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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

A most unusual suspect

A son is convicted of soliciting the brutal murder of his mother and brother.

By Jeff Strange
Assistant District Attorney in Fort Bend County

The Whitaker family enjoyed their last meal together at Pappadeaux restaurant in Stafford on December 10, 2003. Kent and Patricia Whitaker's oldest son, Bart, 24, was graduating from Sam Houston State University that weekend. Before leaving for the restaurant, Patricia, 51 and Kent, 54, had presented Bart his graduation gift: a Rolex watch.

When the Whitaker family arrived back at their home in Sugar Land's upscale Sugar Lakes subdivision, Kevin, age 19, jumped out of the driver's seat so he could unlock the front door. Patricia followed right behind Kevin, but Kent slowed to wait for Bart, who told his father he had to retrieve his cell phone from the Chevy Yukon parked on the street.

Kevin was shot in the chest as he walked into the family's dining room. His car keys were found next to blood drops that spilled on the carpet to mark the spot where the bullet penetrated his heart. Patricia was next, also shot in the chest just as she walked through the door. Kent was standing at an angle on the front porch when struck, a bullet piercing his left chest and lodging in his shoulder. Bart was shot in the arm, later telling police he received his wound as he struggled with the intruder.

Patricia was Life-Flighted to Memorial Hermann Hospital but later died of her wounds. Kent and Bart were also taken to the hospital, but they both survived. Kevin was pronounced dead immediately, his body left behind as Sugar Land Police processed the crime scene.

A 9-mm Glock handgun was found on the kitchen floor next to the back door through which the intruder fled. Both Kent and Bart told police that the gunman was wearing black clothing and a ski mask. Kent told investigators that he could see white skin around the eyehole of the ski mask.

The investigation

Detective Marshall Slot was paged at his home and summoned to the crime scene. He was the on-call detective and thus assumed the responsibilities of the lead detective on the case. Upon arrival, Detective Slot was led to a black leather men's glove lying on the curb next to Bart's Chevrolet Yukon. Thinking "not another O.J.," Slot ordered the glove collected for processing.

It was almost immediately clear to every responding officer and detective that someone had attempted to stage a burglary inside the residence. Several computers and expensive audio and video equipment were untouched, and valuable jewelry was found lying in plain view. In the first floor master bedroom, all of the dresser drawers and side tables had been opened about two inches, but none of the contents had been disturbed. A pillowcase was found lying on the floor next to the bed. The only fingerprints detectives found in the residence belonged to Bart and his family

Even more suspiciously, the intruder had known to enter a built-out crawlspace in Kevin's bedroom on the second floor to pry open a small metal gun safe to retrieve the murder weapon. Blue paint was left behind on the safe where the metal had been dented and twisted to gain entry. The murder weapon belonged to Kevin, a gift from Bart. Six rounds of Cor-Bon ammunition were found in the Glock's magazine, and the four shell casings recov-

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TDCAF News

By Emily Kleine
TDCAF Development Director

Greetings from the Texas District and County Attorneys Foundation!

What an exciting summer it has been. Since I began work as the TDCAF Development Director on May 29, the foundation has been in full swing. We are finishing up our charter Annual Campaign, having received many gracious donations. A special thanks to **Chuck Rosenthal, Mark Edwards, Randall Sims, Judge Susan Reed, Bruce Isaacks**, and **Rusty Hardin** for contributing sizable amounts to establish the foundation. Several additional contributions have been received and are most appreciated. Remember, to acquire new support from outside sources, it is imperative that we have donations from every Texas county.

Thanks to a favorable nod from **John Montford**, TDCAF asked for and received a sizable grant from AT&T to renovate our website. This new and improved site will allow TDCAA members quicker and more complete access to crucial developments in the law, as well as receive immediate information about upcoming training and publications.

In addition, TDCAF is currently working with a major sponsor to host a statewide training for prosecutors and allied professionals for improved DWI investigation and prosecution. Also, a formal grant has been proposed to secure the underwriting of two vital TDCAA manuals. Several more inquiries are being made to obtain funding for general operating support and future TDCAA projects. TDCAF's vision for the future includes funding a statewide victim services coordinator position, a new appellate attorney, improving educational resources for training seminars, and much more.

We are well on our way to improving services for our members, ultimately creating a safer Texas. To reach our maximum potential, we need you! I am asking that you be a living part of TDCAF's launch into excellence. The more funding we secure—through individual donations, asset forfeiture, and corporate and foundation donors—the more programs TDCAA is able to develop to ensure the safety and security of your communities. I am eager to visit with each one of you. Please feel free to call me at 512/474-2436 with any ideas or questions you may have.

Editor's note: For a list of donors during TDCAF's inaugural year, please turn to page 9.

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Sarah Wolf, Editor/Photographer
Diane Beckham, Senior Staff Counsel

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the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

Judy Bellsnyder retiring? No way!

Way! **Judy Bellsnyder**, who has been a meeting planner for TDCAA for 10 years but part of the TDCAA family for more than 20 years, hung up her rooming lists and banquet orders on August 15. Judy's immediate plans are to take care of grandkids, Claire, age 9, and Ally, age 3½.

Those of you who worked with Judy at our seminars and events will miss her because she didn't let you down—she had a way of always getting what y'all needed to make the training successful. When it came to working with a hotel or event center, calling Judy "hard-nosed" would be an understatement.

For us on the staff, we are going to sorely miss her energy, enthusiasm, and sense of mission. We will miss her attention to detail only slightly less, because that generally meant that we were required to check the alphabetized order of 1,200 Annual Update nametags five times to insure accuracy.

The good news is, you will see Judy at the Annual Update at the end of September, so please track her down in Corpus to say goodbye. Thanks Judy, it's been grand!

Standing up for your office

Staring down your judge can be a little unsettling, but sometimes it's your only option. I'm sure that's what **Cindy Stormer**, Cooke County DA, thought when her judge issued blanket discovery orders in cases that, in her opinion, went too far. Discovery's not a problem for Cindy, but y'all have seen discovery orders in the past that create work for the office, and it was becoming a problem.

So check the result of her mandamus at *In re Cindy Stormer*, No. WR-66,865-01, (Tex. Crim. App. June 20, 2007), at www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=15584. In a per curium opinion, the Court of Criminal Appeals ruled that the district court had overstepped its bounds in a number of areas. First, the CCA held that a district court does not have the authority to order the State to disclose an expert's qualifications, the subject of his contemplated testimony, and a report. Under Art. 39.14(b) CCP, disclosing names is fine, but the rest is not required. Second, the court held that the State was not required to produce all the arguably admissible *res gestae* statements, spontaneous statements, or other of the defendant's utterances which the State intends to introduce in its case in chief, because this request would require the prosecutor to create a document that does not already exist. Third, the State cannot be required to produce a list of all tangible items of evidence with a notation of when, where, and by whom it was found.

A seemingly modest victory on paper, but y'all know that directly taking on your judge requires some resolve, and these discovery issues can really eat into your valuable time. Congratulations, Cindy.

Hunt for an innocent man

Sometimes standing up for your independence plays out on a national stage. Just ask **Judge Susan Reed**, the Criminal District Attorney in San Antonio, who was asked by anti-death penalty advocates to step aside in an investigation into allegations that Ruben Cantu had been wrongfully executed in 1993. Well, these people did more than *ask*—they even produced a brief signed by a bunch of law professors saying she *had* to.

Not persuaded by the opinions of a few in the academic community, Judge Reed did her job with the powers granted to her by the Texas constitution. Turns out all those claims of innocence fall a little short of impressive. You can read the district attorney's report in its entirety at www.bexarcountydistrictattorney.org.

There are times when it might be tempting to step around something that looks like a mess, but it is gratifying to see a prosecutor sticking to her guns and doing the job she was elected to do.

At a crossroads early

Mike Jimerson is the first-term county and district attorney in Rusk County who faced a tough situation recently. A number of officers in a local police force were in some pretty big trouble for alleged official oppression, with indictments to follow. And those officers were the leads on a lot of Mike's cases. Mike had some pretty tough decisions about how he was going to handle those cases and what expectations he would set for law enforcement in his community.

In my opinion, Mike chose the option that sets a tone of integrity and independence early in his tenure. He sent a letter to all of the criminal defense attorneys with cases on Rusk County dockets alerting them of potential credibility issues with the officers in question and notifying them that all cases which relied substantially on those officers' testimony would receive a thorough review. If a particular case relied in whole or in substantial part on that officer's testimony and there was insufficient corroboration, the case would be tanked.

It took a couple days for someone to share that with the local papers, and now everyone in the community knows what kind of shop Mike will be running in the future.

Legislative Update highlights

By the time you read this column, we will have almost completed our 2007 Legislative Update tour. If you attended this training, you know that this year's offering was pretty meaty: a lot of new laws to digest in one sitting.

The highs from our side of the presentations? The wide-eyed looks from people (especially defense attorneys) as we outlined the changes to sex offender statutes. What brought the most guffaws from the audience: the change that legalizes carrying a weapon in a motor vehicle in many circumstances. The most popular change: making first-offender DWLI a Class C misdemeanor. (Sometimes it's the little things.)

And the favorite PowerPoint slide of all: the Trunk Monkey, Chaperone Edition, a GMC TV commercial that brought laughs all around. To see all of the Trunk Monkey offerings, just go to www.trunkmonkeyad.com.

Riding into the sunset

Literally. Our long-time leader and friend **Al Schorre**, the district attorney in Midland for over 22 years, retired on June 30 to move to Colorado. Al's not retiring, though. He's got a lawyer job that will require him to ride the circuit between places like Aspen and Steamboat Springs. We will miss him around here, and I'd wish him luck—but it sounds like he's already got a good dose of that!

Welcome to the trade!

We'd like to welcome **Judge Charles Campbell** to the ranks of prosecution. Judge Campbell, a former judge on the Court of Criminal Appeals, was appointed by State Prosecuting Attorney **Jeff Van Horn** as the Special Assistant State Prosecuting Attorney.

We'd also like to welcome **John Radcliffe** as the new acting United States Attorney for the Eastern District of Texas, taking up where **Matt Orwig** left off. John had previously served as the first assistant U.S. attorney and the chief of the anti-terrorism unit for the Eastern District, so he hits the ground running.

And good luck to Matt, who has been a friend to state prosecutors during his tenure. He is relocating to Dallas, where he will practice with the law firm of Sonnenschein, Nath & Rosenthal L.L.P.

Student loan forgiveness inching forward

We continue to get promising reports out of Washington, D.C., that the John R. Justice Prosecutors and Defenders Incentive Act of 2007 continues to make progress. We have been told that in July, the act found its way into the Higher Education Reauthorization Act via an amendment.

I'd be lying to you if I told you I understood how this thing is moving in D.C. or what will happen next. But it is

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good to see this problem get the attention it deserves, and even if the Texas "three session rule" applies (the rule of thumb that any idea worth its salt takes three legislative sessions to pass), this is really good news. Thanks to the National District Attorneys Association for its lobbying efforts on this bill's behalf.

A new dean of prosecution?

A couple years ago I wrote that it appeared that **Tim Curry**, our CDA in Fort Worth, was outdone in terms of years of service only by **Howard Freemyer**, the Kent County Attorney, who has served for 37 years.

But it looks like they are both just babes in the woods compared to **A.J. Hartel**, our Liberty County Attorney. We have learned that A.J. began his service on January 1, 1965, which pegs him at over 42 years of service to the public. Impressive!

Because our electronic database is of recent vintage and relies on the self-reporting of service information prior to 2000, we will hold off formally awarding A.J. a valuable prize (to be determined later) until y'all have had a chance to challenge his service record. So, anyone out there willing to take him on?

Photos from the Prosecutor Trial Skills Course

Photos from the Forensic Evidence Seminar

Law & Order Award recipients

Three legislators were recently presented with TDCAA's Law & Order Award for their work during the 80th Legislative Session. At left, Sen. Florence Shapiro (R–Plano) was selected for being the original author of several important measures that ultimately passed as part of House Bill 8, also known as Jessica's Law. She is pictured with Shannon Edmonds, TDCAA's Director of Governmental Relations, and Judge John R. Roach, Criminal District Attorney in Collin County. Rep. Debbie Riddle (R–Houston), below left, was chosen for her leadership in authoring and passing House Bill 8, also known as Jessica's Law, and her successful efforts to prevent the creation of an overly expansive new legal privilege for the media. She is pictured with Shannon Edmonds. Rep. Aaron Pena (D–Edinburg), below right, was recognized for his successful work as the Chairman of the House Committee on Criminal Jurisprudence this past session. He is pictured with Rene Guerra, Criminal District Attorney in Hidalgo County, and Rob Kepple, TDCAA's Executive Director. The Law & Order Award recognizes legislators who defend the interests of prosecutors, law enforcement, and crime victims on criminal justice and public safety issues. Sen. Tommy Williams (R–The Woodlands) and Rep. Larry Phillips (R–Sherman) will receive their Law & Order Awards at future dates.

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This list represents contributions received as of August 13, 2007.

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At 2006's Annual Criminal & Civil Law Update, we announced that the foundation's goal for the following year was to report full participation from all 254 Texas counties. This map shows those counties from which the foundation has received funds (shaded green) and those that have yet to donate (white). There's still time to give! Call Emily Kleine, TDCAF's Development Director, at 512/474-2436 or visit TDCAF.org to donate today.

Continued from the front cover

A most unusual suspect (cont'd)

ered from the residence were also from Cor-Bon rounds. No other Cor-Bon ammunition was found in the residence although Kevin had other brands of ammunition for the handgun.

Deputy Keith Pikett of the Fort Bend County Sheriff's Department arrived with his nationally recognized scent-discriminating bloodhounds Quincy, Colombo, and James Bond. Pikett tracked his dogs from the rear of the residence where Detective Slot learned the gunman had fled. Each of the three dogs tracked back to Bart's Yukon parked on the street in front of the house. Scent swabs were obtained from the black glove, the murder weapon, dresser drawers in the master bedroom, the pillowcase, and the damaged gun safe in Kevin's room.

Things became clearer when on December 12, 2003, Sugar Land Detective Billy Baugh received a phone call from a source telling him that Bart was not enrolled in Sam Houston State and had not attended the school in some time. Police confirmed this information by obtaining Bart's school transcripts with grand jury subpoenas. When confronted with this information, Bart told police and his father that he had informed his mother that he was not graduating.

The first big break

On December 15, 2003, a Dallas bank teller named Adam Hipp wandered into the Sugar Land Police Department

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requesting to speak with Detective Slot. Hipp had attended Clements High School in Sugar Land with Bart. He told Detective Slot that in the spring of 2001, Bart had recruited him to kill the Whitaker family so that Bart could inherit his parents' share of the family construction business.

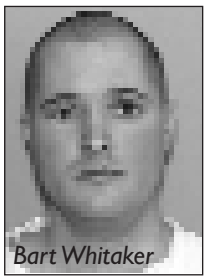
Hipp drew Detective Slot a diagram of the Whitaker house and detailed how Bart was to get the family out of the house by taking them to dinner but leaving a door unlocked to that Hipp could enter. Bart's Baylor roommate was supposed to drive a pistol down from Waco to give to Hipp to use as the murder weapon. In the diagram, Hipp drew a stick figure of the shooter in the dining room and three stick figure bodies in the front foyer. Bart planned to be shot in the arm in an effort to avoid police scrutiny, as he would be the sole heir to the family's estate, which police estimated to be approximately $1.5 million.

Initially, Detective Slot thought Hipp might be the shooter, but he later verified that Hipp was at work late into December 10, 2003. His check-out time at the bank was documented; thus, Hipp was eliminated as a suspect.

Police found Bart Whitaker's former Baylor roommate, Justin Peters, in San Antonio. When interviewed by detectives, Peters admitted to his participation in the plot Hipp had described, which was planned for April 5, 2001. Peters also told detectives that Bart had originally recruited him and another Baylor student, Will Anthony, to kill the Whitaker family in December 2000, but that plot had also failed. Both times, Bart's motive for murder was to inherit the family's estate.

The focus narrows

Detective Slot learned that in December 2003, Bart was sharing his townhouse with a 21-year-old man named Chris Brashear, with whom Bart had worked at Bentwater County Club. A couple of doors down from them lived Steven Champagne, for whom Bart had procured a bartending job at Bentwater.


Bart Whitaker

Both Champagne and Brashear were interviewed by Sugar Land detectives and agreed to submit scent and DNA samples. Deputy Pikett's bloodhounds later selected Brashear's scent in a "scent lineup," indicating that Brashear had come in contact with the glove, murder weapon, drawers in the master bedroom, and gun safe from which the murder weapon was removed.

Adam Hipp retained an attorney and negotiated a non-prosecution agreement for his role in the April 2001 conspiracy in exchange for his continued cooperation with investigators. He agreed to assist police by contacting Bart and recording the conversations. Detectives Baugh and Slot met with Hipp prior to each conversation and scripted the direction they wished the conversation to take. Hipp initially told Bart that Sugar Land police contacted him and were traveling to Dallas to interview him. In subsequent conversations, Hipp mentioned details about the failed 2001 conspiracy and its similarities to the actual murders.

Bart agreed to pay Hipp $20,000 to lie to police about Bart's involvement in the 2001 conspiracy. A Dallas post office box was set up in Hipp's name to receive the payment, and a Highland Park Police detective agreed to monitor the box and maintain the chain of custody of any evidence mailed to it. On April 1, 2004, a Federal Express mailer was received containing $240 in cash. The return address was from K. Soze but listed Bart's Willis, Texas, residence as the return address. One of Bart's favorite movies, *The Usual Suspects*, featured a villain named Kaiser Soze, a criminal mastermind who walked away from police investigators after committing an elaborate murder. Bart often quoted to friends the movie's closing line; "The greatest trick the devil ever played was convincing the world he didn't exist." Bart's fingerprints were all over the mailer.

On June 28, 2004, Bart Whitaker's Chevy Yukon was found abandoned with the engine running at an apartment complex in Southwest Houston. (Bart, at the time, was working as a waiter at the Hotel Icon in downtown Houston.) He had disappeared to avoid capture.

The wiretaps

In June 2005, Detective Slot, with the assistance of the Fort Bend County District Attorney's Office, prepared an application for wiretaps on the cellular telephones of Steven Champagne and Chris Brashear. The suspects had not been in communication for some time, a

major obstacle to our efforts. Bart's whereabouts were still unknown; Champagne, after graduating from Marine Intelligence School, had been reassigned to Camp Pendleton, and Brashear was in Houston. Detective Slot regularly monitored their cell phone records, but there was no evidence they were calling each other.

On August 9, 2005, DPS Director Tommy Davis authorized and signed the application for a wiretap, and Judge Don Strickland signed the order August 22, 2005. Sugar Land detectives worked double shifts at DPS headquarters, monitoring Brashear and Champagne's phone calls. Though the suspects were not in communication with each other, the grand jury subpoenas sparked conversations with other friends and relatives. Sugar Land police served a number of grand jury subpoenas after relevant phone conversations, including one to Champagne's girlfriend the day before police learned she was going to fly to California to visit him. Police also conducted alternating overt and covert surveillance on Brashear as they monitored his conversations.

Champagne spills

Finally, on August 28, 2005, police got the break they had been working for since December 2003. Steven Champagne met Detective Slot at a Starbucks in Conroe. Champagne had had enough and indicated that he wanted to tell police what he knew. He initially told Detective Slot that he unwittingly helped Chris Brashear drive away from the Whitaker home on December 10, 2003. He indicated that he did not know of the murders in advance but only helped dispose of some of the evidence in Lake Conroe after the shootings. Champagne failed a polygraph test and was subsequently informed that any offer of immunity was off the table.

The following day Steven Champagne was scheduled to appear before the Fort Bend County Grand Jury. After an all-day meeting with Detective Slot and FBI Special Agent Jim Walsh, Champagne gave a videotaped confession implicating himself, Bart Whitaker, and Chris Brashear in the murders of Patricia and Kevin Whitaker. Champagne took detectives to the spot on the bridge over Lake Conroe where he and Brashear had discarded a bag of items used in the crime. Arrest warrants were sought for Bart Whitaker, Chris Brashear, and Steven Champagne, and the latter two were arrested.

On September 14, 2005, Detective Slot spoke with a man who would identify himself on the phone only as "Mike Jones." Jones told Slot that he knew Bart was in Mexico because Bart had paid him $3,000 to drive him there. The caller was later identified as Rogelio Rios, Whitaker's coworker at the Hotel Icon.

Investigators learned that Bart was living with Rios' father in Cerralvo, Nuevo Leon, Mexico, and had then fled to Monterrey, Mexico, to avoid capture and further hoping to find work. He was finally tracked down and arrested without incident as he appeared for a "job interview" at a Monterrey restaurant on September 22, 2005. A couple of months later, DPS Trooper Brandon Curlee recovered a canvas bag containing a Dustbuster used to clean the getaway vehicle, a metal pry tool whose paint matched the paint transfer left on the gun safe, a water bottle from which Chris Brashear's DNA was recovered, and several Cor-Bon 9mm bullets.

The State seeks the death penalty

In December 2005 Fort Bend District Attorney John Healey publicly announced that we would seek the death penalty for Bart Whitaker. Doing so posed some interesting challenges. Besides the three co-defendants, the only witness to the offense was his father, Kent, whom we subpoenaed to testify. At all times during pre-trial preparation, Kent was cooperative and forthcoming. He was informed that he would be allowed to advocate for his son, should we reach the trial's penalty phase, though such testimony is outside the bounds contemplated for victim-impact testimony.

After evaluating the facts, we determined not to pursue the death penalty for the triggerman, Chris Brashear. Studying the facts of the case and what was known about Brashear and Champagne, we felt that neither would have committed a violent crime without Bart's influence. A plea bargain agreement was reached with Steven Champagne for 15 years in prison to the lower charge of murder in exchange for his cooperation in the prosecutions of Bart and Brashear. Immunity agree-

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ments had already been reached with Hipp, Anthony, and Peters to secure their cooperation during the police investigation.

In December 2006, while preparing for trial, First Assistant District Attorney Fred Felcman got an unexpected Christmas card from Bart. He had written that Fred should keep Fred's family in mind during the holiday season. While the wording of the card was benign, it was Bart's attempt to plant a seed in Fred's mind that harm might come to his family. The card gave Fred an uneasy chuckle. We then discussed how we could use the card to place Bart on death row.

The trial

The first interesting development at trial occurred when Bart was arraigned before the jury. When asked, he refused to enter a plea or either guilty or not guilty, forcing Judge Vacek to enter a plea of not guilty on his behalf. Bart did not want to formally take responsibility for the crimes but wanted to hedge his bets, as he knew the evidence of his guilt would be overwhelming.

The first person called to the stand was Kent, and he faithfully described the execution of his wife and youngest son and his subsequent shooting. A recorded jail call was played in which Bart expressed frustration to his father that he had not been offered a plea bargain for a term of years. He was also angry that his attorney had sent an associate to court for a recent setting, telling his father, "We are not paying for legal aid here." Bart further stated that he wanted the "big guns" in court for the next appearance.

On the trial's third day, Steven Champagne was called to testify. He detailed how he met and befriended Bart in spring 2003. Champagne further told the jury that Bart frequently told him and others that Bart was an orphan and that Champagne was like the brother he never had. In late summer 2003, Bart started joking to Champagne and Brashear about wanting his family killed, as if to gauge their reactions. In September 2003, Bart asked him to shoot his family when they returned from some function that Bart would invent to get his family out of the house. The matter was discussed several times, and Champagne testified that he eventually confronted Bart publicly, hoping that "making a scene" would get Bart to leave him alone. Shortly thereafter, Brashear was invited to move into Bart's townhome.

Champagne told the jury that he agreed to be the getaway driver when Bart told him that he was already guilty of conspiracy to commit the crime. Bart had told his parents that he would be graduating from Sam Houston in December 2003; the celebration would provide the perfect subterfuge to get the family out of the house. Champagne detailed for the jury an argument that Bart had with his father the day before the murders were first to occur. Kent Whitaker told Bart that he could not make it to dinner the following night, which temporarily foiled the plan.

On the day of the murders, the trio started for Sugar Land around 4 p.m. Bart and Brashear departed in the Bart's Yukon several minutes before Champagne. Their gated community had a security camera at the front gate, and Bart had warned them that the police could retrieve the videotape. Champagne knew that the Whitaker family would be eating at the Pappadeaux restaurant in Stafford; he parked in the back of the parking lot with a view of the family's Chevrolet Trailblazer, waiting for them to emerge.

Champagne followed the Whitakers' Trailblazer as it left the restaurant and until they pulled into their driveway. Following Bart's instructions, Champagne parked his vehicle in front of the house directly behind the Whitaker's home. Shortly thereafter, Brashear appeared, jumping into the vehicle's back seat. As they drove out of the neighborhood Brashear detailed the murders to Champagne. Brashear stated that Kevin smiled at him as he pointed the Glock at his chest and fired. Brashear had in his possession Bart's cellular phone, which he had accidentally removed from the Yukon, and a wad of cash that Bart had told him Kent kept in the master bedroom closet. After changing clothes and dumping the evidence in Lake Conroe, the pair went drinking, using Kent's money to pay their bar tab.

Champagne finally detailed a chilling conversation he had with Bart Whitaker in February 2004 as the pair dined in a Woodlands restaurant. Champagne told the jury that Bart wanted to meet with him to find out what Champagne had told police investigators. During the conversation

Whitaker said, "The job wasn't finished," and started to discuss killing his father, Kent.

Will Anthony, Justin Peters, and Adam Hipp each testified about their participation in the prior conspiracies to kill the Whitaker family. It was noted that Bart had sought relationships when each faced periods of turmoil in their lives. Peters had lost a girlfriend in a traffic accident, and Hipp and Anthony were struggling with grades and eventually were expelled from their respective schools. Each, in retrospect, could see how Bart recognized and exploited their personal weaknesses.

Bart Whitaker was found guilty of capital murder in 1½ hours.

The punishment phase

During the punishment phase, Kent and Patricia Whitaker's brother, Bo Bartlett, each pleaded with the jury to spare Bart's life. Their explanation for Bart's behavior was that the family's expectations had placed too much pressure on him and that perhaps he had been given too much too soon. This did not resonate well with the mostly working-class jurors.

In the end Bart took the stand in a final attempt to scheme his way out of the death penalty. He attempted to contradict the State's claim that money was his motivation for wanting his family killed. Bart testified that he had developed an irrational hatred of his family because he could never fulfill their high expectations of him. Of course, Bart found God while in Mexico, and thus was an entirely new person, even participating in jail bible study.

Ultimately, Fred Felcman's cross-examination placed Bart on death row. While Bart's attorney, Randy McDonald, led Bart through most of the direct examination. Fred removed Bart from his comfort zone and often slammed his hand on the jury rail, stopping Bart's testimony in mid-sentence when he became non-responsive. Fred confronted Bart several times regarding his behavior during the police investigation and subsequent trial. When trapped, Bart resorted to blaming his attorneys or co-conspirators, or he simply stated that he had changed after his religious conversion and was now an entirely different person. Fred questioned Bart about the Christmas card, but Bart indicated that it was his sincere attempt to wish Fred a merry Christmas and stated that he had no reason to hate Fred, as he knew he was just doing his job. Fred finished the evisceration by making Whitaker agree that had no reason to hate his family but he killed them anyway.

First Assistant DA Fred Felcman finished Whitaker's evisceration on cross by making him agree that he had no reason to hate his family but killed them anyway.

After 10 hours of deliberation, the jury, many with tears in their eyes as they filed into the jury box, sentenced Bart Whitaker to die for the murders of Kevin and Patricia Whitaker. Bart accepted the verdict with no emotion. Kent flinched when the verdict was read but accepted the jury's decision with grace. Kent later told the local media that the verdict was not what he wished for but that the "Lord was sovereign and that his will had been done." Kent then went home, a true victim, as the last remaining member of his immediate family was removed from the Fort Bend County Courthouse to be transferred to death row.

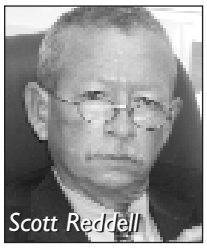
CRIMINAL LAW

By Ben Hoover and Scott Reddell
Assistant Criminal District Attorneys in Wichita County

Battling gang violence

A Wichita Falls jury was the first to enforce an injunction designed to dismantle gangs and keep them off the streets. Here's the message the community is sending.


Ben Hoover


Scott Reddell

Just like so many cities in Texas, Wichita Falls has a gang problem. One of the most well known gangs is the Varrio Carnales (VC), Spanish for "neighborhood brothers." This group is primarily made up of young Hispanic men between 18 and 25. The senseless crimes they commit include theft, criminal mischief, aggravated assault, and drive-by-shootings. Much of the shooting violence is aimed at the VC's rival gang, the Puro Li'l Mafia (PLM). The Wichita Falls Police Department reports that these two groups have been shooting at each other for nearly 20 violent years.

After years of arrests by law enforcement, it was determined that most of the gang activity occurred in one particular part of the city. In the spring of 2006, there was a sharp escalation of gang-related violence. In a three-month period between December 2005 and February 2006, more than 50 drive-by-shootings were reported. On one particular Saturday, seven shootings were allegedly related to the VC. Police identified an area of about one-and-a-half square miles in central Wichita Falls as the hot zone for VC activity, dubbing it the "VC Safety Zone No. 1." Wichita Falls High School, with 1,300 students, sits right in the middle of this dangerous locale.

The injunction

To address this ongoing violence, the district attorney's office, city attorney's office, and police department decided to seek an injunction to stop known gang members from associating in the VC zone. The theory behind the injunction was that if gang-bangers could not associate, then their potential for violence was lessened. The injunctive authority is found in Chapter 125 of the Civil Practice and Remedies Code, which allows a court to enjoin gang activity after finding it to be a public nuisance. The Wichita Falls injunction was modeled after an injunction that Bexar County had issued several years before. Nearly 20 VC members of various ages were singled out as the biggest threats. Several of these men were suspected in scores of drive-by shootings and other violent crimes. On August 31, 2006, the petition was filed and a temporary restraining order issued by the 89th District Court. The court issued an order authorizing the police to give personal service of the restraining order. That same evening, some 25 officers set out to locate and serve each and every defendant with a copy of the restraining order. On September 18, 2006, the temporary gang injunction was ordered into effect by the district court.

The violation

One of the named gang members in the injunction was Michael Busby, a 20-year-old gang-banger with self-admitted ties to both the VC and the Crips. (Gang affiliation sheets used during the book-in proceedings proved to be very handy in identifying which members belonged to a particular gang.)


Busby

On the night of March 6, 2007, just before midnight, several citizens reported a shooting within the VC zone. The alert citizens directed officers to a nearby white house where three of the shooters

had fled. Officers established a perimeter. The owner of the house emerged and told officers that a baby was somewhere inside. Officers entered to find the baby and clear the house. During the search, officers found Busby hiding in the attic with two fellow gang members, all of whom were named in the injunction.

Busby was charged with violating the injunction two different ways: by associating with another named defendant in the injunction and by being on the property of another named defendant. Section 71.02 of the Penal Code provides that violation of the injunction is a class A misdemeanor.

The trial

We were not aware of anyone else in the state who had tried a gang injunction violation and were certain that no one in Wichita County had ever done so. The trial itself was more technical than a typical misdemeanor trial because of what we had to prove. First, we had to prove up the injunction's existence. Second, we needed to prove that Busby had knowledge of the injunction and that he was a named defendant. Finally, we needed to show that he violated the injunction in at least one of the two alleged manners.

During our case in chief, we first called Darlene York, the custodian of records in the sheriff's department, to identify the book-in photos of four VC members, all of whom were involved in the case. The book-in sheet for Busby displayed his signature, which we later used to prove that he had knowledge of the injunction. Further, the book-in sheet for Busby's cohort, Israel Contreras, Jr., listed his address as 1915 6th St., which was the house where the defendant was found hiding in the attic. We were then able to prove that Busby violated the injunction by being on the property of Israel Contreras, Jr.

The next witness was our gang expert, Officer Tommy Smythe, a criminal intelligence specialist with the police department who had spent years studying and identifying the gangs in Wichita Falls. Officer Smythe identified and established the existence and authority of the injunction. He was also able to educate the jury concerning the gangs that lurk in Wichita Falls and specifically identify the VC as one of those gangs. Smythe named Busby as one of the men he personally served with the injunction and testified that the temporary injunction was extended on January 31, 2007. He was instrumental in building the proof that we needed.

Our next task was to prove that Busby had knowledge of the extended temporary injunction and that he was a named defendant. We called a secretary from the district attorney's office to testify that she mailed a letter and an order extending the temporary injunction which notified the defendant of his injunctive status. The letter stated that the court had extended the temporary injunction beyond its original date of expiration. Our witness testified that she mailed the letter and then received a return receipt within a few days. We then used Chris Gay, a handwriting expert with the police department, to testify that the signature purporting to be Busby's on the return was identical to the signature on his book-in sheet. Knowledge was no longer an issue.

The information alleged that the temporary injunction was issued pursuant to Civil Practice and Remedies Code §125.065(a). Bryce Perry, a civil prosecutor in the Wichita County District Attorney's Office who had worked closely with the city attorney's office and the police for months to craft the injunction, was called and testified that subsection (a) of the code contained the relevant language which specifically gave the court authority to enjoin the named defendants.

After hours of testimony that laid the groundwork, we called our first witness to the alleged violation. Sergeant Charlie Eipper is a veteran officer with substantial experience on the SWAT team and the gang task force. On the night of March 6, 2007, he received a dispatch that shots were fired in the VC zone. He and other officers responded to the same white house that courageous citizens directed the police to after the shooting. Upon learning that a baby was inside, Eipper directed officers to enter and clear the residence for the safety of the baby and any other people. His testimony established that both probable cause and exigent circumstances existed to enter and perform the protective sweep. During the search, one officer noticed a door into the attic with debris on the floor directly underneath. Eipper used a SWAT extension mirror to probe the dark attic but could not see well enough to adequately complete the search. He then climbed into the attic and discovered Busby and two other men hiding behind insulation. Eipper told of many past encounters with each of these men and further testified that each one was a defendant in the injunction. His testimony proved that Busby violated the injunction in both of the manners alleged in the information.

During closing, we emphasized that

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the case was now in the jury's hands. The law enforcement team had done its part to create the injunction and vigorously enforce its provisions. We presented the best case we could and then waited for an answer. The jury returned in under 30 minutes with a guilty verdict and a message that gangs were not welcome in Wichita Falls.

A means to an end

This was not Busby's first rodeo. In February 2007, he was placed on five years' deferred adjudication for engaging in organized criminal activity. He was given a reasonable chance to change his ways and failed miserably. Our misdemeanor conviction was just one small step in the large picture. On July 19, 2007, Busby's probation was revoked and he was sentenced to eight years in TDCJ. One week later, both sides reached an agreement for punishment in the misdemeanor gang injunction case. Busby would serve the maximum one year in jail, pay a $4,000 fine, and further plead guilty and accept the maximum on five additional injunction violations.

We had accomplished what we knew was so very important. A standard was set in our community for enforcement of the gang injunction. We believe that the countless hours of extra work put in by the collaborative efforts of the police department, city attorney's office, and district attorney's office were not in vain. At least for a few years, there are children in Michael Busby's neighborhood who will be able to play outside on a safer street.

CRIMINAL LAW

By Warren Diepraam
Assistant District Attorney in Harris County

Anatomy of a DWI "no-refusal weekend"

How Harris County police and prosecutors are cooperating to curb DWIs

Texas is the deadliest state in the nation when it comes to DWI fatalities. Texas statutes designed to decrease the carnage on our roads have been effective to a degree, but many measures seem to have limited success in further curbing the number of deaths. Public perception of how these crimes should be prosecuted has fallen victim to the "CSI effect"; jurors now have a somewhat glamorous view of what evidence is needed in a DWI prosecution. And the refusal of many DWI suspects to provide a scientific or chemical sample to a law enforcement agency after a DWI arrest is a significant problem in ensuring justice in Texas courts.


Warren Diepraam

Theoretically, every person stopped for DWI in Texas should provide a chemical sample to a law enforcement officer. All Texas drivers have impliedly consented to provide a sample of breath or blood when it is lawfully requested by a police officer making a DWI arrest.[1] However, roughly half of suspects refuse to provide a sample.[2] For suspects, there are collateral consequences for refusing to provide a sample, such as administrative license suspensions,[3] and for prosecutors, there are evidentiary consequences, such as admissibility of the subject's refusal as evidence of guilt.[4] Although these consequences are evident, the number of DWI arrestees refusing to provide a chemical sample has remained at roughly 50 percent.[5]

As a result, some law enforcement agencies and prosecutors' offices have begun to use search warrants to obtain blood samples when suspects refuse to submit to a breath test. We in the Harris County DA's Office have formed a Vehicular Assault Team (VAT) to focus our energy on such cases, and earlier this year we established a new program, called "no-refusal weekends," to ensure a breath or blood sample from every suspect pulled over for suspected DWI, full prosecution of these offenders, and, more importantly, to decrease the numbers of fatalities over holidays.

In Harris County, there have been an inordinate number of traffic fatalities during certain holiday periods when alcohol consumption increases: Memorial Day, Halloween, Christmas, etc. This has been noted as a nationwide trend and is addressed by NHTSA and others in both advertising and public information campaigns and in high intensity patrol or checkpoint programs. The loss of life associated with these dates causes a tremendous amount of grief to survivors for the remainder of their lives. A holiday season that should otherwise be festive suddenly becomes a reminder of death and tragedy. To combat this circumstance, we created a plan of action for a "no-refusal weekend" over Memorial Day, and took our idea to Chuck Rosenthal, our district attorney, who has been very supportive of our efforts to combat driving fatalities and who quickly gave us approval to proceed.

Due to the overwhelming number of DWI cases in Harris County,[6] we came up with procedures to streamline the process, to ensure both adequate handling of evidence and protection of suspects' rights. Rather than have the arresting officer take the subject to one location to draft the warrant, then to a hospital or fire station to execute the warrant, we decided that all parties would be at one central facility and that normal DWI booking procedures should be followed. We also knew we'd need more help.

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We discussed the "no-refusal weekend" concept with a local judge, Mike Fields of County Criminal Court No. 14, who volunteered to review the warrants for blood; local and national MADD representatives agreed to hire and pay for a nurse, Angela Biddle;[7] and Paul Lassalle, the Houston Police Department DWI/Task Force liaison officer, handled the entire blood collection process after the suspect was released to him. I decided that we would need three prosecutors at the site to talk to the officers, prepare the warrants, and have them reviewed by a judge. Eric Kugler and Craig Feazel, both VAT members, joined me that night. Separating the workload minimized training of the arresting officers, who simply followed their normal routine.

Because the no-refusal weekend was a first for Harris County, we did not want to create additional evidentiary concerns. Primarily, we decided to ensure the admissibility of other evidence, such as the refusal and the station video, by following standard DWI procedure: The arresting officer would bring the offender to the Houston Police Department Central Intoxilyzer Facility (Central Intox). The officers would then be instructed to follow normal protocol, such as reading the statutory warning to the suspect, either obtaining a refusal or a breath sample, then videotaping the suspect. Therefore, if any problem arose with the warrant or the blood sample, the refusal and the video would be unaffected. When suspects refused to provide a sample, they were brought into another room that had been sanitized to hospital standards and quarantined so that access by others was limited. Although there is no requirement that the room be sanitized, as there is with a mandatory blood draw sample, we decided it would be better to follow this approach.[8] The entire process was videotaped, from the reading of the statutory warning to the blood draw, which was important to minimize suspects' claims of coercion or failing to follow proper procedures, and we catalogued any statements for trial.

The search warrant was drafted in template form prior to the weekend, and Eric Kugler reviewed it.[9] Its purpose was to speed the process of drafting the warrant to ensure that the blood sample was obtained as close as possible to the time of driving. (A prosecutor could also use a warrant from the TDCAA book by Richard Alpert, *DWI Investigation and Prosecution*.) A copy of the template warrant was then stored on the Houston Police Department DWI computers.

As Memorial Day approached, the people and procedures were in place. With preventing fatalities as our focus, we held a press conference whereby our DA, Chuck Rosenthal; Officer Lassalle; and a MADD representative announced that every person arrested for DWI over the weekend and who refused to provide a chemical sample would have a blood sample taken. We tried to get the word out as much as possible.

Unfortunately, many people failed to take notice of the announcement, and the first suspected drunk driver was soon brought to Central Intox. The officers had been previously instructed not to alter their normal process to minimize any admissibility issues with the refusal.[10] We had a quick turnaround on the warrants, which was due to our preparation beforehand; additionally, having prosecutors and officers in the same room to discuss the details of the arrest for the warrant template was beneficial. (Contact between the suspect and the prosecutor drafting the warrant was kept to a minimum.) The prosecutor then faxed the warrant to the judge and called him via telephone. The officer would be sworn to the warrant, and the judge would sign the warrant and fax it back to Central Intox. A copy of the signed warrant was presented to the suspect with an admonishment that the police officer executing the warrant had authority to enlist civilians to obtain the evidence.[11] At that point, the nurse would use a Betadine swab to prep the area and the blood sample was drawn.[12] Although the results would not be available for a week pending analysis, the prosecutors working at Central Intox would accept charges on the case as a DWI Refusal. The entire process involving the suspect was documented by using one videotape for later use by the trial prosecutor and the lawyers defending the suspect.

Although the officers were reasonably attentive at following the protocol and not forewarning the suspect, the impaired suspects were probably not as quiet. A total of 12 blood samples were obtained that night, and three-quarters of them provided breath samples (up from the approximate 50-percent nightly average). The 25-point increase could have been a result of the arrestees communicating with each other or, theoretically, it could have been a coincidence. Therefore, long-term analysis of the compliance rate will be analyzed when the program has sufficient numbers. One thing is certain: On that particular night, every person arrested and processed at Central Intake provided a chemical sample one way or the other.

When the suspects appeared on the various dockets, a package was prepared and delivered to the trial court prosecutors. This package included a certified copy of the arrest warrant, a sanitization certificate with a business records affidavit, a chain of custody statement with a business records affidavit,[13] and a caselaw/statutory citation packet that included court holdings and statutes on issues that may be raised by defense lawyers. After all blood and breath test results were obtained, they were also forwarded to the prosecutors.

Of the 12 people arrested that night who went through the warrant process, 10 tested well above the statutory limit in Texas:[14] Results varied from 0.118 to 0.321, with an average of approximately 0.21! Of the two people who tested under the statutory limit, one tested at 0.073 but had also consumed additional impairing substances, thereby justifying the officer's arrest decision.

The other suspect, an immigrant laborer, received a result of 0.061 with no additional impairing substance in his system. This person would have been handled as a refusal and most likely would have been taken to trial. Although there is no presumption of sobriety for suspects testing below a 0.08 (and all results at or below this level should also be evaluated under the "loss of normal use" definition of intoxication), this person's case was dismissed. Therefore, one person who may have been convicted was exonerated as a result of this process. The exoneration of suspects is also a noteworthy goal of this program, although from this period it appears that the officers' arrest decisions were highly accurate.

The program was an overwhelming success. Police officers built stronger cases without having to do increased paperwork; prosecutors received evidence that should result in appropriate verdicts and sentences; criminal defendants are theoretically receiving a better evaluation of their cases from their lawyers; one underprivileged defendant was exonerated; and the public obtained a streamlined and efficient process to ensure strict compliance with DWI laws.

As far as the future goes, we will continue the program, which should be in effect for every major holiday this year with a final study of results and refusal rates. The limited scope of the Memorial Day event, which was a test run with one law enforcement agency and one intake facility, will be expanded to include all law enforcement agencies, thus necessitating greater cooperation between police, prosecutors, and medical personnel to properly staff the extra facilities. In addition, local judicial personnel will have to enact procedures to ensure orderly and timely handling of these warrant requests. The future looks good because several agencies have already expressed their desire to participate, and judges are aware that the use of search warrants for blood samples will likely increase, as will the number of DWI cases.

But the public will benefit the most from this aggressive response to intoxicated driving: safer roads and better prosecutions.

Endnotes

1 Texas Transportation Code §724.011.

2 "Harris County Statistics for 2006 DWI Offenses." Similar numbers are reported from other state agencies.

3 See generally Texas Transportation Code §724.015 and §§724.031-064

4 *Mody v. State*, 2 S.W. 3d 652 (Tex. App.—Houston [14th Dist] 1999).

5 Some recent proposals to the legislature to increase compliance have gone nowhere. Some states have successfully criminalized breath test refusals, but any attempt to do so in this state has failed. In the 79th Legislative Session, House Bill 3241 would have done just that (among other things), but the bill went nowhere.

6 According to the "Harris County Statistics for 2006 DWI Offenses," about 12,000 DWI cases are filed annually in this county.

7 Although the Texas Transportation Code blood draw requirement relating to a qualified person under §724.017(a) did not apply, it was decided that a nurse with full qualifications should still be used. Because these blood draws were not mandatory blood draws, any person such as a paramedic, doctor, or jail nurse could obtain the sample if a search warrant is used.

8 Texas Transportation Code §724.017(a)

9 For a copy of the template, contact any member of the VAT group or Clay Abbott at TDCAA (512/474-2436).

10 *Erdman v. State*, 861 S.W. 2d 890 (Tex. Crim. App. 1993).

11 See Texas Code of Criminal Procedure art. 18.08, which authorizes an officer to enlist civilians in the process. If a volunteer nurse is unavailable, this section should apply to paramedics or any other person assisting the officer with the blood draw.

12 Although alcohol swabs (isopropanol) should not affect the alcohol results (ethanol), it is still suggested that Betadine swabs be used.

13 Nurse Biddle drew all blood samples, and Officer Lassalle took all of them directly from her to the crime laboratory for testing.

14 Intoxication is defined as having an alcohol concentration of at or above 0.08 at the time of driving according to Texas Penal Code §49.01.

CRIMINAL LAW

By John Gillespie
Assistant District Attorney in Wichita County

Jury selection six years after *Standefer*

How to handle those tricky commitment questions

You try a defendant for aggravated sexual assault. His 7-year-old step-daughter barely manages to make it through her tearful testimony, describing how he repeatedly violated her. The jury believes her and finds him guilty, handing down a 50-year sentence. But a year later, the court of appeals reverses the case and sends it back for a re-trial. The reason: The defense attempted to ask a question at voir dire to which you objected as an improper commitment question, and your judge sustained your objection. The court of appeals found that not only should the defense have been permitted to ask the question, but the denial of the question was also harmful.


John Gillespie

Now, the child must testify again, which you don't know if she can do. And this time, the sadistic defense attorney has the child's prior transcript to beat her up with on the stand. That's usually the point in the nightmare where prosecutors wake up screaming.

After the seminal *Standefer* decision in 2001, jury selection is a minefield of potential error. As prosecutors, we are presented with the dilemma of wanting to get rid of those crazy jurors who will hang the case, but we don't want to go too far and get the case popped on appeal.

In *Standefer v. State*, the Court of Criminal Appeals attempted to clarify what constituted an improper commitment question. In many ways, *Standefer* raised as many questions as it answered. Sure, we have a two-step analytical framework to determine whether a question is proper, but how do you apply those steps?

Let's take a look at the basics of *Standefer* and why the case matters. Then, we'll go over some tips in handling *Standefer* issues with case citations for your trial notebook.

Background on *Standefer*

Before *Standefer*, caselaw was unclear as to when a fact-specific hypothetical in jury selection was permissible. In *Standefer* (a DWI case), the trial court did not allow defense counsel to ask, "Would you presume someone guilty if he or she refused a breath test on their refusal alone?" The Court of Criminal Appeals determined that this was an improper commitment question because it attempted to bind prospective jurors to a verdict based on a hypothetical set of facts that did not lead to a valid challenge for cause.[1]

The court articulated a two-step analytical framework for determining whether a question is proper: 1) Is the question a commitment question, and, if so, 2) does the question include facts—and only those facts—that lead to a valid challenge for cause?

First, if the question is not a commitment question, then *Standefer* doesn't apply. For example, questions to find about prospective jurors' personal beliefs to aid in the intelligent exercise of peremptory strikes would not qualify, as long as the questions do not attempt to bind or commit the prospective juror to resolve or to refrain from resolving an issue a certain way after learning a particular fact.

Sounds simple enough, right? Not so fast. The court explained that while commitment questions most often seek a "yes" or "no" answer, open-ended questions can also be commitment questions in disguise if they attempt to get prospective jurors to set the hypothetical parameters of their decision making. Determining when an open-ended question subtly seeks a commitment and when it just seeks information to help in

the intelligent exercise of peremptory strikes has been a gray area that the courts and trial attorneys have struggled with since *Standefer*.

Also, if the question seeks a commitment, then *Standefer* directs the trial court to determine if it includes facts—and only those facts—that lead to a valid challenge for cause. This presents prosecutors with another tough judgment call: Which operative case facts do you need to mention, and when do you mention too many?

Why *Standefer* matters

Most prosecutors are too busy with actually trying cases to sit around worrying about the esoteric and metaphysical inquiry of whether a question by nature seeks a commitment, or whether the question contains the right mix of facts, and only those facts, to lead to a challenge for cause. *Standefer* issues sound more like those types of question that keep philosophy majors up late at night but give the rest of us headaches.

So why is the *Standefer* analysis important? Two words: harm analysis.

In *Sanchez v. State*, the Court of Criminal Appeals determined that TRAP 44.2(b) harm analysis applies to determining whether improper commitment questions constitute reversible error. The court stated that reviewing courts should "assess the potential harm of the State's improper commitment questioning by focusing upon whether a biased juror—one who had explicitly or implicitly promised to prejudge some aspect of the case because of the State's improper questioning—actually sat on the jury."[2] The court further explained, "The ultimate harm question is: [W]as the defendant tried by an impartial jury, or, conversely, was the jury or any specific juror 'poisoned' by the State's improper commitment questions on a legal issue or fact that was important to the determination of the verdict or sentence?"[3]

The court in *Sanchez* articulated seven non-exhaustive factors to consider if an improper commitment question was harmful:

> 1) whether the questions were unambiguously improper and attempted to commit one or more veniremen to a specific verdict or course of action;
> 2) how many, if any, veniremen agreed to commit themselves to a specific verdict or course of action if the State produced certain evidence;
> 3) whether the veniremen who agreed to commit themselves actually served on the jury;
> 4) whether the defendant used peremptory challenges to eliminate any or all of those veniremen who committed themselves;
> 5) whether the defendant exhausted all of his peremptory challenges upon those veniremen and requested additional peremptory challenges to compensate for their use on improperly committed veniremen;
> 6) whether the defendant timely asserted that a named objectionable veniremember actually served on the jury because he had to waste strikes on the improperly committed jurors; and
> 7) whether there is a reasonable likelihood that the jury's verdict or course of action in reaching a verdict or sentence was substantially affected by the State's improper commitment questioning during voir dire.[4]

Now, while the Court of Criminal Appeals' application of the less-stringent Rule 44.2(b) harm analysis and its articulation of these seven factors suggest that the State's improper commitment questioning may often be found harmless, closer examination demonstrates how dangerous these *Standefer* issues can be.

First, think about the nature of commitment questions. As a prosecutor, you're not going to waste your limited time with the panel on commitment questions that are not important to your theory of the case. Thus, under *Sanchez*, if your commitment question is found to be improper, it will frequently be found to "poison" a member of the jury on a legal issue or fact that was important to the determination of the verdict or sentence.

Also, the second factor in *Sanchez* will almost always weigh toward a harm finding. If you are attempting to commit a panel, then you will either commit every member of the panel, and thus, the second factor in *Sanchez* will weigh against you, or the court will excuse the panel members who refuse to commit. If the defense attorney is seeking a proper commitment, you object, and the judge sustains your objection, then the court of appeals will likely presume that some objectionable jurors made the panel.

As prosecutors, we often have to make split-second judgment calls without having hours to brief the issue. The problems are compounded, however, when the issues are as esoteric as those raised by *Standefer* that can easily build reversible error into the case. Here are some quick guidelines, based on the post-*Standefer* opinions, with case cites to help you handle those *Standefer* issues.

1 Hypotheticals to explain the law or the punishment range are not commitment questions. Courts have approved the use of fact-based hypotheticals to help jury panels understand the

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law and illustrate circumstances where the minimum or maximum sentence would be appropriate. Because you are not seeking a commitment but rather just explaining the law, *Standefer* doesn't apply.[5]

When you use a hypothetical to explain the law, be sure that you are not attempting to bind a juror to a course of action based on that set of facts. For example, giving a set of facts to illustrate why some people could consider giving the maximum would be fine. But if you ask the panelist to commit to give the maximum under a set of facts, then you've crossed the line into an objectionable commitment question.

Also, in constructing the hypothetical to explain the law, make sure you are not just using the same facts from your case.

2 Questions of prospective jurors about their general beliefs in an area will usually be OK. Courts have usually found general questions about a panel member's beliefs permissible. The Court of Criminal Appeals has explained that in cases with "victimless" or "morals" crimes, the trial judge has discretion to permit the State to ask prospective jurors whether they agree that the commission of such a crime is wrong;[6] these are not commitment questions. These types of questions would be helpful in cases involving a small quantity of drugs for personal use, welfare fraud cases, and even driving while intoxicated cases.

Also, in *McDonald v. State*, the prosecution asked panel members, "Do you feel that children likely will make up sexual abuse or unlikely?"[7] The First District Court of Appeals found that this question did not ask the panel members to resolve or refrain from resolving an issue a certain way; "rather, the question merely asks the prospective jurors whether they think it is likely or unlikely that children generally will fabricate allegations of sexual abuse."[8] Thus, the appeals court found that this was not a commitment question.

Similarly, in a DWI trial, asking "What are some signs that somebody is intoxicated?" and "Who thinks that the process of being arrested would be something that might sober you up a little bit?" are not commitment questions.[9] In *Vrba*, the court of appeals also approved of the questions: "Why do you think someone should be punished?" and "Which one of these four theories of punishment is most important to you in trying to determine how someone should be punished?"[10] The court stated that these were permissible inquiries into a juror's 'general philosophical outlook on the justice system' and did not seek to commit prospective jurors.[11]

3 Questions that attempt to establish the parameters of a prospective juror's decision-making are improper commitment questions. These questions may not sound like commitment questions because they are open-ended. Examples include: What circumstances justify the imposition of the death penalty? What factors would justify the imposition of the maximum or minimum or probation?

In a capital case, a defense attorney wanted to ask whether the 40-year-minimum parole law would be something the panel would want to know in answering the special issues. The defense attorney also wanted to ask on which special issues this would be important, how the 40-year-minimum would be important in answering the special issues, and whether prospective jurors would be more or less likely to view a defendant as a continuing threat to society if they knew he could not be paroled for a minimum of 40 years. The Court of Criminal Appeals found that these were improper commitment questions because they attempted to establish the parameters for decision-making that the prospective jurors would use.[12]

4 Defense questions about how the victim's age or status will impact punishment are usually improper commitment questions. Listen for questions where the defense attorney asks how the victim's status would impact a prospective juror's decision, as these inquiries are prohibited. Because a juror may consider a victim's age or status in assessing punishment, asking what impact that would have in advance is improper.

Along these lines, a defense attorney's question in a murder case of whether the fact that the victim was a two-week-old baby would have any effect on the jury's verdict at guilt/innocence or punishment was an improper commitment question.[13] The Court of Criminal Appeals has also explained that it is improper for the defense to attempt to commit prospective jurors on how the victim's age will impact their punishment decision.[14]

5 Questions whether a victim's age or status would impact her credibility or would impact the juror's decision at guilt/innocence are usually proper. While a victim's age or status is an appropriate punishment consideration, it would be improper for a juror to automatically assign credibility to a witness based on age or status, and it would be equally inappropriate for a juror to

return a guilty verdict based on the victim's age or status (except to the extent that a victim's age is an element of the offense).[15]

Thus, the defense is on solid footing in asking whether a juror would automatically start a child witness off with greater credibility, or whether a juror would be inclined to return a verdict just because a child testified, even if she didn't quite believe the State had proven all the elements beyond a reasonable doubt.

6 **Remember that not all commitment questions are improper.** Just because a question explicitly or implicitly seeks a commitment does not make it improper. If the commitment question would lead to a valid challenge for cause and contains the facts necessary for the challenge, then it is proper under *Standefer*.

Proper questions seek to commit a prospective juror to follow the law applying to the case. For example, committing the panel to consider the full range of punishment, impartially evaluate the credibility of each witness after he testifies, follow the judge's instructions about the defendant's right not to testify, and return a guilty verdict if they find each of the elements beyond a reasonable doubt are all proper questions under *Standefer*'s second prong.

In one recent murder case with a female defendant, an appeals court found that the State's question whether prospective jurors would be more likely to consider self-defense when the defendant is a female was a proper commitment question. The court explained that prospective jurors who had an automatic predisposition for the self-defense theory when the defendant was a female exhibited a bias or prejudice in favor of the defense.[16]

7 **Asking whether a prospective juror could convict based on the testimony of a single eyewitness if the juror believed the witness's testimony proved the elements beyond a reasonable doubt is a proper commitment question.** In an indecency with a child case, the trial court permitted the State to ask, over defense objection, if the panel members could return a guilty verdict based on the testimony of a single witness if they believed that witness beyond a reasonable doubt and that witness proved each of the elements of the offense. The Court of Criminal Appeals held that this was a proper commitment question because it led to a challenge for cause, as any juror who would refuse to convict after being convicted beyond a reasonable doubt was holding the State to a higher standard of evidence than required by law.[17]

The court explained that the question leads to a challenge for cause as long as it is framed with the magic language of: if you heard from one witness and *you believed that witnesses' testimony proved each of the elements beyond a reasonable doubt*.[18]

This case offers an important tool for prosecutors in child abuse cases or sexual assaults to eliminate jurors who could never convict based on the testimony of a single eyewitness alone but who would require the State to offer additional evidence. Courts have also approved prosecutors using a variation of this question to commit jurors to convict without medical evidence in sexual assaults or without breath tests in driving while intoxicated cases *if the jurors believe other evidence establishes the elements beyond a reasonable doubt.*[19]

8 **Don't object to *Lydia* defense questions that ask the panel whether they would automatically reject a witness' testimony because the witness has a prior criminal record.** While the question, "Would you automatically reject a witnesses' testimony because he has a prior criminal record?" sounds exactly like the improper type of commitment question *Standefer* prohibits, these questions are likely appropriate because they expose any extreme or absolute opinions on witness credibility.[20]

Be careful not to object to *Lydia*-type questions because if the judge sustains your objection, you may very well build reversible error into your case.

In *Lydia*, the prosecutor, over the defense objection, was permitted to ask the panel if each member could evaluate a witness and his testimony without automatically dismissing his testimony because of some criminal history.[21] While the Fort Worth Court of Appeals held this was not a commitment question, the Court of Criminal Appeals disagreed, finding that it was a commitment question for the State to ask "whether any of the potential jurors would not impartially judge the credibility of the witness or hold extreme or absolute positions regarding credibility."[22]

On remand, the Fort Worth Court of Appeals then found that this question

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met the second prong of *Standefer* because it led to a valid challenge for cause based on a juror's potential bias by seeking to discover if the juror had any extreme or absolute positions regarding a witness's credibility.[23] The appellate court also found that the question satisfied the second prong of *Standefer* because it contained only those facts necessary to lead to a valid challenge for cause. Thus, the Fort Worth Court of Appeals determined that the question of whether a juror would dismiss a witness's testimony because of some criminal history was a proper commitment question.[24]

One important note: The Court of Criminal Appeals in *Lydia* determined only that the question was a commitment question but did not rule on whether it was a *proper* commitment question. Fort Worth appears to be the only court of appeals that has addressed this issue, finding that this commitment question was proper. However, the Court of Criminal Appeals did refuse the petition for discretionary review in *Lydia v. State* and *Tijerina v. State*, both Fort Worth cases holding this was a proper commitment question.

Be careful not to object to *Lydia*-type questions because if the judge sustains your objection, you may very well build reversible error into your case.[25] Rather, take advantage of *Lydia*-type questions. Like the Chinese character for crisis, the *Lydia* decisions present both a danger and an opportunity for the State. While the danger lies in reflexively objecting to a proper defense question, you can also use these questions for your benefit when you have a snitch, co-defendant, or other witness with a less-than-sterling past. Be sure to commit the panel to not automatically reject your witnesses' testimony just because they have criminal history.[26]

I hope that, with these hints, you can ensure that it is the child molester—not the prosecutor—who wakes up screaming, only to realize that his nightmare has come true: his 50-year sentence has been affirmed because you skillfully navigated *Standefer* at trial.

Endnotes

1 See *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

2 See *Sanchez v. State*, 165 S.W.3d 707, 713 (Tex. Crim. App. 2005).

3 See *id.*

4 See *id.* at 714.

5 See, e.g., *Murphy v. State*, 2006 WL 1096924 (Tex. Crim. App. 2006) (unpublished opinion); *Perkins v. State*, 2004 WL 3093239 (Tex. Crim. App. 2004) (unpublished opinion); *Perez v. State*, 2002 WL 872645 (Tex. App.—San Antonio 2002, no pet.) (unpublished opinion); *Thornton v. State*, 994 S.W.2d 845 (Tex. App.—Fort Worth 1999, pet. ref'd).

6 See *Wingo v. State*, 189 S.W.3d 270, 272 (Tex. Crim. App. 2006).

7 186 S.W.3d 86, 90 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

8 *Id.*

9 See *Vrba v. State*, 151 S.W.3d 676 (Tex. App.—Waco 2004, pet. ref'd).

10 *Id.*

11 *Id.*

12 See *Sells v. State*, 121 S.W.3d 748, 755-57 (Tex. Crim. App. 2003).

13 See *Freeman v. State*, 74 S.W.3d 913 (Tex. App.—Amarillo 2002, pet. ref'd).

14 See *Barajas v. State*, 93 S.W.3d 36, 40 (Tex. Crim. App. 2002).

15 See *id.*, 93 S.W.2d at 39-40.

16 See *Braxton v. State*, 2007 WL 441675 (Tex. App.—Houston [1st Dist.] 2007, pet. dismissed untimely filed).

17 See *Lee v. State*, 206 S.W.3d 620 (Tex. Crim. App. 2006).

18 See *id.* at 623.

19 See, e.g.,*Harris v. State*, 122 S.W.3d 871 (Tex. App.—Fort Worth 2003, pet. ref'd) (approving State's commitment for panel to convict in sexual assault case without medical evidence if elements proved beyond a reasonable doubt); *Mason v. State*, 116 S.W.3d 248, 254 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (upholding State committing panel to convict in aggravated sexual assault case without DNA or medical evidence and without the child's testimony if elements proven beyond a reasonable doubt); *Holmes v. State*, 2001 WL 892512 (Tex. App.—Corpus Christi 2001, no pet.) (unpublished opinion) (approving of court's for-cause excusal of witness who could not convict without a breath test).

20 See *Lydia v. State*, 117 S.W.3d 902 (Tex. App.—Fort Worth 2003, pet. ref'd).

21 See *Lydia v. State*, 109 S.W.3d 495 (Tex. Crim. App. 2003).

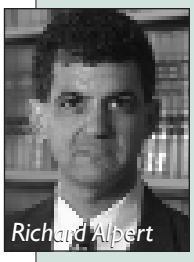
22 See id. at 498-99.

23 See *Lydia*, 117 S.W.3d 902, 905 (Tex. App.—Fort Worth 2003, pet. ref'd).

24 See id.

25 See, e.g., *Vann v. State*, 216 S.W.3d 881 (Tex. App.—Fort Worth 2007, no pet.); *Tijerina v. State*, 202 S.W.3d 299 (Tex. App.—Fort Worth 2006, pet. ref'd).

Alpert honored by MADD


Richard Alpert

Richard Alpert, misdemeanor chief in the Tarrant County Criminal District Attorney's Office, was given the National President's Award for Outstanding Prosecutor from Mothers Against Drunk Driving.

"This award is long overdue," said Susan Bragg, MADD's Director of Victims Services in North Texas, noting that Alpert had been nominated several times before. "We are so excited that this is his year to receive it!"

The honor will be presented by MADD President Glynn Birch during the organization's national conference September 8 in St. Louis.

"MADD's recognition both humbles and re-energizes me," Alpert says. "It strengthens my commitment to those who arrest intoxicated drivers and to lead the prosecution of these offenders in my community. I have been inspired by every victim whom it has been my privilege to serve, and I have benefited from the work of many within the Tarrant County DA's office and around the state. May we together strive to hold all intoxication offenders accountable while providing hope and support for the victims who have suffered by their criminal actions."

Congratulations on this well-deserved recognition, Richard!

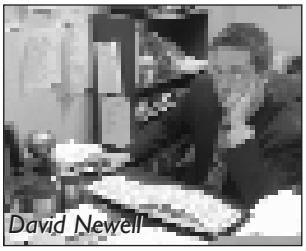
AS THE JUDGES SAW IT

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

Texas Court of Criminal Appeals edition

Questions

1 Joshua Thompson was an associate pastor at a Baptist church, where his brother, Caleb, was also very active. In July, one of the Bible-study teachers reported to the associate pastor that an 11-year-old boy in the class was misbehaving. Joshua drove the boy to Caleb's nearby residence. Associate Pastor Thompson beat the boy with a tree branch over about 90 minutes while Caleb helped hold the child down. As a result of the beating, the child's back from the neck to his buttocks was one large bruise. There was indication that the child had myoglobin in his kidneys, which is released into the bloodstream as a result of the death of muscle cells. Had the boy not received prompt medical attention, he would have died from renal failure.


David Newell

Joshua Thompson was charged with first-degree felony injury to a child and second-degree felony aggravated assault. The jury was instructed that they could find Joshua Thompson guilty of first-degree injury to a child if he merely intended to cause *bodily injury* to a child, and he actually caused *serious bodily injury* to a child.

Keeping in mind that third-degree injury to a child is committed when a person intentionally or knowingly causes *bodily injury* to a child, was the transferred intent instruction proper?

yes _____ no _____

2 Kerry Rollerson was convicted on seven different felony charges stemming from three burglaries of three separate homes that occurred on three consecutive days. While Rollerson took guns in the robberies of two of the homes, in the robbery of the third home, no guns were taken because the owner, James Hines, did not own a gun. Curiously, however, Rollerson had left a revolver cylinder in the front bedroom and the

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gun's cylinder pin outside. As Hines did not own a revolver, he noticed the discarded cylinder and some shells inside.

For the Hines case, Rollerson was charged with burglary of a habitation. The trial judge heard all seven cases in a consolidated trial and found Rollerson guilty of all seven offenses, including the Hines burglary. The trial judge also entered a deadly weapon finding in each case. The court of appeals determined that the evidence was factually insufficient in the Hines case, thereby sending the case back for re-trial. The court of appeals also found the evidence legally insufficient to support any of the deadly weapon findings, meaning that the State could not again seek a deadly weapon finding on the retrial of the Hines burglary.

Is the State collaterally estopped from seeking a deadly weapon in the retrial of the Hines burglary?

yes _____ no _____

3 Assistant Harris County District Attorney Warren Diepraam was handling what looked to be another tragic intoxicated manslaughter case. This one involved Mark Wayne Lomax who had a blood-alcohol level at three times the legal limit. Lomax was speeding, weaving, and tailgating on a crowded public street when he collided with a truck, resulting in the death of a 5-year-old girl. Diepraam also noted that Lomax had two prior convictions for DWI at the time of the wreck. As Diepraam stroked his soul patch contemplatively, he realized that Lomax had committed a murder in the furtherance of committing a felony, namely felony DWI. Thus, Diepraam decided to charge Lomax with felony murder, with felony DWI as the underlying felony. Lomax filed a motion to quash alleging that felony DWI could not serve as the underlying felony for felony murder because DWI does not require a culpable mental state.

Can Diepraam charge Lomax with felony murder where the underlying felony expressly requires no culpable mental state?

yes _____ no _____

4 Efrain Alameda was going through a divorce when he moved in with a female friend named Deborah, whom he had known for eight or nine years, and her 12-year old daughter. Alameda lived in an extra bedroom for almost a year until he was able to get a place of his own. After he left, Deborah became suspicious that Alameda was still communicating with her daughter, who is identified only as J.H., without her knowledge (quite the paradox, I know). Deborah attached a listening device to the phone jack in the garage so that she could record all incoming and outgoing calls. Over two weeks she recorded almost 20 hours of conversations between Alameda and her daughter, neither of whom knew they were being recorded.

Prosecution ensued for, you guessed it, aggravated sexual assault of a child. Prior to trial, Alameda filed a motion to suppress the audiotapes, claiming that their recording was a violation of Penal Code §16.02 (interception of a wire communication without consent) and should be suppressed under article 38.23 of the Code of Criminal Procedure. The trial court held that Deborah could vicariously consent to the recording of J.H.'s phone conversations, and the tapes were admitted.

Can Deborah vicariously consent to recording her child's phone conversations?

yes _____ no _____

5 Eugene Robert VanNortrick was indicted on two counts of aggravated sexual assault of a child under 14. He pled guilty and elected to have the jury assess punishment. After voir dire and outside the jury's presence, the trial court admonished him orally as to the range of punishment and the requirements of registering as a sex offender. He was also admonished in writing as to the requirements of registering as a sex offender. He was not admonished about the immigration consequences of a guilty plea by a non-U.S. citizen. The record was "silent" as to VanNortrick's citizenship status, though his pen pack showed that he had been previously convicted of a felony in Michigan.

Was the failure to admonish about immigration consequences harmless error?

yes _____ no _____

6 Robert Nesbit was placed on probation for 10 years beginning April 29, 1994. The State filed a motion to revoke on April 29, 2004. Was the motion to revoke timely filed?

yes _____ no _____

7 Barbara Bell Johnson called 911 shortly before midnight. She was hysterical and kept telling the 911 dispatcher, "Come, come, I killed him." She gave directions to her house when the dispatcher informed her that she needed to know where Johnson lived to send police there. She kept repeating that she shot her husband, that he used to beat her, and that he wouldn't do it anymore. Johnson agreed to meet the police officer in her garage after repeatedly requesting that the 911 dispatcher send an officer.

When police arrived, Johnson was handcuffed for safety's sake and placed in the patrol car. The officer then went inside the house to look for the dead husband. The officer performed a brief protective sweep and noticed the .380 pistol that Johnson had used to shoot her husband. The officer went back outside and called the paramedics. When they arrived, both the officer and the paramedics went back into the home. About 15 minutes later, an investigator arrived and moved Johnson to another car because the first officer had to leave. Johnson even asked one of the officers if there was anything that the police wanted her to show them inside the house.

Johnson later filed a motion to suppress, claiming that the third entry into the home was not justified under the emergency aid doctrine. The trial court denied the motion, ruling that Johnson had consented to the search and even if there were no consent, the evidence was still admissible because the officer had seen it in plain view when he was lawfully justified to be in the house (the first entry). The court of appeals held that the third entry was not justified under the emergency aid doctrine, but the admission of the evidence was harmless error.

Was the evidence admissible based upon consent or based upon the emergency aid doctrine? (You thought it was going to be another "yes" or "no" question, eh?)

consent _____
emergency aid doctrine _____

8 Guadalupe Vasquez shot his landlord, Gary Jackson, twice in the chest and once in the head. We know this because Vasquez signed a written confession after seven hours of interrogation at the police station. Vasquez had been asked for a statement, and he voluntarily drove to the police station with his wife. One of the detectives doing the interrogation testified that prior to the interview, he did not have probable cause to arrest Vasquez and that Vasquez was not in custody, was not in handcuffs, and was free to leave at any time. During the seven-hour interrogation, Vasquez's requests to leave were either deflected or ignored. The trial court denied Vasquez's pre-trial motion to suppress the statement that claimed it was not voluntary, and the videotape of the interview and the written statement were admitted at trial. Vasquez requested a jury instruction on the voluntariness of the confession. The State objected, claiming that there was no factual dispute, and therefore, voluntariness became a legal question that was not appropriate for the jury to decide. Vasquez replied that the evidence had raised an issue of voluntariness so he was entitled to a jury instruction because article 38.22 requires such an instruction when the evidence is raised.

Is Vasquez entitled to a jury instruction on the voluntariness of his confession?

yes _____ no _____

9 Billy Moore was convicted of misdemeanor driving while intoxicated. On March 22, 2005, the trial court imposed a sentence of 100 days in jail. The next day, Moore's trial counsel filed a timely motion for new trial and a motion to withdraw as counsel. On May 13, 2005, Moore's new attorney, an appellate one, filed an amended motion for new trial along with leave to file the amended motion. This was more than 30 days after imposition of the sentence, and the amended motion raised two new grounds not raised in the original motion. One of these grounds claimed a *Brady* violation, but the motion itself contained no supporting affidavits.

On May 20, 2005, Moore's appellate counsel filed a second amended motion for new trial, this time with the accompanying affidavits and another motion for leave to file the motion for new trial. The trial court granted leave to file the second amended motion on the same day it was filed and set a hearing for the motion on June 3, 2005, the 73rd day after the sentence was imposed. After the hearing, the trial court granted the motion based upon the *Brady* allegation alone.

On June 14, 2005, the State filed a motion for reconsideration alleging for

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the first time that the trial court lacked the authority to rule on the amended motion, but the trial court denied the State's motion because it was more than 75 days past the imposition of sentence. The State appealed.

Should the trial court's order granting a new trial be reversed?

yes _____ no _____

10 Michael Scott admitted to taking part in the Yogurt Shop Murders that occurred in Austin. He was convicted of capital murder, but based upon the jury's answer to the first special issue, he was given a life sentence. In a prior, separate trial, his accomplice, Robert Springsteen, was also convicted of capital murder (and sentenced to death), but his sentence was commuted to life after the Supreme Court's decision in *Roper v. Simmons*.

During the trial, Springsteen's statement was introduced against Scott to corroborate Scott's statement. Though his earlier versions of events tended to exculpate him, in a later statement Scott admitting to helping tie up the victims and raping one of the girls and shooting her, though he claimed he did so at gunpoint. There was no "CSI" evidence tying Scott to the offense. The Court of Criminal Appeals agreed with the court of appeals that the co-defendant's statement was admitted in violation of *Crawford*.

Was it harmless error?

yes _____ no _____

Answers

1 Yes. Penal Code §6.04(b)(1) authorizes the transfer of culpable mental states between offenses contained in the same statute and also between greater and lesser included offenses. Penal Code §6.04(b)(1) provides that a person is criminally responsible for causing a result if the only difference between what he desired, contemplated, or risked was that a different offense was committed or a different person or property was injured, harmed, or otherwise affected. According to the majority opinion, offenses are "different" if they are based upon different legal theories. However, this explanation appeared to implicate the "mistake of fact" defense found in §8.02 of the Penal Code. The majority ultimately determined that "mistake of fact" may be raised as a defense in situations (such as the one in Thompson's case) where a defendant claims that he intended to cause only bodily injury, not serious bodily injury. However, the majority hastened to add that the mistake must be reasonable for "mistake of fact" to be raised as a defense. Adding insult to injury, the Court of Criminal Appeals had previously held in *Honea v. State* that the doctrine of transferred intent did not implicate a "mistake of fact" defense, but the court overruled that portion of *Honea* in Thompson's case. Thus, Thompson had not requested a "mistake of fact" instruction at the trial so he was not entitled to relief based upon the absence of such an instruction in the jury charge in this case. I certainly hope Thompson learned his lesson. *Thompson v. State*, _____ S.W.3d _____, 2007 WL 1828341 (Tex. Crim. App. June 27, 2007).

2 No. According to the Court of Criminal Appeals, neither the double jeopardy clause nor collateral estoppel bars the re-litigation of the deadly weapon issue. Both the State and the defense agreed that double jeopardy did not apply to sentencing proceedings for non-capital offenses. However, Rollerson argued that the State could not relitigate the issue because it had already litigated the deadly weapon finding and received an adverse finding on an ultimate issue. While the majority agreed that a deadly weapon finding can be an ultimate issue, it pointed out that for collateral estoppel to apply, the defendant must receive a *favorable* ruling on ultimate issue *from the factfinder*. Here, the factfinder had found *against* Rollerson in the first trial. "It does not matter, for purposes of collateral estoppel, that the court of appeals found the evidence legally insufficient to support the original factfinder's determination. The court of appeals was not the original factfinder." Judge Womack dissented but did not write an opinion. *Rollerson v. State*, _____ S.W.3d _____, 2007 WL 1828947 (Tex. Crim. App. June 27, 2007).

3 Yes. Felony murder may be predicated upon the underlying offense of felony DWI. The Court of Criminal appeals noted that its job is to interpret the law as the legislature enacts it, regardless of how harsh it seems. Consequently, the majority agreed with Diepraam's literal, common-sense read-

ing of the felony murder statute which allows felony murder to be predicated upon any felony except manslaughter. According to the majority, the felony murder statute dispenses with a culpable mental state because the very purpose of the statute is to punish an "unintentional murder" consistent with the historical purpose of the felony-murder rule. Thus, the majority rejected the defendant's claim that "murder has never been a 'strict liability' crime in Texas."

The majority also rejected the claim that the felony murder statute is unconstitutional because it is vague and indefinite for failing to allege a culpable mental state. The judges overruled a portion of their opinion in *Rodriguez v. State*, 548 S.W.2d 26 (Tex. Crim App. 1977), which seemed to hold that "the act of murder" required a culpable mental state in a felony murder prosecution. As the court explained, *Rodriguez* could not hold that "the act of murder" required a culpable mental state because that would be inconsistent with a holding that felony murder gets its culpable mental state from the underlying offense which would always necessarily be different from a culpable mental state for the act of murder. Moreover, the majority rejected the claims that legislative changes to the felony-murder statute and the addition of more specific intoxicated-related offenses indicated that the legislature intended for DWI homicides to be prosecuted exclusively as intoxication manslaughter. The court reasoned that the non-substantive changes to the statute in 1993 merely gathered all intoxication related offenses into one section, and they did not suggest a legislative intent to render those sections the exclusive vehicle (so to speak) for intoxication offense prosecution. Nothing in those new sections, nor in the felony murder statute, limits the prosecution of intoxication-related homicides to intoxication manslaughter or excludes felony DWI as a possible predicate felony for purposes of felony murder.

The court also rejected Lomax's argument that allowing felony DWI to be a predicate for felony murder had the effect of "swallowing up" intoxication manslaughter. This argument failed, according to the majority, because this "merger doctrine" argument was based upon the erroneous premise that felony DWI was a lesser-included offense of intoxication manslaughter. Putting aside the defendant's assumption that "intoxication manslaughter" could not be the predicate felony for purposes of the felony murder statute, the court determined that felony DWI was not a lesser-included offense of intoxication manslaughter and therefore was not exempted from the felony murder statute.

Finally, the majority dismissed the dissent's claims that intoxication manslaughter was a specific statute and it therefore governed over the general felony murder statute because the two statutes were *in pari material*. The court found no irreconcilable conflict between felony murder and intoxication manslaughter because both statutes were designed to cover different situations and they were not intended to be considered together.

P.S. Diepraam's prosecution of the case resulted in a 55-year prison sentence for Lomax. *Lomax v. State*, _____ S.W.3d _____, 2007 WL 1829371 (Tex. Crim. App. June 27, 2007).

4 Yes. A parent can vicariously consent on behalf of her minor child to taping telephone conversations as long as the guardian has a good-faith, objectively reasonable basis for believing it is necessary and in the child's best interest. Because this case spawned a few concurring opinions and one dissenting one, the rationale for the tape's admissibility may seem a little confusing. Four judges (Meyers, Price, Johnson, and Cochran) based the decision to admit the tapes on cases that indicate a minor child has no expectation of privacy when a parent is routinely allowed to enter a child's room. Under this reasoning, a parent is allowed to vicariously consent to a search of the child's room. Therefore, by extension, a parent can vicariously consent to the recording of the conversation.

Four other judges (Keller, Keasler, Hervey, and Womack) wrote a concurring opinion to approach admissibility from another angle. According to this concurring opinion, there was never an "interception" of the communication under §16.02 because there is an exception to the definition of "intercept" that allows parents to surreptitiously record their own minor child's conversations as long as the parent is doing so in the ordinary course of the parent's business of caring for the child. The concurrence reaches this decision by noting that fed-

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eral courts have recognized a similar exception in the federal wiretapping statute, the same statute upon which Texas wiretapping statutes are based.

Judge Holcomb dissented because of a sentencing error and never discussed the tape's admissibility.

Judges Keasler, Hervey, and Presiding Judge Keller, joined the opinion authored by Judge Meyers without limiting the approval solely to the outcome. Therefore, that seems to make Meyers' opinion the majority one, though it seems four judges would go farther and say, not only can a mother vicariously consent to taping her daughter's phone calls, but if she does so, she doesn't "intercept" the wire communication. Still, the good news for everyone appears to be that all the judges agree that the tapes were admissible. Good news for everyone, except Alameda, that is. *Alameda v. State*, _____ S.W.3d _____, 2007 WL 1828371 (Tex. Crim. App. June 27, 2007).

5 No. The failure to admonish a defendant about the immigration consequences for a non-U.S. citizen who pleads guilty is harmful error where the record is silent as to the defendant's citizenship status. The State first argued that the Michigan felony gave a "fair assurance" that VanNortrick was a U.S. citizen and the court of appeals should've drawn the reasonable inference that VanNortrick was a U.S. citizen. A unanimous Court of Criminal Appeals rejected this argument explaining that there were any number of inferences that could have been drawn from the prior conviction that would not have negated the possibility that VanNortrick was a non-citizen. As Womack essentially put it, just because he wasn't deported doesn't mean he wasn't deportable.

The court also rejected the State's second argument that under a silent record, it was impossible to establish harm. The court explained that with a silent record regarding citizenship, it was impossible to have a fair assurance that VanNortrick would not have changed his plea had he been informed of its immigration consequences. Moreover, the evidence against VanNortrick, though strong, made little difference to the court's determination of harm. The court reasoned that nothing in the record indicated that VanNortrick knew the immigration consequences of his plea and there was no way of knowing how overwhelming evidence of guilt would affect the thought process of a non-U.S. citizen considering entering a plea. Finding that they had no fair assurance that VanNortrick's substantive rights were not affected (their double negative, not mine) by the trial error, the judges reversed the plea.

So when a trial court fails to admonish a defendant about the immigration consequences of a guilty plea and the record is silent as to citizenship (or there's a prior felony conviction in Michigan), harm is established. *VanNortrick v. State*, _____ S.W.3d _____, 2007 WL 1828918 (Tex. Crim. App. June 27, 2007).

6 No. The motion to revoke was a day too late. The term of probation begins on the very first day of sentencing because a defendant's freedom is restricted on that day, and if the first day is counted, the last day cannot be counted, as that would add a day to the sentence.

I know what you're thinking: What about Government Code §311.014 which says that for computation of time you *don't* count the first day and you *do* count the last day? Explaining that computation of time depends on the purpose of the time period, Judge Cochran notes that when you must exercise a right during a time period, you start counting on the first day. However, when the last day is more of a deadline, the last day is counted to give you the full benefit of the time period. Most importantly to Judge Cochran, there's "no double counting." Because the first day has to be counted (remember the defendant is subject to restrictions on his rights on that first day), the last day can't be counted, as that would increase the overall time of probation. As Presiding Judge Keller points out in her concurring opinion, article 42.09 §1 of the Code of Criminal Procedure seems to require that the first day be counted because the statute states that the sentence begins on the day the sentence is pronounced. Given that the Government Code section dealing with time computation is a more general statute, the specific Code of Criminal Procedure section, according to Judge Keller's concurrence, should control. Judge Hervey remained unconvinced (as did Judge Keasler and Judge Meyers), and she said so in her dissent. This opinion was 14 pages long, but only if you include the orphaned foot-

note fragment on page 14. *Nesbit v. State*, _____ S.W.3d _____, 2007 WL 1695349 (Tex. Crim. App. June 13, 2007).

7 Consent. While all the judges at every stage of the game seemed to agree that the conviction should stand and most everyone agreed that the evidence was admissible, ultimately the majority concluded that Johnson's repeated pleas for police assistance and her offer to help search the house amounted to voluntary consent of searching the home. In upholding the search based upon the implied consent, the court noted that when a homeowner calls 911 and requests immediate assistance because of an emergency, he is indicating his consent to the arrival and entry of the responding officers to resolve that emergency and, absent any evidence of the revocation of that consent, an objectively reasonable limited investigation by responding officers into said emergency. As Judge Cochran succinctly puts it, the police did exactly what Johnson asked them to do. This is not illegal conduct. Johnson was clearly in a position to revoke her consent, but she instead offered to go into the home to help the officers. Additionally, the fact that there were three entries into the home didn't make the police's level of intrusion any less reasonable, as a person who calls 911 surely expects the police to enter the home, take pictures, and perform a cursory search relevant to the homeowner's call.

Judge Johnson wrote a concurring opinion (along with Judges Meyers and Price) that found no problem with the first two entries but took exception with the third. These three said a warrant should have been obtained for the third entry. However, because the defendant had readily admitted to shooting her husband and the only issue was self-defense, any error in admitting the evidence was harmless, according to the concurring opinion. *Johnson v. State*, _____ S.W.3d _____, 2007 WL 1695323 (Tex. Crim. App. June 13, 2007).

8 Yes. Unlike an article 38.23 jury instruction, a factual dispute is not a prerequisite to an instruction on the voluntariness of a confession under article 38.22; all that is required is that some evidence raises the issue. As the majority explained, article 38.22 clearly sets out the procedure when a confession's voluntariness is challenged. When a question is raised regarding its voluntariness, the trial court must hold a hearing and make an independent finding about the voluntariness of the confession outside the jury's presence. Upon a judge's finding as a matter of law and fact that the statement is voluntary, the statement can go to the jury, but the jury is to be instructed to disregard the statement unless they believe beyond a reasonable doubt that the statement was voluntarily made. The majority noted the difference between article 38.23 and article 38.22; the former requires a factual dispute (based upon caselaw), the latter requires only that a question be raised about voluntariness.

Of course, the majority never explained how you can raise an issue without a factual dispute, how it's somehow OK for the jury to decide a question of law, or what the distinction between a question being raised (article 38.22) and an issue being raised (article 38.23), but hey, the judges did cite to Dix and Dawson. The good news is that, by drawing the distinction between articles 38.23 and 38.22, it appears the majority is willing to toe the line when it comes to requiring a factual dispute in 38.23 cases. *Vasquez v. State*, 225 S.W.3d 541 (Tex. Crim. App. June 6, 2007).

9 No. Even though a defendant cannot amend a motion for new trial more than 30 days after imposition of the sentence, the State still must object to the untimely amendment to stop the trial court from entertaining such an amended motion. The majority goes through a lengthy discussion of the history of the rules regarding motions for new trial which I will not reproduce here. Suffice it to say, the court rejects the idea that the trial court lacks jurisdiction or authority to consider an amended motion. The court characterizes this rule as one of "claim processing" based upon *Eberhart v. United States*, 546 U.S. 12 (2005), a United States Supreme Court case that interpreted the federal deadlines for filing a motion for new trial.

Moreover, the court recognized that to reach a decision where a defendant could file an amended motion with leave of court after the first 30 days would require the court to overrule its precedent in *Dugard v. State*, something the court was unwilling to do. Indeed, the court even hinted that interpreting this

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rule of appellate procedure to allow for such an amendment in contrast to previous caselaw might abridge, enlarge, or modify the defendant's substantive rights, something the court cannot do. Thus, the trial court should not have granted the amended motion for new trial, but Moore still gets a new trial because the State didn't object to the amendment. *State v. Moore*, 225 S.W.3d 556 (Tex. Crim. App. June 6, 2007).

10 No. The admission of the co-defendant's statement in violation of *Crawford* in this case was not harmless error. According to the majority, the defendant had impeached or challenged most of the evidence that corroborated Scott's statement. Moreover, the prosecution asked the jury to compare the two statements during final argument, thus compounding the error by emphasizing the erroneously admitted statement. This, according to the majority, was enough to move the jury in its decision making so that the error was not harmless beyond a reasonable doubt. The four-judge dissent, led by Presiding Judge Keller, noted that the only impeachment was from the conflict between Scott's earlier denials; thus, the evidence was corroborated by his own statement and not the co-defendant's statement. *Scott v. State*, _____ S.W.3d _____, 2007 WL 1610493 (Tex. Crim. App. June 6, 2007).

AS THE JUDGES SAW IT

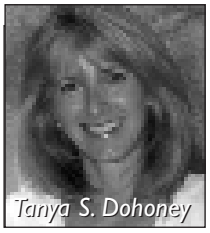
By Tanya S. Dohoney
Assistant Criminal District Attorney in Tarrant County

U.S. Supreme Court edition

Courtroom conduct

Matthew Musladin shot and killed Tom Studer outside of Musladin's estranged wife's home. While he admitted killing Studer, Musladin claimed he did so in self-defense. A jury rejected Musladin's self-defense argument and convicted him of first-degree murder.

During the trial, several of Studer's family members sported 2- to 4-inch buttons emblazoned with Studer's photo while they sat on the front row of the courtroom gallery. On appeal, Musladin argued that the courtroom-displayed buttons deprived him of his 14th and 6th Amendment rights by eroding his presumption of innocence. After considering the influence of the spectators' buttons, the California courts rejected the spectator-conduct claim. Ultimately, however, the Ninth Circuit Court of Appeals reversed.


Tanya S. Dohoney

What sayeth the Supremes?

Answer

This conviction stands, but the various opinions suggest prudence in the arena of courtroom conduct. *Carey v. Musladin*, 549 U.S. ___, 127 S.Ct. 649, 166 L.Ed.2d 482 (December 11, 2006) (6:3:0) (Thomas). Certain courtroom practices are so inherently prejudicial that they undermine the defendant's right to a fair trial. For example, the compelled wearing of jail togs was previously found inherently prejudicial conduct which was not justified by any essential state policy. *Estelle v. Williams*, 425 U.S. 501, 503-06, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). On the flip side, another case found that the state-sanctioned seating of four uniformed state troopers right behind the defendant did not compromise fair-trial rights. *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). At the time of this decision, no prior Supreme Court case reviewed the impact of courtroom-spectator conduct—as opposed to government-sponsored practices.

Justice Thomas' majority opinion vacated the Ninth Circuit's holding based upon the distinction between state-versus-spectator-sponsored behavior. This differentiation led the majority to find that the Ninth Circuit had overextended its habeas authority under 28 U.S.C. §2254(d)(1) because the state court's decision was not contrary to nor an unreasonable application of clearly established federal law. Justice Thomas briefly noted the lack of prior guidance from the Supreme Court and the wide divergence among state-court decisions on spectator-conduct claims but, relying on §2254's limitation, he left consideration of the merits of this issue for another day.

Three concurring opinions weighed in, however, voicing several concerns. Justice Kennedy's decision to vote with the majority stemmed from his determination that the atmosphere at the instant trial was not one of severe coercion or intimidation. He suggested that the lack of guiding precedents on the issue stems from the fact that trial courts already institute careful measures to preserve courtroom decorum. Nonetheless, he suggested that a new rule should be considered after the issue percolates in state courts first. Above all, Justice Kennedy noted that judges should be committed to preventing an intimidating trial atmosphere because the fair and orderly administration of justice is of utmost importance.

Justice Souter also concurred. Contrary to finding a distinction, he believed that the *Williams-Flynn* line of cases applied to potentially unfair courtroom *conditions* because it is incumbent on trial courts to control lay persons in the courtroom. While pointing out that the buttons constituted an obvious

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appeal for victim/family sympathy, he found the record did not show that conditions had reached an unacceptable risk. He also discounted, yet wanted briefed, the spectators' 1st Amendment interest.

In yet another concurrence, Justice Stevens suggested that the reliance on §2254 was an artifice ("dictum about dicta") used repeatedly by a bare majority of the Court to reject constitutional claims. Stevens also disputed the existence of any spectator speech rights in the criminal trial context.

For Texas cases on this issue, see *Nguyen v. State*, 977 S.W.2d 450 (Tex.App.—Austin 1998) (upholding trial judge's denial of defense request to have spectators remove buttons displaying victim's photo), *affirmed on other grounds*, 1 S.W.3d 694 (Tex.Crim.App. 1999), and *Davis v. State*, 223 S.W.3d 466 (Tex.App.—Amarillo 2006, pet. ref'd, untimely filed) (rejecting defense complaints regarding multiple uniformed officers in gallery, along with spectators wearing medallions bearing the deceased officer's photo).

Federal habeas

Convicted of rape, robbery, and burglary, Lonnie Lee Burton received a lengthy sentence in 1994 in accordance with Washington's state sentencing guidelines. When one of his prior convictions was later overturned, the trial judge entered an amended judgment and sentence in 1996. Burton's conviction was upheld on direct appeal, but his case was remanded for re-sentencing and, in December 1998, the trial court entered a second amended judgment of sentence.

While his direct appeal was pending in 1998, Burton filed a federal habeas petition under 28 U.S.C. §2254. The standard form he filled out warned applicants that they must ordinarily exhaust their available state-court remedies or risk a subsequent bar to presenting additional claims later. Burton nonetheless sought to challenge the constitutionality of his three convictions without addressing any sentencing issues. On the form, he listed the 1994 judgment date as what he contested. He also answered "yes" to the question about any pending appeal *as to the judgment under attack* and explained that he was appealing the sentence which was amended as a result of his direct appeal. Burton filed another federal habeas petition in 2002, this time contesting the 1998 judgment and challenging only the constitutionality of his sentence.

Was this a second/successive petition under the federal habeas corpus rules which required compliance with the gate-keeping requirements of 28 U.S.C. §2244(b)?

Answer

Yes. *Burton v. Stewart*, 549 U.S. ___, 127 S.Ct. 793, 166 L.Ed.2d 628 (January 9, 2007) (PC). Although the federal district court and the Ninth Circuit rejected the State's jurisdictional claims regarding Burton's failure to obtain a trial court order authorizing a second/subsequent petition as required under §2254's gate-keeping provision, the Supreme Court reiterated that the goal of the Antiterrorism and Effective Death Penalty Act (AEDPA) is to streamline federal habeas corpus litigation and reduce piecemeal litigation. Burton's first petition was not subject to dismissal as containing exhausted claims and was adjudicated on the merits. Because he neither sought nor obtained authorization for his second/successive petition, the district court lacked jurisdiction to consider the habeas claim.

Retroactivity of *Crawford*

Marvin and Laura Bockting lived in Las Vegas with their daughters Autumn and Honesty. Six-year-old Autumn awoke from a bad dream one night but refused to tell her mother about the dream, explaining that stepfather Marvin had threatened her not to tell. A subsequent rape examination revealed strong medical evidence disclosing that Autumn had not simply been *dreaming* about being sexually molested. Subsequently, Autumn described Marvin's assaultive acts in detail to a detective and her mother.

When it came time for Marvin's trial on four child-sex-abuse counts, Autumn's distress prevented her from even being sworn in as a witness. A state statute authorized third parties to testify to the hearsay statements of a young child regarding sexual or physical abuse when the trial court rules that the child is either unavailable or unable to testify. Accordingly, both the mother and detective recounted Autumn's statements to the jurors. Marvin's conviction was affirmed on direct appeal in 1993 but, during the pendency of his habeas petition, the Supreme Court decided

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Does *Crawford* apply to this child-sex case which occurred more than 10 years earlier than the opinion?

Answer

No. *Crawford* will not be applied retroactively to cases on collateral review. *Whorton v. Bockting*, 549 U.S. ___, 127 S.Ct. 1173, 167 L.Ed.2d 1 (February 28, 2007) (9:0) (Alito).

The *Teague v. Lane* framework dictates that an *old rule*—one dictated by prior law—applies both on direct and collateral review, but a *new rule* is generally applicable only to cases that are still on direct review. See *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Holding that *Crawford* was clearly a new rule, flatly inconsistent with prior governing precedent, i.e., *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the court also considered and rejected the two exceptions that authorize expanded applicability of new rules. In its analysis, the court stated that *Crawford*'s procedural rule reflects the Framers' preferred mechanism (cross-examination) for ensuring that inaccurate out-of-court testimonial statements are not used to convict. The court contrasted the *Crawford* rule with the holding of *Gideon*, the only case ever identified by the Supreme Court as qualifying under the *Teague* "watershed" exception. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Finding the *Crawford* rule much more limited in scope than *Gideon*'s mandate to appoint counsel for indigents facing felony charges, the court also found that *Crawford* did not alter the understanding of bedrock procedural elements essential to the fairness of a proceeding. Unlike the sweeping and profound change *Gideon* implemented, the *Crawford* rule—while important—lacks the primacy required to fall within the *Teague* exception for watershed rules. Therefore, it does not apply to cases pending on collateral review when it was handed down.

Penry error

Dallas County prosecutors tried LaRoyce Lathair Smith for a brutal capital murder. His trial occurred after the Supreme Court's first *Penry* decision. However, it predated the Texas Legislature's enactment of an additional catchall special issue and the Supreme Court's second *Penry* opinion. See *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (*Penry II*). In an attempt to comply with *Penry I*, the Dallas County trial judge submitted a nullification instruction along with the statutory special issues. The additional charge allowed the jurors to answer no to the special issues if the mitigating evidence, taken as a whole, convinced the jury that Smith did not deserve the death penalty. After Smith's trial with this additional nullification instruction, *Penry II* found a similar instruction flawed.

On direct review, the Court of Criminal Appeals affirmed Smith's conviction, distinguishing the *Penry* precedents, and the Supreme Court summarily reversed. Reconsideration of the capital sentencing on remand to Austin resulted in another affirmance after the court relied, for the first time, on a preservation failure. Specifically, the court found that Smith's pretrial claims regarding the unconstitutionality of the capital sentencing scheme failed to preserve a challenge to the nullification charge submitted and, therefore, the court applied the traditional Texas charging-error framework and held that Smith failed to show egregious harm warranting reversal. See *Almanza v. State*, 686 S.W.2d 157 (Tex.Crim.App. 1985) (op. on reh'g) (preserved claims need only show "some harm," but an egregious harm standard applies to unpreserved issues).

Which *Almanza* standard applies to error in Smith's situation?

Answer

The lower standard of "some harm." The Supreme Court again reversed. *Smith v. State*, 550 U.S. ___, 127 S.Ct. 1686, 167 L.Ed.2d 632 (April 25, 2007) (4:1:4) (Kennedy) and held that, while Smith raised a claim regarding the inadequacy of the unobjected-to nullification instruction, his primary complaint focused on the special issues preventing the jury from considering his mitigating evidence—*Penry I* error—which was preserved pretrial.

Justice Souter's concurring opinion ponders whether a harmless-error analysis is ever appropriate when considering *Penry I* error.

Justice Alito's dissent states that,

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after *Penry I*, defense counsel often twiddled their thumbs during charging conferences discussing how to cure *Penry* error. Those attorneys declined trial court invitations to sculpt a curative instruction and argued that *Penry I* simply prevented application of the death penalty scheme to their clients, many of whom faced evidence of aggravating factors that would lead to a death sentence regardless of the instructions submitted. In light of Smith's failure to object to the trial judge's attempt to cure the known federal constitutional defect in the instructions, Justice Alito considered the Court of Criminal Appeals' application of *Almanza* correct. He bluntly observed that the majority's decision allowed Smith's counsel to sandbag the trial court.

A passenger's standing during a traffic stop

Deputy Brokenbrough stopped a Buick driven by Karen Simeroth to check on a vehicle's temporary registration tag. When talking to the driver, the deputy recognized the passenger as "one of the Brendlin" brothers and was aware that one of these siblings had skipped his parole supervision. The deputy asked for the passenger to identify himself, then returned to his patrol car, verified the existence of a no-bail parole warrant, and called for backup. During the wait, the deputy noticed Brendlin open and close his passenger-side car door. Once reinforcements arrived, the deputy ordered Brendlin out of the Buick at gunpoint and arrested him. The officers discovered an orange syringe cap on Brendlin during a search incident to his arrest; they also found syringes and a bag of a green leafy substance in a pat-down search of the driver, resulting in her arrest. A subsequent search of the car uncovered methamphetamine-production paraphernalia.

Brendlin was charged with possession and manufacture of methamphetamine. He sought to suppress the evidence by arguing that Deputy Brokenbrough lacked authority to stop the Buick. The trial judge rejected the suppression request after finding the stop lawful. The court also ruled that Brendlin had not been seized until he was ordered out of the Buick. Brendlin appealed this ruling after agreeing to a four-year sentence and pleading guilty.

The California Supreme Court upheld the conviction in spite of finding the deputy's traffic stop invalid. The court specifically ruled that passengers are not constitutionally seized during a traffic stop, theorizing that the driver is the exclusive target of the police conduct and a passenger cannot submit to an officer's show of authority while the driver controls the vehicle.

Does a traffic stop subject a passenger, as well as the driver, to a 4th Amendment seizure?

Answer

Yes. *Brenlin v. California*, 551 U.S. ___, 127 S.Ct. 2400, 168 L.Ed.2d 132 (June 18, 2007) (9:0) (Souter). When a police officer makes a traffic stop, a passenger of the car is seized for 4th Amendment purposes. In *California v. Hodari D.*, the Supreme Court held that a police officer may make a seizure by a show of authority, without physical force, but that *there is no seizure without actual submission*. *California v. Hodari D.*, 499 U.S. 621, 626, n.2, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). When an individual's submission to a show of governmental authority involves his passive acquiescence such as in the case of a car passenger, the determination of whether the seizure occurred in response to authority turns on whether a reasonable person would have believed he was not free to leave considering the totality of the circumstances. Justice Souter opined that a sensible person would expect police officers stopping a vehicle to be exercising control over all of the vehicle's occupants. Therefore, passengers—including Brendlin—may challenge the legality of the stop of a vehicle in which they ride.

This decision confirms opinions from almost every state's courts, including Texas'. See *Kothe v. State*, 152 S.W.3d 54, 61 & n.19 (Tex.Crim.App. 2004). While passengers are constitutionally seized during a stop, however, they do not generally possess standing to challenge a vehicle's search. See *Jones v. State*, 119 S.W.3d 766, 787 & n.54 (Tex.Crim.App. 2003).

Jurisdictional nature of notice of appeal

Keith Bowles beat Ollie Gipson to death in 1999 and received a sentence of 15 years to life imprisonment under Ohio law. After his federal habeas application was denied in 2002, he had 30 days to file a notice of appeal, but he missed the deadline. Federal law allows trial courts

to extend the time for filing notice of appeal for up to 14 days under certain conditions. Bowles sought such an extension and, inexplicably, the trial court issued an order granting Bowles 17 extra days for filing his appellate notice. Bowles filed the day before the 17th day but after the statutory 14-day period.

Did the notice of appeal confer jurisdiction to hear Bowles' case?

Answer

No. *Bowles v. Russell*, 551 U.S. ___, 127 S.Ct 2360, 168 L.Ed.2d 96 (June 14, 2007) (5:4) (Thomas). In spite of Bowles' reliance on the district court's order, the appellate court still had no jurisdiction. Justice Thomas, writing for the majority, explained that the timely filing of a notice of appeal is a jurisdictional requirement for which the court has no authority to create equitable exceptions. Thus, the unique circumstances of this case do not alter the finding of a lack of jurisdiction to entertain Bowles' appeal. Note that no extension is available regarding the time for filing a state-court notice of appeal. *Slaton v. State*, 981 S.W.2d 208 (Tex.Crim.App. 1998).

Justice Souter's bitter dissent described this case as an "intolerable" bait and switch.

Competency to be exectuted

Dressed in camouflage, Scott Lewis Panetti invaded his in-laws' house and executed them in front of his daughter and estranged wife. A psychiatric evaluation prior to his capital trial revealed that Panetti suffered from a fragmented personality and that he experienced delusions and hallucinations for which he had been repeatedly hospitalized. Numerous extreme psychotic episodes were described. Nevertheless, the Texas state court ruled Panetti competent to stand trial and waive counsel. Stand-by counsel later described Panetti's trial court behavior as bizarre, scary, and trance-like.

Later, when the trial judge set the execution date, Panetti contested his competency to be executed. Under *Ford v. Wainwright*, the 8th Amendment prohibits a state from carrying out a death sentence on an insane prisoner. *Ford v. Wainwright*, 477 U. S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). State-appointed experts determined that Panetti's bizarre behavior was calculated and that he had a rational understanding of his execution.

Ultimately, however, the Supreme Court deemed the trial court preceding constitutionally inadequate under *Ford* and turned to the question of what constituted a rational understanding of being executed. For instance, if a capital defendant is aware of the government's stated reason for his execution, but a mental disorder results in that defendant's delusional belief that the government's professed reason is a "sham," does this delusion render him incompetent to be executed?

Answer

Yes. *Panetti v. Quarterman*, 551 U.S. ___, 127 S.Ct. 2842, 75 USLW 4628 (June 28, 2007) (5:4) (Kennedy). A prisoner's awareness of the State's rationale for his execution is not the same as a rational understanding of it, and a delusional belief regarding execution is relevant to the comprehension of the execution if it so impairs the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution. Expert evidence may clarify the extent to which severe delusions may render a defendant's perception of reality so distorted that he should be deemed incompetent. Panetti's case was remanded for further proceedings.

Justice Thomas' four-vote dissent listed the myriad times that Panetti had been found competent and pointed out the spurious nature of the evidence supporting Panetti's current incompetency claim (an unsworn physician's letter containing no diagnosis and no discussion of execution understanding and a one-page declaration of the law professor who attended the doctor's 85-minute session with the defendant). The dissent opined that this case should also have been poured out based upon federal habeas gate-keeping rules as a second/successive petition because Panetti failed to raise a *Ford* claim during his initial habeas application.

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