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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

Violating the public trust

The longtime Rockwall County Criminal DA was convicted in two trials of theft by a public servant and several other charges. Here, the special prosecutors who tried the cases tell how they did it.

By John Schomburger and Justin Johnson
Assistant Criminal District Attorneys in Collin County and
Jim Skinner
Formerly of the Collin County Criminal DA's Office,
now in private practice in Plano

It is not your typical day when the district attorney walks into your office and informs you that you will be prosecuting the neighboring county's DA. Right after "Yes, sir" leaves your mouth, you wonder where this assignment might lead you.


John Schomburger, Jim Skinner, and Justin Johnson

Rockwall County Criminal District Attorney Galen Ray Sumrow had been indicted only weeks before by a Travis County grand jury for abuse of official capacity concerning $68,000 of apportionment funds (state money provided to cover office expenses) he diverted into his personal bank account. Our job was to investigate separate allegations that Sumrow embezzled from his hot check fund to reimburse himself for trips he never made and for airline tickets he bought his girlfriend to travel to TDCAA's Annual Update. Little did we know that 16 months later, after conducting a grand jury inves-

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Also in this issue:

Happy birthday, TDCAF!

TDCAF is entering into its third year! Hard to believe that, once a dream in the minds of several board and advisory committee members, the foundation is now fully operational and growing. In the last two years, we have accomplished much in the way of improved educational resources, innovative ways to offer training, and new avenues for funding that would not have existed before TDCAF's inception. And for that, we thank *you*, our members, for making this dream a reality.

By Emily Kleine
TDCAF
Development
Director

The **USAA Foundation** in San Antonio made a contribution to underwrite the cost of books for law enforcement attendees at the San Antonio Regional Update, held on June 27. Thank you, USAA Foundation! Another round of thanks goes to **John Bradley**, Williamson County District Attorney, for leading the way in asking our elected prosecutors across the state to fund a new appellate attorney position at TDCAA. This person will assist prosecutors with appellate briefs and issues, respond to e-mail and telephone requests for legal assistance, and guide the development of new legal arguments, theories, and trial tactics for Texas prosecutors.

TDCAF's Annual Campaign continues to gain momentum. Over 20 percent of our goal of $100,000 has been reached. If you have not given yet, please remember that every dollar counts! It is crucial to have support from within our ranks to successfully ask new, outside donors to provide funding for all of TDCAA's important work. You may designate your gift, if you'd like, for training, the new appellate attorney position, books, in honor or in memory of a loved one, or for general operations. We appreciate your support!

I've just returned from the Dallas–Fort Worth area, thanking our Fort Worth **Champions for Justice** sponsors and visiting with new donors. Soon, I will head out west to team up with **Matt Powell**, Criminal District Attorney in Lubbock County, to meet with prospective local contributors. **James Eidson**, Criminal District Attorney in Taylor County, has invited me to speak at the **Abilene Crime Stoppers** luncheon later this month. Also, keep an eye out for more **Champions for Justice** events on the horizon. We have two locations and honorees on the radar, and plans are falling into place. More details to come.

Be sure to check out our new website: **www.tdcaf.org**. It has recently been polished, and you will be most pleased with it. I look forward to seeing you soon! ✤

Recent Gifts to TDCAF

Rob Baiamonte, County Attorney, Goliad County
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Bert Graham, Assistant District Attorney, Harris County
Russell Hardin, Jr., Friend of TDCAF, Houston
Gene Heatly, Friend of TDCAF, Vernon
Cheryll Mabray, County Attorney, Llano County, *in honor of my prosecutor pals who supported me in my re-election*
Renee Ann Mueller, 21st Judicial District Attorney
Tom O'Connell, Friend of TDCAF, Plano
Scott Sherwood, County Attorney, Carson County
Sullivan Funeral Home, Friend of TDCAF, Vernon, *in honor of Staley Heatly*
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USAA Foundation, Friend of TDCAF, San Antonio
Western National Bank, Friend of TDCAF, Odessa
Jerilynn Yenne, Criminal District Attorney, Brazoria County, *in memory of Jim Mapel and Joyce Wheeler*

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Opening a dialogue about race

By Bill Turner
District Attorney in Brazos County

Several years ago, while my family was on vacation, I offered to pick up burgers for lunch. Not far from the hotel was a fast food place, and Katy, my younger daughter, wanted to go along for the ride. When we got in line I noticed that we were the only white folks in the restaurant. The two families in front of us and the cashier belonged to a different race. When the first family ordered their meal, the cashier handed each kid a balloon. The next family also had a little one, and she got a balloon too. I thought to myself, "This is a cool and unexpected bonus." But when I placed my order, the cashier was pleasant enough, but no balloon for Katy. As I left I noticed the next kid in line got a balloon. I remembered thinking that this must be one of the many faces of racism. The cashier was courteous and she said no derogatory words and gave no disgusted looks, but when it came time for favors, we were left out. Katy was too young to notice, but on the way back to the car I wondered how I would answer if she asked why she didn't get a balloon.

A few weeks ago I went to a fast food place for lunch. When I got in line, I noticed the cashier was handing out balloons to the kids. My mind raced back to the earlier slight—I guess it left an impression. I placed my order and on the way out I noticed a commotion. In the corner sat a dozen kids celebrating a birthday. Each kid had a balloon.

Today, I can't tell you if I misjudged the original cashier. Did I overlook a birthday in the corner? I don't know. I never asked the cashier for an explanation, and she never felt the need to offer one. I don't know who had the responsibility to talk about it. I do know that the lack of a dialogue left room for confusion and distrust.

A tough topic

Racism is a topic that is difficult to talk about. We have seen public figures—in our own state, in some of our offices—lose their jobs because of the words they chose. Emotions can run high. Many times problems are brewing just beneath the surface and no one wants to dig. But the failure to talk about racism leaves room for confusion—confusion in the communities we represent and confusion in our offices, confusion that will not be resolved by being ignored.

TDCAA is addressing the issue. Executive Director Rob Kepple has started a much-needed dialogue by gathering a diverse group of prosecutors to talk about racism in the workplace and in the criminal justice system. Jarvis Parsons, an African-American prosecutor in my office in Brazos County, has agreed to chair the group, and we have already met to hammer out issues to be addressed.

The group's primary focus is to help TDCAA members recruit and retain minority prosecutors. Why aren't we getting more such applicants, and why are we losing good prosecutors to the private sector? Resolving those issues will inevitably uncover other topics of concern, but I can't think of a better group to tackle the issues of racism than prosecutors. We are charged with doing what is right in our everyday jobs. We share a common interest to improve our communities and treat people fairly. A diverse workforce can be a valuable resource, providing the insight necessary to properly address problems that arise in every neighborhood. It is because we share these common values that we should be able to trust each other enough to engage in a candid conversation.

While there is a committee at TDCAA studying the issue, a lot can be accomplished by individual effort. Public discussions will be somewhat reserved for obvious reasons, but private discussions with people you trust can yield the best information anyway. In my office, Jarvis and I have spent hours trying to unravel some of the most difficult issues involving race and the criminal justice system. It is exhausting work, and there are some topics we haven't come to agreement on. Nonetheless, we agree that even the effort moves the ball forward.

As prosecutors our work is not as simple as balloons and birthday parties. We deal with some of the most complex issues challenging our communities. Addressing those issues properly requires us to move away from our comfort zone and enter into serious dialogue. Our offices and our communities will be the better for it. ✤

Character and power

"Nearly all men can stand adversity, but if you want to test a man's character, give him power." — Abraham Lincoln.

Not everyone can do the job of a prosecutor. It's been said that prosecutors drive some pretty heavy machinery, so that machinery can't be entrusted to just anyone. The power of criminal prosecution demands good intentions and good judgment. Some people have the temperment for the job, but others are better off not having the discretion and responsibility to do justice.

By Rob Kepple
TDCAA Executive Director in Austin

Let's face it: With 327 elected prosecutors and over 2,600 assistants statewide, at any given time we are going to have a few who aren't well-suited for the job. Texas prosecution is healthy, but it is our continuing responsibility to look with eyes wide open at what has happened in the past so we can learn from others' mistakes—and triumphs—for the benefit of our profession.

So, in this edition of *The Texas Prosecutor*, the cover story details the two trials of a former criminal district attorney, **Ray Sumrow**. This is not a particularly fun subject; many folks in this association know Ray and count him as a friend even to this day. But these cases are important for the expert way in which they were handled—kudos to **Jim Skinner, John Schomburger, Justin Johnson**, and **Judge John Roach** in the Collin County Criminal DA's Office for taking on such a huge, sticky case.

We shouldn't shy away from talking about this subject because of who the defendant is. In this way we honor the concept that the law holds us all to the same high standard, and we honor the prosecutors who have the unpleasant task of enforcing the law even when the lawbreaker may be within their own profession.

Seminar feedback via the TDCAA website

Last year we introduced the paperless seminar when we put papers and PowerPoint presentations online a week before the conference to give attendees time to download and print whichever files they wanted.

Y'all have shown an overwhelmingly favorable response to not having to lug around a heavy binder at every seminar. Our next innovation targets more paperwork: seminar evaluations. We rely heavily on them in creating and refining our courses, and we really want you to fill them out and hand them back, but our return rate is dismal, especially at large conferences such as our Annual Criminal & Civil Law Update.

To get a better response from you—and save a few trees—we are implementing a new Web-based evaluation system. After the seminar is over, attendees will receive an email from us inviting them to click on a link and fill out the seminar evaluation online. It's like what Holiday Inn does after your stay, except we won't ask if your pillows were fluffy enough. We will implement the new program for September's Annual, so please take the time to share your thoughts after the conference!

"Witnesses to the Prosecution"

Prosecutors are keenly aware of the issues surrounding actual innocence cases and how those are playing out in the appellate courts, legislature, and media. One part that had been missing in the discussion, however, was an in-depth discussion with the trial prosecutors who obtained the convictions that were later overturned.

That piece of the story has finally been told. **John Council**, a longtime reporter for the *Texas Lawyer*, published a story in that weekly newspaper on June 9, 2008, entitled "Witnesses to the Prosecution." In it, Mr. Council recounts his interviews with more than a dozen prosecutors who handled the Dallas cases at the heart of a string of exonerations over the last several years. You can find it on our website, www.tdcaa.com as a PDF, attached to this column in the September-October 2008 issue.

It is compelling reading. The prosecutors told about cases with unusual facts but few witnesses that pointed to a particular suspect. They

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spoke of doing the best they could with what they had. They talked candidly about the heartbreak of finding out that they had prosecuted the wrong person and relief that the person had been released from prison.

As we continue to develop our policies, practices, and law about handling actual innocence cases, it is good to hear from these dedicated public servants about their role in this national debate. Thanks, John, for adding this piece to the discussion.

The demise of the local op-ed page?

Every newspaper hopes to mold public opinion in its jurisdiction by publishing opinions and editorials. Maybe it is just here in Austin, but it seems that prosecutors and government employees in general take a beating on a regular basis. Fair enough—newspapers are supposed to provide that check and balance, and after all, good government is boring.

The traditional newspaper business ain't what it used to be. Today's information superhighway offers more varied views on any given subject and many avenues for news. A person doesn't have to work for a paper or television station to report something newsworthy—she can simply tap away at her home computer at the end of the workday.

For instance, you might want to check the blog of an anonymous Harris County lawyer, **harriscountycriminaljustice.blogspot.com**. In response to all of the debate about convictions based upon the testimony of a single witness, the writer offers a pretty compelling argument for why convictions must be had on the testimony of a single eyewitness. (See the July 27th post.) A second blog, the Women in Crime Ink Blog (**womenincrimeink.blogspot.com**) is also worth a look. Read Kelly Siegler's post dated July 23, titled "Win at All Costs? Not Really." In it, Kelly argues that the real problem in the profession is not bad prosecutors seeking to convict innocent people with unfair tactics. It's exactly the opposite: timid prosecutors unwilling to take the close, tough cases to trial. She argues that crime victims are not well-served by prosecutors unwilling to take on the tough case and work to develop more evidence and that prosecutors should have more faith in the jury process.

These are insightful opinions you won't ever see in the local op-ed page, and it is satisfying that these other views find a way into the debate.

The latest polling on your job

A group of really smart Texas leaders, movers, and shakers get together every so often in a group called the **Texas Lyceum**. And every year, they poll Texans on issues, including what are the most important issues facing Texas today.

The good news is, Texans are confident you and your local police force have it under control. In 2007, they had immigration and education at the top of the problem list. Crime? Way down near the bottom, with only 4 percent thinking it was the most important problem facing the state. In the poll just completed in 2008, fuel prices, the economy, and immigration were at the top. Drugs/Crime netted just 1 percent of the vote. (The response "None/Don't Know" got 3 percent.)

This lack of interest in criminal justice apparently is resonating nationally. **George Will**, in the June 22, 2008, edition of the *Washington Post*, observed that there is near silence about crime because Americans feel safer. Why? Better policing and more incarceration is his answer. He even makes fun of some *New York Times* headlines: "Crime Keeps on Falling, But Prisons Keep on Filling" (1997); "Prison Population Growing Although Crime Rate Drops" (1998); "Number in Prison Grows Despite Crime Reduction" (2000); and "More Inmates, Despite Slight Drop in Crime" (2003)—as though falling crime rates have *nothing* to do with dangerous people being behind bars.

So crime may continue to lead your local nightly news, but it probably won't be the top issue for our state leaders when the legislature convenes in January.

Goodbye to great friends

In the last few months we lost a couple of well-known and respected prosecutors. The first was **Ted Busch**, a former first assistant district attorney in the Harris County DA's Office, who passed away in June. Ted had retired and moved to Fort Stockton, but he stayed in close touch with his Harris County colleagues. I had the privilege of working in the Houston office when Ted was first assistant, and I know how

well he was liked by those around him.

Our second loss these past few months was **Steve Storie**, a former investigator in Dallas, who died of cancer. Many of his friends didn't even know he had been diagnosed. Steve was one of the first prosecutors on the TDCAA circuit training folks on how to investigate and prosecute family violence cases with an uncooperative victim. He contributed mightily to our profession, although his contributions on the football field as a high school and college official may be even more well known to those who loved him.

A new and an old TDCAA face

When you get the chance, please welcome the newest members of the TDCAA staff, **Sherry Chen** and **Andrew Smith**.

Sherry Chen has taken over as our Database Manager and Membership Director from **Lara Brumen**. Sherry has been in the database development and management business for a number of years, including working as the information systems manager for the Texas Council on Family Violence. We are very happy to have Sherry on board, and it didn't take long for our members to discover her talents. Sherry is already deep into helping a Texas prosecutor unlock secrets stored in an ancient database that uses—gasp—floppy disks! Glad to have you on board, Sherry.


Sherry Chen

And Andrew Smith has taken over the job of Publications Sales Manager, replacing the very capable **John McMillin** who now studies law at Texas Tech. Many of you might recall that Andy worked as our sales manager several years ago. Like a big family, we just reeled him back in! Lucky for us. He will fulfill your book sales orders while continuing to pursue his music career. Welcome back, Andy!


Andrew Smith

And news of the weird—really weird

Many of you surely read with disgust about the recent legal wrangling in Wisconsin over a revolting scenario and whether it actually constituted a crime. Here are the facts:

Some guy, while reading the obituaries in his local paper, saw the picture of a lovely young woman who had just died in a motorcycle accident. He decided that he would like to have sex with her. So with a friend and his twin brother (and a pocket full of condoms and lubricant), the brilliant trio went to the cemetery late one night where this poor woman was recently laid to rest and attempted to dig up her coffin. They got pretty far down but simply couldn't open the sealed sarcophagus before they were discovered and arrested.

Now, that's about as disgusting as it can get. But what's the crime in Wisconsin? Believe it or not, prosecutors had to go all the way to the Wisconsin Supreme Court before they could prosecute for, of all things, attempted sexual assault. Their theory, which the Supreme Court affirmed, was that the situation fit the definition of attempted sexual assault because of the victim did not (could not) consent. Whew!

When we first read the reports on this case, we immediately wondered how this offense could be handled in Texas, so I sent our summer law clerk, **Pam Dallefeld**, to the books. What she reported constitutes a true tribute to the Texas Penal Code. As you know, the Texas PC has been rated the best of all state criminal codes in past studies when it comes to clarity, coverage, and ease of use. Here is why: You've got your pick of attempted abuse of a corpse (PC §42.08(a)(5)), criminal mischief (PC §28.03(f)), and you could even throw in a criminal trespass (PC §30.05) charge, depending on the cemetery's security. Here is something you can't say in Wisconsin: I bet a Texas *jury* would max these guys out! ✤

What was your proudest moment in a prosecutor's office?

David Newell
Assistant District Attorney in Harris County

My proudest moment actually occurred at my desk, which is often the case for appellate attorneys. One of the first cases I had the pleasure of working on as the second person of a two-man appellate division was a response to a death penalty writ of habeas corpus. The defendant had killed his drug-dealing friend. The murder took place in a house with several crack users; the defendant then ushered the witnesses into the main room and executed each one. He killed one witness and shot another point-blank in the face. Then the gun jammed and the defendant fled the scene. Miraculously, the witness who had been shot in the face, a 15-year-old girl whose addiction and rough upbringing had led her into prostitution, survived and later identified the defendant.

On the writ, the defendant came up with numerous complex, conditional, and ultimately meritless claims. My chief and I waded through them all, gathering a Bible's worth of supporting documentation to add to our response. Our proposed findings of fact and conclusions of law spanned several pages and allowed the trial court to deny relief on every possible ground. Granted, this type of output is par for the course in such cases, but it was my first exposure to it. I got a one-page, unpublished response from the Court of Criminal Appeals upholding the trial court's denial of relief. I could not have been more ecstatic. Even though it didn't take place in front of a courtroom full of people, it was still my proudest moment. To this day, I still apply the lessons I learned from that case to every case that has followed.

I could go on and on about how proud I was of my chief and the prosecutors who tried the case, but that's an entirely different question.

For the next issue, tell us about the best thing you've learned by talking to jurors after trial. Email the editor at wolf@tdcaa.com; type War Stories in the subject line.

Jay Johannes
Assistant County and District Attorney in Colorado County

Many things come to mind, but one moment that stands out is receiving an email from a prosecutor I admire requesting permission to use an information-sharing agreement I had created for school districts and juvenile probation departments. She needed it for a CLE program she was presenting at TDCAA's Annual conference. It felt good to have another prosecutor recognize my work.

Jeff Strange
Assistant District Attorney in Fort Bend County

My proudest moment as a prosecutor was designed never to see the inside of a courtroom. I assisted Sugar Land police with what was then a two-year-old murder investigation of Bart Whitaker, who was suspected of orchestrating the murder of his mother and brother and the near-fatal shooting of his father in December 2003. I became involved in the investigation in January 2005 to assist Detective Marshall Slot who wanted to get a wiretap order for the cell phones of Whitaker's co-conspirators, the suspected shooter and getaway driver.

No Texas court had previously granted a wiretap application on a murder case, let alone a two-year-old murder case. With the assistance of Harris County Assistant District Attorney Ted Wilson and Captain Doug Kunkle of the Texas Department of Public Safety, Detective Slot and I prepared a 75-page affidavit justifying the wiretap. Judge Don Strickland signed the order and through good police work and some dumb luck, the suspected getaway driver, Steven Champagne, confessed to police three weeks later.

Bart Whitaker was sentenced to death and the shooter, Chris Brashear, pled guilty to a life sentence. Champagne received 15 years in prison in exchange for his cooperation. Evidence from the wiretap was never used in trial, as it was designed

to induce the co-conspirator's cooperation in prosecuting Bart Whitaker. But this prosecution was successful because of the hard work of the entire Sugar Land Police Department and our First Assistant, Fred Felcman. I will go to my grave proudest of my work on this case.

Ann Diamond
Assistant Criminal District Attorney in Tarrant County

About 20 years ago my job included mental health commitment hearings, a duty currently handled by two other attorneys in our office.

The probate courts back then appointed different attorneys each week to represent the proposed patients in the following week's commitment hearings. Often these were newly licensed attorneys. Each week after the new attorney was appointed, I would pick up the phone and share whatever information about the case and the process the attorney requested. The first time I worked with each attorney I made "the offer": If the attorney ever felt a patient was not mentally ill but was held for reasons unrelated to mental health, we would work together to get her out. The offer was not about marginal or arguable cases where outpatient mental health services might be determined sufficient on court day; it was about any case where someone was railroaded.

Only twice did attorneys take me up on the offer. The first of those cases involved a teenage girl. The patient's attorney, a newly licensed lawyer, called me after an initial client visit and asked that I go see his client in person with him.

We went together to the mental hospital and interviewed the girl. Our visit created great consternation in the hospital staff; never before had the mental health prosecutor and patient's attorney come to see a patient together. It was immediately clear that this young lady was not in the same ballpark as the hundreds of other commitment cases I had seen. The mentally ill teens roamed the hallways in packs, and it was striking how out of place she was there. The other hospitalized teens could tell she was not like them. The situation scared her, and it seemed dangerous to her attorney and to me.

The girl's parents were concerned because they found that she had written a will. The admitting doctor (who was unavailable and out of state during our joint attorney visit) had convinced them that this child was likely to kill herself at any minute because of the will. There was no other fact, threat, recent bad events, signs of depression, antisocial behavior, personality disorder—no other indication of any problem, just the will. She was doing well in school, active in extracurricular activities, not a drug user or drinker, and she had good friends, a positive social life, and a decent family situation (if overprotective parents). (For those unfamiliar with mental commitment cases, her complete hospital file with all doctors' and nurses' notes was completely open to us as attorneys in the case.)

The girl explained that she had recently seen an episode of a popular TV series that disturbed her because a character on the show died without a will and the surviving relatives fought over the her belongings. The thought that her relatives might fight over her things upset her so much that she wrote a will—the kind of will a teenage girl writes: "To my friend Suzy, I leave my favorite blue jeans; to my brother Tom, I leave my pet cat…." Well, no one else in the family, the court system, or the hospital team had seen the show, but I had. It *was* disturbing. Add to it that when I was a teenager, one of my high school homework assignments was to write a will. I have to tell you, the wills my friends and I wrote for our homework looked a lot like this patient's will. Every last one of us willed our favorite blue jeans to our best friend.

Mental health laws required then as now that when an involuntarily held person no longer fits the commitment criteria, she is to be released. Such patients are not to be kept another several days or weeks until insurance benefits run out. The hospital could not provide a doctor, any doctor, who was willing to swear that on that date the girl still met the commitment criteria. I called the probate judge (at home) and moved for immediate dismissal of the case, joined by the patient's attorney. The judge knew me well enough by then to know that I was not prone to act rashly. He granted the motion. This was not a quick situation; it took us the better part of the afternoon into the evening. We did not leave the hospital without the girl.

For those who don't remember what mental hospitals were like in the 1980s, there were problems with some mental hospitals aggressively seeking inpatients in questionable cases. Admitting physicians and staff were sometimes paid a bounty on

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each admission. It was a lucrative and corrupt industry, and the hospital in this case has long since closed. There were major state legislative hearings around the state, and soon thereafter our mental health laws were substantially rewritten to codify a patient bill of rights and protect against the era's aggressive marketing, "wallet biopsy" activities, and inappropriate use of forced inpatient hospitalization.

The patient's lawyer and I became friends. We always refer to this as the Storming of the Bastille case. His version when retelling it is always more dramatic than mine (his features lights and sirens that I swear I don't recall). Suffice it to say we worked together and did the right thing for an innocent kid. Each Bastille Day we touch base to remember the case that we both consider one of our finest hours in the practice of law.

Scott Brumley
Potter County Attorney

I was having a brutal day in federal court. My every objection was overruled. Every objection the other guy made was sustained. I had to fight tooth and nail to get the most routine evidence admitted. The other guy seemingly just had to *think* about his exhibits to get them in.

Toward day's end, however, I had a quiet epiphany: I realized we were going to win. Admittedly, the case was not an especially significant one (other than to the parties). So why was that a proud moment? Because that is when it dawned on me that being a courtroom advocate isn't about dominating. Some can do that, of course, but I don't have the wherewithal to dominate. Instead, being in court is about persevering through frustration toward what we see as the correct result while recognizing that the other guy gets his day in court, too. At that moment, I finally considered myself a lawyer.

There is still substantial debate over that last part, though.

Edna Hernandez
Assistant District Attorney in Washington County

One of my proudest moments was during a murder trial when I was fighting a motion to suppress the defendant's various statements. I had stayed up late the night before, trying to find a case on point—a thankless job, usually—and I had a terrible sinus infection. I felt like crap, but I had to be there. And on that day, the victim's family was sitting in on thw suppression hearing.

I overheard one sister turn to the other and say about me, "Poor thing, she sounds so sick." The other sister answered, "Yes, but I'm glad she's here. She's good." The victim's family had been very defensive with us. They didn't trust us and thought we didn't care about the case because the victim was a drug dealer. It felt good to hear them recognize that we were working as hard on this case as we would on any other.

Wesley Wittig
Assistant District Attorney in Fort Bend County

You know you've arrived when law enforcement recognizes your efforts. In narcotics work, you don't have victims to tearfully measure your performance and you are repeatedly asked, "Why are you trying a drug case?" That's great for the ego, but add to it seasoned narcs breaking in a rookie drug prosecutor.

The local task force stopped being leery of me when I finally got a respectful sentence (60 years for a crack cookie—enough to mean the defendant was a dealer). All the officers were present throughout trial to witness my end of their case. They gave me an award of sorts to recognize my efforts, and they all signed it. Mind you, it was not an official plaque from the organization but something from the guys in the trenches. It is a steam train engine mounted on a metal plate with rough-hewn wood framing, and it hangs proudly in my office. The caption reads, "I'm driving this bitch!" and it refers to my conversation with the task force lieutenant about not being anybody's caboose anymore—that I am now driving the train. (The conversation was much more vulgar, but you get the idea.) He calls me "Engineer" now.

I should note that my success was due to a team effort by law enforcement, my trial partner, Chief Mark Hanna, and the defendant, who testified.

Patricia Dyer
Assistant Criminal District Attorney in Taylor County

As an appellate attorney, the opportunity to have a proud moment touched by a victim's family is limited, but for one oral argument, the two sons of the victims flew in from Maryland to witness oral argument.

I knew they were coming, and they rode with me to Eastland (where I worked as a briefing attorney) for the oral argument.

Their parents—retired for only a short time and on one of their RV trips—had been hit from behind by a semi-truck and killed. The truck driver was on methamphetamine. The issue on appeal was sufficiency of the evidence to show he had lost use of his mental or physical faculties as a result of the methampetamine. It was a very technical argument, primarily based on the fact that there were no human studies to show the exact effect of methaphetamine at different stages in time, but it became a little more passionate after talking with the family. I was glad that we did not have to get into the details of their parents' death.

After oral argument we went shopping at the gift shops near the court. They were impressed with the local legend of Rip, the Horny Toad, and even bought horny toad earrings for one of their daughters. I called them when the opinion was issued and again when mandate issued. They appreciated the updates.

Appellate work is sometimes thankless. We just work behind the scenes, and the victims—or anybody, really—rarely know how the judicial process progresses after a conviction and what it takes to uphold that conviction. It's especially difficult when the issues are not as black and white as most people would think. After this particular oral argument, the family really understood and appreciated the work it requires.

Terese Buess
Assistant District Attorney in Harris County

One of the proudest moments of my career in prosecution came with the trial of a 17-year-old high school student who had been sexually assaulted by a fellow student. The victim suffered from cerebral palsy and was confined to a wheelchair. Her rapist rolled her off of the school bus as it arrived in the morning, pushed her into the boys' restroom, pulled her out of her chair, and brutally sexually assaulted her on the floor.

When I first met the victim, my heart sank. Her speech was severely impacted by her cerebral palsy—she was verbal but incomprehensible. We met weekly for several months while I struggled with the problem of how to present her testimony to a jury. Her outcry to a teacher was very sketchy, and the medical records contained no information about how the sexual assault had occurred or who had committed it. This victim's testimony was going to be critical to make the case.

Fortunately, I had been transferred to our post-conviction writs division and held onto a couple of trial cases, so I had a little more time to devote to this case than I normally would have. After regular meetings for many months, I could understand my victim's speech without constantly asking for clarification. We devised a trial strategy: I would ask the question, she would answer, I would repeat verbatim that answer and ask her if that was correct, and she would say yes or no.

She made one of the most compelling witnesses I have ever had the pleasure to work with. I had warned the court reporter about what was going to happen, and we all acted like it was perfectly normal. The jury maxed the defendant with a 20-year sentence. Best of all, my father came to watch that trial and after closing arguments, he hugged me and said, "It's one thing to know what you do, but to see you do it—I understand why you love it." ✤

Correction

In the July-August 2008 issue, the article on how prosecutors can spend discretionary funds contained an error. Prosecutors are indeed allowed to pay assistants' employment taxes on salary supplements (on authority of AG Opinion No. JC-0397). A corrected version of the chart is on our website in that particular issue's section. We regret the error. ✤

How do you balance work and home?

For my first murder trial I had a new suit, new pantyhose, new shoes, a great haircut, and I got to the office two hours early to work on my opening statement.

For my most recent murder trial, I wore the only clean suit in my closet (after finding baby spit-up running down the back of the first suit I put on), dug around in my closet for some new hose, worked on my opening statement in the shower and during the drive to work, wore my slippers into the courthouse while carrying my heels in my bag (so as not to drop the baby on the way in to daycare), fixed my hair in my office (I couldn't find my hair spray in the diaper bag but knew I had some in my desk drawer), downed two cups of coffee and a can of Diet Rock Star, and got to work just in time to get a Diet Coke and head to court for voir dire.

By Sunshine Stanek
Assistant Criminal District Attorney in Lubbock County (with Kirby, 5, and Campbell, 5 months)

Sound familiar?

I have just recently returned to work from maternity leave (which I cut short because I didn't want to completely miss a capital case I had worked on for two years). Now, having a 5-year-old daughter and 5-month-old son, I have been reflecting on work-home balance. Is there is a distinction between the two? Can there be a healthy balance? For those of us who work in a district or county attorney's office, sometimes it is hard to distinguish where work ends and home life begins. Being a working parent is hard, but being a working parent immersed in a world of evil is a different scenario. We are in daily contact with the worst people humankind has to offer. So, how do you leave this world and go home to a 5-year-old who wants to know how your day was and a teething baby who just wants to be held and show you his new bubble-blowing trick?

First, you be honest with yourself. Are you spending enough time with your family? Are you leaving work at work? Are you spending enough time on yourself to maintain your personal integrity and beliefs? To make sure you can answer those questions with "yes" most of the time, here's what I do: The minute I walk in the door at home, I take my work clothes off and put on my "play clothes." This is very important to my daughter because it signifies that the work day is over and we are at home for the rest of the evening. If my shoes are left on for more than a minute after we walk in the door, she is physically taking them off for me. The two or three hours before bedtime are reserved entirely for my children. My daughter and I cook dinner together every night while the baby sits and watches us. We discuss *only* her day, not mine, unless she asks about it. We sing along to a blaring Hannah Montana CD while in the bathtub, read library books, and end the day by saying our prayers. I always end mine the same way: "Lord, please keep my children happy, healthy, and *safe*." I do not check email or work on trials until both kids are in bed, and I often end the day with a glass of wine as I do my own personal "research," pouring over *US, People, Cosmo*, and the occasional *Parent* magazines.

Second, you must be honest with your children. I tell my daughter that adults who break the rules have to go to jail. And when they are old enough to ask about the death penalty and the more violent cases that I work on, I will be honest with them about what we are working on and why. Recently a burglar broke into the Meals on Wheels building where she and I often volunteer. This caused her great concern and she asked me everyday when I got home from work if we had caught the bad guys and what we were going to do to them. She could not believe that someone would rob a place where the whole goal is to help people. It just blew her little 5-year-old mind, and honestly, it should blow our adult minds as well. Sometimes it takes her comments to put everything back in perspective for me. Her little eyes asking me what will happen to those criminals reminds me that there have to be consequences for evil actions. I spend my days away from her and my son to make our community a better place to live and our neighborhood a safer place to play. Her elementary perspective makes me realize that the time spent away from my family makes all of our worlds a better place. It makes it all of the stress worth it.

And then there are the days when I cannot for the life of me get to the courthouse without throw-up on my suit jacket and in desperation

I turn to my friends in the office for help, advice, or even a spare blazer. Is there anyone else who has these days? I recently asked fellow prosecutors and investigators for their advice on balancing difficult jobs with their regular lives and parenthood, and I got a wide range of responses that all amount to the same thing: Work and life outside of the office are difficult to separate, but making time for the little things adds up to great benefits for both yourself and your family.

And when all else fails, keep a Shout wipe in your desk drawer.

Jana K. McCown
Assistant District Attorney in Williamson County

I have two girls and a boy, ages 14, 11, and 7. I've been prosecuting since long before they were born, but having children definitely changes your perspective. In order to cope with the bad things I hear about at work, I do two basic things. First, I try not to read any articles in the paper about children outside my county who are injured or sexually abused. There are enough cases in my jurisdiction to deal with, so I compartmentalize.

Second, and more helpful, my family attends church regularly. You have to find places with people who are generally trying to live right and raise their children to be happy, healthy, and godly kids. By reminding myself that good people are out there, it helps me deal with the lack of trust that our profession generates. I'm still more careful than most, I expect, but I recognize that I cannot predict when or where something bad might happen because it could be any place at any time. As my kids grow up, I also explain (in small, age-appropriate doses) why I parent the way I do.

Michael L. Ecker
District Attorney's Investigator in Potter County

When it's time to go home, go home. Don't take office work with you. Have dinner at home—TV off, seated at the table, and taking your time to eat and chat. You should be wearing comfortable clothing. If it's nice outside, play with the kids for a while. Of course, if the weather is bad, engage in some non-stimulating activities with the family. I say non-stimulating because it helps us wind down emotionally so we are more able to put the workday behind us and less likely to think about the workday ahead.

Eat out only once or twice a week (you will save money). A couple of times a week, walk the mall. But for your health's sake, set a deadline to be back home by 8 p.m. That gives you time to bathe the kids, get them to bed, and have some quiet time for yourself.

We are too active. We pass that on to our children, then they suffer the same stress we do. Kids need down time just like we do. For some reason we think we must serve on a committee, play intramural sports, go to the gym (we don't have to look like Hollywood actors), coach little league, and do all of those things in addition to work. We are too committed and overwhelmed, and we are burning the candle at both ends.

The Book of Psalms (chapter 46, verse 10) says, "Be still and know that I am God." Take time for meditation and prayer. Read the Psalms before going to bed. You will be surprised at how quickly your stress level and blood pressure drop.

Go to bed earlier. Americans don't get enough sleep. We need nine to 10 hours per night. Remember: Office jobs are more stressful than digging ditches. Stop digging your own early grave.

Audrey Louis
Assistant District Attorney in Atascosa County

My boys are my release. The minute I walk in the door, they demand immediate immersion into their world of trucks, books, swings, tee-ball, and the occasional tantrum. This is invaluable. It is a reminder that work is work and play is play.

Kim Witman
Criminal District Attorney's Investigator in Lubbock County

Due to the nature of our jobs, it's hard sometimes to remember what the world looks like through the eyes of a child. Watching my 8-year-old daughter, Taryn, this summer, I have been reminded that riding bikes, playing with friends, and flagging down the ice cream man take highest priority on her "to do" list.

Last March, I had the opportunity to assist our office in a capital murder trial with a change of venue. During voir dire and the trial, I frequently had to leave Taryn with relatives when I went to Amarillo. It was difficult for both of us, but I tried to explain to her how important this case was. I absolutely love

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my job as an investigator and can say that I am one of those people who can't believe I get paid for what I do. What I did not particularly like is that Taryn overheard me talking about this case at times, and I had to find a way to explain the death penalty to her. I also told her I thought it would be best if she didn't go to school and tell her second-grade class about it. However, it's inevitable that children of prosecutors and law enforcement officers probably know more about the sinister acts that occur in this world than children whose parents have "normal" jobs.

Earlier this summer, Taryn and I went to church camp in Floydada. We were able to spend uninterrupted time together, which made her feel important. My focus was solely on her, not on a trial she heard about on the nightly news. There was no cell phone reception, no computers, no televisions, no meetings to attend, and no deadlines to meet. This short break from my work routine refreshed and rejuvenated me. We all know how stressful investigations and trials can be. Taking time off to do fun things with my family is one of the best cures I have found. I always come back to work with a fresh outlook, a better attitude, and renewed energy.

Taryn and I have made some good memories in the past, and I'm sure there are many more to come. She probably won't remember all of the weeks I had to leave her for voir dire and the capital murder trial, but I bet she will always remember the three days I spent with her at camp. Maybe we would all be less stressed if we scheduled time with our families like we schedule appointments for work. On at least some weekends, we should focus on riding bikes, playing with friends, and flagging down the ice cream man.

Rainey Webb
Assistant Criminal District Attorney in Tarrant County

Our 3-year-old twins have to endure the curse of both parents working in the criminal justice system. My husband is on the Dallas SWAT team, and I work in the felony division of the Tarrant County DA's office. We both feel like we have the best jobs in the world and recognize that our knowledge of the criminal side of our community is an occupational hazard that changes the way we view everything and everyone. We are constantly trying to balance being good parents with being completely paranoid every time we walk out of the house with the kids. I believe the key to finding balance in our lives is to appreciate what we have and to enjoy the time we have together. It's a corny answer but it's true. Life experiences have enabled me to not take things for granted. I have so many close friends who had trouble conceiving children, deal with children who are not healthy, or have other difficult issues. We have also lost friends in law enforcement who never knew when they left their house that morning it would be their last day on earth.

We both try to make the most of every day. I believe any expert will tell you that what kids want most is time, so at the end of the day when we get home, the first thing we do is take off our "daytime clothes," put on our "comfy clothes," and go outside and play as hard as we can. It's not only great for the kids to get all their energy out, but it's also great for me to unwind. It lets me stop and realize that compared to the people I have been dealing with all day, whether they are defendants or victims, my life is pretty good.

Yesterday neither one of the kids wanted to go outside. They *had* to watch a movie or TV. As much as I wanted to do the same, I knew they were only going to get crankier if we stayed inside. Then my son suggested we go for a swim. We all got our suits on and got in the pool long enough to get wet and then everyone got out, at which point my daughter said, "Let's look for animals in the clouds." My son piped up, "We can lay our towels on the ground and look up at the sky. That will be great!" Forty-five minutes later I had seen an alligator, an elephant, an airplane, a snowy mountain, the letters X and Y, and a ladybug—all through the imagination of two 3-year-olds.

Just when I was about to concede that the world is going to hell in a handbasket, the cumulative wisdom of the six years those kids have been alive reminded me that joy is in the little things.

Philip Ray
Assistant District Attorney in Potter County

A couple of years ago, I knew a prosecutor—OK, I *was* that prosecutor—who was burning out so fast that he'd supplement his daily Welbutrin and beta blockers with a glass or two of whiskey in the evenings. When I turned 33—two years ago this month—it was a milestone that spun through my mind

every time I looked around my empty apartment. You know that guy who hasn't unpacked even two years after he's lived there? That was me. I had no pictures displayed and no mention of friends or family anywhere. My personal life had taken a backseat to my career.

A coworker, Ralph Fletcher, talked me into attending a personal growth seminar, PSI Basic. (See www.psiseminars.com for more information.) I dragged my older brother, Kenneth, to whom I was barely speaking, with me. What I found in that goofy, huggy atmosphere was that I'd completely forgotten all the non-work things I'd always enjoyed. I was so wrapped up in the seriousness of my cases that I'd stopped having fun.

Here I am, two years later, with this suggestion to keep your career going: Find something outside of it that makes you smile. Whether it's starting a regular night to play video games with friends or discovering a new art or craft, our lives even out if we diversify. What I didn't realize two years ago was that if my entire focus was work—if all I had was my job—I would stop loving it.

Take a class. It doesn't have to be a personal growth seminar (although the one I took was the best money I've ever spent). Sign up for a cooking course, pick up a new sport, or learn Spanish. Find something that makes you hurry home at the end of the day. For me, it's my fiancee, Misty Thornton, her dog Bradee, and my tennis-ball-crazy Labrador, Cassidy. Balance out your life, and your appreciation for your job will swell—instead of crushing you. ✤

Continued from the front cover

Violating the public trust (cont'd)

tigation in Rockwall, analyzing 22,000 documents, and enduring five weeks of litigation in two separate trials with 37 witnesses and more than 300 exhibits, Ray Sumrow would be on his way to prison in Huntsville.

Sadly, public corruption is so frequent in our society today that we seem to have become desensitized to hearing about yet another corrupt politician. But this time it was different. It was one of us—not only an elected official, but a man who swore to uphold the Constitution, seek justice, and prosecute those who break the law.

Sumrow's background

Galen Ray Sumrow (he goes by Ray) seemed an unlikely target of an investigation. He was the longtime criminal district attorney for Rockwall County, who before that served as a police officer. Sumrow was first elected DA in 1985. Throughout his tenure, he accumulated many honors, among them State Bar Prosecutor of the Year in 2001. He also served on the TDCAA board of directors and as president of the board in 1996; additionally, he sat as chairman of the board of trustees of Lake Pointe Medical Center in Rockwall. One thing was clear: We knew our evidence had better be strong before any case was filed against Ray Sumrow.

Accusation

Sumrow's downfall was linked to a 2006 criminal investigation into Rockwall County Treasurer Sheree Jones. Jones stole over $3,000 of public money which she used to pay her mortgage. After the money was discovered missing, the county sheriff's investigators confronted her and she eventually confessed. During her interrogation, Rockwall Chief Deputy David Goelden asked, "Is there anyone else in the county that you know of that is engaging in criminal's activity?" Her answer: "You need to look at Ray Sumrow." Deputy Goelden told Jones that when her case was over, he would revisit her revelation about the DA.

Sumrow's office prosecuted Jones for abuse of official capacity (ironically one of the same charges that would ultimately be filed against Sumrow himself). Once Jones was indicted, she resigned from office, pled guilty in an open plea, and was placed on deferred adjudication. In the wake of her plea, Sumrow was quoted in the *Dallas Morning News*: "It's a blight on us all. All public officials, myself included, should realize that they take an oath, and they have a responsibility to live up to that oath." Sumrow also stated, "As officeholders and public employees, we're entrusted with those funds and have a duty to see that they're handled appropriately."

After disposing of her case, Jones

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returned to the sheriff's office to tell investigators that in 2003 and 2004, Ray Sumrow diverted $67,980 of state comptroller apportionment funds into his personal bank account.[1] The state comptroller had been encouraging offices to use a new direct deposit system, and Sumrow filled out the direct deposit form so that state apportionment funds would go into his personal bank account starting in December 2002. The county was finally alerted to his misappropriations in 2004 when an outside auditor noticed the funds were missing and Treasurer Jones was tasked with locating the funds. In May 2004, Jones asked Sumrow if he knew anything about the missing money, and Sumrow denied any knowledge, telling Jones he would "look for the checks," as if they had simply been misplaced or lost. Within a few weeks, Jones determined that the missing money had been direct-deposited into Sumrow's personal bank account. She asked him to return the money, to which the DA offered excuses and promises to pay it back: "It was a banking error"; "it was the comptroller's fault"; "the bank is going to send the money back." It was excuse after excuse.

Start of the investigation

After Jones told Chief Goelden about the apportionment funds and her case was disposed of, Rockwall County Sheriff Harold Eavenson decided to include outside law enforcement agencies in the investigation. Texas Ranger Chris Clark and FBI Special Agent Brent Chambers responded to help. Because of the obvious conflict for the Rockwall County Criminal District Attorney's Office, investigators turned to the Travis County District Attorney's Office, which had venue over the apportionment case because the funds were sent from the state comptroller in Austin. Gregg Cox, the chief public integrity prosecutor for that office, agreed to examine the case, and he started to subpoena bank records.

Meanwhile, on February 8, 2007, Ranger Clark and Special Agent Chambers visited Sumrow at his office. Sumrow, who knew both men, gave them statements that we later used in court to show he was lying to investigators. (Unbeknownst to Sumrow, Ranger Clark had a digital tape recorder in his shirt pocket and recorded the conversation.) Sumrow said he knew of only one errant direct deposit but didn't know why or how the money got into his account. Once Sumrow learned that there was money in his account, he said he called the comptroller's office and "ate that lady's *#% out" for the mistake. At the end of the interview, the investigators gave Sumrow a letter from Mr. Cox, inviting him to testify before the Travis County grand jury on April 10, 2007.

The day after his interview with Chambers and Clark, Sumrow borrowed a key to the county storage barn and secretly moved computer parts and electronics components from his house to "hide them in plain sight" in the barn. About two weeks later, the pile of 58 computer parts was discovered and Chief Goelden was able to match 11 parts to those purchased at Fry's Electronics with DA hot check fee funds. Among the items found was a hard drive purchased in 1999 that appeared to have been used exclusively by Sumrow's daughter and his girlfriend for non-governmental purposes.

This wasn't the only action Sumrow took after he discovered an investigation was underway. Within two weeks of the meeting with Chambers and Clark, Chambers took Sumrow's office computer to Rod Greg, Senior Forensic Examiner for the FBI in Dallas, who discovered a program called Evidence Eliminator, an electronic file-shredding program that obliterates files so they can never be recovered. Further investigation showed that within a week of Ranger Clark and Agent Chambers' visit and within 48 hours of Gregg Cox telling Sumrow that the Travis County grand jury would take up the matter of the missing apportionment funds, 18,697 electronic files had been shredded on Sumrow's office computer during a seven-minute window.

Travis County grand jury

Weeks later, Sumrow testified before the Travis County grand jury. Unlike the interview at his office, he claimed that he had never talked to anyone in the comptroller's office about the apportionment funds. He also said that the Rockwall County Commissioners knew the apportionment money was in his own account. (The commissioners from that time period would later prove that statement false.) The grand jury indicted Galen Ray Sumrow on three counts of abuse of official capacity soon after he testified.

The Travis County investigation had uncovered a person in serious

financial straits. As bank records and other financial data were accumulated and analyzed, investigators saw that Sumrow was constantly behind and juggling just to make ends meet. It was not uncommon for him to be $2,000 to $3,000 in the red every month. As a frame of reference of his trouble, during a 23-month period, Sumrow accumulated 309 non-sufficient fund (NSF) charges. Over a 48-month period, he took out 24 bank loans. It was only during the five months following the apportionment fund deposits that his account went in the black. Without the apportionment funds, his personal account would have dropped more than $30,000 into the red. Paying back the funds required six months and a home refinance loan. Sumrow had needed money, and the apportionment fund was an easy, quick fix.

All of this financial turmoil begs the question: How was Sumrow spending his salary? There is no answer to that. We saw a regular spending pattern of $300–$400 cash per day, and he was rarely at work. But despite the intense investigation, we could not conclusively prove what he spent the money on.

Collin County investigates

Investigators looking into the apportionment fund matter had developed evidence that Sumrow also stole money from his office's hot check fund. They believed Sumrow "repaid" himself for trips he and his girlfriend never took. There was no venue in Travis County for those charges, so they approached Rockwall County District Court Judge Brett Hall, who in turn appointed Collin County Criminal District Attorney John Roach as attorney *pro tem* to look into the case.

District Attorney Roach appointed us as special prosecutors. The two of us had never met before; the Collin County Criminal District Attorney's Office works out of two buildings (one for felonies and one for misdemeanors), and prosecutors from one office rarely see the prosecutors from the other. But we were a perfect match. Schomburger was a career felony prosecutor, and Skinner was a misdemeanor prosecutor who happened to have 20 years of law enforcement experience as a criminal investigator in New Mexico and six years' experience as a civil attorney in Dallas. As a team, we were experienced in felony trial work and investigation of complex corruption cases.

We were in absolute agreement that a quick indictment was the wrong way to go and that because we were dealing with a public official who had been in office for 20 years, we had to be thorough and not leave any stone unturned. Jim Skinner was in charge of running the investigation. He set up base in the Rockwall County Sheriff's Office, where he was given a conference room to work in and where he had close access to the investigators on the case. Skinner and his team collected, indexed, and bates-stamped[2] more than 22,000 documents, identifying trial exhibits and preparing demonstrative exhibits that proved useful during grand jury and both trials. Skinner ran the discovery in the case as if it were a complex civil litigation matter. Items identified as trial exhibits were cross-referenced to respective witnesses and over 18,000 bates-stamped documents were filed with business record affidavits and copies turned over to the defense immediately following the first indictments. (As we neared trial, Justin Johnson, a Collin County Assistant Criminal District Attorney, was added to assist in preparations and brief any issue that might come up during trial.)

Besides working up the travel fraud, investigators reviewed computer purchases from Fry's and compared them to the county property inventories and the items recovered at the storage barn. The investigative team could not locate several computer items purchased with office discretionary funds, so we decided to run a search warrant at the DA's office to find out what missing components were in the office computers (Sumrow had worked on them in the past). A team of 20 FBI agents and investigators searched the office, took apart every computer, and photographed every component and each step of the process. We found some items on our missing parts list, and we knew after the search what items remained missing. We then compiled detailed charts identifying the components by description, serial number, invoice number, and the corresponding fee fund check number that paid for it. We carefully catalogued these invoices and checks because each pair would be introduced at trial to prove our case. We never did locate thousands of dollars of software and disposables such as CDs and DVDs that had been purchased with fee funds, but we had more than enough evidence to charge and prove Sumrow had mis-

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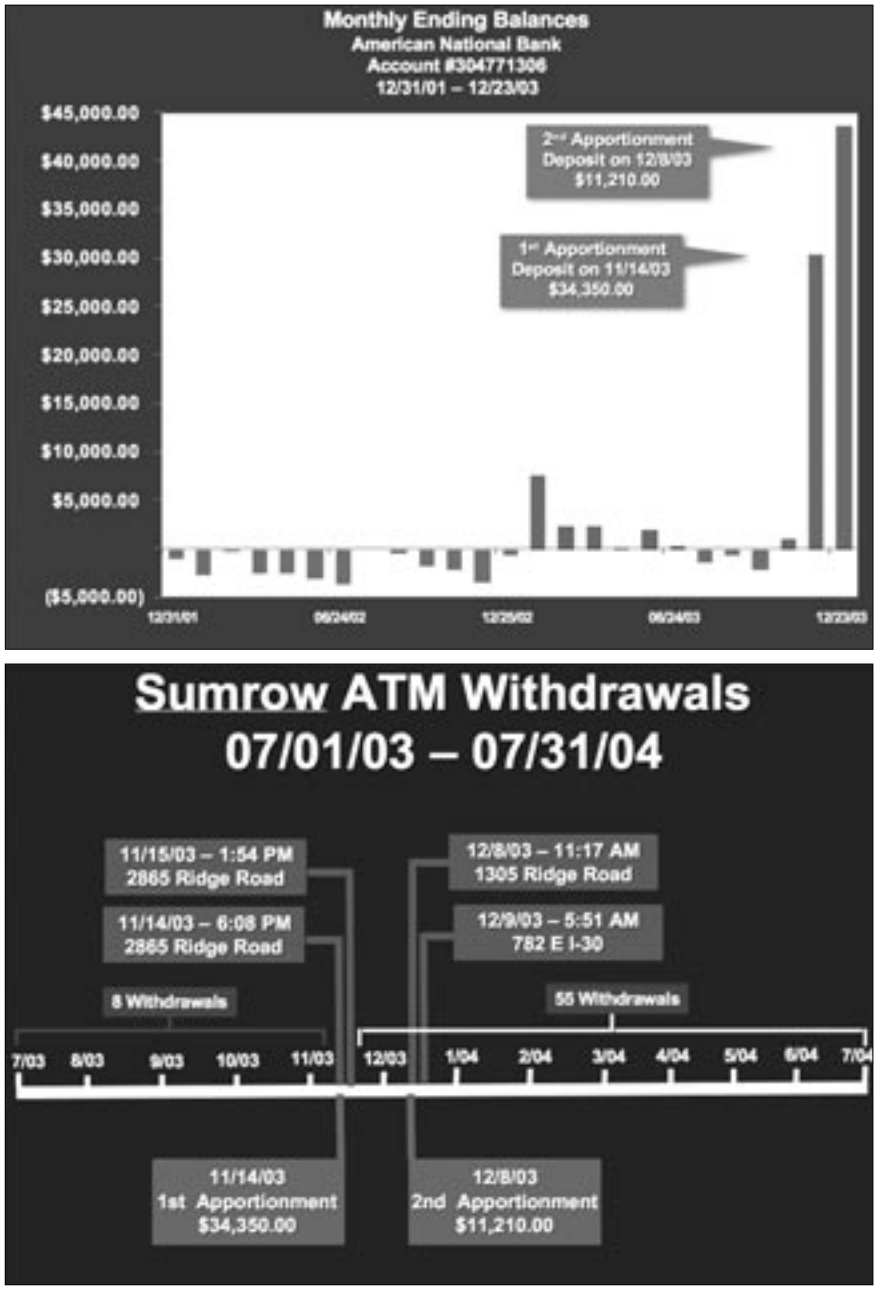
used the funds entrusted to him.

The "Blue Alien"

One item that showed up in Sumrow's office after the investigation began was a computer that became known as the Blue Alien. Sumrow had brought this PC from home, where it had been for two years. We discovered that the blue aluminum chassis and the components inside were bought with fee funds. It contained a high-end graphics card, superior sound card, seven cooling fans, glow-in-the-dark cables, and a glowing ultraviolet blue light. From the front, this computer resembled an alien and was adorned with skull-and-crossbone vent decorations. It was built to handle games, although it could be used for other purposes as well.[3] This computer was seized during the search warrant and was a perfect trial exhibit: When it was plugged in, it glowed neon blue in the courtroom.

There was one more important detail on the Blue Alien: On its back was a wireless antenna. The DA's office didn't have a wireless Internet system, but Sumrow had one at his house that had been purchased with fee funds from Fry's Electronics. The Fry's installer recalled the transaction and specifically remembered the Blue Alien at Sumrow's house. Chief Goelden examined every Fry's invoice and every check from Sumrow's account and discovered that the invoice from the Wi-Fi purchase and installation had been altered. In the description of the installation, Sumrow had covered up the words "in home" with a felt-tip pen.

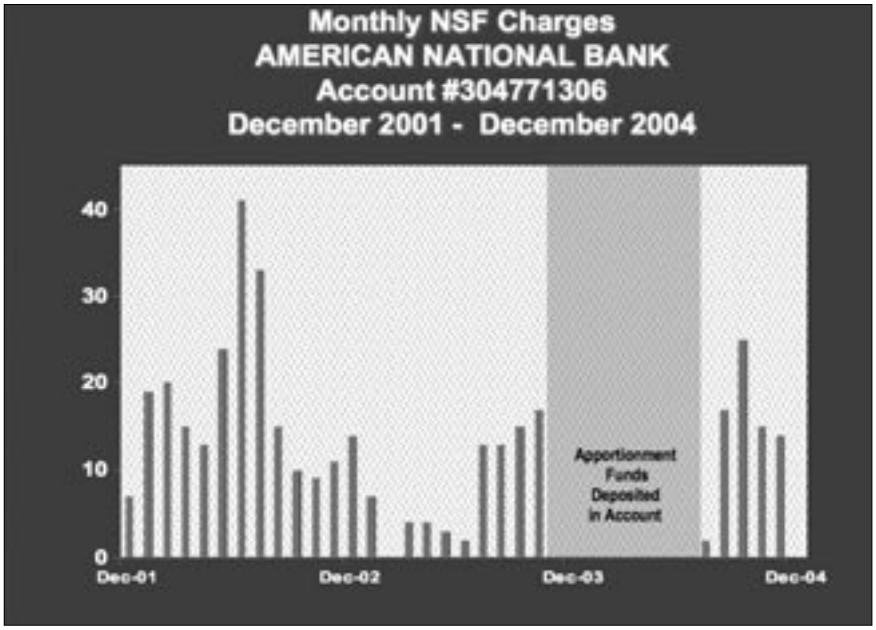


These are PowerPoint slides shown at trial; the top shows Sumrow's monthly checking account balances. It is often in the red. At bottom is a record of his ATM withdrawals, which increased in frequency after state funds were deposited into his account.

What else could we find?

The discoveries did not end with the Blue Alien itself. Fee fund checks were required to have two signatures, and the check for the home wireless system appeared to have been countersigned by Sumrow's first assistant, Craig Stoddart. But close examination revealed the signature to be a forgery. A second forgery on another check—this one for parts inside the Blue Alien—was also found.

As we reviewed thousands of bank records, a business check for $1,000 captured David Goelden's



Another PowerPoint slide shows the number of non-sufficient funds (NSF) charges from Sumrow's bank. These charges disappeared during the several months the misappropriated funds were in his account.

attention when he saw "computer" written on the memo line. The check was written by Rockwall County Commissioner Jerry Wimpee to Ray Sumrow. Goelden and two of his investigators quickly visited Commissioner Wimpee, who consented to a computer examination that revealed computer parts purchased with DA fee funds. We then quickly located two other computers that Sumrow sold to other people, both of which contained parts purchased with fee funds. We now had overwhelming proof that Sumrow had been misusing office funds for his own gain.

The summer of 2007 took us to the Rockwall County grand jury. After several meetings the grand jury returned five indictments charging Sumrow with two forgeries, one count of tampering with a government document, and an aggregated theft indictment with 75 counts. As the scope of our investigation widened, we worked closely to coordinate our efforts with the Austin team members, Gregg Cox and his lead investigator, Matthew Langan. We carefully scrutinized their abuse of official capacity case and decided to add a theft count to our indictment because our financial analysis led us to believe that what Sumrow had really done was steal those apportionment funds. The theft case would be our highest charge as a second-degree felony (because of Sumrow's status of a public servant). The grand jury indicted on the apportionment cases, giving us abuse of official capacity counts as well as the theft count we wanted.

Getting ready for trial

Pre-trial on the case was with a new judge. Judge Brett Hall of Rockwall County recused himself, and Judge John Nelms was appointed. In the pre-trial hearings, Judge Nelms determined there would be a change of venue to Dallas County. He also heard complaints from the defense concerning discovery. Immediately following the indictments, we had given the defense a copy of every document in the case—not in response to a discovery motion; we simply didn't want to give the defense room to complain about anything. They complained anyway, saying the documents were not in an order they could understand. Consequently, we bates-stamped and indexed every document produced during the investigation. This early decision to manage our discovery as if this prosecution were a complex civil litigation matter paid huge dividends: We had no discovery disputes during our weeks of trial in these cases.

FBI Forensic Financial Analyst Gil Kerry was indispensible as he put every financial aspect of the case into a spreadsheet and helped us turn a mountain of evidence into a presentation that was compelling and easy for the jury to understand. Kerry created a series of graphs, three of which are printed on these pages, that clearly demonstrated that when the apportionment deposits increased Sumrow's bank account balance, his spending habits changed dramatically, his ATM withdrawals increased, and his NSF charges disappeared. This evidence also demonstrated another amazing coincidence: Sumrow's only two consecutive-day ATM withdrawals coincided with the first two apportionment direct deposits, proving that he knew the money was coming and used ATM machines, rather than call the bank and potentially leave a witness, to learn when the funds hit

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his account. All of this financial evidence led to one conclusion: Sumrow knew the $68,000 was in his account, contrary to his claims that he was a bad bookkeeper and didn't know the money was there.

Pre-trial hearings consisted of attacks on our indictments and a motion to sever the apportionment case from the rest of our prosecution. Responding to complaints that the defense had not received proper notice from our 75-count aggregated theft indictment, we agreed to plead the computer parts with more specificity. In preparing this new and more specific pleading, we converted it into a large trial chart that we used repeatedly in the courtroom. The chart grouped the counts by type of theft and helped the jury stay on track, easily matching the testimony and evidence with the different counts, whether they related to the travel fraud, the Blue Alien, airline tickets, or components for building PCs for sale. It was also useful from the standpoint that we easily matched the forgeries and the tampering counts with those parts listed on our trial chart.

The judge granted the defense motion to sever the apportionment case from the other indictments. We needed that evidence to show that Sumrow was in dire financial straits and to explain why an elected district attorney making over $100,000 a year would steal a $50 computer part, so we immediately gave notice in open court that we would offer the apportionment funds direct deposit matter as 404(b) evidence in the computer parts trial.

There were never any meaningful plea negotiations prior to the first trial. From day one, Sumrow's position was that he would consider only misdemeanor probation on the apportionment case. Based on the scope and depth of the corruption we had uncovered, misdemeanor probation was out of the question. The defense was willing to concede only that there might have been misuse of a misdemeanor amount of money. Their position was that Sumrow was a bad bookkeeper and had so much loan money coming into his account, he didn't realize that he had received $68,000 of public money. As to the fee fund charges, Sumrow maintained that all expenses were at the sole discretion of the DA and all of the expenditures he made from the fund were legitimate.

The first trial

The first trial was scheduled to begin March 3, 2008, in the George Allen Sr. Courts Building, the civil courthouse in downtown Dallas. Judge Nelms brought in 100 potential jurors; he wanted a big pool to account for publicity and to deal with jurors' potential scheduling problems. One veniremen had read about the case and couldn't understand why a district attorney would have to steal something as inexpensive as computer parts, only reinforcing our belief that for all of this to make any sense to the jury, we had to explain Sumrow's upside-down financial condition and how he tried to avoid detection in the apportionment case. It was a long day. We lost a lot of jurors, but by 7:30 p.m., we had a jury seated.

We started the trial with a hearing outside the jury's presence on the apportionment evidence issue. We argued that it was contextual 404(b) evidence and also admissible under §31.03(c)(1) of the Texas Penal Code.[4] The judge ruled in our favor, allowing us to show the jury the motivation behind Sumrow's thefts and allow the jury to make sense of what the defendant had done.

How we told the story

The trial began with the county auditor and Special Agent Chambers telling the jury of the apportionment fund deposit into Sumrow's personal bank account. We then called members of the Rockwall County DA's Office to prove up the fee funds account records and to show that Sumrow requested reimbursement for some trips without providing supporting documentation. Members of the auditor's office confirmed this fact and also described the unforgettable look on First Assistant Craig Stoddart's face when he was shown his forged signatures on the checks.

We enlarged the forged checks to poster size for trial. Stoddart testified that the signatures were not his. These checks purchased most of the internal parts for the Blue Alien as well as the installation of the wireless system. The invoice for the wireless system was tampered with to hide that the system was installed in Sumrow's home. Although he would eventually make a weak claim that it could have been used for work purposes, Sumrow never showed any work he ever did from home with this computer.

We showed multiple trips for which Sumrow requested and received reimbursement that he never actually took. Several times,

Sumrow claimed he attended TDCAA or TDCJ-CJAD (Texas Department of Criminal Justice's Community Justice Assistance Division) board meetings, yet the meeting minutes did not reflect his attendance. In one instance, investigators recovered an email thread between a TDCAA staff member and a Rockwall DA's office employee where they discussed the fact Sumrow should have been at a meeting but was not. During the trial, we also brought evidence showing that Sumrow directed an employee to purchase airline tickets for his girlfriend that were ultimately paid for with hot check funds. Evidence admitted at trial included photographs of Sumrow and his girlfriend sitting on the plane and at a restaurant during one of the trips.

Eleven of the 58 computer parts that Sumrow had taken from his house and placed in the county barn were brought into court. Witnesses testified that many of the other items also belonged to the DA's office as well, and that historically, they found it hard to get equipment and electronics support at their office, yet Sumrow was constantly purchasing PC parts and electronics from Fry's.

The heart of the case came in through Chief David Goelden, using his testimony to tie the computer parts to the Fry's invoices and the hot check fund, describe how the investigation unfolded, and prove up the stolen computer parts in the PCs Sumrow built and sold for personal gain. Goelden's quiet, unassuming demeanor and unequivocal knowledge of the case's facts paid off in front of the jury.

The defense

The defense strategy was layered, intended as an explanation for everything. In sum, it was: 1) Ray Sumrow liked to use cash and kept poor records; 2) the DA had the sole and absolute discretion for how fee funds were spent, and his lack of accurate bookkeeping did not make him a criminal; and 3) the State could not prove that the electronics and PC components they recovered had been purchased by Sumrow with fee funds. To put on their defense, they flooded the courtroom with computer parts that were close in description to, or identical models of, those charged in the indictment.

It was clear their strategy was to confuse and exhaust Goelden during cross-examination and hope that he would agree that the parts they brought to court *could* be the actual items Sumrow was charged with stealing. Unfortunately for them, we had realized from the beginning that to get one item wrong in our cataloguing could be a disaster, so we had spent months cross-referencing invoices to parts and fee fund checks, then listing the parts by serial number and description. Our endless hours and diligence in organizing all of these elements paid dividends on cross.

As one example, defense counsel presented Chief Goelden with a photo of a floppy drive recovered from a computer Sumrow had built and sold. Goelden identified the photo and testified that Sumrow had purchased that drive with fee funds. Goelden was then shown a second photo, which the defense represented as the back of this particular floppy drive. This second photo showed the item had been manufactured in 2002, after the sale of the computer in question, which certainly made it look like we had made a mistake in our cataloguing. But, because we had bates-stamped all the documents (including photos), we quickly determined that the defense had presented a picture of the floppy drive that had been recovered, then presented a photograph of a *different* floppy drive. Pointing this out to the jury on re-direct was a blow to the defense's credibility.

The State rested in a strong position. The defense then put on some character witnesses and called the defendant to the stand. Sumrow offered excuses for each and every allegation. Trying to explain away the travel fraud, he claimed that if he accepted "reimbursement" for a trip that he didn't take, then he would just "make it up next time," and not turn in a voucher for the next trip. Sumrow also testified that he thought he had his first assistant's permission to forge his signature; that he planned to use the Blue Alien as a backup server for his office; and that he obliterated the "in home" notation on the invoice for Wi-Fi installation because he feared that it would be unclear to the store that this item should not be taxed as it was for government use. He also claimed that all of the parts he bought were in computers in the DA's office or just unaccounted for and that anything he brought from home was at his house only so he could fix it or store it there. Apparently, to the jury, he just didn't sound believable.

We spent several hours crossing Sumrow. He and the defense pound-

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ed the jury throughout the trial with the theory that the elected DA had the sole and absolute discretion to purchase whatever he wanted for the office as long as it wasn't for his own enrichment. One of his character witnesses testified that Sumrow was so careful with county money that he had repaired an office car himself rather than take it to a mechanic. Sumrow, wishing the jury to recognize his dedicated stewardship of public funds, was only too happy to agree on cross-examination that he did this to save Rockwall County money. However, once he committed to this story, we presented Sumrow with checks showing that he paid himself as the mechanic out of the fee fund account. What Sumrow stated as something virtuous became another misuse of discretionary funds.

After both sides closed, the jury deliberated into the following day and then came back after a weekend off. Interviews with them after the trial indicate that one juror hung them up on the two forgeries and tampering case. Eleven of them had decided to convict quickly, so they spent the next day arguing with the lone holdout, ultimately convicting Sumrow on the theft case and hanging on the two forgeries and tampering.

Apparently the judge was convinced as well. After hearing some additional evidence at punishment, he denied the defense's request for probation and sentenced Sumrow to four years in the penitentiary. Judge Nelms' comments before pronouncing the sentence were brief, eloquent, and memorable.[5] Sumrow was then taken into custody and transported to the Rockwall County jail where he bonded out.

Our next job was to remove Sumrow from office. The law seemed straightforward: According to Local Government Code §87.031, when a county officer is convicted by a jury for any felony, the conviction operates as an immediate removal from office, and the court shall include an order removing the officer in the judgment. If the officer appeals the judgment, the appeal supersedes the removal order unless the court finds that it is in the public interest to suspend the officer pending the appeal. Therefore, we asked Judge Nelms to enter an order of removal in the judgment and to make an affirmative finding that it was in the public interest to suspend Sumrow from office, pending appeal.

The defense countered with a curious argument. They claimed that a criminal district attorney is a state officer, not a county officer, and therefore not subject to removal under §87.031. Judge Nelms called a recess until the next day to give each side an opportunity to find some law on the issue. Unfortunately (or fortunately!), there is very little caselaw out there that deals specifically with removing a DA from office following a felony conviction, but we did find some in support of our argument that a DA is in fact a county officer for some purposes.[6] After briefing the issue and making a quick argument, Judge Nelms entered the order of removal and suspended Sumrow pending appeal.

The second trial

The apportionment trial was set to begin two months after the first trial. We approached Sumrow's counsel with a plea offer of four years in prison to run concurrently with the first four-year sentence. He would also need to resign and waive his appeal. Sumrow declined our offer.

Only 10 days before trial, the defense filed a motion to recuse Judge Nelms. We believed it was an attempt to delay the trial and filed our response, requesting an expedited hearing. The motion was eventually denied.

In this second case we called ex-treasurer Sheree Jones to detail the discovery of the apportionment money in Sumrow's account. Because she had embezzled money, been charged with abuse of official capacity, and been prosecuted by Sumrow, we believed it was risky for the defense to attack her. In spite of her bad deeds, she could have been anyone's grandmother. She was believable and extremely remorseful for what she had done. She violated the public's trust and was so ashamed of it, it was a perfect contradiction to the district attorney who would never admit he was wrong and had an excuse for everything. Jones was very sympathetic. We also put on witnesses from the comptroller's office who explained how apportionment funds were transmitted and who testified they had never spoken to Ray Sumrow about direct deposits into his account—contrary to what he told Special Agent Chambers.

The key witness at the second trial was again Gil Kerry, the FBI financial analyst. Sumrow's defense

was that he didn't need the money and didn't know the funds had been deposited into this personal bank account. Kerry's testimony was devastating, as it showed that Sumrow not only knew when the money was deposited but also that his spending habits increased dramatically after the deposits. Kerry used a series of PowerPoint slides and posterboard trial exhibits to explain Sumrow's financial condition and activity. As he put it: "In my business, numbers tell a story, and the numbers in this case tell me that Sumrow knew the apportionment money was in his account."

In spite of Kerry's testimony, the defense still ran with the "I didn't know the money was in my account" defense. They also claimed that if Sumrow were guilty of abuse of official capacity, it was only of a misdemeanor amount, based on the theory that the "value of the use of the thing used" was the amount of interest that should have been charged for the time period that Sumrow possessed these funds. (The defendant elected not to testify this time around.)

Sumrow had three problems with his defense. First, the $68,000 was not a loan; the State of Texas doesn't make loans to publicly elected officials. Second, Sumrow actually spent the money—it wasn't just sitting in his account. So the "value of the use of the thing used" was the portion of the money he spent, and that was a felony amount. Third, because we had decided to focus on the second-degree felony theft by public servant count, the "value of the use of the thing used" was not even an issue. The defense was fighting the wrong battle.

The court's charge allowed only a conviction of either theft by public servant or abuse of official capacity. We asked for a verdict on the theft charge, and the jury agreed with us. For punishment we put on an abbreviated version of our first trial and argued for 15 years' confinement. The jury agreed on that too after only a couple hours' deliberation. The judge again put Ray Sumrow in custody, but this time he could not bond out during his pending appeal because the prison sentence exceeded 10 years. Once again, Sumrow was removed from office and suspended in the event of an appeal. He sat in the Rockwall County jail for a month before he tendered his resignation.

Conclusion

We began this endeavor with allegations of misappropriated state funds and saw the case widen into a major investigation resulting in a 15-year prison sentence for a sitting criminal district attorney. Our successful prosecution began with Collin County Criminal District Attorney John Roach understanding the commitment and resources necessary to conduct a proper corruption prosecution. We also had the right people with the right abilities who could devote the time required to get the job done. The collaboration between the Rockwall County Sheriff's Office, FBI, Texas Rangers, Travis County District Attorney's Office, and Collin County Criminal District Attorney's Office was truly a team effort. No one on the team was too proud to do the little things necessary to secure a successful outcome. Preparation, preparation, preparation! That was the key.

As Gil Kerry said, "Numbers tell a story," and in these cases, the numbers said, "Guilty."

Endnotes

1 Every district attorney's office is entitled to $34,350 dollars a year from the state to reimburse certain office expenses. To receive the funds, the elected DA submits a voucher detailing the expenses, and the state comptroller judiciary section either mails a check or direct-deposits those funds into the office bank account.

2 Bates-stamping is a method that numbers each piece in a certain order so all parties can ensure that every document is accounted for.

3 Editor's note: When news got out that Sumrow had a Blue Alien, it made a ripple in the gaming world. Go to www.penny-arcade.com/comic/2008/03/12/ to see a cartoon about the case.

4 §31.03(c)(1) of the Penal Code states that "evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty."

5 "I don't believe that anyone can have a serious doubt that faith in public officials may be at an all-time low in our country. You can hardly pick up a newspaper these days that you don't read about some disgraced public official. It's very sad. A public official, like Caesar's wife, must be above suspicion.

"Certainly, a great deal of suspicion hung over your tenure in office, Mr. Sumrow. You're held … to a much higher standard. I expect over your 22 years as district attorney, you have sent people to prison … for less than the charges against you in this particular case.

"The purposes of the penal laws of our state … [are] to punish the offender, to deter others from committing similar crime,s and for rehabilitation. Mr. Sumrow, in spite of the crime that has been proven beyond a reasonable doubt against you, I do not think that you are a bad person, but I have learned in 45 years of criminal justice that sometimes good people do bad things. I believe that you have done some bad things.

"The evidence that we have heard over these past three weeks has suggested that to me, you were less than candid in your testimony. That

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Note about the Texas Forensic Science Commission

The Texas Forensic Science Commission was created by House Bill 1068 (passed during the 2005 Legislative Session); its purpose is to investigate complaints that allege professional negligence or misconduct by a laboratory, facility, or entity that has been accredited by the director of the Texas Department of Public Safety that would substantially affect the integrity of the results of a forensic analysis.

The commission has a duty to report its findings and can order remedial actions to correct deficiencies in forensic analysis. Reporting forms are on the commission's website, www.fsc.state.tx.us. You may contact Leigh Tomlin, the commission coordinator, at 888/296-4232 with questions.

Federal student loan repayment assistance for prosecutors

The John R. Justice Prosecutors and Defenders Incentive Act was signed into law by President George W. Bush August 14 as part of the Higher Education Act reauthorization package. The loan repayment assistance for prosecutors appears in §§951 and 952 of H.R. 4137, the College Opportunity and Access Act. The complete text of that bill is available at http://thomas.loc.gov (enter bill number HR 4137 in the search box to view the final enrolled version online).

Despite this good news, note that H.R 4137 merely authorizes the creation of a repayment assistance program. Before such a program becomes operational, Congress must appropriate funds and the U.S. Attorney General must promulgate regulations to govern their disbursement. Unfortunately, both contingencies can take years; in fact, Congress is under no obligation to ever fund the program. In other words, passing this legislation is only the first step in what may be a very long journey, so don't go out and buy yourself a shiny new pickup just yet.

TDCAA will keep you informed of developments as they occur. Call with further questions.

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means, basically, perjury. I believe that that evidence also showed that you had indirectly or obliquely attempted to get some of your employees to perjure themselves. The evidence suggested that you tampered with evidence during the trial, not to where it was at a level that it would be proven beyond a reasonable doubt, but it certainly raised a suspicion.

"And there has not been any evidence of remorse in the case. You have blamed your troubles on others, basically slandered the sheriff and some of his employees. I don't know whether you have enemies in the sheriff's office; possibly, maybe even probably you do, but they were in no way responsible for your acts. And being a whistleblower and raising the hue and cry so that an investigation will be done is certainly one of the duties of a sheriff.

"I don't really have any doubt at all that you would be as good a probationer as any court ever had. I don't think you're any danger to the community. But that's not to say that you're deserving of it. The court is not going to place you on probation.…

"I do not do this with any great feeling of joy or satisfaction. It's kind of like watching somebody injured in an automobile accident or something. It's what you have done to yourself. And I have to say I feel sympathy for you because I know that although you did wrong, I think you were just swept up perhaps in personal problems. But that in no way excuses it.

"I think that your conviction, your sentence here, will I hope send a message to others who hold offices such as you, not to be tempted to feed themselves from the public trough.…"

6 *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985), *cert. denied sub nom. Dallas County v. Crane*, 474 U.S. 1020, 106 S.Ct. 570, 88 L.Ed.2d 555 (holding that a Texas district attorney is properly viewed as a county official); *In re Guerra*, 235 S.W.3d 392, 405 (Tex.App.—Corpus Christi 2007, orig. proceeding) ("a district judge may remove a county officer [e.g., a district attorney] from office for … official misconduct").

Carol Vance honored

The Texas Bar Foundation awarded its prestigious Fifty Year Outstanding Lawyer Award to Carol Vance along with three others for the year 2008. Vance is former District Attorney of Harris County and former president of the Texas District and County Attorneys Association and the National District Attorneys Association. He is a retired senior partner of Bracewell and Giuliani and a Fellow of the American College of Trial Lawyers.

Vance was a founder of the National College of District Attorneys and helped write the 1974 Penal Code on the State Bar and the TDCAA committee. He chaired the Texas Department of Criminal Justice, where he, along with Chuck Colson and Governor George W. Bush, helped start the first Christian Prison in the U.S. That prison, the Carol S. Vance Unit in Sugarland, is named after him and enjoys an incredibly low 8-percent recidivism rate.

Though Vance demurs, saying he does not deserve the award, he notes that "it is great to see DAs, retired DAs (and assistants and ex-assistants) recognized for either professional or community service." Congratulations, Carol, on a much-deserved honor!

Boating while intoxicated

An intoxicated driver of any type of motor vehicle—including a boat or jet ski—puts the public in danger. Boating While Intoxicated might not be the sexiest (or most common) case, but with the additional factors of a fluid surface and the danger of drowning mixed in, it deserves attention.

By Calvin Grogan and Bill Harris
Assistant County and District Attorneys in Lamar County

On June 10, 2007, Robert James Wilson was arrested in Lamar County for BWI while operating a jet ski and was indicted the same month. His criminal history extended back to the mid-1970s with convictions for attempted sexual assault and assorted alcohol-related offenses. Multiple misdemeanor DWI convictions in the 1980s finally led to his first felony DWI in Dallas County in 1991. Between 1991 and 2001, he was convicted of four alcohol-related felonies including a TDCJ sentence for BWI in 2001.

Because of his numerous felony convictions, Wilson was enhanced as a habitual offender. We also alleged that the manner and means in which he operated the jet ski made it a deadly weapon. Prior to trial we offered a 25-year sentence (which he declined). Based on his refusal to accept the minimum punishment (as enhanced), we set the case for trial.

From the beginning we knew the only contested issue was going to be intoxication—and our evidence on that issue was not as strong as we would have liked. We had an admission of consumption, failed HGN, failed SFSTs, and very questionable behavior, but Wilson refused to give a breath sample at the time of arrest. And to stack it further in his favor, he behaved normally on the intoxilyzer room video, answered questions appropriately and without hesitation, and did not exhibit any of the classic signs of intoxication.

We recognized jury selection was going to be crucial in this case. We did a standard voir dire on intoxication, asking whether any of the panelists would require scientific evidence of intoxication. We identified a handful of jurors who told us they would need a breath or blood test to convict, and we subsequently struck them for cause. We also questioned the jury panel on the concept of "masking"—that is, that experienced drinkers can hide their intoxication but still be legally intoxicated—which they readily recognized and accepted. We felt masking was going to be an important issue in light of the defendant's performance on the intoxilyzer tape.

We outlined the differences between DWI and BWI and explained how such a crime, ordinarily a misdemeanor, could be enhanced to a felony with prior convictions. One of the potential jurors was a young man on misdemeanor DWI probation. He answered many of our questions appropriately. He readily admitted his guilt, saying he made a "mistake" and was doing well on probation. Considering the masking and lack of scientific evidence issues, we felt leaving him on the jury might be a good thing as he could impart his own experience with drinking to his fellow jurors.

The indictment was read, including the jurisdictional enhancement paragraphs, and the jury heard Wilson had prior felony DWI convictions from Dallas and Denton Counties. We had obtained a written stipulation from the defendant that exactly paralleled our jurisdictional allegations. Had he refused to so stipulate, we were prepared with a TDCJ pen pack reflecting these convictions. We had to rely on these felony convictions because we were unable to get copies of the ancient misdemeanor judgments and sentences with sufficient identifying information (i.e., fingerprints) linking them to Wilson.

First contact with the defendant

When the trial commenced, the State's first witness was Texas Parks and Wildlife game warden Bryan Callahan. Callahan testified he ini-

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tially observed Wilson operating his jet ski in an erratic manner, weaving in and out of buoys designating a no-wake zone. At Pat Mayse Lake north of Paris, the no-wake zone is located immediately adjacent to a roped off swimming area for families and children. This factor would later become important on the deadly weapon special issue.

The first thing Callahan noticed upon making contact with Wilson was that he smelled strongly of alcohol. During the initial encounter, Wilson admitted to drinking four beers over a six-hour span. Callahan conducted a battery of non-standardized field sobriety tests on the water. Game wardens are instructed to perform these simple tests to determine whether there is sufficient evidence to conduct a further investigation utilizing the familiar standard field sobriety tests (SFSTs). These "on the water" tests include reciting the alphabet and two divided attention tests (finger count and hand-palm touches). Wilson passed the alphabet test but failed the divided attention tests. (Unfortunately, game wardens on Pat Mayse Lake are not equipped with video equipment in their boats so none of this testing was shown to the jury.) As a result, Callahan instructed Wilson to follow him to shore so further field sobriety testing could be administered.

Instead of complying, Wilson opted to open the throttle on his jet ski and raced a quarter mile across the lake toward a densely wooded shoreline. After reaching speeds in excess of 40 miles an hour, Wilson beached his jet ski and fled into the woods. After a brief foot chase, Callahan captured Wilson and placed him in handcuffs. Callahan told the jury Wilson was restrained due to safety concerns (Callahan was alone in a forest with a man who just attempted to elude him).

The game warden then escorted Wilson to a nearby level parking lot to finish his intoxication investigation. (Callahan testified he had not decided if Wilson was intoxicated and, more importantly, was therefore not subject to custodial interrogation.) For obvious reasons, it is impractical to administer SFSTs on the water. Furthermore, game wardens are instructed to allow 15 minutes of observation before administering SFSTs on land after removing a subject from the water. This time allows the suspect to regain his equilibrium.

Callahan testified that Wilson failed all of the SFSTs. More specifically, he exhibited four of eight clues on the walk-and-turn test and two of four clues on the one-leg stand test. While these might have meant he technically failed the tests, it was not the most compelling evidence of intoxication.

Instead of stressing the number of clues present on each test, we focused Callahan's questioning on the importance of administering divided attention tests to intoxication suspects. Callahan told the jury these tests were a very helpful tool in his investigations and that they were a reliable predictor of whether someone was capable of operating a watercraft. Because one of the SFST clues observed was losing balance, Callahan emphasized how important balance is when operating a jet ski. He also told the jury that, based on his personal experience, alcohol causes slower reaction times and increases risky behavior.

Fortunately (and to our great surprise), game wardens are trained and certified in HGN administration. According to Callahan, Wilson exhibited four of six clues on the HGN test. It was the only scientific evidence we could present and, notwithstanding their answers to the contrary, we knew jurors wanted objective scientific evidence on the intoxication issue. We had to make sure Callahan could make a cogent, persuasive HGN presentation.

In preparing for trial we learned Callahan had never testified in a criminal trial despite being a game warden for more than 10 years. With this in mind, we set aside an afternoon to prepare him. He was very interested and cooperative in developing his HGN testimony. We spent a few hours going over the testimony in detail and making sure he had done the test correctly, finding out what clues he was looking for, and ascertaining he understood the basics of HGN testimony. Callahan did an outstanding job on the stand and no doubt the jury found his HGN testimony persuasive.

According to Callahan, it was at this point of the investigation that Wilson became belligerent and used profanity toward him and another game warden, Darla Barr, who had arrived to assist. Callahan told the jury this behavior was an additional indicator of intoxication. Callahan said he did not believe Wilson had consumed only four beers that day and that in his opinion Wilson had lost the normal use of his physical and mental faculties and was intoxi-

cated. Warden Barr also testified Wilson was intoxicated based on her observation over a 30- to 40-minute period. This testimony put defense counsel on the horns of a dilemma, as it was Barr who had previously arrested Wilson for BWI in 2001 and had stopped him many other times for BWI over the years. Her previous encounters with the defendant were admissible after we asked Wilson on cross why he had used foul language toward Barr, and he replied that it was because of their "past run-ins." That response opened the door for us to ask about those past run-ins. Defense counsel's cross examination of Barr was minimal, and he never challenged her opinion of his client's intoxication.

Cross-examination and defense claims

On cross-examination of Callahan, the defendant's speed on the jet ski became a contested issue. Counsel repeatedly asked if a lesser horsepower (hp) personal watercraft was capable of reaching speeds in excess of 40 mph. He phrased his questions on the horsepower issue to insinuate it wasn't an offense to operate a personal watercraft of less than 50 hp while intoxicated, even asking Callahan point-blank if that were true. We strenuously objected to this line of questioning. We were initially a bit confused about this horsepower issue, but over a break we determined that, pursuant to §724.002 of the Transportation Code, a person refusing to provide a breath specimen is not subject to losing his driver's license if operating a personal watercraft equipped with a rated horsepower of less than 50 hp. It is similar to the 180-day driver's license subspension for refusing to submit a breath specimen when a person is arrested for DWI, except this consequence applies to personal watercraft and BWI. It was a red herring in the midst of this trial because it is an administrative penalty, not a criminal one.

Defense counsel introduced a copy of the jet ski title listing the horsepower at 26.2, which, according to Wilson's attorney, meant he couldn't be guilty of BWI. We felt obliged to call a rebuttal witness to explain how a personal watercraft's horsepower is rated. According to our expert, there are two ways to rate horsepower: at the motor or at the pump. The horsepower is always lower "at the pump" because the personal watercraft has to channel water through its intake before it comes out the rear, which is where horsepower is measured "at the pump."

Our expert, Shane Kienast, who happened to have done repair work on Wilson's particular jet ski, told the jury it was actually capable of 85 hp "at the motor," which meant it could reach speeds of 50 mph on open water. We reminded the jury in closing argument that even though this issue was irrelevant, we proved the horsepower on this personal watercraft was greater than 50 hp.

The intoxilyzer room

Normally, a trip to the intoxilyzer room is not time-consuming. However, Pat Mayse Lake is about 20 miles from the intoxilyzer room at the Lamar County Sheriff's Office near downtown Paris. The time between Callahan's initial encounter with Wilson and their arrival at the sheriff's office was more than an hour. Wilson looked normal on the intoxilyzer room video, having had over an hour to sober up. Defense counsel used the video to portray his client as someone who had not lost the normal use of his mental and physical faculties, as he was standing upright and asking intelligent questions.

We called DPS Trooper Greg Wilson (no relation to the defendant) to testify. Trooper Wilson, a certified intoxilyzer operator, had met the defendant and Callahan at the jail to assist with the investigation. Trooper Wilson testified about the physical clues of intoxication he observed that night in the intoxilyzer room (odor of alcohol and glassy eyes), but more importantly he described in detail the masking principle to the jury. Wilson explained that many times experienced drinkers can appear normal on video, especially when they have time to sober up. Trooper Wilson frequently testifies in DWI trials in Lamar County and is a very personable witness who quickly builds a positive rapport with juries.

Ultimately, defendant Wilson did not provide a breath specimen and refused to perform additional SFSTs on camera. Just as in DWI cases, there is a mandatory statutory warning that must be read to BWI suspects before asking for a breath specimen. We introduced Wilson's DIC-24 form into evidence. We used both refusals in closing argument to remind the jury what Wilson was hiding from them and that his refusals could be used as evidence of guilt.

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Verdict and punishment

During closing arguments the jury was reminded Wilson operated his jet ski erratically near small children swimming in the lake. We reminded the jury of Callahan's testimony: that it was difficult to stop a personal watercraft because there are no brakes and that a driver's reaction time needed to be sharp. Finally, we argued that a subject who cannot maintain his balance was very likely to fall off the personal watercraft at some point with no ability to prevent it from going near the children. The jury deliberated for just eight minutes before returning a guilty verdict with a deadly weapon finding.

Prior to trial, Wilson elected to have the judge assess his punishment in the event of conviction. He pled true to each of the punishment enhancement paragraphs and did not object to several other judgments and sentences reflecting drug and weapons convictions. Some of the jurors who remained for the sentencing phase were shocked to hear his criminal record. They seemed to be comforted by this information after their quick verdict—and comfortable (as we were) with District Judge Scott McDowell's sentence: 35 years. ✤

Editor's note: Shortly after his conviction and sentencing, Robert Wilson passed away after hanging himself in his jail cell.

Move your county's justice system along more efficiently

How, you ask? By implementing a direct-filing system. Williamson County did—with great success. Here's a blueprint for doing the same in your county.

By Jana McCown
First Assistant District Attorney in Williamson County

Williamson County is a mixed rural-urban county at the edge of a major metropolitan area (Austin) and at one time was one of the fastest growing counties in Texas, if not in the nation. Like many other Texas counties, growth was adversely affecting our criminal dockets and caseloads. With no end in sight for the projected population increase, in mid-2004 the Williamson County District Attorney's Office began planning to make major changes to the way cases were filed with the district clerk's office and distributed to the district courts.

Our DA, John Bradley, and I had many discussions about making our office more efficient and, at the same time, evening out the ebb and flow of cases into the three district courts. We decided that it was time to implement a direct-file system. We started talking about this shift with the judges and district clerk long before we were ready to implement any change. The timing was right because the judges were feeling the increased burden too.

Having spent our early years prosecuting in Harris County, we both knew the benefits of having a file opened in the clerk's office as soon as a case arrived. Getting the defendant into court before indictment is another key component. We also knew there were gaps in the system that allowed cases to age without activity at certain stages of the process. We began our quest for a system that would work in a county with a population of over 300,000 people and approximately 2,000 to 2,200 new felony cases a year. I believe, however, that many of the steps we took would work no matter your jurisdiction or county size; the Williamson County Attorney's Office, for instance, recently initiated a direct-file system. Any prosecutor's office could implement such a system and mold it to fit its practices.

How charges are filed

When a law enforcement agency decides to file a felony criminal case, the officer involved can go to any magistrate in Williamson County to present a complaint and affidavit to support issuance of an arrest warrant. This system of filing charges is decentralized and not supervised by any one agency or office. Having more than 15 different law enforce-

ment agencies that might file a felony case makes it difficult for a single prosecutor to monitor the filings and make sure that we find out about all cases in a timely fashion.

Many counties across the state have similar filing issues, especially multi-county jurisdictions. The first potential problem is caused by this decentralized system of filing, because the prosecutor's office will not know that a charge is pending unless and until someone, either the police or the magistrate, sends paperwork to the prosecutor's office. Years ago in Williamson County, the law enforcement agency might even wait until an arrest was made before forwarding that paperwork, and occasionally (not too often) the statute of limitations ran because no indictment was sought.

We have not changed the basic method by which charges are filed, although future plans to make the process more centralized and accountable are in the "thinking about it" stage. It's been my experience that when making major changes, it is best to work in baby steps. We all know how tough it is to convince a judge, clerk, or any adult who has been doing something the same way for years to make changes. You have to be prepared for complaints and give folks time to adjust before they will accept that a new way is really better.

Changing the old ways

Previously, when a defendant was arrested for a felony offense, a case file was opened only in the DA's office. No file was created at the district clerk's office until an indictment was returned or an information filed. Without a file that contained the public record, there was no place to put the original complaint, affidavit, bail bond, or any pretrial motions that might arise before indictment (i.e., competency exams, motions to raise or reduce bail, etc.). Only after an indictment was returned would the district clerk open his file and assign a cause number and a district court coordinator schedule a court date for the defendant to appear. This meant that 90 to 120 days (or longer) might pass without any significant interaction between the prosecution and defense. While pre-indictment plea offers were made on many cases, it is much easier to negotiate when the attorneys and defendant are in the same place at the same time.

Cases were also assigned to a district court and distributed to a prosecutor based on when information about the crime was received by the district attorney's office. A file was then created and processed through intake and grand jury. All cases indicted during the grand jury term of a given court were assigned to that court and received a cause number. This system resulted in an influx of 220 to 280 cases into a single court during a three-month period, followed by approximately 40 to 50 additional cases over the next six months until the next grand jury term began. The prosecutors for that grand jury's court were burdened with all the new cases for that term. The court would have a heavy influx of cases for three months, followed by a very small trickle for the next six months. The size of the dockets varied greatly between courts depending on when the grand jury was meeting. Therefore, we wanted to even out the case assignment and workload.

The challenge

We acknowledged in advance to the different judges, coordinators, and clerks that changes to our filing system would, of course, involve a transition period while the various offices learned and adjusted to the new procedures. As soon as the district judges and clerk gave final approval, letters were written to the defense bar and bail bondsmen to inform them of the new procedures *before* implementation. Everyone had the opportunity to ask questions ahead of time and during the first year of our direct-file system. We had regular monthly meetings and invited our intake attorneys, district clerk's office, court coordinators, magistrate, and jail employees who were affected. At those meetings, we discussed how the system was working and whether adjustments were necessary. It became a collaborative effort to make it work smoothly. Luckily, it didn't take too long before most people realized that the new system was better.

The process

When a defendant is arrested and charged with a felony, the following steps occur:

1 Law enforcement agencies file the complaint and affidavit with the magistrate's office in the jail when the defendant is brought to the jail.

2 The DA's office reviews all felony arrests within 24 hours of filing, except for cases that are magistrated

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over the weekend or a holiday (those are reviewed on the next business day). The purpose is to review charging decisions as early as possible; it usually takes less than an hour each morning. In the beginning, we frequently had to call either the law enforcement agency or a justice of the peace or municipal court judge's office to obtain a copy of the complaint/PC affidavit, but we told law enforcement agencies about the changes and requested that officers leave that information at the jail with the suspect; eventually fewer and fewer calls had to be made.

3 If felony charges are accepted, the district clerk opens a file by assigning a randomly chosen cause number pursuant to the method designated by the district judges. Both the DA's office and the district clerk's office review available information *before* a random assignment occurs to ensure a case or community supervision is not already pending, which would direct the new case to a particular court. If emergency protective orders are issued or conditions of bond ordered, those can also be filed with the clerk.

4 At the same time the district clerk opens a file, the DA's office also opens its own file. Copies of the PC affidavit are brought to the DA's office and data entered in the computer, and we begin the process of gathering additional information (running a criminal history, requesting judgments, obtaining recordings, statements, and offense reports, etc.).

5 Initial court dates are scheduled by the district judges and provided to the magistrate in advance. When an arrest is made between certain designated dates, the first court date for that time period has been pre-determined so that the defendant may be informed.

6 After the court assignment is made and at the time of magistration, the magistrate can tell the defendant to which district court his case has been assigned and his first appearance date (ideally within two weeks of arrest). Prosecutors are instructed to make a pre-indictment offer at the earliest possible court setting. (It is especially easy to make a recommendation on state jail felonies at an early stage.) The pre-indictment offer may even be sweetened a little bit as incentive to plead the case early. Defendants are also admonished that if they make bond before their court date, they must still appear, and, if they are not indigent, they should retain an attorney to appear with them on that date. All of this information is on a written form that has been approved by the district judges.

7 The defendant appears at what are designated as "pre-indictment docket" settings.

8 If at any time a defendant desires to waive indictment and enter a plea, an information can be prepared and filed in the district clerk's file. At the pre-indictment court dates, every effort is made to have a proposed information already included in the file so that it can simply be signed and given to the clerk.

9 Once an indictment is returned, it is numbered and put in the same file originally opened at the time of arrest. No new cause number will be required unless multiple indictments are returned by the grand jury. More than one complaint may be filed together if it is likely that a single indictment will issue.

10 After the indictment, defendants continue to go to court on dates decided by the district court (according to the schedule already in use).

11 Where charges are referred to the DA's office for consideration by the grand jury or when the defendant has not been arrested, the district attorney's office conducts a preliminary review before files are opened in our and the district clerk's office.

12 When charges have been filed by law enforcement but no arrest has been made, the case will be filed after an assistant DA's review.

13 When no charges have been filed but an information has been forwarded to the district attorney's office for presentation to a grand jury, if appropriate, the case will be filed after review by an assistant prosecutor. This involves having the agency draft a complaint and obtain a warrant. The clerk then uses the original complaint to open a file and assign a cause number.

14 When a charge is referred without obtaining a warrant and it is a likely no-bill, it is presented to the grand jury without first filing a complaint or direct filing. If the defendant is indicted, the case can be assigned a cause number and court at that time based upon the filing of the indictment.

15 If at any time during the above process the defendant is arrested, the case shall immediately be handled as an arrest case as set out above.

Advantages to direct filing

Now that we've had this system in place for over two years, its advantages are clear. They include:

- a more evenly paced distribution of felony cases into the district courts;
- defendants may be jailed for shorter periods because they are not waiting for an indictment;
- the district courts acquire jurisdiction earlier for cases filed through the magistrate;
- earlier assignment of a cause number;
- cost savings due to earlier diversion to the county attorney's office, those cases that are declined, and a smaller jail population;
- a defendant begins appearing in court approximately 60 to 90 days earlier, thereby providing opportunity for earlier resolution of cases;
- the district clerk's file provides better access to filed complaints (which are public records);
- there is a place to file the original bail bonds; motions to revoke, raise, or otherwise change bonds; motions requesting mental health exams and orders; and writs of habeas corpus;
- mental health exams can be ordered earlier; and
- pleas can be negotiated and entered earlier.

The results

Effectively changing the filing system and improving efficiency required the cooperation of many elected officials. I'm happy to say that Williamson County rose to the challenge and welcomed changes that would improve the exchange of information and move felony criminal cases more quickly through the system. The Williamson County District Attorney's Office also modified our intake system to complement the changes and move the charging decision process earlier in the overall timeline.

It took abut 18 months from when we contemplated the change until the full implementation in January 2006. In hindsight that sounds like a long time, but we moved slowly to allow everyone to adjust and to give people time to anticipate the impact on their individual offices and budgets. Once we began, judges had to determine how to distribute the 300 or so cases that were already pending (filed and given cause numbers) in our office. After the initial large influx of cases, it took about six months before judges began to see their dockets even out. The random assignment instead of grouping by grand jury works extremely well in that respect.

In the first six months of that preliminary 18-month period, screening at the magistrate's office diverted a significant number of cases to other agencies, and charging decisions and corrections were made at an earlier stage than in the past. During the first six to 12 months of tracking the pre-indictment pleas, 20 to 25 percent of defendants resolved their cases with a pre-indictment plea. That number has continued to rise, and currently we consistently plead about a third of all cases before indictment. With the decrease in the number of cases that must be presented to a grand jury, we have fewer grand jury dates during a three-month term and fewer individual dates where grand jurors work late into the evening.

The defense bar has welcomed the change because it moves cases more quickly and the exchange of information occurs earlier. Even the bail bondsmen are happy because in most cases they can now find out the first court date by the time their defendant is released from jail. The jail population is also positively affected because of the earlier resolution of cases. All in all, it was a successful transformation and one that we believe can be just as successfully duplicated in other jurisdictions. ✤

TDCAA's upcoming seminar schedule

Annual Criminal & Civil Law Update, Sept. 17–19, at the San Luis Resort in Galveston. The host hotel, the San Luis Resort and Spa, is sold out, but rooms may become available if cancellations occur. Call 800/392-5937 to check availability. Additional hotel rooms are available at the Hilton Galveston (located at 5400 Seawall Blvd.), 409/744-5000 for reservations; the Holiday Inn on the Beach (located at 5002 Seawall Blvd.), 409/740-3581 for reservations; and the Hotel Galvez (located at 2024 Seawall Blvd.), 800/505-1947 for reservations.

Key Personnel Seminar, Nov. 5–7, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Elected Prosecutor Conference, Dec. 3–5, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Prosecutor Trial Skills Course, January 11–16, 2009, at the Doubletree North in Austin.

Investigator School, February 2–6, at the Omni Colonnade in San Antonio.

Civil Law Seminar, May 26–29, at the Westin Park Central in Dallas.

Prosecutor Trial Skills Course, July 12–17, at the Doubletree North in Austin.

Advanced Trial Skills Course, August (dates to be determined), at Baylor Law School.

Annual Criminal & Civil Law Update, September 23–25, at the Omni Bayfront and Marina in Corpus Christi.

Key Personnel Seminar, November 11–13, at the Southfork Hotel in Plano.

Elected Prosecutor Conference, December 2–4, at the Omni in Fort Worth. ✤

Court of Criminal Appeals update

Questions

1 Edward Busby abducted, robbed, and ultimately murdered a 78-year-old woman with his female accomplice, Kitty (no, I'm not making that up). The victim suffocated from the multiple layers of duct tape Busby had wrapped around her face.

Busby was arrested in Oklahoma for a traffic violation the next day while driving the victim's car. In his first story to the police, he and Kitty obtained the vehicle from a man named JD (first a reference to "Gunsmoke," and now "Scrubs"—this guy likes TV), and when they found a body in the trunk, they just disposed of it. Later, Busby admitted the offense, although he claimed only to be doing what Kitty told him to do. At one point during the interrogation, after Busby had given his second version of events, he admitted that he still hadn't told the police the whole story.

By David C. Newell
Assistant District Attorney in Harris County

During closing argument, the State detailed Busby different stories and highlighted his statement that he still hadn't told the police the whole story. The State wrapped up this summary by arguing to the jury that Busby still had not told the whole story. The State also repeatedly highlighted that Busby had not taken responsibility for his own conduct in his statements. Was this a comment on the defendant's failure to testify?

Yes _____ No _____

2 The State charged Tumar Williams in three separate indictments for delivery of a controlled substance; one contained a drug-free-zone provision. The State consolidated all three cases into a single jury trial. A jury convicted Williams in all three cases. The trial court ordered that the punishment on the drug-free-zone case run consecutively after the other two offenses. Can the trial court stack?

Yes____ No ____

3 Safety National Casualty Corp., a bail bond company, posted a $10,000 bond on behalf a defendant charged with felony theft. When the defendant failed to appear at his next court setting, the bondsman quickly located him and secured his appearance. The trial court forfeited the bond and placed the defendant in custody, although he later obtained a new bond. Safety National sought to recover the forfeited bond money based upon Article 22.13(a)(5) of the Code of Criminal Procedure, which permits a bondsman to seek recovery of the money for a limited time after the failure to appear if the criminal was later arrested and incarcerated.

Rather than award the bond money to the bondsman, the trial court awarded the State $5,000 plus court costs. The trial court also held that the rule allowing bail bond money to be refunded if the bond-jumper is re-arrested within 270 days (in felony cases) was unconstitutional under a separation of powers theory. The court of appeals affirmed, agreeing with the trial court that the provision had to be unconstitutional because it impacted the timing and finality of the trial court's judgments. Is Article 22.13(a)(5) constitutional?

Yes _____ No _____

4 Cody Oursbourn led police on a short car chase after they located him driving an Impala that had been reported stolen at gunpoint earlier that night. During the short foot chase that inevitably followed the car chase, Oursbourn fell and hit his head. Two days later he gave a statement to the police, though he was still injured and wearing a neck brace. The detective admitted telling Oursbourn that several witnesses had identified Oursbourn as the carjacker even though this was a lie.

The trial court had Oursbourn evaluated for competency, and the court-appointed expert opined that Oursbourn was incompetent to stand trial. When Oursbourn later became competent, he filed a motion to suppress his videotaped statement claiming that he did not completely understand or knowingly waive his rights. However, the court-appointed expert, Dr. Edward Friedman, also indicated that he believed Oursbourn was competent when he gave his videotaped confession. For her part, Oursbourn's mother testified that the defendant was bipolar and in his manic state on the day of the robbery and the day after. Oursbourn never requested a

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voluntariness instruction or objected to the lack of one. Should the trial court have instructed on the voluntariness of the confession *sua sponte*?

Yes _____ No _____

5 Perry Williams shot and killed Matthew Carter in the middle of a robbery in the middle of a crime spree. In fact, Williams participated in at least five robberies during this spree, two of which happened after he killed Carter. There was also evidence that Williams committed the capital murder to ingratiate himself into the Crips gang and that Williams was still associated with the Crips while he was incarcerated on the capital murder charges.

In contrast, Matthew Carter, the victim in this case, was, among other things, one of the top 10 students at the Baylor College of Medicine. He was on his way to meet his fiancée (a fellow medical student) to help her with a class project when he was kidnapped and later killed. His murder dramatically affected his entire school and even resulted in rescheduling the medical school exams.

Williams sought to waive the consideration of the mitigation special issue to avoid the introduction of this victim-related evidence. Can Williams waive the mitigation issue in a capital murder case?

Yes _____ No _____

6 Oscar De La Paz sexually assaulted his girlfriend's 7-year-old daughter. During his trial, the State introduced the child's medical records from a hospital in Sweetwater and the Hendrick Medical Center in Abilene. The Hendrick records contained notes from three employees describing how the girl had indicated how De La Paz had caused her physical injuries. The State did not call the child or the notes' authors. When the State sought to introduce the records, De La Paz objected based upon hearsay and *Crawford*. The State responded that the notes were admissible under the medical diagnosis exception to hearsay. The State never responded to De La Paz's Confrontation Clause challenge. Should the trial court have admitted the records?

Yes _____ No _____

7 A jury convicted Darlie Routier of capital murder for stabbing her 6-year-old son to death. The trial court sentenced her to death based upon the jury's answers to the special issues. Routier filed a motion for post-conviction DNA testing of certain items that contained multiple blood stains. During trial she had sought testing of those items generally, but not each individual stain. Routier had claimed at trial that a stranger had committed the murder, but the State countered her claim by presenting evidence that the crime scene had been staged to look like there had been an intruder.

In her post-conviction motion for DNA testing, Routier argued that new testing would bolster her claim that there had been an intruder and undermine the State's claim that the crime scene had been staged. The trial court denied the motion, finding that Routier had failed to establish by a preponderance of the evidence that a jury would not have convicted her if exculpatory test results from the biological materials had been presented. The trial court also found that DNA testing was available at the time, and Routier either tested the samples or could have and chose not to. Should the killer mom get another bite at the DNA apple?

Yes _____ No _____

8 In late 2005, an intoxicated Beth Landers got into a car wreck that dislocated a motorcycle driver's head from his spine. Landers filed a pretrial motion to disqualify the newly elected district attorney who had represented her in a felony intoxication assault that had been reduced to misdemeanor DWI two years earlier. Landers argued that her due process rights were violated because the district attorney used "confidential information" he had obtained from his previous representation of her. She pled guilty and went to the jury for punishment where her extensive criminal history was introduced. Landers testified in her defense that she pled guilty in an effort to take responsibility for her actions. She admitted to having a life-long problem with drugs and alcohol. She received a 99-year sentence.

At the evidentiary hearing on Lander's motion for new trial, the trial court examined the district attorney's case file from his previous representation of Landers. There were some notes relating to Landers' drug use, but the same information could be found in the offense report. The two cases (the 2002 case and the 2005 intoxication manslaughter

case) both involved driving and intoxication by alcohol and cocaine. Should the DA be disqualified?

Yes _____ No _____

9 Deputy Justin Royall responded to a domestic violence call involving Grady Warner. The dispatcher informed Royall that there was a "blue" warrant out for Warner for his parole violation. Deputy Royall told Warner he needed to talk with him, and Warner walked back to the patrol car with Royall. Deputy Royall backed Warner up against the patrol car and grabbed both of Warner's arms, telling him he was under arrest. When Royall reached to get his handcuffs he took one hand off of Warner. Warner broke free and ran. Does this action constitute escape?

Yes _____ No _____

10 The State charged Stephen Barbernell with driving while intoxicated. More specifically, the State alleged that Stephen Barbernell operated a motor vehicle "while intoxicated." The State did not include any language regarding Barbernell's loss of his mental or physical faculties or any particular blood or breath alcohol content. Is anything missing from the charging instrument?

Yes _____ No _____

Answers

1 No. The court held that the prosecutor's statements were not manifestly intended as a comment on the defendant's failure to testify, nor were they of such a character that the jury would necessarily and naturally take them as such. *Busby v. State*, 253 S.W.3d 661 (Tex. Crim. App. May 14, 2008)(7:2). Because the State referred to Busby's own statements made well before trial, arguing the lack of information from the defendant permissibly referred to those pretrial statements to police and not unanswered questions requiring a response at trial. As the court noted, "It was reasonable and proper for the prosecutor to comment on the shifting nature of [the] appellant's custodial statements that were admitted into evidence." (Note: Busby also complained that his statements to the police were inadmissible because he had not yet been appointed counsel. However, Busby's initial statements, after the Oklahoma traffic arrest, were obtained after he waived his rights and before any capital proceedings had been initiated at all. And the statements admitting to the offense after his arrival in Texas were taken at his own request with proper waivers of counsel.)

2 No. The Court of Criminal Appeals removed the stacking order. *Williams v. State*, 253 S.W.3d 673 (Tex. Crim. App. May 14, 2008)(8:1). §481.132(d) of the Health and Safety Code requires concurrent sentences for all offenses that arise out of the same "criminal episode" when the State prosecutes them in a single trial. §481.134(h) states that punishment for a drug-free-zone offense may not run concurrently with punishment for a conviction under *any other* criminal statute. (All of Williams' convictions were for offenses where the punishment was increased under §481.134(c).) Harmonizing the two sections, the court held that the cases for offenses listed under §481.134 were obviously not included in the §481.134(h) prohibition against concurrent sentences, especially as the definition of "criminal episode" in §481.132 includes multiple offenses under the same chapter. Thus, the court reformed the sentences to all run concurrently.

3 Yes, it is. The Court of Criminal Appeals reversed the court of appeals and upheld the constitutionality of Article 22.13(a)(5). *Safety National Casualty Corp. v. State*, ___ S.W.3d ___; 2008 WL 2481488 (Tex. Crim. App. May 14, 2008)(9:1:0). The Court of Criminal Appeals held that the legislated time limits (270 days to re-arrest in felony cases and 180 in misdemeanors) do not interfere with the judiciary. The time provisions have nothing to do with when a trial court may enter a final judgment; they set limits upon how long a bondsman can seek recovery of forfeited bond money. Thus, the provision did not violate the separation of powers provision of the Texas Constitution. (Judge Cochran wrote an eloquent paragraph to suggest that the legislature may want to change this statute to the extent that the business interests of bail bondsman conflict with the interests of the justice system.)

4 Yes. The trial court should've instructed the jury *sua sponte* generally on the issue of the voluntariness of Oursbourn's confession.

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In a unanimous opinion, the court held that a general voluntariness instruction is "the law applicable to the case" so the defendant doesn't have to request it so long as he's raised "the question." *Oursbourn v. State*, ____ S.W.3d ____; 2008 WL 2261744 (Tex. Crim. App. June 4, 2008)(9:0). The court first distinguished an article 38.22 waiver of rights analysis from a typical due process or *Miranda* analysis. Under the latter, the only concern is police overreaching. Under the former, the voluntariness instruction provision in §6 of Article 38.22 can also be seen as the legislature's attempt to save people from themselves by allowing inquiry into evidence of a defendant's psychological abnormality. So while evidence that a defendant was mentally retarded, intoxicated, or just young and stupid may not make a confession involuntary (and therefore inadmissible) under Article 38.22, it may be enough to get a voluntariness instruction in the jury charge.

The court then explained which types of instructions should be given and when. There are three types of instructions: 1) a general voluntariness instruction under Article 38.22, §6; 2) a general "warnings" instruction under Article 38.22, §7 for failure to adequately warn a defendant of his rights prior to the confession; and 3) a specific, fact-based instruction for violations of the State exclusionary rule set out in Article 38.23(a). A due process or *Miranda* violation claim may justify any or all of these types of instructions related to a confession's voluntariness. A Texas-specific claim merits only a general voluntariness instruction. It's the defendant's responsibility to delineate which type of involuntariness he's claiming, but if he fails to request an instruction, courts of appeals should examine the jury charge for egregious harm.

Finally, the court held that the failure to request a "general" voluntariness instruction does not waive error as it would if it were a defensive issue. Generally, statutes that specifically require jury instructions are "the law applicable to the case," and therefore, they do not require a request for inclusion in the charge. In contrast, a defense (spelled out in a statute, but without a specific statutory provision requiring an instruction) requires a request for inclusion because it depends upon a defendant's theory of the case and the evidence presented. Thus, Article 38.22 and 38.23 instructions must be included in the jury charge when the "question" or "evidence" raises either issue even though the defense doesn't request them. In this case, the general voluntariness question was raised but the issue of police coercion was not, so an Article 38.22 instruction was warranted but an Article 38.23 instruction was not. Consequently, the court remanded the case to the court of appeals to determine whether Oursbourn suffered egregious harm under *Almanza*. (Note: The court's decision in *Busby v. State* (see answer No. 1 in this article) that the defendant was not entitled to an instruction on the voluntariness of a confession, is distinguishable from this case. There, the defendant requested a specific voluntariness instruction under Article 38.23, but there was no affirmative factual dispute, so he wasn't entitled to the instruction.)

5 Yes, Williams should've been allowed to waive the mitigation issue, but the error was non-constitutional and harmless. *Williams v. State*, ___ S.W.3d ___; 2008 WL 2355932 (Tex. Crim. App. June 11, 2008)(6:1:1:1). According to the court, mitigation is a defensive issue because it has no burden of proof. There are no other instances where an element of the State's case has no burden of proof. Additionally, it is framed as a stand-alone punishment issue similar to sudden passion or mental retardation. Also, it is framed to aid the defendant with an affirmative answer. Ordinarily, a party that benefits from a "yes" answer to an issue is the party to whom the issue belongs. Moreover, the legislature placed it in a separate subsection of the statute instead of in the subsection where the State's issues are found. Finally, the Supreme Court mandated the inclusion of the mitigation special issue after *Penry v. Lynaugh* to fix a constitutional deficiency of the old Texas scheme to benefit defendants. Thus, the trial court erred in preventing Williams from waiving the mitigation special issue.

Judge Price concurred in the result but expressed the view that a defendant cannot waive the mitigation special issue. Judge Johnson authored an opinion that concurred in part and dissented in part. Johnson dissented because she, too, does not believe a defendant can waive the mitigation special issue; she would have fashioned a rule that the inclusion of a mitigation special issue does not make victim character evidence admissible—all evidence would be governed by Rules 403 and

404. Additionally, the waiver of the special issue would result in the inadmissibility of victim impact and victim character evidence. Judge Meyers authored a dissenting opinion where he regards the mitigation issue as belonging to the jury, not one party or the other—thus, it cannot be waived by the defendant.

6 No. You read that correctly. No, but not for the reason you probably think. The court ultimately held that the State, as the proponent of the medical records, had the burden to overcome De La Paz's Confrontation Clause objection. Because the State didn't respond, the State failed to establish that the notes were not testimonial, and the trial court improperly admitted them. *De La Paz v. State*, ___ S.W.3d ___; 2008 WL 2437648 (Tex. Crim. App. June 18, 2008)(6:1:2). And that's really the extent of the analysis.

However, the court was nice enough to point out that it is unresolved whether statements to a non-governmental employee could be testimonial for purposes of a Confrontation Clause analysis. Moreover, the court never explained how the State could have responded to establish that the statements were not testimonial. Be aware of the risk for this opinion to be read as holding that statements made for purposes of a medical diagnosis are testimonial where the child victim does not testify. The opinion doesn't hold that these records are testimonial, but rather that the State failed to carry its burden to prove that they *weren't* testimonial.

7 No. In evaluating the trial court's finding that Routier should've tested the samples before, the court found it necessary to construe the language "evidence containing biological material." *Routier v. State*, ___ S.W.3d ___; 2008 WL 2486417 (Tex. Crim. App. June 18, 2008) (7:2). Under Article 64.01(b), a defendant can request testing of evidence containing biological material if that evidence: a) wasn't subjected to DNA testing because DNA testing wasn't available, b) was not previously subjected to DNA testing because DNA testing was available but not technologically capable of providing probative results, c) was not previously subjected to DNA testing, through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing, or d) was previously subjected to DNA testing but can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results more accurate and probative than the previous test results.

The court indicated that the statute is designed to require defendants to avail themselves of whatever DNA testing is available at the time of trial. Then, consistent with this view of the legislative intent, the court held that "evidence containing biological material" must refer to individual samples of biological material even if taken from the same physical source. Holding otherwise would allow a defendant to obtain subsequent testing where only one portion of an object was initially tested so long as the technology had improved. Thus, the defendant must consider each possible stain on a given object at the time of trial and request testing of it at that time; otherwise, the defendant may be foreclosed from getting testing of those stains at a later time.

8 No. The court held that a defendant's due process rights are violated based upon an elected prosecutor's conflict of interest only when the defendant can show "actual prejudice." *Landers v. State*, ____ S.W.3d ____; 2008 WL 2437733 (Tex. Crim. App. June 18, 2008)(5:2:2). "Actual prejudice means either that the prosecuting attorney has previously and personally represented the defendant in a substantially related matter, or the prosecutor has obtained 'confidential information' by virtue of the representation and used it to the defendant's disadvantage." In this case, "it was certainly no secret that [Landers] had a drug and alcohol problem." The fact that she may have conveyed that information to the prosecutor during the prior representation did not turn the information into confidential information. Indeed, the court noted that Landers did not point to any piece of information that the prosecutor had learned during the previous representation that was not already in the public domain. While the court cautioned that discretion (being the better part of valor) favored voluntary disqualification, the court still held that Landers had failed to demonstrate that her due-process rights had been violated. (Note: The two-judge dissent argued that Landers' Fifth Amendment right against self-incrimination was violated because she was forced to testify

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to prevent this "obvious breach of ethics.")

9 No. The Court of Criminal Appeals held that a defendant does not commit escape unless he has first been successfully restrained. *Warner v. State*, ___ S.W.3d ___; 2008 WL 2596961 (Tex. Crim. App. July 2, 2008)(8:1). In reaching this decision, the court again rejected the State's argument that the term "arrest" should be interpreted to include any meaning "acceptable to common parlance" because, not surprisingly, "arrest" is a technical term. The court also rejected the State's request that the court apply the definition for arrest found in Article 15.22 of the Code of Criminal Procedure. The problem with that, the court noted, is that "arrest" is defined as being taken into custody in Article 15.22, and custody is defined as being under arrest. So, the court again relied upon its previous holding in *Medford v. State* to opine that "an 'arrest' is complete when a person's liberty of movement is successfully restricted or restrained, whether this is achieved by an officer's physical force or the suspect's submission to the officer's authority."

And if that's not clear enough, the court added that "an arrest is complete when a reasonable person would have understood the situation to constitute a restriction on the freedom of movement of the degree to which the law associates with formal arrest." (Note: *Medford* dealt with grabbing one arm, while this case dealt with grabbing both arms.)

10 No. In a unanimous opinion, the Court of Criminal Appeals reversed, holding that the State was not required to allege which definition of intoxication it intended to rely upon at trial. *State v. Barbernell*, ___ S.W.3d ___; 2008 WL 2596934 (Tex. Crim. App. 2008)(9:0). The court noted that it had required the State to allege the type of intoxicant in *Garcia v. State*, but that it had undercut that opinion somewhat by holding in *Gray v. State* that the type of intoxicant was not an element of the offense. Then, the court explained that it had held in *State v. Carter* that each definition of intoxication created two different DWI offenses, but that holding was incorrect. Based upon its recent holding in *Bagheri v. State*, the definitions of intoxication aren't elements of the offense either. Rather, they set out different ways of proving the same offense. Thus, simply alleging that a defendant drove "while intoxicated" provides a defendant with adequate notice of the charges against him. This holding also seems to apply to claims that the State failed to allege a particular type of intoxicant, though that was not the specific issue before the court. Moreover, this holding may seem to undermine support for the synergistic charge, and a case may come down in the future doing away with it. However, simply pleading DWI as "while intoxicated" should obviate the need for any such charge down the road, so the synergistic charge issue may simply become moot. ✤

U.S. Supreme Court update

Questions

1 Michael Watson needed a gun and, unfortunately for him, he told a government informant of his desire. When negotiating the price, no dollar amount was set, but the informant cleverly suggested a barter: Watson could pay with narcotics. After trading 24 doses of OxyContin for a .50 caliber semiautomatic pistol, Watson was arrested. Federal law sets a mandatory minimum sentence for defendants who use a firearm during and in relation to any drug trafficking crime. "Use" is undefined, and here, the defendant challenged whether receiving a gun in barter for narcotics constituted use. Is he correct?

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

Yes _____ No _____

2 In 1996, a Minnesota jury convicted Stephen Danforth of sexual conduct with a 6-year-old boy. Although the child did not testify, the jury heard a videotaped interview of his accusation. On appeal, Danforth argued that the tape's admission violated his constitutional confrontation rights. Applying existing caselaw, Danforth's claim lost.

After his conviction became final, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) announced a "new rule" for evaluating the reliability of testimonial statements in criminal cases and required confrontation as the constitutional indicium of reliability. Danforth filed a state postconviction writ seeking to rely upon *Crawford*, but the state court held that *Crawford* did not apply to Danforth's state habeas petition under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). The Minnesota Supreme Court held that, under *Teague*, state courts are not free to apply a broader retroactivity standard than that of *Teague* to Supreme Court decisions announcing new constitutional rules of criminal procedure. Are states prohibited from fashioning their own retroactivity standard?

Yes _____ No _____

3 Allen and Mary Snyder separated, but in August 1995, they discussed the possibility of reconciliation and agreed to meet with each other. Mary had a date with another man on the evening before the planned get-together with Allen. When Mary's date drove her home to her mother's house that evening, Allen was stealthily waiting for their return. He opened the man's car door and repeatedly stabbed Mary and her escort, killing him.

Allen Snyder was charged with capital murder. Voir dire started with a panel of 85 prospective jurors, more than 50 of whom initially claimed that sequestration would create extreme hardship for them. In each instance, the nature of the scheduling commitments was explored and a number of veniremen were dismissed. As jury selection progressed, 36 people survived challenges for cause; five were black. The Louisiana prosecutor eliminated each of these five with strikes, and an all-white jury sentenced Snyder, a black man, to death.

Of the five blacks peremptorily struck, one was a black college student named Jeffrey Brooks. The prosecution stated two reasons for striking Brooks during the *Batson* hearing: his nervousness and concern that the young man's student-teaching obligations might lead him to compromise his verdict in favor of a lesser-offense to end his jury service quickly. The trial court and successive Louisiana appellate courts overruled Snyder's *Batson* complaint. Was this correct?

Yes _____ No _____

4 Mexican national Jose Ernesto Medellin had lived in the United States since preschool. As a Houston gang member, he participated in the gang rape and brutal murder of two teenage girls who were simply walking home one day when they encountered Medellin and his fellow gang members. After raping the girls for over an hour, the gang discarded their bodies in a wooded area after Medellin personally strangled at least one of the girls with her own shoelace. Arrested a few days later, Medellin received *Miranda* warnings, waived his rights, and confessed in writing. Law enforcement officers did not inform him of his Vienna Convention right to notify the Mexican consulate of his detention.

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Later, a jury convicted Medellin of capital murder and imposed a death sentence. Following an unsuccessful direct appeal, Medellin raised his Vienna Convention claim in his first application for state postconviction relief. The Court of Criminal Appeals rejected the argument based upon Medellin's procedural default, as well as on the merits. Similarly, a federal court rejected the claim for Medellin's failure to show prejudice arising from the Vienna Convention violation. Pending Fifth Circuit appealability, the International Court of Justice (known as the World Court) handed down its *Avena* decision in a suit brought against the United States by Mexico. In *Avena*, the court ruled that 51 named Mexican nationals were entitled to review and reconsideration of their state-court convictions regardless of any forfeiture of their right to raise this claim; the ruling included Medellin. Nevertheless, the Fifth Circuit denied a certificate of appealability and concluded that the Vienna Convention did not confer individually enforceable rights. The Supreme Court granted certiorari and, in the meantime, President George W. Bush issued a Memorandum to the U.S. Attorney General stating that the United States would discharge its international obligations under the World Court's *Avena* decision.

Does the ICJ ruling, along with the Bush memo, constitute binding authority in federal and state courts?

Yes _____ No _____

5 After exhausting their state and federal appellate remedies, two double-homicide capital murderers sued three Kentucky officials seeking to have the State's lethal injection protocol declared unconstitutional under the Eighth Amendment. The two prisoners claimed that the risk of officials botching the protocol could lead to cruel punishment, although they conceded that the procedure was constitutional if properly performed. They sought to have a painless procedure guaranteed, suggesting that numerous aspects of the protocol created opportunities for error and, therefore, the entire procedure was "cruelly inhumane." The men's lawsuit led to a seven-day bench trial where the trial court heard 20 witnesses and many experts and ultimately upheld the protocol after finding there was minimal risk of improper administration of the lethal injection protocol. The Kentucky Supreme Court affirmed and held that a method of execution runs afoul of the Eighth Amendment only when it creates a "substantial risk" of wanton and unnecessary infliction of pain, torture, or lingering death.

Most states use the same three-drug combination in their lethal injection protocol. The first drug, sodium pentothal, is a fast-acting barbiturate sedative that induces a deep, coma-like unconsciousness when given in the amounts used for lethal injection. Next, pancuronium bromide is a paralytic agent that inhibits all muscular-skeletal movement and, by paralyzing the diaphragm, stops respiration. The third drug, potassium chloride, interferes with the electrical signals that stimulate heart contractions, inducing arrest. Proper administration of the first drug ensures that the prisoner does not experience pain associated with paralysis or cardiac arrest caused by the last two drugs.

The two Kentuckians proposed an alternative protocol that had never been adapted or tried in any other state. The Supreme Court granted certiorari to determine whether Kentucky's lethal injection protocol satisfied the Eighth Amendment. Does it pass constitutional muster?

Yes _____ No _____

6 The court's foundational self-representation case, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), held that the Sixth and Fourteenth Amendments include a constitutional right to proceed *without* counsel when a criminal defendant voluntarily and intelligently elects to do so. Forcing an attorney on an unwilling defendant is contrary to the basic right to defend oneself as one truly desires.

In this case, Ahmad Edwards tried to shoot a store security officer while Edwards stole a pair of shoes. Prosecuted for various crimes arising from this episode, Edwards urged the trial judge to allow him to represent himself. Yet Edwards had already twice been found incompetent to stand trial and regained competency after hospitalization. Edwards' first self-representation request came on the eve of trial and was coupled with a continuance so that he could proceed *pro se*. After the trial judge rejected the continuance, Edwards proceeded to trial with counsel and was convicted of two of the lesser charges. The two

more serious crimes resulted in mistrial. When the State sought retrial on the unresolved crimes, Edwards again requested self-representation. The trial judge noted Edwards' lengthy psychiatric history and that he still suffered schizophrenia. The court concluded that Edwards was competent to stand trial but not competent to defend himself. Appointed counsel represented Edwards at his second trial.

Did the trial judge's refusal to permit him to represent himself at retrial deprive him of his constitutional right of self-representation?

Yes _____ No _____

7 Central Texas officers found Walter Rothgery with a weapon. Relying on a mistaken background check showing Rothgery as a felon, they arrested him for felon firearm possession.

Texas Code of Criminal Procedure Article 15.17 mandates a hearing following a warrantless arrest; the proceeding combines a Fourth Amendment probable-cause determination with formally apprising an arrestee of the accusation and with setting bail. At Rothgery's hearing, the magistrate found PC existed based upon the arresting officer's affidavit. Rothgery requested counsel but was told that counsel appointment would delay setting bail, so he opted for quick release over representation. He promptly made the $5,000 bail but lacked additional funds for an attorney. Rothgery repeatedly sought appointment of counsel (including in writing), but his petitions went unheeded. Six months later, an indictment issued, and his re-arrest led to an increased bond which he could not make. After sitting in jail for three weeks, he received an appointed attorney and also a reduced bond. The attorney promptly assembled paperwork confirming Rothgery's nonfelonious past that led to the indictment's dismissal.

Rothgery brought a §1983 action against Gillespie County and argued that had he received counsel within a reasonable time after the article 15.17 hearing, he would not have been indicted, rearrested, or jailed for three weeks. Lower courts poured out the claim. When did Rothgery's Sixth Amendment right to counsel attach?

Yes _____ No _____

8 Louisiana's 1995 legislature defined capital aggravated rape as any anal, vaginal, or oral intercourse with a child under 12. Three years later, Patrick Kennedy raped his 8-year-old stepdaughter and received the death penalty for his crime. While all child-sexual assaults are repulsive, these facts reach a horrific pinnacle. After Kennedy called 911 to report that his stepdaughter had been raped by neighborhood boys, he told officers that he had run to aid the child after hearing her screams. He also claimed to have seen one of the boys escaping on his 10-speed bike. Authorities found the girl in a bloody blanket in her bedroom, bleeding profusely from her vaginal area. Kennedy said he had carried her in from the yard, washed her (which ultimately thwarted DNA sample collection), and deposited her on the bed.

Medical testimony revealed her vagina had been ripped and her cervix separated from the back of her vagina, leaving her rectum protruding into the vaginal structure. Her entire perineum was ripped from stem to stern. Inconsistencies in the stories and with the physical evidence caused officers to question Kennedy's story. Strong controverting evidence included the discovery of blood on the underside of the child's mattress, Kennedy's early-morning phone inquiry to a coworker to learn how to remove blood from white carpet because his daughter had "just become a young lady," and his call (over an hour before calling 911) to B & B Carpet Cleaning about urgently removing bloodstains. Relying also on the victim's testimony about waking up with Kennedy on top of her and his telling her to blame the neighborhood boys instead of him, a jury found Kennedy guilty of aggravated rape. During punishment they learned that he had abused his wife's goddaughter three times, including having sexual intercourse with her when she was 8. The jury returned a unanimous capital sentence.

In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861 (1977), the Supreme Court barred the use of the death penalty as punishment for the rape of an adult, albeit a 16-year-old woman, but it left open whether the Eighth Amendment permitted capital punishment for other nonhomicide crimes. Distinguishing *Coker*, the Louisiana Supreme Court upheld this capital sentence under an Eighth Amendment analysis because children are a class that requires special protection.

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Does the Eighth Amendment's "cruel and unusual punishment" prohibition bar the death penalty for the rape of a child where the crime did not result, nor was it intended to result, in the victim's death?

Yes _____ No _____

9 Dwayne Giles shot his ex-girlfriend, Brenda, near his grandmother's garage. No one witnessed the murder, but Giles' niece heard the commotion from inside and, after hearing six gunshots, she and the grandmother ran out to find Dwayne with his gun standing over bullet-ridden Brenda.

At trial, Giles claimed self-defense in spite of Brenda's unarmed body having entry wounds from behind. Giles claimed that Brenda had a vicious history and came that day to his grandma's, threatening him and the latest love of his life. Prosecutors sought to introduce statements Brenda had made to officers after a domestic-violence episode three weeks before her death. Crying, Brenda had told of Giles' physical and verbal threats, spawned by his belief that she was cheating on him. She described him punching and choking her, threatening to kill her, and wielding a knife.

California law authorizes the admission of hearsay statements describing the infliction or threat of physical injury without a declarant's availability if the statements are deemed trustworthy. Brenda's out-of-court assertions were admitted under this provision.

After Giles' murder conviction but during his appeal's pendency, the Supreme Court handed down *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). A California appellate court held that *Crawford* recognized the doctrine of forfeiture by wrongdoing and found that Giles forfeited his right to complain of the statements' admission because his intentional criminal act made Brenda unavailable. Is the forfeiture-by-wrongdoing doctrine valid under *Crawford*?

Yes _____ No _____

10 The District of Columbia generally prohibits handgun possession. The D.C. Code criminalizes carrying an unregistered firearm and prohibits the registration of handguns. A separate D.C. provision authorizes the police chief to issue a one-year handgun license. Also, residents must keep their lawfully owned firearms, such as registered long guns, unloaded and disembled or bound by a trigger locking device, unless kept in a place of business or used for lawful recreation.

Dick Heller, a special police officer who carried a handgun while on duty at his federal position, applied for a certificate to keep a handgun at his home, but his request was refused. His subsequent lawsuit sought to enjoin the city from enforcing its bar on handgun registration. Although his claim was dismissed at the district court level, his argument found purchase with the D.C. Court of Appeals, which held that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as the requirement that guns in the home be kept nonfunctional, violated that right. Was the D.C. court correct?

Yes _____ No _____

Answers

1 Yes. Receiving a firearm in a barter transaction does not fall within the term "use." *Watson v. United States*, 553 U.S. ___, 128 S.Ct. 579 (December 10, 2007) (Souter) (8:1:0). Justice Souter writes that the meaning of an undefined term must turn on the language as we normally speak it. A seller does not "use" a buyer's consideration. For instance, when a person purchases a cup of coffee at a courthouse cafeteria, the customer has not "used" the coffee, only the dollar bill. Receipt in trade cannot be transformed into use of a firearm.

Souter points out a statutory alternative for this drug trafficking mandatory minimum, albeit untested in appellate courts. The alternative requires evidence of firearm possession "in furtherance of" such trafficking crime without any underwhelming, policy-driven contest with the English language.

2 No. *Danforth v. Minnesota*, 553 U.S. ___, 128 S.Ct. 1029 (February 20, 2008) (Stevens) (7:2). *Teague*'s retroactivity rule involves "redressability" when it defines whether a violation that occurred prior to the new rule's announcement will be entitled to retroactive relief. *Teague* sets out a general rule of nonretroactivity for cases on collateral review unless the new rule falls within stated exceptions (substantive rules and watershed rules).

Recently, *Whorton v. Bockting*,

549 U.S. ___, 127 S.Ct. 1173 (2007) held that federal law does not *require* state courts to apply *Crawford* to cases that were already final. *Danforth* instead decides that neither *Teague*, nor any other federal rule of law, *prohibits* states from applying such "new rules" retroactively to state prisoners even if the Supreme Court itself has found the case nonretroactive under federal law. *Teague* itself was tailored to the unique context of federal habeas and had no bearing on whether states could provide broader relief in the comfort of their own postconviction backyards. While *Teague* fashioned its nonretroactivity rule to limit federal authority for overturning state convictions, it did not circumscribe a state court's ability to grant relief for violations of new constitutional law rules when reviewing its own state convictions. Accordingly, Danforth's case is remanded, leaving the Minnesota court free to decide whether to apply *Crawford* to this conviction.

Several unaddressed questions include whether states are required to apply "watershed" rules in state postconviction proceedings and whether Congress can alter the rules of retroactivity by statute.

3 No. *Snyder v. Louisian*a, 553 U.S. ___, 128 S.Ct. 1203 (March 19, 2008) (Alito) (7:2). While the record lacked any judicial factual determination about the nervousness excuse, the Supreme Court found that the second proffered reason for striking Brooks—the student-teaching obligation—failed even under the applicable highly deferential standard of review. Although Brooks initially worried about serving on this jury, after a clerk contacted his professor, who indicated that the student's brief absence would not undermine his spring graduation, Brooks expressed no further concern. In contrast, a white juror named Laws actually served, yet he offered strong reasons why being empaneled would cause him hardship. As a building contractor, Laws' jury service would delay two families from moving into their new homes; also, Laws' wife was recovering from a hysterectomy and, with no nearby family, he was responsible for shuttling his children to school. Nevertheless, the prosecutor quizzed Laws and obtained assurances from him that, if called to serve, he would do his best to make alternative arrangements for his responsibilities.

The seven-member majority doubted the Louisiana prosecutor's sincerity based upon the disparate treatment of the panel members. The prosecutor's worries that Brooks would favor a lesser verdict to shorten the trial (which made little sense, in and of itself) should have applied even more so to Laws' demanding work and family obligations. Also, because the prosecutor readily acknowledged and anticipated an extremely brief trial, serving would not have seriously interfered with Brooks' ability to complete his student teaching requirement.

Because neither excuse held water, the prosecutor's proffered strike was deemed suspicious and led the court to declare the explanation pretextual, giving rise to an inference of discriminatory intent and shifting the burden to the State. However, the court opined that the subtle question of causation could not be profitably explored 10 years later on remand. Therefore, the court held that the trial judge committed clear error in rejecting the claim regarding the prosecution's exercise of its racially-motivated peremptory challenge against juror Brooks, violating *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

Although not discussed in the Supreme Court's opinion, this trial became notorious because of the prosecutor's racially-charged comments that described the "O.J. Simpson case" as a black man getting away with murder.

4 No. *Medellin v. Texas*, 553 U.S. ___, 128 S.Ct. 1346 (March 25, 2008) (Roberts) (5:1:3). Neither the *Avena* decision, nor the President's Memorandum ordering the U.S. to discharge its international obligations under *Avena*, constitutes directly enforceable federal law that trumps state habeas procedures.

In this significant test of presidential authority seeking to enforce treaty obligations and to override contradictory state criminal procedural rules, presidential authority lost. The Chief Justice held that Bush could not unilaterally transform an international obligation into domestic law; he quoted founding father James Madison, saying that the President "in whom the whole executive power resides cannot of himself make a law." Thus, the Texas Court of Criminal Appeals' decision in *Medellin* was affirmed.

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5 Yes. In five separate opinions with three judges signing the plurality, three concurring opinions, and one dissenting opinion, the Supreme Court upheld Kentucky's lethal injection protocol under the Eighth Amendment. *Baze v. Rees*, 553 U.S. ___, 128 S.Ct. 1520 (April 16, 2008) (Roberts) (3:4:2).

Over time, states with capital punishment have altered their method of execution to more humane means. While hanging was the predominant form of mid-19th century execution, by 1888 New York became the first state to authorize electrocution after finding it more humane. Later, death by firing squad and lethal gas were used by a few other states. Originally developed by the University of Oklahoma College of Medicine, lethal injection has become the most prevalent form of imposing the death penalty in the United States.

Although the Supreme Court has never invalidated a state's chosen procedure for carrying out a death sentence under the Eighth Amendment, an 1879 opinion described English cases involving methods such as disemboweling, burning, quartering, or beheading as constitutionally violative because they deliberately inflicted pain for its own sake. So, while torture and lingering death are forbidden, cruelty, under the Eighth Amendment, implies something inhuman and barbarous, something more than the mere extinguishment of life.

After considering the extensive evidence and trial court fact-findings, the plurality concludes that these capital defendants did not carry their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol resulted in "sufficiently imminent dangers" constituting cruel and unusual punishment. The purportedly marginally safer one-drug, barbiturate-only alternative was not viewed as a sound option. Typically used by veterinarians, it did not significantly reduce a substantial risk of severe pain, nor was it feasible or readily subject to implementation because no other state used the method and no study supported its effectiveness.

The court cautions that no stay of execution should be granted on grounds similar to those asserted in this case unless the condemned prisoner establishes that the state's lethal injection protocol creates a demonstrated risk of severe pain when compared to known alternatives. The Kentucky protocol ensures that capital prisoners don't need to fear the reaper; instead, they'll be comfortably numb as they pass over the bridge of sighs.

6 No. The right to self-representation is not absolute, and the court's opinion recognized a mental-illness-related limitation on its scope. *Indiana v. Edwards*, 554 U.S. ___, 128 S.Ct. 2379 (June 19, 2008) (Breyer) (7:2). The Constitution does not forbid states from insisting upon representation by counsel for criminal defendants who suffer from severe mental illness to the point where they are not competent to conduct trials by themselves. Judges are entitled to take realistic account of a defendant's mental capacities to determine whether he is mentally competent to try his own case. No specific measure of a defendant's ability to conduct a trial was adopted.

7 A criminal defendant's initial magistration—the proceeding where he learns the charge against him and his liberty is subject to restriction—marks the initiation of adversary judicial proceeding that triggers attachment of the Sixth Amendment right to counsel. Furthermore, attachment occurs even though a prosecutor may not even be aware of or involved in that initial proceeding. *Rothgery v. Gillespie County*, 554 U.S. ___, 128 S.Ct. (June 23, 2008) (Souter) (5:3:1). The decision is a narrow one and the court distinguishes the question of whether arraignment signals the initiation of adversary judicial proceedings versus whether the arraignment itself is a critical stage requiring presence of counsel. (Each of the four written opinions recognizes this distinction.) The court holds that an Article 15.17 proceeding plainly signals attachment even if it is not itself a critical stage. This case reaffirms prior holdings that a criminal defendant's initial appearance before a judicial officer marks the start of adversary judicial proceedings that trigger Sixth Amendment rights attaching. The certiorari grounds did not call for a determination of whether a substantive Sixth Amendment guarantee arises during a Texas magistration.

8 Yes, a death sentence for child rape is unconstitutional. *Kennedy v. Louisiana*, 554 U.S. ___, 128 S.Ct. 2641 (June 25, 2008) (Kennedy) (5:4). The Eighth Amendment requires that punishment for a crime must be propor-

tional to the offense, not by standards that prevailed when the provision was adopted in 1791, but by prevailing norms per *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The amendment's meaning arises from the evolving standards of decency that mark a maturing society's progress. While the standard itself remains the same, its applicability must change along with changes in basic societal mores. Noting the three purposes for punishment—rehabilitation, deterrence, and retribution—Justice Kennedy writes that when the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. Hence, capital crimes must be limited to a narrow category of offenders most deserving of execution. The court delves into the history of the application of the death penalty to rape crimes; the last rapist executed was in 1964. After Louisiana's 1995 enactment in question here, five states passed capital child-rape provisions, including Texas. (See Tex. Penal Code §12.42(c)(3) (enacted 2007); see also Tex. Penal Code §22.021(a).) Four of these, including Texas' provision, require proof of a prior rape conviction. Neither the federal government nor 44 states imposes death for child rapists. Comparing these statistics to the ratios found in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (capital punishment of juveniles), *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct 2242 (2002) (capital cases involving mentally retarded defendants), and *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982) (vicarious felony murderers), Justice Kennedy considered the low number of jurisdictions authorizing capital punishment for child rape and concluded that there is a national consensus against capital punishment for this crime. He also found that *Coker*'s language took pains to limit its holding to adult rape, and thus did not block the emergence of a consensus either.

Although granting great weight to this objective evidence of contemporary values, the court also relied upon its own judgment to discern the Eighth Amendment's acceptability of the death penalty in child-rape cases. Recognizing the permanent psychological, emotional, and sometimes (as here) physical impact rape has on a child, the court recognized the long years of anguish endured by a child-rape victim. Yet, concerned about confining the instances for which capital punishment may be imposed involving crimes against individual persons (as opposed to treason, espionage, terrorism, and drug kingpin activity), the court concluded that the death penalty should be limited to instances where a victim's life was taken because there is a distinction between intentional first-degree murder and nonhomicidal crimes against individual persons, even child rape.

The court also noted some serious negative consequences to making child rape a capital crime, including: during formative adolescent years, capital prosecution would require a child victim's lengthy assistance, causing the child to make a moral choice prior to maturity; that there exist serious systemic concerns with prosecuting child rape because it relies heavily on less precise child testimony which may be unreliable, induced, or even imagined; that the death penalty threat could lead to additional underreporting in child sexual abuse cases; and that a capital sentence might remove a rapist's incentive to not kill the victim.

9 Yes, *but* the forfeiture-by-wrongdoing doctrine is narrow and Brenda's statements may not fall within that exception. *Giles v. California*, 554 U.S. ___, 128 S.Ct. 2678 (June 25, 2008) (Scalia) (6:3).

Crawford held that the Confrontation Clause is most naturally read as a common-law confrontation right, so only founding-era exceptions to confrontation are valid. Under common law, the forfeiture exception permits admission of unconfronted testimony *only when a defendant has engaged in conduct designed to prevent a witness from testifying.* A witness's absence must be predicated on a defendant's "means and contrivance" intended to prevent a witness from testifying. Beginning with *Lord Morley's Case* in 1666, common law relied on this purpose-based forfeiture rule. Centuries of prosecutors never even sought admission of accusatorial unconfronted murder-victim statements on a simple showing of wrongful witness-procurement. Hence, no broad confrontation exception exists where the defendant only committed a wrongful act which rendered a witness unavailable. Therefore, forfeiture by wrongdoing *as the State relied upon here* is not a founding-era exception.

Nevertheless, Justice Scalia ends his majority opinion with a very brief paragraph noting that domes-

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tic-violence cases may fall within the common-law exception if the abusive relationship that ends in murder includes repeated acts intended to isolate or dissuade a victim from resorting to outside help. Because no one considered Giles' intent when contemplating the admission of Brenda's statements under the forfeiture-by-wrongdoing doctrine, Giles' intent can be analyzed on remand to discern if the evidence actually falls within the narrow common-law forfeiture rule.

10 Yes. The Second Amendment protects an individual right to possess a firearm unconnected with militia service and allows people to use their firearms for traditionally lawful purposes such as self-defense within the home. Hence, the D.C. handgun statute violated the Second Amendment insofar as it totally banned home handgun possession and required that any firearm kept in the home be disassembled or bound by a trigger lock, thus rendering that weapon's use problematic for self-defense, the core lawful purpose of weapon ownership. *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783 (June 26, 2008) (Scalia) (5:4).

Even so, this right is not unlimited and cannot be read as the right to keep and carry any weapon in any manner for any purpose. The court specifies that its holding is not jeopardizing longstanding prohibitions on possession of firearms by felons or the mentally ill, nor does it question the authority of laws forbidding firearms in schools and government buildings. Finally, this decision does not undermine laws imposing conditions on commercial arms sales. ✤

Confronting *Crawford*

When does *Crawford* apply? What is testimonial? When can out-of-court statements be used in court? Answers to these questions and more

It has been a little over four years since the United States Supreme Court issued its decision in *Crawford v. Washington*.[1] Since then, Texas courts have issued many opinions concerning what does or does not constitute an out-of-court testimonial statement. To be inadmissible under *Crawford*, the testimonial statement must be made by a non-testifying (or an otherwise unavailable) witness whose statement was not subject to the defendant's cross-examination. As may be expected, many of these cases and confrontation issues concern 911 calls, first responder reports, and outcry statements made pursuant to Art. 38.072 of the Texas Code of Criminal Procedure. The appellate court rulings vary and in many instances are very fact-specific in determining whether an out-of-court statement is testimonial (and therefore excluded by *Crawford*) or is otherwise admissible. This article will examine many of those cases to guide prosecutors in what may or may not be testimonial.

By Samuel B. Katz
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Crawford, Hammon, and *Davis*

In *Crawford*, the State rebutted the defendant's self-defense claim by introducing a recorded statement made by the defendant's wife during police questioning. The defendant's wife did not testify at trial because the defendant asserted his marital privilege under Washington state laws. The defendant objected that his wife's proffered statement violated his Sixth Amendment right to confrontation. Under the previous standard, enunciated by *Ohio v. Roberts*, a defendant's right to confrontation did not bar the admission of an unavailable witness's statement provided that the statement contained an "adequate indicia of reliability."[2] That test was met if the evidence fell within a "firmly rooted hearsay exception" or if it bore "particularized guarantees of trustworthiness."[3]

In *Crawford*, the Supreme Court held that the framework of *Ohio v. Roberts* was inherently unreliable and unpredictable because it allowed for the admission of fundamentally inadmissible statements that the Confrontation Clause was intended to exclude.[4] After a lengthy and thorough review of jurisprudence concerning the right to confrontation dating as far back as Roman antiquity,[5] the court determined that admitting into evidence out-of-court statements that were "testimonial" in nature violated the Confrontation

Clause. These statements were described as more formalized and made under circumstances that would lead an objective witness to reasonably believe the statement would be available for use at a later trial.[6] The actual definition of testimonial was left undefined.

It wasn't long after the *Crawford* decision was released that Texas courts began to wrestle with its implications.[7] Some cases seemed to contain similar fact scenarios, yet, not surprisingly, various appellate courts had differing opinions on what constituted a testimonial statement. For example, some courts held that an excited utterance was *per se* non-testimonial in nature, while other courts held that it did not matter whether the statement was an excited utterance, but rather, it was the nature of the questioning that determined whether the out-of-court statement was testimonial. The Texas Court of Criminal Appeals eventually settled these differences of opinion,[8] ruling that whether a statement was testimonial was to be determined on a case-by-case basis and that there was no "bright line rule" in making the determination.[9]

The Supreme Court revisited the issue of testimonial statements in the context of domestic disputes and statements made to law enforcement officials through the joint opinion in *Davis v. Washington* and *Indiana v. Hammon*.[10] In both cases, police were dispatched to residences for domestic disturbance calls. In *Davis*, the trial court had admitted, over the defendant's Sixth Amendment objection, a 911 call where the victim, who did not testify at trial, identified Davis as her assailant. Ultimately, Davis was convicted and the Washington appellate courts affirmed the conviction, ruling that the 911 call was not testimonial. In *Hammon*, the trial court admitted the affidavit of the non-testifying witness and allowed the testimony of the officer who questioned her and obtained her affidavit, overruling the defendant's Sixth Amendment objection. Indiana's Supreme Court affirmed, finding that the victim's oral statements were non-testimonial and admissible as an excited utterance; while the victim's affidavit was testimonial and wrongly admitted, the error nevertheless was harmless.[11]

The Supreme Court ultimately affirmed the decision in *Davis* and reversed and remanded the decision in *Hammon*. The court held in *Davis* that the statements in response to the 911 operator's questioning was meant to resolve the emergency, which was ongoing at the time of the call.[12] Police questioning in *Hammon*, however, was found to be analogous to the questioning in *Crawford*. In other words, the questioning was done with an eye toward investigating past criminal wrongdoing and there was no emergency or immediate threat to the victim at the time; therefore, the interrogation was testimonial and improperly admitted, as was the affidavit.[13]

The Supreme Court enunciated a "primary purpose" standard in *Davis* and *Hammon* as to whether a statement given to law enforcement personnel and made by a non-testifying witness is testimonial in nature. The "objective witness" standard enunciated in *Crawford* is still applicable.[14]

Does *Crawford* apply?

Before determining whether a statement is testimonial or non-testimonial in nature, first determine whether *Crawford* even applies. For example, the right to confrontation guaranteed by the Sixth Amendment and its interpretation by *Crawford* does not apply to either probation or parole revocation hearings.[15] While the Texas Court of Criminal Appeals has not expressly ruled on this topic,[16] intermediate Texas courts, other state courts, and a majority of federal courts have held that both probation revocations and parole revocations are not a stage of a criminal prosecution implicating the Sixth Amendment right to confrontation and *Crawford*.[17] Likewise the tenets of *Crawford* have been held by some Texas courts not to apply in certain situations in juvenile matters—for instance, a transfer hearing is not a stage of a criminal prosecution and therefore *Crawford* is inapplicable.[18] At least one court has also held that a juvenile does not have a Sixth Amendment right to confrontation during a hearing's disposition phase; therefore, there are no *Crawford* implications.[19] Likewise, the Court of Criminal Appeals has held that *Crawford* does not apply retroactively in habeas corpus proceedings brought under Tex. Code Crim. Proc. Art. 11.071.[20]

Waiving a defendant's right to confrontation

Even if *Crawford* applies, a defendant can waive his right to confront witnesses by a few different means.

1 **Failure to object or by express waiver:** The right to confronta-

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tion under *Crawford* may, of course, be waived by a defendant who fails to timely and specifically object to the admission of the proffered statement, whether testimonial or not.[21] One would assume that this would also mean that a defendant waives his rights under *Crawford* when he enters into a plea bargain to a criminal charge. However, the Texas Court of Criminal Appeals recently held that the waiver of a defendant's right to confrontation and cross-examination of witnesses, entered into and signed as part of a plea bargain, does not abrogate the right of confrontation at sentencing.[22] A close reading of *Stringer* indicates that the waiver signed by the defendant referred to his waiver of his right to confront and cross-examine witnesses pursuant only to Tex. Code Crim. Proc. Art. 1.15.[23] Therefore, the best practice would be to also obtain an express written waiver of the defendant's confrontation rights under the Sixth Amendment of the Constitution of the United States, Article I, §10 of the Texas Constitution, *Crawford v. Washington*, and its progeny, in both the guilt-innocence and punishment phases of trial, to ensure a valid waiver.

2 Forfeiture by wrongdoing: The United States Supreme Court stated in *Crawford* that it would continue to recognize forfeiture by wrongdoing and also alluded to this principle in *Davis v. Washington* after having reversed and remanded *Hammon* back to the Indiana courts.[24] The doctrine is long established and based on the equitable principle that a defendant should not be allowed to "profit" from his misdoing if he is the reason a witness is unavailable.

In *Gonzales v. State*, the Texas Court of Criminal Appeals adopted and applied this doctrine in a capital murder case.[25] Police had arrived at the victims' house, finding that both had been shot. Maria Herrera described her assailant as a man whom she recognized as a relative of her neighbors across the street; he had taken their truck. She died a few hours after giving her statements. Acting on this information, police found the stolen truck and set up surveillance; they saw the defendant, who matched Maria's description, get into the truck. He then led police on a high-speed chase. After he was apprehended and arrested, Maria's blood was found on his shoes.[26] At his trial, the defendant objected to her statements as hearsay and as violative of his confrontation rights; the statements were admitted under the excited utterance and present-sense impression exceptions. The jury convicted the defendant and sentenced him to life. The lower court of appeals, noting the Supreme Court's holding in *Crawford*, affirmed the conviction and ruled that Gonzales could not benefit from his wrongdoing by precluding Maria's statements because of her unavailability (death).[27] The Court of Criminal Appeals upheld and affirmed the lower court's ruling.[28]

3 Failure to submit written interrogatories: Under Tex. Code Crim. Proc. Art. 38.071, a trial court may determine that a child witness under age 13 is unavailable for purposes of testifying in certain types of cases.[29] The Fort Worth Court of Appeals reviewed the application of this statute and *Crawford* in a case involving, among other things, aggravated sexual assault of a child.[30] The State had moved, in a pre-trial hearing, to admit testimony from one of the victims, a 6-year-old child, through her videotaped interview with a CPS investigator. A licensed professional counselor testified that making the child testify at trial would be an extremely traumatic event, as would having her testify by closed-circuit television. The trial court agreed and granted the State's request pursuant to the 38.071 motion.[31]

The appellate court determined that the victim's videotaped interview was testimonial; however, the court also noted that *Crawford* permits a testimonial statement to be admitted if the witness is unavailable to testify *and* the defendant had a prior opportunity to cross-examine the witness.[32] The court went on to state that because Tex. Code Crim. Proc. Art. 38.071 §(2)[33] allows a defendant to submit written interrogatories to the trial court after the court finds the witness unavailable to testify, the defendant's failure to avail himself of that remedy cannot form the basis of the constitutional attack on 38.071.[34] The court therefore held that because the witness's statement was testimonial, the witness was unavailable to testify at trial, and the defendant had the opportunity to cross-examine the witness through written interrogatories, the defendant was not denied his Sixth Amendment right to confrontation; he had, in essence, waived his right.[35] The matter went to the Court of Criminal Appeals, which ultimately determined that

the requests for review by the defendant and by the State were improvidently granted and dismissed both. Judge Cochran, joined by Judge Johnson, wrote a blistering dissenting opinion, stating that the issue was important and needed to be decided by the court, and the opportunity to send written interrogatories is not a suitable substitute for face-to-face confrontation and cross-examination in trial.[36] For now, at least, *Rangel* is still good law in determining whether a defendant has waived his confrontation rights under *Crawford* and Tex. Code Crim. Proc. Art. 38.071.

What is testimonial and what is not

It would be nearly impossible to list every conceivable permutation that could occur when determining whether a particular type of statement is testimonial under *Crawford*. But in various situations where the declarant is unavailable to testify and the defendant had no opportunity to cross-examine her, here is what some caselaw indicates:

1 Institutional records: Jail records, such as disciplinary records and incident reports, as well as school records, may be both partially testimonial and non-testimonial in nature. If the records contain graphic and detailed remarks, including the observer's or author's impressions instead of a mere recitation of facts, those portions are testimonial and inadmissible.[37]

2 911 calls: Generally, 911 calls are not testimonial if law enforcement's questioning concerns dealing with the emergency or exigencies of the circumstances the caller is relating and experiencing.[38] Many cases also deal with the circumstances surrounding police officers' arrival in response to a 911 call. In evaluating these cases, look at police questioning and the circumstances at the time of questioning. Is there still an ongoing emergency? If so, is the purpose of the questioning to establish what had previously occurred, or is it to establish what is currently occurring? The latter will likely be deemed non-testimonial, but the former is probably testimonial and therefore inadmissible.[39]

3 Statements to CPS and statements by children: Statements made to CPS by a collateral source about a defendant's behavior with a victim are testimonial and inadmissible.[40] However, it is not settled whether children's statements made to therapists, who are otherwise independent of the State, are testimonial.[41] Current caselaw suggests statements made to non-governmental therapists in the course of treatment are non-testimonial, particularly if the primary purpose of the notes or statements in the record is for diagnostic or therapeutic reasons.[42]

4 DNA, autopsy, and other scientific reports: Two Texas cases have looked at whether having a medical examiner testify to a forensic biology report containing DNA profiles, which that particular ME had not prepared, violated the Confrontation Clause and *Crawford*.[43] Whether this type of evidence is testimonial depends if the report contained impressions or observations other than those that are detached and neutral recitations of the procedure and results obtained. However, note that one case, *Campos v. State*, reiterated that autopsy reports are non-testimonial in nature and do not violate the Confrontation Clause or *Crawford*'s dictates despite the fact that they often contain detailed and graphic observations.[44] The court went on to say that many jurisdictions treat autopsy reports similar to public records and are therefore non-testimonial.[45] Lastly, one court has recently held that a fingerprint report prepared to prove or establish past events potentially relevant in a later criminal prosecution, renders it testimonial.[46]

Summation

Since the issuance of *Crawford*, Texas courts have struggled to determine the decision's limits because the United States Supreme Court "did not provide an exclusive definition of testimonial statements."[47] The Court of Criminal Appeals has followed *Davis v. Washington* and stated that the focus in determining whether a statement is testimonial is to look at the objective purpose of the interview or interrogation, not at the declarant's expectations.[48] In other words, is the statement being taken to establish past events or criminal activity, or is it being taken in the context of dealing with an ongoing emergency or situation needing immediate attention? Determining that the statement was taken in an attempt to deal with an ongoing emergency or as a preliminary investigation while sorting out what is happening will help establish that the out-of-court statement is non-testimonial and therefore does

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not violate *Crawford*.

Lastly, remember that when a *Crawford* objection is raised, the burden shifts to the State, as the proponent of the evidence, to establish the statement's admissibility. The State is then obligated to establish that *Crawford* doesn't apply, that the statement does not contain testimonial hearsay, or that the statement, while containing testimonial hearsay, nevertheless is admissible under *Crawford*. I hope the cases discussed in this article will arm you for that battle and enable you to overcome future *Crawford* objections. ✤

Endnotes

1 *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

2 *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980).

3 *Id.*, 448 U.S. at 65-66, 100 S.Ct. at 2538-2539.

4 *Crawford v. Washington*, 541 U.S. at 60-63, 124 S.Ct. at 1369-1371.

5 *Id.*, 541 U.S. at 43, 124 S.Ct. at 1359-1360.

6 *Id.*, 541 U.S. at 52, 124 Ct. at 1364-1365.

7 See, for example, *Lagunas v. State*, 187 S.W.3d 503 (Tex. App.—Austin, 2005, pet. ref'd)(the appellate court requested attorneys send supplemental briefs concerning the effect of *Crawford* on the issue of the admittance of a 4-year-old's excited utterance admitted through the testimony of a New Braunfels police officer); *Wilson v. State*, 151 S.W.3d 694 (Tex. App.—Ft. Worth 2004, pet. ref'd)(the answers of a witness who approached officers and asked questions of them and who, in turn, was asked questions to determine why she was upset, were non-testimonial in nature). But see *Lee v. State*, 143 S.W.3d 565 (Tex. App.—Dallas 2004, pet. ref'd)(out-of-court statement by co-defendant upon questioning by police and given during the stop, but after the defendant had been arrested, was testimonial in nature and violated *Crawford*).

8 See, for example, *Cassidy v. State*, 149 S.W.3d 712 (Tex. App.—Austin 2004) *cert. denied,* 544 U.S. 925 (2005) abrogated by *Wall v. State*, 184 S.W.3d 730 (Tex. Crim. App. 2006) and the first *Wall v. State*, 143 S.W.3d 846 (Tex. App.—Corpus Christi 2004, pet. granted). Both cases involved police questioning of a witness in a hospital. In *Cassidy*, the witness's responses were delivered through an interpreter to the police and were in response to an interview by an officer. The Austin Court of Appeals characterized the statements by the witness as excited utterances that were non-testimonial in nature. *Cassidy*, 149 S.W.3d at 716. In *Wall*, the Corpus Christi Court of Appeals held that a similar interview of a witness (without an interpreter) was a police interrogation and therefore the responses were testimonial in nature and their admission constituted error under *Crawford* that was deemed to be harmless error due to the overwhelming amount of other evidence of the defendant's guilt. The *Wall* case went up to the Court of Criminal Appeals on the issue of whether the admission of the evidence was harmless. The court held it was not harmless as to the guilt of the defendant and the matter was remanded back to the lower court to determine if there was harmless error as to punishment. On remand, the lower court of appeals determined the error to be harmless as to punishment. *Wall v. State*, __ S.W.3d __, 2008 WL 451862 (Tex. App.—Corpus Christi 2008, pet ref'd).

9 *Wall*, 184 S.W.3d at 742.

10 *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006).

11 *Id.*, 547 U.S. at 813, 126 S.Ct. at 2268.

12 *Id.*, 547 U.S. at 826-828, 126 S.Ct. at 2276-2277.

13 *Id.*, 547 U.S. at 829-832, 126 S.Ct. at 2278-2279.

14 "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington*, 541 U.S. at 51-52, 124 S. Ct. at 1364-1365. See also *De la Paz v. State*, S.W.3d __, 2008 WL 2437648 (Tex. Crim. App. 2008), and the article by Allie Phillips published in the September–October 2006 edition of *The Texas Prosecutor*, "The luxury of indecision: Child forensic interviews after *Hammon* and *Davis*."

15 *Diaz v. State*, 172 S.W.3d 668 (Tex. App.—San Antonio 2005, no pet.); *Trevino v. State*, 218 S.W.3d 234 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

16 *Mauro v. State*, 235 S.W.3d 374, 375-376 (Tex. App.—Eastland 2007, pet. ref'd).

17 See *Morrisey v. Brewer,* 408 U.S. 471, 480, 92 S.Ct. 2593, 2600 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973); *Diaz*, 172 S.W.3d at 672. See e.g., *United States v. Aspinall*, 389 F.3d 332, 342-43 (2nd Cir. 2004); *United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004); *Peters v. State*, __ So.2d __, 2008 WL 1901668 (Fla. May 1, 2008); *State v. Abd-Rahmaan*, 111 P.3d 1157, 1162 (Wash. 2205)(cases holding that *Crawford* does not apply to probation revocation or revocation of supervised release). But see *United States v. Jarvis*, 94 Fed. Appx. 501 (9th Cir. 2004) not design. for publ.; *Ash v. Reilly*, 354 F.Supp.2d 1, 9-10 (D.D.C., 2004)(holding that *Crawford* applies to revocation of supervised release or parole).

18 *In re S.M.*, 207 S.W.3d 421, 425 (Tex. App.—Ft. Worth 2006, pet. denied). See also *In re D.L.*, 198 S.W.3d 228, 229-30 (Tex. App.—San Antonio 2006, pet. denied).

19 *In re M.P.*, 220 S.W.3d 99, 109 (Tex. App.—Waco 2007, pet. denied).

20 *Ex parte Lave*, __ S.W.3d __, 2008 WL 2512820 (Tex. Crim. App. 2008); *Ex parte Aguilar,* 2006 WL 1412666 (Tex. Crim. App. 2006) (not designated for publication). While not finding any cases expressly concerning 11.07 proceedings and *Crawford*, it would be appropriate to presume, under the rationale in the 11.071 cases, that *Crawford* would not retroactively apply in those proceedings as well.

21 "We conclude the right of confrontation is a forfeitable right and must be preserved by a timely and specific objection at trial." *Deener v. State*, 214 S.W.3d 522, 527-28 (Tex. App.—Dallas 2006, pet. ref'd); "We find nothing in Crawford that would excuse appellant for failing to make a confrontation claim at trial." *Bunton v. State*, 136 S.W.3d 355, 369 (Tex. App.—Austin 2004, pet. ref'd); See also *Reyna v. State*, 136 S.W.3d 173, 179 (Tex. Crim. App. 2005)(an objection on hearsay does not preserve error on Confrontation Clause grounds).

22 *Stringer v. State,* 241 S.W.3d 52, (Tex. Crim. App. 2007).

23 "Under Art. 1.15, Code of Criminal Procedure, I waive and give up the right to appearance, confrontation, and cross-examination of the witnesses ... [.]"); *Stringer*, 241 S.W.3d at 57-58. The court found that the reference to the specific statute limited the scope of the written waiver to the guilt phase of the plea/trial phase only and was not valid for the punishment/sentencing phase of the plea; see also *Giles v. California*, 128 S. Ct. 2678 (2008), discussed in more detail on page 45 of this journal.

24 *Davis*, 547 U.S. at 833, 126 S.Ct. at 2280.

25 *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006).

26 *Gonzales*, 195 S.W.3d at 115.

27 *Gonzalez v. State*, 155 S.W.3d 603, 610 (Tex. App.—San Antonio 2004).

28 *Gonzales*, 195 S.W.3d at 126. Other intermediate courts have followed the forfeiture by wrongdoing doctrine. See, *Sohail v. State*, __ S.W.3d __, 2008 WL 458300 (Tex. App.—Houston [1st Dist.] 2008); See also *Carillo v. State*, 2007 WL 541598 (Tex. App.—Austin 2007, no pet.) (Mem. Op.) (not design. for publication)(statement made by victim before his death was a dying declaration exception to the hearsay rule and the court did not reach issue of forfeiture by wrongdoing even though acknowledging expansion of the doctrine by *Gonzales*).

29 Murder, Capital Murder, Manslaughter, Aggravated Kidnapping, Indecency with a Child, Sexual Assault, Aggravated Assault, Aggravated Sexual Assault, Injury to a Child, Elderly or Disabled Individual, Prohibited Sexual Conduct, Aggravated Robbery, Sexual Performance by a Child, and Continuous Sexual Abuse of Young Child or Children. Tex. Code Crim. Proc. Art. 38.071, §1.

30 *Rangel v. State*, 199 S.W.3d 523 (Tex. App.—Ft. Worth 2006, pet. granted), pet. dismissed as improvidently granted, 250 S.W.3d 96 (Tex. Crim. App. 2008).

31 *Id.*, 199 S.W.3d at 528.

32 *Id.*, at 535.

33 "(b) If a recording is made under Subsection (a) of this section and after an indictment is returned or a complaint has been filed, by motion of the attorney representing the state or the attorney representing the defendant and on the approval of the court, both attorneys may propound written interrogatories that shall be presented by the same neutral individual who made the initial inquiries, if possible, and recorded under the same or similar circumstances of the original recording with the time and date of the inquiry clearly indicated in the recording." Tex. Code Crim. Proc. Art. 38.071, §2.

34 *Rangel*, at 537.

35 *Id.*

36 *Rangel v. State*, 250 S.W.3d 96, 102 (Tex. Crim. App. 2008). See also *Lasher v. State*, 202 S.W.3d 292 (Tex. App.—Waco 2006, pet. ref'd) (defendant's issues regarding alleged Confrontation Clause errors and Tex. Code Crim. Proc. Art. 38.071 did not comport with the objections raised at trial and as such, were not properly preserved).

37 *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005) *cert. denied*, 126 S.Ct. 2982 (2006)(Smith County and TDCJ incident and disciplinary reports documented in graphic and detailed terms numerous offenses by the defendant and were therefore indamissible); *Ford v. State*, 179 S.W.3d 203, 209 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd)(the defendant's disciplinary records were admissible, distinguishing *Russeau* because "the disciplinary records admitted at the punishment phase of appellant's trial are sterile recitations of appellant's offenses and the punishments he received for those offenses. The records do not contain statements that could be considered testimonial in nature."); *Grant v. State*, 218 S.W.3d 225, 232 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd)(defendant's high school disciplinary records contained graphic and detailed terms and these portions were testimonial and inadmissible).

38 *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006); *Dixon v. State*, 244 S.W.3d 472, 483-84 (Tex. App.—Houston [14th Dist.] 2007 pet. ref'd)(caller's statements made in the course of a conversation initiated by the victim of a crime were neither "official and formal in nature" nor "solemn declaration[s] made for the purpose of establishing some fact").

39 *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273-74 (2006); See also *Wall v. State*, 184 S.W.3d 730, (Tex. Crim. App. 2006); *Mims v. State*, 238 S.W.3d 867 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

40 *Wells v. State*, 241 S.W.3d 172 (Tex. App.—Eastland 2007, pet. ref'd); See also *De La Paz v. State*, __ S.W.3d __, 2008 WL 2437648 (Tex. Crim. App. 2008).

41 See, for example, *Rangel v. State*, 199 S.W.3d, 523 (Tex. App.—Ft. Worth 2006, pet. granted) pet. dismissed as improvidently granted, 250 S.W.3d 96 (Tex. Crim. App. 2008)(videotaped statement by child to CPS worker was testimonial; however, the issue was waived by the defendant and not properly preserved for appeal).

42 But see *Lollis v. State*, 232 S.W.3d 803 (Tex. App.—Texarkana 2007, pet. ref'd)("when a forensic or investigatory motive predominates, the resulting statements are testimonial; when therapeutic or healing motive predominates, statements are not testimonial").

43 *Campos v. State*, __ S.W.3d __, 2008 WL 2261441 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.); *Johnson v. State*, 2006 WL 1738288 (Tex. App.—Dallas 2006, pet. ref'd) (not designated for publication)(DNA reports were not testimonial where the reports followed standard established scientific protocols, contained factual evidence, could have been just as likely to exculpate as to inculpate the defendant, were not accusatory, and the medical examiner could be cross-examined regarding any inferences or conclusions to be drawn from the report).

44 *Campos*, __ S.W.3d __, 2008 WL 2261441. At least three Texas courts have determined that autopsy reports are non-testimonial in nature. See *Terrazas v. State*, 2006 WL 2080381, (Tex. App.—Austin 2006, pet. ref'd) (mem. op., not designated for publication) (introduction of autopsy report did not violate Confrontation Clause, in part because report contained factual statements setting forth matters observed pursuant to duty imposed by law); *Mitchell v. State*, 191 S.W.3d 219, 221-22 (Tex. App—San Antonio 2005, pet. ref'd) (autopsy report was non-testimonial because report did not fall within categories of testimonial evidence described in *Crawford*); *Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App—Corpus Christi 2005, pet. ref'd).

45 *State v. Craig*, 110 Ohio St.3d 306, 853 N.E.2d 621, 639 (2006) *cert. denied*, __ U.S. __, 127 S.Ct. 1374, 167 L.Ed.2d 164 (2007)(because autopsy reports are non-testimonial business records, their admission does not violate defendant's confrontation rights); *State v. Cutro*, 365 S.C. 366, 618 S.E.2d 890, 896 (2005) (autopsy reports are similar to public records, not testimonial, and may be admitted without violating confrontation rights). But see *Smith v. State*, 898 So.2d 907, 916-17 (Ala. Crim. App. 2004) (admission of autopsy report without author's testimony was error because it enabled prosecution to prove an essential element of the crime without providing defendant an opportunity to cross examine its author); *State v. Davidson*, 242 S.W.3d 409, 417 (Mo. Ct. App. 2007) (holding that because autopsy report was prepared for litigation, it was testimonial and admission without author's testimony violated defendant's confrontation rights).

46 *Acevedo v. State*, 255 S.W.3d 162, 172 (Tex. App.—San Antonio 2008, pet. filed).

47 *De La Paz v. State*, 229 S.W.3d 795, 798 (Tex. App.—Eastland 2007) rev'd and remanded, *De La Paz v. State*,__ S.W.3d __, 2008 WL 2437648 (Tex. Crim. App. 2008).

48 *Id.*, __ S.W.3d __, 2008 WL 2437648 at pg. 8.

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