THE TEXAS PROSECUTOR

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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01 Texas Code of Criminal Procedure

Changes in expunction law

How the 82nd Legislature changed Chapter 55 of the Code of Criminal Procedure for the better—and for worse

The dust has settled, the compromises have been struck, and the ink is drying. The 2011 legislative session is over, and those of us charged with executing the laws are left to try to sort out the changes. One area that received attention this session was Code of Criminal Procedure Chapter 55, the expunction statutes. As criminal history information becomes more accessible online and accessed by the private sector for employment purposes, expunctions are used more every day. The 82nd Legislature (2011) tried to resolve some perceived problems from the previous versions of the statute and, of course, created new challenges of their own. This article will attempt to summarize the changes and a few areas of confusion that may have to be resolved by the courts or by a future legislature.

By Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

Waiting period expunctions

The first major change to expunction law came in the form of "waiting period" expunctions, expunctions granted under Article 55.01(a)(2)(A). Under previous versions of the statute, a person could not receive an expunction unless either the statute of limitations had expired or a felony indictment had been dismissed for certain reasons. This meant that cases with a lengthy or *no* statute of limitations could not be expunged. For example, a person arrested for sexual assault of a child—even if the police immediately discovered the child was lying and released the arrestee—could never obtain an expunction because there is no statute of limitations for that offense.

Under the new law, however, there is some relief. A person may obtain an expunction if no charges have been filed after a waiting period has passed: 180 days for Class C misdemeanors, one year for Class A and B misdemeanors, and three years for felonies.[1] This is not an absolute drop-dead date, however. The petitioner must still prove that he has been released *and* the case is no longer pending.[2] If the police (or prosecutors) are in an active investigation, then the petitioner is not entitled to an expunction. Because expunctions are considered civil cases, the burden of proof is on the petitioner to prove the case is not pending.[3] But be warned—many trial courts will nonetheless put the burden of proving that there *is* an active investigation instead on the State.

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Help us celebrate TDCAF's 5th anniversary

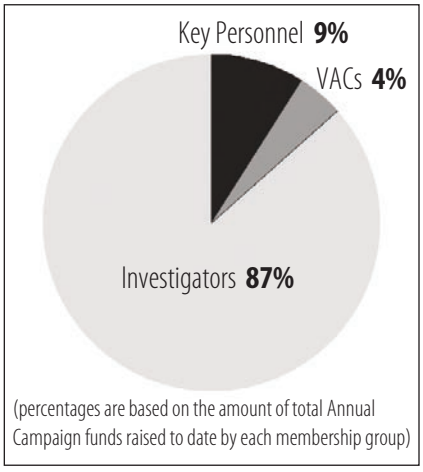
We would like to thank you, our TDCAA members, the TDCAA Board of Directors, TDCAF Board of Trustees, and TDCAF Advisory Committee for five successful years of leadership and support. Please help us celebrate this year by making a contribution to the 2011 Annual Campaign.

Annual Campaign membership challenges

By Jennifer Vitera
TDCAF Development Director in Austin

By now you should have received the 2011 Annual Campaign brochure or postcard, which is your invitation to be a part of the Texas District and County Attorneys Foundation. The foundation is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel.

This year will be our second annual campaign membership fundraising challenge. It looks like our investigators are in the lead again this year (see the pie chart below), but there is still time to contribute. Just like last year, we've got two different fundraising goals for our membership groups, one for investigators, key personnel, and victim assistants and one for elected prosecutors.



(percentages are based on the amount of total Annual Campaign funds raised to date by each membership group)

For the first goal, three of our membership groups (investigators, key personnel, and victim assistance coordinators) have stepped up to challenge each other in their fundraising efforts. We will track the results based on dollars raised compared to percentage of membership in each of these groups. We will feature a bimonthly update on who's leading the way on our website and in *The Texas Prosecutor*.

For the second goal, we are asking for 100 percent support from all 333 elected prosecutors across the state (either through a personal unrestricted gift or a restricted gift) to the Annual Campaign. You can make a pledge that can be paid out through December 31, 2011. Please take a look at the brochure we mailed you for more information.

Reasons to give

Why should you give to the foundation? There are many reasons; here is what one member had to say.

"Rural district and county attorneys' offices are the backbone of TDCAA and the foundation. I have seen both evolve and respond to our concerns and needs. Active support of the foundation allows Texas' prosecutors to reap maximum continuing education benefits without major expense to our offices. TDCAA's training has provided the novice touch-typist with the knowledge and confidence to publish PowerPoint presentations to a jury. We are trained by the best of the best.

"Not once in 12 years have I been disappointed in TDCAA's instructors. They answer both the difficult and less complex questions with ease. The relationships formed with these very fine prosecutors make every one of us blessed to be prosecuting in Texas and blessed to be a part of TDCAA. The citizens of my small town expect justice! TDCAA and the foundation support us in our challenge to seek justice. Do your part and support the foundation." —*Martha Warner, District Attorney in Bee, Live Oak, and McMullen Counties*


Martha Warner

For additional reasons to consider supporting your foundation or to view the Annual Campaign brochure or 2010's Annual Report, please visit www.tdcaf.org.

PowerPoint for the Courtroom

Here's your chance to polish your courtroom presentation skills while supporting the foundation! This CD walks through almost every element of PowerPoint, from creating new slides to importing and editing video clips. It's a must-

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have for every office, and it's only $25! Thanks to the generosity of Todd Smith, chief investigator in the Criminal District Attorney's Office in Lubbock County, the foundation will receive a portion of the proceeds from the sale of this disk. So order today at www.tdcaf.org.

Leadership Texas update

I had the privilege of traveling to Corpus Christi to hear an update on our state's environment, including policy and practice on water, air, and the coast, plus a very informative update on the status of the Deepwater Horizon disaster by Dr. Wes Tunnell (of Texas A&M University at Corpus Christi).

I would like to thank Yolanda de Leon (TDCAF Board Member) for setting up an introduction meeting in McAllen during this time.

Other fundraising efforts

We still need supporters for our domestic violence training initiative! We are looking for corporate and foundation partners from across the state to reach our total budget goal for this program, which is $100,000. In the last issue of this journal, we mentioned Dow Chemical's support of the *Family Violence Manual*, but we still need additional contributions.

Please contact Jennifer Vitera at vitera@tdcaa.com if there is someone in your area we can meet. ❇

*Recent gifts to the foundation**

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* from June 4 to August 1, 2011
** denotes restricted gift

Random thoughts on seeking justice

The Texas Code of Criminal Procedure charges prosecutors with doing justice above all else, even if it means not getting a conviction. I know this is old news to prosecutors and their staffs, but it compels the question, "What is justice?" I know of no prosecutor who does not take this directive seriously. No one seeks to convict an innocent person—that is a given. The concept of justice sometimes causes me personal difficulty in that murky gray area all prosecutors have encountered in making an appropriate plea bargain offer. The prosecutor is the only person who can dispose of the case short of a trial. He exercises wide discretion in the eventual punishment of most defendants.

By Mike Fouts
District Attorney in Haskell, Stonewall, Kent, and Throckmorton Counties

I live and prosecute in an area that is extraordinarily conservative, and the community has little tolerance for crime. On one occasion when I was negotiating a plea bargain, the defense attorney attempted to appeal to my kinder side. That same defense attorney might explain that while my girth provides for a lot of side, that part devoted to kindness is mighty small. I disagree with such a wholly inappropriate assessment, I am simply aware of my constituency's expectations in regard to the punishment of law-breakers. I can't begin to tell you how many times have I heard from defense attorneys, "I know a jury would hammer him, but you should give my client probation. Don't hammer him just because you can."

I fancy myself a bit of a philosopher, and while I have not been classically trained in philosophy, I have spent an inordinate amount of time riding a tractor, which from sheer boredom lends itself to deep thinking (and inflamed hemorrhoids). Thus, I have given great and delicate consideration to the proposition that despite the fact a jury would likely hand down a significant sentence, I should somehow be the voice of reason and give the gentle fellow probation. This concept on its face seems perfectly reasonable, even advanced and sophisticated (arguably the direct antithesis of me). After all, a prosecutor is supposed to seek justice, and surely my intervention protecting the defendant from a jury's arbitrary sentence would constitute justice.

But here is the problem in my mind with that argument: Whose measure of justice should we use as a metric? Certainly the defendant and his family will have a different opinion of an appropriate sentence than the victim and her family. Likewise, my opinion will likely differ from that of a defense attorney. While undoubtedly Texas prosecutors have been bestowed with a great deal of discretion in the prosecution of cases, I am not sure my personal views have any relevance. I doubt seriously that a defendant or defense attorney would complain that I have been too lenient or soft or that true justice has not been meted out.

After the mental dissection of this issue, I have personally arrived at this conclusion: Your community should set the standard of justice. While I am undoubtedly wise beyond my years, why should my personal sense of justice be substituted for the larger community? If the community insists on jail time, I don't think I should trump that because of my personal opinion.

Changing gears here: The Texas Penal Code and other criminal statutes are chock plumb full of criminal laws applicable throughout our great state. However, we are a large and diverse place. Trust me, the common man of rural West Texas does not necessarily share the same opinion, values, and beliefs as the tattooed and pierced—some might shorten to "classic"—Austinite. Not that there is anything wrong with him.

Many years ago, when I wore the hat of a criminal defense lawyer, one of my clients found himself in the unfortunate position of being caught at a cockfight with three of his prized roosters. Our urban friend Mr. Tattoo might call it a rooster fight or chicken fight, but west of the Brazos it is a cockfight. The guilt of my client was not at issue, and I worked out a plea bargain where the county attorney agreed to allow my client to plead to gambling promotion or cruelty to animals. I conveyed this to my client, and he responded that he would plead to the cruelty to animals charge because it didn't sound as bad as gambling. I thought to myself, "You have got to be kidding me,

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brother. To most folks cruelty to animals is right below sexual assault in the 'sounding bad' category." It should be noted that my client, while an ardent gamecock fighter and prolific beer drinker, insisted that his mama not know he smoked cigarettes. He didn't want to disappoint her with his life choices.

Now my client and his mouth-breathing uncle were offended that cockfighting is even considered an offense—they can expound for days on the virtues of cockfighting—while others likely think it should be a capital crime. The reality is, the perception of your community to the law affects the prosecution of your cases. In my part of the world, if someone shot a feral hog in the middle of a group of preschoolers playing marbles, you would have to do some selling to get a conviction. Yet by the same token, it would not be surprising for a jury to assess jail time for possession of half a joint. Imagine either scenario in Austin, just as a for instance.

The reality is the culture of your community and jury pool has an effect on your success in prosecution. I sometimes struggle with this because while a violation of the law is a violation of the law, it is just not that simple. Our esteemed executive director Rob Kepple once told me, "Sinning ain't sin if good people do it." Taking account of the culture of your community has to play some role in how you charge and prosecute cases if you are going to be successful, in my opinion.

So the next time you have a case that clearly constitutes a crime but you have your doubts that a jury will convict, offer them a plea to cruelty to animals "'cause it don't sound that bad." ❇

EXECUTIVE DIRECTOR'S REPORT

Hot topics in our Legislative Updates

By Rob Kepple
TDCAA Executive Director in Austin

As we crisscross the state on our post-session legislative update tour, we get a pretty clear picture of what changes are of greatest interest to prosecutors. Significantly, the numerous punishment enhancements were not crowd favorites. There are always exceptions, but it seems that prosecutors are by and large satisfied that we have the punishment ranges we need to do justice. Some changes relating to our core functions as prosecutors are the ones that attracted the most attention and questions at the updates.

Expunctions. In the age of electronic databases, mass electronic media, and the instant and diffuse distribution of information, many folks have come to believe that the concept of an expunction—the obliteration of any record of an arrest and/or a criminal charge—is a quaint notion. And you would have thought that the passage of the non-disclosure provisions (allowing for criminal records to be retired from public view but remain accessible to law enforcement and prosecution) would have reduced the call for more expunction legislation. But no.

Two major changes were made to Chapter 55 of the Code of Criminal Procedure. (Read our cover story for more detailed information.) The first allows for expunctions of arrests that have not resulted in criminal charges before the expiration of the statute of limitations. Many times that won't be a big deal, but we know that there are cases that may be percolating a long time before an indictment can be returned, and the prospect of an expunction within the statute of limitations is unnerving. Fortunately, this form of expunction provides that law enforcement agencies and prosecutors don't have to destroy their records, which has left a lot of folks wondering just what they can and can't do with the information that is subject to this variation of the expunction theme.

The second major change is one that has given prosecutors pause because it makes a fundamental change in expunction law. Up until now, expunction has been a purely legal remedy. A person either meets the legal qualifications or he doesn't, and prosecutors and Department of Public Safety (DPS) lawyers have been pretty vigilant in not allowing courts to hand out expunctions not authorized by the statute. But that has changed. Now, records of anything that transpired before a trial are subject to expunction at the discretion of the prosecutor.

So far prosecutors have been pretty leery of the new grant of discretion. It seems to put the sole discretion for an expunction in the hands of the prosecutor with the case on his desk, regardless of the wishes of law enforcement or even other prosecutors who may have a continued interest in the case. Given the potential issues with this new expunction, most prosecutors we have talked to are holding off on using it until they have a chance to gather with other electeds at the Elected Prosecutor Conference in Dallas November 30–December 2. We will have the opportunity there to compare notes and ideas on how to handle this new legal gismo.

Victim notification of plea agreements. This change comes in two parts. First, the judge is required to ask the prosecutor before accepting a plea if the victim, as defined in Art. 56.01 CCP, has been notified of the existence and terms of any plea agreement. (See art. 26.13(c)(2) of the Code of Criminal Procedure.) Second, the prosecutor, as far as reasonably practical, shall give the victim, guardian of the victim, or a close relative of a deceased victim, notice of any plea bargain agreement to be presented to the court.

It is not so much that people are concerned about having to give notice of plea bargains to the victims of a crime, as prosecutors do that as a matter of course. The complication is if a victim, for whatever reason, has been missing in action, uncooperative, or unresponsive to our efforts to involve her in the proceedings. Notwithstanding a lack of cooperation, however, the case must go on and the prosecutor has to make decisions about the best course to follow. So many offices are looking at their victim/witness procedures and making sure that they do their best to properly notify victims and document their efforts if there should be questions later on.

DWI reporting. One of the big disappointments for many prosecutors was the legislature's failure to pass a bill allowing for deferred adjudication in at least some DWI cases. As you know, prosecutor offices all over the state have struggled to find appropriate punishments for the large number of DWI cases on their dockets. Many offices have created diversion programs to reduce recidivism while maintaining a just level of consequences for criminal conduct. There seemed to be widespread agreement that a limited deferred adjudication punishment for at least some DWI offenders (such as first offenders who voluntarily submit breath or blood samples) would offer such a balanced consequence, but it was not to be again this session.

But DWI was not ignored. The legislature passed a law requiring extensive reporting of DWI-related arrests and dispositions. Found at Government Code §411.049, the law requires DPS to compile statewide data on arrests, charges, and dispositions of DWI cases. All arresting agencies and prosecutors will be required to submit information on the cases coming into and leaving the criminal justice system. In addition, DPS will be required to submit a "naughty" list—those agencies and prosecutor offices that did *not* submit the information required. DPS will be developing the system for capturing the information, and the first report is due to the legislature February 15, 2013, at the beginning of the 83rd Legislative Session.

Thanks for "mad-dogging" it

The highlight of the legislative update series? It wasn't one particular bill this time, but the game we played in memory of the late University of Texas law professor **Bob "Mad Dog" Dawson**. The object of the game, which the professor and former prosecutor Dawson used to play with his students: to find the highest possible criminal charge for a given set of facts.

I must say that the folks at the updates I got to present were enthusiastic about the game. Indeed, when I laid out the scenario in which, come September 1, the theft of a single penny is a state jail felony, one audience member quickly pointed out that I had forgotten about an additional enhancement that bumped it up to a third-degree felony. (How would you do such a thing? So as not to spoil the fun for those still thinking on it, we've put the answer on page 27.)

Now that's the spirit!

The final chapter in the Yearning for Zion saga

It was a long time coming, but congratulations to lead prosecutor and former Assistant Attorney General **Eric Nichols**, who recently secured a life sentence for Warren Jeffs, the leader of the Yearning For Zion outfit that made camp a few years ago in Schleicher County. As you might recall, TDCAA awarded Eric the Lone Star Prosecutor award in 2010

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for his tireless efforts in prosecuting case after case of bigamy and child sexual assault that came out of the YFZ compound. Even though Eric has left the AG's office to return to private practice with Beck, Redden, and Secrest in Austin, he wanted to see the YFZ prosecutions through to the end. Well done, Eric, and hats off for seeing these cases through.

NDAA report

With important issues bubbling at the national level, it is good to know that three Texas prosecutors will be part of the 2011–12 National District Attorneys Association (NDAA) leadership. **Judge Patricia Lykos** (DA in Harris County) will serve on the NDAA Board of Directors; **Henry Garza** (DA in Bell County) will serve as a director on the Executive Committee; and **John Bradley** (DA in Williamson County) has been appointed as a vice president. There are plenty of issues at the national level that require good leadership: attacks on prosecutorial immunity, unfounded claims of prosecutor misconduct, forensic science, eyewitness identification, funding of the J.R. Justice Student Loan Repayment Program, and the closing and possible relocation of the National Advocacy Center. Congratulations to you three, and good luck! ❇

It's heating up out there!

As I write, Austin is entering its 63rd day of 100-degree-plus heat; thoughts of spontaneous human combustion come to mind. Before I had the honor of working in the offices of Carol S. Vance and John B. Holmes Jr., my introduction to the legal system came with reading *Bleak House* by Charles Dickens. As a kid, I was fascinated by the all the characters, most notably a legal system that took years to get through and consumed men and money. My favorite human character, the one who had the evidence that would have solved the case, spontaneously combusted.

By Suzanne McDaniel
TDCAA Victim Services Director in Austin

With this heat it is easy to imagine walking outside and bursting into flames. But have you come close to spontaneously combusting in your office? Help is on the way.

Upcoming seminar

At this year's Key Personnel and Victim Assistance Coordinator Seminar (November 2–4 at the Westin Oaks Hotel in Houston), we are offering a slate of workshops on understanding and working with different personalities along with hands-on, problem-solving solutions. Prosecutor staff members work with law enforcement, lawyers, judges, and corrections officers in the office and with medical personnel, mental health professionals, and non-profit advocates outside of the office. How best to communicate with all to get the job done? Find out by joining us in November.

We will also have a legislative update, family violence and protective order information, and a post-adjudication track with representatives from the Board of Pardons & Paroles and TDCJ Victim Services. What's the difference between the judgment and the pen packet? Who does what? Where does it go? Find out this and more by registering now at www.tdcaa.com.

Plea of guilty notification

The Texas Legislature was busy last session, and there's lot to report. If you haven't attended a TDCAA Legislative Update, you can get information on the workshop and materials here: www.tdcaa.com/training/legislative-update-including-3-hours-tcleose-3182-credit. Most pertinent to readers of this Victim Services column are the changes made by SB 1010 to Art. 56.08 (Notification of Rights by Attorney Representing the State) and Art 26.13 (Plea of Guilty) of the Code of Criminal Procedure. "As far as reasonably practical," prosecutors are now required to give the victim of felony and misdemeanor crimes involving personal injury or death, notice of the existence and terms of any plea bargain agreement

to be presented to the court. This new duty applies regardless of whether the victim requests that information (as previously required). The bill also requires that a victim be informed by the prosecutor that the court must verify this notice before accepting any eventual plea agreement in the case. This change applies to a plea bargain in those cases involving personal injury or death presented to the court on or after September 1, 2011. The law already requires the judge to ask if a victim impact statement has been returned and ask for a copy of the statement; now the court shall inquire if the State has given notice of the existence and terms of a plea bargain to the victim.

How to get this word to victims along with the fact that they need to provide contact information and updates to the prosecutor so that they can be reached? Will you put it in the introductory notice that you are required to send no later than the 10th day after the date an indictment or information is returned [per Art. 56.08(a)]? Will your office tag those cases and assign a VAC or investigator to maintain contact? Will you develop a new software program? Let us know your solutions to this new legislative requirement.

Victim Impact Statement (VIS) revision

As required by statute in odd-numbered years [per Art. 56.03(h)], the VIS form and reporting procedure are under revision. TDCJ Victim Services Division held revision committee meetings this summer to meet the December 1 deadline. TDCAA Victim Services Board Members Blanca Burciaga (Tarrant County), Nancy Ghigna (Montgomery County), Chair Cyndi Jahn (Bexar County), and Jill McAfee (Bell County) participated along with VACs Trinity Grogan and Rita Thomas (Corryell County), Ellen Halbert (Travis County), Wanda Ivicic and Irene Odom (Williamson County), Chris Jenkins and Kenda Zimmerman (Dallas County), and Cheryl Williams (Anderson County). The meetings have been very informative as each jurisdiction brings different implementation procedures to the table and everyone learns from one another.

TDCAA was there from the beginning. The first VIS development meeting was held on August 21, 1985, in Austin. Former TDCAA Director Steve Capelle (now Travis County First Assistant DA), ADA Bert Graham and VAC Gail O'Brien (Harris County), ADA Rider Scott (Dallas), and I (as the director of the Governor's Crime Victim Clearinghouse) were all present. Rider proposed the confidential protections for victim contact information. The first Clearinghouse Legislative Report on the VIS (1987) noted many of the same issues that this year's committee recognized: the need for awareness by prosecution, the courts, and corrections; training and follow-up; designating "who's on first" for collecting the commitment papers; and most importantly an interagency procedure gap. We will be posting the revised VIS and accompanying report form on our website.

Web resource

The Office of Justice Programs has launched CrimeSolutions.gov, a website to help practitioners and policymakers understand what works in justice-related programs and practices. It includes information about over 150 programs (including a page with over a dozen related to victims!) that are rated to indicate if a program meets its goals. This new resource for those of you interested in evidence-based practices can be accessed at www.crimesolutions.gov.

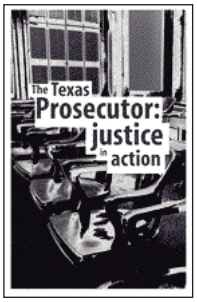
Stay cool!

Please don't spontaneously combust. At least not before you send in your ideas, suggestions, and comments to me at mcdaniel@tdcaa.com. ❇

Prosecutor booklets available for members

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

Any TDCAA member who would like copies of this



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

A note about death notices

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

TDCAA's seminar schedule for 2011

Annual Criminal & Civil Law Update, Sep. 21–23, Corpus Christi (Omni Bayfront and Marina).

Key Personnel & Victim Assistance Coordinator Seminar, November 2–4, Houston (Westin Galleria).

Elected Prosecutor Conference, Nov. 30–Dec. 2, Dallas (Sheraton Dallas).

Plus:
Updated DWI Regional Trainings with W. Clay Abbott throughout the year and Legislative Updates starting July 22 in Austin. See www.tdcaa.com/training for more information on these seminars and more. ❇

Law & Order Award given

Ector County District Attorney Bobby Bland (left) and Ector County Attorney Cindy Weir-Nutter (right) present State Rep. Tryon Lewis (R–Odessa) with TDCAA's Law & Order Award, which honors legislators for their work on criminal justice and public safety issues. Rep. Lewis received his award in front of an appreciative crowd at TDCAA's Legislative Update in Midland. ❇

Two important changes on intoxication offenses from the legislature

This session certainly had a lot less impact on DWI prosecution than most of the sessions in the last decade, but two significant changes go into effect September 1, 2011, and you need to know about them. While I will address them here, this short article is no substitute for TDCAA's Legislative Update seminar.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

High-BAC aggravated (non-enhanced) DWI

HB 1199 created a new fact-based enhancement for first-time DWI offenses. It requires proof "on the trial of the offense" that the defendant's blood-alcohol concentration (BAC) was 0.15 or more "at the time of analysis." If proven, the first-time DWI offense is a Class A misdemeanor instead of a Class B. This allegation must be pled and should be proved at punishment. This "on trial of the offense" language is the same as the §49.04(c) Penal Code enhancement for having an open container.[1] Proving the level of BAC at trial will obviously require the same predicate as proving the BAC itself, and it will work with both breath and blood testing.[2]

Extrapolation will not be an issue because it is the BAC "at the time the analysis was performed" that must be proven, not the driver's BAC at the time of operating his vehicle. Unfortunately, defendants who refuse to give a sample—and who are allowed to maintain that choice by officers not seeking a blood search warrant—will avoid this enhanced punishment range, which is yet another great reason to initiate a blood search warrant program in your jurisdiction.

An updated *DWI Investigation and Prosecution* book is coming your way this fall that will include new model charging language, but it is pretty easy to simply track the language in the new §49.04(d) of the Penal Code, set out below.

> (d) If it is shown on the trial of an offense under this section that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor.

Charging will be a bit more complicated. I recommend submitting the issue as a special issue rather than as an element of the offense, the main reason being that it should be read and charged at punishment. Secondly, submitting the issue as an element would make lesser-included charges a very difficult task. It should parallel an open container finding (this provision was added to the section containing that provision and has identical language).

When providing the range of punishment in pre-plea admonitions, prosecutors will have to monitor the court closely to make sure the correct range of punishment is given. Now is the time to update any admonition forms your courts use. In plea-bargaining, the enhancement can be waived, required, or otherwise negotiated.

A DWI with one prior conviction and a BAC over 0.15 will still be just a Class A misdemeanor. In such a case, even making the allegation may overly complicate the situation, and with no residual benefit. Alleging a high BAC in DWI with a Child, Intoxication Manslaughter, Intoxication Assault, or Felony DWI also has no effect on the range of punishment.

My guess is there are very few prosecutions that really need this "fix." I doubt many of you were hampered by a limit of 180 days' incarceration on first-time DWI offenders. Yet any new tool is better than the lack of the same. The one thing I like about the new charge is how good it will look in enhancements of DWI offenders who don't get the message and have to be prosecuted for repeated violations down the line.

Brand-new DIC-24 with warnings about blood search warrants

SB 1787, spearheaded by the good folks from the Bexar County Criminal District Attorney's Office, requires that officers give DWI defendants all the facts before they refuse to give breath or blood under the implied consent law. It amends §724.015 of the Transportation

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An unnecessary sequel: blood-alcohol analysis, the Confrontation Clause, and *Bullcoming v. New Mexico*

By David C. Newell
Assistant District Attorney in Harris County

At the risk of pop culture apostasy, I wasn't all that impressed with *The Hangover II*. The first movie was fresh and new, but the sequel was the same type of thing just applied to subtly different facts. The United States Supreme Court decision in *Bullcoming v. New Mexico* is actually kind of like that. Not in the sense that it features a chain-smoking monkey, of course, but as a sequel to the recent hit, *Melendez-Diaz v. Massachusetts*, *Bullcoming* carried with it such promise—only to reveal itself to be something we'd already seen before.[1] While *Bullcoming* does build upon the foundation laid by *Melendez-Diaz*, ultimately it still leaves enough unanswered questions that a third installment is guaranteed.

Where we left off

In 2009, the United States Supreme Court held in *Melendez-Diaz v. Massachusetts* that an affidavit from a lab analyst about a forensic analysis he performed was a testimonial statement and the defendant had a right to cross-examine that analyst under the Sixth Amendment.[2] Because the State introduced the certificate of analysis and never called the analyst to testify, *Melendez-Diaz* was denied his right to confront the witnesses against him. And, to make matters more interesting, Justice Scalia also explained that simply introducing the analysis as a business record may not satisfy the Confrontation Clause as re-imagined under *Crawford v. Washington*. According to Scalia, courts must look to whether the business record was prepared for the purpose of use at trial to determine whether it was testimonial. But notice-and-demand statutes that require a defendant to raise an objection to lab analysis prior to trial or waive his right of confrontation, such as articles 38.41 and 38.42 of the Texas Code of Criminal Procedure dealing with laboratory analysis of physical evidence, don't violate the Sixth Amendment.[3]

After *Melendez-Diaz*, courts of appeals wrestled with situations where an expert's analysis was introduced through a report even though the expert performing the analysis did not testify. In *Cuadros-Fernandez v. State*, the Dallas Court of Appeals held that an unsworn report on DNA analysis was testimonial and should not have been admitted without giving the defendant an opportunity to cross-examine the analyst.[4] Similarly, in *Wood v. State*, the Austin Court of Appeals held that an autopsy report prepared by a non-testifying medical examiner violated the Confrontation Clause based upon *Melendez-Diaz*.[5] However, the Austin Court of Appeals also held that the testimony of a second medical examiner was admissible because that second expert gave his own opinions based in part upon a review of the non-testifying medical examiner's autopsy report.[6] And finally, the Fort Worth Court of Appeals upheld in *Settlemire v. State* the introduction of breath-test results and Intoxilyzer maintenance logs through a technical supervisor even though she had not supervised the Intoxilyzer that had been used to test the defendant's breath.[7]

So what you see after *Melendez-Diaz* is courts of appeals grappling with three issues. First and most obviously, can the State satisfy *Melendez-Diaz* by calling a witness to testify about a non-testifying expert's analysis based solely upon that witness's familiarity with the way such analysis is generally performed? Second, is machine-generated data testimonial? And finally, what if an expert testifies about his own opinion based upon the data collected and conclusions drawn by an non-testifying expert? These questions set the stage for the Supreme Court's decision in *Bullcoming*, which could have answered all three questions but really only addressed the first.

Plus ça change, plus c'est la même chose[8]

The facts of *Bullcoming v. New Mexico* are materially indistinguishable from those in *Melendez-Diaz*. New Mexico charged Bullcoming with DWI and took him to the hospital where a sample of his blood was drawn. The blood was tested at the Scientific Laboratory Division of the

New Mexico Department of Health by a forensic analyst named Caylor. Caylor prepared a report that showed the results of the analysis, but it also related additional information from the analyst himself. For example, it stated that Caylor had received the untampered sample and that the number on the sample matched the number on the report. It also related that Caylor had performed a particular test under a particular protocol and that nothing in the test affected the integrity of the blood sample. Unfortunately, Caylor had been placed on unpaid leave for an undisclosed reason,[9] so the State called another analyst, who had neither participated in nor observed the test, to validate the report.

The United States Supreme Court held that the report was testimonial and that the surrogate testimony of a scientist who did not sign the certification or perform or observe the test did not meet the constitutional requirements of the Sixth Amendment.[10] Justice Ginsberg, writing for the majority, explained first that the report contained more than computer-generated data; it also contained assertions by the non-testifying analyst that the sample came from the defendant and hadn't been tampered with and that the test had been performed properly.

According to Ginsberg, the laboratory report resembled those in *Melendez-Diaz* "in all material aspects." The only difference seemed to be that the non-testifying expert in *Bullcoming* had not had his assertions notarized. Consequently, the defendant had a right to confront the non-testifying expert about the assertions contained in the report, and the State should not have been allowed to introduce the blood-alcohol

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DWI Corner: Two important changes on intoxication offenses from the legislature

Code, which delineates the warnings an officer must give a DWI arrestee when requesting a chemical sample under the implied consent law.

An officer may request "one or more specimens of the person's breath or blood."[3] In perfect cases the officer would obtain a blood sample, then request a breath sample. Further, after a refusal, an officer can seek a search warrant from a qualified magistrate. The Court of Criminal Appeals has repeatedly found that search warrants are permitted[4] and reasonable[5] in DWI cases. All this new statue does is add warnings to the list used to create the DIC-24 form that sets out those warnings. The new language is as follows:

> (3) if the person refuses to submit to the taking of a specimen, the officer may apply for a warrant authorizing a specimen to be taken from the person.

The act went into effect September 1, 2011. Watch for new DIC-24 paperwork and make sure local agencies replace all of those forms on September 1. Don't let this date go by without getting your house in order. The language needs to be read exactly. The wording "may apply for a warrant" is the proper phraseology. Officers could be argued to negate consent if they tell the defendant they "will get a warrant," "will draw blood regardless," or other such improvisations. This wording is important, and like the rest of the DIC-24, should be read verbatim and provided in writing.

This warning gives an arrestee all of the facts before deciding to consent or refuse to a breath or blood sample, and I hope it increases compliance. It will also be used against the State in cases where the officer won't or can't get a warrant—not that this issue has not been routinely raised by the defense before this change. It also makes instituting and increasing blood search warrant programs that much more important. If such a program is not happening in your jurisdiction, you already had a problem. Perhaps some departments will see this statutory change as the writing on the wall and catch up.

The new DIC-24 is already available on the DWI Resource page at www.tdcaa.com, so check the website. And good luck with these new changes. ❇

Endnotes

1 Open container enhancements are properly read and charged at punishment, yet a defense request to place them at guilt-innocence was found to be harmless. The case might well have been reversed if the enhancing paragraph were read and charged at guilt-innocence over objection. *Doneburg v. State*, 44 S.W.3d 651 (Tex.App.—Fort Worth 2001, pdr ref'd.).

2 It has been discussed that proving BAC "at the time of testing" in blood-draw cases will make this enhancement impossible because it will be impossible to prove the defendant's BAC in his body at the time the lab tests the sample. This is a rather overly precise use of the language. I recommend prosecutors simply argue that the first part of testing (and a vital step) is extracting the blood—because the actual testing may take place over several hours or even days in a lab, making this interpretation of the language silly and impractical.

3 Tex. Trans. Code §724.011.

4 *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002).

5 *State v. Johnston*, 2011 WL 8913234 at *1 (Tex. Crim. App. March 16, 2011).

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analysis without calling that analyst to the stand.

Justice Ginsberg went on to explain that allowing the defendant to cross-examine a surrogate expert did not satisfy his right of confrontation. The testifying expert didn't know what the non-testifying expert had observed or what process had been used during the testing. Moreover, had the original analyst testified, the defendant could have cross-examined him about the reasons for his unpaid leave, such as whether it was incompetence, evasiveness, or dishonesty. Because he could not do that through cross-examination of the surrogate witness, the court held that Bullcoming's right of confrontation had been violated.

This portion of the holding would seem to validate the Dallas Court of Appeals' opinion in *Cuadros-Fernandez*. While the State didn't call a surrogate witness in that case, after *Bullcoming* it's clear that such a distinction would not matter. Simply offering the report of analysis, even unsworn, runs afoul of both *Bullcoming* and *Melendez-Diaz*.

Significantly, however, Justice Sotomayor wrote a concurring opinion that clarified what the court was *not* deciding. She acknowledged that this case was materially indistinguishable from the facts considered in *Melendez-Diaz* but went on to explain the factual circumstances not present. According to Justice Sotomayor, the State had never suggested an alternative purpose for the report, such as medical treatment. In making that point, Sotomayor cited to portions of *Michigan v. Bryant, Giles v. California*, and even *Melendez-Diaz* that noted medical reports and statements for medical purposes would not likely be testimonial. Additionally, she noted that this was not a case where a supervisor testified after having observed an analyst conducting a test, though she was quick to explain that the question of what degree of involvement was necessary to admit such a report was still open.

Justice Sotomayor also reiterated that this was not a case where the State introduced raw data generated by a computer. Here, the State had introduced the non-testifying expert's statement that included machine-generated data copied from a gas chromatograph printout along with other statements about the procedures used in handling the blood sample. Because the "other statements" were testimonial, there was no need to decide whether the State could introduce the computer generated data.

Notably, this machine-generated data theory seems to be what allowed the admission of maintenance logs and breath test results of the Intoxilyzer in *Settlemire* mentioned above. On one hand, *Settlemire* seems to be distinguishable from *Bullcoming* in that the Intoxilyzer itself makes assertions about whether a proper breath specimen was taken and whether the test was performed properly. On the other hand, the officer administering the test must assert that the sample comes from the defendant by typing in the proper identification information, so it remains to be seen whether *Bullcoming* significantly undermines the holding of *Settlemire*. But clearly the better practice is to call the officer who administered the breath test (if possible) as well as the technical supervisor to completely avoid any potential confrontation clause issues.

But back to *Bullcoming*. Justice Sotomayor noted that this was not a case where an expert witness was asked to give an independent opinion about underlying testimonial reports that were not admitted into evidence. The State had never asserted in *Bullcoming* that the testifying expert offered an independent, expert opinion about blood-alcohol concentration. Justice Sotomayor noted that they would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

This, of course, is the very situation that the Austin Court of Appeals faced in *Wood* regarding autopsies. The *Wood* court correctly anticipated one aspect of *Bullcoming* when it held that the non-testifying medical examiner's report violated *Melendez-Diaz*. However, and perhaps fortunately for Texas, it went further to address whether a second expert's independent opinion based upon that report would violate the Confrontation Clause. The Austin Court of Appeals held that it didn't. As Justice Sotomayor's concurrence makes clear, the United States Supreme Court has yet to say whether it does.

It is, of course, very tempting to regard these limitations of the opinion's scope as an implicit endorsement of the introduction of computer-generated data or independent expert opinions based upon non-testifying expert observations and opin-

ions. And the vote breakdown makes it even more tempting, with four justices dissenting and Justice Sotomayor (the swing vote and author of the court's earlier opinion in *Michigan v. Bryant*) concurring. However, Sotomayor does not point to any legal authority to suggest what her opinion might be on those unresolved issues. So, just like at the end of *Back to the Future II*, we have to wait until next summer to see what happens next (spoiler in the footnote).[11]

To be continued …

So *Bullcoming v. New Mexico* leaves us pretty much exactly where we were at the end of *Melendez-Diaz*. When a prosecutor finds that she wants to introduce a lab analysis but the person who performed the analysis is unavailable, the first question should always be whether the analysis can be redone. If not, testimony from a person who has some knowledge of how the test was performed is the next best option. Finally, seeing if an expert could give an independent opinion about the analysis without merely being a surrogate for the non-testifying expert's opinion may work as a last resort. Fortunately, the United States Supreme Court recently granted certiorari in *Williams v. Illinois*, where the State's DNA expert gave an independent opinion regarding DNA analysis performed by a non-testifying expert based upon that non-testifying expert's report.[12] I hope a decision on that case in the upcoming term will provide a satisfying end to the trilogy and cure the hangover (II) left from *Melendez-Diaz* and *Bullcoming*. ❇

Endnotes

1 Well, and both *Melendez-Diaz* and *Bullcoming* were summer releases, just like *The Hangover I and II*.

2 *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

3 Again, make sure you thank Ken Sparks, County and District Attorney in Colorado County, and Jay Johannes, an Assistant County and District Attorney in Colorado County, for coming up with the idea for these statutes. These laws were noted favorably by the United States Supreme Court in *Melendez-Diaz* and have been upheld against a constitutional challenge in Texas. See e.g. *Deener v. State*, 214 S.W.3d 522, 527-28 (Tex. App.—Dallas 2007, pet. ref'd) .

4 *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 658 (Tex. App.—Dallas, no pet.).

5 *Wood v. State*, 299 S.W.3d 200, 209-10 (Tex. App.—Austin 2009, pet. ref'd).

6 *Id.*; See also David C. Newell, "Strange Things Are Afoot At The Circle K . . . mart?: An examination of the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*," *The Texas Prosecutor*, September–October 2009, volume 39, No. 5 (2009)(noting that a second medical examiner should be able to testify about his own opinion regarding an autopsy in reliance upon a non-testifying medical's autopsy report). But I'd be wary of trusting that author; his picture looks kind of sketchy.

7 *Settlemire v. State*, 323 S.W.3d 520, 522 (Tex. App.—Fort Worth 2010, pet. ref'd).

8 This is an epigram from Jean-Baptiste Alphonse Karr that roughly translates to "The more things change, the more they stay the same." I'm sure he was way hotter than Bradley Cooper. See e.g. http://popwatch.ew.com/2011/06/03/bradley-cooper-speaks-french/

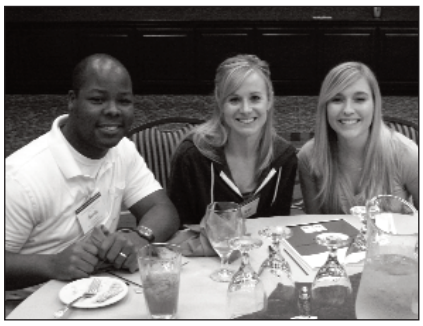
9 I personally think it had something to do with Walter White and Jesse Pinkman. See *Breaking Bad* (AMC television broadcast, January 20, 2008). Better call Saul.

10 *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

11 Doc Brown is rescued in the Old West, falls in love with Ted Danson's future wife, and totally pimps out a train. *Back to the Future Part III* (Universal Pictures 1990). *Teen Wolf Too* (or as I like to call it *Teen Wolf As Well*) was not fortunate enough to merit a triologic end.

12 *People v. Williams*, 939 N.E.2d 268 (Illinois 2010), *cert. granted*, 2011 WL 2535081 (June 28, 2011). Of course, there's already a Supreme Court case entitled *Williams v. Illinois*, but that's to be expected when you give people common names like Illinois.

Photos from our Prosecutor Trial Skills Course in Austin



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Changes in expunction law (cont'd)

Waiting period expunctions may be granted only if no indictment or information has ever been filed charging the person with a misdemeanor or with a felony arising out of the same transaction.[4] The wording of this section of the statute is rather confusing. It appears that a person cannot have a misdemeanor expunged if he is charged with a felony arising out of the same arrest, but if he is charged with another misdemeanor, then he *can* receive the expunction. How this will play out in practice has yet to be determined.

Another confusing area of this subsection comes from the waiting periods for misdemeanor offenses. The six-month or one-year waiting periods for misdemeanors applies only "if there was no felony charge arising out of the same transaction."[5] It is not clear what is meant by a "felony charge"—after all, if an indictment or information for a felony arising out of the same transaction was actually filed, then under the previous paragraph the person is not eligible at all for a waiting period expunction.[6] This would seem to suggest that "felony charge" simply means that the person was arrested for both misdemeanors and felonies in the same arrest, regardless of whether formal charges have been filed. In this circumstance, the felony waiting period of three years will apply. But because a misdemeanor statute of limitations is only two years,[7] it would be faster for the petitioner to just apply for a regular expunction when the statute runs instead of waiting for the longer waiting period to run.

The most important thing to remember about these new expunctions is that they are not *full* expunctions. If they were, they would essentially just change the statute of limitations of all felonies to three years, because the State would have to destroy all of its records if it did not get an indictment filed in that time. Instead, any expunctions granted under the waiting period subsection *must* include language in the order authorizing the police and the prosecutor to retain their records and files.[8] This way, the public criminal history information will be destroyed, but law enforcement will be able to continue its investigation. Unless the person is again arrested for or charged with an offense arising out of the transaction for which he obtained an expunction, the law enforcement agencies still may not release any information about the expunged case.[9] Waiting period expunctions will thus act more like a nondisclosure, where public information is sealed but law enforcement is able to continue using the records as necessary.

Even if the waiting period has not passed, however, the State may nonetheless agree to an expunction under this subsection. If the prosecutor certifies that the arrest records are not needed for use in *any* criminal investigation or prosecution, including prosecution of another person, then the case may be expunged even before the waiting period has passed.[10] This exception would apply in circumstances where the prosecutor has determined that no crime occurred, not simply that the wrong person was charged. If the prosecutor agrees to an expunction under this subsection, then the provision allowing law enforcement to keep the records does not apply.[11]

Discretionary expunctions

Another major change to expunction law is the addition of discretionary expunctions. Under this section, the prosecutor may, at any point until the person is tried, recommend an expunction.[12] This is a drastic change from previous versions of the statute, which authorized any respondent listed in the petition to contest the expunction.[13] Even if the prosecutor agreed, any other agency listed in the expunction could oppose. Now, the prosecutor's decision will bind every other government agency. But while most expunctions are mandatory, discretionary expunctions must still be approved by the trial court before they can be granted.[14]

Discretionary expunctions do give the prosecutor important flexibility to authorize an expunction in cases where one is truly warranted but not authorized under any other segment of the law. For example, if immediately after a person was arrested and booked, the victim said, "No, I meant to identify the person next to him," the arrestee would have that arrest on his record for several years until the waiting period ran. Also, if Robert Alan Smith was mistakenly arrested under a warrant for Robert Adam Smith, he would not otherwise be able to obtain an expunction—again, for at least several years.

However, this new law is also subject to abuse. There are no

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restrictions on when or how the recommendation must be done. Unlike waiting period expunctions, for example, the petitioner does not need to show that the case is no longer pending. A defendant could begin calling the DA's office asking for a discretionary expunction from the moment he is arrested, even while an active investigation is pending. While it is of course unlikely that a prosecutor would *agree* to an expunction in such a situation, it could become burdensome for prosecutors to constantly be subject to such requests. Also, if expunctions are requested so early, the prosecutor will likely not even have any records of the case, as they will still be in the hands of the police agency. It could become difficult to evaluate the requests for discretionary expunctions to determine which are meritorious.

Another area of confusion is in who may recommend a discretionary expunction. The statute says "an office of the attorney representing the state authorized by law to prosecute the offense for which the person was arrested" may recommend expunction.[15] This brings confusion in cases where more than one office may be authorized to prosecute the offense. For example, a theft where the stolen property was taken through several counties, or even a capital murder where a person was kidnapped in one county and killed in another. Care must be taken to avoid forum-shoppers for this type of expunction.

Actual innocence expunctions

Another change in expunction law is for people who were granted relief on the grounds of actual innocence. Although they almost certainly would have been eligible for expunction under the old expunction statute, either as a pardon or a dismissal for reasons indicating absence of probable cause, the legislature created a new form of expunction especially for actual innocence. Under this section, a person may receive an immediate expunction so long as the pardon or court order "clearly indicates on its face" that it was granted on grounds of actual innocence.[16] This type of expunction is treated the same way as an acquittal or pardon—the petitioner need provide notice only to the State, rather than all the agencies listed on the petition, and expunction is automatic.[17]

The main changes in this section come not from the entitlement to expunction but in how agencies must respond to it. In actual innocence expunctions, the State has the duty to prepare the expunction order.[18] It must also notify the Texas Department of Criminal Justice if the petitioner is still in custody.[19] When the agencies comply with the expunction order, they must send *all* relevant records to the district clerk.[20] Unlike in other expunctions, there is no provision for the agencies to simply redact or delete the records where return is "impracticable." Once the records are returned, the district clerk must retain the records until the statute of limitations has run for any civil cases relating to the petitioner's wrongful imprisonment.[21]

The lack of ability to redact records where return is impracticable could bring challenges to agencies attempting to comply with actual innocence expunctions and make it more difficult for agencies to prosecute the true offender. For example, in a sexual assault case, a new DNA test may show that the person convicted of the offense was actually innocent and identify the true perpetrator. If the actually innocent defendant files for an immediate expunction, the State is required to return *all* of its records regarding the arrest to the district clerk for retention. If the arrest records include important information for prosecuting the case, it is not clear how the State could obtain copies of it for prosecution of the true offender. Presumably, an actually innocent defendant could agree to including a provision in the expunction order authorizing the State and the police to keep records for investigation of another person for the offense, similar to the provisions of §4(a-2) of Article 55.02, but absent this agreement, there is no explicit authorization for including such an exception in the order. Prosecutors should be diligent in drafting the expunction orders for actually innocent petitioners to ensure that important evidence is not lost.

Prior felonies

Another change in the expunction statute makes it easier for convicted felons to obtain an expunction. Before, cases that were refused or dismissed could be expunged only if the petitioner had not been convicted of a felony in the five years before the arrest.[22] That provision has been removed, so prior felony convictions no longer bar an expunction.

Misdemeanor dismissals

Petitioners whose misdemeanor cases are dismissed also have a new ability to obtain an expunction. If an indictment or information is dis-

missed or quashed, the petitioner may receive an expunction if he can prove that 1) it was void, 2) he completed a pretrial intervention program, or 3) the indictment or information was dismissed for reasons showing an absence of probable cause to believe the person committed the offense.[23] This provision existed in previous versions of the statute, but it was limited solely to felonies. Now misdemeanors may also be expunged under this section.

Appellate acquittals

The legislature cleared up some confusion regarding acquittals issued by appellate courts. Under the old law, a person could receive an expunction if he was acquitted by the Court of Criminal Appeals, but it was silent about acquittals from the intermediate courts. The appellate courts were split on whether this meant that intermediate court acquittals could not be expunged or if it was implied in the statute.[24] The legislature removed that confusion and explicitly authorized expunctions where the person was acquitted by an intermediate appellate court and the period for discretionary review has expired.[25]

Miscellaneous provisions

A person who absconds while free on bail is not entitled to receive an expunction under either the waiting period or statute of limitations subsections.[26] He may, however, still receive an expunction if he is acquitted or pardoned, if the case was dismissed for lack of probable cause, or if the prosecutor recommends expunction.

Expunction is available only to someone who was arrested for either a felony or a misdemeanor.[27] Thus, even under previous versions of the law, someone arrested for community supervision or parole violations would not be eligible for an expunction.[28] The legislature opted to make this provision even more explicit, however, and prohibited expunction for arrests pursuant to a warrant issued for violations of community supervision.[29]

Class C expunctions

Class C convictions that were dismissed pursuant to Art. 45.051 of the Code of Criminal Procedure (the provision dealing with deferring disposition [the Class C probation statute]), have a special rule in Art. 45.051(e) specifying that they can be expunged under Art. 55.01 of the Code of Criminal Procedure.

But before proceeding under this statute, note that certain Class C offenses, particularly "status offenses" (those crimes that can be committed only by people of a certain age, such as Minor in Possession of Alcohol, Minor in Possession of Tobacco, Failure to Attend School, etc.), may have other code sections that deal specifically with their expunction, and the process may be easier than seeking an expunction under Art. 55.01 of the CCP.

So check the following statutes before proceeding with expunctions under Chapter 55 of the Code of Criminal Procedure: Art. 45.0216 of the Code of Criminal Procedure (Class C non-traffic convictions, which can be expunged upon the child's 17th birthday), §106.12 of the Alcoholic Beverage Code (Minor in Possession of Alcohol convictions, upon the child's turning 21); Article 45.055 of the Code of Criminal Procedure (Failure to Attend School Convictions upon turning 18), and §161.255 of the Health and Safety Code (Minor in Possession convictions upon turning 18).[30]

Conclusion

Chapter 55 was already a complex and confusing scheme. After the 82nd Legislative Session, some areas of confusion were cleared up, but others were added and the statute was made even more complex in general. How the courts will interpret some of the new provisions remains to be seen, but a prudent prosecutor will carefully review the new statute before wading back into expunction law.

For a more detailed examination of the expunction statute and forms for handling the most common expunction situations, a new edition of *Expunction & Nondisclosure* by Andrea Westerfeld and Katharine Decker is now available from TDCAA. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 55.01(a)(2)(A).

2 Tex. Code Crim. Proc. art. 55.01(a)(2).

3 See, e.g., *T.C.R. v. Bell County District Attorney's Office*, 305 S.W.3d 661, 663 (Tex. App.—Austin 2009, no pet.).

4 Tex. Code Crim. Proc. art. 55.01(a)(2)(A).

5 Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(i)(a) & (b).

6 Tex. Code Crim. Proc. art. 55.01(a)(2)(A).

7 Tex. Code Crim. Proc. art. 12.02.

8 Tex. Code Crim. Proc. art. 55.02, §4(a-1).

9 Tex. Code Crim. Proc. art. 55.02, §4(b).

10 Tex. Code Crim. Proc. art. 55.01(a)(2)(A)

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(i)(d).

11 Tex. Code Crim. Proc. art. 55.02, § 4(a-1).

12 Tex. Code Crim. Proc. art. 55.01(b)(2).

13 *Texas Dept. of Public Safety v. Katopodis*, 886 S.W.2d 455, 458 (Tex. App.—Houston [1st Dist.] 1994, no writ).

14 Tex. Code Crim. Proc. art. 55.01(b) ("a district court may expunge").

15 Tex. Code Crim. Proc. art. 55.01(b)(2).

16 Tex. Code Crim. Proc. art. 55.01(a)(1)(b)(ii).

17 Tex. Code Crim. Proc. art. 55.02, §1a(a).

18 Tex. Code Crim. Proc. art. 55.02, §1a(b)(1).

19 Tex. Code Crim. Proc. art. 55.02, §1a(b)(2).

20 Tex. Code Crim. Proc. art. 55.02, §5(a)(1).

21 Tex. Code Crim. Proc. art. 55.02, §1a(d).

22 See *T.C.R.*, 305 S.W.3d at 664-65, citing former Article 55.01(a)(2)(C).

23 Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii).

24 Compare *Harris County v. E.B.H.*, 95 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) with *Ex parte Current*, 877 S.W.2d 833, 836 (Tex. App.—Waco 1994, no writ).

25 Tex. Code Crim. Proc. art. 55.01(b)(1).

26 Tex. Code Crim. Proc. art. 55.01(a-2).

27 Tex. Code Crim. Proc. art. 55.01(a).

28 See *In re Wilson*, 203 S.W.3d 929, 931 (Tex. App.—Texarkana 2006, no pet.).

29 Tex. Code Crim. Proc. art. 55.01(a-1).

30 An excellent article in the *Municipal Court Reporter*, the official publication of the Texas Municipal Courts Education Center (TMCEC), was written by Jim Bethke and can be found here: www.tmcec.com/public/files/File/The%20Recorder/2002/Aug02recorderNo2.pdf. Though nine years old at the time of this writing, the article still contains good law and explains Class C expunctions with greater detail and clarity than we can provide here.

Unraveling a web of lies

How prosecutors convicted a serial domestic abuser of murder—despite his girlfriend's false confession to the crime

On July 4, 2009, just before midnight, Kristina Earnest and Tommy Castro rushed into the emergency room at Wilbarger General Hospital with the limp body of 5-year-old Kati Earnest. Emergency room personnel did everything they could to help little Kati but it was too late.

By Staley Heatly
District Attorney pictured with Jeff Case, DA Investigator, both in Wilbarger, Foard, and Hardeman Counties

Kati's body was covered in bruises from front to back and head to toe. Castro and Earnest claimed that they had found her face down in the bathtub. As for the bruises on Kati's body, they were from playing belly-busters at the pool and from being beaten up by other young kids at the park. None of what they said made any sense to the shocked nurses and doctors.

The next day the Vernon Police Department received the autopsy results from Tarrant County. The results confirmed everyone's suspicions: Kati had died of blunt force trauma.

With autopsy results in hand, Vernon Police Department detectives called the couple back in for interviews. After she was confronted with the results of the autopsy, Kristina Earnest quickly confessed in a flat, emotionless monotone to having killed her own child. She was so cooperative with investigators that she even went back to the apartment with DA Investigator Jeff Case and Vernon Police Detective Mickey Allen to show them just how she had committed the crime. She was arrested by the Vernon Police Department and charged with capital murder. We were convinced, however, that there was much more to the story.

The boyfriend

After her arrest, we turned our focus to her boyfriend, Tommy Castro. A quick check revealed prior family violence convictions from the 1990s in the Dallas-Fort Worth area. In addition, just two months before Kati's death, he had been placed on probation for aggravated assault with a deadly weapon in another jurisdiction. The victim was a woman named Shyla Frausto. And just two days before Kati's death, on July 2, Castro was convicted of having violated a protective order against Frausto.

Within a few days of Kati's death we were in contact with Shyla Frausto and Castro's ex-wife, Melissa Castro. Melissa had been with Castro from 1992 to 1995 while Shyla had dated him between 2007 and 2009. The similarity between the two

women's experiences was startling. Both gave detailed accounts of the incredible brutality and abuse that they suffered at Castro's hands.

Castro's history spoke for itself. We were not foreclosing the possibility that Earnest had something to do with the crime, but everything was pointing to Castro as the perpetrator.

Castro was not shy with the police. Whenever they requested the opportunity to meet with him, he came. He talked and talked but almost never answered a question. When it came to the crime, he always claimed that he didn't know what happened because he was "out of it" and "heavily medicated" because he was suffering from kidney stones. Initially, Castro praised his girlfriend for being a wonderful mother and "wife." He feigned surprise at her confession and intimated that it must have been coerced by police. He was less generous with the deceased little girl. He described Kati Earnest at various times as being "gluttonous," "hard-headed," "disrespectful," and "a liar."

The truth comes out

After Castro was arrested, we allowed him to exchange mail with Kristina. The letters showed Castro's absolute control over her. He quoted biblical Scripture freely and encouraged her to give her problems to God. He constantly assured her that he loved her and encouraged her to stay strong but most importantly to keep her mouth shut. After a couple of weeks we cut off all communication between them. Within a couple of days Kristina passed a note to a jailer asking to speak to a detective. The truth finally came out.

She confirmed our suspicions that she had been abused by Castro and confessed to the crime because she was scared of what he might do to her and her remaining living children, a 3-year-old named Haleigh (who was living with her father and did not move to Vernon) and 20-month-old J.W. Bell.

The background

Kristina Earnest was only 21 years old when she met 41-year-old Tommy Castro in Amarillo. In January 2009, Kristina lost her mother to cancer. She was hopeless and depressed. Enter Tommy Castro. The unemployed itinerant defense contractor offered her the opportunity to stay home with her kids while he worked and took care of the family.

Initially, Castro was respectful and caring. He told Kristina that he was a religious man and he spent a lot of time reading the bible and praying with her. Castro had Kristina quit her job and at the end of May, they moved to Vernon with her children, 5-year old Kati and 20-month old J.W.

They spent their first night in Vernon at a motel. The first time Castro beat Kristina occurred shortly after check-in. He began berating her for supposedly wanting to have sex with some workmen that were outside the hotel. She tried to gather her things and leave when Castro struck her the first time. He grabbed her by the throat, held her up against the wall, and told her that she was not going anywhere. He took her cell phone and removed the cord from the phone in the room. Castro told her that he would put her to sleep and that she would never see her little "rats" again if she tried to leave him.

A couple of hours later, Castro apologized for his behavior. He told Kristina he had lost it because of her inappropriate behavior. He told her that she could leave and go back to Amarillo as soon as the marks on her face were healed. Unfortunately, Kristina's marks never healed. They were always replaced by new, fresh bruises.

A couple of days later, the couple signed a lease on a three-bedroom apartment at a complex on the outskirts of town. Kristina hoped that Castro would keep his word and that the violence was over. After the initial incident, Castro had been contrite and even sweet. Unfortunately, the acts of family violence never ceased and the honeymoon periods between acts of violence got shorter and shorter. She and her children lived in constant fear of Castro.

He had strict rules in the household for both Kristina and her children. He limited their food intake to one measured serving per meal while he could eat all he wanted. When Castro left the apartment, which was rare, he placed a piece of tape on the outside of the door to make sure that the door was not opened while he was gone. If the tape was broken, Kristina got a beating. He also routinely inspected her genitals to see if she had been having sex with the neighbors.

Castro didn't start hitting the kids until June. If he thought the children were disobedient, he would hit them. He would hit them on the behind with his hand and smack them across the head. His favorite method of punishing Kati was to

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spank her with a wooden boat that she had made in Sunday school class. It was a flat piece of wood about 8 inches inches long with a tapered point. He also made Kati lie on the ground and do flutter kicks when she didn't behave. With Castro, you hadn't been appropriately punished unless and until you cried. On the other hand, if you cried you were weak and had to be punished more.

The murder

On July 4, 2009, Castro and Kristina woke up late. Castro took out the trash and stopped by the parking lot to check on his pride and joy, a 2009 Mazda RX-8. When he returned to the apartment, he accused Kati of urinating in his car. At first Kati denied that she had urinated in Castro's car but after some prodding she admitted that she had.

Lying was one of Tommy Castro's pet peeves and the Mazda sports car was his baby. To punish the child, Castro struck her numerous times on the bottom with her wooden boat. When he didn't get the reaction that he wanted, he had her lean back against the bed with her hands behind her back and her stomach exposed. He took the boat and slammed it against her stomach over and over. She whimpered but would not cry. He did it again three more times and she finally let out a cry. Castro still wasn't satisfied. He made Kati lay down on her back on the floor and he smashed his fist against her stomach two times. Then he stood up and he stepped on her abdomen with his full weight and walked over to the other side of her. Castro then turned around and stepped on her abdomen again back over to the other side. At that point, Kati's death was imminent. Castro had transected her duodenum and caused severe damage to other internal organs.

Kati complained about her stomach all day. Earnest pleaded with Castro to take her to the hospital on multiple occasions. At around 11:00 p.m., Kati started throwing up. Castro picked her up and took her into the bathtub to contain the vomit. He turned on the water to try and clean the vomit off Kati. Earnest got into the bathtub and held on to Kati's head while she was sick. Just after 11:30 p.m., Kati looked into her mother's eyes and took her last breath. Castro and Earnest rushed Kati to the hospital, but she was dead on arrival.

On the way to the hospital, Castro told Earnest what she was going to say to the doctors and nurses. She complied. He had been beating her for weeks and she felt like he was completely in control and that she had no choice but to do what he demanded. When the police called Castro and Earnest in for an interview, Castro told her she would confess to the crime or something bad would happen to her other two remaining children. She believed him and did as she was told. Only after the pair had been separated for weeks in jail did Earnest gather the courage to tell the truth.

A history of violence

Considering Tommy Castro's violent past, Kristina Earnest's version of events made perfect sense. In addition to finding Shyla Frausto and Melissa Castro, my investigator Jeff Case had tracked down six other women he had abused starting in 1992 all the way up to the day Kati died. They lived all over Texas, and we even found a woman in Indiana whom Castro had beaten while he was doing contract work there.

These women all suffered numerous, brutal beatings at Castro's hands. Almost all of these women dated him for a year or more. They stayed with him out of a mix of fear, hope, and love, but mainly fear.

We believed Earnest's story and thought that she would be a credible witness, but we also knew that we would not be allowed to call these other women in the guilt phase of the trial unless the defendant somehow opened the door. If the jury couldn't hear from these women, they wouldn't know Tommy Castro's true nature and we would be relying solely on the word of a woman who had previously confessed to the crime. Because of that, our focus at trial was to provide evidence that corroborated Earnest's claim of domestic violence.

Testimony from State's witnesses

The first six witnesses we called were nurses and CPS personnel who observed Castro and Earnest at the emergency room. The nurses testified that Earnest was distraught and sobbing uncontrollably at the death of her daughter; she stood by the bed holding Kati's hand, stroking her hair, and pleading with her to come back. Castro, on the other hand, was barking orders at the nurses and doctors telling them that they should continue their lifesaving efforts. He showed no emotion and never shed a

tear throughout the night. As one nurse said, "He had the only dry eyes in the ER that night."

Castro was also clinging tightly to little J.W. Bell. The nurses tried to take the child from him but he refused. Castro was wearing a ball cap when they came into the ER, but after they arrived he placed the cap on little J.W.'s head. J.W. kept trying to take if off but Castro would not let him. When the nurses finally got J.W. away from Castro, they took off his ball cap and noticed a large laceration on the top of his head. They also noted that he had bruises all over his face and the rest of his body. CPS workers took photos of those bruises, and they were introduced at trial. The nurses also observed bruises on Kristina Earnest's body. She had a black eye, a split lip, and bruises on her arms and legs.

The only person that did not have any bruises was Tommy Castro.

CPS investigator Tina Burkhart described how Kristina was silent, whimpering and looking down at her feet the entire morning. When Burkhart asked her a question, Kristina would look over at Castro before answering. He sat in the chair next to her, leaning over so that his knees were touching hers. He had a stern look on his face. Burkhart explained how Castro controlled the conversation and intimidated both her and his girlfriend.

We also called several people from the apartment complex. The neighbors stated that they rarely saw Kristina outside of the apartment, and when they did she walked with her head down and refused to make eye contact. The apartment manager, April Maldonado, testified that she had seen her leave the apartment on only a couple of occasions, and she never saw the children outside. When Kristina was outside, Castro was always leading her around. He kept a firm grip on her arm with both of his hands. Kristina always stared at the ground and never said a word unless Castro gave her permission. Maldonado also witnessed Castro leave the apartment complex with Kristina in his Mazda. When he did so, Castro would unlock the passenger side door with his key chain, place Kristina in the car, lock the doors again, walk over to the driver's side, unlock the door and get in. He was in complete control of her every movement.

After we called these third-party witnesses to set the scene, we put Dr. Judith Beechler on the stand as an expert witness on family violence. Dr. Beechler, a professor of counseling at Midwestern State University, has worked with battered women for over 20 years. She testified at length about the cycle of violence and the power and control wheel. Her testimony was critical and provided the jury with invaluable insight into the mindset of a battered woman. At the conclusion of her testimony, we knew that the jury would be ready to hear from Kristina Earnest.

Kristina's testimony was powerful and believable on the heels of the doctor's previous testimony. She spoke of how Castro rapidly isolated her from her family and even convinced her that her family was no good for her. He limited her financial capacity by making her quit her job so that she would have to rely on him for support. When they moved to Vernon, Kristina had to leave her car in Amarillo at his parents' house so that she would not have her own transportation. And when they got to Vernon and the domestic violence started, he took her cell phone away and completely eliminated her contact with anyone outside the home. Through isolation, physical violence, and manipulation through religion, Kristina became completely submissive to Castro.

After Kati's death Castro kept Kristina sedated on a steady dose of prescription anti-anxiety medication. Castro had gotten a 90-pill prescription of Clonazepam filled on July 2 in Amarillo that called for one pill per day. When he was arrested on July 10, 2009, the bottle of Clonazepam was empty. This helped explain Earnest's flat, monotone confession.

We also called Tommy Castro's father, Frank Castro, to the stand. Castro frequently called his father from jail, and he always communicated in Spanish. Fortunately, I speak Spanish. Frank was a very reluctant witness but he eventually admitted that his son had told him that he wanted to marry Kristina and that she did not kill her daughter. This was in stark contrast to the trial strategy of blaming Kristina for Kati's death. He also told his father that he was "not going to tell the truth about what happened" in court and that the only person he would tell was a priest. He also begged his father to talk to Kristina and to tell her to keep her mouth shut. Castro said that he "needed Kristina."

Another door is opened

The defense's trial strategy was that Kristina Earnest had committed the

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murder. However, when defense attorneys cross-examined her, they did not attack her accusations of domestic violence. That foreclosed the possibility of us introducing the testimony of the prior victims of family violence. The defense, however, through its opening statement and vigorous cross-examination, opened another door by placing the identity of the perpetrator of the crime at issue.

As a result of the defense strategy, we were able to call Shyla Frausto, Castro's ex-girlfriend, as a witness. Frausto dated Castro for about 18 months between 2007 and 2009. Her testimony was powerful and if the jury had any doubts about Castro, they were erased by the time she was finished. Frausto was beaten in much the same way as Kristina. He booby-trapped the door so she could not leave the house and he inspected her genitals whenever he returned home to see if she had had sex with other men. More significantly, however, her 10-year-old son was beaten in much the same way as Kati.

Frausto testified that Castro would beat her son with a flat piece of wood, about the same size and shape as the wooden boat that was used on Kati. She also testified that Castro would step on her son's abdomen and side and walk from one side of him to the other while stepping on him—exactly how Kati was killed. Finally, the medical examiner, Dr. Marc Krouse, had told the jury that Kati had deep bruising on one side of her neck. The doctor noted that this type of bruising was consistent with having been strangled in a head lock. Frausto testified that Castro would often put her son in a head lock as well. The similarities amounted to a signature: beating children with wood, strangling them in a head lock, and stepping on their abdomens.

Castro takes the stand

There was no doubt that Castro would testify. In his own mind, he knew that he was the smartest person in the room and that he could set the record straight with the jury. Castro was on the stand for seven hours, six of them on direct. Nancy Nemer with the Attorney General's Office assisted me in the trial, and she did an excellent cross-examination of the defendant. She methodically picked apart Castro's new version of events: that Kristina was a terrible mother who had attempted to drown Kati a couple of days before her death. Nemer used details from his numerous prior statements to carefully and methodically unravel his story, showing how outlandish it was, and proving him a liar. She even got him to admit on the stand that he had been an "animal" with his previous girlfriends. It was a wonderful case of death by a thousand tiny cuts. She never got angry or frustrated at Castro's failure to answer her questions directly. She was persistent and polite, and by the end of her cross, Castro lost whatever tiny bit of credibility he may have had with the jury.

The verdict

The jury deliberated for almost three hours before returning a verdict of guilty to the lesser-included offense of felony murder. (Considering the obstacles we faced with Kristina's false confession, I had decided not to seek the death penalty.) While I was a little disappointed that we did not get an automatic life sentence with a capital conviction, I was very happy that we had the opportunity to put on a punishment case. Several women had the chance to empower themselves by facing a man who had caused them such enormous pain.

The stories from the previous victims were heart-wrenching and mirrored Kristina Earnest's testimony. They were beaten, imprisoned, sexually assaulted, and traumatized. They all did whatever Castro said. The woman from Indiana testified that one time Castro told her he was going to strangle her to death. She testified that she picked up a kitchen knife and stabbed herself in the arm hoping that it would make him stop. It worked but she suffered permanent tendon and nerve damage to her arm. As Castro drove her to the hospital he told her exactly what explanation to give when they got to the ER. She did just as she was told.

By the time the punishment phase was over, the jurors were leaning over, staring at Castro and shaking their heads. The pronouncement of the sentence was just a formality. In less than 10 minutes the jury came back with a verdict of life in prison and a $10,000 fine.

After the verdict, a crowd of prior victims and their families gathered in my office crying, hugging each other, and smiling. These women had lived in terror for years, afraid that Castro would reappear at any time to terrorize them again. There was an enormous sense of relief and satisfaction that justice had finally been served, not just for Kati Earnest, but for all of them. ❇

The Victim Impact Statement quarterly activity

What the latest statistics say about this important part of a victim's voice in court

By Mike Jones
Program Coordinator at the Texas Crime Victim Clearinghouse
with Janice Sager and Kristi Heiman
Program Specialists in the TDCJ Victim Services Division

Back in 1987 when the Texas Crime Victim Clearinghouse, then a program of the Office of the Governor, made its initial report to the 70th Texas Legislature, it concluded that the Victim Impact Statement (VIS), although "still a relatively new procedure," was "largely ignored or forgotten by the criminal justice system." But the Clearinghouse believed then as it does today that the Victim Impact Statement is the "most effective voice that the victim can have."[1]

If you don't remember—or were not born yet—it was the 69th Texas Legislature that passed House Bill 235 that created the statute in the Code of Criminal Procedure that detailed crime victims' rights in Texas, defined the "statutory victim," and established the use of a form called the Victim Impact Statement. The statute as it read then also required the Texas Crime Victim Clearinghouse to prepare and submit a report "on the implementation of the Victim Impact Statement" to the 70th Legislature.

Article 56.05 of the Code of Criminal Procedure states that the Texas Crime Victim Clearinghouse, now a program of the Texas Department of Criminal Justice's Victim Services Division, in partnership with the Board of Pardons and Paroles (BPP) and the TDCJ Community Justice Assistance Division (CJAD), is still required to "develop a survey plan to maintain statistics on the numbers and types of persons to whom state and local agencies provide victim impact statements during each year." If you have been a victim assistance coordinator in a county or district attorney's office for even a short time, you most likely have come across this survey plan, the Victim Impact Statement Quarterly Activity Report.

Setting aside the statutory requirement that the Clearinghouse collect and maintain statistics, why is the Quarterly Activity Report important? Because of the dedication and hard work of many people, the VIS is no longer ignored in the criminal justice system. More and more key decisionmakers recognize its importance as well as their obligation to consider it when making vital decisions along the way. The Victim Impact Statement may serve as the single most important right victims have in our complex criminal justice process. Not only is it a personal record of the impact of violent crime on victims and their families, but it also serves as their voice in the process. If they choose to participate, their Victim Impact Statement can influence how justice is ultimately served.

Although the Clearinghouse is no longer required to submit a report to the Texas Legislature, we have continued to collect statistics on the "numbers and types of persons to whom state and local agencies provide victim impact statements during each year." Historically, the Clearinghouse has collected these statistics on a semiannual, calendar-year basis. In calendar year 2010, we began to collect the statistics quarterly. Beginning September 1, 2011, the statistics will be based on a fiscal year timeframe.

The latest statistics

Last fiscal year, 2009–10, the TDCJ Victim Services Division published these statistics in its first annual report. (You can find it on the TDCJ website at www.tdcj.state.tx.us. Click on the Victim Services Division link in the Quick Links box.) In that report, counties that reported (that is, 90 percent of Texas' 254 counties) stated that 96,367 Victim

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Impact Statements were provided to victims by county and district attorney's offices during the fiscal year. These numbers indicate that prosecutors' offices across the state are working very hard to ensure that victims of crime are receiving Victim Impact Statement packets. Of those, 14,642 victims, or 15 percent, returned the VISes to the counties.

Of the 231 reporting counties, 27 said they did not provide or receive back any Victim Impact Statements. Keep in mind that the Clearinghouse solicits reports from both county attorney's offices as well as district attorney's offices. Because many county attorney's offices deal only with misdemeanor offenses, they may not encounter victims as defined in the Code of Criminal Procedure and so would have no statutory obligation to provide Victim Impact Statements.

Because 85 percent of victims who were provided Victim Impact Statements decided not to return them, it is important to identify the reasons why. First, not all cases that are indicted are adjudicated, so there is no reason for the victim to return the statement. Also, some victims do not want to have anything to do with the criminal justice process. Finally, many victims believe the wheels of justice will rumble on, regardless of their involvement, and the system will take care of everything.

However, many victims may not return their Victim Impact Statements because they are unclear of its role and importance in the process; they may confuse it with other documents and forms they receive; they fear the offender having access to it; or it may be too emotionally difficult to complete the VIS at the time they receive it.

If a victim chooses not to submit a Victim Impact Statement, that is his right. If he does not submit one because the form or the process is confusing or unclear, then the criminal justice system has not fully served that victim. Innovative practices that will increase the likelihood that victims will complete and return Victim Impact Statements must be explored.

Revisions

Every odd-numbered year, according Article 56.03(h) of the Code of Criminal Procedure, the Clearinghouse convenes a Victim Impact Statement Revision Committee. The committee consists of representatives from the BPP and TDCJ CJAD along with the Texas Youth Commission, the Texas District and County Attorneys Association, the Office of the Attorney General, and county and district attorney's offices across the state. Recent committees have included at least one victim representative as well. In addition to complying with statutes and incorporating updates based on new legislation, the committee works very hard to insure that the Victim Impact Statement serves the victims for whom it is meant. The committee takes great care to design a form that is easy to complete, that includes all the information it needs to collect, and that is easily distinguishable from other forms, such as the Crime Victims Compensation form. To set victims at ease, the victim contact information, which is protected by law, is separate from the victim impact portion and clearly indicates that the information is confidential. The instructions included with the packet have been designed to be clear and concise as well.

Still, only 15 percent of the Victim Impact Statements are completed and returned. Even fewer, around 4 percent, make it to TDCJ Classification and Records for inclusion in offender files for review by the BPP and to be forwarded to the TDCJ Victim Services Division for notification purposes. Some Victim Impact Statements that are not forwarded to TDCJ are sent to the Texas Youth Commission (TYC) if the offender is a juvenile and to community supervision and corrections departments for offenders who are sentenced to community supervision (probation). The only way these VISes are forwarded to TDCJ is if the juvenile offender ages out of TYC and is transferred to TDCJ or if the offender's probation is revoked and is transferred to TDCJ. At this time, we do not collect statistics on how many Victim Impact Statements come to TDCJ from TYC or local community supervision and corrections departments.

If we have designed a useful Victim Impact Statement packet and the county and district attorney's offices across the state are providing them to victims, how can we make sure that victims who want to exercise their right to be heard get that opportunity? Front-end efforts, such as making sure the victim knows what she is receiving in the Victim Impact Statement and how it will be used and protected throughout the process, and follow-up procedures, including letters or phone calls to

find out if the victim received and understands the Victim Impact Statement, may address the reasons Victim Impact Statements are not completed and returned.

However, in many counties, implementing these kinds of programs is much easier said than done. Small counties may not have the staff to follow up with victims. Very often the victim assistance coordinator already wears many hats or may provide victim assistance as only part of her overall job duties. A large county may have a bigger staff, but the number of victims it serves is astounding. In FY 2009–10, four of the largest counties in Texas—Dallas, Harris, Tarrant, and El Paso Counties—provided over half of all Victim Impact Statements distributed statewide, a total of 49,115. Providing services to victims and affording them their basic statutory rights is difficult even with a large victim services staff. Going beyond that by providing front-end and follow-up services requires some creative initiatives, such as enlisting volunteers and interns or using new technology.

There is a misconception across the state that Victim Impact Statements are the sole responsibility of the victim assistance coordinators in county and district attorney's offices. Prosecutors' offices and their victim assistance coordinators bear a tremendous responsibility for Victim Impact Statements. However, they are not alone. Statutes clearly mandate that the courts, district clerks, sheriff's offices, and corrections agencies are charged with their own responsibilities related to Victim Impact Statements. For this reason, the Clearinghouse has partnered with other state and local agencies to develop training programs as well as sample protocols designed to inform, educate, and guide all agencies and criminal justice professionals who have legal responsibilities regarding Victim Impact Statements.

As these sample protocols continue to develop and as the criminal justice community and the general public become more aware of and educated about the availability, uses, and importance of the Victim Impact Statement, the Quarterly Activity Report will continue to be one of the main tools available to gauge whether these efforts are working at the state and local levels. Return rates of Victim Impact Statements do not tell the whole story, but as long as we continue to develop programs from what we learn from the Quarterly Activity Report and strive for participation from every county and district attorney's office in the state, these statistics can be clear indicators that the efforts set forth back in 1983 by the original Texas Crime Victim Clearinghouse are continued by the dedicated criminal justice professionals who now serve victims in our state. The victims of crime in our communities deserve no less. ❇

Endnote

1 Suzanne McDaniel, *Crime Victim Impact.* A Report to the 70th Legislature, Texas Crime Victim Clearinghouse, Office of the Governor of Texas, 1987, p 45

Executive Director's Report

Thanks for "mad-dogging" it answer

Here's how the legislature made the theft of a single penny a third-degree felony: If the theft is committed during a disaster declaration, the penalty is increased by one degree. Most of Texas is under a drought disaster declaration, so any theft committed in an area with such a declaration can be enhanced to the next-highest degree—it applies to most Texas counties! ❇

'Beware of false prophets, who come to you in sheep's clothing'

How the Texas State Securities Board convicted a Scripture-quoting con man who bilked elderly victims out of hundreds of thousands of dollars

By Dale R. Barron and Alexis Goldate
Enforcement Attorneys, Texas State Securities Board in Austin

In October of 2008, Polly Prestwood, an elderly resident of Flynn, a city in Leon County, made a phone call that set Reginald Lee Clark on the path to prison. Frustrated by Clark's refusal to provide her information about investments she had made with him, Prestwood contacted the Texas State Securities Board (TSSB) to determine whether Clark was registered with the state to sell investments.

Clark held himself out as a successful financial adviser and a true Christian man who only wanted to help his elderly clients invest safely and securely. But he was not registered with the TSSB as a securities dealer or agent to sell investments, as required by the Texas Securities Act. After learning Clark was unregistered, Prestwood filed a complaint against him with the TSSB Enforcement Division and provided copies of her checks made payable to Clark's company, Clark Investment Advisers, which did business in and around Limestone County.

The Enforcement Division began a joint investigation of Clark's activities with the Limestone County Sheriff's Office and County and District Attorney Roy DeFriend. Members of the Enforcement Division interviewed Clark at his home in Woodway, near Waco, where he stated he sold only insurance products and there would be no need for a client to write a check directly to him or his company to make an investment. Clark further stated that any funds invested by a client would be paid directly to the company issuing the product.

Prestwood's records flatly contradicted Clark. Each check she wrote to Clark Investment Advisers had Clark's endorsement on the back. He was first indicted in June 2009 for theft of property and misapplication of fiduciary property, and the indictment named Prestwood as his victim.

The scheme and its victims

Clark represented himself as a born-again Christian, and his victims bought into his charm and ability to quote Scripture. He ended emails to one investor with suggested prayers; to another he wrote, "God bless what we are trying to do." Prestwood told TSSB attorneys that Clark would bring passages from the Bible to their discussions about investments.

Clark gained his victims' trust by initially placing them in legitimate investments such as annuities or brokerage accounts. After some time, Clark would convince them to move their money to another investment he touted, one that would provide higher returns. The type of investment he offered varied with each investor.

When Polly Prestwood first met Clark, he represented himself as a registered broker who successfully handled investments for a number of people and offered to help manage her money. Clark first placed some of Prestwood's money in annuities in 1999, and she received timely reports and statements regarding the status of her investment. In 2004, Clark approached her with a new investment opportunity that promised a higher yield. Best of all, he guaranteed Prestwood that her principle would never be at risk.

Clark told Prestwood her funds would be placed with an investment management company that accepted investments only in large blocs. That meant Prestwood's funds would need to be combined with the funds of several of his other investors to make an investment large enough for the management company to accept. Clark told Prestwood to make her

checks payable to Clark Investment Advisers and he would see to it that her funds would be placed with the management company along with the funds from his other investors. Based upon Clark's representations, Prestwood wrote three checks payable to Clark Investment Advisers in the following amounts and on the following dates: (1) $28,497.97 on January 29, 2004; (2) $70,703.48 on March 23, 2004; and (3) $151,966.32 on July 7, 2004.

Prestwood had no reason not to trust Clark. He had previously placed her funds in legitimate investments, and she was pleased with the returns. From 2004 to 2008, Clark sent Prestwood periodic account statements from her three investments. The statements purported to show that the investments Clark was making on behalf of Prestwood were earning about 13 percent—impressive returns at a time when interest rates were heading toward historic lows.

However, the financial analysis of bank records told another story: Clark used Prestwood's money to pay his personal expenses and to pay other investors. Approximately $87,000 of her money went to an individual in Houston who had previously invested his money with Clark.

Clark ensnared Lafon Denney by cold-calling him to offer an investment in annuities. Denney invested in an annuity, but in 2005, Clark convinced him to move his money from the annuity into a Scottrade account over which Clark would have trading authority. In 2006, Clark convinced Denney to purchase a government bond. Because Scottrade did not sell that particular bond, Clark said he needed to purchase the bond himself. At Clark's direction, Denney wired $45,000 from his Scottrade account into Clark Investment Advisers. With Denney's money, Clark continued to illegally move money between clients: He used Denney's $45,000 to pay Prestwood a partial distribution of $35,000 on her investments.

In 2008, Clark executed a wire transfer that moved $15,000 from Denney's Scottrade account into Clark's personal bank account. Examination of the wire instruction revealed that Clark forged it. Clark took the 2006 wire instruction—the one Denney knew about—and forged it to show the date as 2008. Adding insult to injury, Scottrade received only one wire instruction for $15,000 but had mistakenly processed the transaction twice. Again, Clark misappropriated the money. He used the entire $30,000 to pay his personal expenses and to make payments to Prestwood.

Jean Carson considered Clark to be a close family friend, but she became another of his victims. Clark originally placed her money in a brokerage account, but he later convinced her to invest in a horse-breeding operation. She, too, sent her money to Clark Investment Advisers and then eventually, upon Clark's instructions, made payments directly to him. Clark sent her pictures of mares and spreadsheets that purported to show the status of her investment. Carson wrote three checks to Clark for investments in the purported breeding operation: (1) $69,390.90 written on April 3, 2003; (2) $10,000 written on May 6, 2005; and (3) $10,000 written on June 17, 2005. The checks were included in the superseding indictment against Clark.

Further financial analysis of Clark's bank records, however, revealed Carson wrote additional checks to Clark for the breeding operation, but they were not alleged in the superseding indictment of Clark per an agreement between the State and the defense (they were not admitted until the punishment stage of the trial). Analysis of Clark's bank records revealed that he spent all of Carson's money on personal expenses and toward additional payments to Prestwood. Carson, like the others, was impressed by Clark's charm and ability to quote the Bible. To this day she simply refuses to believe Clark stole her money.

The Groesbeck Band Booster Club

Clark even incorporated the local band booster club into his scheme. In 2008, the treasurer of the booster club, Liz Beard, gave Clark a blank check from the club's bank account. Beard told TSSB attorneys it wasn't uncommon to provide Clark a blank check so he could buy supplies for the club; after all, he was club president. In early 2008, Clark made out the check to his firm, Clark Investment Advisers, in the amount of $3,000. Once again, someone else's money went to pay Clark's personal expenses, including payment of a fine to the City of Allen Municipal Court.

But Beard noticed that the blank check was written to Clark's firm.

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She confronted Clark, who told her he had purchased bonds with the funds on behalf of the booster club. Beard demanded that Clark return the money. Five months went by before Clark complied, in May 2008. Clark paid the booster club $3,636.00, a total he said was the return of the original check plus interest earned on the purported bonds.

There were no bonds, of course. The money with which Clark repaid the booster club came from the forged wire transfer from the Scottrade account of Lafon Denney.

The "real Reggie"

It became clear that Prestwood—and other investors discovered later in the investigation—didn't know the real "Reggie," as Clark called himself. The evidence soon showed him to be a typical confidence man who gained a person's trust and ultimately betrayed that trust—a true wolf in sheep's clothing.

Three months after the first indictment, DeFriend, the Limestone district attorney, appointed Dale Barron and Alexis Goldate, enforcement division attorneys at the TSSB, as special prosecutors to handle the cases against Clark. On April 8, 2010, we offered Clark a plea through his defense attorney, David Deaconson. If Clark, having no prior criminal history, would plead guilty to the theft charge, we would dismiss the charge of misapplication of fiduciary property and recommend a sentence of 10 years in state prison, probated for 10 years. Clark would also pay $150,000 upfront partial restitution to Prestwood on or before April 30, 2010. The intent of our plea was to make Prestwood as financially whole as possible, and to do it as soon as possible. Clark balked at the plea offer, we withdrew it, and the cases were then set for trial.

As the investigation into Clark's activities continued, Eliza Cardiel, a TSSB financial examiner, found two additional victims, Lafon Denney and Jean Carson, both of Nueces County. The DA's Office in May 2010 obtained superseding indictments against Clark for aggregated theft of property over $200,000 in value and for misapplication of fiduciary property of the value of $200,000 or more. Both of these indictments included Denney and Carson.

A significant portion of these three investors' funds were deposited into Clark's bank accounts in Limestone County, which gave the county venue to prosecute the cases as an aggregated theft and an aggregated misapplication pursuant to §§31.09 and 32.03 of the Texas Penal Code. Under these provisions, amounts can be aggregated pursuant to one scheme or a continuing course of conduct and may therefore be treated as one offense for purposes of jurisdiction, limitations and venue.[1]

The trial

Once it was clear the case was going to trial, we had to prepare a strategy that wouldn't confuse jurors or make the case overly complicated. We decided to try the theft charge and dismiss the pending misapplication charge. Basically, both cases would require presenting the same evidence but proving different elements. Even if we were successful in convicting Clark in both cases, the sentences in each would run concurrently because they both arose out of the same criminal episode. We felt that by trying both cases together, the jury might get lost in trying to connect the evidence to the different elements of each of the two charges. We also felt that based upon our evidence, if we could not convict Clark of the single charge of aggregated theft, we had no business bringing the case to trial in the first place.

Trying a case of investment fraud is not as daunting a task as it would seem to prosecutors who don't have experience in these cases. After all, an average case of theft will always involve a thief who takes property belonging to another without that owner's effective consent and with the intent to deprive the owner of the property. A case of investment fraud charged as a theft is no different, except that in almost every case involving the theft of investment funds, the thief will usually gain possession of those funds by means of deception. To prove that the victim was deceived, it is generally necessary for the victim to testify at trial. Jurors need to hear what misrepresentations the defendant made to convince his victims to invest.

To prove the deception we needed the trial testimony of Prestwood, Denney, and Carson. Both Denney, 79 years of age, and Carson, 77, lived in Corpus Christi, 350 miles from the county courthouse in Groesbeck. A flight from Corpus Christi to Austin, then a 90-minute drive to Groesbeck is an unpleasant journey for people near 80 years of age. Fortunately, the Texas Legislature in 2005 had the wisdom to

expand Chapter 39 of the Code of Criminal Procedure, which deals with taking witness depositions. It now allows the State as well as the defense to depose some witnesses. State lawmakers added to Chapter 39 in 2009 by including language that requires judges to grant an application to take a witness deposition if the deponent is 65 or older.

Based upon these provisions in the law, the State made application to the court to take both Denney's and Carson's depositions in Corpus Christi at the TSSB branch office there. The application was granted, Denney and Carson gave videotaped depositions, and these were presented to the jury. Portions of the testimony of Denney and Carson regarding extraneous offenses and transactions were withheld from the jury by agreement for later presentation by the State during punishment, if necessary.

Because Prestwood lived close by in Flynn and had lost the most money, we decided to have her testify in person. We felt it was necessary to have at least one of the victims testify at trial so that victim could bond with the jury. She told jurors how Clark sent her bogus statements over a four-year period that reportedly showed her investments earning stellar returns. Later, Clark consistently refused to tell her the status of her investments. Prestwood provided handwritten notes by Clark that encouraged her not to take any distributions. In fact, when she told Clark she wanted to withdraw money to buy a boat for her and her husband, Clark told her, "No," and she didn't buy the boat.

In addition to the testimony of the victims, the next most important thing the State must present to the jury in an investment fraud case is how the investors' funds were misappropriated. Generally, the State must take voluminous amounts of bank records and prepare a summary that the jury can easily understand, such as a chart, graph, or spreadsheet. It would be impractical to introduce all of the bank records in a financial crime case and expect a jury of laymen to be able to tell exactly how the victim's funds were misappropriated.

All of the bank records in our case were authenticated by a business record affidavit signed by the custodian of the records and filed with the Limestone County District Clerk's Office well before 14 days prior to Clark's trial.[2] Once these records were filed in an admissible form, Eliza Cardiel, our financial examiner, could summarize them. The summaries could then be presented to the jury to show the source and use of the investors' funds, pursuant to Rule 1006 of the Texas Rules of Evidence.

The summaries of the bank records in this case were most telling. We decided that the clearest way to show the jury how Clark misappropriated the victims' funds was to show portions of the spreadsheets Cardiel prepared. In almost all cases, Cardiel showed that soon after a deposit of investor funds was made into one of Clark's bank accounts, he would quickly spend the money. He paid his family's household expenses and paid back some money to investors. He also sent $20,000 of Prestwood's money to a title company in Limestone County—part of his payment for a house he bought in Mexia.

The defense strenuously tried to exclude testimony on two fronts. First, Clark's attorney tried to keep out testimony of how the defendant had used Prestwood's money to pay back one of his previous investors. Second was the testimony regarding the misappropriation of the booster club's funds. The defense argued that both pieces of testimony were extraneous offenses not alleged in the indictment and that their prejudicial effect against Clark would greatly outweigh their probative value to the jury. We argued that because Prestwood's money was used to pay back Clark's previous investor and Denney's money was used to pay back the booster club, this evidence was actually not extraneous but in fact proved how those funds were misappropriated. The court agreed and the jury heard the evidence.

The trial spanned a mere four days: one day of jury selection, 1½ days for us to present our evidence, and another day at punishment. The defense put on no evidence and called no witnesses in the guilt-innocence stage. The jury deliberated for less than an hour before returning a guilty verdict.

On the last day of trial, we presented the remainder of videotaped testimony that we agreed to withhold from the jury until the punishment stage. We presented the testimony of a former Texas Ranger regarding the circumstances surrounding Clark's arrest, including the fact he was found hiding under a desk when authorities came for him. Prestwood testified how her ordeal with Clark had affected her life and

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News Worthy

Jeff Bray passes away

Texas lost a beloved former prosecutor on August 20 with the passing of Kenneth Jefferson "Jeff" Bray.

Jeff was a proud Texas Aggie who attended law school at Oklahoma City University. He joined the Gregg County Criminal District Attorney's Office in December 1995 and prosecuted juvenile cases there until joining the Dallas County Criminal District Attorney's Office in June 1997 in the Appellate Division and then the Specialized Crime Division. He represented the State in nearly 300 cases on appeal and is listed as counsel of record in 13 published opinions.

Jeff joined the Collin County Criminal District Attorney's Office in 2003, where he was a member of the Specialized Crime and Felony Trial Divisions. In 2006, Jeff left prosecution, but he did so to work with police officers as the Senior Legal Advisor for the Plano Police Department. Jeff advised the chief of police, trained cadets at the police academy, provided in-service training, and assisted officers with legal issues related to their investigations.

In 1997, at TDCAA's Prosecutor Trial Skills Course, a classmate caught his eye. Jennifer McComic was also a proud Aggie, and they married that September. In 2006, Jeff and Jennifer were blessed by the birth of their daughter, Charlotte Belle Bray.

Jeff was inquisitive and enjoyed problem-solving and mechanics. An avid gardener, he built his own greenhouse and raised orchids and other exotic plants. Jeff seldom missed an opportunity to see the Aggies play football, but he counted ardent Longhorns, Sooners, and Red Raiders among his friends.

Jeff never turned away a request for help. If something needed to be done, he would figure out a way. Despite being sick for several years, Jeff worked hard and did not complain to his friends and colleagues about the special burdens life dealt him. He will be greatly missed by his family and all the police officers, judges, prosecutors, defense attorneys, and others whose lives he touched. ❇ *—John Rolater, Assistant Criminal District Attorney in Collin County*

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the life of her husband, both financially and emotionally. The Prestwoods had to take out a reverse mortgage on their home so they could pay their bills and living expenses. They had always planned to travel when they retired, but now their camper-trailer rarely moves from their driveway. Simply put, they are not living the life they had expected after a lifetime of working and saving.

The defense called three character witnesses during punishment that included two of Clark's ministers, both of whom testified how the defendant was a fine Christian man. Clark's mother testified that "Reggie" had always been such a good boy all of his life. The jury deliberated on the matter of punishment for almost three hours and returned a verdict of 25 years in the Texas Department of Criminal Justice Institutional Division and a fine of $10,000. We both thought Clark deserved more time, but ultimately we were pleased with the outcome.

In the end, Clark didn't take the stand to explain his actions. He showed no remorse and offered no apologies to his victims. Clark spent most of the time during trial reading his Bible. None of Clark's family members or friends was in attendance until the last day. Ultimately, Clark was no different than any of the other con men that we as fraud prosecutors have come to know and loathe. They generally leave financial devastation in their wake, just as Clark did, and most of their victims are senior citizens, as was the case here.

Con men know where the money is: in the hands of seniors, who have spent a lifetime saving and investing. The worst of the worst con men are the ones that hide behind the Word of God to perpetrate their scams. It would behoove us all to remember Jesus's words in the Gospel of Matthew 7:15: "Beware of false prophets, who come to you in sheep's clothing, but inwardly they are ravenous wolves." ❇

Endnotes

1 See *Graves v. State*, 795 S.W.2d 185 (Tex. Crim. App. 1990); *Vitiello v. State*, 848 S.W.2d 885 (Tex. App.—Houston [14th Dist.] 1993); *Weaver v. State*, 982 S.W.2d 892 (Tex. Crim. App. 1998).

2 Therefore, they were properly authenticated pursuant to Rule 902(10) of the Texas Rules of Evidence and were admissible as an exception to the hearsay rule under Rule 803(6).

There's a new kid in town …

… and he's not what he seems. In a nationally publicized story, a 22-year-old man posed as a 15-year-old basketball player in Odessa. How prosecutors made him acknowledge his identity and ensure he could never lie about it again.

By Bobby Bland
District Attorney in Ector County

On July 26, 2011, the 6-foot-5, 210-pound defendant stood in the courtroom, and Judge Denn Whalen asked him, "Are you Guerdwich Montimere?"

The defendant answered "Yes sir."

"Are you the one and the same Guerdwich Montimere charged with the crimes of tampering with governmental records and sexual assault of a child?"

"Yes sir, I am."

That is the normal way to begin pleas and usually the least interesting part of the hearing. And yet that afternoon in the Ector County Courthouse, every ear in the courtroom perked up to hear the answers to those questions.

That is because two and a half years before, in February 2009, that same defendant arrived in Odessa off a Greyhound bus and began telling everyone he was Jerry Joseph. He introduced himself as a 15-year-old orphaned immigrant from Haiti who had come to live with his long lost half-brother, Jabari Caldwell, a student with a basketball scholarship at the University of Texas at Permian Basin. Jerry Joseph decided as part of this new identity that he would go to Permian High School, which was immortalized in the book, movie, and TV series *Friday Night Lights*, and enroll as a student.

When he arrived at the school with his "brother," Jerry took a birth certificate identifying himself as Jerry Joseph born on January 1, 1994. Once his Haitian birth certificate was translated into English from French, he was informed that because of his age, he would have to go to junior high, and so he was enrolled in ninth grade at Nimitz Junior High. Because of Jerry Joseph's orphan status, he qualified for free lunches and other special assistance. Of course, someone that size quickly garnered the attention of various coaches in town, and before long, Jerry was playing basketball and getting ready to go on to Permian High where he would become a star.

At the end of the semester, his half-brother Jabari Caldwell left Odessa because his scholarship was not renewed. With Jerry ostensibly homeless, he moved in with the head coach of the Permian basketball team, Danny Ray Wright. Coach Wright noted he was a well-behaved kid, fit in well with the family and was required to do chores and earn his own spending money. He never did anything to betray his true identity or age through his behavior or even the way he played basketball.

At Permian, Jerry began to excel at school and sport. As a sophomore, he soon started on the varsity team. Permian is not traditionally a basketball power team, but the school did very well that year with their 6-foot-5 guard, achieving its best district record ever and a playoff berth. Jerry was even voted District Newcomer of the Year. The basketball star was popular, very mannerly, and well-liked by both faculty and students.

He even started playing with some traveling teams. One of them played in an Amateur Athletic Union (AAU) tournament in Arkansas, where only the best student-athletes in the country play. There, a coach named Louis Vives glanced across the court at Jerry Joseph and recognized him as Guerdwich Montimere, who had played on Coach Vives' South Florida AAU team when Jerry was at Dillard High in Fort Lauderdale. Of course, Guerdwich had already graduated from high school and had even gone on to a college in Illinois on scholarship. It seemed odd that this was the same person, but both Coach Vives and his players knew it was, and the team started yelling at him, "Hey Guerd, what's going on?" and "What are you doing, man?" Jerry Joseph turned around when they called out "Guerd" but proceeded to ignore them the rest of the time. Coach Vives, not dissuaded, went up to him directly and asked, "Guerd, what are you up to?" Jerry looked him in the eye and replied, "I don't know who

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you are talking about." He then turned away, avoiding his former team for the rest of the tournament.

Coach Vives was not going to turn Jerry in to tournament authorities because he didn't know the full story and because he wanted to maintain trust amongst his players, but of course, the cat was out of the bag. Once back in Florida, he sent emails to the local paper and the administration at Permian saying that the person known as Jerry Joseph was actually Guerdwich Montimere. When the principal and assistant principal received this information, they pulled Jerry out of class, but he told them he didn't know what they were talking about. Sophomore Principal Gregory Nelson gathered photographs from the local paper and from Florida's Dillard High School and compared them to known photos of Jerry. He was amazed at their similarities. Principal Nelson had watched every single one of Jerry Joseph's games, knew exactly what he looked like, and saw from the photos that Jerry and Montimere were one and the same person.

At that point administrators again called Jerry Joseph to the office and showed him the pictures; the student would not even acknowledge that they looked alike. They brought in the Ector County Independent School District Police to question him, but again, he denied being Guerdwich Montimere. Coach Wright was brought in too, and he said he didn't know anything about it but acknowledged the resemblance between the photos. Wright's wife searched Jerry's room at home and found a passport and Social Security card belonging to Guerdwich Montimere, as well as some IDs belonging to other students from Dillard High School, in a suitcase hidden in the back of a closet.

At that point, Immigration and Custom Enforcement (ICE) agents were called in and took custody of Jerry Joseph. ICE took his fingerprints and ran them through IAFIS, but because Guerdwich Montimere had no criminal history, there was no match. Federal agents were left with a decision on how to treat him. What ICE guidelines applied? Guerdwich Montimere was a citizen, and Jerry Joseph was illegal. Guerdwich Montimere was a 22-year-old adult, and Jerry Joseph was a 16-year-old juvenile. The feds were in the process of trying to classify and house Guerdwich/Jerry when it was decided they would release him to Coach Wright, who was willing to be Jerry's guardian, until they could get positive proof either way.

The ICE agents obtained Jerry's administrative file from Virginia, which had to be specially requested. Normally, when someone under the age of 14 comes into the U.S., he is not fingerprinted, but because Jerry's mother filed for him to be able to work, Guerdwich Montimere was fingerprinted when he was a child. The file gave us prints we could use to compare to the known fingerprints of Jerry Joseph. Two technicians at the Odessa Police Department positively identified the fingerprints of Jerry Joseph and Guerdwich Montimere as the same. At that point, Chief Rowden of the Ector County Independent School District Police confronted him with that information, and after a short time the young man broke and acknowledged that the fingerprints were right and he was wrong. When asked if he was Guerdwich Montimere, he replied, "Yes sir." Then he back-pedaled and re-told the same old story, restating that he was not Guerdwich Montimere, didn't know anything about it, and refused to take responsibility.

At the same time, it was determined that the documents he had filed with the school district were governmental public school records and therefore could be filed on. Jerry had defrauded the system by taking free school lunches as well as other services, and his intent was to defraud. He was arrested several times for tampering with governmental records and failure to ID, but was bonded out by well-meaning people who wanted to help Jerry Joseph.

And then the other shoe dropped.

Sexual assault charges

Once the story was out that Jerry Joseph was really 22 years old, a 15-year-old girl he had befriended the summer before came forward and said they had had sex. Of course, at the time she believed Jerry Joseph to be a 15-year-old kid like her. Despite a lot of heat from classmates labeling her a snitch, our victim was willing to come forward and testify as to what happened.

When our office first received the call from the school district police about the case, I thought, "Well, that's interesting." Then, before I knew it, I was getting calls from newspapers in Florida and *USA*

Today, plus magazines including *GQ, Esquire, Sports Illustrated*, and *ESPN*. Every single murder case I have ever prosecuted has garnered less coverage than this case did, and that includes one where three peace officers were killed. This curious story was mentioned in print and on television and radio all over the country, and so we knew we had to treat it appropriately.

Once we found out about the sexual assault, the dynamics of the case changed. Obviously, this was no longer a weird, cute story, but there was an actual victim's face to put with the crime. We charged Montimere with tampering with evidence (by presenting a false birth certificate), submitting false entries into public school records, and fraudulent use of identifying information. This last count was in case we found out along the way that there was an actual Jerry Joseph whose birth certificate Guerdwich had used as his own. Prior to presenting the case to the grand jury, I made sure we looked into any collusion between the coach or the staff at Permian High and the defendant but found no wrongdoing. With the crime having occurred at the *Friday Night Lights* school, many rumors and innuendoes were spread and had to be fully addressed. Nothing ever came to light as to any conspiracy between the player and coach or between the student and faculty. All evidence suggested that Montimere had duped all those he had met.

Pulling together evidence

Gathering information and trial documents was the next phase of prosecution. My investigator, Linda Greenwood, reached out to all of her contacts in the federal government, including the Department of State. This was following the earthquake in Haiti, so the best we could do was find out that apparently someone had filed Montimere's birth certificate in Haiti, but it appeared to be a very good fake. However, while the State Department provided findings, they were not likely to provide expert testimony.

The ICE agents provided us with a copy of the administrative file, which proved invaluable for the information therein, including pictures that looked like Montimere, signatures that resembled his, information about his twin brother and his mother, and the fingerprints. We gathered all the pictures we could from Florida and locally, and put them side by side for jury presentation. We also got certified copies of all of his school and driver's license records in Florida, as well as transcripts from Dillard High and the college he attended in Illinois.

We also began to track down witnesses in Florida, quickly learning that how easy it would be depended on which county people lived in. My advice is, if you need to get witnesses out of Florida, start as soon as you can. We began getting the subpoenas out well over a month before the trial started, and we were still working on a few out-of-state witnesses the week before trial was to begin. We found that in Broward County, the county where most of our witnesses were located, we had to go through the courts and file the proper paperwork both locally and at the state level so that officials could serve the witnesses. Officials there were very helpful and located several people for us; through them we were able to talk to Coach Louis Vives (who had spotted Guerdwich at the basketball tournament) as well as Guerdwich's mother. Originally, we wanted to call her as a witness to identify her son, but she told me she was not sure she could. We decided it would not be worth the chance of bringing her here just to have her say "maybe" he was her son when we already had a confession and fingerprints.

I briefly toyed with the idea of proving up his identity by getting DNA (because we live in the "CSI" world), but the only way to prove who the defendant was through DNA would be to get samples from his mother and go through that difficult process. Then we would still have had to establish *her* identity through fingerprints. On top of that, Guerdwich had a twin brother; DNA can be the same in identical twins, but fingerprints are not. So we obtained a copy of Guerdwich's brother's fingerprints to show the difference between the two. We were prepared, through our experts, to tell the jury the truth of the science, which is that even though DNA is "cooler" and has more interesting numbers, fingerprints are actually more unique than DNA.

The plea bargain

With ESPN, *USA Today*, and newspapers from Florida to Texas interested, we took this case extremely seriously. However, with such national attention, it was easy to lose focus on what justice truly meant in this case and who the real victim was. She is a girl who is now 17,

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entering her senior year in high school, who had been subjected to a lot of taunts at school, who had been called a snitch for coming forward, and who wanted to get on with her life. She was certainly not looking forward to the media spotlight, so I sat her down and asked her what would be fair and right in this case. She said three years. At the time, I wasn't considering any type of plea bargain like that. I thought we needed a longer sentence, what with all of the national attention, but after talking with the young lady and listening to her, I realized that what she was saying was reasonable, and in the end I needed to do what was best for the victim and in the interest of justice—not what the media thought, not what I thought, not what would look best. We needed to do what was right, and three years was the right number. It meant that she would not have to testify and could get on with her life.

I made this offer to the defense attorney, and in the end the sticking point was that the defendant did not want to register as a sex offender—apparently he felt like he did not need to acknowledge the sexual assault. That was non-negotiable as far as I was concerned. I knew that the three years in prison would be some measure of punishment, but requiring him to register everywhere he went—as Guerdwich Montimere—would be the ultimate punishment.

With apparently no plea in place, assistant DA Brooke Hendricks and I continued to talk to girls who were rumored to have had sex with the defendant. We never found anyone besides the one victim we knew about, but we uncovered the names of more friends, including one of his best. This teammate told us that "Jerry" had confided in him about his sexual relationship with our victim, breaking the case open. Now we did not have to rely solely on the victim's testimony (without any physical evidence) to prove up the sexual assault: We had his confession to a friend, and I made sure the defense attorney knew that.

Once Montimere knew that his best friend had come forward, I got a call that afternoon from defense counsel, who said they were willing to take the deal. We brought Montimere into court, and he still had the gall to sign "Jerry Joseph" on the paperwork. The judge and I made it clear to the defense attorney that we were not going to stand by and let him deny who he was. He was going to have to state in the plea papers, on the record, and in open court, "I am Guerdwich Montimere; I committed this crime."

With all of the hours and hard work we put into this case, hearing those words and knowing that he will never be able to do it again was very satisfying. We knew we managed this case, with all of the attention on it, in a way that was satisfactory to all. At the time, I truly wanted to try it because we had worked so hard, but I knew the plea was necessary for the victim. With a case where everybody is paying attention, we as prosecutors can't let the publicity, fame, and everything that goes along with that influence how we handle it. However, the publicity *should* influence how diligently we prepare; the game-changer in this case came the week before we were to go to trial. We had never stopped pursuing justice.

Now everywhere Guerdwich Montimere goes, he will have to register with the local authorities and admit, "I am Guerdwich Montimere. I now live in your town, and I am a sex offender." That is the ultimate justice. ❇