commission of additional offenses.

Continued on page 44

Annual rescheduled, January Prosecutor Trial Skills Course cancelled

As most of you probably know, TDCAA's Annual Criminal and Civil Law Update that was scheduled for September in Galveston was postponed due to Hurricane Ike. To secure appropriate hotel and training room capacities, we needed to utilize one of our existing contracts and amend it to include the Annual agenda.

After careful consideration of many options, we decided to hold the rescheduled Annual in Austin at the Doubletree North Hotel, which was originally slated as the site of our January 2009 Prosecutor Trial Skills Course. Unfortunately, we had neither the faculty, resources, nor room space to hold both the Annual and the Trial Skills Course simultaneously. Thus, the January Trial Skills Course has been cancelled.

However, we have secured additional rooms and meeting space for the July 2009 Prosecutor Trial Skills Course (also set at the Doubletree North in Austin, July 12–17) to accommodate the extra attendees who normally would have attended the January session.

Contact us with questions or concerns regarding this change. We hope to see you there!

Continued from page 43

9 Yes, but just barely. In general, conflicting testimony—in and of itself—will not authorize admission of prior consistent statements offered to rebut an express or implied charge of recent fabrication or improper influence or motive. However, based upon the facts and posture of the arguments in this case, the trial court did not abuse its discretion in admitting the victim's out-of-court assertions to the CPS investigator and officer to show that the child had said the same things to others earlier. The court reversed the court of appeals' decision. *Klein v. State*, No. PD-502-06, ___ S.W.3d ___, 2008 WL 4414498 (Tex. Crim. App. October 1, 2008) (Hervey) (5:4/4)

Judge Cochran's dissent would narrow the application of Rule 801(e)(1)(B) to allow rehabilitation of a witness only when the recent-fabrication accusation arose based upon "some improper reason" such as a bribe, plea deal, civil lawsuit, etc.

10 No. Only statements that are directly against the speaker's penal interest—including blame-sharing statements—are admissible pursuant to Rule 803(24). *Walter v. State*, No. PD-1929-06, ___ S.W.3d ___, 2008 SL 4414536 (Tex. Crim. App. October 1, 2008) (Cochran) (8:2). The statement-against-self-interest hearsay exception stems from the common-sense notion that people ordinarily do not say things that are damaging to themselves unless they believe they are true. To be admissible, a self-inculpatory statement must subject the declarant to criminal liability and the declarant must realize this when it was uttered; also, sufficient corroborating circumstances should indicate the statement's trustworthiness. The fact that a person makes a broadly self-inculpatory confession does not make the confession's non-self-inculpatory assertions credible; indeed, one of the most effective ways to lie is to mix falsehood with truth. Thus, the self-exculpatory statements that shift the blame to another person must be excluded, and trial judges must separate and exclude the self-inculpatory comments from the mix. The trial court abused its discretion by admitting Markel's narrative *in toto* without discerning whether each assertion was directly self-incriminating or, at a minimum, shared blame equally.

Endnotes

1 This case generated five opinions: Six judges joined the majority; the other three judges wrote separate concurrences, and Judge Cochran delivered a four-vote concurrence that included votes from two other judges who had, like Cochran, also joined the majority. No one dissented.

2 Four members of the court participated in a concurring and dissenting opinion authored by Judge Price as well as Judge Cochran's dissent. The four members of the mixed-result opinion concurred on the sufficiency issue.

The *Atkins* ambush

The prosecution of a capital murderer got tricky when, just before the jury returned a guilty verdict, the defense filed an *Atkins*[1] motion. In spite of the last-minute curve ball, justice prevailed.

By Kevin Yeary and Rose Zebell
Assistant Criminal District Attorneys in Bexar County

On November 22, 2004, a couple of days before Thanksgiving, Diane Tilly, a schoolteacher from the Alamo Heights area of San Antonio, was preparing to leave town to visit her boyfriend. She was packing her bags when there was a knock at the front door. It was 15-year-old Pearl Cruz.

Diane had seen Pearl once before. She recognized her as the daughter of a man who had come by offering to mow her lawn. Diane had told Pearl's father, Ronnie Joe Neal, that she didn't need her lawn mowed. Neal had introduced Diane to his daughter, Pearl, and Diane told them that they could have her old swingset.

Now on Diane's doorstep, Pearl said that her car had broken down and asked to use the phone. It was a ruse just to get inside. While Pearl was pretending to call someone and Diane's back was turned, the teenager pulled out a gun and told Diane to get on the floor. Pearl then let her father, Neal, into the house through the back door.

The two tied up Diane's wrists with a shoelace, then began searching through her house for things to steal. Neal found a handgun and an ATM card, and he demanded that Diane give him the PIN, firing gunshots into the floor of the living room and threatening to kill her cat. He also took Diane to her bedroom and sexually assaulted her. (When Pearl saw this happening, she got angry and started throwing things—she was jealous. It would later come to light that, although Pearl was Neal's daughter, she was also pregnant with his child.)

They loaded Diane into her car and drove to a secluded area. After the three walked deep into a field, Neal and Pearl made her kneel down. Diane was saying, "You don't have to do this; please don't do this." Neal then shot her over and over with the handgun he had taken from her house.

With the killing done, Neal and Pearl drove back to the motel. The next morning, they got up and went to a Valero station to get more money from Diane's account. Upon returning to the motel, however, they saw reports on television that Diane and her car were missing. Neal and Pearl panicked. They took Diane's car out to the same general area where they had killed her, drove it off the road into a culvert, doused the car with lighter fluid, and set it on fire.

Coworkers alerted police after Diane did not attend a Thanksgiving luncheon the next day, and officers obtained video from a gas station where Diane's ATM had been used. Knowing they were searching for a white truck and a tall, thin black man with a shorter Hispanic girl, they canvaseed the area in two-man teams. They found Neal and Pearl loading up their pickup truck at a local motel and took both into custody.

While Neal was in jail waiting to see a magistrate judge, he talked to a cellmate about the crime, saying he went to a woman's house and that he shot her. Neal identified his victim as the missing teacher. He also revealed details about items he took as well as how he shot Diane and covered up her body.

Pearl eventually struck a deal with the State. She gave a statement, led officers to Diane's body, and agreed to give truthful testimony. In return it was agreed that the State would try her as a juvenile and seek a determinate sentence rather than try her as an adult for capital murder.

By the time Pearl took officers to Diane's body, it had already begun to decompose. Nearby they found an earring, shell casings, and a bullet or two lodged in a tree. The bullets and

Continued on page 46

Continued from page 45

the shell casings were matched through ballistics to the gun that Neal abandoned in the field when he was being chased by officers. Neal's DNA was matched with the DNA recovered from semen inside Diane's body.

Preparation for trial

The Bexar County prosecution team included Catherine Babbitt, Jill Mata, and Rose Zebell. Neal's case was worked up like every other capital case: Witnesses were interviewed, defense counsel was permitted access to the State's file, and prosecutors prepared to present their best case to the jury.

Neal was initially represented by an attorney hired by his family. While represented by that attorney, in January 2005, he had a bond reduction hearing at which his cellmate testified about what Neal had told him about the crime and a medical examiner testified about the autopsy. At the end of that hearing, Neal was remanded without bond. Neal's first attorney was also allowed a hearing on a motion to suppress physical evidence in July 2005, and the trial court denied that motion.

Eventually, the attorney hired by Neal's family was released and, in October 2005, the trial judge appointed two highly qualified and experienced local capital defense attorneys who filed a new motion to suppress evidence, which was heard and denied in November 2005. Jury selection for trial began in January.

In all of that time, it never became apparent to the prosecution team that the defense was preparing to raise an *Atkins* claim.

The trial and ambush

Opening statements and testimony began February 21. The trial lasted two weeks, and closing arguments on guilt-innocence were delivered relatively uneventfully March 1. Then the team received word that the jury had a verdict.

When the prosecution team went to receive the verdict, there was an unexpected surprise. They were notified at that point, with the verdict waiting, that the defense had filed an *Atkins* motion. The motion was nothing too complicated; it simply alleged:

> Counsel has become aware that the issue of mental retardation exists in this cause and needs additional time in which to adequately prepare for and present an *Atkins* claim to this court for a preliminary determination by the trial judge and potential determination by the jury should the need arise.

The prosecutors were told that the defense found out about the jury's verdict while they were filing their *Atkins* motion.

Needless to say, an *Atkins* motion just before the jury's verdict is a game-changer, and all manner of questions arose. As a result, before receiving the verdict, the trial court opened a hearing on the *Atkins* motion.

At the hearing, defense counsel proffered to the court that, as soon as they were appointed—in October 2005—they issued subpoenas for records relating to Neal and that the records had been trickling in ever since. Counsel explained that the last of those records came in only the preceding month and that their expert had been reviewing those records and had informed them only "last week" (meaning in the middle of the guilt-innocence phase of trial) that, in his opinion, Neal was mentally retarded. As a result, the defense requested a 30-day continuance between the guilt-innocence phase and punishment so they could "re-interview all of the witnesses" they had spoken to and seek additional witnesses to help them prove up the mental retardation claim.

At the conclusion of the hearing, the court announced its preliminary conclusion that some kind of continuance would be granted if Neal were found guilty, which he was. With the parties' consent, the court had the bailiff interview the jury about their schedules, and, armed with that information and input from both the prosecution and defense, the court decided that the trial would be re-convened for punishment four weeks later on Monday, April 3, 2006.

The continuance and arguments

During the continuance, the prosecution team educated themselves on *Atkins* jurisprudence, mental retardation in general, and the law relating to it. They contacted Dr. Richard Coons of Austin to consult on the issue of mental retardation. Coons is both a psychiatrist and a lawyer, has a private medical practice, and testifies from time to time as an expert.

Because Neal had a history of incarceration, the prosecution team also consulted with Drs. John Sparks and Cesar Garcia, both psychiatrists who worked at the University Health System to provide care for

inmates at the Bexar County Adult Detention Center. Both had previously interacted with Neal in a professional capacity while he was incarcerated as an adult for other offenses. The team also consulted Dr. James Sherman, a psychologist who had performed psychological evaluations and testing on Neal when he had been arrested as a juvenile.

On March 28, the court convened a formal pre-punishment hearing. At this hearing the defense team argued that, because the legislature had been through two sessions since *Atkins* was decided and had failed to establish a vehicle affording the protections enunciated under *Atkins*, the trial court was without any authority on its own to "come up … with a procedure" to afford those protections. The defense also argued that, if the trial were to proceed, it should do so only after a separate jury was seated to determine whether Neal was mentally retarded, emphasizing that the sitting jury had not been voir-dired on the issue of mental retardation. The defense also contended that the court should make its own determination about whether Neal was mentally retarded, and, if it agreed with the defense, it should prohibit the imposition of the death penalty as a matter of law. Finally, the defense claimed that the burden of proof on the issue of mental retardation should be placed on the State to show that Neal was not mentally retarded beyond a reasonable doubt.

By the time the pre-punishment hearing was convened, the prosecution team had enlisted the help of the late Dan Thornberry, an attorney in the office's appellate division, who directed the trial court to the Court of Criminal Appeals' opinions in *Ex parte Briseno*[2] and *Hall v. State*.[3] Thornberry contended that the procedures approved by the Court of Criminal Appeals in *Briseno* and *Hall* were sufficient to protect Neal's rights and that the trial court could implement those procedures in the absence of legislation. Thornberry argued that, based on the Court of Criminal Appeals' holdings in those cases, it was clear that mental retardation was in the nature of an affirmative defense that a *defendant* must establish by a preponderance of the evidence. He also argued that there was no reason why the same jury that decided guilt could not also decide the mental retardation issue. Therefore, he continued, if the court found some evidence of mental retardation, the issue should be submitted to the jury on punishment, placing the burden of proof on the defense by a preponderance of the evidence.

The defense tried to distinguish *Briseno* and *Hall*, arguing among other things that *Briseno* was a habeas case and did not involve an *Atkins* claim raised for the first time at trial, but in the end, the trial court agreed with the State.

The punishment phase

When the punishment phase of trial resumed, the prosecution team was ready. The defense called Neal's mother, who testified that Neal had behavioral and school problems, stole things, eventually dropped out of school, had suffered a head injury, and showed signs of depression. The defense also called two experts, but only one of them specifically opined that Neal was a person with mental retardation.

Dr. Richard Garnett testified for the defense that Neal had taken three IQ tests before he turned 18: When Neal was 11 years old, he scored a 70; when he was 15 years old he scored a 72; and when he was 17 years old he scored an 87. Garnett contended that, applying a concept called the "Flynn effect," Neal's scores were actually lower than they appeared.[4] He identified several areas of Neal's life before age 18 that, in his opinion, tended to show limited adaptive functioning, specifically, Neal's problems in school, learning difficulties, failing sixth grade, poor adjustment to parole, juvenile probation officers's recommendation he be put in special placement, difficulty following rules, poor organizational and decision-making skills, history of getting into fights, and susceptability to being manipulated or taken advantage of by others. Based on these observations, Garnett concluded that Neal satisfied all the criteria to be diagnosed as mentally retarded.

In rebuttal, the State called two inmates who testified that Neal bragged about faking his mental retardation claims. The State also called Drs. Sherman, Sparks, Garcia, and Coons to rebut the defense expert's testimony, all of whom testified the defendant was not mentally retarded. Dr. Sherman based his conclusion on a number of sources, including Neal's school records, juvenile detention records, and his own clinical evaluation of the defendant. Dr. Sparks conceded that Neal had low intelligence and that he had sustained a head injury, but he also

Continued on page 48

Continued from page 47

was of the opinion that Neal had no organic brain syndromes. Dr. Sparks observed that Neal could cooperate with people and give reasonable answers to questions, and he concluded that Neal's problems were rooted in anger, depression, and a "conduct disorder and antisocial personality."

Dr. Garcia had been Neal's doctor, and he based his testimony on his observations while treating the defendant. He observed that Neal was articulate and organized and that he could navigate systems, had "executive functioning skills," could write out an adequate grievance statement, and had even developed a detailed plan to escape from jail.

Finally, Dr. Coons also concluded that Neal's problems were personal as opposed to intellectual. Coons explained that Neal's poor performance on IQ tests appeared to be related to extraneous problems such as anxiety, depression, or lack of motivation. He observed that Neal was adaptive to society, able to express his thoughts, able to accomplish tasks when motivated, and that he fit in with the standards of his cultural group. He was also a capable worker and a "prolific writer." The doctor also explained that the Flynn effect, on which the defense expert had relied, is properly applied only to groups, not individuals.

At the close of evidence, the trial court permitted both sides to submit arguments outside the jury's presence on the mental retardation question. After hearing the evidence and arguments of counsel, the court made findings of fact on the record rejecting Neal's claim. The court then instructed the jury in the court's punishment charge—in addition to those other instructions and issues provided for by law for capital punishment charges in Texas—in the following way concerning the mental retardation issue:

> You are instructed that the Defendant must prove Issue No. 1 submitted to you by a preponderance of the evidence.
>
> You may not answer Issue No. 1 "No" unless you agree unanimously, and you may not answer Issue No. 1 "Yes" unless ten (10) or more of you agree to do so.
>
> Members of the jury need not agree on what particular evidence supports an affirmative answer to Issue No. 1.
>
> By the term "Preponderance of the evidence" is meant the greater weight of the credible evidence.
>
> With respect to Issue No. 1, you are instructed that mental retardation means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.
>
> Mental retardation means significantly sub-average intellectual functioning of a person that is concurrent with deficits or impairments in adaptive functioning in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset of the deficits or impairments must originate before the age of 18.
>
> Sub-average general intellectual functioning refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used.
>
> In regard to standardized psychometric instruments you are instructed that the recognized standard error of measurement is a range of five points higher or lower.
>
> Adaptive behavior is defined as the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group.
>
> Issue No. 1 is: Do you find by a preponderance of the evidence that the Defendant, Ronnie Joe Neal, is a person with mental retardation?
>
> Answer: We, the jury, because at least ten (10) jurors find and determine by a preponderance of the evidence that the defendant is a person with mental retardation find the answer to Issue No. 1 is "Yes."
>
> Or
>
> Answer: We, the jury, unanimously find that the answer to Issue No. 1 is "No."
>
> You are instructed that if you return a verdict of "Yes" to Issue No. 1 then you shall cease your deliberations. You are further instructed that if you return a verdict of "No" to Issue No. 1, only then are you to answer Issue No. 2.[5]

The jury answered Issue No. 1, the mental retardation issue, "No." The jury also answered the other issues in a manner that called for death; immediately thereafter, the trial court sentenced Neal to death for the capital murder of Diane Tilly.

Lessons

The defendant addressed many of the arguments he made in trial to the Court of Criminal Appeals on direct appeal from his judgment of conviction and sentence. On June

Continued on page 50

Continued from page 48

18, 2008, the court rejected his arguments in a published opinion.[6] As of this writing, he has a petition for writ of certiorari pending before the U.S. Supreme Court.

Some valuable lessons can be gleaned from the prosecutors' experience in the *Neal* case. First, unless and until the state legislature devises a different procedure, the issue of mental retardation should be treated in the nature of an affirmative defense to the death penalty that the defendant must raise and prove at punishment by a preponderance of the evidence. Second, also unless and until the legislature devises a different procedure, the court may properly craft a charge issue to protect the defendant's rights in relation to the prohibition against execution of persons with mental retardation.[7] Third, the same jury that decides guilt in a capital case can also answer an issue at punishment concerning whether the defendant is mentally retarded. Fourth, never think that a capital defendant won't resort to an *Atkins* defense, even in the middle of trial when he has given no previous indication that he will raise it. Lastly, on the chance that a capital defendant may raise an *Atkins* defense at trial, it is prudent to fully explore the defendant's history ahead of time because you never know.

Endnotes

1 *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that execution of a person with mental retardation violates the Eighth Amendment of the United States Constitution).

2 *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

3 *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004).

4 *In re Salazar,* 443 F.3d 430, 433 (5th Cir. 2006) (explaining, "[The Flynn effect] attributes the general rise of I.Q. scores of a population over time to the use of outdated testing procedures, emphasizing the need for the repeated renormalization of I.Q.-test standard deviations over time."); see also *Ex parte Blue*, 230 S.W.3d 151, 166 n. 7 (Tex. Crim. App. 2007) (quoting from *In re Salazar*).

5 Beginning with Issue No. 2, the trial court gave the statutorily mandated instructions for capital murder cases in Texas, provided for by Texas Code of Criminal Procedure article 37.071.

6 *Neal v. State*, 256 S.W.3d 264 (Tex. Crim. App. 2008).

7 Over a year after Neal was sentenced, the Court of Criminal Appeals decided Hunter v. State, 243 S.W.3d 664 (Tex. Crim. App. 2007), cert. denied, 2008 U.S. LEXIS 6609, 77 U.S.L.W. 3198 (U.S. Oct. 6, 2008). In that opinion, the Court of Criminal Appeals explained, "Although a jury determined the issue of mental retardation in this case, it is important to note at the outset that *a jury determination of mental retardation is not required.*" Id., at 667 (emphasis added). The court's conclusion was direct and clear. Also, the U.S. Supreme Court denied certiorari in the Hunter case, but it might be wise to continue to let juries decide this issue, at least until the U.S. Supreme Court expressly agrees with the Court of Criminal Appeals' statement in Hunter.

Prosecuting sex crimes in juvenile court

Some aspects of prosecuting sex crimes in juvenile court are unique. Attention to these areas can improve prosecutors' management of juvenile sex crime litigation.

In many ways trying juvenile sex crime cases is very similar to trying sex crime cases against adult defendants. Both types generate strong emotions, and they both involve the same difficulties of presenting child witnesses who must describe having been hurt, violated, humiliated, and traumatized. The trial mechanics and the defenses are also similar to adult sex crime prosecution. These challenges, however, take place within the dynamics of juvenile court. In light of these difficulties and their context, success in juvenile sex crime prosecutions should be measured in terms of protecting sexual assault victims and seeking accountability and rehabilitation for juvenile offenders.

By Andrew J. Walker
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Meeting these goals requires a familiarity with the quasi-civil rules of juvenile court, a clear grasp of the mechanics of proving a sex crime, and effective communication with crime victims and their families. TDCAA has published excellent books to assist prosecutors in each of these three areas, and they are good places to start,[1] but some topics are unique to sex crime prosecution in juvenile court. This article will focus on three of them: addressing the age and development of the person on trial during jury selection, determining a case's appropriate disposition, and discussing a case's disposition with victims and their families.

Jury selection

A successful voir dire nips potential problems in the bud before opening statements by setting out what is germane to the case. Juvenile sexual offenses evoke confusion, disgust, and any number of generalizations about teenagers and sex crimes in the jury pool. As well, some trials risk being defined by the juvenile offenders' needs or the conditions in which they live rather than the cases' facts. Clearly defining the relevant issues is the most important part of jury selection because it gives the prosecutor control of a case's subject matter and weeds out potential jurors who cannot keep this focus.

Generally, if the prosecutor focuses the jury panel's attention on deciding whether the offense took place, strong jurors and problematic jurors in juvenile sex crimes are the same as in adult sex crimes. The prosecutor must prevent strong jurors from disqualifying themselves early on by explaining that the case is not a referendum about child abuse and that revulsion to sexual offenses is not an exemption from jury service. Then, along with discussions about the types of evidence the jury could expect, possible weaknesses in the facts of the case, and commitments to follow the law, the prosecutor should raise issues relating specifically to a juvenile trial. It is important to directly address the fact that the case is a juvenile trial because to do otherwise is to ignore a significant difference between typical beliefs that come to many jurors' (and judges') minds about sex crimes and the dynamics of your trial.

If the judge has not discussed differences in terminology, some presentation of the use of terms in juvenile court may be a good introduction to a discussion of juvenile issues (for example, that the alleged offender is called the "respondent" instead of the "defendant"). I evoke discussion by asking questions about any perceived differences between adult sex crimes and juvenile sex crimes or juvenile crime in general. I do so with the goal of limiting the relevance of these issues to the types of facts the jury will hear. Possible questions a prosecutor can ask include:

- What does a sex offender look like?
- Should juveniles be prosecuted for sex crimes?
- How should the justice system address sex crimes alleged against juveniles?
- Are there any differences between juvenile sex crimes and adult sex crimes?
- Should juveniles who commit sex crimes be treated differently from adult sex offenders?

These types of questions are important because they can get jurors talking. Jurors' answers and the discussion these questions provoke will more easily identify problematic jurors as the prosecutor monitors the direction of the conversation. It is then easier to present subjects that sometimes appear dif-

ferent in a case against a juvenile, such as social relationships, empathy between a victim and a perpetrator, or a child victim's difficulty testifying. (Unless the case invokes the determinate sentencing statute, the prosecutor should focus jurors' attention to their role as factfinders by explaining that only the judge will determine the sentence if the jury finds that the crimes alleged are true.) As the jurors are better screened and the issues are focused to factual issues relevant to guilt or innocence, the prosecutor should present the type of facts the jury will hear and the issues most important for the particular case.

An appropriate disposition

The greatest difference between juvenile and adult sex crime prosecution is the potential to reform the offender and prevent future criminal sexual behavior. While success in prosecuting adult offenders is usually measured by the length of the prison sentence they receive, success with juvenile offenders is usually best achieved by finding the best setting for strict, long-term, intensive sex offender treatment by a properly licensed professional.[2]

Pedophilia and other criminally deviant adult sexual conditions are rare among juveniles.[3] Given enough time, however, we will all see juvenile cases that involve sadism, pedophilia, or predatory behavior that shocks the imagination. Such cases virtually always necessitate transfer for trial as an adult or a lengthy determinate sentence. Fortunately, the majority of juvenile cases do not fit in these categories. Most junior high- and high school-age offenders have different motivations for their acts, different understandings of the acts' consequences, and far more success in sex offender treatment programs than adults.[4] Unless a juvenile will be an adult in a short amount of time, the case can usually be handled as a non-determinate case within the juvenile system.

In Galveston County, a significant percentage of the juvenile sexual offenses on the docket involve teenage siblings, cousins, and babysitters sexually assaulting prepubescent children. These cases involve perpetrators doing extreme harm but are rarely based on the deviant mental operations of adult offenders. With good preparation, a willingness to take the toughest cases to trial, and the broadest possible range of disposition options, more cases are won and more enter into favorable plea agreements.

The disposition options in these and other juvenile sex crimes require determining what treatment options are available. The Texas Youth Commission (TYC) offers appropriate treatment but sometimes not until a spot opens in a program.[5] Other options include residential placements and public and private outpatient providers. Only after this review is complete can justice be served on a case-by-case basis. Galveston County uses each option, depending on each juvenile's risk to public safety and his or her needs. We never send juveniles adjudicated for sex offenses to unlicensed providers because it is illegal to provide treatment without licensure by the Texas Council on Sex Offender Treatment,[6] and we would never consider solutions such as six months of visits with a psychologist who does not specialize in sex offender treatment and who does not fully consider the needs of crime victims and public safety.

Treatment should include the respondent and the adult family members when possible. It should be viewed as a huge intervention that includes forensic investigation into the respondent's behavior, and it should affect all aspects of the participants' lives. Juveniles and their families must agree to allow treatment records to be available to probation officers and prosecutors, for the juveniles to submit to polygraph tests at the therapist's request, and to discuss subjects such as incest and sexual abuse.[7] A treatment program does not dive straight into taboo subjects but must have clear expectations and address issues relating to accountability, empathy for victims, and the effects of the criminal behavior.[8] It should incorporate the goal of eliminating criminal behavior and raising the overall quality of life in a community. A treatment provider must keep public safety in mind at all times and be able to recognize the small percentage of juveniles with sociopathic tendencies significant enough to manipulate a therapeutic setting or otherwise cause the juvenile to not respond appropriately.[9]

Ten years ago the Galveston County District Attorney's Office, in conjunction with a local treatment provider, developed a plan to effectively treat appropriate youth with sexual behavior issues. The treatment team is composed of juvenile probation officers, treatment providers, a liaison with the Child

Continued on page 54

Continued from page 53

Advocacy Center, the polygrapher, the district attorney's office, and, when needed, a Child Protective Services representative.[10] Having everyone in the same room allows the prosecution to act more efficiently and to fully understand the facts of a case before a probation revocation is filed.

There is no one-size-fits-all plan to treat and monitor juvenile sex offenders. The amount of time a juvenile under our team's review spends in treatment can vary substantially; the average length of treatment is about 18 months. The minimum term of probation we seek for a teenager in this type of program is 24 months. At times this term necessitates a determinate sentencing petition to ensure that the juvenile can continue on probation until successfully completing the program. For a county with a population of about 280,000 people, this option provides services to 20 to 25 juveniles each year and costs approximately $140,000 annually, which comes out to between $5,600 and $7,000 per youth per year.

We cannot, however, seek a community-based placement without verified information about the juvenile offender that would make the placement appropriate, nor can we expect that we will always incarcerate a juvenile after a hard-won trial. There is currently not enough data to show the long-term success or failure of community-based placement or more restrictive placements. For these reasons, the prosecutor must seek information about the offense, the environment in which the offense took place, and whether there have been additional offenses. Questions about a juvenile sexual offender should include:[11]

- What other type of sexually abusive behavior has the juvenile committed?
- How many victims are there?
- Is the victim still in the offender's home?
- What access does the juvenile have to other vulnerable people?
- Are there other underlying psychopathology issues?
- What was the level of intrusiveness of the sexual act?
- Did the juvenile use force, threats, intimidation, coercion, or weapons during the offense?
- How frequent was the sexually abusive behavior?
- Are the juvenile's parents or guardians minimizing or denying the seriousness of the offense?
- How strong is the juvenile's familial support network?
- How honest is the juvenile about the sexually abusive behavior?
- How empathetic is the juvenile toward the victim?
- What other delinquent behavior has the juvenile committed?
- How does the juvenile present himself on social networking websites?

Risk assessment is not an exact science, and public safety must be kept in the forefront of placement decisions. Usually we will not know all of the answers to all of these questions. However, the more a prosecutor knows or can show is unknown, the stronger the argument for the most appropriate disposition to a case.

Discussions with victims and their families

One of the most difficult aspects of prosecuting juvenile sex crimes is prosecuting crimes that involve extreme violations of a child's dignity, mental health, and physical well-being in a system that is built around the rehabilitation needs of the perpetrator rather than the needs of the victim. Some people initially want no less than a life sentence for a juvenile sex offender; others want no punishment at all. When the victim and the perpetrator are in the same family, the family is sometimes drawn apart with extreme bitterness, with some rallying around the child-victim and others around the juvenile perpetrator.

The range of results for a juvenile sex crime trial must be presented in the context of a juvenile court and within the parameters of the available dispositions, which often requires lengthy discussions with a victim's family. Seek help from victim assistance professionals in your jurisdiction. Make sure that everyone on the prosecution team is familiar with the dynamics of a sex crime prosecuted in a juvenile court. Discussions with victims about disposition are best saved for after discussions about the victim's condition, victim assistance and counseling, and what to expect at trial. Victims and their families must know that the prosecutor is attuned to their needs and is seeking justice.

Most people can recognize the interests at stake and can set aside their anger and frustration when professionals whom they respect and trust are involved. Discussing the available sentencing options with a victim's family can assist grief-stricken and angry families as the prosecutor takes time to discuss the legal process and juvenile courts with them. Families should know as

much of the process as a prosecutor's office can explain. I always attempt to explain the trial process, with an emphasis on the victim's testimony, outcry testimony, and sentencing process within the parameters available. In my experience, I have been surprised and extremely moved by the numbers of times victims' parents have wanted sex offender treatment—rather than prison time—when they learn what options are available for the juveniles who have inhumanely hurt their children.

Conclusion

As with adult trials, preparation wins juvenile cases and, one case at a time, improves the quality of life in a community. Juvenile prosecutors are in a delicate and unique position because they have the chance to provide an offender with rehabilitation that would be inappropriate for an adult offender. Careful attention when selecting a jury, determining an appropriate disposition, and discussing that disposition with victims and their families will ensure that all parties involved in a trial for a juvenile sex offense are treated fairly and that all goals of juvenile prosecution are met.

Endnotes

1 See Terese M. Buess and Michael E. Trent, *Investigation and Prosecution of Child Sexual Abuse*, 2nd Ed. (2007); Chris Hubner and Sharon N. Pruitt, *Juveniles* (2005); Diane Beckham, *Victim Assistance Manual*, 2nd Ed. (2007).

2 See Texas Administrative Code, Title 22, §810.3 (setting out licensure requirements for sex offender treatment providers).

3 For general information about juvenile sex offenders that is not burdened by social science jargon, see Council on Sex Offender Treatment, Treatment of Sex Offenders: Juveniles with Sexual Behavior Problems, informational statement, available at www.dshs.state.tx.us/csot/csot_tjprobs.shtm; see also The Association for the Treatment of Sexual Abusers' summary about children with sexual behavior problems, available at www.atsa.com/ppChildren.html.

4 Association for the Treatment of Sexual Abusers, Board Resolution, *The Effective Legal Management of Juvenile Sexual Offenders*, March 11, 2000, available at www.atsa.com/ppjuvenile.html.

5 With the recent TYC reforms adopted by the 80th Legislature, we send fewer people to TYC and have far less leverage against really rough teenagers who are not major offenders. One effect of the decision to downsize TYC will be more crimes that could have been prevented (by incarcerating juveniles likely to reoffend) and longer prison sentences for juveniles certified to stand trial as adults. A discussion of these TYC reforms is too lengthy to delve into here.

6 Texas Administrative Code, Title 22, §810.3(a) (detailing licensure of sex offender treatment providers); see also §§810.61; 810.62 (setting out standards of practice); §810.63 (establishing general assessment standards); §810.65 (establishing assessment and treatment standards for use during treatment of juveniles); §810.68 (establishing standards of practice for treatment of juvenile); §810.92 (establishing code of ethics).

7 In Texas, juvenile sex offenders may be required by law to submit to polygraph examinations. See Texas Administrative Code, Title 22, §810.65(g); Texas Human Resources Code, Title 3, §61.0813. Polygraph tests are a typical part of the therapy in Galveston County's outpatient program and provide strong motivation for honest dialogue with treatment providers. Juvenile sex offenders in Galveston Country are required to submit to polygraph tests conducted by expert polygraphers as a condition of probation.

8 The legislature sets out the issues to be addressed in treatment in Texas Administrative Code, Title 22, §810.68.

9 For more information about what constitutes sex offender treatment, see *Understanding Treatment for Adults and Juveniles who have Committed Sexual Offenses*, a project of U.S. Department of Justice Office of Special Programs Center for Sex Offender Management (November 2006), available at www.csom.org/pubs/treatment_brief.pdf.

10 For a discussion of collaborative teams to manage sex offender monitoring, see *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policy Makers and Practitioners*, a project of U.S. Department of Justice Office of Special Programs Center for Sex Offender Management (July 2007), available at www.csom.org/pubs/CSOM_handbook.pdf. Collaborative teams may also be used to monitor adult sex offenders if they are released from prison. They may include correctional officials, victim advocates, faith-based institutions, law enforcement officers, court administrators, and others.

11 A useful resource that discusses most of these factors in the context of gauging the appropriate course of action for a juvenile sex offender is included in the Colorado Sex Offender Management Board Standards and Guidelines for the Evaluation, Assessment, Treatment, and Supervision of Juveniles who have Committed Sexual Offenses, available at www.dcj.state.co.us/odvsom. A form produced by the Texas Juvenile Probation Commission that incorporates many of these factors is available at www.tjpc.state.tx.us/publications/forms/2004/RARC-SEX0204.pdf.

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