THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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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

Set the way-back machine for a year-end caselaw quiz

A question-and-answer column on 10 significant cases from the Texas Court of Criminal Appeals and Supreme Court of the United States

By David C. Newell
Assistant District Attorney in Harris County

Long, long ago, the As The Judges Saw It column followed a quiz format where we'd pick 10 "significant" cases from the Court of Criminal Appeals (and sometimes the United States Supreme Court) and boil them down to simple binary questions to educate prosecutors who might have been unfamiliar with the cases and to challenge the ones who were. With a bit of nostalgia in mind, I've gone through the cases from the last term and picked out (in no particular order) a few of the bigger ones that everyone probably knows and several smaller ones that may have been overlooked.

Questions

1 Police officers discovered the bodies of Juan and Hector Garza. They had been shot with a shotgun, and at the crime scene, police discovered shotgun shells. Eventually, the investigation led to Genovevo Salinas. At his home, police found a shotgun, and Salinas voluntarily accompanied officers to the station for questioning. Police did not read Salinas his *Miranda* warnings, and they questioned him for about an hour. Salinas answered every question they asked. When the investigating officer asked Salinas if the shotgun shells found at the crime scene would match the shotgun in Salinas' home, Salinas remained silent. Ballistics analysis later matched Salinas' shotgun to the shells at the scene. At his trial, the State sought to introduce Salinas' silence in response to the officer's question about the shotgun shells.

Should the trial court have admitted the evidence of Salinas's pre-arrest, pre-*Miranda* silence?

Yes _____
No _____

2 A joint FBI and Washington D.C. task force suspected Antoine Jones of trafficking narcotics. Based upon information gathered from various investigative sources, the FBI got a warrant authorizing the installation of a GPS device on the Jeep Grand Cherokee registered to Jones's wife. The FBI was supposed to install the device in 10 days and in the District

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Honoring the Founding Fellows of the Texas Prosecutors Society

The Foundation is honoring our Founding Fellows (listed in the blue box below) of the Texas Prosecutors Society at this year's Elected Prosecutor Conference Wednesday, December 5. This elite group has committed both money and time to the newly formed Texas Prosecutors Society, whose purpose is to establish an endowment for the Foundation. We thank you for your leadership and support!

By Jennifer Vitera
TDCAF Development Director in Austin

Every year we will invite a new class of 50 honorees to participate in the Texas Prosecutors Society. Invitations for 2013 will go out in November 2012.

Golf tournament and silent auction

The 2012 Annual Golf Tournament and Silent Auction hosted by the Texas District and County Attorneys Foundation grossed over $11,000 in donations. Thank you to our generous sponsors, donors and participants—we appreciate your support! Proceeds from the annual event will benefit the 2012 Annual Campaign.

Here are a couple of photos from the day (below and on page 4), as well as some winners. The team of Matthew Banister, Mark Hanna, Wes Wittig, and Pancho Lopez came in first. Lisa McMinn won for the

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Founding Fellows of the Texas Prosecutors Society

Richard B. Alpert
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Eduardo Arredondo
Patrick C. Batchelor
Diane Beckham
Robert Newton Bland, IV
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Mark Yarbrough

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Texas District & County Attorneys Foundation

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best plaid outfit, Alfonso Lopez for the longest putt, and Marc Chavez for the longest drive. Thank you to everyone who participated!

2012 Annual Campaign

As we wrap out another year, we hope you will consider contributing to our 2012 Annual Campaign whose theme is, "It is more blessed to give than to receive, to serve than to be served." We at the Texas District and County Attorneys Foundation know both of these truths all too well—that's what we do!

Just to name a few things, in the last four years we've funded our Train the Trainer seminar and the Advanced Trial and Appellate Advocacy Courses; published the *Domestic Violence Training Manual* and *Offense Report Manual* and sent them free to all prosecutor offices; put on two DWI Summits; sponsored last year's Intoxication Manslaughter Course; updated the TDCAA website; and hired a victims services director and a senior appellate attorney. We even reimburse folks in your office who attend our seminars for part of their food and hotel expenses.

The Foundation is always at your service, so please consider giving so that many others can receive. Please use the attached envelope to mail in your donation or give on our website, www.tdcaf.org, to show your support.

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

DWI Summit sponsors

Our third DWI Summit will be broadcast November 15 on Anheuser-Busch's satellite network in cities across Texas and 10 other states. Thank you to this year's sponsors, Anheuser-Busch, the Texas Department of Transportation, Smart Start and LifeSafer. ❇

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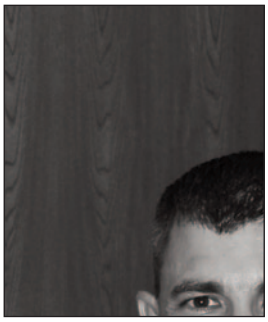
* gifts received between August 5 and October 5, 2012

A call to action

As I approach the end of my term as president of the Texas District and County Attorneys Association, I'd like to take this opportunity to thank the TDCAA staff, my friends on the board of directors and executive committee, and my staff at the Polk County Criminal District Attorney's Office for all the help they've given me throughout this year. Until you've had an opportunity to serve in a leadership position in our association, it is impossible to understand and appreciate just how much time and work goes into the administration of a statewide organization that serves and assists such a broad, diverse, and talented membership. For those of you who had the opportunity to attend the annual at South Padre Island in September, you will know exactly what I'm talking about when I say how fortunate we are to belong to such a well-run organization. In saying that, I'm not patting myself on the back but rather extending all the accolades to the TDCAA staff, board, and speakers who really hit the ball out of the park this year.



By William Lee Hon
Criminal District Attorney in Polk County

At the beginning of 2013, I'll pass the baton off to my good friend David Escamilla (County Attorney in Travis County) who I know will do a great job as president and uphold the best traditions of our association. Good luck, David!

We live in a challenging and interesting time as Texas prosecutors. I've noted previously in this column how I feel like our profession is frequently under attack. It's no big secret that in many instances lately, prosecutors have been portrayed negatively in the media. With that said, to the extent that we are under attack, this is a debate that we cannot and must not shy away from. Although we cannot get around the fact that there have been some very disturbing and public mistakes in our criminal justice system, we have to be willing to publically defend those aspects of the criminal justice system that work, and we also have to be open-minded to legitimate and well-intentioned proposals for improvement and reform.

When you get the feeling that the mainstream media is against you or is, at a minimum, lacking in objectivity, it is very easy to become confrontational and defensive. At the same time, there are individuals out there like Michael Morton who have a very compelling story to tell and are absolutely entitled to be heard in regard to how law enforcement and prosecutors might better do their jobs. While we might not agree on every proposal, we should always be striving for improvements to the system that might truly lessen the odds of wrongful convictions. When it comes to improving the system, we should be the progressives, not the reactionaries.

It was in this progressive spirit that TDCAA released the report "Setting the Record Straight on Prosecutorial Misconduct" in September. While a significant portion of that report was dedicated to refuting the Innocence Project's misleading claims regarding the frequency of true prosecutor misconduct, the report's most important recommendations (in my opinion) concern what we can do as prosecutors to improve the way we do our jobs and increase the likelihood "that justice is done" in each and every case.

The 83rd Texas Legislature will convene in Austin in January. Without a doubt, there will be any number of well-intentioned bills filed to increase "prosecutor accountability" or change the way we conduct our business. We cannot sit on the sidelines for this discussion. The TDCAA report by the Training Subcommittee on Emerging Issues can serve as a very important starting and reference point in these discussions for what prosecutors are doing to improve our own profession. We don't have to wait on the legislative session to recognize there are things that we can be doing ourselves—and with the cooperation of law enforcement—to make progress.

I can remember when I first became a prosecutor in 1996 how intimidated I was by the advent and proliferation of DNA testing and its use as forensic evidence. I did not come from a very strong science background and I suppose it was my own perceived inadequacy that made

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me fear that I could not effectively communicate to a jury the importance of this new and powerful evidence. Fortunately, prosecutors in our association did understand the value of DNA and were able to train the rest of us on how to present this type of evidence. In fact, it was prosecutors who took the initiative in convincing the courts and legislature of the reliability and importance of DNA evidence! Today, I am not the least bit hesitant to present DNA testimony in court, and judges and juries have grown to expect it in many cases.

Improvements to eyewitness identification procedures recently went online in September of this year and are being implemented by law enforcement agencies across the state. Prosecutors were an important part of this discussion as well. I know everyone is just now beginning to understand the importance of these new standards but I would be willing to bet that in a matter of years—just like with DNA evidence—everyone will become quite comfortable and conversant with the new eyewitness identification protocols.

If you stop and think about it, for decades now there has been a progression of legal and technological advancements in our profession. Sometimes prosecutors have been ahead of this curve, and other times we've been behind it playing catch-up. In either case, I understand that there is a natural resistance and hesitation when it comes to changing how we do things—I'm as guilty of this mentality as anyone. I'm a conservative. But we cannot be overly conservative and closed-minded when it comes to good ideas or recommendations for improving our profession and the criminal justice system.

Moreover, I believe when we are the ones who are progressive and advocating new ideas, it enhances our credibility with the legislature, media, and public. As an elected criminal district attorney, I think my constituents want me to do everything I can to make the system more efficient and to improve the likelihood of obtaining the correct result in every case. I would add that these are not mutually exclusive concepts; we can make sure that tax dollars are spent wisely and reduce the potential for wrongful convictions at the same time. But we absolutely have to be involved in the discussion, make suggestions, and promote good ideas. We simply cannot become complacent.

Toward this end, I hope that you will join with David Escamilla and the TDCAA board next year in advancing the proposals made by the training subcommittee. Come to Austin. Attend legislative committee hearings on matters that pertain to us. Meet with your legislators. Connect with the media. Provide public support for the good ideas. When there are bad ideas proposed—and there surely will be—give well-thought-out and well-reasoned opposition and, when possible, offer better options or alternatives. There are lots of good ideas and proposals in the training subcommittee's report just waiting to be advanced. And rest assured, the board will implement many of those proposals through our association.

But we cannot let the media and the defense bar define this narrative for us. We have to get past this natural fear of change and the apprehension that many of us feel when it comes to public and media relations. If we can't, or won't, do everything we can to educate the media and the public on who we are and what we're doing to improve our own profession, then someone else will do it for us—and I promise you they will not have our best interests at heart.

In closing, my year as TDCAA president has been challenging, fun, and eye-opening all at the same time. It has been a pleasure to serve. But I don't intend to ride off into the sunset anytime soon. I enjoy being a prosecutor and I am proud to be a part of this profession. Although there are challenges on the horizon, I want to continue to inform others about all of the good things that prosecutors do and be a part of any dialogue regarding how we can do our jobs better. Rather than an "adios," consider this column a full-throated request and prayer that you'll get involved—a call to action, in other words. Be active. Be a part of our association. Serve on committees. Come to the legislature next spring. You can bet I'll continue to do the same. See you there. ❇

Doing the right thing

By Rob Kepple
TDCAA Executive Director in Austin

At our Annual Conference we spent some time talking about our profession, the media's overstated allegations of prosecutorial misconduct, and how we as prosecutors can do better. By now you all have read the report on the TDCAA website titled, "Setting the Record Straight on Prosecutorial Misconduct." The report served as a centerpiece for our first day of training in South Padre, but I must give a lot of credit to our keynote speaker, **Pete Adams**, for setting the right tone.

Pete is the director of the Louisiana District Attorneys Association. As you know, the prosecutors in Louisiana have been under scrutiny in the wake of the United States Supreme Court's *Connick v. Thompson* decision in which the court, citing prosecutorial immunity, poured out a $14 million judgment for a person who had been wrongfully convicted due to *Brady* violations. So Pete knows this issue and has been working with his folks to squarely address it.

And Pete was dead on. Louisiana prosecutors, like those in Texas, believe that wrongful convictions are indefensible and unacceptable. Pete's advice was straightforward: Do the right thing for the right reason. But Pete recognized, as we all do, "the right thing" can sometimes be very hard to figure out.

His advice? You are leaders in your community, and people will naturally look to you for guidance in criminal justice matters. After all, you are devoting your career to making your community a safer place. But to lead effectively, we as individuals and together as a profession must earn the trust of the public and lawmakers.

By the time this edition of *The Texas Prosecutor* hits your desk, the TDCAA Training Committee will have met and begun work on the training recommendations contained in the misconduct report. There is a lot of work to do to modify and improve TDCAA training and support for Texas prosecutors to squarely address the issue of wrongful convictions. The association's leadership is committed to getting it right and making sure that you continue to hold the high ground as a leader in criminal justice in your community.

Thanks to those leaving our "Band of Brothers"

On December 31, 2012, around 60 county and district attorneys will serve their final day in office. The list is so long this year that I decided to do it a little differently: to thank one of you, whom I know personally, and to let someone else, **Nicole Crain**, an assistant DA in Hill County, thank her longtime boss.

First off, I'd like to thank **Ken Sparks**, County and District Attorney for Colorado County. Ken will be retiring at the end of this year. I first met him in the 1980s when he was a defense attorney in Houston. Ken had started his career as an assistant district attorney in Houston, so he was plenty patient with me as I was learning how to do the prosecutor's job. Honest, respectful, and patient is how I remember my first dealings with him.

It was my good fortune that I was here at the association when Ken took office in Colorado County. Like some of you, Ken was a successful criminal defense attorney, but he was best-suited as the leader of the law enforcement community. I think Ken is that type of person who uses his common sense and empathy for the victims of crime to guide him, and that is the type of person who makes a great prosecutor.

Like all of you, Ken took his job very seriously. Ken was very active in educating and teaching his law enforcement officers and shared with us his *Offense Report Manual,* which has seen widespread use around the state. Ken thought a lot about what it meant to be a prosecutor and what it took to do justice in his community.

Ken's dedication to bettering the profession went beyond the county line; he served on the TDCAA Board, was a frequent faculty member, and he was very concerned that our profession remain above reproach. Ken set the standard for a public prosecutor very high and had little tolerance if someone failed to meet expectations.

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On more than one occasion Ken served as a special prosecutor for other prosecutors who needed a hand. That is just the kind of thing each and every one of you has done for others in the profession.

Secondly, I'll let Nicole pay tribute to **Dan V. Dent**, the retiring district attorney in Hill County. "My boss, Dan V. Dent, is retiring after being the elected district attorney in Hill County for 32 years and seven months," Nicole writes. "We're a rural county located just off Interstate 35 between Dallas and Waco. Our office is small (just two of us attorneys), and until eight years ago, Mr. Dent did it all with the assistance of only his secretaries—no assistant district attorney, no investigator, just a lone prosecutor kickin' butt and taking names from grand jury to appeals.

"In the community, he is respected by all and known by all, which, incidentally, is a huge asset in picking a jury. Mr. Dent has outlasted changes in politics, judges, and constituents through his honor, integrity, and ability to be a strong, fair hand for justice. He survived when the courthouse and his office burned down in 1993, resulting in the loss of most of his files. He has even survived theft of evidence during a jury trial. The year was 1986, and 'Tinyman,' who was not so tiny, was on trial for manufacturing methamphetamine. Around the third day of trial, the meth lab and methamphetamine being stored in the law library of the courthouse were too tempting for Tinyman. In the middle of the night, Tinyman's friends broke into the courthouse and stole the meth. Even without the evidence, Mr. Dent finished the trial, and Tinyman was convicted.

"Mr. Dent, with his quiet ways, is a model for what we, as prosecutors, should seek to be."

Well said, Nicole! I'd like to thank every one of you because you have served well in a difficult profession, and as such have had the privilege of being among a group that had a rare bond, "we few, we happy few, we band of brothers, for he today who sheds his blood with me today shall be my brother."

Pre-filing of bills for the 83rd Legislative Session

The 83rd Legislative Session begins January 8, 2013, but pre-filing of bills begins November 12. To keep up with bills that affect our profession, click on the Legislative tab on the TDCAA website. When the session begins, there you will also see **Shannon Edmonds**'s posts analyzing what is going on in the big pink building.

TDCAA leadership report

At the Annual Business Meeting in conjunction with the Annual Update in September, the membership elected the executive committee, and four regions picked new regional directors for two-year terms. The new terms for these folks will begin on January 1.

Lee Hon (CDA in Polk County) will move from President to Chairman of the Board; **David Escamilla** (CA in Travis County) becomes President; **Rene Peña** (DA in Atascosa County) becomes President Elect; and **Staley Heatly** (DA in Wilbarger County) becomes Secretary/Treasurer. In addition, **Daphne Session** (CA in Houston County) will take over as County Attorney at-Large and **Joe Shannon** (CDA in Tarrant County) will be the Criminal District Attorney at-Large. Finally, President Lee Hon has appointed **Dan Joiner** (ACDA in Taylor County) to fill the vacant unexpired term as Assistant Prosecutor at-Large.

Your new Regional Directors will be: Region 1, **Randall Sims** (DA in Potter County); Region 2, **Randy Reynolds** (DA in Reeves County); Region 4, **Patrick Flannigan** (DA in San Patricio County); and Region 7, **Maureen Shelton** (CDA in Wichita County). Thanks to all of you for your willingness to serve the prosecutors of Texas!

Thanks for your service

This association thrives because it is truly a member-driven outfit. I want to take a moment to thank those who will be leaving board service for their efforts in keeping your association constantly working to bring you what you need. Those heading off the board at the end of this year are: **Mike Fouts** (DA in Haskell County); **Judge Susan Reed** (CDA in Bexar County); **Jo Anne Bernal** (CA in El Paso County); **Mark Yarbrough** (C&DA in Lamb County); **Jesse Gonzales** (DA in Pecos County); **Bernard Ammerman** (C& DA in Willacy County); and **Janice Warder** (DA in Cooke County). Thanks!

A full-service prosecutor

Sure, we pride ourselves in doing a good job of representing the victims

of crime, our counties, and our communities, but **Will Thompson**, an ADA in Navarro County, took public service to a whole new level a couple months ago when he came to the aide of a relative of the defendant he was trying.

During a break in the court proceedings a woman appeared to pass out. Will and the court bailiff took charge, and Will, by putting his hand by the woman's nose, quickly determined that she wasn't breathing. He immediately began mouth-to-mouth resuscitation, and after the second breath the woman began to breathe again on her own. He stayed with her until the paramedics arrived, then got back to his day job. Just another day on the job for a prosecutor-slash-superhero!

Gender and our profession

Time for a fun fact: In the last issue of the *Texas Bar Journal*, the State Bar broke down the legal profession by gender. Of the 89,987 lawyers in Texas, 66 percent are men and 33 percent are women. The breakdown in prosecution is much different: Of the 2,511 assistant prosecutors, 50.98 percent are men and 49.02 percent are women. It's good to see that kind of balance in the profession. ❇

Watch your language in DWI jury charges

By John Stride
TDCAA Senior Appellate Attorney

We have all heard it or said it—especially when children are around: Watch your language. As children, adults, and especially lawyers, using appropriate language matters. This is not, however, a lesson on avoiding age-inappropriate language, colorful backtalk, or plain ol' vulgarity. Instead, this article focuses on the less rude, written language of DWI jury charges.

In recent years, the Court of Criminal Appeals has been articulating the scope of permissible jury charge instructions. Opinions have specifically addressed DWI charges but the subject matter is quite large, for example; whether an instruction is 1) law applicable to the case, 2) raised by the evidence, 3) improperly expanding on the charging instruments allegations, or 4) improperly commenting on the weight of the evidence. As they seem to have attracted special attention from the court across the spectrum of criminal cases, however, improper comments on the weight of the evidence alone are addressed here.

When composing a jury charge, trial courts are statutorily barred from commenting on the value of the evidence. A judge shall deliver to the jury "a written charge distinctly setting forth the law applicable to the case, not expressing any opinion as to the weight of the evidence."[1] With that restriction in mind, let's consider an example.

At trial, evidence is elicited that, in the middle of a highway intersection, an officer found an intoxicated person trying to balance astride a motorcycle while wearing his helmet, holding his keys, and attempting to kick-start the machine. Inevitably, the case turns on the meaning of the term *operate*, which is not defined by the Penal Code. Concerned that the jury instructions may not adequately assist the jurors in reaching a verdict, the resourceful prosecutor thinks to insert a definition in the charge. The prosecutor forages around and digs up a splendid appellate opinion explaining the term. Thoroughly persuaded by the lucidity of the definition and believing it should help the jury decide the critical issue, the trial court incorporates in the charge that operating means "exerting personal effort to cause the vehicle to function." During argument, the prosecutor exploits the definition and, ultimately, the jury returns a guilty verdict.

The problem? The case has been sabotaged—innocently and inadvertently, but still sabotaged. By injecting a non-statutory definition into the jury charge, the trial court impermissibly guided the jurors' understanding of the term and commented on the weight of the evi-

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dence. Given the correct appellate claim and that the failure to preserve error does not prevent a successful claim of charge error, an appellate court will require a new trial.[2]

Non-statutory definitional instructions

While most jury instructions probably could be improperly phrased so as to constitute an improper comment on the weight of the evidence, instructions defining terms undefined by statute lend themselves to this mistake too easily. The illustration above, as most will recall, is drawn from *Kirsch*,[3] where the Court of Criminal Appeals held that including a definition of "operate" constituted an improper comment on the weight of the evidence because it restricted the jurors' own understanding of the word. The court reasoned that when a term is not statutorily defined, the rules of grammar and common usage prevail in construing it, but if the term possesses a "technical or particular meaning," the term is understood that way. Accordingly, jurors can ascribe to non-statutorily defined words any meaning that is "acceptable in common parlance." A trial court that employs a non-statutory definition in a charge not only inhibits the jury's understanding of the term, but it may also wrongly focus a jury's attention on a specific type of evidence that supports an element of the offense. The court disagreed that the term "operate" had acquired a specialized meaning and, thus, jurors should have been at liberty to give it the meaning accorded in everyday usage.

In addition, the court warned that the mere fact an appellate court has reached a definition of an undefined statutory term for sufficiency review purposes does not render it a legitimate term to include in a jury charge. On remand, the intermediate court held the improper instruction harmful and remanded for a new trial.[4]

In the same vein, this year an intermediate court held erroneous an instruction defining "normal use." In *Baggett*, the definition of that term as "the manner in which a normal non-intoxicated person would be able to use his mental or physical faculties" was also borrowed from an appellate opinion reviewing the sufficiency of the evidence and was "marginally" an improper comment on the weight of the evidence.[5] Fortunately, the Texarkana Court of Appeals found the objected-to error harmless.

Breath test refusal instructions

The courts have also disapproved of instructions that juries can consider a defendant's refusal to submit to a breath test. In *Bartlett*, the trial court submitted a three-paragraph instruction based on the Texas Transportation Code provision permitting evidence of breath tests refusals.[6] In rejecting a jury instruction based on the provision, the Court of Criminal Appeals observed that there are just three exceptions to the general rule that a trial court cannot single out a particular item of evidence in a jury charge without signaling an impermissible view of the weight of the evidence. The trio of exceptions arise where the law:

- directs the court to instruct that some weight or some degree of significance attaches to a category or type of evidence: e.g., an accomplice witness instruction under CCP art. 38.14 or a limiting instruction under TRE 105;
- identifies specific evidence as a predicate fact from which the jury may presume the existence of an ultimate or elemental fact: e.g., recklessness and danger for the offense of the deadly conduct under Penal Code §22.05(c); or
- assigns jurors the task of deciding whether certain evidence may be considered: e.g., voluntariness of a confession under CCP art 38.23. The court must necessarily identify the exact evidence in question.[7]

As it has on several prior occasions, the court cautioned that even a "seemingly neutral instruction" runs the risk of constituting an improper comment on the weight of the evidence because it focuses the jury on a particular piece of evidence. Here, the breath-test-refusal instruction did not fall within any of the three exceptions and, although seemingly neutral, was an improper comment on the weight of the evidence. The case was remanded for a harmless error analysis, and the Thirteenth Court of Appeals held that the preserved error was harmless.[8]

Over the last decade, the Court of Criminal Appeals has made plain that unless a jury charge instruction is the progeny of a statute (or a rule of evidence), it is likely an improper comment on the weight of the evidence.[9] This general rule has been applied in charges other than DWI cases.[10]

"Susceptibility" or "synergistic effect" instructions

In DWI cases, it can be unclear how the defendant became intoxicated whether by ingestion of alcohol, drugs, or both. This is certainly true when, at trial and for the first time, a defendant arrested for intoxication by alcohol suggests that prescription drugs were the cause of what was really no more than an indiscretion. In these cases, trial courts have instructed juries on the *combination* of alcohol and drugs and *concurrent causes*.[11] Courts have also submitted *susceptibility* instructions, also known as *synergistic effect* instructions. While the former are children of the Penal Code and should ordinarily pass muster on review, the latter have been adopted without any statutory ancestry. Given the Court of Criminal Appeals' current mission to eliminate non-statutory instructions from jury charges both in DWI cases and cases in general, is it time we reconsider whether susceptibility or synergistic effect instructions should be submitted at all?

The latest indication that susceptibility instructions have been ill-adopted revealed itself last year. In *Barron*, officers arrested the defendant for DWI on the basis of her consumption of alcohol but subsequently found a partially empty hydrocodone blister pack in her car.[12] At trial, despite the lack of any evidence demonstrating that the defendant had ingested the medicine on the day of her arrest, the court submitted a susceptibility instruction. The Fifth Court of Appeals held the instruction unsupported by the evidence and found the error harmful.

The Court of Criminal Appeals, reviewing only the question of harm, also found the error harmful. "At a minimum, the instruction emphasized the State's evidence of combination by suggesting a specific mode of action (susceptibility) through which use of a 'medication or drugs' together with the use of alcohol could produce intoxication." And later: "Harm can also result from an instruction emphasizing a particular theory or the weight to be given to a particular piece of evidence." This analysis is really nothing more than what the court employs in finding an instruction an improper comment on the weight of the evidence.

Nevertheless, the majority of the Court of Criminal Appeals has not yet squarely reached the question as to whether a susceptibility instruction is an improper comment on the weight of the evidence—although *Gray* was a close encounter. In that case, where the information alleged intoxication by alcohol alone, then-Justice Alcala, writing for the First Court of Appeals, upheld a susceptibility instruction given with a combination instruction as law applicable to the case and *not* 1) confusing or misleading to the jury, 2) expansive of the allegations in the information, or 3) a comment on the weight of the evidence.[13]

On review, the majority of the Court of Criminal Appeals also held that the susceptibility instruction constituted law applicable to the case and did not wrongly expand the allegations of the charging instrument.[14] The court, despite the invitation to do so, had expressly declined to review whether such an instruction constituted an improper comment on the weight of the evidence. Notwithstanding the limited scope of review, Judge Cochran diligently explained in her dissent (joined by Judge Meyers) why she considers a susceptibility instruction improperly given—always. The instruction is not grounded in statutory law, but rather is a creature of a 1939 Court of Criminal Appeals' opinion "transmogrified" over the next 45 years into a legal jury instruction. Merely because a jury instruction has been submitted for years is insufficient justification to secure its survival.[15] Further, the idea promoted by the instruction can still be conveyed to the jury by the evidence, testimony, and argument. Judge Cochran concluded that a susceptibility instruction is not part of the law applicable to a criminal case and is a comment on the weight of the evidence.

In *Otto*, however, the majority of the Court of Criminal Appeals decided four years after *Gray* and the same interval before *Barron* that, where an indictment alleged intoxication by alcohol alone, a combination and concurrent cause instruction absent a companion susceptibility instruction improperly expanded the allegations in the indictment.[16] But again in her dissent, Judge Cochran, joined by Judge Holcomb this time, observed that the submitted instruction was based in the statute and did not comment on the weight of the evidence.

So far, Judge Cochran may have been in the minority on her position that susceptibility instructions are a comment on the weight of the evidence, but if the instruction is con-

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sidered within the court's present overall scheme for jury charges—that non-statutory instructions are improper—susceptibility instructions linger most uncomfortably.

Despite this background, however, the State Bar Committee on Pattern Jury Charges (Criminal) recommends the synergistic effect instruction as "part of the substantive definition of the statutory terms" and concludes that "it should not, and ultimately will not, be regarded as prohibited comment."[17] That said, "Some members of the committee strongly believed that the term *operate* should be defined despite the absence of a definition in the Texas Penal Code."[18] In the three years since this volume was published, could the views of the Court of Criminal Appeals judges have evolved, along with its membership, to the degree that, if presented with the issue today, it would no longer approve a susceptibility instruction?

In any event, just because the law does not permit the inclusion of non-statutory instructions on various aspects relevant to your cases does not mean the concepts involved are barred from the courtroom altogether. Parties remain free to reason with the jury about matters that the trial court's charge cannot include, so argue them.[19] For the cautious, such arguments may be their approach to focus a jury on the concept of susceptibility or synergistic effect. For others, you may be happy with simply retorting: "Whatever!" For those falling somewhere between, how about you "give it a ponder?"[20] ❇

Endnotes

1 Tex. Code Crim. Proc. art. 36.14.

2 See *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). Preserved charge error will result in a reversal if a reviewing court finds just "some harm," but unpreserved charge error will lead to a reversal only if a reviewing court finds "egregious harm."

3 *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012).

4 See *Kirsch v. State*, 366 S.W.3d 864 (Tex. App.—Texarkana 2012, no pet.), *aff'd*, 357 S.W.3d 645.

5 See *Baggett v. State*, 367 S.W.3d 525 (Tex. App.—Texarkana 2012, pet. ref'd). Although this case and *Kirsch* were heard by the same court of appeals, they arise from different counties.

6 See *Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008).

7 *Id.* at 151.

8 See *Bartlett v. State*, No. 13-06-00344-CR, 2009 Tex. App. LEXIS 6883 (Tex. App.—Corpus Christi, Aug. 28, 2009, pet. ref'd) (not design. for pub.).

9 Interestingly, unlike statutes, the rules of evidence are drafted by the court and, like opinions, are what the court says. So, are instructions based on the rules of evidence, in contrast to those grounded in statutes, in a less secure position when deciding whether they are an improper comment on the weight of the evidence?

10 See, e.g., *Morales v. State*, 357 S.W.3d 1 (Tex. Crim. App. 2011) (instruction on duty to retreat in self-defense charge); *Walters*, 247 S.W.3d at 204 (instruction on prior verbal threats in self-defense charge); *Brown v. State*, 122 S.W.3d 794 (Tex Crim. App. 2003) (instruction on inferring intent from acts done and words spoken); *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998) (instruction on alibi); *Browning v. State*, 720 S.W.2d 504 (Tex. Crim. App. 1986) (instruction on inferring theft from nighttime entry of a residence).

11 See Tex. Penal Code §§6.04 (concurrent causation) and 49.01(2)(A) (combination of two or more substances).

12 See *Barron v. State*, 353 S.W.3d 879 (Tex. Crim. App. 2011).

13 *Gray v. State*, No. 01-02-00602-CR, 2003 Tex. App. LEXIS 4965 (Tex. App.—Houston [1st Dist.] June 12, 2003) (not design. for pub.), *aff'd*, 52 S.W.3d 125 (Tex. Crim. App. 2004).

14 *Gray*, 152 S.W.3d 125.

15 We learned that lesson nearly a decade ago. See *Brown*, 122 S.W.3d 794 (deciding that a frequently submitted instruction on inferring intent from acts done and words spoken was an improper comment on the weight of the evidence).

16 See *Otto v. State*, 273 S.W.3d 165 (Tex. Crim. App. 2008). The majority also 1) ruled that the concurrent cause instruction was legally and substantively similar to a combination instruction and 2) had a somewhat mind-bending "but-for" discussion with the dissent.

17 SBOT Texas Criminal Pattern Jury Charges, Intoxication and Controlled Substances §A4.5 (2009).

18 Id. at §A4.4

19 See, e.g., *Gray*, 152 S.W.3d at 138 (Cochran, J., dissenting).

20 The many hundreds of you attending the legislative updates across the state last year will recall the video clip on sexting which invited viewers to do the same. See http://adweek.blogs.com/adfreak/yrs-give-it-a-ponder-campaign-for-lg.html for a refresher.

Res judicata bars subsequent prosecutions in *Ex parte Doan*

"Did you call each other up to coordinate what you were wearing?"

It's a common joke—meant to save face—when two people walk into the same room unintentionally wearing the same outfits. Sadly, when it comes to criminal prosecution, failing to get on the phone and check with prosecutors in other counties is no joking matter.

By David C. Newell
Assistant District Attorney in Harris County

In a recent decision by the Court of Criminal Appeals in *Ex parte Doan*, the court held that prosecutors in one county are the same party as prosecutors in another county for purposes of issue preclusion. As such, a prosecutor in one county may be bound by a prosecutor's failure to carry her burden in another county at a hearing on a motion to revoke probation. So, going forward, it may now be necessary for prosecutors across the state to coordinate with each other before proceeding in a revocation proceeding, lest the State be barred by *res judicata* from proceeding on a criminal law violation it never had a full opportunity to prosecute. Because no one wants to be caught wearing collateral estoppel.[1]

There's an MRP hearing today?!

Dustin Doan was placed on community supervision in Brazos County. While he was on probation, he was charged with misdemeanor theft in Travis County. The Brazos County Attorney[2] moved to revoke Doan's probation based on many things, including the Travis County theft allegation. But at the hearing on the motion to revoke, the prosecutor called the probation officer only to prove up the new theft charge. Doan objected based on hearsay, and the trial court sustained the objection. The prosecutor made no further attempts to prove up the theft, and the trial court denied the motion to revoke in Brazos County.

Subsequently, the Travis County Attorney sought to prosecute Doan on the theft he had allegedly committed in that county. Doan filed a pre-trial application for writ of habeas corpus based upon *res judicata*. According to Doan, the adverse ruling in the hearing on the motion to revoke under a lower burden of proof barred the prosecutor in Travis County from proceeding upon the misdemeanor theft under the higher burden of proof. The trial court initially granted relief, but when the Travis County prosecutor moved for reconsideration on the ground that the Brazos County judge's ruling was too vague to constitute a final adjudication of a specific fact question, the trial court entered an order denying relief. For its part, the court of appeals affirmed on the ground that the Brazos County Attorney and the Travis County Attorney were not the same parties for the purpose of issue preclusion. Thus, according to the court of appeals, there was no need to determine whether there must be a specific finding of "not true" to an allegation in a motion to revoke before the doctrine of issue preclusion can be invoked.

Res judicata

The Court of Criminal Appeals reversed, holding only that the Brazos County Attorney who had brought the motion to revoke probation and the Travis County Attorney who was prosecuting Doan for a new theft allegation were the same party for purposes of *res judicata*.[3] Writing for the majority, Judge Womack acknowledged that the Brazos and Travis County Attorneys' lack of control over each other's decision-making process may very well mean that they do not have the "authority" to represent each other in court. But, on a more fundamental level, both criminal actions are styled the same, with "the State" as the same party in each case, regardless of which prosecuting authority is present.[4]

Now I know what you're thinking: Didn't the court already decide this with those administrative license cases? Well, not according to the court. In *Reynolds v. State*, the court had acknowledged that the Texas Department of Public Safety and a district attorney both represent the citizens of the State, but the court

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held they were not the same parties because the citizens of the State had no power, like a private litigant, to control the course of the litigation by the lawyers representing the separate governmental entities.[5] According to Judge Womack, this rule was too broad and would effectively make any government action immune from claims of *res judicata* because the citizenry would never directly control any government attorney. The more proper test comes from Judge Womack's concurring opinion in *Brabson v. State*,[6] namely whether in the earlier litigation the government's representative had authority to represent its interests in a final adjudication on the merits.

The court went on to explain how a hearing on a motion to revoke probation is not an administrative hearing. While the court had previously characterized probation revocation as administrative, that was due to a need to describe quickly the idea that a defendant at a revocation hearing did not have the same procedural rights as a defendant in a criminal trial. But according to the court, just because a revocation hearing is not a trial does not mean it is an administrative hearing. Moreover, the court's holding in *Hill v. State*, that a probation revocation hearing is "administrative in nature," was based upon cases interpreting parole revocation hearings. Unlike parole revocation hearings, probation revocation hearings are not before an administrative board; they are in front of a judge with both sides represented by counsel. Additionally, the rules of evidence apply, and a defendant has the right to appeal. So, aside from the burden of proof, the court noted few procedural differences between a Texas criminal trial and a Texas community-supervision revocation proceeding. Given the similarities between probation revocation proceedings and a criminal trial, the court held that the Brazos County Attorney in the probation revocation hearing was the same party as the Travis County Attorney seeking to try Doan in a criminal trial.

Notably, however, three judges concurred to suggest a limit to the majority's holding that the two different county attorneys were the same party. Judge Johnson, joined by Judges Cochran and Alcala, explained how Articles 32A.02 and 28.061 of the Texas Code of Criminal Procedure suggest that prosecutors in municipal, county, and district courts belong to separate classes of parties. Prior to 1987 the effect of these two statutes was to bar felony prosecution if a lower court failed to try the accused on a lesser accusation from the same criminal transaction within the statutory time period. But the legislature amended Article 28.061 to add the words "other than an offense of a higher grade that the attorney representing the State and prosecuting the offense that was discharged does not have the primary duty to prosecute." Thus, according to Judge Johnson, the legislature appeared to regard felony prosecutors across the state as the same party as other felony prosecutors, but not the same party as a misdemeanor prosecutor in the same or different county. In this case, a misdemeanor prosecutor in one county was the same party as a misdemeanor prosecutor in another county because they each belonged to the same class, but had the criminal allegation been a felony, the misdemeanor prosecutor would not have been the same party. This distinction may be key because without the three votes in this concurring opinion, Judge Womack's opinion loses its majority status.

So does collateral estoppel apply?

Notably, the court had previously held in *Ex parte Tarver* that a finding in a probation revocation hearing that a defendant had not committed an assault precluded a subsequent prosecution for the same assault based upon collateral estoppel.[7] In reaching that decision, the court specifically stated that double-jeopardy principles were not implicated by revocation hearings before holding that collateral estoppel could bar subsequent prosecution where the revocation court makes an adverse finding on an elemental fact necessary to the subsequent criminal prosecution.

But the court hastened to add in *Tarver* that the mere overruling of a State's motion to revoke probation is not a fact-finding that will bar subsequent prosecution for the same alleged offense because a trial court has wide discretion to modify, revoke, or continue probation even if the trial court believes the allegations in the motion to revoke the probation are true. Judge Womack in *Doan* doesn't seem to retreat from this position, noting that the court's holding that the Brazos County Attorney was the same party as the Travis County Attorney as a matter of state law. According to Judge

Womack, the Travis County Attorney sought to prove theft to criminally punish Doan for theft while the Brazos County Attorney sought to prove theft to have the criminal punishment from a prior case altered to his detriment; this difference was sufficient to allow the case "to escape the narrow grasp of the Double Jeopardy clause."

But the dissent seized upon this aspect of the holding to say, essentially, that if the double jeopardy clause does not apply, then neither should collateral estoppel, which the United States Supreme Court recognized as stemming from the double jeopardy clause in *Ashe v. Swenson*. Presiding Judge Keller, joined by Judges Hervey and Keasler, argued that the court had implicitly overruled *Tarver* because *Tarver* was based upon *Ashe* which was based upon the double jeopardy clause by conducting a collateral estoppel analysis based upon state law. Moreover, the dissent repeatedly pointed out that the majority never really provided any explanation for its conclusion that the Travis County Attorney and the Brazos County Attorney were the same party. Even assuming that collateral estoppel applied to probation revocation hearings, the Travis County Attorney had no authority or control over the proceedings in Brazos County, so estoppel would apply only if the Travis County Attorney had prosecuted both proceedings.[8]

The majority's response? In a footnote, Judge Womack explained that *Tarver* was not actually concerned with collateral estoppel that sprang from the federal constitution, but whether *res judicata* applied to "administrative hearings." Sure, *Tarver* cited some federal Supreme Court cases, but it was not obvious whether the holding was based in constitutional law or common law. And, given that there were no prior cases from the court applying collateral estoppel, it is possible to read *Tarver* as using the federal cases only as explanation of common-law doctrine.[9] So according to the majority, *Tarver* was actually an "administrative collateral estoppel" case because there were no prior cases discussing common-law collateral estoppel.[10] Those federal cases (to which the court cited and that were based upon collateral estoppel as a subset of the double jeopardy clause) were apparently there just to explain the court's reasoning like some form of legal garnish. The majority did not present anything more to explain how the Brazos County Attorney and Travis County Attorney were the same party.

But potentially overlooked in this case is the court's remand to the lower court to reconsider the merits of Doan's argument that a specific finding of "not true" to the criminal violation was unnecessary to invoke issue preclusion. The majority, having found that the Brazos County Attorney and the Travis County Attorney were the same party, did not actually hold that prosecution in Travis County was barred by virtue of the trial court's denial of the Brazos County Attorney's motion to revoke probation. Having grafted *Tarver* into a *res judicata* case rather than collateral estoppel, the majority essentially called it a day. If *Tarver* is still good law, the Austin Court of Appeals should hold that Travis County would not be precluded from subsequently prosecuting Doan for theft because, as the court noted in *Tarver*, the mere overruling of a State's motion to revoke is not a fact-finding that would bar subsequent prosecution. But as the above discussion demonstrates, *Tarver*'s holding is now far from clear even if it hasn't been implicitly overruled.

Going forward, cautious prosecutors should make every effort to coordinate with other Texas prosecutors when proceeding upon a motion to revoke probation based upon a law violation in another county. And while felony prosecutors may not be in the same "class" as misdemeanor prosecutors in another county, remember that that argument comes from a concurring opinion, so a majority of the court has yet to adopt it. A prosecutor might be able to rely upon it in a pinch, but still the better practice would be to find a way to work with folks in the other county before proceeding. After all, the last thing anyone wants is to be the butt of the joke. ❇

Endnotes

1 A faux pas regardless of whether it's before or after Labor Day.

2 Please note that the court's opinion speaks in terms of the Brazos County Attorney and the Travis County Attorney without clarifying whether it was the actual elected officials doing all the heavy lifting or merely their dedicated employees. I do the same throughout this article because the court seems focused on the offices rather the actual people.

3 *Ex parte Doan*, 369 S.W.3d 205 (Tex. Crim. App. June 20, 2012)(6:3:3).

4 But really, what's in a name? That which we call a rose by any other name would smell as sweet. *Romeo and Juliet* (Act II, Scene ii, lines 1-2).

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5 *Reynolds v. State*, 4 S.W.3d 13 (Tex. Crim. App 1999).

6 *Brabson v. State*, 976 S.W.2d 182, 188 (Tex. Crim. App. 1998)(Womack, J. concurring). Who says concurring opinions aren't important?

7 *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986).

8 That was the situation in *Tarver*, by the way.

9 All the court's citations to *Ashe v. Swenson*, 397 U.S 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469, 475 (1970) in *Tarver* to the contrary. See e.g. *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986)("To allow such a second attempt [at litigation of an adversely determined fact] would be to allow one of the risks the Double Jeopardy clauses protects against").

10 Um … what?

Photos from our Annual Criminal & Civil Law Update in South Padre

Photos from the Advanced Trial Advocacy Course in Waco

Continued from the front cover

Set the way-back machine for a year-end caselaw quiz (cont'd)

of Columbia. They did it in Maryland. On the 11th day.

Over the next 28 days, the FBI used the device to track the vehicle's movements and its location within 50 to 100 feet; the device communicated that location by cellular phone to a government computer, relaying more than 2,000 pages of data over the four-week period. The report contained information showing when the car was parked in a garage near Jones's residence as well as when he was travelling on public roadways.

Is the information transmitted from the GPS device regarding Jones's travel on public roadways a search?

Yes _____

No _____

3 Trooper Mike Ashby pulled Jose Pena over for a traffic violation. The officer smelled what he believed to be marijuana and saw what he believed to be fresh-cut marijuana covering the cargo area of Pena's van. The officer arrested Pena and transported him to jail. Trooper Ashby recorded the traffic stop, arrest, and transport of Pena to jail on a car-mounted camera. The plant material was seized and sent to the DPS laboratory in Waco for testing. It came back showing 23.46 pounds of marijuana based upon microscopic inspection and the presence of THC in the plant. The plants were destroyed, however, before Pena filed a motion for independent testing.

Pursuant to a *Brady* motion, the State provided the defendant a copy of the videotape of the car-mounted camera. When Pena's attorney asked where the audio was on the recording, the State responded that there was no audio. Trooper Ashby later testified that there was no audio due either to a battery malfunction or his failure to activate the recording device that he carried. Trooper Ashby also testified that Pena had vehemently denied that the material was marijuana, saying he had cut plants on the side of the road in Kansas to make leather goods and trinkets. During closing argument, the State argued that the defendant had put up a smoke screen and requested independent testing only after they knew the plant material had been destroyed. But after jury deliberations, it was discovered that a part of the tape *did* have audio and the jury never heard the audio portion.

Did the prosecutor violate *Brady*?

Yes _____

No _____

4 Jesus Cosio sexually abused his former girlfriend's daughter over several years. The State charged him with four counts: two of aggravated sexual assault and two for indecency with a child. The proof of sexual misconduct was divided up into four different incidents:

- a "shower incident" involved the defendant getting into the shower with the victim (who was 7 or 8 at the time) where Cosio touched the child's breasts and vagina;
- the "bedroom incident" occurred a week after the shower incident and involved the defendant taking the victim into the bedroom he shared with the victim's mother and making the victim fellate him. This incident also included vaginal penetration;
- the "Burger King incident" involved the defendant making the victim fellate him both on the way to the restaurant and on the way back; and
- the "pornography incident" occurred when the victim was 9 or 10 and involved the defendant taking the victim into the bedroom, showing her a pornographic movie, then making her take off her clothes to try the positions they saw in the movie. This incident included vaginal penetration.

Cosio requested that the State elect which counts it proceeded upon because the evidence supported more than one instance of his misconduct under each count. Count One, aggravated sexual assault of a child, was supported by proof of fellatio in "the bedroom incident" and "the Burger King incident." Count Two, also aggravated sexual assault of a child, was supported by evidence that Cosio had penetrated the victim's vagina with his sexual organ in "the bedroom incident" and "the pornography incident." Counts Three and Four, both indecency with a child by contact, were supported by evidence of the defendant touching the victim's genitals in "the shower incident," "the bedroom incident," and "the pornography incident" because the pleadings did not differentiate whether the defendant used his penis or hand to contact the victim's genitals.

A proper jury instruction would

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require the jury to be unanimous about each count, each incident, or each incident within each count?

Each count _____
Each incident _____
Each incident within each count _____

5 While Conrad Lilly was incarcerated in a maximum-security prison operated by TDCJ, he was indicted on two counts of assault on a public servant. The trial court arraigned Lilly in the prison unit's chapel, which also served as a branch courthouse for the county. After his arraignment, Lilly filed a pretrial motion to transfer his trial proceedings from the chapel courthouse to the public county courthouse.

At the hearing, the Offender Rules and Regulations for Visitation was admitted and witnesses were called. Visitors had to first pass through a "highway gate" to enter the parking area. Then, the visitor would have to pass through the front gate of the prison unit followed by two fences with razor wire and a series of three locked metal doors. Visitors would be subjected to a physical pat-down search and would be required to walk through a metal detector after removing their shoes and belts. Visitors could be excluded from entry for a variety of infractions such as wearing offensive clothing or seeking admission for an improper purpose. The State noted, however, that the docket for the chapel-courtroom was posted at the county courthouse a month prior to the pretrial hearing and that docket reflected that Lilly's hearing would be at the prison unit. The trial court denied the motion to transfer.

Should the judge have done so?
Yes _____
No _____

6 After Dustin Doan was placed upon community supervision in Brazos County, he was charged with misdemeanor theft in Travis County. Brazos County moved to revoke Doan's probation based upon the new theft allegation. At the hearing on the motion to revoke in Brazos County, the prosecutor called Doan's probation officer to prove up the Travis County theft. Doan objected on the basis of hearsay, and the trial court sustained the objection. The prosecutor made no additional attempts to introduce evidence of the theft. Finding that the State failed to meet its burden of proof, the trial court denied the motion to revoke in Brazos County.

Afterwards, Travis County proceeded on its misdemeanor theft case against Doan. He filed a pre-trial writ of habeas corpus to bar any further prosecution of the theft offense under the doctrine of *res judicata*, or issue preclusion. The trial court denied the requested relief, and the court of appeals affirmed on the basis that the Brazos County Attorney and the Travis County Attorney were not the same parties for purposes of issue preclusion. Consequently, the case did not involve a person "criminally prosecuted twice for the same event" under the double jeopardy clause because the Brazos County Attorney and the Travis County attorney are independent entities with no control over each other's decision-making processes.

Are they different parties?
Yes _____
No _____

7 At a nightclub, members of Ronnie Tienda's group of friends were "throwing" gang signs and "talking noise" to David Valadez and two passengers in his car as they left the club. Valadez's car came under gunfire from a caravan of three or four cars also traveling down the road, and Tienda was a passenger in one of the cars in the caravan. Valadez was killed. Witnesses agreed that Tienda was at least present during the shooting.

Valadez's sister informed the State of three MySpace profiles that she believed Tienda registered and maintained. Two were created by "Ron Mr. T" and a third by "Smiley Face," Tienda's nickname. The State sought to introduce multiple photos "tagged" to these accounts because the person in the photos at least resembled Tienda; that person displayed gang-affiliated tattoos and made gang-related gestures with his hands. Additionally, instant messages, links, and posts on these accounts referred to Valadez's funeral, the shooting, and details about the State's investigation. The State offered this evidence at trial through the victim's sister.

However, the defense elicited testimony regarding the ease with which a person could create a MySpace page in someone else's name and then send messages. Moreover, the case-specific facts in the MySpace messages were not solely within the defendant's knowledge but were known to the deceased's

family, friends, and practically any other third party interested in the case. The defense objected to the admission of the evidence, claiming the State failed to authenticate it.

Was it admissible?

Yes _____

No _____

8 Owen Harris was caught masturbating in a car knowing that a 6-year-old girl and two 9-year-old girls were present. (How is that for an opening sentence?) Harris pleaded guilty to three counts of indecency with a child by exposure arising from the same criminal episode. After a punishment hearing, the trial court sentenced Harris to 10 years in prison for each count, with the first two counts running consecutively and the third running concurrently with Counts One and Two.

Does this violate the double jeopardy clause's prohibition against multiple punishments for the same offense?

Yes _____

No _____

9 In the early hours of July 1, 1997, a group of four or five men kicked in the door of a residence and broke in with bandanas over their faces. During the invasion, one of the armed men fatally shot an occupant of the home. Two witnesses, the deceased's roommates, identified Adrian Chavez as the shooter; one told police that the shooter pulled down his mask immediately after he opened fire on the victim and that he recognized the gunman as Chavez. The other roommate said he recognized Chavez's voice and build.

The State charged Chavez with capital murder, but the jury convicted him of the lesser-included offense of aggravated robbery. After the trial, Chavez admitted for the first time that he had participated in the offense but only as the driver. He met with prosecutors to provide the names of others involved to see if it would influence sentencing. While the meeting was taking place, the jury sentenced Chavez to 55 years in prison.

Subsequently, prosecutors received information from what they considered credible witnesses previously unknown to the State that two other men had admitted to the crime, one of whom admitted to the shooting. One man said Chavez had devised and coordinated the offense, and the other stated that Chavez had remained in the getaway vehicle during the course of the offense. Based upon this information, Chavez filed a writ of habeas corpus claiming that the State had offered false testimony and that his conviction should be overturned as a matter of due process.

Did the prosecutor's unknowing use of false testimony violate due process?

Yes _____

No _____

10 The State charged Gary Black with possession with intent to deliver methamphetamine. At the hearing on the motion to suppress, an undercover investigator testified that he had conducted surveillance of Black's home and that he saw Black leave his house in a car. The investigator knew that Black had active arrest warrants, so he called another officer to arrest him so the investigator's cover would not be blown. Pursuant to an arrest on the outstanding warrants for failure to appear before Justice of the Peace Pat Jacobs and for driving without a license, police recovered several baggies of methamphetamine from Black's pockets.

Black argued the warrants proffered as justification for the stop and arrests were invalid because the supporting documentation had not been executed until after the issuance of the warrants themselves. The trial court denied the motion to suppress. During the State's case-in-chief, prosecutors called Judge Jacobs to testify that she was present on the date that Black had failed to appear. Based upon her personal knowledge, she had issued the warrant for failure to appear. Black objected to the State's proffer of Judge Jacob's testimony on the ground that the hearing on the motion to suppress was over and the issue could only be consensually relitigated. Additionally, Black argued that Article 36.02 of the Code of Criminal Procedure prohibits the introduction of testimony after the argument of a "cause" is concluded. When the trial court ruled upon the motion to suppress, according to Black, that "cause" was concluded and the trial court lost the authority to re-open evidence on the suppression issue.

Can the State re-open, or is the evidence on the motion to suppress closed?

Re-open _____

Closed _____

Answers

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1 **Yes.** According to the Texas Court of Criminal Appeals, pre-arrest, pre-*Miranda* silence is admissible.[1] Writing for the majority, Judge Womack explained that obviously the Fifth Amendment prohibits the State from commenting on a defendant's refusal to testify at trial. However, a defendant's silence before trial is considerably less protected. The State does not violate a defendant's Fifth Amendment rights by cross-examining him about post-arrest, pre-*Miranda* silence when a defendant chooses to testify.

Moreover, pre-arrest, pre-*Miranda* silence can be used to impeach a defendant who testifies. Judge Womack noted that the United States Supreme Court had not decided whether pre-arrest, pre-*Miranda* silence would be admissible as substantive evidence of guilt against a non-testifying defendant. Judge Womack also noted that federal courts were split on the issue. But, reasoning that the Fifth Amendment by definition protects against compelled self-incrimination, Judge Womack explained that a suspect's interaction with the police is not compelled in pre-arrest, pre-*Miranda* circumstances. Thus, the trial court properly admitted Salinas's pre-arrest, pre-*Miranda* silence as substantive evidence of guilt and the prosecution can comment upon it whether the defendant testifies or not.

2 **Yes.** In the *United States v. Jones*, the trial court suppressed the GPS evidence showing Jones's car parked in the garage but admitted the evidence showing the car's path on the roadway. All of the judges on the United States Supreme Court agreed that the evidence constituted a search, but they differed sharply on the analysis required to get there.[2] Writing for a five-judge majority, Justice Scalia explained that placing a GPS device under the car was a search because it amounted to a trespass.

Justice Alito, joined by Justices Ginsberg, Kagan, and Breyer, also believed the placement of the GPS device under the car was a search. However, they analyzed the case under a traditional expectation-of-privacy analysis, that is, whether long-term monitoring of the vehicle was a search. Justice Alito would have held that the continued monitoring of Jones's car, even though it was on a public roadway, interfered with Jones's reasonable expectation of privacy, though short-term monitoring would not have.

Justice Sotomayor wrote a separate concurring opinion that agreed with aspects in both Justice Scalia's majority and Justice Alito's concurrence. Justice Sotomayor agreed with Justice Alito that long-term monitoring of Jones's car would have violated Jones's reasonable expectation of privacy. She noted that Justice Scalia's property-rights analysis, as Justice Alito's analysis established, was quickly becoming obsolete as physical intrusion, or trespass, is no longer necessary for many forms of surveillance. However, she did join Scalia's majority in adopting the property-rights analysis as additional to and not as a substitute for a privacy analysis. The good news for Texas prosecutors is that the CCA is already largely in agreement that standing to contest a search in Texas under the state exclusionary rule can be established by a showing of an infringement of either privacy or property rights.[3]

3 **Yes.** Failure to inform Jose Peña about the audio portion of the videotape of his transport to the jail constituted a *Brady* violation.[4] Writing for a unanimous court, Judge Hervey explained that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The purpose of this rule is to avoid an unfair trial.

Here, it was undisputed that the prosecution failed to turn over a copy of the audio when it was requested, and the State represented that there was no audio on the tape, so Peña was unaware of it. Moreover, the court distinguished its prior holding in *Havard v. State*, that the failure to turn over a copy of the defendant's own statements did not violate *Brady*. While *Havard* focused on the failure to disclose the existence of a specific exculpatory statementmade by the defendant that he would have necessarily been aware of as a matter of logic, here the evidence in question was the audio portion of the videotape. It included the entire exchange between Peña and the officer as well as other sounds of his arrest and transport. Further, the audio portion of the video was the only piece of evidence that substantiated Peña's defense, and the State had taken the position at trial contrary to Peña's defense. The evidence was both favorable and material as either exculpatory and impeachment evidence that negated Peña's culpable mental state and discounted the offi-

cer's testimony.

4 Each incident within each count. A unanimous Court of Criminal Appeals held that the jury instruction in *Cosio* allowed for the possibility of a non-unanimous verdict because the jury was not required to agree on which incident satisfied which count.[5] Writing for a unanimous court, Judge Keasler explained that non-unanimity can occur in three situations. First, there can be a unanimity issue when the State presents repetition of the same criminal conduct but the results of the conduct differ. There, a proper instruction would require the jury to be unanimous about each specific result. Second, a jury unanimity issue can occur where the State presents evidence that the defendant committed the same offense multiple times but on separate occasions. A proper instruction there would require the jury to be unanimous about each occasion. And third, there can be a jury unanimity problem when the State charges one offense and presents evidence of that offense and another offense that's a crime under a different section. A proper instruction in that circumstance would require the jury to be unanimous about which statutory provision the defendant had violated.

Here, the instructions fell in the second category as each count contained multiple, different instances of the same statutory violation. The jury charge was erroneous in this case because the jury was not instructed that it had to agree on which incident gave rise to a particular count (i.e., the bedroom incident, the shower incident, or the Burger King incident). Fortunately, Cosio did not object to the jury charge based upon jury unanimity so the convictions were upheld because the erroneous jury instructions did not cause egregious harm.

5 No. The Court of Criminal Appeals held that Lilly had demonstrated his trial was unjustifiably closed to the public in violation of his Sixth Amendment right to a public trial.[6] Writing for the majority, Judge Hervey explained that the focus of a hearing on a claim of a right to a public trial is not on whether the defendant can show someone was actually excluded. The focus is on whether the trial court fulfilled its obligation to take every reasonable measure to accommodate public attendance at criminal trials. The admittance policies in this case were highly restrictive and the cumulative effect of the prison unit's policies undermined confidence that every reasonable measure was taken to accommodate public attendance at the defendant's trial. Moreover, because the trial court was the party who closed the trial, it was incumbent upon him to justify that closure. Here, the trial court failed to make specific findings in support of the closure of the trial. The trial court did not identify an overriding interest that justified the closure and how that interest would be prejudiced, why the closure was no broader than necessary, and why no reasonable alternatives to closing the proceedings existed.

6 No. The Court of Criminal Appeals held that the Brazos County Attorney and the Travis County Attorney are the same party for purposes of issue preclusion.[7] Writing for the majority, Judge Womack explained that courts should look to whether, in earlier litigation, the representative of the government had authority to represent its interest in a final adjudication on the merits to determine if two separate governmental entities are the same party for purposes of *res judicata*. Here, both the Brazos County Attorney and the Travis County Attorney had the authority to represent their interests in a final adjudication even though neither had any authority or control over each other's dockets or cases.

Moreover, aside from the burden of proof required to prove a probation revocation, there are few procedural differences between a criminal trial and a probation revocation hearing so a revocation hearing is not "administrative in nature." That distinguishes this situation from the cases holding that an adverse ruling in an administrative license revocation hearing does not bar subsequent prosecution on a criminal law violation. However, the court reached its decision based upon common-law *res judicata* rather than collateral estoppel flowing from the double jeopardy clause. (See the article on page 13 of this journal for a more in-depth look at *Ex parte Doan*.)

7 Yes. A unanimous Court of Criminal Appeals upheld the trial court's determination that the evidence was authentic and admissible.[8] Writing for the court, Judge Price first noted that under Rule 104 of the Rules of Evidence, the trial court need not be persuaded that the proffered evidence is authentic, just that

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the proponent of the evidence has supplied facts sufficient to support a reasonable jury determination that the evidence he has proffered is what it purports to be. Judge Price also noted that courts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted, and/or stored information. Print-outs of emails, Internet chat room dialogue, and text messages have all been admitted into evidence when found to be sufficiently linked to the purported actor so as to justify submission to the jury for its ultimate determination of authenticity.

In this case, sufficient circumstantial evidence established authentication, notably, that Tienda had a number of unique tattoos that could identify him in the photos posted on the MySpace profiles, and the email names lined up with Tienda's name, nickname, and home city. The timeliness of the reference to the victim's death and funeral provided circumstantial evidence as well as pictures of Tienda lounging in a chair displaying his ankle monitor. Judge Price acknowledged that Tienda could have been the victim of an elaborate and ongoing conspiracy, but that was an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a *prima facie* showing that the pages belonged to Tienda.

8 **Yes.** According to the Court of Criminal Appeals, the allowable unit of prosecution for indecency with a child by exposure is the exposure itself rather than each new victim.[9] Judge Hervey, writing for the majority, explained that the gravamen of the offense for indecency is the exposure because, in the statute, the verb "exposes" was followed by the direct object "the person's anus or any part of the person's genitals." This suggests the focus of the offense is upon each exposure rather than upon each child viewing the offense. Consequently, Harris committed only one offense under §21.11(a)(2)(A) of the Penal Code, and the multiple convictions amounted to a double jeopardy violation.

9 **Yes.** The Court of Criminal Appeals held that the prosecutor's unknowing use of false testimony violates the due process clause of the Fourteenth Amendment.[10]

OK, admittedly, there were a lot of other writ/appellate issues going on in this case than just this basic proposition. The real issue was whether a claim of unknowing use of false testimony was a new legal claim that overcame the bar against subsequent writs, and there was an additional appellate skirmish over the proper standard for materiality on such a claim. Should the same materiality standard apply for the knowing use of perjured or false testimony ("a reasonable likelihood that the false testimony affected the sentence")? Or should it require something greater than a determination by a preponderance of the evidence that the outcome would have been different, the standard for unknowing use of perjured testimony? Ultimately, the court applied the former standard and determined that Chavez failed to show a reasonable likelihood that the false testimony affected his sentence because he had been convicted of aggravated robbery rather than capital murder.

That said, it is worth noting that the court still held that a witness's intent in providing false or inaccurate testimony and the State's intent in introducing the testimony are not relevant to a false-testimony due-process error analysis. The concern with such a claim is not the prevention of perjury but rather the accuracy of the result and that the defendant was convicted and sentenced upon truthful testimony. Here, the habeas court found that the testimony in question was not perjured, but the court rejected this finding as irrelevant. Taking the record as a whole, the testimony gave the jury a false impression because it was undisputed that the identification of Chavez as the shooter was false after the actual shooter confessed and pleaded guilty. So even though the witnesses firmly believed they were telling the truth (and so did the prosecutor) the fact that the witnesses were subsequently found to be merely wrong or mistaken meant the use of their testimony violated Chavez's due process rights.

10 **Re-open.** The Court of Criminal Appeals held that the trial court had the discretion to allow the State to re-open evidence on a motion to suppress even over Black's objection.[11] Writing for the majority, Judge Price explained that the review of a ruling on a motion to suppress is generally limited to the evidence adduced at the hearing on that motion unless the parties consensually re-litigate the issue during trial.

A trial court "may" but is not

required to resolve a motion to suppress evidence in a pre-trial hearing under art. 28.01 of the Code of Criminal Procedure. But that ruling is interlocutory in nature and subject to reconsideration and revision as any other ruling on the admissibility of evidence under Rule 104 of the Texas Rules of Evidence. Additionally, the court rejected Black's argument that art. 36.02 of the CCP circumscribes a trial court's authority to re-open a hearing. By its own terms, Article 36.02 empowers a trial court to "allow testimony at any time before the argument of a cause is concluded, if it appears that it is necessary to a due administration of justice." According to Judge Price, "cause" means "trial." ❇

Endnotes

1 *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. Apr. 15, 2012)(7:1).

2 *United States v. Jones*, 132 S.Ct. 945 (Jan. 23, 2012)(5:1:4).

3 See e.g. *Wilson v. State*, 311 S.W.3d 452 (Tex. Crim. App. 2010)(Hervey J., concurring).

4 *Peña v. State*, 353 S.W.3d 797 (Tex. Crim. App. Sept. 28, 2011)(9:0).

5 *Cosio v. State*, 353 S.W.3d 766 (Tex. Crim. App Sept. 14, 2011)(9:0).

6 *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. April 18, 2012)(7:1:1).

7 *Ex parte Doan*, 369 S.W.3d 205 (Tex. Crim. App. June 20, 2012)(6:3:3).

8 *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. Feb. 8, 2012)(9:0).

9 *Harris v. State*, 359 S.W.3d 625 (Tex. Crim. App. Nov. 9, 2011)(8:1).

10 *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. May 23, 2012)(6:2:3).

Keeping the State Bar's criminal pattern jury charges current

Your help is needed to update the first two volumes.

By John Stride
TDCAA Senior Appellate Attorney

Dear colleagues, as you will be aware, the State Bar of Texas is publishing criminal pattern jury charges. You may not know, however, that in just the last four years, the parent committee on criminal pattern jury charges (composed of approximately 20 members drawn from the bench, prosecutor's offices, defense practice, and academia) has prepared no less than three volumes of pattern jury charges that have been released: Intoxication and Controlled Substances (2009), Defenses (2010), and Crimes Against Persons (2011). There are over 900 pages of materials already. A fourth volume of Crimes Against Property, addressing arson, burglary, criminal trespass, theft and related offenses, and the misapplication of fiduciary property will be published this winter. Moreover, the parent committee is currently preparing a fifth volume to include pattern charges on: attempts, solicitation, conspiracy, organized criminal activity, and money laundering.

The criminal pattern jury charges are gaining traction across the state. Accordingly, to ensure the charges are based on current law, consistent across the volumes as the series evolve, and most useful to practitioners, a subcommittee has been tasked with updating the first two volumes. In preparing the updates, the subcommittee is interested in receiving comments and suggestions on the current charges.

Members of the bench and bar are invited to submit comments addressing the contents of the first two volumes. Comments useful to the committee will include specific feedback on the content and utility of the first two volumes as currently formatted. The deadline for submitting comments is December 31, 2012.

Comments should be directed to me at John.Stride@tdcaa.com or by calling 512/484-2381.

Evidence 101

A guide to admitting evidence at trial

You've picked a sympathetic jury, given a moving opening statement, and now you're ready to offer up all kinds of incriminating stuff against the defendant. Everything is golden … until there's an objection to your evidence. The judge asks you for a response. Sweat beads up on your furrowed brow. You fan yourself with your extremely well-written and expertly edited copy of *Family Violence Investigation and Prosecution*, thoughts of its witty and attractive authors (ahem) doing nothing to calm your nerves.

By Ellic Sahualla
Assistant District Attorney in El Paso County

You look to your co-counsel—listlessly thumbing through the case file, blind to your plight. You look to the defense attorney—cackling madly, twirling a devilish mustachio. You look to the judge—shooting a death-gaze, impatiently waiting to keep your evidence out. You're the conductor of a case careening off the rails into a burning chasm of doom where your boss waits to fire you for incompetence, leaving you a penniless shill doing document review or *gasp* *criminal defense*. What do you do?! Pull the brake! And read on.

The basics

Stop, relax, take a deep breath, and repeat after me: Admitting evidence is easy. It probably doesn't seem like it, but let's look at the core standard for getting anything in, Rule 901. It simply says that the foundation for admitting evidence "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[1] In other words, you just have to convince the judge that whatever you're offering is what you say it is. Even where predicates are suggested by the rules, they're just for "illustration only, and not by way of limitation, [merely] examples."[2] There are no magic words for admitting evidence.

So when you respond to an objection about evidence, don't get twisted up in technicalities. Just explain to the judge why the evidence is authentic—how you know it's the same piece of evidence collected on-scene and why you're sure it hasn't been altered. And if the defense keeps on objecting, remember that they have to be specific about what part of the predicate they believe is lacking.[3] Once you insist on that, you may discover that they don't have a good reason for keeping something out, or more commonly, that their objections go to the weight of the evidence and not its admissibility (which is a handy response you can give in these situations).

The mechanics

So how does that translate into practical action? Well, let's start with something so incredibly simple that they often don't teach it in law school: what to do in mechanical terms. Start by marking your exhibit with a number, letter, or whatever symbol is used in your jurisdiction so it's identified for the record. Before offering a piece of evidence or talking to a witness about it to lay the foundation, show it to the defense lawyer and make sure the record reflects that you did so ("I'm showing defense counsel what I've marked as State's Exhibit Three"). If you need to give it to a witness to refer to as you go through your predicate questions, get the judge's permission to approach the witness before handing it to the witness. Then just ask the questions and move to admit it.

Identification

There are some standard things to ask most witnesses that cover qualifications and connections. Anytime you're questioning someone with specialized knowledge who's going to sponsor a piece of evidence, you want to discuss how he knows what he knows. For example, when talking to a police officer, go over where he works and how long he's been there, any relevant prior employment, what education, training, and experience he's had, what ranks and certifications he holds, what his current assignment is, and so forth. You don't want his life story, but make sure the

jurors know whom they're dealing with.

What I mean by connections is showing how the evidence is linked to the case. Sometimes that's as easy as pointing out whomever something needs to be connected to, such as who gave a breath sample in a DWI case:

> Q. You said "the defendant." Can you point out whom you mean and describe what he's wearing?
>
> A. He's right there by the defense attorney and he's wearing a blue shirt.
>
> Q. All right, let the record reflect that the witness has identified the defendant.

Writings

It might also involve describing the distinct characteristics[4] of something to show from where or whom it came. That's essential for things such as texts, emails, and social media messages, where you need to explore how the content or context of a message sheds light on who wrote it.[5]

> Q. This is what's been marked State's Exhibit One; do you know what it is?
>
> A. Yes—it's a copy of a text message that the defendant sent me that night.
>
> Q. How do you know it was from him?
>
> A. It came from his phone number. I got lots of texts from him when we dated, so I know how he writes, and this sounds like him. I also got this about an hour after he beat me up and that's what we're talking about in the message.
>
> Q. Is this printout the exact same message you got that night?
>
> A. Yes.

Other than that, just be sure not to let the jury see anything before it's admitted or else you'll risk a mistrial. But once you've gotten something into evidence, go ahead and ask the judge for permission to show it to the jury, which is known as "publishing" it. As far as how to do that, always ask how to make the strongest impact on the jury with a particular piece of evidence. Jurors need to know exactly what it is, what it means, and why that's important—they need to care about it. Also, if the jury is examining evidence, stop talking to the witness until the jurors are done; you don't want their attention divided.

The theory

Now comes the exciting part: what to ask to get in your evidence.

Photographs and videos

Prosecutors often think of photographs as the easiest type of evidence to admit, so that's a good starting point:[6]

> Q. I'm showing you what I've marked State's Exhibit One. What is it?
>
> A. It's a picture of Jane Doe.
>
> Q. Does it accurately show how she looked that night?
>
> A. Yes.

But let's take a step back: *Why* is that the predicate for a photo? Because it establishes that the picture shows what you say it shows through a witness with personal knowledge[7] of the subject matter. The defense may make a big deal about who took the photo or how clear the picture is, but all of that goes to the weight of the evidence, not whether it comes in.

In principle, every piece of evidence is just as simple. Testimony of a witness with knowledge is the predicate for virtually everything. Although you may need to ask a few more questions, what it always comes down to is someone knowing about a thing and explaining the what, why, and how of it. Don't fall into the trap of thinking about an arbitrary set of questions as *the* predicate for a kind of evidence; that's a completely backwards approach that won't teach you anything. If instead you take what we cover in this article as a general theory for admitting things, you can build questions for anything from it.

In fact, the only additional tools you need are for specialized pieces that require a business records foundation, a chain of custody, or expert testimony. "Business records" are a broad category that covers documentation of any regularly conducted activity,[8] including medical treatment. Usually they're brought in through a custodian of records, but the rules specify "the custodian or other qualified witness" so you also can introduce medical records through a nurse or maintenance logs through a mechanic. What you have to show is simple: that the records were 1) created near the time the documented event happened; 2) kept regularly; 3) as part of the regular practice of the business; and 4) by or based on information from someone with personal knowledge of the event.

9-1-1 calls and computer-aided dispatch (CAD) notes

Combining what we've covered so far—qualifications, connections, testimony of a witness with knowledge, and a business records predicate—let's look at getting in an emergency call recording:[9]

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Q. Good morning. Please tell the jury what you do for a living.
A. I'm the custodian of records for El Paso Police Department communications.
Q. And what does that involve?
A. I maintain records of all the 9-1-1 calls that come in and coordinate our systems and operators.
Q. That's a big job—are you the only one who does that?
A. Sort of. I do have assistants who share some of the work, but I'm the one responsible for it all.
Q. How long have you been in that position?
A. Five years now.
Q. What did you do before that?
A. I started as a 9-1-1 operator. I did that for three years, and then I became a supervisor. That was my job for two more years, and while I was there, I started to help do some of the stuff I'm in charge of now. That's how I transitioned into my current role.
Q. OK, thanks. Now, take a look at these—State's Exhibits One and Two. Do you recognize them?
A. I do. Exhibit One is a recording of the 9-1-1 call made on January 1, 2012, from 111 Main Street; Exhibit Two is the call-taker's notes, which is called a CAD (which is short for computer-aided dispatch).
Q. How do you know these are the same records that were made that day?
A. Well, it's all done by computer, and this is all properly documented. It's got the information I just gave you on it along with the case number, the time, and the name of the call-taker.
Q. How does that work—what's the standard practice when someone calls 9-1-1?
A. The whole call is automatically recorded, and then the call-taker makes notes as well. The notes are sent out to police officers and other responders as part of the dispatch. That way they know what they're responding to.
Q. All right. Are these records kept regularly by the El Paso Police Department?
A. Yes.
Q. Are they made at the time of the call?
A. Correct, as the call is going on.
Q. And because of that, everything on the recording and in the CAD is based on the personal knowledge of the call-taker and the caller?
A. Right.
Q. Is the call-taker an employee of the El Paso Police Department?
A. Yes, they are.

That might seem like a lot more than what we did for the photograph, but in principle, it's the same. The custodian gave her qualifications, connected the evidence to the case, told us how she knew what it was and why it was authentic, and covered the business records stuff. There's nothing special about these questions—anything that gets the same information out will do.

Generic physical evidence—chain of custody

A chain of custody is something you need to establish when dealing with generic evidence. When you have a unique thing like a gun, you can point to the serial number on the item and say, "Yep, it's the same number as the one found at the scene, so we know this is the right gun."[10] When you have something like a baggie of cocaine (which looks much like any other bag of coke), you have some extra work to do. What you need are the beginning and the end of the chain—how something left where it was found and made its way to court, so that we know they're one and the same.[11] The links in between go (you guessed it) to weight, not admissibility:[12]

Q. This is what's been marked State's Exhibit One. Have you seen it before?
A. Yes.
Q. What is it?
A. It's an evidence bag containing a knife collected at the victim's house that night.
Q. Can you explain how you collected the knife?
A. When she pointed it out to me, I placed it in this bag, which has a tag on it. The tag has the case number, a description of the piece of evidence, and other identifying information.
Q. Who filled that information in?
A. I did. These are my initials on the tag to show that.
Q. How do you know it's the same bag and same knife?
A. It has all the info linking it to this case, it looks exactly how I remember it, and the bag is sealed.

You may need expert testimony to support things such as lab reports, breath tests, or fingerprint comparisons. Just using the word "expert" makes it seem pretty intimidating, but in reality, experts are easier than lay witnesses because they have a lot more latitude in giving opinions and talking about things they don't personally know the facts of.[13] All they require is a little legwork.

First you need to qualify the expert by showing she has sufficient background in her field and that her background goes to the opinion she's going to give.[14] After that, tackle the expert's reliability.

Fingerprint comparison

Courts have made a distinction between "hard science" and "soft science." Hard sciences are things such as chemistry or physics. To use evidence based on hard science, all you have to do is show three things: 1) that the underlying theory is valid; 2) that the technique applying the theory is valid; and 3) that the technique was properly applied.[15] Soft sciences include psychology or the dynamics of domestic violence. Standards are similar: Courts look to whether 1) the field of expertise is legitimate; 2) the expert's testimony is within the scope of that field; and 3) the testimony properly relies on the principles of the field.[16]

You can meet these criteria by showing how widely accepted the theory is, how qualified the expert is, the literature on the theory or technique, the known rate of error involved, whether there are other experts to test the results, how clearly the science can be explained to the court, or the experience of the person who applied the technique.[17] That may take a lot more questions than a photo, but it's just an expansion of our basic "here's what I know and why" theory. Let's take fingerprints:[18]

Q. What's your area of expertise?
A. Fingerprint comparison.
Q. How'd you learn to compare fingerprints?
A. Well, I was first exposed to it on the job as a police officer. Eventually, I was sent to an academy course on lifting and examining fingerprints, which I completed successfully. After that it was on-the-job training, although I did get sent to an advanced FBI course at Quantico where I learned more about using things like IAFIS, which is the national fingerprint database for criminal cases.
Q. How long have you been doing fingerprint comparisons since the academy?
A. Four years.
Q. And how many comparisons have you made?
A. I can't say exactly; over a hundred, for sure.
Q. OK. Let's start with the basics: what's a fingerprint?
A. It's an impression formed by the ridges of the finger due to sweat, oil, and so forth—well, or ink, if it's a fingerprint card.
Q. Are any two fingerprints alike?
A. No. There's never been a case where fingerprints from different people have been found to be identical.
Q. How do you make a comparison?
A. The ridges in fingerprints are variations of loops, arches, and whorls. Besides a basic visual comparison, we use a formula tied to the ridges on each finger.
Q. Is that the standard way fingerprint comparison is done?
A. Yes, it's a practice accepted pretty much worldwide.
Q. Let me hand you State's Exhibit One. That's a judgment that was previously admitted. Have you had a chance to analyze the fingerprint on it?
A. Yes.
Q. And here's what I've marked State's Exhibit Two. What is it?
A. This is an inking of the defendant's fingerprints that I took a little while ago.
Q. [Move to admit the inking as State's Exhibit Two.] Have you compared the two exhibits?
A. Yes, I have.
Q. How?
A. Using the same technique I described earlier. I do it the same way each and every time.
Q. What did you conclude after comparing them?
A. They're a match.
Q. So is the defendant the person who was convicted in the judgment that's State's Exhibit One?
A. That's correct. They're the same person, so he was convicted of this prior offense.

There are certain situations where you need to do a little more work because of statutory requirements; for instance, when talking about a DWI blood draw, you need to establish that the person who drew the blood was a doctor, a qualified technician, a chemist, a registered nurse, or a licensed vocation nurse, and not simply an emergency medical technician.[19] But that just comes from learning the law applicable to your case. Generally speaking, if you introduce the witness, get her to talk about what something is and how she knows, and use a business record, chain of custody, or expert predicate if needed, you can lay the foundation for any evidence.

The magic

OK, remember how I said there's nothing magical about admitting evidence? I lied. There are actually some tricks and special magic words that will get your evidence in easily. The first trick is something you do before trial: filing evidence with the clerk of the court. Lots of things can be admitted this way. Filing business records with an affidavit at least 14 days before trial makes them self-authenticating.[20] You can do the same sort of thing with a certificate of analysis (such as the kind in DWI blood draws or drug cases with lab reports). You have to file it 20 days before trial, and if the defense doesn't object by 10 days to trial, it comes

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into evidence.[21] The same procedure can also be used to establish chain of custody by filing an affidavit.[22] A defense attorney may hem and haw about the Confrontation Clause at trial, but this notice-and-demand procedure was specifically approved by the Supreme Court in the leading case on this issue.[23] You can save yourself a lot of headaches by doing your homework before trial and filing everything.

Next, there's a wide array of stuff that's self-authenticating: signed or sealed government records, certified public records, published works, periodicals, trade inscriptions, documents that come with a certificate of acknowledgement, and commercial paper.[24] The most common of these are prior judgments used for enhancement or impeachment. You may hear some grumbling about confrontation again, but luckily for you, judgments aren't testimonial,[25] so there shouldn't be any Sixth Amendment concerns.

The last trick in the bag is a demonstration. Demonstrative evidence doesn't have a predicate beyond showing that the conditions of the demonstration are similar to what it's duplicating.[26] This approach is great for reenacting how injuries were caused or showing things such as weapons when you don't have the original for some reason. "How does this compare to the knife the defendant used to threaten you? Why, they look the *same*? Goody! Jury, have a look at this scary knife!"

Oh, and I promised you magic words. Abracadabra, hocus-pocus: "We stipulate." Before you've got a defense attorney objecting, before you even start trial, why not just ask the defense whether they have a problem with you introducing certain evidence? You'd be amazed at what you can get in simply by discussing it beforehand.

What this article has covered isn't the last word on evidence, of course. Among other things, I left out statements and the rules about hearsay and confrontation that go with them, which we'll cover in another "back to basics" article down the line. But this should be enough to put you back on the rails, armed with enough guiding principles to make admitting evidence a piece of cake, and free to deal with the million and one other crazy things that can crop up during trial. Good luck, and go get 'em! ❇

Endnotes

1 Tex. R. Evid. 901(a).

2 Id. (b).

3 See id. 103(a)(1) (no error preserved regarding evidence unless objection is specific); *Long v. State*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990) (objection must be specific enough to give State notice of legal grounds and opportunity to cure objection); *City of Mesquite v. Moore*, 800 S.W.2d 617, 619 (Tex. App.—Dallas 1990, no writ) ("A valid objection to an offer of evidence is one that names the particular rule of evidence that will be violated by admission of the evidence").

4 Tex. R. Evid. 901(b)(2).

5 See *Black v. State*, No. 02-10-00283-CR, 2012 WL 117970, at *7 (Tex. App.—Fort Worth Jan. 12, 2012, no pet.) (no showing defendant "wrote or ratified" text messages precluded their introduction as admission of party opponent); *Stafford v. State*, 248 S.W.3d 400, 408 (Tex. App.—Beaumont 2008, pet. ref'd) (covering authentication of handwriting through lay witness); *Shea v. State*, 167 S.W.3d 98, 105 (Tex. App.—Waco 2005, pet. ref'd) (covering authentication of emails). Note that digitally preserved documents are just as admissible as those kept on paper. Tex. Code Crim. Proc. art. 38.44.

6 See generally *Long v. State*, 823 S.W.2d 259, 270 (Tex. Crim. App. 1991) (describing foundation for admitting photographs); *Kelley v. State*, 22 S.W.3d 642, 644 (Tex. App.—Waco 2008, pet. ref'd) (same).

7 Personal knowledge is the basic requirement for all testimony, and it's enough to get evidence in. Tex. R. Evid. 602 & 901(b)(1).

8 Tex. R. Evid. 803(6).

9 Tex. R. Evid. 902(10); *Montoya v. State*, 43 S.W.3d 568, 571–72 (Tex. App.—Waco 2001, no pet.); *Brooks v. State*, 833 S.W.2d 302, 304 (Tex. App.—Fort Worth 1992, writ ref'd).

10 Tex. R. Evid. 901(b)(4).

11 E.g., *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989); *Maranda v. State*, 253 S.W.3d 762, 770 (Tex. App.—Amarillo 2007, pet. stricken); *Caddell v. State*, 123 S.W.3d 722, 727 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

12 See *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) (without evidence of tampering, chain of custody goes to weight, not admissibility); *Stoker*, 788 S.W.2d at 10 (same).

13 See generally Tex. R. Evid. 702–705 (laying out standards for expert testimony).

14 *Vela v. State*, 209 S.W.3d 128, 131–32 (Tex. Crim. App. 2006).

15 *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

16 *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

17 *Kelly*, 824 S.W.2d at 573.

18 See *Gibbs v. State*, 544 S.W.2d 403, 404 (Tex. Crim. App. 1977) (describing how fingerprint comparisons made and admitted); *Acevedo v. State*, 255 S.W.3d 162, 171–72 (Tex. App.—San Antonio 2008, pet. ref'd) (providing proper standards for qualifying fingerprint expert); *Cooks v. State*, No. 05-02-01809-CR, 2004 WL 42612, at *1 (Tex. App.—Dallas Jan. 9, 2004, no pet.) (describing how fingerprint comparisons made and admitted). Fingerprints are something you'll get a lot of practice with, since they're used for linking a judgment or booking sheet's prints to a fresh sample from a defendant. E.g., *Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986).

19 Tex. Transp. Code. §724.017(a).

20 Tex. R. Evid. 902(10). The form you need for the affidavit is in subsection (b).

21 Tex. Code Crim. Proc. art. 38.41. The certificate you need is found in §5.

22 Tex. Code Crim. Proc. art. 38.42. Again, the certificate you need is in §5.

23 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326–27 (2009).

24 Tex. R. Evid. 902.

25 *Smith v. State*, 297 S.W.3d 260, 276 (Tex. Crim. App. 2009).

26 *Cantu v. State*, 738 S.W.2d 249, 255 (Tex. Crim. App. 1987), *cert. denied*, 484 U.S. 872 (1987). If you can't get an original, something similar is admissible as long as it doesn't have "inflammatory attributes" that the original didn't. *Simmons v. State*, 622 S.W.2d 111, 113–14 (Tex. Crim. App. 1981).

Free online resources for judges and attorneys

Those members of the criminal justice system who help abused children can access Texas Lawyers for Children's online resource center free of charge.

By Patricia Hogue
Special Projects Attorney at Texas Lawyers for Children in Dallas

Judges and attorneys across Texas can access—for free—a wealth of materials and resources to help in handling child abuse cases. Texas Lawyers for Children (TLC), a 501(c)(3) nonprofit organization, has created an innovative Online Legal Resource and Communication Center to provide valuable technology and resources to court-appointed solo practitioners and government attorneys all across Texas. TLC created a one-stop shop to consolidate critical child abuse-related information from across the state, where judges and attorneys can also use secure communication tools to pose questions and discuss court improvement ideas with their colleagues.

To highlight the benefits and ease that TLC's Online Center provides to legal professionals currently handling child abuse cases, I would like to share a bit of my own experiences on the road to technology, along with a solemn reminder of how limited we once were and how much more effectively we can work on behalf of children today. Back in 1993, when I started at the Dallas County Criminal District Attorney's office, "technology" consisted of a single county terminal per workroom on which to check criminal histories and a copy machine down the hall to replenish my supply of pre-printed, fill-in-the-blank form motions. Legal research meant actual physical hours in the appellate library, located on the tenth floor of our building (just a hop and a skip on the elevator or up four to six flights of stairs [on a day with a patient judge]) and spending countless hours peering through volumes of the West's Law Digests, Vernon's Statutes, and Southwestern 2nd Reporters as I evaluated the merits of my cases and prepared for trials. I did share access to a secretary with word processing in the mid-1990s during my first child-abuse division stint, but the felony courts still had about a 1-to-50 secretary-attorney ratio. By 1999, when I returned to the child abuse division, my research hours diminished considerably, thanks to the generous help of my wonderful colleagues in the appellate section who just happened to be across the hall from my office. (Thanks again to the whole

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gang!) That was also the year I was provided an actual modern-day computer on my desk and was given a password to Lexis or Westlaw for prosecutors. Oh, such fond memories!

I am thankful that these days, county government attorneys now have access to far more advanced technology and resources to prepare daily dockets, get ready for trial, and enlighten judges and juries. I bet many of today's law school grads are unlikely to fathom such an environment as they enter their first years of practice at firms that are light years away from where I started. However, many of you reading this article still face the challenges of overcrowded and underfunded court systems, especially those in the lovely rural settings of our great state. Adequate county budgets that provide for the latest and greatest technology and training still lag far behind our comrades who started their legal careers at big firms where the expected protocol to "leave no stone unturned" is supported with resources including unlimited access to Westlaw and Lexis; expert witnesses for consultation and trial; online form banks; advice and support from mentors; teams of support staff; and endless budgets for legal conferences and trainings.

Additionally, despite the greatest attempts by law schools to prepare young lawyers to face the challenges of the modern world, there are still many facets of real life, love, and law that are given little or no attention in the academic setting. Take child abuse, for example: How many of us took a course in the dynamics of sexual abuse within the family or the intricacies and causes of brain injury in infants? As a prosecutor or court-appointed *ad litem*, you hit the ground running and often do so totally on your own.

Fortunately for the prosecutors in Texas who handle child abuse cases and the hundreds of attorneys across Texas that serve as court-appointed *ad litems* for abused children, there is a resource available that brings the tremendous big-firm kind of support system to all large and small county offices and solo practitioners throughout the state. The TLC Online Legal Resource and Communication Center, located at www.TexasLawyersforchildren.org, features highly organized resources and collaborative tools (including private email networks) specifically tailored for Texas judges and attorneys who handle child abuse and neglect cases.

Although the site focuses primarily on civil cases, there is ample information relevant to criminal child abuse cases as well. The resource center, designed for fast and easy use, provides hundreds of case summaries linked to the full text of the cases, a brief bank, more than 200 legal forms in Microsoft Word format, articles, manuals, medical and psychological references, practice tips, a conference calendar, links to Texas statutes, and much more. When a TLC subscriber clicks on any of the more than 1,300 topics in the list, the search result contains only information specifically regarding that topic so that the user avoids wading through irrelevant information.

One of the most valuable aspects of the Online Center is the community network that helps to resolve both individual and systemic issues that arise daily in child abuse cases and the court system. Judges and attorneys, both seasoned and brand-new, are connected to one another and can benefit from the exchange of information and share resources. TLC now has over 1,800 judges and attorneys registered to use its services, who estimate that they handle cases involving over 89,000 children.

As a one-stop shop, TLC's Online Center provides what Texas lawyers spread out across 254 Texas counties need: free, immediate access to legal research, forms, medical and psychological information, experts available for questions, and mentors on specific legal issues to trial preparation. Please contact TLC's toll free number 800/993-5852 or email me at patricia.hogue@texaslawyersforchildren.org with any questions. Judges and attorneys who wish to access the Online Center may do so by going to www.TexasLawyersforChildren.org and clicking on "Register" on the red menu bar. ❇

New to DWI prosecution?

Some helpful suggestions and strategies from two misdemeanor prosecutors who've learned a few things along the way

By Charles A. Boulware and Bryan Hoeller
Assistant Criminal District Attorneys in Tarrant County

It was an early Sunday morning just after 1:00 a.m. when Joseph Jenkins's Silver Dodge Ram caught Fort Worth Patrol Officer Curtis Page's attention on Interstate-30. At that time, Officer Page was headed to the Tarrant County Jail on a routine request for assistance, but as he was nearing downtown, he noticed the truck ahead of him briefly cross both left tires over the broken white dividing line. Because this is a common driving error, Officer Page chose not to conduct a traffic stop and moved to the inside lane to pass the truck. Yet as he passed, he noticed that Jenkins was following another motorist by only a few feet. Believing this distance to be unsafe, Officer Page activated his in-car camera and positioned himself behind the defendant's truck to further investigate this suspicious driving behavior. After observing the defendant momentarily cross the broken white dividing line a second time, Officer Page pulled him over.

When Officer Page made contact with Jenkins, a large man in his late 20s, he quickly noticed several signs of intoxication: a slight odor of alcohol, bloodshot and watery eyes, and slurred speech. Jenkins admitted having "two beers," and after a brief conversation, agreed to get out of his truck and perform standardized field sobriety tests (SFSTs). As he exited the truck, Officer Page observed another sign of intoxication: The defendant's balance was slightly swayed. After observing all six clues on the horizontal gaze nystagmus (HGN) test, Officer Page began the instructions phase for the Walk-and-Turn test. However, the defendant informed Officer Page that he was unable to put pressure on his right leg because of a back injury. Therefore, Officer Page did not conduct the Walk-and-Turn and One-Leg Stand.

The officer concluded that the driver was intoxicated and arrested him for DWI. At the station, the suspect was read his *Miranda* warnings and refused to answer questions. However, he did agree to provide breath samples, which showed that he had a blood alcohol concentration of 0.102 approximately one hour and 10 minutes after the traffic stop.

A typical case

This DWI fact pattern is typical and is an actual case we tried. For experienced prosecutors, a brief examination of the facts reveals several issues that must be addressed in preparation for trial. However, for new prosecutors, it's a whole different scene. It may be your first week on the job, and you are still trying to remember what SFST and NHTSA stand for. Nonetheless, you will be first-chairing your very first DWI trial tomorrow at 9 a.m.

Your partner is nice enough to provide you with a PowerPoint voir dire, sample direct examination, and a well-used copy of Richard Alpert's *DWI Investigation and Prosecution* book, but these resources do little to relieve any anxiety as you fear looking like an amateur in trial. Add to it that the inexperienced arresting officer (who also doesn't know what SFST and NHTSA means) will arrive at 8 a.m. for witness preparation.

Like many others, such a situation was our initiation to DWI prosecution. We currently have a combined total of over 75 DWI jury trials, but as we reflect on those first few, there is a lot we know now that we wish we knew then. As prosecutors, we try many types of DWI cases. Some will be great State's cases, such as those involving a wreck with a high blood test, and some will be terrible cases, such as a total refusal where the defendant politely informs the officer that a lawyer friend told him to always refuse any test. However, the cases that routinely result in a trial (rather than a plea bargain) are the ones that involve a balanced mixture of favorable and unfavorable facts. Our purpose in this article is to

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share approaches we have found effective in preparing for these types of trials; additionally, we will apply the approaches to two common case scenarios: the low breath test case and the breath test refusal. We will then conclude with five tips for jury selection.

Preparing for trial

Those who are new to DWI prosecution are likely new to criminal prosecution in general and still learning how to work up a case. We believe the following five tips are helpful when preparing for DWI cases.

1 **Educate yourself.** We recommend reading Richard Alpert's *DWI Investigation and Prosecution* book (available at www.tdcaa.com/publications) and the National Highway Traffic Safety Administration (NHTSA) *SFST Student Manual* (available at www.tdcaa.com/dwi) cover to cover.[1] These two books alone provide a solid foundation for DWI prosecution.

2 **Learn from your fellow prosecutors.** Discussing strategies and observing colleagues in trial will reveal established, effective techniques. It will also familiarize new prosecutors with the trial process.

3 **Develop a team strategy.** A consistent message is invaluable, so coordinate with your partner on how to present evidence.

4 **Account for the video when planning the witness meeting.** DWI cases often include lengthy roadside and/or station videos that can consume the entire meeting. Therefore, set aside plenty of time to fully discuss the case with the arresting officer.

5 **Make sure you can prove all the elements.** Although the issue in trial is usually intoxication, elements such as "operating" or "public place" can be a major issue, so be sure to examine all the elements when evaluating your case.

Preparing the State's argument

The ultimate goal in a DWI case is to prove intoxication. In any given case, however, the numerous facts that prove intoxication are not equally persuasive. Therefore, highlight those facts most favorable to the case throughout the trial by developing the closing argument first, then working backwards through the other phases of the trial.

Establishing the closing argument first will 1) allow you to properly determine what topics need to be covered in jury selection and which facts need to be emphasized during presentation of the evidence, and 2) produce a consistent message throughout the trial so that the closing argument will be more effective.

When organizing the closing argument, separate the evidence of intoxication into four categories: 1) subjective evidence, 2) objective evidence, 3) evidence of guilt, and 4) evidence of drinking. Subjective evidence encompasses the typical signs of intoxication that prove the first two definitions of intoxication: the loss of normal use of mental and physical faculties. Examples of subjective evidence include bad driving, difficulty following instructions, performance on the field sobriety tests, etc. Objective evidence applies to the third definition of intoxication, an alcohol concentration of .08 or more. Therefore, this evidence is present only when there is a breath or blood sample.

The most commonly argued evidence of guilt is a defendant's refusal to submit a breath sample. While the State should always argue this point, our experience has taught us that a breath test refusal is rarely the deciding factor when a jury reaches a guilty verdict. Those jurors that consider a breath test refusal to be strong evidence of guilt are oftentimes exposed in jury selection and struck by the defense. Therefore, it is important to identify additional evidence of guilt, such as leaving the scene of an accident or exhibiting uncooperative behavior, because it will strengthen the State's breath test refusal argument.

Evidence of drinking is easy to identify, but it may be limited to an odor of alcohol. However, other evidence, such as the defendant's admissions, open containers in the car, and bar receipts, is often available. This evidence helps refute the common defense arguments that a past medical condition, the unusual act of performing the SFSTs, or nervousness explains why the defendant displayed signs of intoxication.

Every DWI case will have some combination of these categories of evidence. As you gain experience, you may develop your own system for classifying evidence of intoxication. It's important to be mindful, though, that the evidence can vary significantly from one trial to the next, and therefore, so should the approach. Categorizing the evidence helps identify the strengths of the case (evidence of intoxication) and

its weaknesses (potential defense arguments). This approach is essential for developing an appropriate trial strategy.

Scenario One: the low breath-test case

We now turn to applying the strategies just discussed to a low breath test case. Remember that one of our recommendations in preparing a case is to develop the closing argument first. In a low breath test case, a prosecutor's primary focus during closing argument should be substantiating the breath test results. This is particularly important in cases like the example at the beginning of this article, so we will use it as an example.

In this fact pattern, there are less obvious clues showing the loss of normal use, but nothing with great jury appeal. The defendant's inability to perform the Walk-and-Turn and One-Leg Stand largely accounts for this lack of evidence, and we can expect the defendant's back injury to come up as an explanation for why the officer observed swayed balance as well.[2] In addition, while the defendant's driving behavior can be described as careless, it was by no means erratic. There is some decent evidence of drinking (his admission of having "two beers" and the odor of alcohol) and two 0.102 breath samples. However, the defendant's refusal to answer questions after *Miranda* means the technical supervisor will have insufficient information to offer an opinion based on retrograde extrapolation (an opinion which estimates the defendant's BAC at the time of driving). As a result, the technical supervisor will likely concede on cross-examination that it's possible that the defendant's BAC was lower than .08 at the time of driving.

In this type of case, prosecutors must first convince the jury that the breath test results are accurate. Some jurors cynically view the Intoxilyzer instrument as "some breath test machine used by the police," so the State must give them confidence in the Intoxilyzer. One method is to tell the jury that you are not asking them to find the defendant guilty based on the BAC number alone but rather because of the evidence supporting that number and the stringent regulations required for its admissibility.

Begin by explaining that breath testing has been used in Texas since 1968, so critics have had 44 years to challenge the science and validity behind it. Those challenges have been unsuccessful, and the Texas Department of Public Safety (DPS) , charged by the legislature and relying on the most up-to-date federal and industry specifications, still considers it a reliable means of determining a person's alcohol concentration. Also note that DPS not only approves breath testing, but it also regulates it to further ensure that reliable results are produced. Follow this information with a reminder that the Intoxilyzer operator, technical supervisor, and instrument itself were all certified as required. Finally, argue that because the instrument passed all on-site and online inspections before and after the date on which the defendant provided the samples, not only was the instrument certified, but also the evidence shows it was working properly as well. To maximize the effectiveness of these arguments, emphasize these facts during direct examination so that the jury begins to feel comfortable with the breath-testing program prior to closing argument.

After validating the breath-testing program, it is important to further substantiate the results with the State's subjective evidence. It is OK to concede that you are not arguing that the defendant was "falling down drunk." However, note that the peace officer was in the best position to observe the defendant, and his special training allows him to detect even those subtle signs of intoxication. This sets the stage for the prosecution's argument that the officer was indeed trained properly—the breath tests results show his opinion was correct, and all the evidence is consistent with intoxication.

Be prepared to answer the defense's argument that the defendant could have been under .08 at the time of driving. In this particular case, this defendant admitted drinking "two beers." However, he was a big man—6-foot-7 and 300 pounds—which means he obviously had more than two beers. When we tried this case, we wanted to argue that the reason the defendant was untruthful with the officer was because he knew he was intoxicated (evidence of guilt). To set up this argument, we developed testimony from our technical supervisor regarding his expertise in retrograde extrapolation and "dosing" experiments. Afterwards, we asked him if a hypothetical man with our defendant's height and weight could drink two beers and attain an alcohol concentration of .102. Our technical

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supervisor confidently answered that it was "impossible." This argument is designed to shift the jury's focus from the possibility that the defendant was under the legal limit and back to reasons why the defendant was intoxicated. Because defendants rarely admit to drinking an amount of alcohol consistent with the breath test results, this argument is often available and effective when there is insufficient information for an extrapolation opinion.

Scenario Two: the breath-test refusal

Statistics in our county reveal which DWI trials are most challenging. In 2010, the conviction rates for cases with breath and blood tests were 83 and 100 percent, respectively. However, the conviction rate for all DWI cases in Tarrant County was 58 percent. This sizeable decrease is attributable to breath/blood test refusal cases (45 percent conviction rate) and the dreaded total refusal (35 percent). Until counties across the state implement 24-7 mandatory blood draws, the majority of DWI trials will be refusals.

One reason breath-test refusal cases are difficult is because the absence of objective evidence often causes juries to demand obvious signs of intoxication that are more consistent with a *total* loss of normal faculties. In our opinion, a well-organized "totality of the circumstances" closing argument is the most effective means for overcoming this obstacle.

When organizing closing argument, begin by identifying the small arguments that strengthen the case. Let's assume, in a hypothetical case, that the defendant refused to provide a breath sample, never complained of any sort of injury, and agreed to perform the full battery of field sobriety tests. He subsequently reached the decision point on all three tests after displaying four clues on the Walk-and-Turn and two clues on the One-Leg Stand. However, he still never showed significant difficulty maintaining his balance.

This modified fact pattern is representative of many breath-test refusal cases that go to trial because it contains numerous signs of intoxication but lacks unmistakable signs of intoxication. Therefore, communicating the minor clues that factored into the officer's determination that the defendant was intoxicated is particularly important. One example may be the time of the stop, which is relevant as evidence of guilt because the number of intoxicated drivers is relatively high at 1 o'clock on a Sunday morning. Set up this argument by asking the officer to explain the significance of the time of the stop based on his personal experience. Developing this testimony will allow the prosecution to argue that the defendant's driving behavior at that time is another circumstance consistent with intoxication.

Because you ultimately want the jury to reason that the multitude of subtle signs of intoxication justify a guilty verdict, a well-organized approach is essential. We have found that listing those details on a board throughout direct examination is very effective. After compiling the list, offer it as demonstrative evidence so the defense cannot alter it during cross-examination. In closing argument, use the list to remind the jury that even though the defense tried to explain away the officer's observations, there is simply too much evidence of intoxication. Creating and strategically using this visual aid helps add persuasiveness and organization to your argument and also provides the jury another piece of evidence they can discuss during deliberations.

Jury selection

Once you have formed a trial strategy that sets up the closing argument, it is important to develop a voir dire presentation to enhance it. However, it is equally important to eliminate those jurors who will likely find that argument unpersuasive. Here are five general approaches that we believe help accomplish these two objectives:

1 **Undersell in jury selection.** Regardless of the strength of the State's case, prosecutors' goal should be to exceed the jury's expectations in trial. So it's important to discuss evidence that is indicative of a person at the low end of the intoxication scale (barely a .08 breath test, subtle clues of intoxication, etc.).

2 **Promote a low standard for intoxication.** Explain to the jury that the definition of intoxication was intended to include low levels of intoxication, but instead of lecturing the jury, use a hypothetical designed to have them tell you that the standard should be low. One way to accomplish this is to use the "red bouncing ball" slide on the TDCAA website (find it at www.tdcaa.com/dwi/videos/red-bouncing-ball.html). Most jurors respond to this slide by saying that they would want the

driver to stop "immediately" (within the snap of the fingers), and agree that this prompt reaction would require all of the driver's mental and physical faculties. You can then remind the jury during closing argument that everybody agreed the standard should be low.

3 Justify implied consent when necessary. Many jurors believe the implied consent law violates their civil liberties. To help lessen this concern, inform the jury that officers do not request breath samples from randomly selected drivers; they request breath samples only after an extensive investigation has given them probable cause to believe a driver is intoxicated. This explanation shows the jury that the law is not arbitrarily applied.

4 Get to know the jury. According to the National Highway Traffic Safety Administration, any given jury includes people who drink and drive. After conducting a 2008 national survey, NHTSA reported that 20 percent of the population admitted to consuming alcohol within two hours of driving in the past year, and 13 percent admitted to consuming alcohol within two hours of driving in the past 30 days.[3] What does this mean? Many of your jurors are saying to themselves, "There, but for the grace of God, go I," so it is important to discover which jurors are uncomfortable with a low standard of intoxication or may have difficulty returning a guilty verdict if they believe the defendant had only a little too much to drink. Asking the panel members if they have been personally affected by a DWI-related event is a good way to begin this discussion.

5 Identify jurors that require proof of more than one definition of intoxication. Although there are three definitions of intoxication, the law requires the State to prove only one. Thus, if a juror would require proof of an alcohol concentration of .08 or more, even after believing beyond a reasonable doubt that the defendant lost the normal use of his mental or physical faculties, that juror cannot follow the law and is challengeable for cause. Therefore, prosecutors must set up a cause question that exposes this type of juror.

For example, you could ask the following: "If, at the end of the trial and after hearing all the evidence, it was proven to you beyond a reasonable doubt that the defendant lost the normal use of his mental or physical faculties due to the introduction of alcohol, would you still require proof that the defendant had an alcohol concentration of .08 or more? In other words … who needs a number?" For breath test cases, craft a similar question to identify those jurors that cannot convict on a number alone. After presenting the question, go down the row and get a response from each juror.

Conclusion

Because every DWI case is unique, we are unable to address the seemingly infinite combination of issues that may arise in any one trial, so this article is by no means a comprehensive guide to DWI prosecution. The majority of your education will come from the mistakes you make in the courtroom, so always welcome feedback. If your first case is a DWI repetition though, we want to close with some advice we always receive from a caring judge before the information is read to the jury: "I don't care what you do in trial today; just don't read the enhancement paragraph." ❇

Endnotes

1 Both the DWI book and NHTSA's manual are available online at the association website (the book is for sale at www.tdcaa.com/publications and the manual is a free download at www.tdcaa.com/dwi).

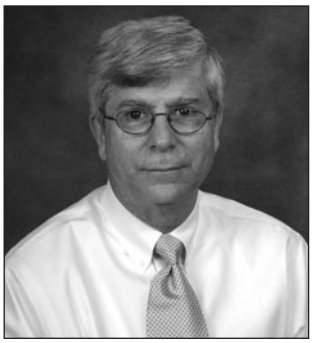
2 We'd like to note that while Jenkins (this particular defendant) did exhibit six of the six clues for HGN, we have chosen to not discuss HGN in this article for a couple of reasons, namely, space limitations and so that we can focus on other types of evidence and strategies that readers may not have considered. A future article on HGN and its usefulness at trial is forthcoming.

3 National Highway Traffic Safety Administration, *National Survey of Drinking and Driving Attitudes and Behaviors*: 2008 Volume 1 Summary Report, pages 1-2 (2010).

New DPS labs reporting requirements

The Texas Department of Public Safety's Crime Laboratories reports will look a little different from now on.

The Texas Department of Public Safety Crime Laboratories are accredited by the American Society of Crime Laboratory Directors' Laboratory Accreditation Board (ASCLD/LAB), and the requirements of this accreditation include specifics on how crime laboratory test results are reported. Note that the DPS labs issue a total of around 100,000 reports a year.



By D. Pat Johnson
Deputy Assistant Director, Law Enforcement Support Division, Crime Laboratory Service

One new reporting requirement went into effect during 2012, and a second is expected to. These requirements specify how two testing issues shall be reported. First, laboratories are required to address how evidence items are sampled for testing. Second, laboratories must address the uncertainty of measurements of evidence when those measurements matter. This article will describe these two new areas of reporting and provide an example of how the new lab reports will appear.

Sampling of evidence

Let's assume that the drug exhibit submitted by a police officer for testing consists of 100 small packets of white powdery material that all look alike (are homogeneous). The crime laboratory analyst may take three different approaches to testing this exhibit, all of which meet accreditation requirements:

1) perform preliminary and confirmation tests on the contents of all 100 packets of white powder and report the findings and total net weight of the drug or drugs identified;

2) perform preliminary and confirmation tests on one packet (or some other small number of packets) of the white powder and report the findings and net weight of the contents of only the packets tested; or

3) employ a statistically valid sampling plan and determine the number of packets that must be tested at a 95-percent confidence level to make an inference about the whole lot of 100 packets. Then perform preliminary and confirmation testing on the contents of that number of packets. If all packets tested contain the same drug or drugs, then the appropriate inference can be made.

Uncertainty of measurement

Mostly the uncertainty of measurement comes into play with weighing drug evidence and with determining the concentration of alcohol in the blood of a DWI suspect. The DPS Crime Laboratories have determined this measure of uncertainty for both types of testing; the uncertainty will be reflected on the laboratory report with a +/- weight with drug items or a +/- weight per volume measure of the alcohol concentration. Sample wording of two such laboratory reports are below and on the opposite page; the sampling plan and uncertainty information is in bright blue text.

Controlled Substance Analysis Laboratory Report

Completion Date: April 2, 2012
Laboratory #
Suspect: Smith, John H.
DOB 10/07/1985
Requested Analysis: Controlled Substance Analysis
Evidence description, Results of Analysis and Interpretation:

01-01 Bag of plant substance
Marihuana 25.68 grams +/- 0.02 grams net weight

02-01 100 plastic packets of white powder
Cocaine 17.34 grams +/- 0.02 grams net weight
10 of 100 packets were sampled for analysis. (A statistical sampling plan was used that indicates with a 95 percent confidence that at least 75 percent of the items contain the substance identified.)

This report has been electronically prepared and approved by:
Rodney Jones, Forensic Scientist
Texas DPS Crime Laboratory

Alcohol Analysis Laboratory Report
Completion Date: August 7, 2012
Laboratory #
Suspect: Doe, John H.
DOB 10/07/1991
Requested Analysis: Determination of Alcohol Analysis
Evidence description, Results of Analysis and Interpretation:
01-01 Gray top blood tube specimen from John H. Doe
Contains 0.095 grams +/- 0.005 grams of alcohol per 100 milliliters of blood
This report has been electronically prepared and approved by:
James Andrews, Forensic Scientist
Texas DPS Crime Laboratory

If you have any questions about either of these matters, feel free to contact me at 512/424-2143 or the manager of the DPS laboratory in your area. ❇

A victim's right to be present throughout trial

A trial team in Travis County recently countered a court's order for victims to leave the courtroom during trial and were able to secure the victim's out-of-state family a seat in court.

"A crime is often one of the most significant events in the lives of victims and their families. [Victims], no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial."[1]

By Meg Garvin
Executive Director of the National Crime Victim Law Institute in Portland, Oregon

While being present at a trial may be extremely difficult emotionally for a victim, it has long been recognized that allowing crime victims to attend criminal justice proceedings may help victims recover from the crime[2] and may prevent the secondary harm that can result from victims' interactions with the criminal justice system.[3]

Stacy Miles-Thorpe, a licensed clinical social worker at the Travis County District Attorney's Office and Secretary of the Texas Victim Services Association Board of Directors, was working with a man who had been critically injured in an auto-bicycle intoxication assault; he was coming from out of state (with his family) to testify. The constitutional right to be present also should have attached to the family,[4] but Stacy had all too often seen the rule of sequestration—often known simply as "the rule"—invoked to keep victims out of the courtroom. Struggling with this, Stacy said she "couldn't imagine their having to travel so far only to sit out in the hall waiting to hear what would happen to the man who devastated their child and changed their lives forever."[5]

Under the Texas Constitution, crime victims have "the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial."[6] Affording victims the right to be present to attend trial by constitution, statute, or rule of evidence is the norm across the country.[7] When the victim is a minor, crime victims' rights laws generally allow courts to recognize other persons, such as family members, who can exercise rights either in addition to or on behalf of that direct victim.[8]

Despite the clarity of the law

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and the burden that must be met to exclude a victim, victims in Texas and across the country continue to be asked (and sometimes ordered) to stay out of the courtroom. In fact, most often the exclusion of victims seems to be based on "the rule" without regard to these constitutional rights or the test. Preempting or responding to these requests or orders involves a five-part legal analysis:

1) criminal defendants do not have a constitutional right to exclude witnesses from the courtroom;

2) as noted above, crime victims in Texas—including victim-witnesses—have a state constitutional right to be present at all public court proceedings, subject only to the limitation that a court make findings that their testimony will be *materially altered* by the victim hearing other trial testimony;

3) under basic principles of law, a defendant's rule-based right to exclude any witnesses must yield to a constitutional guarantee to be present;

4) consensus among courts nationwide is that the mere presence of the victim in the courtroom does not infringe upon a defendant's federal constitutional right to a fair trial; and

5) the procedural remedies that exist within a criminal trial (e.g., cross-examination of victim-witnesses, judge/jury observation of a victim-witness, etc.) afford sufficient protection of a defendant's fair trial right.[9]

Fortunately, Stacy had been working with the Texas Advancing Crime Victims' Rights Workgroup,[10] a group spearheaded by passionate and forward-thinking victims' advocates. In support of the group's work, the National Crime Victim Law Institute (NCVLI)[11] had provided a legal memorandum and sample motion on this very issue. Stacy took NCVLI's memorandum and motion to the prosecutor on the case, who agreed to submit the arguments to the court. (Copies of both documents are available at www.tdcaa.com; just look for this story in the journal archive.) Based on the prosecutor's arguments, the judge granted the motion, ruling that the family could stay in the courtroom.

As Stacy reported, "Trial started on a Tuesday morning and the family was able to hear every witness testify. As hard as it was emotionally, it was healing for them to hear how hard law enforcement and medical personnel worked to treat their son, to find the perpetrator, and to gather evidence. I was grateful that I didn't have to leave these parents sitting on pins and needles in the hall for a week." The defendant was found guilty and was sentenced to 50 years in prison.

The law in Texas supports victims being present in the courtroom even if they are witnesses. Unfortunately, sometimes local culture and practice rather than the law rule the day and victims are left outside. Thanks to the Travis County District Attorneys' Office, we have a clear example of what can happen when a court is presented with the law: Victims are able to witness justice. ❇

Endnotes

1 President's Task Force on Victims of Crime: Final Report (1982).

2 See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 536 (2005).

3 See Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 18-19 (1987)).

4 The general right to be present is found in myriad places in Texas law. See, e.g., Tex. Const. art. I, §30(b)(2); Tex. Code Crim. Proc. art. 56.02(b); Tex. Fam. Code §57.002(a)(11); Tex. Fam. Code §54.08(b); Tex. R. Evid. 614(4). Some of these explicitly provide that it is the victim and the family members who can be present. Cf. Tex. Fam. Code §54.08(b) (providing that court may not "prohibit a person who is a victim of the conduct of a child, *or* the person's family, from personally attending a hearing …").

5 Texas Victim Services Association, "Keeping Victims in the Courtroom," Volume 9, Issue 1, Spring 2012, Page 5.

6 Tex. Const. art. I, §30(b)(2). Texas statutes and rules of evidence also guarantee a victim, a victim's guardian, and the close relative of a deceased victim a statutory right to be present. See Tex. Code Crim. Proc. art. 56.02(b); Tex. Fam. Code §57.002(a)(11); Tex. Fam. Code §54.08(b); Tex. R. Evid. 614(4).

7 See Beloof & Cassell, noting that approximately 17 states give victims unqualified rights to attend trial and approximately 25 states and the District of Columbia give victims qualified rights to attend trial. See, e.g., Cal. Const. art. I, 28(e) ("The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated"); Conn. Gen. Stat. Ann. §1-1k ("'victim of crime' or 'crime victim' means an individual who suffers direct or threatened physical, emotional or financial harm as a result of crime and includes immediate family members of a minor"); Mass. Gen. Laws. Ann. ch. 258B, §1 (defining "victim" as including "the family members of such person if the person is a minor"); Minn. Stat. Ann. §611A.01(b) (providing that the "term 'victim' includes the family members, guardian, or custodian of a minor"); Mo. Ann. Stat. §595.200(6) (defining "victim" to include "the family members of a minor"); N.D. Cent. Code §12.1-34-01(10) (specifying that "[t]he term 'victim' includes the family members of a minor"); S.C. Const. art. I, §24(C)(2) (providing that "the term 'victim' also includes the

person's spouse, parent, child, or lawful representative of a crime victim who is … a minor"). Cf. Utah Code Ann. §77-37-2 (defining "victim" generally, and specifying that the rights to information "also apply to the parents, custodian, or legal guardians of children"); Vt. Stat. Ann. Tit. 13, §5301(4) ("'Victim' means a person who sustains physical, emotional, or financial injury or death as a direct result of the commission or attempted commission of a crime or act of delinquency and shall also include the family members of a minor, incompetent, or a homicide victim").

8 *Id.* See also Fundamentals Of Victims' Rights: An Overview of the Legal Definition of Crime "Victim" in the United States, National Crime Victim Law Institute 2011. See also Child Victims' Rights Bulletin: Child-Victims' Independent Participation in the Criminal Justice System, National Crime Victim Law Institute August 2012.

9 Each of these arguments, annotated with Texas and national caselaw supporting them, can be found in a legal memorandum drafted by the National Crime Victim Law Institute (www.ncvli.org).

10 A workshop at the Texas Victim Services Association (TVSA) 2011 conference led to the creation of the workgroup. The group is focusing on awareness, compliance, and enforcement, examining our current victim rights legislation, analyzing which ones are enforceable, and studying what other states have done to make rights a reality for every victim every time. The National Crime Victim Law Institute is providing research and analysis to aid the group. If you would like to be involved, email Karen.kalergis@gmail.com.

11 The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. For more information, visit its website, www.ncvli.org.

Securing an out-of-state witness

How to bring witnesses from outside Texas and respond to such requests from authorities in other states

For a Dallas County prosecutor, obtaining a subpoena for a material witness residing in Dallas County is as simple as applying for a subpoena under art. 24.03 of the Texas Code of Criminal Procedure. If the same Dallas County prosecutor has a material witness residing in Tarrant County, it is, again, no problem. Article 24.16 entitles the State or defense to a subpoena for an out-of-county witness in felonies and misdemeanors punishable by confinement.

By Kimberly Duncan
Assistant Criminal District Attorney in Dallas County

What if the Dallas County prosecutor determines that a material witness resides in Oklahoma County, Oklahoma? Problem? Not at all!

The Uniform Act to Secure Attendance of Witnesses From Without State (which I'll call the Act) is the tool for securing the attendance of witnesses who do not reside in Texas. The Act, which has been adopted by all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands, is codified in art. 24.28 of the Texas Code of Criminal Procedure and provides the method for obtaining the presence of witnesses outside a state to testify at grand jury investigations, criminal trials, and other proceedings in the state.[1] The Act explains the procedures for obtaining nonresident witnesses in Texas prosecutions as well as the procedures for requests for Texas-based witnesses in out-of-state prosecutions.

For the past six years, I have assisted prosecutors in other states in securing the appearance and testimony of material witnesses located in Dallas County; over that time, I have familiarized myself with the process, learned the ins and outs of the Act, and become aware of potential pitfalls. I have also assisted other Dallas prosecutors in utilizing the Act to obtain testimony and the production of evidence from witnesses in other states, including material and necessary witnesses in numerous murder and capital murder cases.

Basics for Texas requests

The Act requires action in both the requesting state and the witness's home state. Once a prosecutor determines that a material witness does

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not live in Texas, she should determine where the witness is located. Some attempts fail at this initial stage—without sufficient information regarding the witness's whereabouts, the State will not be able to provide adequate information to enable the witness's home state to locate the witness. Additionally, this information is critical to determining the county in which the witness resides in the other state. Ascertaining the proper county and, ultimately, the proper person in that county to handle an out-of-state witness request is vital to the process.

Contacting the district attorney or other appropriate county prosecutor in the county where the witness resides early in the process is helpful for several reasons. First, it will provide a contact person so a time-sensitive request does not float aimlessly around the district attorney's office in the witness's home jurisdiction. Additionally, by communicating with a prosecutor in the witness's home state at the beginning of the process, a prosecutor can minimize or eliminate future issues by determining if the other jurisdiction has any special requirements pertaining to out-of-state witnesses and the form or content of the pleadings.

After determining the location of the witness, the State then files a Motion to Secure the Attendance of Out-of-State Witness or an Application for a Certificate of Materiality in the court in which the case is pending. Additionally, the prosecutor should prepare a certificate for the judge to sign. The judge's certificate is the most important document in the entire process. The proceedings in the witness's home state center on the receipt of a certificate, under the seal of the court, from a court of record in the requesting state. Accordingly, it is crucial that the certificate contain the following:

- a statement that a criminal prosecution is pending in the court or that a grand jury investigation has commenced or is about to commence;
- a statement that the requested witness is a material witness for the State of Texas in the criminal proceeding;
- the specific number of days that the witness will be required; and
- the seal of the court.[2]

The Act provides that, at a hearing in the witness's home state, the information in the certificate is prima facie evidence of all the facts stated therein.[3] Therefore, it is beneficial to provide as much information as possible in the State's initial motion and the judge's certificate.

While the Act requires only that the certificate contain these assertions, a judge in the witness's home state will be required to determine that:

1) the witness is material and necessary;
2) it will not cause undue hardship to the witness to be compelled to attend and testify; and
3) the witness will be exempt from arrest and service of process.

It is, therefore, the best practice to include further elucidation on the witness's materiality, his exemption from arrest and service of process, and the absence of undue hardship in the motion and certificate to help ensure a smoother court proceeding in the witness's home state. Additionally, some jurisdictions expressly require more than a "mere conclusory" statement of the witness's materiality.[4] As a practical matter, if describing the witness's expected testimony in the body of the motion and certificate would be too lengthy, a prosecutor or investigator can attach an affidavit detailing the same to the motion.

Section 5 of the Act protects the witness from arrest and service of process while in this State and while traveling, and the judge in the witness's home state will be required to determine that the witness will be exempt from arrest or service of civil or criminal process.[5] As such, it is a good practice to include a provision in the motion and certificate expressly recognizing and explaining this exemption. This section should explain that a person entering the State in obedience to a summons directing him to attend and testify in this State shall not, while in this state or in any state through which he passes pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons. Under the express language of this provision, a witness cannot be arrested or otherwise served with process while in the state pursuant to the summons, but it does not bar the State from arresting the person if he commits a criminal act while in the state pursuant to the summons, nor does it create a future bar to an arrest for prior acts once the person has complied with the summons and returned to his or her home jurisdiction.

Likewise, because the judge in the witness's home state will be

required to make a determination whether the witness will suffer an undue hardship if compelled to attend and testify, including a provision in the motion and order stating that attendance in the matter will not cause the witness undue hardship can be helpful. Finally, the motion and certificate should include recognition of the State's responsibility to compensate the witness with required witness fees as well as transportation and lodging expenses.[6]

Once the motion has been filed and the certificate signed by the trial court judge and affixed with the seal of the court, it should be sent to the contact person in the witness's home state. In addition to the motion and certificate, be sure to include any other documentation or items required by the other state. A cover letter with as much contact and identifying information for the witness as possible will help make the process proceed smoothly as well. It is incredibly helpful to include a letter addressed to the witness to provide her with a contact person in your own office. Some states may also require a check for any witness fees due to the witness under her state law. Notably, some jurisdictions, particularly counties with smaller district attorney's offices, may also request preparation of documents for filing in their court.

Upon receipt of the State's motion and the certificate, the prosecutor in the witness's home state will present it to a judge. Generally, the prosecutor will file a motion with the Texas motion/application and certificate and present an order setting a show-cause hearing to a judge in that jurisdiction for signature. After the judge signs the show-cause order, the witness will be served with the order and all of the supporting documentation. At that point, the witness will be required to attend the show-cause hearing in his home county.

At this stage in the process, many jurisdictions permit a witness to sign a written waiver of hearing in which he agrees to appear and testify in the requesting state. The Act does not expressly provide for waiver, but it is a common practice with cooperative witnesses and eliminates the need for a witness to appear for a show-cause hearing. If appropriate under the specific witness's circumstances and permitted by his home jurisdiction, the officer responsible for serving the witness with the show-cause order can provide the witness with the show-cause order, certificate, and letter from the requesting prosecutor and present the witness with a waiver of hearing form to sign. Be aware, however, that not all jurisdictions allow witnesses to waive the show-cause hearing, and it can vary between counties within the same state. Also, it is not wise when dealing with uncooperative witnesses; a court hearing and official summons directing the witness to attend and testify at the Texas proceeding are always the best practice when dealing with an uncooperative witness.

At the show-cause hearing, the witness will have an opportunity to explain any reason why he should not be required to travel to Texas to testify. Because the judge's certificate is prima facie evidence of all the facts stated therein, a certificate containing ample detail regarding the materiality of the witness and setting forth a reasonable number of days for the witness to appear and testify will be very useful to the judge's determination.

If the judge determines 1) that the witness is material and necessary; 2) that it will not cause undue hardship to the witness to be compelled to attend and testify; and 3) that the laws of this state (and of any other state through which the witness may be required to pass by ordinary course of travel) will protect him from arrest and service of civil and criminal process, the judge shall issue a summons directing the witness to attend and testify at the Texas trial, grand jury, or other proceeding as requested.[7] The witness will then be required to attend the Texas proceeding and be subject to the penalty for disobeying a subpoena in their home jurisdiction if they do not comply. Once directed to appear and testify, the witness should then contact the requesting county in Texas to make travel arrangements.

Specialized requests

Significantly, the Act also provides a mechanism for a material witness to be brought immediately before a judge in his home jurisdiction, and at the conclusion of a hearing, taken into custody and delivered to a Texas officer.[8] To rely on this provision, the judge's certificate must include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance.[9] If the certificate includes such a request, the judge in the witness's home state may direct that the witness be "forthwith brought before him for said

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hearing," instead of setting a show-cause hearing and giving the witness advance notice of the hearing.[10] Once the witness is brought before the judge, the judge can order the witness into custody to be delivered to a Texas officer.

As a practical matter, this is a useful tool, but it requires a great deal of communication and cooperation between the two jurisdictions involved to have the witness served at a time when he can be brought directly before a judge in his home jurisdiction and efficiently transferred to an officer from Texas. The Dallas County District Attorney's Office recently assisted the State of California with a request for a witness that included a recommendation that the witness be taken immediately into custody, and the request was clearly necessary to secure the witness's attendance at the California proceeding. The witness was a fellow gang member of the defendant in a murder trial and had, at a minimum, seen the defendant with the murder weapon immediately after the shooting; the witness may have even provided the murder weapon to the defendant. The Fugitive Section of the Dallas Sheriff's Office picked up the witness in the early morning hours, brought him immediately to court, and at the conclusion of the hearing, transferred him directly to two officers from the State of California.

Another common scenario involves a request for the production of documents or other physical evidence. It is important to recognize that the Act specifically refers to the appearance of a witness to provide live testimony and does not mention a subpoena *duces tecum*. Accordingly, not all jurisdictions are receptive to requests to compel the production of documents or other physical evidence, particularly when the request is not made in conjunction with a request for the appearance of the witness.[11] Many jurisdictions, including Texas, do, however, permit subpoenas *duces tecum*.[12]

A common practice when requesting the production of documents or other physical evidence is to request the attendance of the custodian of records to appear and produce the requested evidence. If a business-records affidavit from the custodian of records for the evidence would be sufficient to authenticate the evidence, the motion and certificate could provide for a live appearance by the witness to produce the evidence or, in lieu of personal appearance, submission of the requested evidence and a business records affidavit received prior to the date of the proceeding.

Again, while not expressly stated in the language of the Act, the Act can be used to obtain the testimony of witnesses who are minors. Article 24.011(a) of the Code of Criminal Procedure authorizes a Texas court to issue a subpoena directing a person having custody, care, or control of a child younger than 18 years to produce the child in court. Other states generally have similar statutory provisions for securing the attendance of minor children as witnesses. Therefore, in requesting the attendance and testimony of a child witness, the State's motion and certificate should request that the minor child's parent or guardian be directed to produce the child in court.

Responding to requests

If you receive a request for an out-of-state witness, the first step is to verify that the address is located in your specific county and that the certificate from the judge in the requesting state is under the seal of the court and includes the statutorily required information: a statement that there is a criminal prosecution pending or a grand jury investigation that has commenced or is about to commence, a statement that the witness is material to the prosecution, and the number of days that the witness will be required to appear and testify.[13] If any of the information is omitted, contact the requesting state immediately so authorities there can correct the problem and resend the certificate.

To help the process move smoothly and to provide the information to the judge who will ultimately conduct the show-cause hearing in a clear manner, a good approach is to prepare a motion for a show-cause hearing setting forth all of the information in the certificate from a judge in the requesting state as well as a proposed order setting a show-cause hearing to present to the judge. The petition can then be filed in any court of record with the requesting state's certificate with any supporting motions from the requesting state attached. The filed motion should be presented to the trial court along with the prepared show-cause order setting the time and date for a hearing and ordering the witness to appear at the hearing. Once the order setting the show-cause hearing is signed, the witness

should be served with notice of the hearing and a copy of the show-cause order.

At the hearing, the judge must determine the following before issuing a summons directing the witness to appear and testify in the requesting state:

1) the witness is material and necessary;

2) it will not cause the witness undue hardship to be compelled to attend and testify in the prosecution or grand jury proceeding in the other State; and

3) the laws of the requesting state (and of any other state through which the witness may be required to pass by ordinary course of travel) will give the witness protection from arrest and service of civil or criminal process.

It is helpful to ask the trial court to take judicial notice of the petition and attached certificate filed in conjunction with the request and to remind the court that the requesting state's certificate is *prima facie* evidence of all the facts stated therein. If the requesting State has provided an affidavit with additional information regarding the witness's materiality or any other matters relevant to the hearing, offer it in support of the request at the hearing.

Conclusion

Prosecutors can clearly benefit from understanding the Uniform Act to Secure Attendance of Witnesses From Without State and by following its procedures to obtain testimony from witnesses living outside of Texas. Additionally, by assisting other jurisdictions in obtaining the appearance and testimony of witnesses living in Texas, Texas prosecutors can provide valuable assistance to our sister states in their prosecutions, while building connections that may prove helpful in future cases. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 24.28; see also *Tracy v. Superior Court*, 810 P.2d 1030, 1033 n.2 (Ariz. 1991) (noting that the Uniform Act has been adopted by all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands); Studnicki and Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 St. John's L. Rev. 483, 532 (2002) (same).

2 Tex. Code Crim. Proc. art. 24.28 §4(a).

3 Id. §3(b).

4 Compare *Ex parte Armes*, 582 S.W.2d 434 (Tex. Crim. App. 1979) (concluding that a certificate from a requesting state stating that a witness is material and necessary is sufficient to support a finding of materiality and necessity for purposes of the issuance of a summons under the Act), with *In re Adams*, 356 N.E.2d 55 (Ill. 1976) (deciding that mere conclusory statements in a certificate that a witness is material will not justify a finding of materiality by a court in the state where the witness is located and that the determination of whether a witness is material and necessary should be made by the local court rather than a court in the requesting state).

5 Tex. Code Crim. Proc. art. 24.28, §5.

6 The Comptroller of Public Accounts will help pay for expenses related to out-of-county and out-of-state witnesses; see Tex. Code Crim. Proc. art 35.27 §6.

7 Id. §3(b).

8 Id. §4(a).

9 Id.

10 Id. §3(c).

11 See, e.g., *GM Corp. v. Florida*, 357 So.2d 1045 (Fla. Dist. Ct. App. 1978) (holding that the Act does not apply to requests solely for the production of documents).

12 See, e.g., *In re Bick*, 372 N.Y.S.2d 447 (1975) (concluding that "the term 'subpoena' subsumes a subpoena duces tecum requiring the production of books and records"); *In re Saperstein*, 104 A.2d 842 (N.J. Super. Ct. App. Div. 1954) (construing the term "subpoena" to include a subpoena *duces tecum*).

13 Id. art. 24.28, §3(a).

Award winners at the Annual

Roe Wilson, an assistant district attorney in Harris County (pictured at left), was named the C. Chris Marshall Award winner for distinguished faculty. She is pictured with Jo Ann Linzer, chair of TDCAA's training committee.

Matthew Powell, the criminal district attorney in Lubbock County (pictured at left), was named the State Bar Prosecutor of the Year. He is pictured with William Lee Hon, TDCAA President.

Alan Curry, an assistant district attorney in Harris County, was honored with the Oscar Sherrell Award for outstanding service to the association.

Law & Order Award winner

State Representative Senfronia Thompson (D-Houston), center, was honored with TDCAA's Law & Order Award at a recent meeting of the Joint Interim Committee on Human Trafficking. She is pictured with Harris County Attorney Vince Ryan (left) and TDCAA Director of Governmental Relations Shannon Edmonds (right), who co-presented the award to Rep. Thompson in recognition of her work on behalf of victims of human trafficking and family violence last session.

TDCAA e-books are available!

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

A note about death notices

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

SCOTUS grants certiorari in *Missouri v. McNeely*

In a move that could affect DWI prosecution nationwide, the Supreme Court of the United States granted certiorari in *Missouri v. McNeely*, a case involving a nonconsensual, warrantless blood draw after a DWI arrest. The court will soon determine whether the dissipation of alcohol from the blood alone is sufficient to implicate the exigent circumstances exception to the Fourth Amendment warrant requirement.

By Lauren Owens
TDCAA Research Attorney in Austin

The facts of the case are thus: Tyler McNeely was arrested for DWI, and after refusing to provide a breath or blood sample, the arresting officer ordered a phlebotomist to take a blood sample without obtaining a warrant.[1] The Supreme Court of Missouri held that the warrantless blood draw violated the Fourth Amendment because there were no "special facts" to justify the arresting officer's failure to obtain a warrant before taking a sample of McNeely's blood.[2]

Missouri joined Utah, Iowa, and the Ninth Circuit in interpreting the Supreme Court's holding in *Schmerber v. California*[3] to require additional exigent circumstances beyond the natural dissipation of alcohol to justify a warrantless blood draw. These "special facts" have been held to include the need to investigate an accident or transport a defendant to the hospital for injuries.[4] Other courts, including the highest courts in Wisconsin, Oregon, and Minnesota, have adopted a broader interpretation of *Schmerber*, holding that the dissipation of alcohol in the blood alone is an exigent circumstance sufficient to justify a warrantless blood draw.[5]

The outcome of the case could lead to a dramatic increase in the number of DWI cases supported by blood evidence, and prosecutors around the nation will no doubt be anticipating the court's decision. Oral arguments will likely be scheduled for early 2013. ❇

Endnotes

1 *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012).

2 *Id.* at 75.

3 348 U.S. 757 (1966).

4 *McNeely*, 358 S.W.3d at 74-75.

5 *Id.* at 73.

Applications for Investigator scholarship and awards online

The deadline for the Investigator Section scholarship, PCI applications, and Chuck Dennis Award nominations is December 1, 2012. See our website, www.tdcaa.com, for more details (search for "scholarship"). If you have any questions, please contact Melissa Hightower at 512/943-1111 or mhightower@wilco.org. ❇

New Victim Services Board members for 2013

Congratulations to the new members of the Victim Services Board, whose terms will start January 1, 2013:

Region 1: Mary Duncan (Lubbock County Criminal District Attorney's Office)

Region 3: Beverly Erickson (Burnet County Attorney's Office)

Region 5: Rachel Leal (Galveston County Criminal District Attorney's Office)

Region 7: Laurie Gillespie (Erath County District Attorney's Office)

Region 8: Tracy Viladevall (McLennan County Criminal District Attorney's Office) (filling the unexpired term of Jill McAfee, Bell County District Attorney's Office, who takes over as board chair in January). Congratulations to all of you on these new roles!

Texas District & County Attorneys Association

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NEWSWORTHY

How to host a "tree of angels" in your community

The Tree of Angels is a meaningful Christmas program specifically held in memory and support of victims of violent crime. The Tree of Angels allows your community to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

This special event honors and supports surviving victims and victims' families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree. The first program was implemented in December 1991 by Verna Lee Carr with People Against Violent Crime (PAVC) in Austin. Over the years the Tree of Angels has become a memorable tradition observed in many Texas communities, providing comfort, hope, support, and healing.

The Tree of Angels is a registered trademark of PAVC, and we are extremely sensitive to ensuring that the original meaning and purpose of the Tree of Angels continues and is not distorted in any way. For this reason, we ask that if your city or county is interested in receiving a copy of the How-To Guide, please complete a basic informational form on the Tree of Angels website, http://treeofangels.org/index.html. After the form is completed electronically and submitted to PAVC, you will receive instructions on how to download the guide. Please do not share it to avoid unauthorized use or distribution of the material.

If you have any questions regarding the How-To Guide, contact Verna Lee at PAVC 512/837-PAVC (7282) or e-mail her at vernalee@peopleagainstviolentcrime.org. ❇

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field.

Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at sarah.wolf @tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇